Rulemaking, 7 FCC Rcd 6387, 6402 (1992).

That television ownership proceeding left no doubt as to the uncertain station of TV LMAs. In its *Notice of Proposed Rulemaking*, 7 FCC Rcd 4111 (1992), the Commission sought comment on

> the extent to which...LMAs are a pervasive phenomenon in television, whether they present the same competitive and diversity concerns we found in the radio industry and whether we similarly should restrict them in some fashion in the television station context.

Id. at 4116. That inquiry was later followed up by the more detailed *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524 (1995) wherein the Commission tentatively concluded to attribute LMAs regardless of whether or not the duopoly rule was modified, *id.* at 3583, and sought comment as to whether LMAs entered into prior to the adoption of the *Further Notice* ((December 15, 1994) should be grandfathered or renewed. *Id.* at 3584.

Thus, while the Commission's delay in providing guidelines is inexcusable, and has exacerbated the problem of reversing the tide of LMAs, it is at the same time extremely disingenuous for broadcasters to argue that they "did not anticipate" that the Commission might limit or abolish LMAs at some point. *See* Paxson Comments at 33. The record demonstrates that the dubious legality of TV LMAs has been publicly debated for almost six years.

It is for this reason, too, that Paxson's argument that failure to grandfather is tantamount to an impermissible retroactive rulemaking must fail. Paxson states that retroactive rules may be improper only when necessary to protect "reasonable reliance interests," quoting *Heckler v. Mathews*, 465 U.S. 728, 746 (1984)[16] or where they interfere with the "legally induced, settled

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[16]*Heckler v. Mathews* did not involve retroactive application of a law or rule. The case involved a prospective application of a 1977 law that required the reduction of spousal benefits under the Social Security Act by the amount of Federal or State Government pensions received

expectations of private parties." Paxson Comments at 31. As demonstrated above, any reliance on the publicly debated uncertain state of LMA affairs over the past six years cannot, under any measure, be deemed to be "reasonable." And, because TV LMAs have always an unlawful evasion of the ownership rules and Section 310 (d), any expectations a party might have would not be "legally induced."

In looking at retroactive rules, "the courts analyze whether the inequity of retroactive applications is counterbalanced by sufficiently significant statutory interests." *E.L. Wiegand Division v. NLRB*, 650 F.2d 463, 471 (3rd Cir. 1981) *cert. denied*, 455 U.S. 939 (1982). Here, any inequity that might accrue from failure to grandfather or permit LMAs in the future is offset by two significant statutory interests - the Commission's statutory interest in licensing broadcasters in the public convenience and necessity, and its statutory interest in prohibiting unauthorized transfers of control under Section 310(d).[17]

C. Waivers for LMAs Should Be Granted Only Upon a Detailed Showing that the Benefits of an LMA Would Result in Palpable Public Interest Programming Benefits.

Those broadcasters engaging in LMAs spin numerous tales of the public benefits of these

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by the Social Security applicant.

[17]The considerations that determine whether a retroactive rule is inequitable under *Retail, Wholesale and Department Store U. v. NLRB*, 466 F.2d 380, 390 (DC Cir 1972), *see* Paxson comments at 31-32, also cut in favor of MAP, *et al.'s* position: 1) the case is not one of first impression: indeed, in 1992, the FCC attributed ownership to radio broadcasters who engaged in LMAs for greater that 15% of the broadcast day; 2) a new rule would not "represent an abrupt departure from well established practice," but would "fill a void in an unsettled area of law," and 3) the statutory interest in applying a "new" rule is great despite the reliance of certain broadcasters on the lack of Commission regulation of TV LMAs - as discussed above, LMAs violate the Commission's public interest mandate in ensuring diversity and violates Section 310(d)'s restriction on unauthorized transfers of control.

arrangements, meticulously recounting each and every new children's show, news program and "Toys for Tots" campaign. *See, generally*, LIN Comments; NAB Comments at 19-20 (discussing LIN LMAs). MAP, *et al.* applaud these broadcasters for their uncommon commitment to the public interest.[18] But these broadcasters are few, and uncommon. Indeed, for every "good" LMA there are many "bad" ones where the programming consists largely of home shopping or infomericals, and where children's educational programming is a mandated afterthought, and there is no news, documentary or other informational programming.

Thus, the Commission should not grandfather all LMAs, or permit new ones in the future because a handful have proved beneficial. Instead, it should grant narrow waivers based on compelling circumstances and the public interest showing described supra. LMAs like those described by LIN, which have saved failing stations and provided expanded public interest programming, should have no trouble in meeting the waiver criteria proposed at pp. *supra*, or in reporting to the Commission on a biennial basis about the public benefits that have redounded from these combinations. Those broadcasters who cannot abide by those criteria are not worthy of the benefits of such extraordinary relief.

III. The Commission Must Count Intermarket Satellites for Purposes of the National Ownership Rules.

Both Paxson and CBS urge the Commission not to count intermarket satellite stations for the purposes of the multiple ownership rules. Paxson argues that counting intermarket stations

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[18]MAP, *et al.* do not consider "Toys for Tots" campaigns, food drives and other similar non-program community activities to be part of a broadcasters public interest obligations under the Communications Act of 1934. Many businesses engage in this type of "service" for self-serving, promotional purposes. But the public interest standard must mean more than merely engaging in the same local activities as Giant and Safeway.

for purposes of the rules, but not intramarket stations is "illogical and inequitable," Paxson Comments at 38. CBS makes the bald statement that eliminating the intramarket exemption "would needlessly discourage operation of satellite stations by group owners, and might in some situation lead to a loss of television service in communities where few over-the-air stations are available."

Neither of these arguments make the case for keeping the intermarket satellite exemption. Contrary to Paxson's assertion, it is completely logical to attribute intramarket, but not intermarket satellite stations. The purpose of satellite stations has always been to extend the reach of stations located in the same, or nearby market. *See Central California Communications Corp.*, 47 FCC 2d 1001, 1002 (1974)("[n]ormally, a satellite is licensed to a television station in a *nearby city* and rebroadcasts the programming of that parent station"). [Emphasis added] Moreover, they have been required to serve local needs by providing at least some locally originated programming and by retransmitting programming that would address regional issues. *See e.g.*, *Mad River Broadcasting*, 4 FCC 6456, 6457 (1989)(factor in granting satellite status was applicant's commitment to maintain station's local studio for daily broadcasts of local programming); *Taft Broadcasting*, 5 FCC Rcd 6988, 6991 (1990) (factor in granting satellite status was promise to continue current public affairs programming and to increase station's local news by adding a local weekend newscast). Intermarket stations, on the other hand, offer no benefits to their communities of license, and merely serve as a vehicle for broadcasters with no connection to a community to extend their ownership reach without attribution. Exclusion of those stations from national TV audience reach will only encourage warehousing and speculation in spectrum with no regard to the needs of the public.

CBS's argument is no more persuasive. As it recognizes in its comments, the repeal of the 12 station ownership limit greatly "mitigate[s] the disincentive" for group owners to operate satellites. CBS Comments at 6. Moreover, to the extent that there is any disincentive, it is only for the largest group owners who are bumping up to the 35% national reach cap. Those broadcasters not approaching the cap would still be eligible, and likely willing, to operate these stations. The Commission should not sacrifice localism and the proper operation of the national ownership rules just to appease a handful of the largest TV broadcasters.

IV. It is No Longer Necessary to Discount UHF Stations for the Purpose of the National Ownership Rules.

Paxson urges the Commission to retain the UHF discount for the purpose of tabulating the national ownership rules. *E.g.*, Paxson Comments at 36. The rationale behind these arguments is that UHF stations suffer from technical disadvantages and higher operational costs which lead inevitably to lower viewership. *See* Paxson Comments at 10-11; LSOC Comments at 72.

But the UHF discount must be viewed in light of changing technologies and the lifting of the national ownership limits. As a practical matter, the discount benefits only the largest group owners, like Fox and Paxson, which are bumping up against the 35% national ownership reach cap. Most of these stations are carried on cable systems, and, because they are often affiliated with one of the broadcast networks, will likely continue to be carried even if "must carry" is declared unconstitutional.[19]

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[19]Even if the Supreme Court were to declare unconstitutional the must carry scheme embodied in the 1992 Cable Act, it would not eliminate the Commission's authority to impose a more carefully drafted "must carry" rule. In *Turner Broadcasting v. FCC*, 114 S.Ct. 2445 (1994)(*"Turner I"*), the Supreme Court specifically upheld must-carry in principle, but sought

Moreover, as some broadcasters recognize, the conversion to digital television and other technological advances will eliminate any technical or economic disadvantage UHF stations now have. *See* ABC Comments at 6; Post-Newsweek Comments at 4. Indeed, UHF stations may well receive better channel placements than their VHF compatriots in the switch to digital. Thus, the UHF discount has, or will very soon become, an anachronism. The Commission should therefore retire it when it engages in its biennial review of the rules in 1998.

CONCLUSION

Broadcasters have not met their burden of demonstrating that relaxation of the duopoly rules is necessary or in the public interest. There is no evidence that multichannel competitors are overtaking, or will ever overtake, broadcasting as the most-watched video medium. The evidence is much to the contrary, in light of cable and DBS' financial struggles, and the impending arrival of digital television.

Moreover, the Commission must heed viewpoint diversity concerns that go beyond pure economic or antitrust analyses. Relaxation of the duopoly and other ownership rules will significantly diminish viewpoint diversity to an extent that is inconsistent with the First Amendment rights of the public to access "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. US,* 326 US 1, 20 (1945). In the absence of any evidence that relaxation is necessary to preserve free over-the-air broadcasting, the Commission

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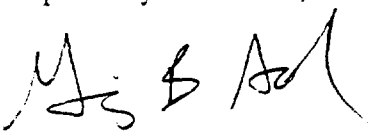
more information on whether the particular scheme before it was harmful to broadcasters. In the event must carry is struck down, it is likely that small UHF station owners will petition the FCC for some kind of relief for those stations only. Based on the rationale in *Turner I* (evidence of harm), those stations might be able to make the case for some limited form of must carry. Indeed, Congressional staff recently discussed the possibility of passing legislation embodying new form of must carry for smaller stations. "Supreme Court Decision on Must-Carry To Frame Issue, Hill Staffers Say," *Communications Daily*, March 19, 1997 at 3-4.

should decline to do so.

Respectfully Submitted,



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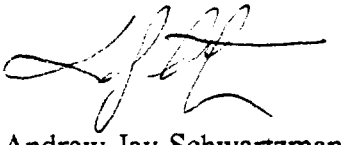

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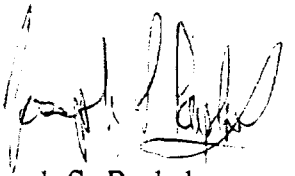

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