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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)
)
Review of the Commission's)
Cable Attribution Rules)

CS Docket No. 98-82

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To: The Commission

REPLY COMMENTS OF UNIVISION COMMUNICATIONS INC.

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SUMMARY

Univision Communications Inc. (“Univision”) hereby encourages the Commission to maintain its cable attribution rules while clarifying the attributable status of a discrete group of business relationships. Both the cable industry’s continued domination of the MVPD marketplace and the inability of the Commission’s regulatory safeguards to adequately protect broadcasters and programmers from the anti-competitive tactics of cable system operators make it particularly inappropriate for the Commission to relax its attribution rules. Any relaxation of the attribution rules will permit cable system operators to achieve even greater concentrations of market power, thereby adding to their ability and incentives to engage in anti-competitive behavior. Accordingly, the Commission should use this proceeding reaffirm its commitment to monitoring the true extent of cable system operators’ interests to ensure that they cannot abuse their market power to the detriment of diversity and the public.

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REPLY COMMENTS OF UNIVISION COMMUNICATIONS INC.

Univision Communications Inc. ("Univision"), by its attorneys, hereby submits its reply comments in the above-captioned rulemaking proceeding¹ regarding the Commission's cable television attribution rules (the "NPRM"). Unsurprisingly, comments filed by cable system operators in response to the NPRM have proposed that the Commission should further relax the cable attribution rules to permit cable system operators to achieve even greater concentrations of market power. As set forth below, Univision encourages the Commission to reject these proposals. Instead, to promote diversity and protect against anti-competitive behavior, the Commission should maintain the cable attribution rules and clarify the attributable status of a discrete group of business relationships.

¹Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82 (released June 26, 1998).

INTRODUCTION

1. Univision's interest in this proceeding derives from its position as the leading Spanish-language television broadcaster in the United States. It operates the Univision Network, the most popular Spanish-language television network in the United States, which has 47 television station affiliates, 22 of which are full-power television stations. Univision controls Univision Television Group, Inc., which indirectly owns and operates 13 full-power UHF and eight low-power UHF television stations. In addition, Univision owns and operates Galavision, the most-watched Spanish-language cable television network in the country.

2. To serve Hispanic communities across the country, Univision relies heavily upon cable carriage. In Univision's case, 25 of the 47 television stations that air the programming of the Univision Network are low power television stations. Because low power television stations, by definition, have limited geographic coverage, cable carriage is often critical for them to successfully serve all of their market. Similarly, because many areas do not have sufficient concentrations of Spanish-speaking residents to justify a dedicated broadcast facility, nearly one million Hispanic television households nationwide receive their Univision programming by way of a satellite feed to their local cable system, which then relays the Univision Network programming over its cable system.² Finally, Univision's Spanish-language cable network, Galavision, is of course completely dependent on local cable television systems in order to reach the 2,282,362 Hispanic television households it serves.³

²Nielsen Code Data (Sept. 19, 1997 and Oct. 18, 1997).

³Nielsen Code Data (Dec. 20, 1997).

3. Univision's reliance upon cable system operators has given it a unique appreciation of how the Commission's cable attribution rules serve the twin goals of promoting diversity and protecting against anti-competitive behavior. As explained below, permitting cable system operators to further concentrate both horizontally and vertically by relaxing the attribution standards will only harm diversity and encourage more anti-competitive behavior.

I. The Cable Industry's Continued Domination of the MVPD Marketplace and the Inability of the Commission's Regulatory Safeguards to Adequately Protect Broadcasters and Programmers From the Anti-Competitive Tactics of Cable System Operators Demonstrate That The Commission Should Not Relax the Cable Attribution Rules

4. The parties in this proceeding arguing to relax the attribution standards essentially contend that changes to the multichannel video programming distribution ("MVPD") marketplace and other existing regulatory safeguards should alleviate any anti-competitive and diversity concerns the Commission might have. They assert that such concerns are effectively unwarranted speculation that should not deprive the public of benefits that would result if the Commission relaxed the attribution rules to permit greater cable television market concentration. As detailed below, Univision's real-world experiences in dealing with cable system operators is at odds with these assertions. Indeed, Univision has found that the Commission's anti-competitive and diversity concerns are well-founded -- even with the present attribution rules in place. The real speculation in these proceedings are the speculative public benefits that cable system operators have promised will result if the attribution rules are relaxed.

5. As an initial matter, contrary to the stated beliefs of cable system operator commentators,⁴ no significant changes to the MVPD marketplace have occurred to warrant a relaxation of the cable attribution rules. As stated by the Commission at the beginning of this year, “87% of MVPD subscribers receive service from their local franchised cable operator. While this represents a slight decrease from last year, it shows *the cable industry continues to occupy the dominant position in the MVPD marketplace.*”⁵

6. For broadcasters and video programming providers such as Univision, these dominant cable system operators are gatekeepers to the homes of viewers. This gatekeeper status can easily be abused by cable system operators to implement anti-competitive strategies that inure to the benefit of cable system operators and injure their non-affiliated program suppliers such as Univision.

7. The power that cable system operators can wield and abuse, *with the attribution rules in place*, is evidenced by the difficulties that Univision experienced with getting Tele-Communications, Inc. (“TCI”) to comply with the Commission’s must-carry rules in San Francisco. In 1993, Univision station KDTV sent must-carry letters to all TCI cable systems in the San Francisco market (comprising 83% of all cable households in the market) requesting carriage on Channel 14, KDTV’s on-air channel. TCI generally failed to honor KDTV’s request for on-channel carriage during the 1994-97 period covered by KDTV’s 1993 election. During the 1996 must-carry election period, KDTV once again asked that it be carried on Channel 14, and

⁴See, e.g., Comments of Time Warner, Inc., CS Docket No. 98-82, at 7; Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 15-17.

⁵Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming CS Docket No. 97-141, Fourth Annual Report, FCC 97-423 (January 13, 1998) at ¶ 7 (emphasis added).

emphasized the importance of being carried on a single channel on all systems to avoid viewer confusion and to allow KDTV to effectively market its channel throughout the San Francisco area. Despite *five years* of must-carry requests and negotiations, KDTV was carried on Channel 14 on only fifteen of TCI's 37 cable systems in the market. To obtain on-channel carriage on the other 22 systems -- a right to which KDTV was clearly entitled -- Univision was forced to submit two petitions for special relief to the Commission. When these petitions were granted, and TCI was ordered to carry KDTV on Channel 14 on the systems, TCI filed petitions for reconsideration which had the effect of maintaining the status quo.⁶ Recently, Univision was forced to give up trying to position KDTV on Channel 14 throughout the San Francisco market, despite possessing a Commission staff decision ordering TCI to comply with this request, in order to obtain carriage of another of Univision's stations on a desirable channel on TCI's many Chicago systems.⁷

8. Unfortunately, KDTV's plight is not unusual. Many of Univision's stations have had to expend significant resources fighting and negotiating with various cable system operators for the cable carriage and channel positioning that they should have received automatically after notifying the cable system operator of their must-carry rights. During this process, these stations are frequently moved around in the cable system's channel lineup, making it difficult for even the most interested viewer to locate a station with any consistency.

⁶Complaint of KDTV License Partnership, G.P. against TCI Cablevision of California, Inc., CSR 5196-M (CSB, released May 22, 1998); Complaint of KDTV License Partnership, G.P. against TCI Cablevision of California, Inc., CSR 5097 (CSB, released February 4, 1998).

⁷Despite the carriage of Univision's WGBO-TV on Channel 6 on many systems in Chicago for a number of years, TCI recently announced that it intended to move the WGBO signal off of Channel 6 throughout the Chicago area.

9. These difficulties completely contradict statements filed by the cable system operators in these proceedings contending that the “existence of the program carriage, program access and leased access rules severely constrains the ability of cable systems to foreclose unaffiliated programmers from their systems.”⁸ Ironically, TCI, the very cable system operator that had refused to carry KDTV in San Francisco even after being ordered to by a Commission staff decision, has stated in its comments that “must carry, program carriage, leased access and other specific requirements, ensure a diversity of viewpoints on cable systems.”⁹

10. Quite simply, regulatory safeguards such as must carry, channel positioning, leased access, channel occupancy limits, and programmer discrimination complaints, are insufficient to protect diversity and prevent anti-competitive behavior. First, must-carry rights, while helpful, provide only limited protection for Univision’s full power stations, and no protection for its low power television stations, cable network Galavision, or the satellite-delivered Univision Network service. Over one-half of Univision-affiliated television stations are low power television stations that are not entitled to the protection of must-carry rights.

11. Moreover, even Univision’s full power station are not adequately safeguarded by the Commission’s must-carry and channel positioning rules. It is not uncommon for cable system operators facing a must-carry demand to falsely deny receiving an adequate signal from the station at their headend.¹⁰ This shifts the burden to the station to conduct measurements to demonstrate

⁸Comments of Time Warner, Inc., CS Docket No. 98-82, at 17.

⁹Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 39.

¹⁰*See, e.g.*, Complaint of Mountain Broadcasting Corp. against TKR Cable Co. of Elizabeth Request for Carriage, 11 FCC Rcd 4772 (CSB 1996).

that an adequate signal exists, and delays the need for the cable system to commence carriage.

Univision itself has been compelled to expend enormous sums of time and money to obtain cable system compliance with the must-carry and channel positioning rules. For example, reluctant cable system operators in the New York market forced Univision's full power station WXTV(TV) to expend extensive resources to determine the status of its signal and to negotiate for cable carriage that the station was entitled to under the must-carry rules.

12. Second, leased access is actually a form of anti-competitive behavior insofar as it permits a cable operator to provide its affiliated programmers with free access, while charging competitors, such as Univision, a fee for similar carriage. This is a particular problem for a broadcasters like Univision which seek a national audience but do not have affiliates in every designated market area. Third, channel occupancy limits do not effectively protect against anti-competitive behavior because the limits give the cable operator the option of dropping competitors from the system instead of the cable operators' affiliated programmers. Finally, programmer discrimination complaints are utterly impractical given the thousands of cable systems that could potentially be involved. The difficulty of adjudicating such issues with regard to thousands of systems would result in generating hundreds of complaints that would prove to be an unsustainable drain on both the Commission's and Univision's resources.

13. Most importantly, cable system operators know that the worst that will happen to them if they fail to comply with regulatory safeguards, such as the must-carry and channel positioning rules, is that they may *eventually* be forced to carry the station on the proper channel after all appeals are exhausted. Failure to comply with these rules therefore carries no risk for cable system operators. Thus, cable system operators have little incentive to comply with the

rules, since many broadcasters cannot expend the resources necessary to establish non-compliance and prosecute the matter before the Commission.

14. Univision therefore urges the Commission to actually penalize cable system operators that fail to comply with its rules. Penalties, such as forfeitures and reporting conditions, are necessary if the Commission expects its rules to have any deterrent effect on the behavior of cable system operators.¹¹

15. As these regulatory safeguards are insufficient to prevent cable system operators from abusing their gatekeeper status, the Commission should continue to employ its attribution rules to ensure that the complete scope of a cable system operators' interests are identified and regulated by the Commission's ownership rules and cross-interest policy. Without proper attribution, the Commission cannot effectively enforce its rules and policies against the parties in interest and therefore the Commission will be unable to lower the ability and incentives that cable system operators have to abuse their horizontal and vertical market power.

16. Commentators that attempt to assuage the fear of Congress and the Commission that cable system operators can restrict unaffiliated programmers from gaining access to video distribution outlets provide another instance in this proceeding of where real-world consequences sharply diverge from theoretical studies. For example, TCI notes that while vertically integrated cable television operators, such as itself, "could engage in vertical foreclosure. . . . [by] invest[ing] in a non-vertically integrated cable operator, and thereby increas[ing] the ability and incentive of

¹¹Such penalties would be especially necessary if the Commission were to accept certifications of non-influence as some commentators have proposed to determine nonattribution. See., e.g. Joint Comments of Adelfia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc., CS Docket No. 98-82, at 8.

the cable operator to deny access to both systems by rivals of its program service. . . . The empirical evidence to date suggests that the likelihood of vertical foreclosure is small.”¹² TCI reinforces this contention by stating that “vertically-integrated cable operators are not engaging in vertical foreclosure. . . . [and] with regard to the Commission’s concern about diversity, as demonstrated above, the number of channels alone promotes diversity. Moreover, ownership of programming has little bearing on carriage. That is, evidence suggests that cable operators do not disfavor non-affiliated programming.”¹³

17. In reality, TCI has already indicated that it will abuse its gatekeeper status to benefit from vertical integration. A prime example of such vertical foreclosure has resulted from TCI’s recent acquisition of a substantial ownership interest in the Spanish-language Telemundo Network and its stations. In October of 1997, when TCI was structuring that acquisition, TCI abruptly removed Univision’s Galavision signal from TCI’s Denver cable system and gave the cable channel position to a Telemundo affiliate located nearly 100 miles away in tiny Steamboat Springs, Colorado.¹⁴ According to the general manager of the Telemundo station, the station had been working to be placed on the TCI system in Denver for two years.¹⁵ Unsurprisingly, only as TCI was finalizing negotiations for the Telemundo transaction did the Telemundo station suddenly succeed in obtaining cable carriage. In addressing why TCI chose Galavision as the

¹²Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 37.

¹³Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 38-39.

¹⁴See *TCI Pulls Plug on Galavision*, ROCKY MOUNTAIN NEWS, October 23, 1997, at page 1B.

¹⁵Id.

signal to be dropped, a TCI spokesman stated that “[b]ecause Galavision is also Spanish-language cable programming, it ended up being the one no longer carried.”¹⁶

18. Confirming that the timely addition of the Telemundo signal in Denver was no accident, *Hispanic Market Weekly*, a trade publication of the Hispanic media industry, wrote that

Liberty vice president David Jensen says that the voluntary agreement in Denver will probably be repeated in other markets where Telemundo is not already carried by existing cable systems. “One of the things TCI and Liberty want to do is improve Telemundo’s reach all over the country.” adds Jensen. “*If we have the capacity, we’ll roll it on. If not, we’ll bump another signal off the system.*”¹⁷

19. TCI’s failure to bump another channel off of its Denver system instead of Galavision in order to make room for the Telemundo signal confirms that the Commission’s anti-competitive and diversity concerns are warranted. TCI had the option of providing the public in Denver with additional Spanish-language programming, which would have provided competition to Galavision’s signal and added diversity to a predominately English-language cable system. By removing Galavision’s signal, TCI clearly indicated that it was uninterested in providing the public in Denver with that diversity. Moreover, TCI ensured that the Telemundo station would not face direct competition from Galavision.

20. In light of these experiences, Univision urges the Commission not to relax its attribution rules to permit cable television operators to further concentrate their market power. Such a result will only increase the incentives and abilities of the cable system operators to engage in anti-competitive behavior and harm diversity. As noted by the Commission, “the ownership

¹⁶Id.

¹⁷*Picking Up the Signal*, HISPANIC MARKET WEEKLY, Dec. 22, 1997, at page 1 (emphasis added).

attribution rules are intended to identify those relationships that confer on their holders a degree of *influence or control* over key business decisions . . . such that the holders should be subject to the Commission's regulations."¹⁸ Properly identifying these relationships is vital for the Commission to effectively regulate cable system operators in the United States. Failing to account for even a single influential or controlling relationship permits rogue entities to influence the operation of cable systems outside of the law -- most likely to the detriment of non-affiliated broadcasters and video programmers.

II. Clarifying the Attributable Nature of Certain Business Relationships Will Remove Any Uncertainty Regarding the Attribution Rules

21. Claiming that the Commission's traditional attribution standard based on influence is too "ephemeral and elusive,"¹⁹ certain commentators have proposed to abandon the traditional attribution standard entirely and replace it with an inquiry into operational or managerial control. These radical proposals, such as TCI's urging the Commission to "adopt an attribution standard for cable horizontal ownership based on operational control,"²⁰ greatly overreacts to any perceived problems with the attribution standard. Nearly every type of business relationship has been analyzed by the Commission to determine whether it merits attribution and, in most cases, the attributable status of any given relationship is certain. The few that remain less certain can be clarified by this proceeding.

¹⁸Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82 (released June 26, 1998) at ¶ 12 (emphasis added).

¹⁹Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 25.

²⁰Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 25.

22. In general, the remaining uncertainty regarding what business relationships are attributable results from situations where an investor hopes to enjoy numerous business relationships which individually are nonattributable but in combination with other relationships are likely confer upon the investor an ability to influence key business decisions. The Commission should address which, if any, of its normally nonattributable business relationships can be enjoyed cumulatively without rising to the level of attribution.²¹

23. Examples of the inherent contradiction present where investors hope to escape attribution but wish to possess as many avenues of influence as possible have been provided by the many comments filed by cable system operators in which TCI recently became a major investor.²² Most of these comments discuss how a small cable system operator was having difficulty obtaining the necessary capital to remain competitive and the solution was to enter into a joint venture with TCI. TCI provides financial security, purchasing power, greater programming selection, and experience regarding the offering of new services such as internet

²¹Given that certain investors will seek to enjoy as much influence or control over their investment as possible while remaining nonattributable, and that the Commission cannot anticipate every permutation of business relationships that may occur, the Commission must retain its cross-interest policy to serve as a “catch-all” to protect against any future arrangements in which it appears that the nonattributable investor complies with the attribution rules in letter only. Complaints that this policy is too unclear miss the point; those that wish to “push the envelope” and implicate the cross-interest policy voluntarily risk attribution.

²²See, e.g., Joint Comments of Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc., CS Docket No. 98-82; Comments of Cablevision Systems Corporation, CS Docket No. 98-82; Comments of Bresnan Communications Company, L.P. and TCA Cable TV, Inc., CS Docket No. 98-82.

access.²³ In exchange, TCI receives nearly half of the small cable operators' equity, super majority rights over "fundamental matters such as sale of assets and change of status," and a minority position on the cable operator's board of directors.²⁴

24. Incredibly, after acknowledging that TCI's investment and expertise are vital for the small cable operator to remain in business, the small cable operator then asks the Commission to not attribute TCI's interest in the cable system because TCI has agreed on paper that the small cable operator will retain exclusive managerial control. More plausibly, it would seem that TCI will employ its position on the board of directors to monitor and recommend key decisions on the operation of the system. While the small cable operator can technically reject any "suggestions" that the TCI representatives might have, TCI can withdraw its financial and technical support of the system to indicate its disapproval with the manner in which decisions are being made. Considering that these small cable system operators have admitted that they need the support of TCI in order to survive, it therefore cannot be expected that these small cable operators will ignore any "suggestions" that TCI's representatives on the board of directors make. Accordingly, such arrangements should result in attribution for TCI.

25. These arrangements also illustrate how the single majority shareholder exemption can be abused. The Commission should not allow this exemption to be used where the minority shareholder enjoys numerous other business relationships with the cable system in addition to the

²³Joint Comments of Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc., CS Docket No. 98-82, at 9-13.

²⁴Joint Comments of Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc., CS Docket No. 98-82, at 12-14.

equity interest. In other words, the Commission should only permit passive investors to invest in excess of 5%, up to 33%, without attribution in reliance upon a single majority shareholder if the minority investor has no additional business relationships that provide any means to influence the single majority shareholder's decision making.

26. The Commission should also use this proceeding to unequivocally state what it has indicated for years -- that an entity that has a right to representation on a company's board of directors has an attributable interest in that company.²⁵ Members of a board of directors wield immense influence over a company's operation. It would be nonsensical for the Commission to find that a company that holds a 5% in a widely-held publicly-traded corporation wields enough influence to be attributable, but that same company with a 4% interest in the corporation and a representative on the corporation's ten member board of directors (representing a 10% vote) is not attributable. Given a choice of how to best influence a corporation, a seat on a corporation's board of directors provides far more power than a 5% equity interest. Although Time Warner,

²⁵*See, e.g., Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606 (1995), at ¶ 96 ("While corporations have no obligation to give debtholders voting rights, except in bankruptcy, it is not unusual for a corporation's bankers to have representation on the firm's board of directors. (In such cases, of course, attribution attaches to the directorship.)"); *Telemundo Group, Inc.*, 10 FCC Rcd 1104 (1994), at Footnote 8 (finding that holder of warrants and preferred stock who lacked the right to designate a director was not attributable until it acquired such rights by exercising its warrants); *see also Turner Broadcasting System, Inc.*, 11 FCC Rcd 19595 (1996), at ¶¶ 17, 19 (finding no attributable interest in cable system because TCI transferred its shares in cable system operator to another company owned by TCI in which, among other things, TCI's right to elect directors had been eliminated); *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd 2654 (1992) at Footnote 11 ("[c]ombining an otherwise non-attributable ownership interest with a positional interest that provides significant opportunities to influence a licensee's affairs will continue to trigger our [multiple ownership] Rules."); *cf. Request of Paramount Communications, Inc.*, 7 FCC Rcd 1390 (1992), at ¶ 9 (waiver of duopoly rule granted in explicit reliance on Paramount's representation that it would forgo representation on the board of the licensee and thereby limit its influence over the licensee).

Inc. (“Time Warner”) argues that “attribution is not triggered because an entity merely holds the power to appoint less than a majority of the board of directors of a corporation in which that entity does not otherwise hold an attributable interest,”²⁶ Time Warner does not provide any Commission decision supporting this position. To the contrary, Time Warner confirms that a position on the board of directors does carry great influence when it mentions earlier in its comments how one of its minority investors was unable to influence any management decisions because the minority investor was prevented from gaining a seat of its board of directors.²⁷

27. Finally, with regard to the other discrete business relationships that the Commission has proposed to review, Univision urges the Commission to approach each one with a simple question: is the relationship consistent with that of a passive investor? Those relationships that require active involvement by the investor, such as attending director meetings and reviewing budget proposals, not only provide avenues of influence, but would not be insisted upon by the investor unless the investor actually expected that the time committed to performing these activities would actually bear fruit. On the other hand, truly passive business relationships, such as approval rights over certain long-term fundamental matters which rarely arise (e.g. the sale of the cable system itself), do not offer an investor enough of an opportunity to exert influence such that the relationship rises to the level of attribution.

²⁶Comments of Time Warner, Inc., CS Docket No. 98-82, at 64.

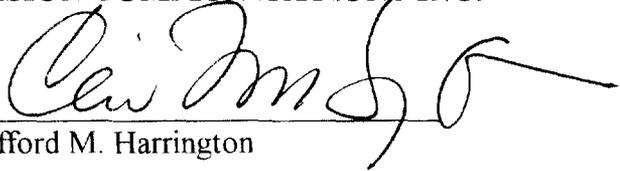
²⁷Comments of Time Warner, Inc., CS Docket No. 98-82, at 51-52.

CONCLUSION

For the reasons set forth above, Univision urges the Commission to maintain the cable television attribution rules consistent with these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Renee Williams, do hereby certify that I have this 3rd day of September, 1998, mailed by first-class United States mail, postage prepaid, copies of the foregoing "**REPLY COMMENTS OF UNIVISION COMMUNICATIONS INC.**" to the following:

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