case-by-case.[27]

UPN's analysis concedes that there are many markets in which there is no conceivable risk of foreclosure.[28] Moreover, in making the foreclosure argument, UPN vastly overstates the alleged undersupply of local outlets that are "potential qualified affiliates". First, UPN misconstrues the statistics on the number of broadcast stations per market cited in the Notice. UPN says that local markets representing only 59% coverage "have the six stations needed to support the two new incipient networks".[29] In fact, the 59% figure cited in the Notice refers to markets having "more than six stations".[30] The percent of national coverage in markets with 6 stations, but no more than six, is significantly higher than 59%. According to NERA, citing the 1995 Broadcasting and Cable Yearbook, it is 74%.[31]

UPN then goes on to discount its mistaken 59% figure even further by eliminating stations UPN considers not "commercially viable".[32] While it claims that the excluded stations have geographical or technical handicaps or "special formats", UPN makes it impossible for commenters to critique those claims by failing to

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[27] UPN Comments at 27 n. 37.

[28] Id. at 18.

[29] Comments of the United Paramount Network (filed Oct. 30, 1995) at 17 ("UPN Comments").

[30] Notice, par. 13.

[31] NERA Study at Table 1.

[32] UPN Comments at 17.

identify the excluded stations. As a general matter, we see no reason why stations with special formats should be excluded from the count of available outlets. While such stations may not be commercially viable as network outlets today, no reason is given why they could not become commercially viable if UPN was able to offer them a network program service attractive enough to induce them to change their current formats.

Nor does the fact that UPN and WB must rely primarily on UHF stations for their broadcast outlets provide a rationale for retaining the rules. Fox was able to succeed as a fully competitive fourth network based primarily on UHF stations, and UPN and WB made their business decisions to go into the networking business with full knowledge that unaffiliated stations were virtually all UHF stations.

At its core, the UPN/WB argument is that the government should shield them from competition from the existing networks in order to foster their successful development. However, in the absence of market power, there is no reason based on competition policy that the Commission should intervene to aid some competitors -- new networks -- at the expense of others -- the existing networks. Since no network has market power over its affiliates -- much less over all network affiliates or potential affiliates -- there should be no regulation that inhibits the competition among networks. There is no optimum number of networks; the number of networks and their scope should be determined by the market, not by Commission fiat. Moreover, the specific circumstances here are that the two

networks advocating a protectionist policy are well-heeled entertainment conglomerates who are perfectly capable of fending for themselves. UPN is owned by Chris Craft, whose holdings also include eight television stations, and by Viacom (through its subsidiary's right to buy 50% of the network), which has substantial interests in television and radio stations, cable networks and domestic and international video production including the Paramount studios. WB is owned by Time Warner, whose substantial media interests include cable networks and systems, publications and television and movie production including the Warner studios, and by the Tribune Company, which owns television and radio stations, newspapers and publications.

B. The Commission's Diversity Policy Provides No Basis For Favored Regulatory Treatment For UPN or WB

Finally, Commission diversity policy lends no support to the argument that the Commission should protect the development of UPN and WB. The Commission traditionally measures diversity by counting the number of local voices. This is appropriate because local outlets are the gatekeepers of the number and variety of viewpoints to which the public is exposed, not the number of networks and other suppliers to those outlets. Whether the local outlet receives its programming from a network or syndicator should not matter for diversity purposes. The number of program syndicators which supply programming to stations in competition with the networks has experienced an exponential rate of growth in

recent years.[33] Thus, the success or failure of UPN or WB would not affect diversity.

III. The Dual Network Rule

Very few commenters propose retaining the dual network rule in its current form. The Media Access Project ("MAP") does not oppose complete repeal of the rule.[34] NASA, in calling for eventual reform of the rule, acknowledges that marketplace changes have diminished the concern that dual networking could increase network bargaining power over affiliates.[35] NASA points out that companies today already provide multiple networks to American homes via cable, satellite and wireless cable. Indeed, the existing networks have interests in multiple program services offered on cable, such as Capital Cities/ABC's interests in ESPN, A&E and Lifetime. With respect to the transition to advanced television, NASA supports the position we articulated in our opening comments -- that a network

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[33] PTAR Economic Analysis at 17-18. See also Notice of Proposed Rulemaking, MM Docket No. 94-123 (released Oct. 25, 1994), par. 19.

[34] Comments of Media Access Project (filed Oct. 27, 1995) at 2-3.

[35] NASA Comments at 40-41. Several affiliates, in their individual comments, continue to assert that repeal of the dual network rule would increase the networks' bargaining leverage. See Comments of Blade Communications, Inc. (filed Oct. 30, 1995) at 23: Comments of Sinclair Broadcast Group, Inc. (filed Oct. 30, 1995) at 20-21. However, none of these commenters provides any reasoned analysis to explain how or why the offering by a network of a second over-the-air program service would change the relationship between the network and its existing affiliates. Nor do these commenters explain why this asserted increased bargaining leverage would interfere with the affiliates' ability to fulfill their local public interest obligations.

be permitted to provide more than one network feed to its affiliates.

Viacom argues that repeal of the dual network rule would lead to the foreclosure of new networks.[36] While Viacom concedes that dual networking may foster efficiencies, it says those efficiencies can be achieved without repeal of the rule because networks can sell new program services to cable operators.[37] The Viacom argument echoes a point we made in our opening comments -- that the rule operates to skew the offering of innovative programs to subscription-based services. This results in a detriment to free, over-the-air television service. The risk of foreclosure that Viacom cites is, for the reasons discussed above and in our initial comments, unlikely, speculative and market-specific and therefore, best resolved by relying upon antitrust law enforcement.

IV. Territorial Exclusivity Rule - SBC's Proposal That The Commission Should Expand The Territorial Exclusivity Rule And Adopt New Enforcement Procedures Should Be Rejected

For the reasons stated in our opening comments, we believe there is ample justification for scrapping the second prong of the current rule altogether or, alternatively, modifying it to extend the permitted exclusivity area to the DMA.

SBC in its comments not only defends the rule in its present

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[36] Comments of Viacom, Inc. (filed Oct. 30, 1995) at 12. Viacom is a program supplier to UPN and has a contingent ownership interest in UPN (its subsidiary holds an option to buy 50% of the equity). Id. at 2 n. 3.

[37] Viacom Comments at 12.

form but urges an expansion of the rule to incorporate a "rebuttable presumption of a rule violation" if a network "terminates an affiliation in a community without affiliating with another station in that community" or if a multi-community affiliation agreement between a network and a multiple owner "displaces network affiliates in one or more communities" and "the displaced stations have superior coverage to the group owner's local station."[38] SBC's comments utterly fail to justify its position.

We need not respond in any detail to SBC's claim that in 1994 ABC traded the disaffiliation of SBC's WWSB(TV), Sarasota, for the agreement of Scripps Howard Broadcasting Company, the owner of nearby ABC affiliate WFTS(TV), Tampa, to enter into long-term ABC affiliations in Cleveland and Detroit.[39] This charge was previously made in SBC pleadings that alleged an ABC-Scripps agreement to disaffiliate WWSB(TV) in violation of Section 73.658(b) -- an allegation that was denied by ABC and Scripps Howard and was dismissed pursuant to a settlement between SBC and ABC.[40] In

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[38] Comments of Southern Broadcast Corporation of Sarasota (filed Oct. 30, 1995) at 21 ("SBC Comments"). SBC also urges the adoption of expanded discovery procedures. Id.

[39] SBC Comments at 12.

[40] ABC maintained that its issuance of a notice of disaffiliation to WWSB(TV) was based on its unilateral concerns about the degree to which the station's service would duplicate that of WFTS(TV), which was becoming ABC's affiliate in Tampa-St. Petersburg. The settlement provided for continued affiliation with WWSB(TV) under conditions designed to test in practice the validity of ABC's concerns about the fragmentation of network audiences in the central counties of the Tampa-St. Petersburg Designated Market Area and the relative value to the network of WWSB(TV)'s audiences

approving that settlement, the Chief, Mass Media reviewed the entire record and "determined that the evidence is insufficient to raise a substantial and material question of fact concerning ABC's or Scripps Howard Broadcasting Company's compliance with Section 73.658(b) of our rules."[41] SBC's attempt to revive the same charge in the context of this rulemaking proceeding can lend no support to its defense of the rule, much less to its proposal that the rule be drastically expanded.[42]

SBC attempts to bolster its argument by pointing to the case of KTVK(TV), Phoenix, which was found to have lost its ABC affiliation to another Phoenix station (owned by Scripps Howard) as a result of a multi-community agreement between Scripps Howard and ABC.[43] But the Chief, Mass Media Bureau did more in that case than find that there was no violation of Section 73.658(b). He noted that "networks have no obligation to affiliate with a particular

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in Sarasota County, given the coverage of the area as a whole by WFTS(TV). See Joint Petition for Approval of Settlement Agreement, BTCCT-941021KF et al., March 14, 1995 ("Joint Petition"), at 2-3.

[41] Letter to Matthew L. Leibowitz and Joel Rosenbloom, FCC File Nos. BTCCT-941021KF and BTCCT-941021KG (July 14, 1995).

[42] It is surprising that SBC has made this charge, in light of its commitment, in consideration of ABC's promise of a conditional affiliation, not to "make any claim before the FCC based in whole or part on the averments contained in [SBC's previous pleadings]" (Joint Petition, Ex. B at 2). The factual assertions on this topic that SBC makes in its comments were all made in those pleadings, were rebutted or shown to be insignificant by ABC and Scripps Howard, and were found -- in an order that is now final -- insufficient to raise a substantial issue whether ABC's decision to disaffiliate WWSB(TV) was the product of an ABC-Scripps agreement or understanding.

[43] See Eugene F. Mullin, Esq. and Nathaniel F. Emmons, Esq., 10 FCC Rcd 4416 (M'Media Bureau, 1995).

station," that "the Commission will not ordinarily interfere with the business judgments of networks," and that the rule itself embodies a recognition of "the important part that economics play in network station contractual relationships."[44] He found also that "[a] network's decision to switch affiliates in a community of license, even if such a change arises as a result of a multi-market agreement, does not threaten the public's interest in market-based network service."[45]

SBC's proposal, which falls just short of barring multi-community negotiations altogether, would be contrary to the public interest. In today's video marketplace, with four and potentially more broadcast networks, as well as independent stations and a staggering array of nonbroadcast program services, the massive annual program investments that a network must make in order to remain competitive require an effective and reasonably stable set of station outlets.[46]

Moreover, the same efficiencies in station operation that (as the Commission has found) can make a group owner a desirable licensee can also make it attractive for a network to affiliate

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[44] Id. at 4417.

[45] Id.

[46] When it eliminated the rule that restricted the length of affiliation agreements, the Commission found that a more stable system of network affiliates would "make it easier for networks to plan their programming schedules, attract advertisers, and attract capital that can be used for expanding and improving services to the affiliates." Elimination or Modification of Section 73.658(c) of the Commission's Rules, 4 FCC Rcd 2755, 2757, par. 17 (1989); see also id. at 2759 n. 30.

with several stations in a group, particularly if the group has a record of operating vibrant network-affiliated stations that support their networks with both program clearances and effective non-network programming. The Commission should not prohibit or discourage networks from giving weight to such factors in their selection of affiliates.[47]

So, too, as the Commission has recognized, the normal pattern of network affiliations, under which "[e]ach network affiliates with only one station per market," has "important efficiency properties."[48] SBC's proposals would virtually guarantee the continuation of affiliations that have become markedly inefficient.

As a general matter, SBC's "rebuttable presumptions" would inject the Commission deeply and inappropriately in network-affiliate dealings. If SBC's proposals were adopted, the Commission -- not the marketplace -- would determine when (if ever) a network could terminate an affiliation in a community that is part of a larger geographic market without substituting another in the same community. The Commission -- not the marketplace -- would

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[47] See Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C. 2d 17, 31-34, 44-45 (1984), on recon., 100 F.C.C. 2d 74 (1985). We note particularly the Commission's citation of a study "showing that group-owned stations have significantly higher ratings on their local news programming" (100 F.C.C. 2d at 31). As affiliates, such stations can supply a network with a superior "lead-in" to its prime-time schedule.

[48] Notice of Inquiry, Gen. Docket No. 86-336 (Scrambling Inquiry), 104 FCC 2d 1444, par. 85 (1986). See Report, Gen. Docket No. 86-336, 2 FCC Rcd 1669, par. 159 (1987); Report and Order, Gen. Docket No. 87-24 (Program Exclusivity in the Cable and Broadcast Industries), 3 FCC Rcd 5299, pars. 110 & 116, on recon., 4 FCC Rcd 2711 (1988), aff'd sub nom. United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

determine whether an affiliate displaced as a result of a multi-community agreement offered superior coverage and whether, if so, the difference should outweigh other advantages of the agreement to the network. We submit that whatever restriction, if any, the Commission decides to retain on exclusivity terms in network affiliation contracts can be policed under existing Commission law and precedent without the need for erecting a special procedural framework for this one rule such as that advocated by SBC.

Respectfully submitted,

By: _____

Alan N. Braverman
Vice President & General Counsel

Sam Antar
Vice President, Law & Regulation

Roger C. Goodspeed
General Attorney, Law & Regulation

Capital Cities/ABC, Inc.
77 West 66th Street
New York, New York 10023

Counsel for Capital Cities/ABC, Inc.

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