ORIGINAL

MANIA K. BAGHDADI
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
THOMAS J. DOUGHERTY, JR.
JAMES G. ENNIS
RICHARD HILDRETH
EDWARD W. HUMMERS, JR.
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BARRY LAMBERGMAN
PATRICIA A. MAHONEY
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ROBERT D. PRIMOSCH
LEONARD R. RAISH
JAMES P. RILEY
DAVID N. ROBERTS*
MARVIN ROSENBERG
STEPHEN R. ROSS
TIMOTHY R. SCHNACKE**
LONNA M. THOMPSON
HOWARD M. WEISS

*ADMITTED IN TEXAS ONLY
**ADMITTED IN KANSAS ONLY

FLETCHER, HEALD & HILDRETH

ATTORNEYS AT LAW

SUITE 400, 1225 CONNECTICUT AVENUE, N.W.

WASHINGTON, D.C. 20036-2679

(202) 828-5700

TELECOPIER NUMBER

(202) 828-5786

ORIGINAL
FILE

PAUL D. P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)

RETIRED
RUSSELL ROWELL
EDWARD F. KENEHAN
ROBERT L. HEALD
FRANK U. FLETCHER

TELECOMMUNICATIONS CONSULTANT
HON. ROBERT E. LEE

WRITER'S NUMBER
(202) 828-
5715

August 24, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Stop Code 1170
Washington, D.C. 20554

RE: MM Docket No. 91-221

Dear Ms. Searcy:

Transmitted herewith of behalf of Capitol Broadcasting Company, Inc., licensee of broadcast station WRAL-TV, Raleigh, North Carolina, are an original and four (4) copies of its "Comments" in the above-referenced proceeding.

Should any question arise concerning this matter, please communicate with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH

Patricia A. Mahoney

Patricia A. Mahoney
Counsel for
Capitol Broadcasting Company, Inc.

PAM/cla
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: The Commission

COMMENTS

SUMMARY

Capitol Broadcasting Company, Inc. (Capitol), licensee of broadcast station WRAL-TV, Raleigh, North Carolina, herein respectfully submits its Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 92-209, 7 FCC Rcd 4111 (1992) (NPRM), in the above-referenced proceeding. Capitol commends the Commission for initiating this proceeding to consider relaxing the ownership rules and policies that pertain to television broadcasting. While Capitol generally supports the Commission's efforts to eliminate or relax rules and policies that unfairly and unduly restrict broadcasters, who find themselves facing dramatically increased competition from competitors who are not bound by any similar rules and policies, Capitol herein addresses only two matters discussed in the NPRM: the radio and television cross ownership rule, Section 73.3555(b) of the Rules, and Section 73.658(l) of the Rules.

The radio and television cross ownership rule should be completely eliminated. The Commission has already recognized the economies and efficiencies that can be achieved by freely

permitting television and radio cross ownership in a market. The Commission's own studies have demonstrated the worsening economic state and ever-increasing competition facing radio and television broadcasters. Thus, the economies that can be achieved are desperately needed. Moreover, given the explosive growth of services and programming sources over the more than 20 years since the rule was adopted, the original objectives of the rule (fostering competition and promoting diversity) have been achieved, and there is no continuing need for the rule.

Similarly, Section 73.658(1) of the Rules, also adopted over 20 years ago, should be eliminated. The rule was adopted primarily to foster UHF development at a time when the sources of video programming were limited to local television stations and the three major networks. Today, particularly with the growth and expansion of cable, which extends the reach of UHF stations, and other multi-signal, non-broadcast sources of programming, there is no longer any justification for the rule. The continued existence of this rule, which applies in very few markets, restricts broadcast licensees from exercising their own judgment and presenting the programming they believe best serves the interests and needs of their service area.

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To: The Commission

COMMENTS

Capitol Broadcasting Company, Inc. (Capitol), licensee of broadcast station WRAL-TV, Raleigh, North Carolina, by its attorneys, hereby respectfully submits its Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 92-209, 7 FCC Rcd 4111 (1992) (NPRM), in the above-referenced proceeding:

I. Introduction

Capitol commends the Commission for initiating this proceeding to consider relaxing the ownership rules and policies that pertain to television broadcasting. Capitol offers these comments as the licensee of a network affiliated VHF television station[1] in Arbitron ADI market 32 (Raleigh-Durham, N.C.).

While Capitol generally supports the Commission's efforts to eliminate or relax rules and policies that unfairly and unduly restrict broadcasters, who find themselves facing dramatically increased competition from competitors who are not bound by any

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[1] Capitol subsidiaries are also the licensees of one AM and three FM stations, and one UHF independent television station.

similar rules and policies, Capitol herein addresses only two matters discussed in the NPRM: the radio and television cross ownership rule, Section 73.3555(b) of the Rules, and Section 73.658(1) of the Rules.

II. The Radio-Television Cross Ownership Rule Should Be Completely Eliminated

This proceeding affords the Commission an excellent opportunity to totally repeal its one-to-a-market or radio-television cross ownership rule, Section 73.3555(b) of the Rules. While this rule was relaxed in 1989, the time has now come for the complete elimination of the rule.

In its Second Report and Order in Amendment of Section 73.3555 of the Commission's Rules, MM Docket No. 87-7, 4 FCC Rcd 1741 (1989) (Second Report and Order), the Commission outlined at length the efficiency, programming and other service benefits from permitting radio-television combinations in the same market. See 4 FCC Rcd at 1746-50. Such benefits included enabling marginal stations to stay on the air, the activation of unused channels, and the improvement of the facilities of existing stations. Id. at 1749-50. However, in that proceeding, the Commission rejected the notion of eliminating the radio-television cross ownership rule entirely, stating:

> "A large number of commenters supported the first of these other options, to eliminate the radio-television cross-ownership rule completely in all markets. Although this approach would give broadcasters the most flexibility in station acquisition and taking advantage of joint ownership efficiencies in all size markets, some commenters argued that this option would abandon our traditional method of safeguarding viewpoint diversity and economic competition. In the interest of caution, we have decided not to eliminate the

> rule, but instead to adopt a new case-by-case waiver policy at this time in order to assess the effects of relaxing the one-to-a-market policy."

Second Report and Order, 4 FCC Rcd at 1750 (footnotes omitted). The time for "caution" has ended. The Commission has ample evidence of sufficient and increasing viewpoint diversity and economic competition such that it can easily assess the effects of eliminating the one-to-a-market policy. There is no reason to retain restrictions on ownership simply because they are "traditional." Given the worsening economic state of the radio industry and the ever increasing competition facing both radio and television stations, well documented by the Commission both in this proceeding and in the radio proceeding, it is clear that the economies and efficiencies that can be achieved are desperately needed and that there is no threat to diversity if the rule is repealed. The Commission should, in light of the demonstrated benefits from such combinations, remove all restrictions and barriers to common ownership of TV and radio.

In the NPRM in this proceeding, the Commission seeks comment on whether it should permit consolidation of radio and television ownership under the respective rules for each service without the additional limitation of a one-to-a-market rule. Capitol enthusiastically supports this proposal for complete elimination of the one-to-a-market rule. If there must be ownership limits, radio and television limits should be treated separately, particularly at the local level.

As an alternative to elimination of the rule, the Commission has suggested more "moderate" alternatives that would permit ownership of (1) one AM, one FM, and one television station in a market or (2) elimination of the rule only for AM/TV combinations. Finally, the Commission suggests codifying the waiver criteria adopted in 1989 and applying them in all markets in which 30 "independent voices" remain. Capitol opposes all of these more moderate or "cautious" approaches as unnecessary in today's multi-signal competitive environment.

As the NPRM points out, the radio-television cross ownership rule was first adopted in 1970. It was viewed by the Commission as an extension of its duopoly rule. NPRM, 7 FCC Rcd at 4116. See Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 F.C.C.2d 306, 307 (1970), on reconsideration, 29 F.C.C.2d 662 (1971). At the outset of its discussion in adopting the rule, the Commission noted that its multiple ownership rules have the twofold objective of (1) fostering maximum competition in broadcasting and (2) promoting diversification of programming sources and viewpoints. 22 F.C.C.2d at 307.

With respect to diversity, the Commission's rationale for the need for regulation was premised on the ability of a licensee to exercise control over news and public affairs programming and the idea that there was a scarcity of outlets through which this information could or would be disseminated:

> "Application of the principles set forth above dictates that one person should not be licensed to operate more than one

> broadcast station in the same place, and serving substantially the same public, unless some other relevant public interest consideration is found to outweigh the importance of diversifying control. It is elementary that the number of frequencies available for licensing is limited."

Id. at 311 (emphasis added).

It is apparent from the above passage that, when the Commission adopted the one-to-a-market rule, it believed that the sources of programming competing in a market were and would remain finite and limited because the number of frequencies available were limited. Thus, it seemed appropriate at that time to place limits on the number of outlets one speaker in a community could control. It is also apparent that, when the Commission adopted its one-to-a market rule, the Commission viewed television and radio as each other's only competition in the provision of news and public affairs using the electronic media. The Commission never considered a future with a multiplicity of competing services not limited by the availability of broadcast spectrum. The Commission also, during this same time period, believed that it was unlikely that in the future there would be any television networks other than the three major networks. *See* page 12, *infra*.

Twenty-two years later, there has been a tremendous explosion in the growth and development of additional media outlets and sources of programming. As the Commission discovered in its examination of the radio ownership rules, the radio industry has become increasingly diverse and competitive, particularly over the past decade. Just during the period from 1980 to 1991,[2] the number of FM radio stations grew from 4374 to 6077, and the number of AM stations increased from 4589 to 4985. See Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2757 (released April 10, 1992), modified on other grounds, on August 5, 1992 (text not yet available). At the same time, the number of non-radio outlets competing with radio for audiences and advertising revenues has also increased substantially. Id. Popular music is now available over cable, on cable networks such as MTV and VH-1; and the number of 24-hour per day cable radio network entities has risen from approximately six in 1984 to 15 today, offering approximately 100 separate audio channels, including three digital networks, each of which provides about 30 channels of CD quality music. Id. at 2757-58. Radio also faces competition in the future from Digital Audio Broadcasting/Broadcast Satellite Sound (DAB)/(BSS), which will offer national channels of CD-quality radio programming by satellite.

Also, as the Commission found in the radio proceeding, in response to the intense inter- and intra-industry competition, radio station programming has become increasingly diverse and targeted. Whereas, during the mid-1970s, one follower of the radio industry classified stations according to eight major formats,

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[2] In 1970, there were 4269 AM stations, 2476 FM stations, and 872 TV stations on the air. See Broadcasting & Cable Market Place 1992 (hereinafter Broadcasting & Cable), at E-15, E-110. As of January 1, 1992, there were 4988 AM stations on air (5223 authorized), 6036 FM stations on air (7356 authorized), and 1488 TV stations on air (1688 authorized). Id.

today it tracks 35 major formats and more than 20 minor formats. Id.

As the Commission has recognized both in the radio ownership proceeding and in this proceeding, the number of television stations has also increased dramatically in the last decade, from 1019 in 1980 to 1494 today. Id. at 2758. During this same period, cable, which competes with both radio and television, has enjoyed tremendous growth, with national cable penetration increasing from 25% in 1980 to 64% today and the number of national basic cable programming networks growing from 34 to at least 80 during the same period. Id.

In the OPP Working Paper (26), Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996 (1991) (OPP Paper), the FCC's Office of Plans and Policy examined changes in competition in the television broadcast industry over the period from 1975 to 1990 and presented its predictions for the next decade. At the very outset of the Executive Summary to the OPP Paper, the FCC's staff observed:

> "Over the past fifteen years the range of broadcast, cable, and other video options available to the American viewer has increased dramatically."

6 FCC Rcd at 3999. The staff noted that its

> "analysis supports the conclusion that in the new reality of increased competition regulations imposed in a far less competitive environment to curb perceived market power or concentration of control over programming are no longer justified and may impede the provision of broadcast services."

Id. The OPP Paper's Executive Summary also contains the following findings:

- In 1975, the U.S. had three commercial broadcast television networks and no cable networks; cable television was solely a broadcast retransmission medium.

- By 1990, there were four commercial broadcast networks and over 100 national and regional cable networks.

- In 1976 only 17% of television households subscribed to cable.

- In 1990 over 56% of television households subscribed to cable.

- The number of broadcast stations increased by 50% during the period 1975-90, with independent television stations accounting for three-quarters of the growth.

- The number of off-air stations available to the median household increased from six in 1975 to ten in 1990.

- By 1990 94% of television households were located in markets with five or more televisions stations.

- In 1975 there were no home satellite dish systems and no home videocassette recorders (VCRs).

- In 1990 3% of television households had home dishes and 69% owned VCRs.

Id. These findings were largely adopted by the Commission as "statistics" that "are well known" in its Notice of Inquiry, 6 FCC Rcd 4961 (1991), in this proceeding.

The staff also summarized its findings on viewing patterns:

> "Expansion in the availability of outlets and programming has dramatically changed viewing patterns. The broadcast networks and their affiliates have been the big losers. The prime-time viewing share of the three major commercial networks plummeted from 93 in 1975 to 64 in 1990. The all-day three-network viewing share fell from 41 to 35 between 1984/85 and 1989/90. These declines have been accompanied by increased viewing of independent stations and cable networks. In recent years, pay cable

> and independent station viewing has leveled off, but basic cable viewing continues to grow. Overall, viewing of cable-originated programming rose from 14 percent to 26 percent of total viewing and from 24 percent to 39 percent of viewing in cable households. Thus, the decline in the broadcast share results from both increased cable penetration and increased cable viewing shares in cable households."

OPP Paper, 6 FCC Rcd at 4000 (emphasis added). Thus, the Commission's own studies and findings document the growth and diversity of media outlets and the continuing growth of cable, which is not limited by the availability of frequencies. Indeed, with the advances in signal compression techniques and the impending advent of DBS, the public will have a seemingly unlimited and infinite number of programming sources available.[3]

Unlike the industry in 1970, radio and television stations are no longer the only source of news (local, national or international) and public affairs programming. Radio and television stations today face ever-increasing competition for viewers, listeners, and advertisers from cable, wireless cable, satellite, video cassette recorders, and (coming soon) DBS. These competitive sources of programming are diverse and are not limited by either the technical limitations or the artificial ownership restrictions that inhibit broadcasters from effectively competing. Thus, there is no reason to limit the number of radio stations a licensee can acquire relative to the number of television stations it can acquire in the same market. For the purposes of the

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[3] See OPP Paper, 6 FCC Rcd at 4033-36. The staff has described video compression technology as "the technological factor that almost certainly will have the biggest impact on the video delivery marketplace over the next ten years." Id. at 4042.

Commission's ownership rules, they should be treated as two distinct services.

III. <u>Section 73.658(l) of the Rules Should Be Repealed</u>

Capitol is in a unique position to comment on the Commission's proposal, at paragraph 41 of the <u>NPRM</u>, to delete Section 73.658(l) of the Rules. Capitol is the licensee of a network-affiliated VHF station in a market that has only two commercial VHF stations, Raleigh-Durham. Capitol strongly supports repeal of this rule, which should never have been adopted.

In <u>Limitations re: TV Network Programs</u>, 28 F.C.C.2d 169 (1971), in a rulemaking proceeding that commenced with a petition filed by the license of a UHF station in Durham, North Carolina, the Commission adopted rule Section 73.658(l), which essentially provides that, in television markets in which two stations have already affiliated with two of the three major networks and in which there are one or more independent stations with reasonably comparable facilities, the network without an affiliate in that market must first offer its programming to the independent station before offering it to the affiliated stations. At the time the rule was adopted, the Raleigh-Durham market was one of only two markets in the country having two VHF and one UHF station in which the UHF station did not have a regular affiliation with one of the three networks. In the other market, Augusta, Georgia, the UHF station was silent at the time the rule was adopted. In "numerous other such two-VHF-plus-UHF markets," the UHF station had already affiliated with a major network. 28 F.C.C.2d at 169. Thus, because one UHF licensee could not obtain a network affiliation in 1971, the Commission created a rule that still exists today and that continues to impinge upon the rights of commercial broadcasters to select the programming they wish to present to their communities.

In adopting the rule, the Commission felt that the situation presented in the Raleigh market was "contrary to [its] expressed goals of furthering UHF." Id. at 185. The Commission denied that it was adopting "special legislation" and characterized its action as "largely designed simply to extend the general pattern which has developed voluntarily, to situations where it has not been applied in the absence of a rule and where it should apply if the public interest is to be served." Id. at 185.

Section 73.658(1) is contrary to several expressed goals of the Commission. Other subsections of Section 73.658 have been adopted to "lessen network dominance" and to promote competition and diversity, but this rule actually threatens those goals. It artificially alters the bargaining power of all stations in the affected markets, particularly the stations that are already affiliated with other networks who cannot bid for programming of the third network. It also affects the bargaining power of the networks. The network also loses the ability to provide its programming to the widest possible area. The rule forces the network to affiliate with a station with which it may not want to do business.

In adopting the rule, the Commission recognized that the new rule was seemingly contrary to other provisions of Section 73.658 (i.e., paragraphs (a), (c), (d), and (e)) by promoting "exclusive" relationships between stations and networks, "something which it has been one of the key objectives of Commission regulations for 30 years to prevent and discourage." Id. at 193. The Commission also acknowledged that it was "true that to some extent, the rule adopted looks in the other direction; this is one of the reasons why we might well be reluctant to adopt it in a less limited context." Id. Although the Commission recognized that as to exclusivity vis-a-vis other networks the rule represented a deviation from Commission policy in this respect, the Commission stated that it nevertheless believed that the public interest warranted this departure, noting:

> "It does not appear that, for the present or the immediate future, there will be any additional `networks' in the sense that that term applies to ABC, CBS and NBC--entities distributing programs for a large amount of time daily, generally on an interconnected basis. If and when such developments appear realistic possibilities for the near future, we can take another look at this rule."

Id at 193. Obviously that time has arrived. Today there are four national commercial networks, including Fox Broadcasting Company (Fox). The Fox network, with 145 affiliated television stations, is generally considered to be a national network and certainly satisfies the Commission's definition above (an entity distributing programs for a large amount of time daily, generally on an interconnected basis). Indeed, there is a Fox network affiliate in each of the top 50 markets, including Raleigh-Durham. See Broadcasting & Cable Market Place 1992, (hereinafter Broadcasting & Cable), B-3-70, E-17-93. Broadcasting & Cable, F-68-69, includes Fox Broadcasting Company in its listing of "Major National Television Networks" and reports 145 affiliated television stations. The same source reports ABC with 223 affiliates, CBS with more than 200, and NBC with 205. Id. at F-66-F-71. In addition, the Public Broadcasting Service, also a national network service, distributes programming to 340 stations. Id. at F-72.

In addition to the major television networks, Broadcasting & Cable lists the following as Television Program Networks: IDB Communications Group Inc.; Moody Broadcasting Network; Telemundo Group Inc.; and Univision. Id. at F-73. The same source lists 19 Regional Television Networks, Id. at F-74, and four Unwired Television Networks, Id. at F-75. There is no question that today's video marketplace in no way resembles the competitive environment that existed in 1971, when Section 73.658(l) was adopted. See also pages 7-9, supra.

There is no continued justification for Section 73.658(l). Today there are more UHF stations (583 commercial, 236 educational) than VHF stations (557 commercial, 124 educational). See Broadcast Station Totals as of July 31, 1992 (FCC Press Release 24341, Aug. 11, 1992). All TV receivers must be able to receive UHF stations. More importantly, as the Commission's staff has recognized, the number of UHF stations has increased greatly in the last decade,[4] largely because cable carriage has reduced the disadvantage of UHF relative to VHF stations and thus increased their potential audiences. OPP Paper, 6 FCC Rcd at 4012, 4031. There is clearly no longer the same need to protect and foster UHF development as existed in 1971.

Moreover, as the number of media outlets and the sources of programming have grown, as the dominance of the three major networks has been substantially weakened, and as independent television stations have become more dominant in their local markets, the relationships between the major networks and their affiliates have been substantially altered, to the point that networks have substantially reduced affiliate compensation and have even proposed that affiliates pay them. See, e.g., "CBS Affiliates Protest Moves Beyond 'Comp,'" Broadcasting (July 27, 1992) at 4; "CBS Offers Affiliates Deduction Addition," Broadcasting (July 6, 1992), at 3, 12. All television licensees need and should have equal ability to bargain freely for their programming. Only then will the local programming marketplace be truly competitive.

The Commission's Rules ought to be directed to protect and further the interests of the viewing public, not one unhappy UHF licensee. The public interest is best served by policies and rules that promote and preserve the greatest possible programming choices

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[4] In 1975, four years after Section 73.658(l) was adopted, there were 514 commercial VHF stations and 192 commercial UHF stations. Of the total, only 86 were independents. As of 1990, there was a total of 1093 commercial TV stations (547 VHF and 546 UHF), of which 380 were independents. OPP Paper at 4011.

for the consumer and the greatest freedom of the licensee to program to meet the demands, needs, and interests of its market. A rule that tells a network in a few selected markets that it cannot offer its programming to two television stations is not in the public interest and is not justified. A rule that tells a licensee that it cannot acquire programming from a specific network is not in the public interest and is not justified. Section 73.658(l) should therefore be repealed.

IV. <u>Other Matters</u>

Although not the subject of any proposal in this proceeding, the off-network ban of the Prime Time Access Rule of Section 73.658(k), is ripe for review and repeal. On July 21, 1987, Capitol filed "Comments in Support of Application for Review" in connection with an Application for Review that was filed by Channel 41, Inc., seeking review of the Mass Media Bureau's denial of a petition for rulemaking to delete the "off network ban." To the best of Capitol's knowledge, the Commission has ignored that Application for Review, permitting it to languish at the Commission. Over the past five years, numerous parties have sought review and repeal of the rule to no avail. Capitol once again urges the Commission to delete this unnecessary and inconsistent restriction on television broadcasting.

V. <u>Conclusion</u>

As has been demonstrated above, the television industry is no longer what it was when the one-to-a-market rule and Section 73.658(l) of the rules were adopted. As a result of the explosive growth in the number and sources of media outlets and the resulting competition and diversity, these rules are no longer necessary or justified and should be eliminated.

Respectfully submitted,

CAPITOL BROADCASTING COMPANY, INC.

By: Patricia A. Mahoney
Marvin Rosenberg
Patricia A. Mahoney

Its Attorneys

FLETCHER, HEALD & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 828-5700

August 24, 1992