substitutes. Given the variety of alternative means of advertising, it would be a rare marketplace indeed where a single owner is in a position to exercise realistic control over access and pricing. And in such circumstances, the Department of Justice, not this Commission, is the appropriate agency to exercise jurisdiction to stem abuses.[40/]

From the point of view of a listener or viewer, however, various media are not perfect substitutes. Viewers turn to television, cable television, and alternative video delivery systems; listeners turn to radio stations; and readers turn to newspapers and magazines for different reasons. All these media are sources of news, information and entertainment, but the audience's reliance on and use of each medium depends upon variables such as the time and place of use, the information/entertainment desired and similar factors. For example, when there is severe weather, radio and television are the best and most immediate source of critical information. The immediacy of radio and television coverage of fast-breaking news stories such as bombings, assassinations and natural disasters cannot be matched by the print media. Although television and radio are both immediate, television offers the added benefit of visual coverage. However, someone wanting detailed information concerning election results or analysis of news stories must turn to a newspaper or magazine (or on-line service) for such in-depth coverage. Newspapers and magazines are likewise unrestrained by time limits and can offer their readers a far broader variety of information than the broadcast and cable media.

40/ As the Commission is aware, the Department of Justice has not hesitated to scrutinize and to restrict those acquisitions that it believes endanger a fully competitive marketplace. See, e.g., United States v. American Radio Systems Corporation, Civ. No. 1:96CV02459 (D.D.C. Oct. 24, 1996); Shareholders of Citicasters, Inc., FCC 96-380 (Sept. 17, 1996).

In today's media marketplace, there are more sources of information and entertainment than any individual can possibly absorb. Cable systems with more than 100 channels are becoming increasingly more common: it would take a single viewer several days to sample each one for only a half hour. In addition to local radio and television stations and daily and weekly newspapers, markets are served by cable television and DBS systems with multiple channels of non-local video and audio information; at least two nationally-distributed newspapers (the Wall Street Journal and USA Today); multiple national magazines covering not only news and information but virtually every conceivable topic; and the burgeoning volume of electronic information, including on-line services and Internet access. Simply reciting the diversity of currently available sources makes it clear that a single entity in a marketplace cannot exercise monolithic control over listeners and viewers. Modern-day information overload effectively prevents media dominance.

Given the ever-increasing media diversity, it is clear that the radio and television duopoly rules, standing alone, afford all necessary (and, it is submitted, more than necessary) protection to the public interest in diversity and competition.[41/] Radio and television ownership restrictions -- adopted in a world where electronic communication was limited to radio and television and where cable television, much less DBS and the Internet, were not even imagined -- are archaic anachronisms. Newer and more expansive and influential media -- cable television, DBS, and the Internet, for example -- are not subject to similarly intrusive ownership restrictions. Radio

41/ PCC is not alone in this belief: the court in WSB, Inc. v. FCC, 85 F.3d 695 (D.C. Cir. 1996) also suggested that the Commission's ownership rules were overly restrictive and unnecessary.

and television, too, should be freed from the unnecessary restrictions of excessive ownership regulation.

IF THE COMMISSION RETAINS THE ONE-TO-A-MARKET RULE, IT SHOULD INCORPORATE A 20-VOICE STANDARD FOR COMMON RADIO AND TELEVISION OWNERSHIP

If the Commission nonetheless feels compelled to retain the one-to-a-market rule in some form, PCC urges that it be modified to permit ownership of one television station and up to the maximum number of radio stations permitted by the radio duopoly rules so long as a minimum of 20 independently-owned voices remain in the market.[42/]

-- 20 Voices. The Commission has noted, "In terms of both our diversity and competition concerns, the number of separate owners in the market may be the best measure of potential competition among stations and of the likelihood of diversity of editorial viewpoints and program formats."[43/] To date, the Commission has adopted thirty voices as a quantitative minimum standard for diversity and competition. This standard first appeared as a component of the one-to-a-market waiver standard, based in large part on recommendations of NTIA and comments of NBC. At that time, the Commission characterized the 30-voice standard as "conservative" and one that "may far exceed the market size and the number of voices necessary

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42/ The market for these purposes would be defined in accordance with prior precedent. See, e.g., Infinity Holdings Corp. of Orlando, FCC 96-494 (Dec. 26, 1996); S.E. Licensee G.P., FCC 96-464 (Nov. 27, 1996).

43/ Broadcast Multiple Ownership Rules, Second Report and Order, 4 FCC Rcd 1741, 1751 (1989).

to ensure diversity and prevent competitive abuses."[44] The court in WSB, Inc. v. FCC, 85 F.3d 695 (D.C. Cir. 1996) also recognized that a 30- voice diversity standard as a "high" standard which more than adequately protects diversity and competition.

PCC submits that 30 voices is, in fact, a far too conservative test that in practice does not even begin to measure actual diversity -- it has not in the past, for example, included daily and weekly local newspapers, the multiple services carried on a single cable system, national newspapers such as USA Today or The Wall Street Journal, satellite-delivered DBS services, Internet services, magazines or other media that also contribute to diversity. A 20-voice standard is far more realistic and provides a more than sufficient guarantee of full diversity and competition in the public interest. If a viewer, listener or advertiser has available 20 independent alternatives to commonly-owned radio and television stations, it does not matter how many stations are commonly owned: there are still more alternative sources of information and outlets for advertising than a viewer, listener or advertiser can possibly use.

-- No Market Size Limitation. Although the Commission's ownership restrictions have in the past included a market size restriction, PCC submits that a market size component of a modified one-to-a-market rule is unnecessary. If there are twenty independent sources of news and information available to an individual listener, and twenty alternative outlets available to an advertiser, the size of the market where the listener or the advertiser is located is irrelevant. A viewer or listener in small city A who can receive twenty independent voices has available to

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44/ Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, MM Docket No. 87-7, 4 FCC Rcd 1741, 1751 (1989) ["One-to-a-Market Order"].

him exactly the same extent and type of diversity as a listener in big city B who has the same number of independent voices available. Smaller markets may in fact have more voices than larger markets,[45] and since the FCC's principal concern is and should continue to be diversity, it is the number of voices, not the size of the market, that should control regulatory decisions.[46]

-- Identity of Voices. The "voices" to be counted in measuring remaining diversity should include commercial and noncommercial radio and television stations, daily newspapers, cable television systems and MMDS systems. As discussed above, both commercial and noncommercial broadcast stations make significant contributions to diversity (the Commission's main regulatory concern) and likewise have an economic impact. To arbitrarily exclude noncommercial stations from the mix of cognizable independent voices is to artificially reduce the measure of actual market diversity.

Cable systems, MMDS systems and daily newspapers must also be included in the mix of measurable voices. Cable systems provide locally-produced programming as well as mandatory access channels that serve as forums for discussions of local issues. Leased cable access channels also afford opportunities for the presentation of local programming. Additionally, the entertainment programming presented on cable systems and MMDS systems also contributes to

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45/ The Commission itself has observed "[i]t is our view that even below the top 25 markets or in a market with far fewer than 30 voices or owners, diversity and competition exist to such an extent that it is appropriate to take into account the efficiency and other benefits of allowing joint station operations." One-to-a-Market Order, 4 FCC Rcd at 1752.

46/ The Commission has granted numerous one-to-a-market rule waivers to stations in smaller markets that satisfied its current 30-voice standard. See, e.g., U.S. Radio Stations, L.P., 11 FCC Rcd 5772 (1996); Ramar Communications, Inc., 7 FCC Rcd 3310 (1992); Great American Television and Radio Co., Inc., 4 FCC Rcd 6347 (1989).

an informed electorate. One need only recall episodes of entertainment programs dealing with issues such as abortion and gay rights to realize that entertainment can make a significant contribution to the development and discussion of significant public issues.

Further, cable systems, MMDS systems and daily newspapers are all subject to cross-ownership prohibitions.[47/] It is illogical and irrational to restrict their common ownership with broadcast stations yet at the same time to fail to consider them cognizable alternative independent voices. If television/cable, cable/MMDS and broadcast/newspaper cross-ownership are restricted because of their potential adverse impact on diversity and competition, it necessarily follows that independently-owned cable systems, MMDS systems and daily newspapers must be counted among independent alternative voices in determining cognizable diversity within a particular marketplace.[48/]

Stations that are being operated pursuant to an LMA should be counted as independent voices. The Commission's long-established policies and the terms of existing LMAs uniformly require a station's licensee to retain ultimate control of finances, personnel and programming. It would be inconsistent with such requirements -- and with LMAs' contractual provisions that implement them -- to attribute a brokered station to the broker in counting voices: the

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47/ See, e.g., 47 U.S.C. § 533(a); 47 C.F.R. § 76.501.

48/ The proposed definition of "voices" will, in any event, understate available diversity: no consideration will be given to national newspapers, magazines and non-daily newspapers. If the Commission were to limit cognizable "voices" to radio and television stations alone (as it has in the past), excluding daily newspapers, MMDS systems and cable systems, it would substantially understate actual available diversity. In such circumstances, a 30-voice standard would be extraordinarily conservative.

Commission would in effect be treating parties' contractual obligations as fictions.[49] LMAs should not be considered when determining the number of independent voices in a particular market.

-- Five Factor Waiver Request. If the Commission decides to retain the five-factor waiver test in some form -- and, as noted, PCC urges that the rule itself be changed -- it should eliminate its narrow focus on selected pre-established criteria. Rather, as with a television duopoly waiver policy, the Commission should indicate the general categories of showings that will be considered. Applicants would not be required to submit all of such showings, but rather would be permitted to select those that are best suited to their particular circumstances.

Under such a waiver policy, cost savings would continue to be considered, but would not necessarily be controlling. Applicants also could receive favorable treatment if they proposed to forego the potential cost efficiencies of combined operations in favor of the enhanced diversity and competition associated with continued separate operations.

Evaluation of the types of facilities involved should be eliminated: the rule itself makes no distinctions based on the nature of facilities to be owned, and it is therefore inconsistent and illogical to condition waivers on such considerations. The number of other media outlets owned in the market would not be considered; rather, the number of independent voices remaining would be a controlling factor. Market shares also would not be considered because, as noted

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49/ Network contracts typically provide networks with substantial control over affiliates programming and operations, yet the Commission does not -- and has never -- treated affiliates as less-than-independent voices within particular markets.

above, they are unstable and subject to radical change.[50] Financial difficulties would be an enhancement factor if present, but, consistent with precedent,[51] would not be required.

Finally, other types of benefits in areas such as employment and programming should receive greater "credit" than has been the case in the past. Among such public interest benefits that would be acceptable are particular children's programming commitments; broadcast of significant local news and public service programming or programming for currently-underserved audiences; minority and female training, internship and scholarship programs; assistance to noncommercial stations; and minority and female purchasing plans.

TELEVISION LMAs AND JSAs SHOULD NOT BE ATTRIBUTED

Benefits of JSAs and LMAs. Congress has expressly praised the public interest benefits of JSAs, LMAs and similar cooperative arrangements. The Conference Report on the Telecommunications Act of 1996 expressly referenced LMAs' "positive contributions,"[52] and the House Committee Report on that legislation also noted that "[t]he efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity, enabling stations to go on the air which would not otherwise be able to obtain financing, and saving failing stations which would otherwise go dark."[53]

50/ Market share considerations should continue to be matters for evaluation by the Department of Justice, which has primary jurisdictional responsibility for such issues.

51/ See, e.g., Louis C. DeArias, 11 FCC Rcd 3662 (1996); Atla Gulf FM, Inc., 10 FCC Rcd 7750 (1995); Secret Communications, L.P., 10 FCC Rcd 6874 (1995).

52/ S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 164 (1996).

53/ H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 119 (July 24, 1995) ["House Report"].

The Commission, too, has long recognized such arrangements' significant public interest benefits. Even as it began to regulate radio LMAs, the agency acknowledged that

> the various operational joint venture arrangements described in the Notice generally strengthen the radio service that the public receives by providing stations that are not commonly owned with economies similar to those available to commonly owned stations. Such arrangements are generally beneficial to the industry and listening audience because they enable stations to pool resources and reduce operating expenses without necessarily threatening competition or diversity.[54/]

It likewise recognized that LMAs "can provide competitive and diversity benefits to both the brokering parties and to the public."[55/]

PCC's experience as the participant in a number of radio and television LMAs confirms the accuracy of this conclusion. Through LMAs with other broadcasters, PCC has been able to facilitate the institution of new broadcast service. In several cases, that new service has been provided by minority broadcasters. PCC's LMAs have in practice advanced the twin Commission regulatory goals of new service (with attendant diversity and competition) and minority ownership. The Commission's proposal to require attribution of LMAs and JSAs would discourage parties from entering in to such arrangements and thus deprive the public of the significant, tangible benefits they provide. PCC therefore urges the Commission not to require their attribution.

54/ Revision of Radio Rules and Policies, Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, 2787, par. 63 (1992). The Commission's decision to regulate LMAs was driven not by a belief that they did not provide public interest benefits, but rather by fear that they could be used to circumvent the newly-relaxed ownership rules.

55/ Further Notice para. 135.

LMAs. If the Commission nonetheless decides to adopt some standards for television LMA attribution, such standards should be limited to the general radio LMA guideline requirements relating to content and licensee control.[56] Television stations should not be attributed based on the same 15% standard applicable to radio LMAs. Rather, the 15% standard should be based on the amount of locally produced programming provided by the broker. Unlike radio stations, which generally are programmed entirely on a local basis, many television stations rely on substantial amounts of network and syndicated programming. In such circumstances, the 15% standard is artificially low. To more closely parallel the radio LMA attribution standards, any 15% attribution standard should exclude network and syndicated programming.

JSAs. Joint sales agreements, even if coupled with debt or equity interests, should not be considered attributable interests. JSAs affect only a limited aspect of station operation -- sales -- and hence do not raise concerns equivalent to those associated with LMAs. In particular, JSAs do not implicate the diversity concerns that underlie -- and are the principal focus of -- the Commission's ownership rules. To the extent that JSAs may raise competitive concerns, those are appropriately matters for Department of Justice attention. See Elimination of Unnecessary Broadcast Regulation, Second Report and Order, 59 RR 2d 1500 (1986).

56/ Television LMAs would be permissible if "undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming." 47 C.F.R. § 73.3555(a)(3)(ii).

Other Ownership Rules. If the Commission adopts new LMA or JSA attribution standards, neither radio nor television LMAs or JSAs should be considered attributable for purposes of other Commission ownership restrictions. The Commission has never considered such arrangements to create attributable interests for purposes other than duopoly regulation, and there is no evidence that this prudent public interest decision has created abuses or adversely affected competition and diversity. In the absence of concrete evidence of actual abuses, extending new attribution requirements beyond the duopoly rules is unnecessary and would disserve the public interest.

EXISTING LMAs AND JSAs MUST BE FULLY GRANDFATHERED

If the Commission fails to accord full grandfathering to existing LMAs and JSAs under new attribution standards, termination of existing business relationships would penalize entities like PCC and others that reasonably relied on an existing regulatory scheme in taking risks to provide expanded service in the public interest. A failure to accord full and permanent grandfathering to existing LMAs would be inequitable in the extreme. Entities like PCC made substantial financial and other commitments in reliance on the Commission's regulatory scheme; the Commission should not penalize their success by requiring such arrangements' artificially premature termination. Such action would not only be unfair: it would also be contrary to existing constitutional and judicial requirements.

Retroactive Application. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[57]

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[58] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties.[59] The Supreme Court recognizes that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides an exceedingly persuasive justification."[60] This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[61]

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements:[62] (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden

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57/ 5 U.S.C. § 551(4) [emphasis supplied].

58/ See, e.g., American Express Co. v U.S., 472 F.2d 1050 (C.C.P.A. 1973); Energy Consumers and Producers Ass'n, Inc. v. Department of Energy, 632 F.2d 129 (Emer. Ct. App. 1980), cert. denied, 449 U.S. 832 (1980).

59/ Retroactive rules are not per se improper, E.L. Wiegand Div. v. NLRB, 650 F.2d 463 (3rd Cir. 1981), cert. denied, 455 U.S. 939 (1982).

60/ Heckler v. Mathews, 465 U.S. 728, 746 (1984).

61/ Cf., Amendments of Parts 20 and 24 of the Commission's Rules, 3 CR 433, 471 (1996); CATV of Rockford, Inc., 38 FCC 2d 10, 15 (1972), recons. denied, 40 FCC 2d 493 (1973).

62/ See, e.g., Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1971); Adelphia Cable Partners, 2 CR 76, 82 (1995).

retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one. The proposed failure to grandfather television LMAs cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions. See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, 53 FCC 2d 1102 (1975) [grandfathering broadcast-cable cross-ownership]; Second Report and Order, Docket No. 18110, 50 FCC 2d 1046, 1074 (1975) [grandfathering broadcast-newspaper cross-ownership]; Multiple Ownership Rules, 25 FCC 2d 318 (1970) [no divestiture required by new multiple ownership rules]; Multiple Ownership Rules, 3 RR 2d 1554 (1964) [existing combinations grandfathered notwithstanding adoption of new contour overlap standards]; Multiple Ownership Rules, First Report and Order, 40 RR 2d 23 (1977) [regional concentration of control rules include grandfathering provisions]; Multiple Ownership of Television Broadcast Stations, 5 RR 2d 1609 (1965) [Top 50 Market policy includes grandfathering provisions]. It has also grandfathered applicants and licensees not in compliance with other types of newly-announced rules. See, e.g., Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, 3 FCC Rcd 5024, 5025 (1988) [grandfathering the location of public inspection files]; Deletion of Section 97.25(c) of the Amateur Rules, 66 FCC 2d 1 (1977) [grandfathering the right of a licensee to apply for the Amateur Extra Class license without examination]; see also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Memorandum Opinion and Order, PP Docket No. 93-253, 75 RR 2d

833 (1994) [grandfathering applications on file by using lottery rather than auction procedures]; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, 11 FCC Rcd 7824 (1996) [spectrum cap and cross-ownership rules to be applied prospectively only]. A failure to grandfather existing television LMAs would be a radical and unjustified departure from this longstanding practice.

Further, entities that entered into renewable LMAs relied completely on the lack of Commission regulation of such agreements. Numerous parties to LMAs reasonably structured their business arrangements (including contractual provisions governing renewal and assignment), arranged financing and made other commitments based on the absence of Commission regulation or even specific plans therefor. In such circumstances, it would be grossly inequitable for the Commission to require disruption of established business relationships entered into on reliance on an existing regulatory environment.[63/]

Retroactive LMA regulation by denying renewability and transferability would also impose significant burdens because stations that did not anticipate the need to assume full responsibility for station operations would be hard-pressed to make alternative plans for financing, programming, staffing and other operational requirements. Many if not most existing television LMAs involve an existing television station and a new or struggling UHF station. Often, the owners of stations subject to LMAs have been minority owners who lacked the

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63/ The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation. See, e.g., Helvering v. Griffiths, 318 U.S. 371, 402 (1943); NLRB v. E & B Brewing Co., 276 F.2d 594, 600 (2d Cir. 1960).

expertise or resources necessary to institute successful television station operations. The assistance and experience of established station owners have fostered new service that would otherwise not have been available to the public. Entities that were willing to take the risks necessary to create this new service should not now be penalized for their success and contributions to the public.

If the support provided by the LMA is forcibly withdrawn, the likelihood is that circumstances will return to the status quo ante -- no service. In many cases, the brokered station could not survive without the benefits associated with the LMA. Plans were made based upon certain business assumptions, specifically including the renewability of the underlying business agreements. Stations that could not exist in the absence of an LMA in the past are unlikely to be able to do so in the future. Failure to respect agreements entered into in the absence of FCC regulations by prohibiting their renewal or transfer will inevitably result in diminution or loss of established service. Retroactive application of any new LMA attribution standards will, in short, burden both the public and affected private parties.

Finally, there is no statutory interest in applying the new rule. To the contrary, Congress expressly directed the Commission not to tamper with existing LMAs. Section 202(g) of the 1996 Act states that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission." This language is explained in the Conference Report accompanying the legislation:

> [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's

> rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.[64/]]

Contrary to the Second Notice's strained interpretation of this language, PCC submits that Congress' intent that existing LMAs -- including renewal provisions -- be grandfathered could not be clearer. Federal agencies such as the Commission are precluded from issuing a rule that has a retroactive effect unless Congress has explicitly conferred the power to do so.[65/] Here, not only has Congress failed to give the Commission the power to retroactively apply its new LMA rules to prohibit grandfathering: it has expressly directed the agency not to do so.[66/]

There is absolutely nothing in the legislative history of Section 310(d) of the Communications Act of 1934, as amended, (or in the legislative history of Section 202[g]) supporting the Second Notice's claim that the former provision grants the Commission authority over LMAs and overrides Section 202(g)'s clear statutory mandate. Section 310(d) was enacted well before LMAs were a recognized industry concept and for a specific purpose -- to ensure that the Commission only review the qualifications of the assignee or transferee filing an application. MMM Holdings, Inc., 4 FCC Rcd 6838, 6839 (1989) (noting that "the Commission's consideration under Section 310(d) of whether grant of the application will serve the public

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64/ S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 164 (1996).

65/ Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988).

66/ It is black letter law that administrative agencies must obey the dictates of their enabling statutes. Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961); United States v. Seatrain Lines, 329 U.S. 424, 432-433 (1947). For the Commission to fail to permanently grandfather existing LMAs would violate established judicial principles.

interest, convenience, and necessity properly focuses on the transferee's qualifications.") That provision says nothing about grandfathering particular ownership and attribution rules, and obviously does not preempt Section 202(g)'s express direction.

Failure to grandfather existing LMAs would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests: it would also disserve the public interest in enhanced television service and deprive the public of the Congressionally-recognized benefits of LMAs.

A Commission failure to fully grandfather existing LMAs by allowing their renewal and transfer would disregard Congress' express direction and disserve the public interest by depriving viewers and the marketplace of LMAs' acknowledged benefits. The public interest, in short, demands full grandfathering of existing LMAs

THE COMMISSION MUST RETAIN THE UHF DISCOUNT IN ITS NATIONAL TELEVISION OWNERSHIP RULE

The Commission has decided that it will defer review of the continuing public interest justification for the UHF discount in its national television ownership limits until its 1998 biennial ownership review.[67] However, it seeks comments whether there may be circumstances in which an owner of UHF stations might have a disproportionately high national audience reach notwithstanding compliance with the rule.

67/ National Ownership Notice para. 16. As demonstrated above, UHF stations continue to face significant competitive obstacles that make retention of the handicap appropriate and necessary to the public interest.

The existing national television ownership rule, including its UHF discount, reflects a considered evaluation of the public interest. The Commission should not revisit or revise this evaluation by anticipating unusual circumstances in which the rule might appropriately be applied in a restrictive manner. Both the Commission and Congress recognize that the considerations that prompt ownership restrictions focus on local, not national factors.[68/] There is thus no need for exceptional restrictions on national television station ownership.

The four national television networks provide substantial amounts of programming to affiliates that serve virtually all of the nation, yet the Commission does not restrict the amount of programming that they may provide or the number of stations with which they may affiliate. Individual station ownership should not receive less favorable treatment. If competitive concerns associated with a single owner's interest should develop, the Department of Justice is the appropriate agency to act. As noted above, recent experience demonstrates that it will not be reluctant to do so. There should, in consequence, be no special Commission national television ownership restrictions.

TELEVISION HOUSEHOLD
CALCULATIONS SHOULD BE BASED ON DMA HOUSEHOLDS

As demonstrated above, the DMA has replaced the ADI for both business and most regulatory purposes. The Commission should acknowledge this reality by using DMA television households in evaluating compliance with national television ownership limits.

68/ See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, MM Docket No. 91-221, 10 FCC Rcd 3524 (1995).

THE SATELLITE EXEMPTION SHOULD REMAIN UNCHANGED

The Commission tentative concludes that satellite stations should be counted for purposes of the national television ownership limits if they are in a market separate from that of their parent station. National Ownership Notice para. 20. PCC urges the Commission instead to continue its current practice of omitting satellite stations from national ownership calculations. Given the current requirements to qualify for satellite status,[69] satellite stations are almost invariably licensed to small communities that often constitute separate television markets. Under the Commission's proposal, such stations would be considered attributed, while other stations that are located in communities that by happenstance are in the same market as the parent station, would not be attributable. Such disparate treatment is illogical and inequitable when both satellites would have been required to satisfy the same requirements for satellite status.

Considering satellite station ownership for any purpose would be inconsistent with the underlying purpose of the satellite ownership rules: to encourage use of spectrum that would otherwise lie fallow and to facilitate provision of local television service to viewers who would otherwise be unable to receive it. The Commission's apparent assumption that satellite station attribution would not be a disincentive to satellite station operation is misplaced, particularly since group owners are more likely to have the resources, experience and incentive to assume the risks and costs of satellite station operation.

69/ Television Satellite Stations Review of Policy and Rules, Report and Order, MM Docket NO. 87-8, 6 FCC Rcd 4212 (1991), pets. for recons. pending.

LMAs SHOULD NOT BE ATTRIBUTED TO THE
BROKER IN ADMINISTERING NATIONAL OWNERSHIP RULES

Television LMAs should not be attributed to a broker in determining its compliance with national ownership limits. Even without express Commission requirements therefor, television LMAs typically include provisions that ensure that the licensee, not the broker, retains ultimate control over the brokered station's programming, personnel and finances. It is inconsistent with such provisions to attribute the brokered station to the broker.

Moreover, if the Commission attributes the station's ownership to the broker, would it also attribute ownership to the licensee? Merely asking this question indicates the illogic and impropriety of attributing ownership to a broker.

OTHER ATTRIBUTION ISSUES

The Commission should adopt an equity plus debt gloss on attribution only for the four major networks. These networks have, historically, exercised extraordinary influence over their affiliates, triggering the need for exceptional regulation. See 47 C.F.R. § 73.658. The major networks' importance continues undiminished, and, indeed, may be even more significant as marketplace diversity increases the competitive pressure on individual television stations. An equity plus debt gloss on attribution -- PCC suggests at 25% level as appropriate -- is thus appropriate for the major networks and those entities that control them.[70/]

70/ Use of the Commission's attribution standards in administering a new equity plus debt gloss would create an overbroad attribution nightmare. For example, a 5% voting stockholder in a network that held the requisite debt and equity combination in a licensee is not in a realistic position to influence programming or operations, yet the proposed rule changes could bar such an interest.

There is no need to impose such a benchmark on other entities. The Commission already has rules restricting newspaper and cable system ownership of broadcast stations. An equity plus debt gloss would make these onerous existing regulations even more burdensome. Moreover, given the lack of any demonstrated abuse (in contrast to the situation involving major networks) there is no public interest need for such additional regulations.

PCC supports an increase in the voting stock benchmarks to 25% for both stockholders and passive investors. As a practical matter, stockholders holding less than this level of interest are not in a position to exercise effective day-to-day control over station operations.

CONCLUSION

The Commission's decision in this important rulemaking proceeding must reflect the practical realities of television station operation in the contemporary communications marketplace. It must recognize that this marketplace is not limited to broadcast stations, but encompasses a vast variety of old and new media. In that dynamic environment, television ownership restrictions are an unnecessary anachronism. To the extent that the Commission feels compelled to continue to encumber television licensees with ownership limitations, those limitations should, at least, reflect the practical realities of station operation. PCC therefore urges the Commission to issue a decision consistent with the comments and suggestions set forth herein.

Respectfully submitted,

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February 7, 1997