DOCKET FILE COPY ORIGINAL

RECEIVED
FEB 7 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
Review of the Broadcast National Television Ownership Rules	)	MM Docket No. 96-222
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-7
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

Of Counsel:
Angela J. Campbell
Karen M. Edwards
Randi M. Albert

INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001-2022

Gigi B. Sohn
Andrew Jay Schwartzman
Joseph S. Paykel

MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, DC 20036
(202) 232-4300

Counsel for MAP, et al.

Law Student Intern:

Sarah C. Wickham
Northeastern University School of Law

February 7, 1997

No. of Copies rec'd 0+11
List ABCDE

TABLE OF CONTENTS

SUMMARY ii

INTRODUCTORY STATEMENT- LOCAL/NATIONAL, MULTIPLE/CROSS, TV/RADIO/NEWSPAPER, AND ATTRIBUTION OF OWNERSHIP QUESTIONS ARE INTERDEPENDENT AND MUST BE CONSIDERED AS A WHOLE 2

The Commission Has Not Had Time to Assess the Impact of Changes Which Have Already Transpired 3

The Commission Has Underestimated the Economic Health of the Broadcasting Industry 6

The Commission's Concern With Programming Diversity, As Opposed to Viewpoint Diversity, Is Misplaced 8

I. THE COMMISSION SHOULD NOT MODIFY THE GRADE B CONTOUR OVERLAP RULE ABSENT COMPELLING EVIDENCE THAT IT WILL NOT RESULT IN A SIGNIFICANT DIMINUTION OF VIEWPOINT DIVERSITY 11

II. THERE SHOULD BE NO UHF EXCEPTION TO THE DUOPOLY RULE AND ANY WAIVERS TO THE RULE MUST BE EXTREMELY LIMITED IN SCOPE 12

A. UHF Exception 14

B. TV Satellite Exception 15

C. Failed Station Waiver 17

D. New and Vacant Channels 18

E. Small Market Share/Minimum Number of Voices 21

1. Market Share 22

2. Minimum Number of Voices 22

F. Public Interest and Unmet Needs 24

G. Interim Waiver Policy 26

III. EXISTING LMAs SHOULD NOT BE GRANDFATHERED EXCEPT IN COMPELLING CIRCUMSTANCES 27

A. Grandfathering 30

B. Renewal and Transferability 31

CONCLUSION 32

SUMMARY

MAP, *et. al*, oppose creation of local TV duopolies directly or indirectly (as through devices such as "LMAs") as well as waiver policies which would undermine such current or revised ownership rules as the Commission determine to employ.

In addition, because the Commission has divided its review of broadcast ownership rules into four concurrent overlapping proceedings, these comments also address issues common to each of these dockets, including erroneous assumptions the Commission has made about the nature of the marketplace of ideas and the likelihood of an increasingly concentrated broadcast industry to contribute to diversity in that marketplace of ideas.

Given the dearth of substantive information in the record, especially about transformations in media ownership concentration since passage of the 1996 Telecommunications Act, it is imperative that the Commission conduct a qualitative assessment of the present state of viewpoint diversity before considering any proposals to relax the duopoly rule. For the same reasons, the Commission should also suspend its interim duopoly waiver policy.

Diversity in the marketplace of ideas is a function of the number of separately controlled sources of information. The Commission should resist urgings of the broadcasting industry to equate a mere multiplicity of program channels with diversity, since there is no diversity of viewpoint where a large number of offerings are under common economic or editorial control.

The Commission is overly fearful about the supposed economic perils facing the broadcasting industry, and thus overemphasizes cost-saving "efficiencies" rather than preserving diversity. It may therefore be too receptive to arguments that abundant quantities of programming in the market, and not the source diversity of that programming, is sufficient to protect the First Amendment goal of maintaining a vibrant marketplace of ideas.

Authorization of local TV duopolies would be a severe blow to the public's right to

receive information. There is no indication that the profitability of such combinations will in any way redound to the benefit of viewers. For this reason, MAP, *et al.* do not support various proposals to narrow the geographic scope of the Commission's bar on common-owned TV stations, such as its plan to substitute DMAs for the Grade B test now in use. Nor do they favor "exceptions" for UHF-UHF combos, "failed" stations, small markets, or other devices to evade the imperative of diversity by shutting out new competitors. Any such waivers as the Commission may nonetheless decide to grant should be conditioned on detailed and specific showings that there will be palpable service improvements to the community, and subject to constant review to insure those commitments are met. That the Commission even asks about some of these schemes indicates a willingness to sacrifice the public interest, as does the suggestion that potential new or uncompetitive media formats may be equated with broadcasting for purposes of diversity analysis.

The welcome proposal to restore "out of market" TV satellites to calculations of national audience reach does not absolve the FCC of its irresponsible refusal even to decide the five year-old appeal of its satellite rule revisions. Neither this change, nor the proposed treatment of "intramarket" satellites, however, addresses the fundamental problem, *i.e.* that in the name of localism the FCC still tolerates stations which need carry no locally originated content.

Perhaps the most pernicious aspect of this review is the suggestion that the Commission should tolerate the blatant evasion of ownership policies through the device of "LMAs." Such arrangements have never been lawful, and the Commission should not bless them simply because an unknown number of broadcasters have employed this extralegal mechanism. Congress has authorized the Commission to disapprove LMAs expressly, including existing LMAs, and it should use that power.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
Broadcast Television National Ownership Rules	)	MM Docket No. 96-222
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-7
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

Media Access Project, Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights and Women's Institute for Freedom of the Press ("MAP *et al.*"), respectfully submit these comments in response the Commission's *Second Further Notice of Proposed Rule Making*, FCC No. 96-438 (released November 7, 1996) (*Second FNOPR*) and its *Notice of Proposed Rulemaking*, FCC 96-437 (released November 7, 1996).

These comments have two elements:

- MAP, *et. al*, here state their strong opposition to the Commission's proposals to permit creation of local TV duopolies and, further, to establish extremely generous policies with respect to requests for waivers of such standards as it does set forth.

- In addition, because the Commission has divided its review of broadcast ownership rules into four concurrent overlapping proceedings, these comments will also address sev-

eral of the issues common to each of these dockets.[1] In particular, MAP, *et al.* will address erroneous assumptions the Commission has made about the nature of the marketplace of ideas and the likelihood of an increasingly concentrated broadcast industry to contribute to diversity in that marketplace of ideas.

INTRODUCTORY STATEMENT- LOCAL/NATIONAL, MULTIPLE/CROSS, TV/RADIO/NEWSPAPER, AND ATTRIBUTION OF OWNERSHIP QUESTIONS ARE INTERDEPENDENT AND MUST BE CONSIDERED AS A WHOLE

Much of the discussion immediately following applies not just to local television duopolies, but more broadly to the general issue of concentration of control in the mass media. The Commission's decision to consider revisions of each of its broadcast ownership rules separately significantly complicates preparation of a coherent response. It requires parties to afford *à la carte* treatment to four overlapping dockets incorporating the records of about a dozen different solicitations for comments, and submissions responding thereto. The approach tends to compartmentalize broadly based objections to increased concentration of control and undermine those who would seek to oppose further repeal or relaxation of the FCC's various ownership rules.[2] More importantly, it interferes with the Commission's ability to engage in rational decisionmaking.

For example, in revising radio-television cross-ownership standards, the Commission asks whether these strictures can even be eliminated altogether, on the basis that radio and television

---

[1]*Further Notice of Proposed Rulemaking*, FCC No.96-436 (released November 7, 1996) (*Attribution Notice*); *Notice of Inquiry*, FCC No. 96-197 (released October 1, 1996) (*Newspaper/Radio Cross-Ownership Notice*); *Notice of Proposed Rulemaking*, FCC No. 96-437 (released November 7, 1996) (*National TV Rules Notice*); *Second Further Notice of Proposed Rulemaking*, FCC No. 96-438 (released November 7, 1996) (*Second Further NOPR*).

[2]The Commission does ask about the "aggregate effect these proposed rules may have on small stations, or stations owned by minorities." *TV Ownership FNOPR* at ¶9. However, it does not pose the same question as to their effect on the ***public*** in general, or ***viewers*** in particular.

ownership rules alone might ensure sufficient diversity and competition in a local market. (*See Second FNOPR at* ¶64). At the same time, however, the Commission has also asked whether it should permit local TV duopolies, undercutting the very protections on which it elsewhere relies. *Id.*, ¶¶ 13, 29.

The Commission has framed the issues in this debate not in terms of whether the current scheme is serving the public interest, but only as to how many of its rules it should repeal or relax. With the notably laudable exception of its proposal to establish meaningful definitions of what is "attributable" ownership, even where it alludes to doubts that current conditions would justify further deregulation, the Commission does not propose better or more effective regulation.

The Commission Has Not Had Time to Assess the Impact of Changes Which Have Already Transpired

What is most startling about the current state of the record before the FCC is that the Commission has proposed to proceed in this direction before it is possible to assess the effect of the recent and dramatic changes in broadcast ownership in this country.[3] The unprecedented

---

[3]According to the Commission, the it lacks data on, *inter alia*, the following: (1) the current number of minority and women owned broadcast properties; (2) the number of small businesses impacted by the local television broadcast ownership proceeding; (3) the number of entities that may seek to obtain a TV or radio license (*see TV Ownership Second FNOPR at* p. 47); (4) the specific public interest benefits that may result from relaxation of the duopoly rule; (5) quantitative estimates of the efficiencies that may result from greater ownership concentration in local broadcasting so as to weight these benefits against the potential harm of such concentration to competition and diversity (See *TV Ownership Second FNOPR* at ¶31); (6) identification and elimination of market entry barriers for small businesses, *Notice of Inquiry* in GN Docket No. 96-113 (In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses), FCC 96-216, released May 21, 1996; (7) the ability of small broadcasters to raise capital, *Capital Formation Notice*, 7 FCCRcd 2654 (1992) (*See Attribution NPRM* at pp. 26-7 n. 76); (8) the number of and location of TV LMAs and the duration and other terms of these contracts, *see TV Ownership Second FNPRM* at ¶87). While comments may adduce some of this information, much of it can only be obtained by broad based information collection proceedings only the Commission (or Congress) could conduct.

restructuring of ownership and in the nature of the business,[4] has even engendered widespread public dissatisfaction and anxiety among large numbers of broadcasters.[5] Many of those broadcasters which have responsibly accepted their trusteeships imposed under the Communications Act, now fear that they will be squeezed out by a new breed of broadcaster that is ready to accept the benefits of a free license to use public spectrum, but unwilling to acknowledge the obligations that accompany this privilege.

Given the dearth of substantive information in the record - and in particular, the market entry barriers faced by minorities and women,[6] and even the number,[7] much less the impact,

---

[4]See also, *Special Report: 1995 $ 8 Billion Station Trading Boom is Only the Beginning, Broadcasting and Cable*, March 11, 1995: total dollars spent on TV and radio stations nearly doubled in 1995 over 1994 (page 40); all forms of broadcast TV revenue (including advertising) rose 3% in 1995 to $27.9 billion (page 41); radio industry saw a solid 7% gain in local and national revenue (page 42). In addition, see *Trading Market Explodes*, Broadcasting and Cable, Feb. 3, 1997, page 19, comparison of station trades (by dollar volume and number of sales) between 1995 and 1996 as follows:

	1996		1995	
TV	$10,488,000,000	99 sales	$4,740,000,000	112 sales
Combos	$12,034,000,000	345 sales	$2,790,000,000	213 sales
FM	$2,628,000,000	417 sales	$685,680,000	329 sales
AM	$212,020,000	254 sales	$106,760,000	195 sales
Totals	$25,362,000,000	1,115 sales	$8,320,000,000	849 sales

[5]"'A lot of good broadcasters decided they didn't want to play under the new order and left the industry,' said longtime industry observer Jim Duncan, present of Duncan's American Radio." David Hatch, "Telecom law fails the test: Critics," *Electronic Media*, February 3, 1997, p. 1

[6]The Commission has only enough information to say that "We recognize that the numbers of minority and women broadcast owners may have changed due to an increase in license transfers and assignments since the passage of the 1996 [Telecommunications] Act." *Attribution Notice* at p. 29.

[7]"How many LMAs exist is unclear because stations are not required to report them to the FCC." Doug Halonen, "Duopoly rule faces challenge; NAB board divided," *Electronic Media*, February 3, 1997, at 29.

of LMAs - and in light of the transformations in media ownership concentration since passage of the 1996 Telecommunications Act - it is imperative that the Commission suspend its review of comments and first conduct a qualitative assessment of the present state of viewpoint diversity before taking any action on proposals to relax the duopoly rule. For the same reasons, the Commission should also suspend its interim duopoly waiver policy.

The imminent move towards digital television significantly exacerbates the conflict. Those who hold licenses today may soon be multi-channel providers, with vastly increased opportunity to influence public opinion or to exploit this public resource for private gain. To be sure, there are many, many broadcasters committed to serve to their communities in the public interest as a trade-off for a license. However, there are too many others whose strategy is to do as little as is necessary to retain their right to hold and exploit spectrum for personal advantage. Among those leading the charge is Lowell Paxson, CEO of Paxson Communications Corporation. Addressing the Association of Local Television Stations recently, Mr. Paxson said his goal is to control airwaves, not market share. "It's all about spectrum," he explained. Amazingly, Mr. Paxson analogized himself to a farmer extracting maximum revenue from his land by first operating a golf driving range and then selling the land when developers have increased market value. At last count, he held 45 full power and 14 low power stations in 37 markets, including 22 of the 30 largest, which are primarily devoted to carriage of direct marketing "infomercials." He was explicit in telling the group that the "big pay-off" was in the years to come when spectrum is revalued by the advent of digital technology. Chris Stern, "Broadcast Exex Urge Loose Regs," *Daily Variety,* January 14, 1997, at 14.

It is indefensible for the Commission to insist on proceeding without awaiting to see the

impact of regulatory changes which have already been made. Blindness to what the Commission is tacitly permitting will expand the cadre of licensees who, like Lowry Mays, Clear Channel's CEO, unabashedly reverse the statutory principle that broadcasters who agree to provide service as trustees for the public are then allowed to sell some commercial time. ("So Mays likes to say that his company is less in the in the broadcasting business and more in the business of selling Fords." Elizabeth A. Rathbun, "Clear Channel builds a broadcast dynasty: 'Lowry Mays & Sons' just keeps getting bigger," *Broadcasting and Cable*, October 7, 1996 at 56).

The Commission Has Underestimated the Economic Health of the Broadcasting Industry

Broadcasting remains the dominant mass medium, with strong prospects for the future. Its transition to digital technologies, with cable carriage, seems assured. Other competing media, including the Internet and other "new media," are incapable of matching broadcasting's unique capability of delivering video advertising to essentially every American household. Broadcasting is, and is likely to remain, uniquely powerful.

Notwithstanding the industry's rosy outlook, the Commission's policy planning is rooted in a very pessimistic set of assumptions which have already been disproved. Ownership proposals now under review were first promulgated in similar form in 1992. *TV Ownership NOPR*, 7 FCCRcd 4111 (1992). The framework the Commission employed at the time still appears to govern the agency's analysis, *i.e.*, that "these rules needed to be amended in order to strengthen the potential of over-the-air television to compete in the current video marketplace and enhance its ability to bring increased choice to consumers." *TV Ownership FNOPR*, 10 FCCRcd 3524, 3529 (1995).

The premise that free, over-the-air television is in jeopardy traces to the issuance in 1991

of the widely disputed, and subsequently discredited, *Office of Plans and Policy Working Paper # 26, Broadcast Television in A Multichannel Marketplace*, 6 FCCRcd 3996 (1991) ("*OPP Report*"). The bleak future prognosticated by the *OPP Report* contemplated rapidly increasing dominance of new competition to "traditional" broadcast services from cable and video dialtone services. OPP's view was that this would soon impair broadcasters' "ability to contribute to a diverse and competitive video programming marketplace." *See TV Ownership FNOPR*, 10 FCCRcd 3524, 3529 (1995). And digital TV, now viewed as central to broadcasting's future viability, was treated not as a boon, but as a threat which "will benefit nonbroadcast media disproportionately,..." *OPP Report*, 6 FCCRcd at 4042.

Issued during a period of recession, and not contemplating the unprecedented health of the early 1990's economy as a whole, the *OPP Report* vastly underestimated the strength of broadcasting, and misperceived what now appears to be a bright future for a stable industry. The record in this proceeding contains numerous submissions documenting the substantive methodological flaws of the *OPP Report* which undermine its validity and usefulness in any FCC policy-making proceeding.[8] Moreover, the *OPP Report* did not anticipate several critical subsequent developments, most especially enactment of the 1992 Cable Act, with must-carry and retransmission consent provisions. Nor did its authors foresee the success of the Fox Network, and the emergence of two additional networks, thereby improving smaller TV stations' prime

[8]Comments filed in this proceeding showed numerous methodological flaws in the *OPP Report,* including cost/benefit calculations which were made only of broadcast profitability and not of services to the public, and significant overstatement of cable's threat to broadcast networks by reliance on the number of cable homes passed (93.2%) rather than the actual number of subscribing households (58.9%). *See, e.g.,* Reply Comments of Telecommunications Research and Action Center and Washington Area Citizens Coalition Interest in Viewers' Constitutional Rights in MM Docket No. 91-221.

time offerings and giving access to national advertising revenues.

The Commission's Concern With Programming Diversity, As Opposed to Viewpoint Diversity, Is Misplaced

None of the recent Congressional or FCC modifications to ownership regulation has changed the fundamental principle that the FCC is charged with maintaining a free flow of ideas. "Diversity of viewpoints is at the heart of the Commission's licensing responsibility." *Second Report and Order,* 50 FCC2d 1046, 1079, *recon.*, 53 FCC2d 589 (1975), *aff'd sub nom., FCC v. NCCB*, 436 U.S. 775 (1978) (*Second Report and Order*).

The Commission must resist incessant efforts to redefine the diversity policy into oblivion. In particular, there is no legitimacy to claims that one owner controlling multiple program feeds in a locality can provide genuine diversity in the marketplace of ideas. "More programming" is not the same thing as "more diverse programming." "More channels" is not the same thing as "more separately controlled channels." The Commission's policies have properly sought to maximize the number of independently-owned local voices on the air,[9] and rejected the notion that it can simply trust monopolists not to abuse their power.[10] The greatest dangers arise at the local level; as the Supreme Court said, the Commission's local newspaper/broadcast cross-

---

[9]For example, the Commission stated: "If a city has 60 different frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas would not be maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated." *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 FCC2d 306; 311 (1970), *recon. granted in part*, 28 FCC2d 662 (1971).

[10]"Centralization of control over the media of mass communications is, like monopolization of economic power, *per se* undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use." *First Report and Order in Docket 18110*, 22 FCC2d 306, 310 (1970), *recon. granted in part*, 28 FCC2d 662 (1971).

ownership rule, "was founded on the very same assumption that underpinned the diversification policy itself...that the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints." *FCC v. NCCB*, 436 U.S. at 814 (1978).[11]

The broadcast industry has pressed the Commission to agree that the mere multiplicity of program channels assures diversity even where there is no diversity in the ownership or control of that programming. But, as the Commission has said in its 1995 *TV Ownership NOPR*, "[w]hile this model may, indeed, promote diversity of entertainment formats and programs, we question whether it would act similarly with regard to news and public affairs programming." 10 FCCRcd at 3551.

MAP *et al.* urge the Commission to resist this dangerous idea. Their skepticism is borne out in evidence already in the record showing that increased concentration of ownership, brought about by changes in the national ownership limits in 1984 and relaxation of the duopoly rule in 1989, has reduced the quantity of, and viewpoint diversity in, local news and public affairs programming.[12] To the contrary, news and issue responsive public affairs programming have become prime targets for budget cuts and contributed to the demise of local news operations,

---

[11]"The significance of ownership from the standpoint of 'the widest possible dissemination of information' lies in the fact that ownership carries with it the power to select, to edit, and to choose the method, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *Second Report and Order*, 50 FCC2d at 1050.

[12]*See* Comments of Black Citizens for A Fair Media, at pages 6, 8 - 19, filed May 17, 1995 in MM Docket Nos. 91-221 and 87-8.

especially in radio.[13]

It is impossible to overstate the importance of establishing and maintaining content-neutral prophylactic ownership policies. After-the-fact judgments of the impact of concentrated ownership control are necessarily subjective, and thus become enmeshed in impossible First Amendment dilemmas. This is not to say that there is no evidence of actual and potential impact of mass media conglomeration.[14] One paradigmatic instance occurred in the wake of the Walt Disney Company-CapitalCities/ABC merger. In November 1996, the Chinese government threatened to deny Disney access to its market because of the company's announced plans to distribute a film about the Dalai Lama. While Disney trumpeted its willingness to resist Chinese pressure over distribution of the movie, the fact is that the executive responsible for the decision, Michael Ovitz, was sacked shortly thereafter, in part because of that decision. Writing in the *Columbia Journalism Review*, journalist Neil Hickey notes that although Disney decided to distribute the film,

> we may confidently predict that neither ABC, CBS, NBC, nor Fox - nor any

---

[13]*Id.* at page 9, citing P. Aufderheide, *After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest*, 40 J. of Comm. 47, 51 (1990) (citing studies showing that deregulation has led to decreased news, public affairs, and community affairs programming). See also, a 1988-89 survey by RTNDA which concluded that deregulation influenced the decisions of radio stations to eliminate news programs. M. McKean and V. Stone, *Why Stations Don't Do News*, RTNDA Communicator, June 1991, at 22.

[14]*See, e.g*, Edward Fink, The Journal of Media Economics, Vol.8, No. 3, 1995, page 125, (reviewing John H. McManus, Market-Driven Journalism: Let the Citizen Beware? Thousand Oaks, CA: Sage, 1994) (arguing that increased concentration "has shifted journalism's goal to one of making constituents happy, and the consumers of news are only one of four constituencies, the others being investors, advertisers, and news sources." *Id* at page 126.) See also, Alan Bash and David Lieberman, *Will Mergers Dilute News Coverage?*, *USA Today*, October 11, 1996; and R.H. Prisuta (1979), *Local TV News as an Oligopolistic Industry: A Pilot Study*, Journal of Broadcasting, 23, 61-68.

> cable network connected with them - will ever broadcast a tough documentary on China's brutal treatment of Tibet or its ruthless suppression of the Tiananmen Square Democracy Movement or its sale of nuclear materials to rogue nations or its expected crackdown of democracy in Hong Kong when its assumes control there on July 1[, 1997].

Neil Hickey, *So Big: The Telecommunications Act At Year One*, Columbia Journalism Review, Jan/Feb 1997, page 25.

Hickey's prediction is borne out by NBC's recent behavior in a somewhat similar context:

> NBC abjectly apologized to China after sportscaster Bob Costas in his on-air commentary at the Olympics referred to 'problems with human rights, property rights...and the threat posed to Taiwan,' as well as to the well-documented use by Chinese athletes of performance enhancing drugs. NBC parent GE, one needs to know, has huge investments in China (lighting, hospital equipment, plastics), and NBC operates a pair of satellite channels (NBC Asia and CNBC Asia) which aspire to serve the whole Chinese mainland, and GE has an agreement with China Telecommunications to build a data transmission network.

Id. at 25.

In the face of these powerful indications that concentrated ownership will harm diversity, the Commission nonetheless proposes to encourage creation of an industry composed of smaller numbers of larger companies. Thus, the underlying bases of the Commission's ownership proposals are incomplete, often inaccurate and overemphasize efficiency over diversity. It is necessary to revise the framework for analysis before reasoned policymaking can begin.

I. THE COMMISSION SHOULD NOT MODIFY THE GRADE B CONTOUR OVERLAP RULE ABSENT COMPELLING EVIDENCE THAT IT WILL NOT RESULT IN A SIGNIFICANT DIMINUTION OF VIEWPOINT DIVERSITY.

The Commission seeks comment on various proposals to narrow the geographic scope of the duopoly rule from its current Grade B contour overlap test. *Second FNOPR* at ¶¶10-28.

It tentatively concludes that the duopoly rule should permit common ownership of television stations in different "Designated Market Areas" (DMAs) as long as the Grade A signal contours do not overlap, because "it may more accurately reflect a television station's geographic market and may further our diversity and competition goals." *Id.* at ¶13.

The Commission may be correct that a DMA is a more accurate "proxy of a television station's geographic market," *Second FNOPR* at ¶14. But viewpoint diversity is what should matter to the Commission. Here, however, the agency makes no attempt to show that its proposed change will maintain diversity at the local level. By contrast, the Commission has been presented with evidence demonstrating that stations with Grade B overlaps do, indeed, have some viewer overlap. *Second FNOPR* at ¶11. Therefore, in the absence of compelling evidence that changing the parameters of the duopoly rule will not result in a significant diminution of diversity of viewpoints, the Commission should not change the current rule.

Additionally, it appears that a DMA/Grade A overlap regime would be fraught with problems that would threaten to undermine the rule. First, as the Commission itself notes, DMAs shift along with viewing patterns, so that application of the rule would be uncertain and inconsistent. *Second FNOPR* at ¶20. Moreover, as the Commission also notes, there are a number of large DMAs and counties in which there will be stations within the same DMA, but do not have overlapping Grade B contours. *Id.* at ¶26-27. Unlike the new proposal, the existing Grade B overlap rule provides the Commission with a consistent, bright-line test, that also maximizes diversity at the local level.

II. THERE SHOULD BE NO UHF EXCEPTION TO THE DUOPOLY RULE AND ANY WAIVERS TO THE RULE MUST BE EXTREMELY LIMITED IN SCOPE.

The Commission generally requests comment on whether it should adopt rules providing

for exceptions to the duopoly rule and/or whether it should grant waivers to the rule in particular circumstances. *Second FNOPR* at ¶29. Specifically, the Commission seeks comment on whether it should adopt an exception for UHF-UHF combinations and/or satellite stations. *Id.* at ¶¶ 33,37. It also asks whether it should permit waivers for UHF/VHF combinations, *id.* at ¶40; failed stations, *id* at ¶41; vacant and new channel allotments, *id* at ¶42; stations with small market shares that are located in large markets, *id.* at ¶47; or for stations that serve unmet needs in a market. *Id.* at ¶54.

The sheer breadth of these proposed exceptions and waivers should, alone, give the Commission pause. The danger of a broad waiver policy has been borne out over and over in the radio-television cross-ownership context, where waivers have been granted so routinely as to undermine the rule. *See, e.g.*, *Capital Cities/ABC, Inc.*, 11 FCCRcd 5841, 5915-6 (1996) (Separate Statement of Commissioner Andrew C. Barrett); *Oliphant and Glendive Broadcasting Corp.*, 10 FCC Rcd 2708, 2713 (Concurring Statement of Commissioner Andrew C. Barrett). If the Commission is, as it professes, actually concerned about "viewpoint and program diversity," *Second FNOPR* at ¶32, it should not adopt ironclad exceptions to the duopoly rule. To the extent that the agency grants waivers at all, it should grant them only in the most narrow and compelling of circumstances, and only upon a specific and enforceable promise that the public will benefit from programming that goes beyond "public interest programming" already required of a licensee. And in no event should a waiver be given to a licensee that will broadcast home shopping or infomercial programming for a preponderance of the day, on either of the two stations.

A. UHF Exception

The Commission requests comment on whether to permit a general exception for UHF-UHF combinations, as opposed to UHF-VHF or VHF-VHF combinations. *Second FNOPR* at ¶33. It also asks whether a case-by-case waiver analysis is preferable to an across-the-board exception. *Id.*

Even as cable penetration reaches 70%, UHF stations do retain some technical disadvantages.[15] However, that does not justify adoption of a hard and fast exception to the duopoly rule. The Commission observes that "many [stations] are not" affiliated with the three major networks, *Second FNOPR* at ¶33, but an increasing number of UHF stations are major network affiliates with large market shares. *Id.* Other UHF stations are benefitting from the increasing success of new part-time networks like WB and UPN. While some UHF stations have no such affiliations, a blanket exception would permit the more powerful affiliates to monopolize a market. In addition, many of those UHF stations that are not "major" network affiliates,[16] are owned and operated by large group owners such as Tribune, Chris-Craft, and Sinclair Broadcasting, and therefore do not require the help of a duopoly to compete. Whatever the relative signal strength of a UHF station *vis à vis* VHF, permitting UHF-UHF combinations as a matter of course will diminish viewpoint diversity, limit competition, and close opportunities to new entrants in the local market.

---

[15]These disadvantages may increase if the Supreme Court invalidates the "must carry" scheme in *Turner Broadcasting System, Inc. v. FCC*, U.S. Supreme Court (No. 95-92[illegible]), Argued October 7, 1996. Depending on the Court's decision, however, the Commission may be able to craft new rules to guarantee carriage for those small stations that are in the most need of must carry.

[16]Commenters consider Disney/ABC, Westinghouse/CBS, NBC and Fox to be "major" networks.

To the extent that the Commission allows UHF-UHF combinations at all, they should be permitted only in the most compelling of circumstances on a case-by-case waiver basis. Commenters discuss the relative merits of each of the Commission's proposed waivers at Sections C-F, below.

B. TV Satellite Exception

The Commission proposes to modify its treatment of TV satellites with respect to the national ownership rules by counting satellite stations for purposes of the national ownership limits, except for "intramarket" satellite stations, *i.e.*, where the satellite is in the same market as its parent. *Second FNOPR*, ¶¶17-24.

MAP, et al. welcome this proposal as an important step in the right direction. However, they also wish to record their extreme displeasure at the Commission's unconscionable and irresponsible delay in addressing this issue, and to make plain that reevaluation of how national ownership limits will be applied to satellite stations does not render moot the five year-old appeal of the Commission's 1991 revision of its TV satellite rules. Report and Order in MM 87-8,* 6 FCC Rcd 4212 (1991), *recon. pending.

On August 12, 1991, the Office of Communication of the United Church of Christ and Washington Area Citizens Committee for Viewers' Constitutional Rights, two of the parties submitting these comments, filed a *Petition for Reconsideration* and a *Petition for Partial Stay or Alternative Relief* challenging the Commission's determination to permit satellites to be operated without regard to local program content. Adoption of the approach set out in the pending *Notice of Proposed Rulemaking* would, in practice, ameliorate much of the harm engendered by the Commission's 1991 action. It would not, however, address the underlying question of how the

Commission can lawfully justify the benefit of satellite status in the name of assisting localities lacking adequate service by authorizing broadcast of programming which may be imported - in its entirety - from hundreds or thousands of miles away.[17]

MAP, et al. agree that, if separate market satellites are to be permitted at all, their audience should be considered as part of the licensee's national audience reach. In proposing to count satellite stations' coverage against the national ownership limits, the Commission is effectively acknowledging the non-frivolous nature of the legal and policy issues raised in the pending appeal of the 1991 decision. However belatedly, the Commission now properly recognizes that the analysis ought to turn on whether a station is located in the same community as its parent. A station located in a distant community should be considered to be what it is - another station, serving a different community. Such stations bear no resemblance to traditional TV satellite stations, offer no new or special benefits to their communities of license, and ought not be treated as such. Separate market TV satellites with distant parents are merely additional stations of national groups being utilized for increased circulation unrelated to the proximity of the parent station.[18]

---

[17]Among other outstanding issues raised in the *Petition for Reconsideration* which would not be resolved by the Commission's proposal is the request for declaratory relief confirming the applicability of the Children's Television of 1990 to satellite TV stations. *Petition for Reconsideration*, p. 7-8.

[18]The Commission should reject Silver King's request to grandfather existing satellites. The same policy considerations which impel the Commission to propose counting out of market satellites against national averages also justify equal treatment for all licensees. The case against such special relief is especially strong here, because of the pendency of the *Petition for Reconsideration* of the Commission's 1991 satellite TV decision. Since they acquired stations notwithstanding the non-finality of that decision, no licensee should be heard to complain of surprise if the regulatory provisions governing satellites are modified. Indeed, all licensees, including Silver King, have had official notice of the pendency of the appeal. *See, Petitions for Reconsideration of Actions in Rule Making Proceedings,* 56 FR 42067 (August 26, 1991). The greater inequity here is that faced by the citizens' groups, who still await action on their non-frivolous *Petition for Re-*

Exclusion of them from national TV audience reach will encourage warehousing and speculation in spectrum with no regard to the needs of the public.

As to "intramarket" satellites, *MAP, et al.* have no objection to the proposal not to "double count" them, precisely because they are targeted to the same market. Such action, however, is intellectually bankrupt so long as these stations are licensed without concern as to whether they are in fact providing any locally-oriented and originated programming. For that reason, *MAP, et al.* will press for prompt action on the citizens groups' appeal of the 1991 TV satellite ruling.

C. Failed Station Waiver

The Commission asks whether the failed station waiver criterion would be appropriate in evaluating a potential duopoly waiver application. *Second FNOPR* at ¶41. In addition, the FCC invites comment on whether it should permit waivers for "failing" stations as well. *Id.*

The failed station waiver that the Commission proposes, *i.e.*, if a station has been dark more than four months or when a station is in bankruptcy proceedings, presents more problems than solutions. First, allowing such duopolies is more than just a matter of preferring "two operating stations with a single owner [over] one operating and one dark station." *Id.* Permitting two stations in a market under the same ownership enables their owner to use its multi-channel clout to obtain an unfair competitive advantage in program acquisition and advertising over owners of single stations. Moreover, such a combination would not increase viewpoint diversity at the local level.

Perhaps most importantly, a failed station policy would keep out new entrants. Even

---

consideration, more than five years after it was filed.

if a station has not been operated for four months, that does not necessarily mean that there are no potential new entrants that might be interested in applying for the station's license. Indeed, according to the staff of the Video Services Division of the Commission's Mass Media Bureau, parties often apply for construction permits for failed stations and vacant allotments. Conversation with Video Services Division staff, February 7, 1997. Distressed properties such as "failed stations" could offer minority, female and other independently-owned voices (who traditionally have less access to capital) an opportunity to enter the increasingly-expensive broadcast marketplace. At the very least, they could provide an opportunity for an otherwise disenfranchised low power TV station to transition to digital TV.[19]

Thus, the Commission should not permit failed station waivers except in the most extreme of circumstances. If station has not been operated for a year, and there are no new entrants willing to apply for the license, then the Commission may consider a waiver, taking into account diversity concerns, and provided that the broadcaster comply with the public interest programming and reporting requirements described in Section F, below.

In any event, the Commission should not permit waiver applications for "failing" station duopolies. If the FCC allowed these stations to become amenable to waiver applications, the owners of otherwise profitable broadcast operations would have an incentive to fail based on the promise of a top dollar purchase by a larger broadcaster.

D. New and Vacant Channels

The Commission asks whether it should permit incumbent licensees to acquire licenses

---

[19]As the Commission well knows, the allocation plan it has proposed for digital television will force a significant number of low power television stations to lose their licenses. *See* Digital TV *Sixth FNOPR*, FCC 96-317 (Released August 14, 1996).

in the same market for frequencies that are currently vacant, or for new channel allotments. *Second FNOPR* at ¶42. Noting that DTV allotments will make such vacancies unattainable in all but rural areas, the Commission asks, *inter alia,* whether it should permit other arrangements, such as permitting broadcasters, either individually or jointly, to use the new or vacant channels for additional broadcast or subscription programming. *Id.* It asks further whether, under *Ashbacker v. FCC*, 326 U.S.327(1945) it is bound to make these vacant frequencies available to all *bona fide* mutually exclusive applicants. *Id.* at ¶44.

Commenters can think of few other proposals that would be more contrary to the Commission's oft-stated goals of promoting competition and viewpoint diversity. Incumbent broadcasters will already be greatly enriched when the Commission, as expected, gives them extra spectrum to convert to digital television. That conversion will enable broadcasters to provide multiple program and nonprogram services where they were once only able to provide one. These services could include subscription services like pay-per-view, data transmission and paging. Permitting a broadcaster to obtain yet more analog and digital bandwidth would more than double its enrichment at the expense of new entrants that would provide diversity and competition.

In focusing yet again only on whether permitting such a waiver will result in two stations instead of one, the Commission misses the bigger picture. *See* Section B, *supra*. Common ownership of any two stations increases market power at the expense of single stations, dilutes diversity, and raises barriers to new entrants. *Id.* Given the already difficult market entry barriers that grow more formidable as consolidation in the industry increases, the FCC should be making its best effort to increase, and not decrease, opportunities for new entrants, who tend

to be disproportionately female and minorities. With "digital" spectrum expected to be given only to incumbent broadcasters, and the 1996 Telecommunications Act's "two-step" renewal procedures effectively ending any opportunity for filing competing applications, vacant and new channels may be the last opportunity non-incumbents have to enter broadcasting.

Moreover, limiting eligibility for these vacant and new channels to incumbent broadcasters is contrary to the holding of *Ashbacker Radio Corp v. FCC, supra.*[20] While the Commission notes that *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956) "did not preclude the Commission from establishing threshold qualification standards that must be met before applicants are entitled to comparative consideration," *Second FNOPR* at ¶44, the agency cannot make the threshold so high that only the incumbent could ever be eligible. *See Citizens Communications Center v. FCC*, 447 F.2d 1201, 1212 n. 34 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).[21] If only incumbents were eligible for new and vacant channels, there would be no opportunity for "comparative consideration."

---

[20]In response to the Digital Television *Fourth FNOPR*, 10 FCCRcd 10541 (1995), MAP and other organizations argued that the holding of *Ashbacker* prohibits the Commission from giving incumbent broadcasters the exclusive right to use the second "digital" channel in the first instance. *See* Comments of Media Access Project, Consumer Federation of America, Minority Media and Telecommunications Council and National Federation of Community Broadcasters, filed November 20, 1995 at pp. 10-13. The same principles apply with even greater force here, since broadcasters can not plausibly argue here, as they did previously, that use of an extra vacant channel is a mere exchange of one frequency for another.

[21]The *Storer* case involved an original application, the grant of which would have violated the Commission's multiple ownership rules. Commenters do not here argue that all applicants for new or vacant allotments be given comparative hearings, no matter how deficient the application. They simply argue that otherwise qualified applicants must be given an opportunity, in a comparative hearing, to demonstrate that they can better serve the public than incumbent broadcasters.

E. Small Market Share/Minimum Number of Voices

The Commission seeks comment on whether it should consider waivers for joint ownership of stations that have (1) very small audience or advertising market shares and (2) are located in a very large market where a specified minimum number of independent voices remain post-merger. *Second FNOPR* at ¶47. The purpose of such a waiver, according to the Commission, would be "to enhance competition in the local market by allowing small stations to share costs and thereby compete more effectively. It could also increase the availability of programming and perhaps, program diversity were such stations to use their economic savings to produce new and better-quality programming or related enhancements." *Id.*

A Small Market Share/Minimum Voices waiver would likely not enhance competition or programming. The waiver permits the elimination of competitors in a market that may be profitable, and which may also be serving niche needs. Moreover, to the extent that the Commission believes that economic savings from combinations might be used to provide better programming, it is not enough for the Commission to wish it to be so. History has proved, time and again, that promised economic efficiencies from multiple ownership have rarely been reinvested in increased public interest programming. *See* discussion at 9 nn. 12 & 13, *supra*. As described in Section F, below, in the event the Commission does permit these waivers, it must, at the very least, 1) require broadcasters to make a specific showing about the kinds of "enhanced" programming that will result from economic savings, 2) require broadcasters to submit biennial reports demonstrating that those promises have been kept 3) require broadcasters to notify the Commission, in writing, when changes in programming or otherwise are made that violate the terms under which the waiver was granted, and 4) prohibit waivers for stations that