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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Review of the Commission's Regulations
Governing Television Broadcasting

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MM Docket No. 91-221

Television Satellite Stations Review of
Policy and Rules

MM Docket No. 87-8

To: The Commission

**COMMENTS OF CBS CORPORATION
ON "TIE-BREAKER" PROPOSAL**

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TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
I. In the September 9 Public Notice, the Commission Appears to Underestimate the Extent to Which Conflicts May Arise Under the New Multiple Ownership Rules	2
II. The New Broadcast Ownership Rules Require a Processing Method That Considers the Presence of LMAs and Non-Controlling Attributable Interests in Addition to Transfer and Assignment Applications	4
III. “First-to-Contract” is the Fairest and Easiest-to-Administer Method of Resolving Conflicts	7
A. The “First-to-Contract” Method is Fair Because It Rationally Determines Treatment of Conflicting Contractual Arrangements	7
B. The “First-to-Contract” Method Is Easy to Administer As It Only Requires the Commission to Determine the Date of Execution or Public Announcement of Arrangements	11
IV. If the Commission Adopts a Random Selection Methodology, It Should Not Favor LMAs or Parties Acquiring Non-Controlling Attributable Interests Over Applicants Seeking to Acquire a Station Outright	12
V. Conclusion	14

SUMMARY

The Public Notice requesting comment on how to resolve conflicts resulting from implementation of the new multiple ownership rules may unintentionally grant priority to entities with LMAs or non-controlling attributable interests at the expense of transfer and assignment applicants. Where the interests of such entities and applicants cannot both be permitted under the new rules, the competing interests should be considered “tied” or in conflict.

The Commission should resolve conflicts on a “first-to-contract” basis, whereby conflicting arrangements would be prioritized based upon the order in which parties executed or publicly announced that they have entered into definitive agreements. “First-to-contract” is both fair and easy to administer. It is fair because it would resolve conflicts based on facts existing at the time of contracting. It is easy to administer because it requires the Commission only to determine the order in which conflicting arrangements are executed or publicly announced.

Alternatives to the “first-to-contract” method are fundamentally flawed. The random selection method would rely on an arbitrary lottery to resolve conflicts rather than the rational, objective measurement of the “first-to-contract” method. As noted in the Public Notice, a first-to-file methodology, although inherently objective, would require burdensome (if not impossible) determinations to make.

Should the Commission be persuaded to use a random selection methodology, it should clarify that entities holding LMAs and non-controlling attributable interests will not be given priority over transfer and assignment applicants. Instead, the Commission should include all conflicted parties in the lottery.

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**COMMENTS OF CBS CORPORATION
ON "TIE-BREAKER" PROPOSAL**

CBS Corporation ("CBS") hereby comments on the proposed procedures for processing applications filed pursuant to the Commission's new local broadcast ownership rules. *See* Public Notice, FCC 99-240 (released September 9, 1999) ("Public Notice").

CBS believes that the Public Notice does not take into account all of the circumstances under which conflicts may arise under the new rules. For example, the Public Notice does not contain any reference to how the Commission proposes to resolve conflicts that arise if more than one licensee of a television station in a market enters into a local marketing agreement ("LMA"), acquires a non-controlling attributable interest or proposes to buy a station in the same market in which all of these transactions cannot be accommodated under the

Commission's new broadcast multiple ownership rules.¹ These conflicts seem incapable of rational resolution using the proposed random selection method.

In lieu of using random selection to resolve such conflicts, the Commission should initially determine processing order on a "first-to-contract" basis. As discussed below, the "first-to-contract" method would be both fair and easy to administer, and would provide a rational means for resolving any conflicts that may arise.

I. In the September 9 Public Notice, the Commission Appears to Underestimate the Extent to Which Conflicts May Arise Under the New Multiple Ownership Rules.

The Public Notice requests comment on the procedures for processing applications filed pursuant to the new broadcast multiple ownership rules. As the Commission acknowledged in its August 6, 1999 Report and Order, the new rules "could result in two or more applications being filed on the same day relating to stations in the same market and that due to the voice count all applications might not be able to be granted."² In the Report and Order, the Commission stated that it would address how to resolve such conflicts in a subsequent action.

In the Public Notice, the Commission proposes to deal only with conflicts between applications for assignment or transfer of control of broadcast stations filed on the same day.

¹ *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket No. 91-221, MM Docket No. 87-8, FCC 99-209 (released August 6, 1999) ("Report and Order"). The Commission issued errata modifying portions of the Report and Order on August 13, 1999 and September 7, 1999.

² Report and Order at ¶ 150.

Conflicts, however, may arise under the new rules in numerous other ways. Take the following examples:

1. Assume that there are nine independently owned and operated television stations in a Designated Market Area (“DMA”). On November 16, 1999, the date the rules become effective, Station A enters into an LMA with Station B. As a result, on November 16, 1999, only eight independently owned and operated stations remain in the DMA. On November 16, 1999, Station C files an application to acquire Station D. Is Station C precluded from making the acquisition or are the two actions — Station A’s LMA with Station B and Station C’s contract to buy Station D — in conflict? If they are in conflict, how will the conflict be resolved? Station A’s LMA of Station B requires no prior consent of the Commission. On November 16, 1999, it is a *fait accompli*.
2. Assume the facts in #1 above. In addition, on November 16, 1999, Station E acquires a non-controlling attributable interest in Station F. The acquisition requires no FCC application. Putting aside Station C’s application to acquire Station D, which of the following two actions, Station A’s LMA of Station B or Station E’s acquisition of Station F, both of which require no FCC application — will be permitted? How will the Commission decide?
3. Assume the facts in #2 above, but instead of Station A entering into the LMA with Station B on November 16, 1999, the day that the new rules become effective, Station A enters into the LMA on November 12, 1999, as permitted under existing law. Is there a conflict, or is Station C now precluded from acquiring Station D and is Station E precluded from acquiring an attributable interest in Station F?
4. Assume the facts in #3 above, but instead of Station C filing an application to acquire Station D on November 16, 1999, it files the application on November 12, 1999. (In the Report and Order, the Commission stated that it will not “accept” an application filed pursuant to the Report and Order until the effective date. The Commission did not prohibit applicants from filing prior to that date; as drafted, the Report and Order merely delays the date by which the Commission may *accept* the application.) Will Station C’s application to acquire Station D have priority over an application filed on November 16, 1999 or will Station C be precluded from acquiring Station D because of Station A’s LMA with Station B?
5. Assume that on November 16, 1999, only Station C files the application to acquire Station D, and on November 17, 1999, Station A enters into an LMA with Station B. Is Station C now precluded from completing the acquisition

because fewer than eight independently owned and operated stations will remain in the DMA post-merger? (Under the new Section 73.3555(b) of the Commission's rules, as modified by the Erratum released August 13, 1999, one company may own two television stations in a market if, *after* the transaction, at least eight independently owned stations will remain. Prior to the Erratum, the rule required that there be more than eight independently owned station at the time of the filing of the application.) If not, how will the Commission resolve the conflict, recalling that Station A is not required to apply to the Commission for consent to enter into the LMA?

Because the Public Notice refers only to a narrow class of potential conflicts — applications to acquire stations filed on the same day — it does not begin to deal adequately with the potential for conflicts that may arise. The Public Notice thus narrowly focuses on how to resolve “ties” — it proposes a lottery, but seeks comment on alternatives, such as auctions or first-come, first-served, that are “both fair and easy to administer.”

In CBS's view, the proper focus of the analysis should be on how rationally to determine when various actions — entering into an LMA, the acquisition of non-controlling attributable interests, or the acquisition of a station — are in conflict; how to determine the priority among conflicting proponents; and how, in the event of a true tie, to resolve the conflict.

II. The New Broadcast Ownership Rules Require a Processing Method That Considers the Presence of LMAs and Non-Controlling Attributable Interests in Addition to Transfer and Assignment Applications.

As explained above, the Public Notice does not contemplate all of the potential conflicts that may ensue upon the effective date of the Report and Order. Although the Commission has acknowledged that the new rules could result in conflicts involving two or more transfer or assignment applications filed on the same day, the presence of attributable

LMAs and non-controlling attributable interests in certain markets could prove to be equally problematic.

As explained in Section I, for example, if an entity that owns and operates a station in a market with nine independently owned and operating television stations enters into an LMA attributable under the new broadcast ownership rules, the Commission would immediately upon the effective date of the Report and Order treat the licensed and brokered station as commonly owned. The resulting reduction in market voices, therefore, could preclude the possibility of another licensee in the market obtaining a second station through an assignment or transfer application. Similarly, if an entity that owns and operates one station in a market with nine independent voices acquires a non-controlling attributable interest in a second station, the result would be the same — that is, a licensee seeking to acquire a second station by assignment or transfer would be prevented from doing so.

These scenarios illustrate the incomplete nature — and inherent inequity — of the Public Notice. By contemplating only the presence of transfer and assignment applications, and by not addressing LMAs and non-controlling attributable interests, the Public Notice does not consider all contractual arrangements that could have an effect on a given market. In effect, the Public Notice, no doubt unintentionally, appears to leave open the possibility of unfairly granting priority treatment to parties creating LMAs or acquiring non-controlling attributable interests to the detriment of parties to transfer and assignment applications.

Adding to the problems associated with the Public Notice is the apparent possibility that entities with LMAs and non-controlling attributable interests could benefit from their preferential treatment vis-à-vis transfer and assignment applicants regardless of when entered

into or acquired. Thus, under the proposals set forth in the Public Notice, an applicant could be prevented from acquiring a second station if a licensee had entered into an LMA prior to release of the Report and Order, if a licensee had entered into an LMA during the interim period between adoption and the effective date of the Report and Order, or indeed if a licensee entered into an LMA on or after the effective date of the Report and Order but prior to the Commission's decision on the pending assignment or transfer application — regardless of when the applicant contracted to acquire the second station.

The failure of the Public Notice to account for these other scenarios makes clear the need for a mechanism that not only prioritizes transfer and assignment applications, but one that also equitably establishes an applicant's processing position relative to entities with LMAs or non-controlling attributable interests. CBS believes that the critical first step that the Commission must take is to make clear that entities with LMAs and non-controlling attributable interests will not receive priority at the expense of applicants for assignment or transfer of control. Specifically, applicants should not be precluded from obtaining a second station in a market simply because of the presence of an LMA or non-attributable interest. Instead, where such parties hold or propose to hold such interests, not all of which would be permitted under the multiple ownership rules, the Commission should consider these interests to be in conflict, and then determine the most equitable method to resolve such conflicts.

III. “First-to-Contract” is the Fairest and Easiest-to-Administer Method of Resolving Conflicts.

The Public Notice announced that the Commission’s standard for resolving conflicts should be “both fair and easy to administer.” With this standard in mind, CBS believes that the Commission should determine the order in which conflicts are resolved on a “first-to-contract” basis. Under the “first-to-contract” method, conflicting arrangements would be prioritized based upon the order in which parties executed or publicly announced that they have entered into definitive agreements implicating the multiple ownership rules. The first-to-contract rule could be applied equally to transferees and assignees seeking to acquire a second station as well as to entities entering into attributable LMAs or acquiring non-controlling attributable interests.

The “first-to-contract” method is both fair and easy to administer. The proposal is fair because it provides the Commission and applicants with an objective — rather than random — means to ascertain compliance with the voice count test. In addition, the proposal is easy to administer because it only requires the Commission to determine the date of execution or public announcement of conflicting arrangements.

A. The “First-to-Contract” Method is Fair Because It Rationally Determines Treatment of Conflicting Contractual Arrangements.

The “first-to-contract” method offers a fair and rational means for resolving conflicts involving contractual arrangements. The fairness of the method results, in part, from the fact that such conflicts would be resolved based on facts existing at the time of contracting. For example, if a licensee is the first to announce publicly that it has entered into a definitive agreement involving stations in a market with nine independent stations, it would have done

so with the knowledge that it could, under the new TV duopoly rules, obtain a second station in the market because eight independent stations would remain post-merger. Accordingly, grant of this licensee's application would justifiably be expected as the Commission would have no cause not to grant the application. Subsequent parties would also receive fair treatment under the "first-to-contract" method because these entities would have entered into their contractual arrangements with the knowledge that a party had already contracted and announced an agreement that might limit a subsequent party's ability to acquire a station. Thus, the subsequent party's contractual expectations would not be upset.

CBS acknowledges that its argument may be viewed as self-serving. On September 6, 1999, CBS and Viacom Inc. executed a Merger Agreement, and on September 7, 1999 that merger was publicly announced. On September 8, 1999, CBS filed the Merger Agreement with the Securities and Exchange Commission ("SEC") on Form 8-K. The proposed merger would result in the surviving entity owning and operating two television stations in one or more markets, thereby implicating the newly revised TV duopoly rules.

A subsequent party might argue that it could not have known in advance that the "first-to-contract" method would determine the order in which conflicting arrangements are resolved. However, CBS emphasizes the fact that *no* methodology — including the proposed random selection method — could have been anticipated, given the Commission's decision in the Report and Order to address the issue at a later date. The Commission did not issue the Public Notice, in which it suggested for the first time that it might use a lottery to resolve conflicts, until September 9, 1999 — three days *after* the date of the CBS/Viacom Merger Agreement. Thus, it is irrelevant that a subsequent party did not receive advance notice of the

adoption of the “first-to-contract” methodology. No one received advance notice of any means to resolve conflicts.

Even had the random selection method been anticipated, however, the advance notice would provide little comfort to the business and financial communities, which have a reasonable expectation that agencies will regulate in a manner that is not random and arbitrary. Businesses with multi-billion dollar arrangements at stake have an understandable need for agency action to be consistent with the regulatory situation at the time these arrangements are made — and an equal need to avoid having reasonable expectations thwarted by mere chance. Similarly, the financial community relies on regulatory predictability and consistency when determining its investment decisions. Because of the capricious nature of random selection, the adoption of that method to resolve conflicts — with or without advance notice — should be avoided.

The “first-to-contract” method is also fair in its treatment of applicants relative to entities holding attributable LMAs or non-controlling attributable interests. Under the “first-to-contract” method, the preferential treatment granted to such arrangements entered into after the Report and Order would be eliminated because each agreement would be treated as determined by the date of the agreement’s execution or public announcement. In this way, the Commission would avoid inadvertently granting priority to certain agreements at the expense of other agreements. Thus, CBS’s proposal is not entirely self-serving. To the contrary, the “first-to-contract” method could potentially prejudice CBS, because LMAs executed or publicly announced prior to September 6 or 7, 1999, would have priority over TV duopolies resulting from the CBS/Viacom merger.

In addition to being a fair mechanism for resolving conflicts, the “first-to-contract” method is also a rational one, as it is based solely on an objective measure — namely, the order in which contractual arrangements are executed or publicly announced. Although evidence of the date of execution or public announcement could take many forms, CBS suggests that the widely disseminated issuance of a press release announcing an arrangement or a public filing with the SEC or the FCC would satisfy this requirement. Should it become necessary to distinguish between two arrangements that were executed or publicly announced on the same day, the Commission should only give credit to a binding, definitive agreement. This “tie-breaker” would prevent an opportunistic party from publicly announcing a “letter of intent” on the same day as the public announcement of a *bona fide* definitive agreement for the sole purpose of blocking grant of an FCC application filed pursuant to the *bona fide* agreement.

With the “first-to-contract” method, the Commission would have a rational, objective means for resolving conflicting contractual arrangements. In sharp contrast, the random selection method, if adopted, would rely on an arbitrary lottery to resolve such conflicts. Although CBS does not question the use of random selection in situations where competing parties are in fact indistinguishable (*i.e.*, “tied” because they entered into conflicting contracts on the same day), it does challenge the assumption that applicants are necessarily tied simply based upon the same-day filing of their applications. Indeed, the Commission has in the past rejected the assumption that simultaneously filed applications are by default tied, and has instead looked beyond the application’s filing date to determine a more rational measure to

distinguish among the applications.³ The adoption of the “first-to-contract” method, with its objective ordering of conflicting arrangements based upon date of execution or public announcement, would provide the Commission with the rational “tie-breaker” it needs to distinguish between such arrangements, and thereby would avoid leaving resolution of conflicts to mere chance. It would also be consistent with one of the underlying objectives of the Report and Order — namely, to bring predictability and stability to the multiple ownership rules.⁴

B. The “First-to-Contract” Method Is Easy to Administer As It Only Requires the Commission to Determine the Date of Execution or Public Announcement of Arrangements.

In addition to being a fair method of resolving conflicting arrangements, the “first-to-contract” method would also be easy for the Commission to administer. The “first-to-contract” method requires the Commission only to determine the order in which conflicting arrangements are executed or publicly announced, and the Commission could place this burden on the parties.

³ For example, prior to implementation of an electronic call sign application procedure that eliminated conflicts associated with applications filed on the same day, the Commission, when confronted with simultaneously filed applications, would assign a call sign to the station having the longest continuous record of broadcasting operation under substantially unchanged ownership and control. 47 C.F.R. § 73.3550(h) (1998). The Commission amended Section 73.3550 and adopted a purely first-come, first-served system of filing electronically applications for call signs.

⁴ See Separate Statement of Chairman William E. Kennard, MM Docket No. 91-221, MM Docket No. 87-8, FCC 99-207 at 80 (released August 6, 1999) (the Report and Order “will provide broadcasters with the certainty they need to make rational business judgments in the marketplace”).

When compared to the first-come, first-served method, the administrative ease of the “first-to-contract” method is pronounced. Although the first-come, first-served method — like the “first-to-contract” method — is inherently fair in that it gives priority to a party that is “first in time,” the difficulties associated with applying a first-come, first-served methodology would overcome whatever advantages it may provide. For example, it would require, as the Commission itself noted, a determination of which application was filed first on a minute-by-minute (or even second-by-second) basis. Not only would this method necessitate making exacting determinations that are administratively burdensome (if not impossible), it would encourage an unseemly “rush to the Commission” by applicants eager to be the first to file on the effective date of the Report and Order. Further, it is not clear how first-come, first-served would be used to decide conflicts involving LMAs or non-controlling attributable interests. Because the “first-to-contract” method poses none of these administrative problems, CBS maintains that it is clearly preferable to the first-come, first-served method and should be adopted by the Commission.

IV. If the Commission Adopts a Random Selection Methodology, It Should Not Favor LMAs or Parties Acquiring Non-Controlling Attributable Interests Over Applicants Seeking to Acquire a Station Outright.

In the event that the Commission is persuaded to use a random selection methodology, the Commission should clarify that attributable LMAs and non-controlling attributable interests will not be given priority over transfer and assignment applications when determining the voice count for purposes of the new TV duopoly rules. As discussed previously, CBS questions the fairness of granting priority to attributable television LMAs and

non-controlling attributable interests at the expense of transfer and assignment applications. By favoring the former over the latter, the Commission in effect would place entities with LMAs or non-controlling attributable interests at the head of the TV duopoly line. Not only would this treatment be contrary to basic notions of fairness, it would disrupt the contractual expectations of parties, like CBS/Viacom, who entered into agreements reasonably anticipating ownership of a second station in a market following the relaxation of the Commission's broadcast ownership rules.

The Commission therefore should include all conflicted parties in the lottery. For example, if on November 16, 1999, an applicant files an application to acquire a second station in a DMA, and the application conflicts with an attributable LMA, both the LMA and the application to acquire the second station should be included in the lottery. Otherwise, the Commission's procedures would have the practical effect of giving LMAs priority over applications. This result would be particularly unjust if the LMA were merely preliminary to an acquisition if, for example, it were coupled with an option to purchase. By favoring the LMA, the Commission would for all practical purposes also grant the broker the exclusive right to acquire a second station in the market.

Under these circumstances, it is clearly unfair not to treat newly attributable LMAs, newly acquired non-controlling attributable interests, and applications for second stations in DMAs as tied. All such arrangements entered into prior to the effective date of the Report and Order should, if in conflict, be subject to the lottery.

V. Conclusion

As explained in Sections I-III above, CBS believes that the "first-to-contract" method is a more rational means than random selection of resolving conflicts that result from implementation of the new multiple ownership rules. In addition, the "first-to-contract" method is both fair and easy to administer. As such, CBS believes that the Commission should adopt the "first-to-contract" method to resolve conflicts. However, should the Commission adopt a random selection methodology instead, it should clarify that LMAs and non-controlling attributable interests will not be afforded preferential treatment over transfer and assignment applications.

Respectfully submitted,

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