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BEFORE THE

# Federal Communications Commission

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| In the Matter of | ) | |
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| Processing Order for Applications | ) | MM Docket No. 91-221 |
| Filed Pursuant to the Commission's | ) | MM Docket No. 87-8 |
| New Local Broadcast Ownership Rules | ) | |
| | ) | |
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To: The Commission:

**COMMENTS OF**
**SINCLAIR BROADCAST GROUP, INC.**

On August 5, 1999 the Commission released a Report and Order establishing new local ownership rules for television broadcasting. *Report and Order*, MM Docket Nos. 91-221 & 87-8, FCC 99-209, released August 5, 1999 ("*Local Ownership Order.*") Subsequently, on September 9, 1999, the Commission released a Public Notice (the "Public Notice") seeking comments on the issue of processing multiple assignment or transfer applications in which the purchaser seeks a second television station in its market. *Public Notice*, FCC 99-240, released September 9, 1999. Sinclair Broadcast Group, Inc., ("SBG"), by its attorneys, and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits the following comments in response to the Commission's Public Notice requesting comments concerning the processing of multiple applications under the new local ownership rules.[1]

[1] Publication of the Public Notice in the Federal Register occurred on September 17, 1999, stating that the deadline for filing comments in this matter was October 4, 1999; therefore, these comments are timely filed.

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## I. INTRODUCTION

In its Public Notice the Commission seeks comments on its proposal to use a method of random selection to select an applicant where two or more applications are filed seeking a duopoly within a particular television market. SBG respectfully submits that the Public Notice raises important issues which are inextricably tied to the new local ownership rules and any resolution of the choice of processing rules must await the consideration of petitions for reconsideration of the Local Ownership Order. The Commission should stay the processing of applications pending a complete analysis in order to avoid massive disruption to the industry.

As demonstrated below, the new rules adopted by the Commission are arbitrary and capricious and must be revisited. Moreover, the proposal to use random selection to choose among broadcast applicants is an abdication of the Commission's obligation to make a public interest determination prior to assigning or transferring a license. Finally, there are better methods of selecting among applicants which will serve the public interest and the Commission should consider those methods before resorting to the use of a forced air blower and ping-pong balls to select licensees.

## II. DISCUSSION

### A. On Reconsideration, the Commission Should Modify its New Broadcast Ownership Rules

On reconsideration, the Commission should modify its recently adopted Local Ownership Rules so that it does not have to deal with situations where only one application can be granted. The Commission should allow licensees to own two television stations within a DMA subject to the determinations of the Department of Justice's Anti-trust Division. The Commission's desire

for "diversity" cannot be determinative because the Commission has not defined that term and has not indicated how that criteria supports its eight voice standard. The DOJ has greater expertise in assessing the anti-competitive effects that a proposed merger may have on a particular market; therefore, the Commission should not squander its limited resources to duplicate a review which is better left to an agency specializing in competitive issues. In a time of ever-shrinking budgets, there is no reason for an overlapping of jurisdiction between the FCC and the DOJ in this area. If this modification is adopted, there will be no need for a forced air machine and ping-pong balls.

If the Commission does not permit licensees to freely hold duopolies subject to the DOJ's review, the FCC should resolve applications filed on the same day based on public interest considerations. In determining the order in which assignment applications seeking a duopoly are processed, the Commission should give priority to an assignee or transferee that is presently involved in a time brokerage or local marketing agreement in the market in which it is seeking a second station. On the day the Commission's new attribution rules become effective, the broker or programmer will hold an attributable interest in the subject station.

Since a station involved in a TBA or LMA will be an attributable interest on the day that the new rules take effect, where a time broker or programmer can demonstrate in connection with the assignment or transfer of a station that it has made a contribution to the public interest, its application should be granted first.[2] In situations where a party has contributed to the public

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[2] Of course, in a market with nine voices including one LMA'd station, on the effective date of the rules the number of voices is reduced to eight, thus precluding (under the rules) the combination of any stations in that market other than the two stations related by the LMA.

interest by creating increased viewership, adding a local newscast, resuscitating a weak station, or facilitating the acquisition of new equipment, and there is no other similarly situated applicant, the application of that time broker or programmer should be granted first. In the event that there are multiple LMAs or TBAs in a single DMA and all the parties can make a showing of a substantial contribution to the public interest under the factors mentioned above, then the Commission should waive its rules and grant all such applications, assuming of course, its rules are not changed on reconsideration. As a last resort, the Commission could conduct a paper hearing to make its decision. All of these alternatives offer a far more reasoned approach to the selection process and a far better means of serving the public interest than the proposal set forth in the Public Notice.

## B. Comments On The Processing of Applications Under the FCC's New Local Broadcast Ownership Rules Must Be Considered Concurrently With Petitions for Reconsideration of Those Rules

There are a number of serious flaws in the Commission's new broadcast ownership rules which may render moot the Commission's proposed method of dealing with multiple applications. Examples of the flaws are set forth herein. Sinclair intends to file a petition for reconsideration of the Local Ownership Rules setting forth its concerns in greater detail.

### 1. The adoption of the eight voices test is arbitrary and capricious

The Commission's adoption of the eight voices test in the Local Ownership Rules is an arbitrary and capricious decision, lacking any rational basis or support. The Commission's Report and Order provides no reasoning or insight as to how the Commission selected the number eight. Although purportedly the new rules are based on enhancing "diversity," nowhere in the Report and Order does the Commission define "diversity" or articulate how this diversity

will serve the public interest. Instead, the Commission simply states, "[t]he eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity."[3]

### 2. The differing voice tests for radio and television applicants are arbitrary and capricious

At the same time that the Commission selects eight voices as the standard for television duopolies, ignoring the voices of radio stations, newspapers, cable television, and DBS within the television market, the Commission adopts rules for radio-television cross ownership which count numerous voices besides independently owned, full power television stations. The Commission has provided no distinction justifying the creation of two different standards for radio-television cross ownership and television duopolies. Once again, the Commission's decisions lack any rational basis and are arbitrary and capricious.

Any decision on the processing of applications must await the resolution of the petitions for reconsideration which are due to be filed shortly. The substantial flaws in the rules necessitate reconsideration and subsequent modification of the rules by the Commission that would render the instant issue moot or affect the processing of applications.

## C. The Commission's Proposal to Use Random Selection to Choose Among Applicants is Contrary to the Public Interest

### 1. The Communications Act does not provide the Commission with authority to use random selection to choose among broadcast applicants

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[3] Local Ownership Order at ¶67.

The Commission's authority to use lotteries is derived from Section 309(i) of the Act. The Commission's prior applications of Section 309(i) sought to handle large backlogs of applications which had lingered for a substantial period of time. In these situations, the Commission determined that it was in the public interest to grant the applications as expeditiously, and with as little further financial burden to the parties, as possible. Section 309(i) does not provide the Commission with the authority to use a lottery to select the order in which it will process applications to transfer or assign broadcast licenses. Section 309(i) provides limited authority to utilize random selection for the grant of an initial license in situations in which significant public benefit would result from the use of a lottery.[4] In granting authority to hold a lottery under Section 309(i), the Conference Report issued by Congress stated that Section 309(i) was:

> [I]ntended to alleviate many of the delays and burdensome costs faced by both applicants and the Commission in an initial comparative licensing proceeding with mutually exclusive applicants. Use of a lottery system established pursuant to this subsection is discretionary with the Commission and such use is appropriate in the public interest within the parameters set forth below.
>
> Relevant factors for the Commission's consideration in determining whether a lottery would serve the public interest would include: whether there is a large number of licenses available in the particular service under consideration; whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; whether there is a significant back-log of applications; whether employing a lottery would significantly speed up the process of getting service to the

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[4] 47 U.S.C. § 309(i); *see also*, *Telecomm. Research and Action Center v. FCC*, 836 F2d 1349, 1358 (D.C. Cir 1988). Furthermore, in passing the "first lottery bill in 1981, Congress and the Commission both focused their attention on the use of lotteries as total substitutes for traditional time-consuming comparative hearings. The Chairman of the FCC testified that the lottery bill as initially proposed 'would permit the Commission to dispense with comparative hearings...'" Id. at 1359 (*citing, Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, S. 601, 97th Cong., 1st Sess. 7 (1981)).

> public; and whether selection of the licensee will significantly improve the level [of] (sic) diversity of information available in the community versus the use of the traditional comparative hearing process. The Commission, in making this public interest assessment when deciding whether to utilize a lottery in a particular instance, should consider all of these factors.[5]

The courts have upheld the Commission's conclusion that Section 309(i) authorizes lotteries only when these decisional criteria are met.[6] In the instant situation, the Commission has not made a showing under these criteria that the use of a lottery would be in the public interest, especially in a situation involving other than an initial grant of a license.

Applying Congress's factors to the present situation clearly demonstrates that choosing among multiple assignment or transfer applicants seeking a duopoly is beyond the scope of the lottery statute. First, none of these applications will involve the grant of an initial license. There is not a large backlog of applicants seeking assignment or transfer in order to own a second television station within a market. There are not a large number of licenses available in the service. There are not a large number of mutually exclusive applications. There will not be an inordinate amount of time spent processing a handful of potential applications. The extension of

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[5] H.R. Conf. Report No. 765, 97th Cong., 2d Sess. 37 (1982); 1982 U.S.C.A.N.N. 2261, 2281. Although the articulation of these factors in the Conference Report does not rise to the level of a statutory requirement, the factors, combined with the then pressing need to find an alternative to lengthy comparative hearings, are instructive as to Congress's intent in granting the Commission the authority to hold lotteries.

The Conference Report goes on to state that except for low power television or the initiation of a new service involving numerous licenses, "the Commission would have an extremely heavy burden to meet in attempting to justify use of a lottery for purposes of granting an individual license for a full-power station." Id. at p. 2282.

[6] *Telecomm. v. FCC*, at 1352 (*citing Amendment of Part 74*, Second Report and Order, 101 FCC 2d 50, 67-68 (1985).

Section 309(i) to a situation unsupported by Congress's criteria would be a significant disservice to the public interest.

### 2. The random selection of assignment applications is an abdication of the Commission's mandate to regulate in the public interest

Rather than deferring its decision-making to the whimsy of a forced air machine and ping-pong balls, the Commission should select a qualified applicant based on a public interest analysis as demanded by Section 310(d). Section 310(d) provides that construction permits or station licenses may only be transferred, assigned or disposed of "upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby."[7] The public interest standard formed the substantial foundation for the Commission's actions in the three recent Report and Orders modifying its ownership rules. The public interest is not furthered by the use of a lottery in this case. Taken to its logical extreme, the use of random selection destroys the basis for having a Federal Communications Commission if an important decision is relegated to sheer chance. SBG submits that the proposals set forth above will better serve the public interest than the use of random selection as they allow for an objective determination that the grant of a particular assignment or transfer application would be in the public interest, convenience, and necessity.

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[7] 47 U.S.C. §310.

## III. CONCLUSION

The Commission does not have the authority to use a lottery to select the order in which it will process applications seeking to assign or transfer a station that would result in a duopoly. Rather than abdicating its role of regulating the broadcast spectrum in the public interest to a forced air machine and ping-pong balls, the Commission should adopt SBG's proposals set forth above. In this manner, the Commission can determine the order in which applications filed on the same day will be processed in a prudent, easy to administer, and fair method which reflects the public interest analysis required by the Communications Act.

Respectfully submitted,

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Dated: October 4, 1999

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## CERTIFICATE OF SERVICE

I, Marcella Schiappacasse, a secretary with the law firm of Fisher Wayland Cooper Leader & Zaragoza, L.L.P., do hereby certify that a copy of the foregoing "***COMMENTS OF SINCLAIR BROADCAST GROUP. Inc.***" was this 4th day of October, 1999 served by hand delivered on:

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