specter of undue concentration, and without threatening the disruption or radical restructuring of the industry that caused the Commission to retreat in 1984 from total repeal of the rule.

A numerical limit of 18 is clearly reasonable. In 1953, when the Commission adopted its numerical limit of five stations, that number represented 2.5% of the 199 television stations then on the air. Today, with nearly 1500 television stations broadcasting, ownership of 18 stations would represent only 1.2% of the total stations in operation. So even if the numerical limit which applied for 30 years is almost tripled to 21, and even if diversity is measured <u>only</u> in terms of the number of available television outlets, the potential for concentration of TV station ownership would be far less than it was in 1953. Of course, viewers today have access to a great many video choices other than over-the-air stations, not to mention information sources such as print media and the vastly expanded numbers of radio stations.

An increase in the numerical limit to 18 would also permit increased group ownership of stations in smaller markets, where efficiencies of common ownership may be particularly beneficial.

A 35% audience reach cap is also a reasonable increment to the current allowable limit, allowing group owners to achieve meaningful growth in station ownership without running the risk -- which remains both unlikely and benign[22] -- that a single entity will buy up "too much" coverage.[23] First, when evaluating this issue, the Commission should keep in mind that it is not dealing with a total universe of household coverage that equals only 100%. There are about 1500 television stations currently in operation, located in over 200 different markets. In each market, several television stations compete for the same viewers. Thus conceptually, in terms of

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[22] When it first adopted the household coverage cap in 1984, the Commission noted that without this limit a single owner could potentially increase its audience base substantially by acquiring many stations in the largest markets. However, it also noted that "there is no evidence in the record that would lead us to believe that such an eventuality would necessarily have an adverse result..." Memorandum Opinion and Order in Gen. Docket 83-1009, supra, 100 FCC 2d at 89. There is still no evidence that the ability to reach a significant percentage of the nation's television households through owned stations is harmful to the public interest.

[23] NBC opposes the suggestion that only the numerical limit be raised (Notice ¶12). It is naive to assume that this approach will be an incentive for investment in small market stations. Some group owners are better managers of small market stations and others (including NBC) have experience and success in managing stations in larger markets. Changing only the numerical cap would discriminate against the latter group of owners. The Commission should not force fit owners with particular types of stations through regulatory policy. The result will only be poorly managed, unsuccessful stations.

percentages, the real universe of household coverage runs in the thousands of percentage points. In the New York, for example, which as the largest television market represents 7.35% of television households, there are 14 commercial television stations. So the total households stations compete for in New York markets represent about 103 household coverage points (14 X 7.35%).24 If the same calculation is repeated in the next 9 largest markets, the total cumulative household coverage points rises to 414 for 125 stations. Even if a single entity bought several top 10 market stations representing 35% of TV households, it would, in reality, control only a small fraction (8.5%) of the households potentially available in those 10 markets, and an even smaller percentage of total U.S. households.

Second, the Commission now has experience under the 1984 household reach limit that demonstrates that any concern that one or two group owners would go on a station buying spree, or that the industry would suddenly be radically altered or disrupted, was unfounded. Television stations still cost tens of millions of dollars to acquire. It is not a decision any company, no matter how large and well-financed, makes lightly or capriciously. In the eight years since the Rule of Seven was relaxed, there has been no "gold rush" to acquire as many stations as the Commission's new limits would allow. Currently only one group owner even approaches the 25% TV household limit (CapCities/ABC with 23.8%). But that level of coverage is actually less than ABC held in 1983 (24.6%). Similarly both the CBS (currently at 22.1%) and the NBC (currently at 20.4%) owned stations cover fewer households than they did before the ownership coverage cap was imposed. Both NBC and CBS could acquire one or more additional major market stations without exceeding the current 25% household cap. Other group owners are currently at least five percentage points below the Commission's current limits.[25]

In sum, NBC believes relaxation of the multiple ownership restrictions to 18 stations/35% is the reasonable and necessary next step toward total elimination of the Commission's multiple ownership rule.

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[25] Broadcasting magazine, March 30, 1992; Paul Kagan & Associates Broadcast Investor, July 31, 1991, p. 7.

NBC also suggests the Commission continue its special treatment of UHF and minority-owned stations. Under the so-called UHF discount, UHF stations are "counted" toward the household coverage limit at only 50% of their actual coverage. Bolstered by cable carriage and new programming services such as the Fox Network and syndication, UHF stations are much stronger competitively in 1992 than they were in 1984. Nevertheless, the OPP Report's contained a dim assessment of the future of many UHF outlets.[26] The Commission should encourage acquisition of these stations by group owners, who could contribute new capital and increased resources to their operations.

NBC also believes the Commission should continue its policy of providing incentives for minority ownership, under which an entity can exceed the numerical or coverage limits if the additional stations are minority controlled.[27] The

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[26] OPP Report, supra, 6 FCC Rcd at 4023-4025.

[27] But see NBC's June 2, 1992 comments in response to the Commission's Notice of Proposed Rulemaking in GC Docket No. 92-52, which deals with the comparative criteria for competing initial applicants for broadcast licenses. NBC took the position that minority "owners" should have some degree of equity participation and some minimum level of investment or equity in an application before a comparative preference is awarded. A similar test should be applied to minority "owners" who seek to take advantage of any special treatment under the multiple ownership rule.

Commission might consider the same approach it recently applied in the radio context.[28] An additional or alternative approach was suggested by the NAACP and LULAC in comments filed in the recent network cable cross-ownership proceeding, under which the Commission would use the carrot of increased numerical and coverage caps to create incentives for companies to finance minority purchasers.[29] The Commission in the past has noted that insufficient capital may be the greatest barrier to entry into broadcasting.[30] Encouraging financial backing for minorities may be the surest way to increase their participation in station ownership.

B. The Duopoly Rule Should Be Significantly Relaxed

The Commission's Notice correctly sets out the considerations that must be balanced in evaluating changes in

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[28] Report and Order on reconsideration in Docket 91-140, released August 5, 1992.

[29] Comments of the National Association for the Advancement of Colored People and the League of United Latin American Citizens in MM Docket No. 82-434, filed March 23, 1992.

[30] Report and Order in Gen. Docket 83-1009, supra, 100 FCC 2d at 19.

the television duopoly rule[31]: should the Commission promote competition and diversity by giving stations the ability to exploit the economic efficiencies of common ownership, or should it promote competition and diversity by pursuing the abstract benefits of diverse ownership? NBC submits that the answer is clear. Regulation of ownership patterns is no longer necessary to ensure, and in fact may diminish, diversity of viewpoints and economic competition. Competition among the numerous broadcast outlets in local markets itself guarantees that diversity of viewpoints will be available to the public.[32] On the other hand, the competitive benefits of common ownership, many of which are enumerated in the Notice, are not being realized because of the Commission's rigidly restrictive local overlap policies.

NBC's Comments in response to the Notice of Inquiry on the changing video marketplace set forth our view that a stringent duopoly rule was no longer necessary to preserve diversity, and that the Commission's strict Grade B overlap prohibition deprived broadcasters of efficiencies that would

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[31] 47 CFR Section 73.3555(a).

[32] As noted above, the average home can receive 12 over-the-air stations and 36 channels overall.

make them more competitive and financially healthy.[33] NBC will not reiterate those points here, as the Commission appears to agree with our assessment, and is seeking comment only on the extent and nature of the changes that should be made in the rule.

NBC urges the Commission to adopt two of the proposals contained in the Notice: (1) the signal contour used to determine whether a prohibited overlap occurs should be changed from Grade B to Grade A; and (2) the Commission should permit combined VHF and UHF or UHF and UHF ownership where there is overlap of Grade A Contours so long as at least six independently owned television stations (including non-commercial stations) remain after the combination.

A reduction in the prohibited overlap to both stations' Grade A Contours would, as the Notice explains, apply the Commission's rules to an area that more accurately reflects a station's core market, and would permit combinations between stations in neighboring markets. To the extent the commonly owned neighboring stations could share costs and sell broader

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33 Comments of National Broadcasting Company, Inc. in MM Docket No. 91-221, November 21, 1991, pp. 60-63.

audience reach to advertisers, the economic benefits could be substantial, and both stations could become more competitive. In addition, to the extent the combined stations share newsgathering equipment, or broaden the geographic area covered by their local news reporters, viewers would receive more and better informational programming about both their local community and their region.

NBC also believes that, where there is a Grade A Contour overlap, the Commission should permit common ownership of VHF and UHF, or UHF and UHF, outlets that do not significantly diminish the number of separately owned television outlets available to the local market. As the Commission suggests in the Notice (¶20), if at least six separately owned television outlets remain in the market after any permissible combination, then even those local viewers that do not subscribe to cable would still have a number of diverse over-the-air television choices.[34] These viewers also have access to radio, home video and print media, which must not be

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[34] Unbuilt but allotted outlets should be counted as services for these purposes, since they would be available voices to the community.

ignored in any calculation of local information diversity.[35] Of course, almost two-thirds of all TV households subscribe to cable, and those viewers typically can also choose from dozens of imported over-the-air stations and cable program channels.

There are several reasons why allowing such combinations would serve the public interest. First, traditionally weaker UHF stations would clearly benefit from financial and personnel support available from a co-located, commonly owned VHF or UHF station.[36] The 1991 NAB/BCFM Television Financial Report indicates that in 1990 the average UHF station lost over $450,000. The OPP Report was particularly pessimistic about the future prospects for UHF stations.[37] Allowing such combinations might mean the difference between bankruptcy and survival for many UHF outlets.

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[35] See n. 14, supra.

[36] The Notice points out that any distinction between VHF and UHF outlets may vanish as the broadcast industry makes the transition to ATV technology (Notice, fn. 37). However, even under the aggressive timetable the Commission has proposed thus far, the full transition to ATV will not occur for over 15 years. Surely the Commission does not want to fail to address the difficulties faced by many UHF stations today because television allotments may be restructured in the next century.

[37] OPP Report, supra, 6 FCC Rcd at 4023-4025.

Even in those cases where a UHF outlet is not on the brink of financial disaster, common ownership with a co-located VHF or UHF might enable the station to provide better and more diverse program service to the community. For example, the owner of the combined properties might decide to use the UHF outlet to more fully utilize its newsgathering and local programming resources, resulting in an increase in locally produced news and public affairs programming. Other business arrangements between the co-located stations might lead to innovative new programming or public service campaigns. These more innovative approaches to programming and community service, coupled with the cost efficiencies that can be achieved through common ownership, would make both stations more competitive over the long term.

NBC submits that the modifications to the duopoly rule we have suggested achieve the proper balance between increasing the competitiveness of television broadcasters and preserving the level of diverse ownership the Commission believes the public interest requires.

III. THE COMMISSION'S RULES AFFECTING NETWORK OWNERSHIP AND AFFILIATION PATTERNS SHOULD BE REPEALED

A. The Dual Network Rule Should Be Eliminated

There is no Commission restriction on the number of cable networks a single entity can own -- no apparent concern that such common ownership is a threat to diversity or competition. The dual network rule,[38] on the other hand, prohibits the operation of two overlapping and simultaneous broadcast television networks. The result has been that two of the three original broadcast networks have been forced to channel new investment into non-broadcast activities.[39] Discouraging network investment in broadcast program services can hardly serve the Commission's diversity goals or the public interest. Yet the dual network rule prevents the networks from developing new and different sources of broadcast programming. It thereby deprives television stations and their viewers of a broader range of program choices, and it reduces competition among program services for distribution on affiliated stations.

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[38] 47 CFR Section 73.658(g).

[39] Notice ¶32.

The dual network rule was adopted in response to marketplace conditions in radio that existed 50 years ago. In the early days of radio, the shortage of distribution facilities and the paucity of program services allowed NBC, then a dominant radio network broadcaster, to wield enormous power that the Commission feared could potentially limit competition. Today there is neither a shortage of distribution outlets, nor a shortage of program sources serving individual stations[40] or viewers.[41] When the radio dual network rule was eliminated 15 years ago, the Commission recognized that the only lingering effect of the rule was to deprive stations, and ultimately the public, of a wider variety of program choice. The television dual network rule has now become similarly unnecessary and counterproductive.

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[40] As noted above, there is now not only a successful fourth broadcast network, but a vibrant first run syndication marketplace that offers affiliated and independent stations original "network quality" programming, as well as off-network shows (See n. 20, <u>supra</u>).

[41] Paragraph 34 of the Notice lists the multiplicity of broadcast and cable programming choices available to the average viewer. With the advent of signal compression and advanced satellite technology, these choices will continue to increase.

While the need for a dual network rule has disappeared, the cost to the public of maintaining the restriction has increased. The Notice recites the many network business opportunities that are foreclosed by virtue of the rule, including the development of multichannel services for affiliates using video compression and satellite technology, greater use of network newsgathering and other resources to provide enhanced service to local stations,[42] creation of alternative language feeds or time shifting of the type being utilized by the cable industry, and the development of special regional networks for news or sports programming.

Repeal of the dual network rule would thus allow networks to contribute to the diversity of programming available to stations and viewers. At the same time, the networks could better utilize their resources and expertise to develop additional revenue opportunities in broadcast, rather than solely in cable network programming services.

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[42] If, for example, the duopoly rule is modified, network affiliates may own additional stations in or near their existing markets. But an affiliate's network could not provide new program services -- such as a national or international news program channel -- to its second outlet under the current rule.

The Commission need not fear that elimination of the rule would "prevent the entry of new, independent programming sources, which are more likely to lack (or require more time to arrange for) the funds needed to create a full complement of programming for new distribution channels."[43] The desire and the financial resources clearly exist in many quarters to launch competing network services. To cite only one example that was referred to earlier, the major Hollywood studios, which clearly have economic resources comparable to, if not greater than the three traditional broadcast networks, have already developed ad hoc networks of original programming to compete against the traditional networks in prime time. And, with many programming services to choose from, network affiliates have no compunction about preempting their network's offering if it is advantageous to do so in their local markets. All the dual network rule does is to uniquely prevent NBC, ABC and CBS from competing against first-run syndicators and cable programmers, who may offer distribution outlets as many different simultaneous program services as they choose.

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[43] Notice ¶34.

NBC also strongly opposes the imposition of "safeguards" to protect affiliated and independent stations from "possible anticompetitive conduct" were the dual network rule to be repealed.[44] Safeguards are totally unnecessary. First, as noted above, the problematic conduct that inspired the Chain Broadcasting Rules (predecessor to the dual network rule) occurred over 50 years ago, when there were few stations and even fewer networks. Those problems could not arise in the competitive marketplace of the 1990's. In any event, if a network did engage in such activities as illegal tie-ins or predatory discounts, the antitrust laws are more than adequate to remedy the situation.

As for the persistent fear that if the Commission alters its regulation of networks in any way they will somehow disadvantage independent stations, their affiliates, or both, NBC can only reiterate the basic points it made in its comments in the Commission's network-cable ownership proceeding, to which the Commission is respectfully referred:[45] these concerns are extreme, speculative,

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[44] <u>Ibid</u>.

[45] Comments of National Broadcasting Company, Inc. in MM Docket No. 82-434, March 23, 1992, pp. 21-28.

nonsensical and inherently contradictory. Networks would have no incentive to undermine either their core business (which is totally dependent on a strong affiliate distribution system), or any new broadcast business venture (which might be dependent on relationships with their own affiliates, the affiliates of other networks, or independent stations). As a matter of law, regulations should not be based on vague and speculative fears that make no logical business sense.[46]

The 50-year-old dual network rule has clearly outlived its usefulness and is now an unnecessary impediment which prevents the three original networks from joining the ranks of many other broadcast program providers. NBC urges the Commission to repeal the rule in its entirety.

B. Section 73.658(f) Of The Commission's Rules (Network Ownership Of Stations) Should Be Repealed

This rule, which prohibits network ownership of stations in certain markets, has obviously been unnecessary for decades. The fact that the rule has never been applied to deny network acquisition of any television station, despite

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46 See, e.g., Quincy Cable TV v. FCC, 768 F.2d 1434, 1458 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

the fact that it has been raised in six cases starting in 1956, is a testament to its obsolescence.[47] Any inequality of broadcast facilities has been eliminated in most markets by cable carriage. Moreover, networks have typically sought to own television stations in larger markets, where there is no shortage of equal facilities.[48] And, as the Commission notes, stations in even the smallest markets are now subject to significant competition. Thus a network would gain no competitive advantage by buying a particular television facility in a small market. And viewers in smaller markets might receive better service from a network-owned station, which would have the economic resources of the network company behind it.

When evaluating the validity of this rule, the Commission should also reexamine the statement made in its 1984 decision to relax the multiple ownership rule. In that Report and Order the Commission stated that it might be a violation of Section 73.658(f) if a network acquired an independent station

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[47] Notice ¶36.

[48] In radio, there has been only one instance where a station has been transferred due to the unequal facilities rule, WBT, Charlotte. See Report on Chain Broadcasting, Docket No. 5060, May 1941, p. 68.

in the same market where it maintains an affiliation with another station.[49] It is not at all clear why network ownership of an independent station in a market where it has an independently owned affiliate has anything to do with this rule. The market in question may or may not have "few stations" or "unequal facilities."

In any event, there is no justification under this rule or otherwise for prohibiting a network from owning an independent station in affiliate markets. Obviously the network-owned independent would broadcast different programs than the affiliate. Affiliated stations are not under network "control." Fear of network hegemony over affiliates has been without foundation for years, assuming it was ever justified.[50] The number of competing outlets and program

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[49] Report and Order in Gen. Docket 83-1009, supra, 100 FCC 2d at fn. 117.

[50] Twelve years ago the Commission's Network Inquiry Special Staff concluded that the network affiliate relationship is essentially a business partnership, where each side bargains hard over the division of profits, but where both sides also share the incentive to make the profits to be divided between them as large as possible. New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Volume II, p. 288 (1980). As the Commission concluded in WBC Associates, L.P., 2 FCC Rcd 6083, 6087, 63 RR 2d 1179, 1186 (1987), "While networks generally offer programming, including news and public affairs, of a national orientation to affiliates, decisions concerning the carriage or pre-emption of such programming, as well as the broadcast of any non-network or local programming, are entirely left to the independent judgment of individual licensees."

services in even the smallest markets ensures diversity of viewpoints. Finally, if the Commission is considering relaxation of the duopoly rule, which would allow a single entity to own two stations with overlapping signal contours, logic dictates that a network should be able to own one station and affiliate with another in the same market.

NBC requests the Commission to clarify that network ownership of an independent station in markets in which it has an affiliation with another station is not a violation of Section 73.658(f) or any other Commission rule.

C. Section 73.658(1) of the Commission's Rules (Broadcast of the Programs of More Than One Network) Should Be Repealed

This rule was designed to affect network affiliation practices in markets with only two VHF outlets. Its purpose was to prevent a network from having a secondary affiliation with one of the two VHF stations rather than a primary affiliation with an otherwise independent UHF outlet. When the rule was adopted in 1971, there were only about 90 independent stations, they had relatively small audiences, and the syndicated program supply market was weak in comparison to the network market. The Commission was concerned that these stations would not be viable without a network affiliation. This rule therefore imposed significant burdens on any network that did not obtain its own full-time affiliate in any market it wanted to serve.

Today the rule is clearly an anachronism. The marketplace conditions on which the rule was based have completely changed.[51] First, UHF stations currently attract substantial audiences due to better all-channel tuners (which were on many fewer sets in 1971) and cable carriage which helps equalize the VHF/UHF differential. As a result, networks now generally prefer a full-time affiliation with a UHF station to part-time carriage by a VHF. At present, NBC is affiliated with only two stations which also carry the programs of ABC or CBS, and they are located in areas served by only one or two stations.

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[51] In fact, the very text of the rule, which speaks in terms of "the three national television networks" distributing the "evening programming" which is the rule's focus, is out of date with the advent of the Fox Network.

Second, network affiliation is no longer essential to station viability. There are now hundreds of independent stations that fare very well without a network affiliation. Their audiences have grown considerably as a result of improved reception, which, in turn, has led to an explosion in the availability of off-network and first-run syndicated programs for which independent stations are the primary market.

The current situation in Raleigh-Durham, North Carolina, one of the markets which inspired the rule,[52] provides the best evidence that this restriction on network affiliation practices is no longer necessary. In 1971 there were only three stations in the market, and the Commission was concerned that the third (a UHF) would not be viable without a full-time network affiliation. Today the Raleigh-Durham market has seven stations, three affiliated with the traditional networks, one with Fox, and three independents.[53] Thus, it is

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52 See Notice ¶39.

53 There is, in addition, a fourth independent, licensed to Rocky Mount, which is attributed to the Raleigh-Durham market by ARB.

apparent that a network affiliation is not a prerequisite to station viability in Raleigh-Durham.

The same is true across the country. NBC has calculated that there are now 152 markets in the United States where there is at least one station not affiliated with any of the three traditional networks, and 106 markets where there is at least one station not affiliated with either one of the three traditional networks or Fox. Thus a great number of stations have been constructed without any expectation of a network affiliation, demonstrating that their owners do not believe one is needed to survive.

Since there is no longer any rationale for the existence of this rule, it should be eliminated.

IV. ANY RULES LIMITING TIME BROKERAGE AGREEMENTS AMONG TELEVISION STATIONS SHOULD BE NO MORE ONEROUS THAN THOSE THE COMMISSION RECENTLY ADOPTED FOR RADIO

NBC cannot furnish the Commission with any information on the extent to which time brokerage agreements exist in the television industry. However, it seems clear that time brokerage can be a useful device that allows one station to more fully utilize its newsgathering and production facilities, or furnishes another station with attractive programming valuable to its audience. Time brokerage can therefore contribute to the diversity of programming in a local market and to the competitive strength of weaker stations.

To the extent the Commission believes it is necessary to regulate television time brokerage agreements, NBC urges that its rules be no more restrictive than those it recently adopted for radio, specifically:

> where an entity owns or has an attributable interest in one (or more) station(s) in a market, time brokerage of another station for more than 15% of that station's broadcast hours per week will result in counting the brokered stations toward the brokering station's permissible ownership totals, both local and national.[54]

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[54] Report and Order in MM Docket No. 91-140, supra, 7 FCC Rcd at (2788).

IV. CONCLUSION

For the foregoing reasons, NBC urges the Commission to eliminate or modify the rules addressed by the Notice as we have requested in these comments.

Respectfully submitted,

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