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

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)))	MM Docket No. 91-221

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SEP 23 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWERS' CONSTITUTIONAL RIGHTS

Gigi B. Sohn
Andrew Jay Schwartzman

MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, DC 20036

Counsel for TRAC/WACCI-VCR

Law Student Interns:

Lynn Quarterman
UCLA School of Law

Stephen J. Kim
University of Pennsylvania Law School

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SUMMARY

The record in this proceeding is devoid of evidence that relaxation of the television ownership limits is necessary or warranted at this time. Without analysis, the Commission has simply incorporated OPP's findings into its proposals to relax both the national and local ownership limits.

The Commission's proposals, and the uncritical support given them by a number of broadcast industry parties, rest on several basic misconceptions. These include the following:

* **The Proliferation of Cable Channels Has Rendered the Goals of the Commission's Ownership Rules Obsolete.**

But only 60% of the country subscribes to cable, which has historically neglected the touchstones of the public interest. i.e., local programming and market diversity. Moreover, the Commission cannot relax its rules based on the mere possibility that new technologies providing diversity and localism will emerge.

* **The Television Industry is Financially Unhealthy, and Ownership Deregulation Is the Cure.**

With the exception of small UHF stations, the overall, long term financial outlook for broadcasters, and especially the networks, is good. In any event, there is no evidence in the record that the proposed rule changes will work to aid anyone but the largest broadcasters. The solution for broadcasters who seek to meet the competitive challenge of the new video marketplace is not deregulation, but adaptation.

* **Increased Concentration of Control Does Not Diminish Diversity, Even at The Local Level.**

This misconception ignores the realities of the television marketplace. At the national level, large group owners can use their clout to gain an unfair competitive advantage in program acquisition. At the local level, such co-ownership is violative of the Commission's longstanding cross-interest policy, which operates on the presumption that persons with ownership interests in two stations in the same market have the incentive and the means to engage in anti-competitive actions.

* **Savings Realized from Joint Ownership Will Necessarily Lead to Improved Local Programming.**

In the wake of its 1985 and 1989 relaxation of the local and national ownership limits, the reality is that the savings realized from so-called "economic efficiencies" is not put back into local and public affairs programming. A number of studies have conclusively proved this point. In any event, the industry parties present no evidence to rebut it.

The Commission must also refrain from eliminating or extending its one-to-a-market rule to television owners. The persuasive and economic power of television as opposed to radio is enough reason to prohibit television owners from taking full advantage of the rule's top 25 market/30 voice waiver standard. In addition, the rule cannot be extended until the Commission enforces the rule as it promised in 1989 - it must not grant "automatic" waivers of the rule, and it must gather evidence as to whether the waiver standard has had a negative impact on diversity in larger markets.

Finally, the Commission must at last confront the fact that its staff has allowed time brokerage practices to be employed as a means of evading FCC rules on ownership and licensee control. While some of the recent changes to radio rules should be extended to TV, such as those insuring that time brokerage is disclosed and treated as attributable when licensees program additional stations, the Commission cannot refuse to address the more basic issues of licensee control. This is especially important in light of the special new responsibilities for TV stations contained in the Children's Television Act of 1990.

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Telecommunications Research and Action Center and Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights ("TRAC/WACCI-VCR") respectfully respond to various comments filed by various members of the broadcast industry ("industry parties") in response to the Commission's Notice of Proposed Rule Making, 7 FCC Rcd 4111 (1992) ("NOPR") in the above referenced docket.

INTRODUCTION

Chairman Sikes' comments accompanying the Commission's decision to raise its radio ownership rules spoke volumes on the reality of rulemaking politics: "[W]e live in a city of shared power. We were asked by key members of Congress to reduce the limit and we did." August 5, 1992 Statement of Chairman Alfred C. Sikes in Revision of Radio Rules and Policies, FCC No. 92-361 (released September 4, 1992) ("Radio Reconsideration Order").

The Chairman's disappointment was well earned. The outcry following the Commission's initial proposal, which would have more than doubled the current ownership limits, blared from all ends of the broadcast universe, including the industry itself. In the end, the Commission's transparent attempt to use self-serving industry data to portray the radio industry as an economic invalid came crashing down under the weight of those who still believe rules should be based on "reasoned analysis."

Once again, the Commission is poised to make sweeping changes in its broadcast ownership regulations. This time, however, in the wake of last month's radio rules decision, it is clear that the parties commenting in this proceeding, many of whom were participants in the radio rules proceeding, will hold the Commission to a strict standard of reasoned rulemaking. Similarly, the Commission's ultimate decision to lower its radio ownership limits demonstrated that it, too, recognized the importance of reasoned rulemaking.[1]

Even so, in their comments responding to the NOPR, many of these industry parties have simply regurgitated the unsubstantiated predictions and misconceptions about the future of the video industry put forth by the Commission's own Office of Plans and Policy ("OPP") in its Working Paper, Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991) ("OPP Report"). And, as TRAC/WACCI VCR stated in their Reply Comments to the Commission's Notice of Inquiry, 6 FCC Rcd 4961 (1991) ("NOI Reply Comments") in this proceeding, OPP's analysis gives little, if any, consideration to the needs of the viewing public.

[1] It is not insignificant in this regaard to point out that the NOPR was issued prior to the Commission's Radio Reconsideration Order.

Among the misconceptions relied upon by some of the industry parties are:

- the growth of cable television and technologies such as VCR's significantly increases diversity of voices to a point where concentration of control is no longer a concern.
- since cable is an unregulated, vertically and horizontally integrated monopoly, broadcasters should have the opportunity to become the same.
- the television industry is suffering, or will in the future, suffer an economic crisis on a par with that of the radio industry, and that deregulation is the cure.
- the savings realized from joint ownership are necessarily put back into new programming, rather than other investments and ventures.
- stations under common ownership and control are still diverse and different voices for First Amendment purposes.

The industry parties' comments are notable not only for what they do say, but also for their complete failure to add any additional evidence to the record. The Commission is therefore on a course to revamp its television ownership rules with nothing more than OPP's analysis, which is suspect at best.[2]

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[2]The Commission's refusal to grant a brief extension in which to file these reply comments pursuant to a request by TRAC/WACCI-VCR and the Office of Communication of the United Church of Christ ("OC/UCC") will further insure that the record in this proceeding is incomplete. Insofar as TRAC/WACCI-VCR and other parties are unable to address at greater length the Commission's recently revised radio rules, the Commission is obstructing rather than assisting in the development of a comprehensive rulemaking record.

I. THE INDUSTRY PARTIES' CALLS FOR INCREASES IN THE NATIONAL AND LOCAL OWNERSHIP LIMITS ARE BASED ON A NUMBER OF FALSE ASSUMPTIONS ABOUT THE STATE OF THE VIDEO INDUSTRY.

Without meaningful analysis, a number of the industry parties have mindlessly adopted as their own OPP's analysis as the basis for their demand that the FCC repeal or substantially loosen the television ownership rules. But, as TRAC/WACCI-VCR explained in their NOI Reply Comments, much of this analysis is based on speculation and misconceptions about the current state of the video market.

A. Misconception #1: The Proliferation of Cable Channels Has Rendered the Goals of the Commission's Ownership Rules Obsolete.

Many of the industry parties advocate increased ownership deregulation of the television industry because of what the Commission calls "a plethora of new services and choices for video consumers." NOPR at ¶1. See, e.g., Westinghouse Comments at 2; CapCities/ABC Comments at 2. Specifically, the rise in the number of cable channels has been most mentioned as providing competition and diversity sufficient to relax or eliminate the ownership rules. E.g., INTV Comments at 16; Westinghouse Comments at 4; LIN Broadcasting, et al. Comments at 3-4. The argument follows that as a result of this growth in video outlets, "the possibility of any undue concentration of economic power or ideological influence by a single broadcast owner or group of owners is nonexistent." NAB Comments at 3; See, e.g., NBC Comments at 12, CBS Comments at 13-14.

But, as TRAC/WACCI-VCR discuss in their NOI Reply Comments at

8-10, the proliferation of cable channels and other technologies has not in turn led to a significant increase in either market diversity or locally oriented programming, which are the touchstones of whether viewers' interests are being served. OPP Report at 1. Much cable programming is niche programming, such as home shopping or music television, or repeats of off-network television series. In addition, cable has never fully developed local origination programming or local access services, including so-called PEG channels and leased access. With the exception of a handful of local cable news channels,[3] these local program services are more often treated like forgotten stepchildren.

OPP concedes that the proliferation of cable has added little to the media mix in the area of local programming: "local programming, particularly news and public affairs, is the single program service that...remains primarily the domain of local broadcasters." OPP Report at 141. As a result, broadcasters are left with a continuing obligation to succeed where cable has failed, and serve the local needs of its audiences.

Moreover, the industry parties also grossly overstate cable's actual influence. Many of them cite the fact that 90% of homes are passed by cable. E.g., Fox Comments at 6; NBC Comments at 11; Westinghouse Comments at 9. But this number is meaningless. The

[3] Broadcasting magazine reports that there are currently only five such channels in operation, with two more planning to begin operations in 1993. "New Cable News Channels on Back Burner," Broadcasting, September 21, 1991 at 62. It states further that because such stations are not generally perceived as revenue generators, there are no plans "for expansion into additional markets anytime soon." Id.

relevant statistic is that 40% of the population either does not have access to, cannot afford, or chooses not to receive cable. This figure is not expected to increase significantly. OPP Report at 74.[4]

The industry parties claim that certain newer technologies will add diversity and competition. See, e.g., Westinghouse Comments at 9; NAB Comments at 4; INTV Comments at 7. But these media simply will not do so any time soon, or perhaps ever. Videocassettes serve almost entirely as an entertainment and instructional medium - one cannot get up to the minute news, a debate on public affairs or other locally originated programming from a video tape. Other technologies, such as DBS, may never become a reality in this country.

The last point is of particular salience here. It is folly, if not completely irresponsible, for the Commission to make drastic rule changes on the possible implementation of "new technologies on the horizon," NOPR at ¶7 n.17, such as DBS, Advanced Television and digital compression. While these technologies "if successful," id., may add to diversity, they may just as likely go the way of AM stereo, leaving no impact on the marketplace of ideas. It is one thing for the Commission to make reasoned predictive judgments, but quite another to assume that fundamental changes will occur and al-

[4]OPP estimates that by 1999, though 93.2% of television households will be passed by cable, 34.3% of such households will not subscribe. Id.

low restructuring of the entire industry based upon such speculation.[5]

Just as important, the industry parties ignore that there is a great deal of common ownership among cable systems owners and cable networks, and between broadcast and cable networks.[6] The horizontal and vertical integration in the cable industry is well documented. See, e.g., S.12, The Cable Television Consumer Protection and Competition Act of 1992, 102nd Cong., 2nd Sess. Secs. 2(a)4-5 ("1992 Cable Act"). Moreover, two of the major networks, ABC and NBC, have substantial cable network holdings. NOPR at ¶32. In addition, Fox is starting its own cable network, and is also providing programming to other cable networks and broadcast stations by virtue of an exemption from the financial interest and syndication rules. The recent lifting of the prohibition against broadcast networks owning cable systems will further exacerbate this problem. Report and Order, FCC 92-262 (released July 17, 1992).

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[5]The Commission admits, and various industry parties warn, that the advent of certain technologies may completely alter the distinctions upon which the Commission bases its new rules. NOPR at ¶20 n.37; See, e.g., NAB Comments at 22-24; Fisher Comments at 4; NBC Comments at 28 n. 36. For example, should the broadcast industry make the transition to advanced television, all of the current stations will be moved to the UHF band, making any distinction in the duopoly rules between UHF and VHF stations obsolete. If the Commission insists on relying on the use of these not-yet-available technologies, then it must delay judgment on these rules until it can properly ascertain the full impact of these technologies.

[6]A new phenomenon which highlights how this concentration of control can diminish opportunity for broadened diversity is the development of television station/cable operator joint ventures to program cable newscasts or entire cable channels. This is not to say that this particular practice is, on balance, bad, but it does raise questions as to whether it constitutes additional diversity.

The myth that cable is equal to broadcasting in terms of influence and reach has fostered yet another misconception: that broadcasters are entitled to be free of the regulatory constraints that bind only them. See, e.g., CBS Comments at 19; INTV Comments at 26. First, given that Congress is now in the process of rectifying its 1984 decision to deregulate the cable industry, it would be unwise policy for the Commission to duplicate that mistake and permit broadcasters to become a horizontally and vertically integrated monopoly like cable. The industry's own rhetoric on the 1992 Cable Act is instructive in this regard. In radio advertisements urging passage of the act, the NAB warns the public of the dangers of such a monopoly, and argues that Congress should not permit it to continue.[7]

Second, and more importantly, there is a fundamental difference between the two media that most of the industry parties fail to mention. Unlike cable, broadcasters are licensed under the Communications Act to serve the public, and are given the free use of

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[7]Passage of the 1992 Cable Act would have far reaching effects on broadcast television which the Commission cannot ignore. The final version as sent to the President has a must carry provision which will put broadcasters, especially smaller UHF stations, in a much stronger competitive position than they are without such a requirement. Also, there is a "retransmission consent" provision which would permit broadcasters to charge cable systems a fee for carrying their signal. Finally, the Act will limit fees that cable can charge subscribers. These provisions greatly enhance broadcasters' position vis a vis cable. As of the date of this filing, the fate of the 1992 Cable Act is uncertain. Grant of TRAC/WACCI-VCR and OC/UCC's September 3, 1992 request for an extension of time within which to file these reply comments would have permitted the commenters in this proceeding to fully consider the effects of this legislation, should it be enacted. In any event, the Commission must await the outcome of this legislation before making any proposed rule changes.

the public's airwaves to do so. There is no franchise to pay for, no subscribers to solicit. Under the Communications Act, the FCC is tasked to insure that the nation's broadcasting system provides the public with the most diverse information from the most diverse sources possible. It is this statutory duty which makes structural regulations such as the ownership regulations necessary.[8]

B. Misconception #2: The Television Industry is Financially Unhealthy, and Ownership Deregulation Is the Cure.

Picking up on the Commission's willingness to relax the radio ownership rules based on that industry's alleged financial woes, a number of the industry parties, consisting primarily of the national networks, adopt the OPP's depiction of the video industry as facing an irreversible decline which can only be stopped by lifting the Commission's current ownership restrictions. E.g., Fox Comments at 3 n.2; NBC Comments at 12-13; CapCities/ABC Comments at 14. And, as they did in the recent proceeding revising the radio ownership rules, these commenters rely on self-serving evidence that the video industry is in financial trouble. E.g., NBC Comments at 13 n.16; Fox Comments at 3 n.2.[9] But the economic argu-

[8]In the absence of structural regulations, which are prophylactic, self-enforcing and content neutral, the Commission must necessarily place greater reliance on content regulation to insure that the public's needs are being served, especially where the marketplace fails to do so. See, OC/UCC Comments at 6 (proposing minimal guidelines for locally produced non-entertainment program should the ownership limits be relaxed.)

[9]Without any analysis of the numbers presented, these industry parties and the Commission take as a given the NAB's conclusion that in 1989, "at least 25 percent of the stations in the top ten markets experienced losses; aggregate losses occurred in most markets below the top 100; and at least 50 percent of independents

ments that may have justified some deregulation in the radio industry simply do not exist here.

With the exception of smaller UHF stations,[10] the long term outlook for television industry, and, especially the networks, is a good one. INTV, the organization which represents the smallest and least financially powerful stations, recognized this fact:

> None of this is to suggest that television broadcasting is on its last legs like an endangered dinosaur on an arid prehistoric plain. Broadcast television and the independent television sector hardly are courting extinction. Some short-term economic rebound is apparent. Moreover, unlike dinosaurs whose needs eclipsed the slow process of evolution, many broadcasters have been able to seize the initiate and take steps to adapt to life in a competitive environment.

INTV Comments at 11.

Contrast this with the "gloom and doom" outlook of the networks, which although they need assistance the least, stand to gain the most from a change in the ownership limits. The Commission took particular note of broadcasters' overall health when it recently voted to maintain certain restrictions on the networks based on the "unique position" they hold in the video market. Evaluation of the Financial Interest and Syndication Rules, 6 FCC Rcd 3094 (1991). The Commission specifically recognized that each of the three original networks continue to maintain a greater audience share than all cable networks combined and all independent tele-

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in all market classes below the top ten experienced losses." NOPR at ¶6, citing 1992 NAB/BCFM Television Financial Report.

[10] It bears notice that the rule changes the Commission proposes here will not aid these small UHFs. See discussion at pp. 11-12, infra.

vision stations combined. Id. at 3110.

By all accounts, the slow initial decline in the networks market share is stabilizing. E.g., "The Networks Finally End Their Prime Time Decline," New York Times, April 1992. In fact, in terms of actual numbers, the networks' viewership has increased. See, e.g., "Truth In Advertising," Advertisement by National Broadcasting Company appearing in, inter alia, the Wall Street Journal, June 20, 1991 at B4. Moreover, prominent players in the industry have admitted that while new entrants like cable have cut into profits, the television business remains very profitable, indeed. "Special Report: The Future of Broadcasting," Electronic Media, August 17, 1992 at 20-23. This is because, inter alia, broadcasting, unlike cable, can reach 100% of the viewing audience, which greatly increases advertising revenues. See, TRAC/WACCI-VCR NOI Reply Comments at 14-15.

Evidently unable to provide any independent evidence that lifting the Commission's ownership restrictions would solve the alleged financial ills of the industry, especially those of small and individual station owners, the industry parties seem content to repeat the Commission's prejudgments. Raising the ownership limits, as the Commission did in 1984, will again most likely inure to the benefit of the largest group owners, i.e., those in the best position to increase their holdings by snatching the most prized stations in the biggest markets.[11] The Commission must make specific

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[11]In light of broadcasters' reticence to partake of the "Mickey Leland" rule, which permits ownership interests in two extra stations if they are minority controlled, the claim that raising the

proposals aimed at assisting smaller UHF stations, rather than simply help the rich get richer.

The answer for television broadcasters in the changing competitive environment is not ownership deregulation. The answer is for television broadcasters to adapt to the changing video landscape, just as radio broadcasters did 40 years ago when television became a reality. Commissioner Duggan recognized this need to change in his statement accompanying the NOI in this proceeding:

> Regulation is important, but the greatest power to shape the destiny of broadcasting is in the hands of the broadcasters themselves: in their courage, their imagination, their agility, their shrewdness. It is far more important, in my judgment, that broadcasters respond vigorously to the change in the marketplace than for the FCC merely to put more stations in the hands of a few owners.
>
> Broadcasters need to invent a whole new future. They need, as never before, to innovate: to launch a new era of research, technical innovation, and imaginative programming. Broadcasters should be creating new services and forging new alliances that will expand their channel capacity and energize their programming.

Statement of Ervin S. Duggan in Notice of Inquiry, supra, 6 FCC Rcd at 4966.

C. Misconception #3: Increased Concentration of Control Does Not Diminish Diversity, Even at The Local Level.

Several of the industry parties accept whole cloth the Commission's claim that group ownership does not necessarily impact diversity, in that group owners do not impose monolithic points of view on their stations, but instead leave editorial decisions to the individual stations. NOPR at ¶9; See, e.g., NAB Comments at

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ownership limits will induce large broadcasters to help capitalize smaller struggling stations rings very hollow, indeed. See, Fox Comments at 4 n.3.

33; CBS Comments at 11-12; CapCities/ABC Comments at 8. This is a central theme in their call for relaxation or elimination of the national ownership limits.[12]

This theory ignores the realities of the television marketplace. As at least one industry commenter recognized, "owners of significant numbers of television stations can use their multi-market clout to obtain an unfair competitive advantage over owners of smaller station groups or single stations in program acquisition." Fisher Comments at 3. This impacts diversity because smaller stations are thus less likely to obtain high quality programming, or must spend more to obtain it, leaving less money for local or public affairs programming. Id. Since, according to the Commission, it is these smaller stations which are in the greatest need of help, raising the national ownership restrictions would be counterproductive.

In any event, the Commission's greatest concern has been di-

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[12]The Commission invites the parties who filed in the television satellite rulemaking to update their comments as to whether television satellites should be exempted from the multiple ownership rule. NOPR at ¶12 n.25; see, Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 5010 (1991). The Commission also asks whether that docket should be incorporated into this proceeding or should be addressed prior to termination of this docket. NOPR at ¶12 n.25. Given that the OPP Report was issued prior to the release of the Second Further NOPR, and that the Commission and the industry parties have simply adopted the Report's findings, there appears to be little to update. That, plus the fact that the proceeding has been pending for nearly a year, should compel the Commission to reach a decision promptly, long prior to termination of this docket. In any event, the Commission should immediately stay the effectiveness of the television satellite rules to prohibit sales of stations to entities which may exceed the current national ownership limits. See, August 12, Petition for Stay filed by OC/UCC, TRAC and WACCI-VCR.

rected towards concentration at the local level. Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2756 (1992), clarified, Revision of Radio Rules and Policies (Reconsideration), FCC 92-361 (released September 4, 1992); Report and Order, 100 FCC2d 17, 37 (1984). But that has not stopped it, or many of the industry parties, from advocating substantial relaxation of the Commission's duopoly rules. Some of these parties even believe that co-ownership of two stations in the same market could increase diversity, because, as commenter CBS put it, "[s]uch combinations also provide station owners with an opportunity to establish innovative alternative programming on a second channel." CBS Comments at 29.

This concept - that concentration of control increases diversity, especially in the local market - is completely at odds with logic and the laws of economics. The idea advanced by several industry parties that an owner of two stations in a market, out of its desire to serve the public, might program its UHF station with an all news format rather than cheaper syndicated fare is nothing if not naive. See, e.g., ABRY Communications Comments at 10; Westinghouse Comments at 8; LIN Broadcasting, et al. Comments at 6-7.

Permitting co-ownership of stations in the same or nearby markets is also at odds with the Commission's longstanding cross-interest policy. See, Reexamination of the Commission's Cross-Interest Policy, 4 FCC Rcd 2035 (1987). The cross-interest policy prohibits, inter alia, ownership by key employees or joint venturers of a licensee in the same market, on the presumption that such persons have the incentive to engage in anti-competitive actions which benefit the employer and the property in which a cross-interest is held, to the detriment of competitors and the public. Id. at 2040, n.1.

The same concerns which warrant the cross-interest policy also demand a prohibition on common ownership of two stations in the same market. However, the dangers are even greater here, since the majority owner of a group of stations can wield more influence than a mere passive owner or key employee. Consider, for example, that A is the owner of two television stations in the same market, B and C. A has a financial interest in a local government contractor which is being investigated for fraud. A prohibits the news departments of both stations from covering the story. The mere ability to engage in this type of conduct warrants retention of the local ownership limits as they now stand.[13]

D. Misconception #4: Savings Realized from Joint Ownership Will Necessarily Lead to Improved Local Programming.

As it has done each time it has relaxed its ownership limits, the Commission touts the "economic efficiencies" that will redound to owners of multiple stations. NOPR at ¶11. These economic efficiencies, the Commission claims, will not only improve the financial condition of the entire industry, but will permit and necessarily result in these savings to be plowed right back into news

[13]Changing the duopoly limits only to permit only Grade A overlaps does not mitigate this problem. Such a change in the rules would, for example, might permit one entity to own a station in Washington, DC, Baltimore, Philadelphia, Trenton, New York City, Hartford and Boston markets, thereby covering the entire Northeast corridor!

and public affairs programming. NOPR at ¶17. A number of the industry parties have naturally accepted this premise without question. E.g., CBS Comments at 16-17; Westinghouse Comments at 10; NBC Comments at 17.

But neither the Commission nor the industry parties have presented any evidence that the change in the national ownership limits in 1984 and the relaxation of the one-to-a-market rule in 1989 have led either to an improvement in the industry's financial condition or to an increase in news or public affairs programming. Nor could they. In fact, a number of studies have shown a decrease in local news[14] and public interest programming[15] since the Commission first relaxed its ownership rules to permit these efficiencies. Instead, it is more often the case that profits made from

[14]One industry-commissioned study concludes that deregulation contributed to ending local news operations despite the fact that television and radio stations that did so denied that deregulation had anything to do with the decision. M. McKean and V. Stone, "Why Stations Don't Do News," RTNDA Communicator, June 1991, 22, 24. Another recent study shows that FCC policies have made news, public affairs and community affairs prime targets for budget cuts. It cites to a decline in news budgets and staffs in radio and television. P. Aufderheide, "After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest," Journal of Communication, 47, 51 (Summer 1990).

[15]An industry specialist states that television deregulation's effects on the public interest have been strongest in decreasing the amount of public service programming and diversity, especially on stations that have been heavily traded and incurred debt. V.E. Ferrall, "The Impact of Television Deregulation on Private and Public Interests," Journal of Communication, 8, 29-30 (1989). Another study showed that most stations in their survey had no changes in public affairs programming since deregulation, but 3% had cut back on such programming because of deregulation, and only 1.6% had increased public affairs programming since deregulation. V. Stone, "Deregulation Felt Mainly in Large Market Radio and Independent TV," RTNDA Communicator, 9 (April 1987).

these savings are used to pay off debt, or put into other investments.

Although several commenters argue that the OC/UCC study indicates that local programming has actually increased since that time, NBC Comments at 14-15 n. 18; NAB Comments at 12-15; CapCities/ABC Comments at 11 n.29, they have distorted UCC's numbers. See, OC/UCC Reply Comments.[16] More importantly, they present no evidence of their own to rebut the ultimate conclusion that local and public affairs programming has decreased since 1984.

Similarly, neither the industry parties nor the Commission present any evidence that these economic efficiencies which come from group ownership will not only improve the financial condition of the broadcasters who need it the least - large group owners. See, Fisher Comments at 3-4. If in fact the television industry is in a financial bind, this solution ignores small individual station owners, who are in the most need of assistance.

II. THE ONE-TO-A-MARKET RULE SHOULD NOT BE ALTERED AND SHOULD BE PROPERLY ENFORCED.

Believing that "[t]here is no rationale for treating television owners less favorably than radio station owners," CapCities/ABC Comments at 23, several of the industry parties propose that concomitant with the change in the local radio ownership rules, a modified one-to-a-market top 25 market/30 voices waiver standard be

[16]Moreover, these commenters ignore a survey submitted by OC/UCC in its NOI comments which shows that from 1974 to 1989, the quantity of news and public affairs has declined since TV deregulation. "The Public Cost of TV Deregulation: A Study of Decline of Informational Programming on Commercial TV."

extended to television owners seeking to own more than one AM and one FM radio station within any single television "metro" market. E.g., NAB Comments at 26-34; Westinghouse Broadcasting at 12-13.[17] The "anomaly" the commenters see is that in markets with 15 or more stations, a radio owner could own up to four radio stations in one market, while a television owner could own "only" three stations - the television station plus two radio stations. NAB Comments at 30.

But this ignores the fundamental differences between the two media. First and foremost, television has a uniquely powerful and persuasive power - and economic impact - which radio could never hope to match. Second Report and Order, 50 FCC 2d 1046, 1083 (1975). Rather than the niche-oriented medium that radio has become, broadcast television is directed towards the entire audience, which makes it the most attractive advertising medium in the country. That is the reason few mass-marketed consumer products are without national television advertising. Giving these already powerful television stations even greater influence through the ownership of up to four radio stations would greatly diminish diversity and increase the potential for anti-competitive conduct.[18]

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[17]The actual relief commenters seek varies somewhat. For example, CapCities/ABC also requests elimination of the Top 25 market standard. Cap Cities Comments at 2-3. NAB requests elimination of the Top 25 market standard and a requirement that only 15 separate voices need be in a market to qualify for a one-to-a-market waiver. NAB Comments at 26. For the reasons cited below, both requests for relief should be rejected.

[18]For example, a TV/radio owner could promise a radio advertiser cut-rate or free television time if the advertiser agrees to buy time only on his stations.

Second, as demonstrated by the record in Commission's radio rules proceeding, the television industry is, overall, in vastly better financial condition than the radio industry. The Commission can only guess that the television industry will suffer economic decline, and, except for the self-serving data presented by the NAB, the Commission presents no other evidence that this is true. In fact, not all of the industry parties agree that the long-term outlook for television industry is bad. See p. 10, supra.

In any event, the Commission may not extend the one-to-a-market rule until it first adheres to the promises it made when it first relaxed that rule to permit waivers in the top 25 markets which also have 30 separately owned voices. The Commission said then that

> This decision reflects our desire to act cautiously to weigh the benefits and costs of proposed mergers and to continue to obtain evidence concerning the ramifications of modifying this longstanding rule.

Second Report and Order, 4 FCC Rcd 1741, 1742 (1989).[19]

As TRAC/WACCI-VCR stated at pp. 33-35 of its Comments filed in the recent radio ownership proceeding, this promise was not kept. Rather than acting cautiously, the Commission has granted every single one-to-a-market rule waiver which has been sought thereunder. Rather than "weigh[ing] the benefits and costs of proposed mergers, it has engaged in no scrutiny whatsoever of applications seeking a waiver, automatically granting them if they meet the top

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[19]Lest the point be unclear, the Commission later added that "This approach...permit[s] us to take a second look to ensure that any further modification of elimination of this rule is fully warranted." Id., at 1743.

25 market/30 voice standard, without regard to whether the public interest is being served. See, May 3, 1991 Letter from Alfred C. Sikes to John D. Dingell.[20] And, rather than "continuing to obtain evidence concerning the ramifications of modifying this long-standing rule," the Commission has gathered no evidence at all since the rule was changed. Id. at 8.[21]

Therefore, until the Commission 1) scrutinizes one-to-a-market applications with some regard to whether the public is being served rather than merely granting automatic "waivers" if the numerical requirements are met, and 2) monitors the relaxation of the one-to-a-market rule to see whether it impacts adversely on diversity and competition in large markets, it has no basis on which to propose, much less extend its further evisceration.

III. THE COMMISSION SHOULD NOT ALLOW TIME BROKERAGE PRACTICES TO BE USED AS A DEVICE TO EVADE OWNERSHIP RULES AND FRUSTRATE THE ENFORCEMENT OF THE COMMUNICATIONS ACT.

In seeking comment on television time brokerage arrangements,

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[20]Chairman Sikes admitted that "no showing beyond the size of the market and the number of voices that will remain after the proposed sale [is now] required in a typical case." Id. at 7. He also stated that "No specific criteria have been adopted [in deciding if grant of a specific waiver will be in the public interest], other than those adopted in the rulemaking proceeding." Id. at 8.

[21]In response to a request for any evidence that Commission has obtained "concerning 'the benefits and costs of proposed mergers and...the ramifications of modifying'" the one-to-a-market rule, Chairman Sikes pointed only to the record of the rulemaking used to change the rule, and not to any experience gained thereafter. Id. This admission renders rather shocking the NAB's bald claim that "since its experiment with waiving the cross-ownership rules in large markets has not resulted in any demonstrable evidence of loss of diversity or competition," the Commission should extend the rule to permit television stations to own more than two radio stations. NAB Comments at 31.