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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
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| Review of the Commission's Regulations Governing Television Broadcasting | ) | MM Docket No. 91-221 |
| | ) | |
| | ) | MM Docket No. 87-7 |
| Television Satellite Stations Review of Policy and Rules | ) | |

COMMENTS OF ABC, INC.


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To: The Commission

COMMENTS OF ABC, INC.

ABC, Inc. ("ABC"), a wholly-owned subsidiary of The Walt Disney Company, submits herewith its Comments in response to the Second Further Notice of Proposed Rule Making ("Notice") in the above-entitled proceeding.[1] ABC owns and operates the ABC Television Network and ten television broadcast stations.

Introduction and Summary

In this Notice the Commission follows up on issues raised in the proceeding in 1995 and addresses new questions raised by the 1996 Telecommunications Act. With ABC's comments in 1995, we

[1] MM Docket No. 91-221 and MM Docket No. 87-7, Second Further Notice of Proposed Rule Making, FCC 96-438 (released November 7, 1996).

submitted economic evidence showing that various aspects of the Commission's television multiple ownership rules were overly restrictive, impeding broadcasters' ability to compete in an ever-increasingly competitive environment without providing any real protection of competition and diversity. On that basis we proposed elimination or relaxation of the national ownership rule, relaxation of the duopoly rule to a Grade A overlap standard and elimination of the one-to-a-market rule.

In the 1996 Telecommunications Act, Congress has resolved the main issues under the national ownership rule. We continue to believe that the duopoly rule should be relaxed and agree that the Commission's Grade A/DMA proposal is a workable duopoly standard. We propose that if the Commission creates a presumptive waiver policy for the duopoly rule that it apply equally to UHF/UHF and UHF/VHF combinations. To confine such a policy only to UHF station owners would confer a substantial competitive advantage on them without any rational basis.

As we did in 1995, ABC proposes that the Commission eliminate the one-to-a-market rule. Our economic evidence showed that radio-television cross-ownership would not raise competitive or diversity concerns in the delivered video programming, advertising or video program acquisition markets. If the rule is retained, the 30-voices waiver standard should apply broadly to all markets and all combinations (including those with multiple radio stations in the same service).

Finally, ABC concurs with the Commission's proposal to grandfather LMA agreements entered into before November 5, 1996 for the initial term of the agreement and for the original parties to the agreement.

## I. Local Television Ownership Rule

### A. Geographic Scope of Rule

We concur with the Commission's proposal to allow joint ownership of stations in different DMAs whose Grade A contours do not overlap. We believe the DMA provides a reasonable approximation of a television station's geographic market and that adding the Grade A contour standard is a workable general rule since different-market stations with Grade A overlaps may in some cases compete for viewers and advertisers. That standard should be subject to a waiver policy, however, as we set forth below.

We further propose that the Commission take up its suggestion that the existing Grade B overlap standard be retained as it applies to same-market stations.[2] There appears no sound basis for restricting the joint ownership permitted under current rules of stations within the same DMA with no Grade B overlap. (Indeed, even within a single DNA there may be circumstances that would justify allowing joint ownership of stations with Grade B overlap.)[3]

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[2] Notice, par. 26.

[3] See Comments of Capital Cities/ABC, Inc. in MM Docket Nos. 91-221 and 87-8 (filed May 16, 1995) ("ABC Ownership Comments") at 19-23. In 1995 ABC, along with CBS and NBC, submitted an economic analysis of television ownership and markets showing that stations with Grade B, but not Grade A, overlaps do not generally compete

Although it may be, as the Commission notes, that most such stations are already jointly-owned (and therefore those combinations will be grandfathered), it seems imprudent to reduce the permissible scope of joint ownership within a DMA when the Commission has not made any suggestion that such combinations raise competition or diversity concerns. We think the "two-tiered rule," allowing common ownership where there is no DMA/Grade A overlap or Grade B overlap, is a reasonable and workable standard.

B. Exceptions and Waivers to Rule

In our earlier comments in this proceeding, we endorsed a Grade A contour duopoly rule and proposed that the Commission maintain a case-by-case waiver policy under a new Grade A rule. We noted that competitive conditions vary widely across markets. We submitted economic evidence showing that in many markets combinations of stations with Grade A overlap could create efficiencies and public interest benefits without undue harm to competition and diversity.[4] The Commission now requests further comment on whether the television duopoly rule should be subject to exemptions or presumptive waiver as to certain combinations.

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for viewers, advertisers or programming. Economists Incorporated, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, ("EI Analysis") filed in MM Docket Nos. 91-221 and 87-8 (May 16, 1995) at 13-17, 87-88, Appendix B (audience); 29-37, 88-89, Appendix D (advertisers); 44-47, 89-90 (programming).

[4] See ABC Ownership Comments at 23-24; EI Analysis at 13-17, 29-37, 44-47, 87-91, Appendices B and D.

With respect to exemptions, we agree with the Commission's proposal to continue to treat satellite stations as exempt from the duopoly rule.[5] The requirement for satellite status that there be no alternative operator ready and able to construct or buy the satellite and operate it as a full-service station is important to ensure that satellite status is not used as a subterfuge to avoid the duopoly rule. Where that requirement is met, the exemption from the duopoly makes sense because it allows television service to be extended to underserved areas by taking advantage of the efficiencies that inhere in dual ownership.

With respect to waivers for combinations involving UHF stations, we believe that a presumptive waiver policy that would allow existing stations, either VHF or UHF, to acquire second stations in the same market that are UHF would have to rest on a number of basic propositions: (a) that free broadcast television faces an unprecedented and growing level of competition from alternative sources of news, information and entertainment; (b) that the proliferation of true alternative sources has led to a concomitant and steadily growing loss of audience share; (c) that duopolies involving at least one UHF station would yield significant efficiencies and operational flexibilities that would enable broadcasters to compete more effectively in the increasingly competitive video marketplace; and (d) that by reducing the uncertainties associated with waiver policy, station owners' ability to compete and maintain the viability of the free over-the-

[5] Notice, par. 37.

air television service would be enhanced.

We believe that those propositions are well founded and support more flexibility in the Commission's duopoly rules. But those propositions support with equal force the application of the waiver policy to both VHF stations and UHF stations wishing to combine with a UHF station. Indeed, the Commission cannot fairly and rationally create a presumptive waiver policy to enhance the competitive strength of broadcast television stations unless that presumption applies to both UHF and VHF owners.

The presumption the Commission is considering would confer a considerable competitive advantage to those stations which are permitted to benefit from it. That advantage would enable the beneficiaries to compete more effectively against not only a non-broadcast video outlet but against all other television stations in the market. There is no basis to confer that benefit on one class of stations in a market to the exclusion of the other. While there are powerful grounds to level the playing field between broadcasters on the one hand and all other media outlets in the market on the other, there is absolutely no basis for the creation of competitive disparities among broadcasters by governmental rule.

The so-called "UHF handicap" certainly would provide no support for such a rule. First, any historical "UHF handicap" that may have existed has been largely diminished by cable penetration and technical advances.[6] Second, even if some minimal handicap

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[6] See EI Analysis at 16; Economists Incorporated, An Economic Analysis of the Prime Time Access Rule, filed in MM Docket No. 94-123 (March 7, 1995), Appendix C; Report and Order, MM Docket No.

still exists, it does not provide a justification for government to confer a substantial competitive advantage to UHF station owners by a presumptive rule. Both VHF and UHF station owners face the same increased competition, and both would benefit equally from acquiring a UHF station in the same market.[7] Any concern the Commission might have that in some markets a UHF/VHF combination might raise competitive concerns can be resolved by retaining the right to review application of the waiver in such circumstances. The proposal is to create a presumptive waiver, and on a proper showing of undue competitive effects the presumption may be overcome with respect to either a VHF/UHF or UHF/UHF combination.

If the Commission decides that it should not extend the presumptive waiver to both types of combinations, the only way to avoid creating a competitively unfair result would be to rely on a case-by-case waiver policy. That policy should be based on the traditional factors used to measure whether the potential benefits of a proposed merger outweigh the detrimental effects.[8] But if the Commission decides to adopt a presumptive waiver policy, it must

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94-123 (released July 31, 1995) pars. 74-76 (noting reduction in UHF handicap).

[7] There is no basis for discriminating between UHF/UHF and VHF/UHF combinations because of diversity concerns. Either kind of merger would cause the loss of an independent voice, but the Commission should not base a discriminating rule on an unsupportable and improper conclusion that some voices are more important to local diversity than others.

[8] See, e.g., Application of Paramount Stations Group of Philadelphia, Inc., 1 CR 121, FCC 95-360 (released Aug. 24, 1995), par. 15. Under a case-by-case approach, whether "UHF handicap" exists in the particular market at issue would be relevant to the analysis.

apply to VHF and UHF owners because the reasons for enacting such a policy apply equally to both.

## II. Radio-Television Cross Ownership Rule

In its 1995 further notice on television ownership, the Commission proposed two alternatives with respect to the radio-television cross ownership (or "one-to-a-market") rule, which forbids joint ownership of a radio station and a television station in the same local market.[9] If the Commission concluded that radio and television stations do not compete in the same local advertising, program delivery or diversity markets, it proposed to eliminate the rule.[10] On the other hand, if the Commission found that radio and television stations do compete in some or all of those local markets, then it proposed to amend the rule to allow radio/television combinations "in those markets that have a sufficient remaining number of remaining alternative suppliers/outlets as to ensure sufficient diversity and workable competition."[11]

In response, ABC submitted an economic analysis concluding that while radio and television stations do compete for advertisers and audience (but not in the video program acquisition market), allowing local radio/television combinations would not raise

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[9] 47 C.F.R. §3555(c).

[10] Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221 and 87-8 (released January 17, 1995) ("Further Television Ownership Notice"), par. 131.

[11] Id., par. 132. See Notice, par. 60.

competitive concerns under traditional antitrust analysis. Our analysis demonstrated that eliminating the one-to-a-market rule would not cause undue concentration in the delivered video programming, advertising or video program acquisition markets and could generate substantial operating efficiencies by combining the resources of radio and television stations.[12] We postulated that in light of the existence of the antitrust laws, as well as separate local radio ownership rules and local and national television rules, the proper question should be whether any useful purpose is served by keeping in place an additional supervening rule for radio/television combinations. We answered then, and assert again now, that based on the economic evidence, the answer is "no."

If the Commission decides to retain the one-to-a-market rule, we propose that the 30 - voices waiver policy, now applicable to

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[12] Comments of Capital Cities/ABC, Inc., MM Docket Nos. 91-221 and 87-8 (filed May 16, 1995) ("ABC Ownership Comments") at 25-26, citing EI Analysis at 93-102. The EI Analysis also noted that diversity markets are likely to be broader and less concentrated than relevant antitrust markets because diversity analysis properly includes extensive non-broadcast, non-video information sources. If the economic effects of a radio/television merger do not offend antitrust standards, therefore, the merger would not pose a significant threat to diversity. Id. at 101-02. In the Notice, the Commission incorrectly cites the ABC Ownership Comments as advocating elimination of the rule because "radio and television [are] not substitutes and [do] not compete in the same markets." Notice, par. 63. Rather, we recognized radio/ television competition for advertisers and audience and showed, through the EI Analysis, that radio/television combinations would not harm competition or diversity.

the top 50 markets[13], be extended to apply to all television markets and to all combinations that comply with the separate television and radio ownership rules. When the Commission created the "top 25/30 voices" waiver policy, it concluded that the competition and diversity policies of the one-to-a-market rule are not necessarily best served by a slavish pursuit of ownership diversity, recognizing that the "demonstrable benefits resulting from the joint ownership of stations" can "far outweigh any minimal impact on the number of separate voices in a market."[14] The Commission also noted that the number of independent voices remaining after a proposed merger is likely the "best measure of potential competition among stations and of the likelihood of diversity of editorial viewpoints and program formats."[15]

We believe it simply makes sense for the Commission to extend the independent-voice test to all markets. Market size per se adds nothing to the analysis of the effect on competition and diversity of a proposed merger. Any "abundance of caution" the Commission

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[13] See 1996 Act, §202(d); 47, C.F.R. §3555 (Note 7); Notice, par. 66.

[14] Second Report and Order, MM Docket No. 87-7 (released February 23, 1989) ("One-to-a-Market Order"), par. 9.

[15] Id., par. 80. On reconsideration, the Commission addressed the contention that it would be sufficient to serve the competition and diversity goals to simply apply the 30 voices test, without regard for market size. The Commission did "not disagree, in the abstract, with the basic proposition that the number of voices present in a market provides a more direct measure of competition and diversity than the size of the market involved." Memorandum Opinion and Order, MM Docket No. 87-7 (released August 4, 1989), par. 14. The Commission retained the market-size element, however, "out of an abundance of caution" and to allow it to assess the effects of relaxing the one-to-a-market policy. Id., pars. 11, 14.

might have felt in 1989 that caused it to retain the market-size test should now be eliminated as a result of the Commission's review of many one-to-a-market waiver requests involving markets below 25 reviewed under the five factor analysis in which market size played no factor in the grant of a waiver.[16]

In applying the 30 - voices test, the Commission should count all independently - owned daily and weekly newspapers, television stations, radio stations and cable channels that have the capacity to act as local outlets for the radio-television market involved.[17] The Commission considers a broad range of media when reviewing proposed joint ownership of a television and radio stations under the five-factor test.[18] It should take a consistent view when applying the 30-voices test.[19]

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[16] See, e.g., Application of US Radio Stations L.P.,3 CR 416 (M.M.Bur. 1996) (granting waivers in 42nd and 58th markets); Application of James M. Ward, Trustee for Gadsden Broadcasting Company, FCC 95-324 (released Aug. 16, 1995) (194th market); Application of Big Ben Communications, Inc., FCC 95-299 (released July 27, 1995) (42nd market); Application of Secret Communications Limited Partnership, FCC 95-154 (released April 19, 1995) (31st market); Application of Burt M. Oliphant, 77 RR2d 761 (1995) (152nd market); Application of BREM Broadcasting, FCC 94-57 (released March 15, 1994) (61st market); Application of Hispanic Radio Broadcasters, 93-405 (released Sept. 3, 1993) (36th market).

[17] The Commission currently counts only television stations in the relevant ADI and radio stations in the relevant television metropolitan market. 47 C.F.R. §73.3555 (Note 7). Newspaper and cable channels should be counted if they are circulated or are available in the relevant television metropolitan market.

[18] See, e.g., US Radio Stations L.P., par. 16; James M. Ward, par. 13; Big Ben Communications, par. 8; Secret Communications, par. 8.

[19] See Comments of ABC, Inc. in MM Docket No. 96-197 (filed Feb. 8, 1997)("ABC Newspaper/Radio Comments") at 17-22, 24-27.

Even if the Commission limits application of the independent-voice test by market size, the waiver policy should apply to radio/television combinations regardless of the number of radio stations owned in either service provided such ownership is consistent with Commission rules. The waiver policy is based on a presumption that so long as the minimum voice and market standards are met, the benefits of joint operation of radio and television stations in a local market outweigh the potential loss in competition and diversity that might be caused by the combination. That presumption is no less applicable to combinations including more than one radio station in a service. If the overall number of media owners whose voices are available to the public is sufficient to satisfy diversity concerns, the number who speak through radio is immaterial. So, too, given the range of competitive alternatives available to advertisers, cross-ownership between a television station and the maximum number of radio stations that antitrust authorities and the Commission would allow to be owned in common would not pose any significant threat to competition.[20]

The result of the Commission's current application of the waiver policy is that television station owners are treated less favorably than radio station owners without any rational basis. A multiple radio station owner may acquire multiple AM and FM stations in one market so long as its combined holdings comply with the local radio rules. A television station owner, on the other hand, may not own more than one AM or FM in the same market without

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[20] See ABC Newspaper/Radio Comments at 22-23.

making a showing under the "more rigorous" five-factor waiver test.[21] In the absence of any finding by the Commission that the latter combination threatens local-market competition and diversity more than the former, the different treatment is unjustifiable and impedes group owners who own television stations from realizing fully the opportunities created by the new relaxed local radio ownership rules.[22]

Finally, if the Commission retains the one-to-a-market rule in some form, it should in any event preserve the ability of a waiver applicant under the "five factor" test to justify joint radio/television ownership on the basis of economic efficiencies without having to make explicit programming or public service commitments. Under the first part of the "five factor" test, the Commission reviews whether the proposed radio/television combination will generate "potential public service benefits" such as "economies of scale, cost savings and programming and service benefits."[23] The Commission traditionally has reviewed waiver

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[21] 47 C.F.R. §73.3555 (Note 7).

[22] In 1992 ABC filed a Petition for Reconsideration in the radio ownership proceeding urging that the Commission allow combinations of a television station and more than one radio station in the same service under the "top 25 market/30 voices" test. The Commission denied the petition pending resolution of the issue in the television ownership proceeding. Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, MM Docket No. 91-140 (released September 4, 1992), par. 33 n. 40.

[23] Notice, par. 73. The other four factors are the types of facilities involved; the number of media outlets already owned by the applicant in the relevant market; any financial difficulties involving the stations involved; and issues pertaining to the level of diversity and competition in the market. Id. Ultimately, the "five factor" test boils down to determining whether a proposed

applicants' showings to determine whether the proposed combined operations will result in cost savings, although "there is no particular level of cost savings that must be achieved in order for a waiver to be granted under the case-by-case standard."[24] When such cost savings have been shown, the Commission has found that the combination offers potential public service benefits without requiring that the applicant present a detailed description of the programming and public service activities that will be initiated with the cost savings.[25] We believe that approach is the correct one. A waiver applicant should not be required, to obtain the waiver, to make specific program or service commitments in advance of beginning the joint operation. Group-owned stations should have the flexibility to design and adjust their programming and pubic service efforts in response to audience and community needs.

## III. Television Local Marketing Agreements

In a parallel proceeding the Commission proposes to treat television local marketing agreements ("LMAs"), for purposes of

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merger allows a party to take advantage of the recognized efficiencies that may result from joint ownership of radio and television stations in the same market without jeopardizing the goals of competition and diversity. See Notice, par. 78.

[24] Application of James M. Ward, FCC 95-324 (released August 16, 1995) (granting waiver of one-to-a-market rule).

[25] See, e.g., Application of KVI, Inc., FCC 94-55 (released March 15, 1994) (granting waiver based on applicant's showing that "joint operation of the station will result in significant cost savings as well as the potential for enhanced programming and service benefits"); Application of BREM Broadcasting, FCC 94-57 (released March 15, 1994) (same); Application of Moosey Communications, Inc., FCC 93-374 (released August 6, 1993) (same).

ownership attribution, in the same fashion as radio LMAs are treated under current rules.[26] As set forth in detail in ABC's comments filed in that proceeding, we concur with the Commission's proposal to attribute ownership to a party who owns a station in a market and supplies more than fifteen percent of another station's weekly broadcast hours in the same market.[27]

In this proceeding the Commission proposes that if television LMAs are made attributable, then the Commission is inclined to grandfather all such LMAs entered into before November 5, 1996 -- the adoption date of the rulemaking notice in this proceeding -- for the purposes of compliance with the Commission's ownership rules.[28] Subject to the Commission's limitation of the grandfathering to the original parties to an LMA and for the original term of the agreement only, ABC has no objection to the Commission's grandfathering proposal.

## Conclusion

ABC agrees with the Commission's proposal to adopt a Grade A/DMA duopoly proposal and believes a presumptive waiver policy is supportable so long as it applies to both UHF/UHF and UHF/VHF

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[26] Attribution Further Notice, par. 27. See 47 C.F.R. §73.3555(a)(3) (radio LMA attribution rule).

[27] See Comments of ABC, Inc. in MM Docket Nos. 94-150, 92-51 and 87-154 ("ABC Attribution Comments") (filed February 7, 1997).

[28] Notice, pars. 89-91. We also note, in taking that position, that the Commission reserves the right "to invalidate an otherwise grandfathered LMA in circumstances that raise particular competition and diversity concerns." Id., par. 88.

combinations. If the Commission decides it cannot extend a presumptive waiver policy to UHF/VHF combinations, it should not adopt such a policy at all and rely on case-by-case analysis for duopoly waivers. The Commission should eliminate the one-to-a-market rule or, if it retains the rule, broaden the application of the 30-voices waiver standard to all markets and all radio/television combinations.

Respectfully submitted,

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