

the Commission made plain that it intends to follow the same cynical and intellectually bankrupt path it has taken with respect to radio. See Revision of Radio Rules and Policies, supra at 2584-89. Specifically, the Commission unquestioningly follows a policy based on a series of staff decisions which have never been examined by the full Commission despite the fact that they constitute an extraordinary abandonment of longstanding agency policy.

Those parties commenting on time brokerage generally support application of the same policies recently adopted with respect to radio. Insofar as the Commission has adopted certain reporting requirements and assumptions about attributing ownership interests to programmer-lessees, TRAC/WACCI-VCR do not disagree.

However, TRAC/WACCI-VCR vehemently object to the Commission's failure to acknowledge, much less explain, that it appears to have changed fundamental interpretations of the Communications Act with respect to insuring licensee control of broadcast programming and operations. The parties supporting the Commission's policy accept these staff decisions as valid. But these actions cannot be reconciled with the public interest and ownership provisions of the Communications Act. In addition, they will not permit effective implementation of the newly adopted amendments to the Communications Act contained in the Children's Television Act of 1990.

The Commission's approach on time brokerage refuses to acknowledge that it is nothing less than a roadmap for wholesale evasion of any ownership rules and policies as the Commission chooses to retain or adopt. As Fisher Broadcasting eloquently

points out in arguing for strong restrictions against time brokerage:

If time brokerage is freely allowed, an intolerable double standard is created under which entities that cannot legally obtain de jure control can nonetheless freely exercise day-to-day control over a television station's programming, advertising sales, and other activities.

Fisher Comments at 5. Under these rulings, a licensee can cede control of up to 167 hours per week of programming to another party. The programmer "lessee" may not be a Commission licensee, and may even be an alien or someone who is otherwise unqualified to be a licensee. In fact, even those who lose their broadcast license through revocation can use this device to program their former station.

The comments submitted in this docket offer absolutely no basis upon which the Commission can possibly justify extending its outrageous rulings in the radio area to television. Nor do they offer any support for the Commission's continuing refusal to examine staff actions redefining the central concept of ownership control. Instead, the handful of parties supporting the Commission's approach take as a given the Commission's erroneous legal position. Their comments are largely devoted to elegies extolling to the claimed policy virtues of time brokerage. E.g., NBC Comments at 42.

The absence of substantive comment leaves an important factual question unexamined. The Commission states that it is "aware of only a handful of such agreements in the industry." NOPR at ¶21. That may be literally true, but it is only because the Commission

has determinedly blinded itself to the phenomenon of time brokerage. The fact is that the Commission does not know how many TV time brokerage agreements there are presently in effect.

It would be wholly arbitrary and capricious to undertake such dramatic and permanent change in the structuring of the industry without obtaining comprehensive and reliable data.

The only survey of time brokerage practices the Commission has ever undertaken is so old, and so unreliable, that it cannot be the basis for policymaking. See Time Brokerage Survey, 7 FCC Rcd 1658 (1992). In denying reconsideration of its radio ownership rules, the Commission abandoned any actual reliance on this data, conceding that "the survey was not intended as a scientific poll, nor was it intended to be the exclusive basis of the Commission's decision." Radio Reconsideration Order, at ¶64. The survey, it now says "was intended only as an illustration that time brokerage is not particularly widespread." Id.

But that is a statement of faith, not a factual assertion. Nor could it be, because of the methodological flaws which make the Commission's own "unscientific" characterization a dramatic understatement. This "survey" used invalid sampling that favored small and very small markets,<sup>22</sup> amateuristic questioning techniques,<sup>23</sup> and lacked any semblance of validation, cross-checking or follow-

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<sup>22</sup>Communities of license were selected without regard to size.

<sup>23</sup>Respondents were asked if they had time brokerage agreements without explanation of the term.

up.<sup>24</sup>

It is of particular relevance here that the Commission's time brokerage survey concluded that time brokerage is uncommon in television. Insofar as this conclusion is based on the Commission's own useless survey, which greatly underrepresented TV stations in its survey,<sup>25</sup> it is wholly unreliable. Yet the parties which filed comments supporting expanded time brokerage, rely on the Commission's own statement for this proposition. E.g., LIN Comments at 14; INTV Comments at 27. However, subsequent to the release of the Commission's "survey," trade press reports of TV time brokerage have become routine. For example, ACRY, which did not mention time brokerage in its comments, has widely advocated the practice. Unless and until the Commission investigates and determines the frequency with which time brokerage is being used on short-term (to accomplish otherwise unlawful premature transfers of control) or long-term bases, it cannot possibly have a factual basis upon which it can base rational decisionmaking.

More fundamentally, the Commission must examine time brokerage practices in light of its own longstanding decisions with respect to licensee control. The commenting parties take as a given that the Commission has definitively ruled that so long as licensees are

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<sup>24</sup>Commission investigators were instructed that "If the answer [to the question of whether a station has a time brokerage agreement] is 'no,' make no further inquiries of that station.

<sup>25</sup>Communities with both radio and TV stations were lumped together in selecting markets, and investigators were then given complete discretion as to how to select stations in selected markets.

aware of political broadcasting policies and review quarterly issues-programs lists, they need do little else to be considered in control of a station. See, e.g., Letter to Brian M. Madden, 6 FCC Rcd 1871 (MMB 1991); Letter to J. Dominec Monahan, 6 FCC Rcd 1867 (MMB 1991).

But the Commission has never undertaken its own review of the legality of the staff letters which the industry (and lately, the Commission itself) cite as the basis for the FCC's changed ownership rules. Indeed, although it initially asked for comment on these decisions in its May, 1991 Notice of Proposed Rulemaking on radio rules, 6 FCC Rcd at 3282,<sup>26</sup> the Commission has repeatedly declined to issue its own ruling on the issues raised by these unexamined staff rulings.

The Commission has in the past relaxed somewhat its oversight over time brokerage, Time Brokerage Arrangements, cite 48 RR2d 776, 772 (1980), but it has at least until now emphasized "the licensee's ultimate responsibility for programming over his facilities," Cosmopolitan Broadcasting Corp., 59 FCC2d 558, 765, aff'd sub nom. Cosmopolitan Broadcasting Corp. v. FCC, 581 F2d 917, 921 (1978). Under these policies, licensees have been expected to have a role

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<sup>26</sup>The Commission asked for comment on "A requirement that each licensee involved retain control, in particular, editorial control,...." It also asked "How should 'retention of editorial control' be assured?...Are the Commission's present complaint and compliance procedures adequate to assure that licensees are not in violation of the Communications Act...?" Id., 6 FCC2d at 3282.

in personnel actions, Phoenix Broadcasting Co., 44 FCC2d 838 (1973),<sup>27</sup> financial matters, Southwest Public Broadcasting Council, 85 FCC2d 713, 715 (1981) and commercial practices.

Historically, time brokerage was justified as promoting diversity, because it was used to permit numerous different parties each to program for an hour or two on a single station. But by allowing a single programmer to "lease" the entire inventory of a station the Commission has created a means to evade ownership rules and laugh at the Communications Act requirements that the Commission insure that stations are controlled by U.S. citizens who are financially sound and of good character. This simply cannot be done when the licensee is not on site, has but one or two employees,<sup>28</sup> and takes no day to day role in any other aspect of the station's operation.<sup>29</sup>

Whatever duties that TV broadcasters have to their adult audiences, they have far greater responsibilities with respect to children. Under the recently enacted Children's Television Act of

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<sup>27</sup>It ought to go without saying that allowing a non-licensee to hire all station personnel so that the licensee reports fewer than 5 employees provides an obvious means of evading the FCC's EEO rules.

<sup>28</sup>In Letter to Roy Russo, 5 FCC Rcd 7586 (MMB 1990), the FCC staff blessed an arrangement which permitted termination of 32 employees, leaving just 3 people under the control of the licensee.

<sup>29</sup>It has been suggested that the Commission's decision to remove itself from program format decisions means that Commission involvement in non-indecent programming should be limited to insuring that quarterly issue-program lists are prepared. But this overlooks licensee responsibilities as to sponsorship identification, payola and plugola, and the responsiveness to community needs which do not flow from programming relating to issues. These and other duties cannot be fulfilled under time brokerage policies.

1990, Congress created specific obligations for programming which meets the needs of children. These duties cannot be met under the "control" manifested in the FCC staff letters on which the commenting parties rely. Nor would it be enough for a licensee to consult just on programming which is prepared for compliance with the duties of Section 303a of the Act to program for the information needs of children. Under the Children's TV Act, there are additional duties to oversee the amount of commercialization throughout the week, as well as a duty to oversee all programming which may be significantly viewed by children.

Time brokerage is a historically useful practice which has been allowed to become the basis for outrageous disregard of the law. The Commission must bring itself back into the ambit of the Communications Act by insuring that TV stations are controlled by those licensed to operate them.

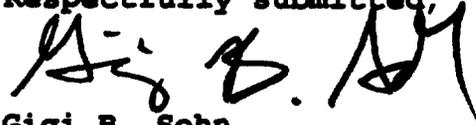
#### CONCLUSION

The industry commenters who advocate relaxation of the national and local ownership limits have simply parroted the Commission's conclusions, which simply parroted OPP's conclusions. This is not the type of "reasoned analysis" that will withstand scrutiny from either Congress or the Federal Courts. There is no evidence in the record in this proceeding that any broadcasters save the very smallest are in need of assistance, or that the Commission's proposals will aid these stations. Nor is the record convincing, in light of prior history and economic reality, that further relaxation will lead to any increased diversity or improved

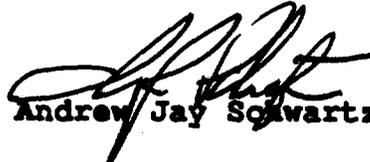
local and public affairs programming.

The Commission cannot alter its television ownership rules for the third time in seven years on so thin a record. In the absence of additional evidence to the contrary, the status quo should be maintained.

Respectfully submitted,



Gigi B. Sohn



Andrew Jay Schwartzman

MEDIA ACCESS PROJECT  
2000 M Street, N.W.  
Washington, DC 20036  
202-232-4300

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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