DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 18 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
Federal Communications Commission
Washington, DC 20054**

In the Matter of	)	
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	
Television Satellite Stations Review of	)	MM Docket No. 87-8
Policy and Rules	)	
Review of the Commission's	)	
Regulations Governing Attribution	)	MM Docket No. 94-150
Of Broadcast and Cable/MDS Interests	)	
Review of the Commission's	)	
Regulations and Policies	)	MM Docket No. 92-51
Affecting Investment in the Broadcast	)	
Industry	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

**PETITION FOR PARTIAL RECONSIDERATION
AND CLARIFICATION OF THE REVISED BROADCAST
LOCAL OWNERSHIP AND ATTRIBUTION RULES
SUBMITTED BY
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

October 18, 1999

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") is seeking partial reconsideration and clarification of several portions of the recently amended broadcast local ownership and attribution rules. NAB believes some minor adjustments are necessary to resolve inconsistencies within the revised rules and to forestall the adverse consequences resulting from application of certain of the rules.

With regard to the amended television duopoly and radio/television cross-ownership rules, NAB believes that the utilization of "voice" tests for these rules will prove disadvantageous to small market broadcasters, especially those that are marginally performing. As adopted, the Commission's voice tests provide the least flexibility to broadcasters in smaller markets, where it is the most needed.

There are, moreover, significant inconsistencies in the voice count requirements and the waiver criteria adopted for the revised duopoly and cross-ownership rules. In particular, NAB asserts that the Commission's decision to consider radio, daily newspapers and cable systems as voices under the radio/television cross-ownership rule, but not under the television duopoly rule, is irrational and unsupportable. NAB accordingly asks the Commission to reconsider its overly restrictive method of counting media voices under the television duopoly rule by including additional types of media (particularly cable television). NAB believes it defies logic to refuse to consider cable as even a single voice when applying a rule concerning competition and diversity within local television markets.

Because it is burdensome and unlikely to promote competition and diversity, NAB also seeks reconsideration of the requirement that all waiver applicants under the amended ownership rules must make a serious effort to sell the station concerned to an out-of-market buyer. Requiring waiver applicants to document their attempts to find out-of-market buyers appears especially burdensome and sterile in situations involving unbuilt stations or stations converting from time-brokerage arrangements into duopolies.

NAB additionally argues that the Commission should eliminate the limits placed on the transferability of station combinations formed under the duopoly and cross-ownership rules. These limitations will prove to be disruptive and will tend to discourage investment in broadcast stations.

With regard to the revised broadcast attribution rules, NAB has serious reservations about the new "equity/debt plus" rule. NAB believes that this rule will diminish the flow of capital to minorities, women and other new entrants in the broadcast industry. Because the rule will discourage existing broadcasters from investing in new entrants (including minority- and women-owned businesses), it will only exacerbate their lack of representation in the broadcast industry. The equity/debt plus rule will also have inconsistent regulatory effects, depending primarily on the capitalization structure of the regulated broadcast companies. For these reasons, NAB requests that the Commission reexamine the equity/debt plus rule, particularly as it relates to the attribution of pure debt.

Before the
Federal Communications Commission
Washington, DC 20054

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	))	MM Docket No. 91-221
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-8
Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests	)))	MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	))))	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	))	MM Docket No. 87-154

TO: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF THE REVISED BROADCAST LOCAL OWNERSHIP AND ATTRIBUTION RULES SUBMITTED BY THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] requests that the Commission reconsider portions of its recent orders adopted in the broadcast ownership and attribution rulemaking proceedings. In these proceedings, the Commission amended its rules for defining the types of interests that are cognizable under the broadcast

[1] NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

multiple ownership rules,[2] and substantially revised the local television and radio ownership rules.[3] NAB believes some minor adjustments and clarifications are necessary to resolve inconsistencies within the revised rules and to forestall the adverse consequences resulting from application of certain of the rules.

I. INTRODUCTION

In the *Ownership Order*, the Commission recognized the continued growth in the number and variety of mass media outlets, as well as the economic efficiencies and public interest benefits generated by common ownership of media outlets. *See id.* at ¶¶ 1, 40. NAB commends the Commission for recognizing the significant changes in the mass media marketplace and revising the television duopoly and radio/television cross-ownership rules to reflect these changes. NAB believes that the Commission generally achieved its stated goal of balancing the efficiencies and public service benefits to be gained from joint ownership of broadcast facilities with its continuing efforts to ensure diversity and competition in the broadcast services. However, NAB has reservations about the utilization of "voice" tests for the local ownership rules, and notes significant inconsistencies in the differing voice count requirements and waiver criteria adopted in the *Ownership Order* for the revised duopoly and radio/television cross-ownership rules. NAB asks that the Commission reconsider its method of counting media voices under the television duopoly rule and its standard for waiving the revised local ownership rules. NAB also requests reconsideration of the limits that the Commission placed on the

---

[2] *Report and Order* in MM Docket Nos. 94-150, 92-51 and 87-154, FCC 99-207 (rel. Aug. 6, 1999) ("*Attribution Order*").

[3] *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 (rel. Aug. 6, 1999) ("*Ownership Order*").

transferability of station combinations formed under the duopoly and cross-ownership rules.

In the *Attribution Order*, the Commission sought "to improve the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees and markets, and facilitate application processing." *Id.* at ¶ 1. NAB supports most of the revisions made to the broadcast attribution rules, but has serious reservations about the new "equity/debt plus" rule. Application of the equity/debt plus standard will, NAB believes, have adverse, unintended consequences, particularly in the flow of capital to minorities, women and other new entrants in the broadcasting industry. NAB also observes that the equity/debt plus rule will have inconsistent regulatory effects, depending in large part on the capitalization structure of the regulated broadcast companies. NAB therefore requests reconsideration of the Commission's decision to adopt the equity/debt plus rule, particularly as that rule relates to the attribution of pure debt.

II. RECONSIDERATION AND CLARIFICATION OF *OWNERSHIP ORDER*

A. The Commission's Utilization Of Voice Tests For The Local Ownership Rules Is Disadvantageous To Small Market Broadcasters.

In the *Ownership Order*, the Commission adopted "voice" tests for the revised radio/television cross-ownership and television duopoly rules. Under both rules, the Commission will now permit a greater degree of common ownership of broadcast stations in the same market, depending on the number of independent media voices remaining in the market after the combination. NAB believes that this reliance on voice tests for purposes of the local ownership rules is ill advised and will, in particular, prove disadvantageous to small market broadcasters.

In this proceeding, the Commission clearly acknowledged that there are economic efficiencies inherent in joint ownership and operation of broadcast stations. *See Ownership Order* at ¶¶ 34-35. The Commission also recognized that the cost savings of joint station ownership may contribute to improved programming and other benefits for the public. *See id.* at ¶ 36. Yet despite this recognition of the economic efficiencies and public interest benefits generated by common ownership, the Commission adopted voice tests that will prevent broadcasters in smaller markets from achieving these efficiencies and providing these benefits.

Given the requirement that a certain number of independent media voices remain in a market after a broadcast station combination, broadcasters serving smaller markets with relatively fewer media outlets will be unable to take advantage of the opportunities presented by joint ownership that will be available to broadcasters in larger markets. For example, television broadcasters in markets with fewer than nine television stations will not be allowed to own or operate a second television station in the same market, due to the duopoly rule requirement that at least eight independently owned and operating full-power television stations remain in the market after any combination. As a practical matter, this restrictive voice count requirement will prevent broadcasters in the majority of markets from achieving the efficiency gains and cost savings associated with joint ownership of two television stations.[4] Thus, the utilization of voice test requirements for the ownership rules will unfairly disadvantage small market broadcasters.

---

[4] NAB has examined the number of television stations in each Designated Market Area ("DMA"), and estimates that there are nine or more independently owned full service television stations in fewer than 50 DMAs. Only in this limited number of large markets will even a single broadcaster be able to take advantage of the economic efficiencies resulting from joint ownership of two television stations.

Adoption of voice count requirements that disfavor small market broadcasters is particularly unfortunate because the benefits to be gained from common ownership are likely to be greater in those smaller markets where the voice tests will prevent such common ownership. According to a study commissioned by NAB in response to the Commission's 1998 biennial review, the positive economic effects generally associated with joint newspaper/broadcast operations are the greatest in smaller markets.[5] Just as joint ownership of newspapers and broadcast stations "could have a significant impact on the efficiency of operations in smaller markets, especially for marginally performing" outlets (*Cross-Ownership Study* at 26), NAB expects that common ownership of small market radio and television stations would produce similarly "significant" efficiency gains.[6] With regard to "marginally performing" small market outlets that would most benefit from joint ownership, NAB specifically notes that, because of their marginal performance, these stations likely add little to diversity in their local markets.[7] Thus, allowing such marginal stations to combine with stronger outlets should not significantly

[5] *See A Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership* by Bond & Pecaro, Inc. at 5-6 (July 21, 1998) ("*Cross-Ownership Study*"). This study found that efficiency gains from joint ownership of newspaper and broadcast operations would be the most significant in proportional terms to small market radio and television stations, where even small cost savings can create a sharp increase in operating profits.

[6] Other parties to this proceeding submitted comments agreeing with NAB's position that the benefits of common ownership of broadcast outlets may be the most significant in smaller markets. *See* February 7, 1997 Comments of Pegasus Broadcast Television, Inc. at 9-14; Association of Local Television Stations at 31. Pegasus in particular argued that the cost reductions associated with common ownership would encourage the creation of new stations in small markets with low total market revenues.

[7] For example, marginal, low-rated stations rarely have the resources to provide local news or even significant local programming at all. *See Ownership Order* at ¶¶ 66, 79.

reduce diversity and competition, even in smaller markets with relatively fewer media voices.

For these reasons, NAB asks the Commission to reconsider its general reliance on voice tests for the radio/television cross-ownership and television duopoly rules. The Commission's existing approach provides the most flexibility for broadcasters in the largest media markets where it is the least needed, and the least flexibility in the smallest markets where it is the most needed. The disproportionately adverse effect that application of the voice count requirements will have on smaller media markets – and in particular for marginally performing broadcast outlets in those markets – warrants reconsideration of these requirements.

B. If The Commission Retains Voice Tests For The Ownership Rules, Additional Types Of Media Should Count As Voices Under The Television Duopoly Rule.

If the Commission ultimately determines to retain voice tests for both local ownership rules, reconsideration of the specific voice count requirements is warranted, as a comparison of the revised radio/television cross-ownership rule with the amended television duopoly rule reveals significant inconsistencies. In the *Ownership Order*, the Commission decided to permit common ownership of a television station and a varying number of radio stations in the same market, depending upon the number of "independent voices" (television and radio stations, daily newspapers and wired cable) remaining in the market after the combination. However, the Commission determined to allow common ownership of two television stations in the same market only if a minimum of eight independently owned and operating television stations will remain in the market after the combination, and at least one of the merging stations is not among the top four-ranked stations in the market. In the context of the television duopoly rule, the Commission refused to consider the other voices (radio, newspapers and cable) that it expressly determined to consider under the radio/television cross-ownership rule.

NAB contends that there is no justification for counting media voices so differently in the context of two similar multiple ownership rules. Both the television duopoly and the radio/television cross-ownership rules are intended to promote diversity and competition in local broadcast markets.[8] Given the shared purpose of these rules, the Commission should consider the same types of media when formulating the terms of both rules.

NAB questions the Commission's refusal to consider other types of media (such as Direct Broadcast Satellite, Open Video Systems, Satellite Master Antenna Television systems, Multipoint Distribution Service systems or the Internet) when counting media voices in the context of the local ownership rules generally. But even assuming that the Commission's decision to exclude these alternative mass media delivery systems was correct, NAB strongly asserts that the Commission's decision to consider radio, daily newspapers and cable as voices in the cross-ownership context, but not in the television duopoly context, was illogical and inconsistent. The Commission included daily newspapers and cable systems in the voice count for the cross-ownership rule because it "believe[d] that such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets." *Ownership Order* at ¶ 113. Because the Commission included

[8] *See Multiple Ownership Rules*, 22 FCC 2d 306, 307 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971) (multiple ownership rules have twofold objective of fostering

newspapers and cable systems in the voice count for purposes of the cross-ownership rule on the grounds that these media are important news sources that compete with radio and television stations, it is contradictory and irrational for the Commission to contend that newspapers and cable systems should be excluded from the voice count in the context of the duopoly rule.

NAB cannot conceive of any rational basis for determining that the same types of media should be regarded as voices under one local ownership rule, but not the other, when both rules serve the same purpose. The Commission cited *no* evidence that newspapers and cable are more competitive with radio than with television, although that seems to be the implied rationale for counting these other media under the cross-ownership rule but not the television duopoly rule. Particularly with respect to the exclusion of cable – a competing video programming source – the terms of the duopoly rule are entirely irrational and unsupportable.

The Commission's contention that no "definitive" empirical studies have quantified the degree to which various media are economic substitutes for broadcast television in local markets certainly does not justify the complete exclusion of all other media from the voice count under the duopoly rule. *See Ownership Order* at ¶ 69. Despite this alleged lack of definitive evidence, the Commission obviously thought there was sufficient evidence as to the economic substitutability of newspapers and cable systems for broadcast stations to count these other media as voices under the cross-

---

maximum competition in broadcasting and promoting diversification of programming sources and viewpoints).

ownership rule.[9] In analyzing the economic concentration in media markets in the context of other broadcast multiple ownership rules, the Commission has, moreover, utilized a local advertising market consisting of radio and television stations, newspapers and cable systems.[10] Even the two most extensive studies in the record in this proceeding both concluded that local advertising markets encompass a wide variety of media (including broadcast stations, cable, newspapers, magazines, direct mail, yellow pages and billboards) and that broadcast television competes with these different types of media. *See Ownership Order* at ¶¶ 31-32.[11] The Commission cannot ignore the weight of existing evidence by merely asserting that such evidence is not definitive (especially if the Commission's standard for definitiveness is unrealistic), and certainly cannot justify the adoption of clearly inconsistent rules on those grounds. Given the Commission's lack of justification for its facially contradictory decisions in the *Ownership Order*, NAB

[9] In this regard, the Commission stated that newspapers and cable systems "compete with radio and television, at least to some extent, as advertising outlets." *Ownership Order* at ¶ 113.

[10] *See, e.g., Stockholders of Renaissance Communications Corporation*, 12 FCC Rcd 11866, 11886 (1997) (analyzing South Florida media market at issue in request for waiver of newspaper/broadcast cross-ownership rule).

[11] These studies also indicated that the data (primarily price information) required to demonstrate quantitatively the extent to which the various media are substitutable in local advertising markets is simply not available. Because transaction prices in the advertising market result from negotiations between individual buyers and sellers for each advertising contract, this price information is not publicly available. *See Ownership Order* at ¶¶ 31-32. Thus, to satisfy the Commission's demand for definitive "evidence quantifying intermedia substitutability" (*Ownership Order* at ¶ 30), commenters would have had to submit studies that apparently cannot even be conducted due to the lack of the necessary data.

believes that the adoption of a voice test limited to television stations under the duopoly rule is arbitrary and capricious.[12]

Even if the Commission remains unwilling to count radio and daily newspapers as voices under the television duopoly rule, the Commission should, at the very least, count cable as a voice. In its 1998 biennial review of the broadcast ownership rules, the Commission found that "[t]elevision stations compete in the market for delivered video programming with cable system operators, wireless cable operators" and "possibly" with Direct Broadcast Satellite ("DBS") operators "serving their 'local' market."[13] In this competitive video marketplace, the formerly preeminent position of broadcast television has continued to erode, especially in relation to wired cable. For example, during the 1997-1998 television season, the four major networks (ABC, CBS, Fox and NBC) accounted for a combined share of only 55% of prime time viewing among all television households (compared to 59% in the previous year).[14] In comparison, the cable

---

[12] Indeed, courts reviewing Commission actions have not hesitated to conclude that inconsistent or contradictory decisions are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See, e.g., Cincinnati Bell Telephone Co. v. FCC,* 69 F.3d 752, 768 (6th Cir. 1995) (FCC's lack of a reasoned explanation for failing to rescind the structural separation requirement applicable to Bell Companies found to be arbitrary and capricious, given the "somewhat contradictory findings" of the FCC during rulemaking at issue); *Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1233 (D.C. Cir. 1993) (FCC's refusal to designate for hearing an issue concerning the real party-in-interest in a radio station application was found to be arbitrary and capricious because FCC "acted inconsistently with its own precedents"); *American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386, 1390-91 (D.C. Cir. 1988) (FCC rule that required telecommunications service carriers to refund earnings in excess of expected rate of return on capital factored into their rates was found to be arbitrary and capricious, because refund rule was "inconsistent with the rate of return prescription it purport[ed] to enforce").

[13] *Notice Of Inquiry* in MM Docket No. 98-35, 13 FCC Rcd 11276 at ¶ 46 (1998).

[14] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report*, 13 FCC Rcd 24284 at ¶ 96 (1998) ("*Fifth*

television industry has continued to grow, in terms of subscribership (serving 65 million television households), channel capacity, advertising revenues, and audience share.[15] Moreover, the recent clustering of cable systems in major population centers will enable cable to compete even more effectively for advertising dollars. *See Ownership Order* at ¶ 37. Wired cable clearly constitutes a formidable competitor to broadcast television in both the delivered video programming and advertising markets, and other multichannel video programming distributors, such as DBS, also provide significant competition to broadcast stations, at least in some markets.[16]

Given cable television's strong competitive position vis-à-vis broadcast television and the large number of channels typically carried on cable systems, it defies logic to refuse to consider cable as even a single voice when applying a rule concerning competition and diversity within local television markets.[17] NAB similarly believes that

---

Video Report"). *See also* Paul Kagan Associates, Inc., *TV Program Investor* (June 21, 1999 and Aug. 6, 1999) (examination of broadcast network ratings over the last two decades shows that ratings for the top 10 shows in 1998-1999 have moved close to the ratings for the bottom 10 shows for the 1980-1981 season, even though television viewership per household has grown over the past two decades).

[15] As the Commission itself has noted, "viewership of non-premium cable networks has grown significantly over the past decade, while viewership of broadcast television stations has steadily declined." *Fifth Video Report* at ¶ 22. Reflecting their higher audience viewership, the advertising revenue of cable networks increased 16% from 1996 to 1997. *Id.* at ¶ 95.

[16] DBS currently provides up to 240 channels to over seven million subscribers, and Multipoint Distribution Service ("MDS") systems serve approximately one million subscribers. *See Ownership Order* at ¶ 29.

[17] Cable should, in fact, arguably be considered as more than one voice, particularly if a local cable news channel is carried on a multi-channel cable system. Because "diversity of viewpoints in local news presentation is at the heart" of the Commission's "diversity goal" (*Ownership Order* at ¶ 66), the Commission should consider counting cable systems with local cable news channels as more than one voice under the duopoly rule.

other competing multichannel video services, such as DBS and MDS, should be counted as at least a single voice in those markets where they are widely available. When examining diversity and competition issues for purposes of the television duopoly rule, the Commission cannot simply ignore video providers that offer numerous channels to viewers in local markets and significant competition to broadcasters.[18]

For these reasons, NAB believes that the Commission erred in the *Ownership Order* in its inconsistent formulation of the television duopoly and radio/television cross-ownership rules. NAB requests that the Commission correct this error by counting radio, daily newspapers and cable systems as voices for purposes of the duopoly rule as well as the cross-ownership rule. If the Commission remains unwilling to make these two local ownership rules entirely consistent, the Commission should, at the very least, count cable as a voice under the terms of the television duopoly rule.

C. The Waiver Criteria Adopted Under The Local Ownership Rules Are Inconsistent, Burdensome And Unlikely To Promote Competition And Diversity.

Significant inconsistencies also exist in the waiver criteria adopted in the *Ownership Order* for the revised duopoly and radio/television cross-ownership rules. The Commission provided for a presumptive waiver of the television duopoly rule in the case of "failed," "failing" and "unbuilt" stations, but determined to waive the cross-ownership rule only in the case of "failed" stations. NAB believes this dichotomy to be

[18] Even if broadcast television does, as the Commission asserts, enjoy a "special, pervasive" impact on society (*Ownership Order* at ¶ 68), NAB does not see how this contention justifies completely ignoring other clearly significant media voices, especially in light of broadcast television's relative competitive decline in relation to other video programming providers.

unjustified, and also objects to certain overly burdensome terms of the waiver criteria, particularly in relation to time-brokered stations and unbuilt stations.

In refusing to allow waivers of the radio/television cross-ownership rule for failing or unbuilt stations, the Commission flatly asserted that it was "not necessary at this time to permit such additional waivers in view of the measured liberalization" of the cross-ownership rule and the earlier "liberalization of the local radio ownership limits." *Ownership Order* at ¶ 118. This conclusory statement does not justify the adoption of inconsistent waiver policies for the television duopoly and radio/television cross-ownership rules, given the shared purpose of the local ownership rules. (*See* Section II.B. above.) The Commission moreover expressly concluded that allowing waivers for failing and unbuilt stations under the duopoly rule would not harm competition and diversity in local markets and would benefit the public interest. *See Ownership Order* at ¶¶ 79, 85. NAB believes this conclusion is equally applicable in the context of the cross-ownership rule.

The adoption of waiver standards for failing and unbuilt stations in the cross-ownership context would also alleviate, to a limited degree, the disadvantages imposed on small market broadcasters by the Commission's voice count requirements. (*See* Section II.A. above.) For example, a struggling small market broadcaster might not be able to combine with another broadcast operation in the same market due to the cross-ownership rule's voice count requirements, and would not qualify for a waiver because the broadcaster had not yet "failed." If the Commission were to adopt a failing station waiver standard, a broadcaster in this situation could join with a stronger station in the same market, and likely "improve its facilities and programming operations, thus benefiting the public interest." *Ownership Order* at ¶ 79. The Commission in fact specifically noted that the failing station waiver standard "may be of particular assistance to struggling stations in smaller markets that are not covered" by the eight voice television duopoly test. *Id.* Given a similarly restrictive voice test in the context of the radio/television cross-ownership rule, the Commission should allow the same failing and unbuilt station waivers under the cross-ownership rule.

In addition to harmonizing the currently inconsistent waiver criteria under the local ownership rules, the Commission should reexamine its standards for establishing a waiver, which are unduly burdensome, especially for time-brokered and unbuilt stations. Specifically, NAB questions the requirement that all waiver applicants must demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to acquire and operate (or construct) the station, and that sale to an out-of-market buyer would result in an artificially depressed price. To make this showing, the Commission specifically stated that a waiver applicant can provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station or permit, and that no reasonable offer from an entity outside the market has been received. *See Ownership Order* at ¶ 76.

Overall, NAB believes that the Commission's existing waiver requirements regarding the documentation of attempts to sell failed, failing or unbuilt stations to out-of-market buyers are unlikely to promote diversity and competition in local markets. Given that the greatest economic benefits of common ownership "occur between stations located in the same market" (*Ownership Order* at ¶ 34), broadcasters trying to sell failed, failing or unbuilt stations are inherently unlikely to succeed in finding out-of-market buyers. Because in-markets buyers would be best able to achieve the cost efficiencies associated with joint ownership that are needed to revive failed and failing stations, the Commission's requirement that owners of struggling, bankrupt or dark stations fruitlessly search for out-of-market buyers constitutes a sterile and burdensome exercise. NAB accordingly requests that the Commission reconsider this portion of its waiver standards.

If the Commission declines to reconsider this general requirement to document out-of-market sale efforts, the Commission should at least clarify the application of this requirement to situations involving time-brokered stations and reexamine the application to unbuilt stations. For example, assume that the parties to a same-market grandfathered (*i.e.*, pre-November 5, 1996) television Local Marketing Agreement ("LMA") want to convert their LMA into a duopoly under the "failed" or "failing" waiver standard. The Commission specifically stated that the waiver applicant's showing in this situation "may be based on the circumstances existing just prior to the parties entering into the LMA." *Ownership Order* at ¶ 147. NAB believes it would be difficult, if not impossible, for the parties here to demonstrate that "active and serious efforts" have been made to sell the brokered station to an entity outside the market. Although the parties' showing may be based "on the circumstances existing just prior" to entering into the LMA, how are the parties supposed to demonstrate that, several years ago, the brokered station could not have been sold to an out-of-market buyer?[19] As a practical matter, NAB cannot conceive

[19] Indeed, it is possible that the owner of the brokered station made no attempt to sell his station several years ago to an out-of-market buyer (or to anyone at all) because the owner decided to enter into an LMA instead. Surely the Commission is not suggesting that the parties seeking to convert a grandfathered LMA into a duopoly must make an active and serious effort to *now* sell the brokered station to an out-of-market buyer. Requiring the parties to an existing LMA to document their efforts to, in effect, terminate

how to make this out-of market sale showing, and, in any event, does not believe that making this showing would advance the Commission's competition and diversity concerns. Converting an existing LMA (particularly an LMA that the Commission has already determined to grandfather) into a duopoly would not adversely affect competition and diversity in the local market because television stations that are brokered do not, according to the Commission, constitute an independent source of viewpoint diversity and are not counted under the Commission's voice tests. *See Ownership Order* at ¶¶ 67, 111. As the conversion of an existing same-market LMA into a duopoly would not reduce competition and diversity, the Commission should clarify that the parties to an LMA who are seeking to qualify for a duopoly rule waiver need not demonstrate that the brokered station could not have been sold to an out-of-market buyer at the time they entered into the LMA. The imposition of such a requirement would be an entirely pointless, if not impossible, exercise for parties to existing LMAs that meet all the other requirements for a waiver of the duopoly rule.

Similarly, requiring the holder of a permit for an unbuilt station to demonstrate efforts to locate an alternative out-of-market buyer seems unlikely to serve the Commission's diversity and competition goals. As the Commission itself stated, an unbuilt station "cannot contribute to diversity or competition." *Ownership Order* at ¶ 85. The Commission's priority under these circumstances should be to promote the rapid construction of any unbuilt station, and this goal would not be served by requiring the holder of an unbuilt construction permit to hunt for an out-of-market buyer, if an in-market entity is ready and willing to purchase the permit and construct the station.

---

their relationship and find an alternative buyer for the brokered station would completely

Indeed, the fact that a station has remained unbuilt for a substantial period indicates that the market may be unable to support another separately owned broadcast facility and that an in-market buyer is likely to be the only viable purchaser.[20] This requirement to document attempts to sell unbuilt stations seems especially burdensome, given the Commission's recent revision of its rules relating to the construction periods for broadcast stations.[21] Because broadcast permittees now have only a strict three-year period in which to construct their stations, permittees who try for nearly three years but fail to complete construction will have a very limited period of time to make the requisite "active and serious" efforts to sell their permits to out-of-market buyers before the permits are automatically forfeited. Particularly in light of its new, stringent rules concerning the construction periods for broadcast facilities, the Commission should reexamine its decision to require waiver applicants to demonstrate active and serious efforts to sell unbuilt construction permits to entities outside the market.

Beyond the policy considerations at issue in requiring waiver applicants to document their attempts to find out-of-market buyers, the Commission should also weigh whether its effort to force broadcast licensees to consider out-of-market purchasers

---

vitiate the Commission's decision to grandfather pre-November 5, 1996 LMAs.

[20] For example, in the Hartford-New Haven DMA, the Commission granted a construction permit to WBNE-TV in 1954. WBNE's facility was not, however, constructed until 1995, 41 years later, and this construction was only made possible by WBNE's permittee entering into an LMA with the owner of another television station in the same market. Even a market as large as Hartford-New Haven (the 27th ranked DMA) was evidently unable to support the construction of a new television station until that unbuilt station formed a combination with a viable *in-market* television station.

[21] *See Report and Order* in MM Docket Nos. 98-43 and 94-149, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part, Memorandum Opinion and Order*, FCC 99-267 (rel. Oct. 6, 1999).

implicates Section 310(d) of the Communications Act of 1934.[22] By requiring a waiver applicant to hunt for an out-of-market buyer, even though an in-market purchaser may be ready and willing to purchase the station at issue, the Commission is determining by implication that the public interest, convenience and necessity would be better served by the transfer of the license or permit to a person other than the current licensee's proposed choice. Application of this waiver requirement seems particularly suspect under Section 310(d) in the context of existing LMAs, where the proposed transferee would be a party with whom the licensee has had a long-standing relationship. Because the Commission is essentially engaging in comparative consideration by imposing this out-of-market sale requirement on waiver applicants, NAB believes that the requirement raises serious questions as to compliance with Section 310(d).[23]

Because the waiver requirement regarding the documentation of attempts to sell stations and permits to out-of-market buyers will not significantly promote the Commission's competition and diversity goals and raises questions as to compliance with Section 310(d), the Commission should reconsider this requirement. At the least, the Commission should eliminate the requirement with regard to unbuilt stations, and clarify

---

[22] This section provides that, in acting on an application for transfer or assignment of a station license or construction permit, the Commission "may *not* consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person *other than* the proposed transferee or assignee." 47 U.S.C. § 310(d) (emphasis added).

[23] *See MG-TV Broadcasting Company v. FCC*, 408 F.2d 1257, 1263-64 (D.C. Cir. 1968), *overruled on other grounds Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991) (Section 310(d) was designed to end the Commission's practice of subjecting assignment applications to comparative consideration, so where permission is sought to assign a valid existing permit, the only question is whether the proposed assignee possesses the minimum qualifications consistent with the public interest, convenience and necessity).

that the requirement does not apply to parties converting an existing LMA to a duopoly. The out-of-market sale requirement appears particularly burdensome and sterile in those contexts and should not be applied.

D. The Restrictions Placed On The Transferability Of Station Combinations Formed Under The Revised Local Ownership Rules Should Be Eliminated.

NAB is also concerned about the limits placed on the transferability of station combinations formed under the television duopoly and radio/television cross-ownership rules. Assume, for example, that the licensee of a top-ranked television station acquires a second, low-ranked television station in the same market under the eight voice/top four-ranked duopoly standard. The licensee then labors to make the unsuccessful station into a top four-ranked station, and eventually decides to sell both stations. The Commission specifically stated in the *Ownership Order* (at ¶ 64) that a duopoly may not automatically be transferred to a new owner if the eight voice/top four-ranked standard is not met. Thus, the licensee in this example would be prohibited from assigning or transferring these two top-ranked stations to a single buyer and would be forced to split the two stations and find separate purchasers. Similarly, a radio/television combination properly formed under the revised cross-ownership rule may not be transferred to a new owner if the market does not satisfy the applicable voice standard at the time of sale. *See Ownership Order* at ¶ 100. The Commission further specified that any combination formed as a result of a "failed," "failing" or "unbuilt" station waiver may be transferred together only if the combination complies with the revised duopoly or cross-ownership rules, or one of the waiver standards, at the time of transfer. *See id.* at ¶¶ 77, 81, 86, 115.

In NAB's opinion, these limits on the transferability of station combinations will prove to be disruptive and will tend to discourage investment in broadcast stations.[24] Once a broadcast station combination has been properly formed under the local ownership rules, NAB believes that such combinations should be freely transferable. Unlike the creation of a new broadcast station combination, the sale of an existing combination cannot adversely impact the level of diversity and competition in the local market. However, requiring the separation of jointly owned stations could prove disruptive because commonly owned stations are very likely to have consolidated a number of functions and operations. Indeed, the forced separation of commonly owned stations could negatively affect service to the public in the local market because the economic efficiencies associated with joint ownership – and the programming and other benefits made possible by those cost savings – would be lost. Broadcasters would also be less likely to invest in failed, failing or unbuilt stations, given the limits on the transferability of station combinations formed as a result of a waiver.

Presumably, it was considerations such as these that lead the Commission in previous ownership rulemakings to *not* require the break up of station groups upon transfer or assignment.[25] The NAB strongly asserts that the Commission should follow

[24] NAB also notes that these transferability requirements in the local ownership context seem inconsistent with the Commission's decision concerning the transferability of grandfathered television LMAs. In that context, the Commission determined to allow grandfathered LMAs to be transferred and renewed by the parties. *See Ownership Order* at ¶ 146. As a result of this dichotomy, a licensee with a grandfathered LMA may freely transfer it to another party, but if the licensee converts the LMA into a duopoly, then the combination may have to be split apart in a transfer.

[25] *See Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2783 (1992), *recon. granted in part and denied in part, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992) ("*Radio Reconsideration Order*") (in revising radio duopoly rules to include both numerical and audience share

its own precedent in this regard, and recognize that requiring the break up of station combinations upon transfer only "penaliz[es] enterprises that grow into stronger competitors." *Radio Reconsideration Order*, 7 FCC Rcd at 6397. Moreover, as NAB noted above (*see* Section II.B.), Commission decisions inconsistent with its own precedent may be regarded by reviewing courts as arbitrary and capricious. *See, e.g.*, *Weyburn Broadcasting*, 984 F.2d at 1233. For all these reasons, NAB asks the Commission to remove the restrictions placed on the transferability of station combinations formed under the duopoly and cross-ownership rules and waiver standards.[26]

III. RECONSIDERATION OF THE *ATTRIBUTION ORDER*

A. The "Equity/Debt Plus" Rule Will Discourage Investment By Established Broadcasters In New Entrants, Including Minorities And Women.

Under the new "equity/debt plus" ("EDP") rule, the holder of a financial interest, whether equity or debt or both, in excess of 33% of the total assets of a licensee or other media entity will have an attributable interest in that licensee if the holder is either (1) a

limitations, the Commission determined not to "require a multiple owner which acquired its stations in compliance with the audience share and numerical station limits . . . to break up its station group upon transfer or assignment because the combined share of the group has grown to a level exceeding the [audience share] limit or the applicable numerical limit has changed").

[26] NAB also believes that the Commission ought to be disposed to grant waivers of the transferability restrictions of 47 C.F.R. § 73.3597(a). Licensees and permittees who obtained their licenses after a comparative hearing but whose stations have been operated on-air for less than one year could be severely disadvantaged, if prevented by this section from applying to transfer their stations during the expected "land rush" period of acquisitions following the effective date of the revised local ownership rules. Given the limited number of sales of broadcast (particularly television) stations that can be approved in most local markets due to voice count requirements, the Commission should be lenient in granting waivers so Section 73.3597(a) does not foreclose certain licensees from selling their stations, even if they have been operated on-air for less than a year.

major program supplier to that licensee (*i.e.*, supplies over 15% of a station's total weekly broadcast programming hours), or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators and newspapers). All stock, whether common or preferred, voting or nonvoting, will be counted toward the 33% threshold. NAB believes that the EDP rule will adversely impact new entrants in the broadcasting industry, including minorities and women, by disrupting the flow of capital from existing broadcasters.

The Commission has had a long-standing commitment to promoting the diversification of ownership of broadcast facilities.[27] Congress has also expressed similar concerns, and has, in the auction context, required the Commission to "ensure" that small businesses and businesses owned by members of minority groups and women "are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). The Commission and Congress have also agreed that the primary impediment to entry into the broadcast industry for small businesses (particularly those owned by minorities and women) is access to and cost of capital.[28]

Unfortunately, NAB believes that the adoption of the EDP rule in the *Attribution Order* will only increase the difficulties experienced by minorities and women in accessing capital and will exacerbate their lack of representation in the broadcast

---

[27] Indeed, a "maximum diffusion of control of the media of mass communications" was one of the two primary objectives of the traditional comparative broadcast licensing system. *Policy Statement on Comparative Broadcasting Hearings*, 1 FCC 2d 393, 394 (1965).

[28] *See Report* in GN Docket No. 96-113, 12 FCC Rcd 16802, 16920 (1997); H.R. Rep. No. 111, 103d Cong., 1st Sess. 254-55 (1993); Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 986, 1007 (1992).

industry. Specifically, the EDP rule will discourage investment by existing broadcasters (or by newspapers and cable operators) in new entrants, including minorities and women, because more investments – including those of pure debt – will now be attributable. Several commenters in this proceeding agreed with NAB's position that the EDP rule will restrict the availability of capital for those new entrants, especially minorities and women, that most need the capital, thereby hindering their ability to enter the broadcast marketplace.[29] Because existing broadcasters are an important source of capital for minority broadcasters,[30] any reduction in the amount of capital made available by existing broadcasters for investment will be particularly deleterious for current and prospective minority broadcasters. NAB is also concerned that small and new broadcasters will be adversely impacted by the EDP rule's restrictions on investment during the transition to digital television, which will require large amounts of capital.

The EDP rule will also likely inhibit the spin off of broadcast stations to new entrants as part of station mergers. As the broadcast industry has consolidated in recent years, many group owners have been required to spin off stations (particularly radio) that exceed the numerical limits in local markets. The Commission has encouraged merging companies to seek out new entrants (particularly minorities) to purchase these stations, and group owners have in fact made such efforts.[31] Unfortunately, the EDP rule will

---

[29] *See, e.g.*, March 21, 1997 Reply Comments of BET Holdings, Inc. at 2-3; Qwest Broadcasting L.L.C. at 3-8; Tribune Broadcasting Company at 21.

[30] *See* March 21, 1997 Reply Comments of Qwest Broadcasting L.L.C. at 3, 7 (specifically asserting that existing broadcasters have been the primary source of capital for minority broadcasters).

[31] For example, approximately 125 radio stations will need to be divested by Clear Channel Communications, Inc. and AMFM, Inc., as a result of their merger. As reported,

discourage these spinoffs in the future, as merging group owners will be reluctant (or even unable) to transfer stations to minorities or other new entrants in the local market who may likely need investment from the merging parties.

Given these adverse effects the EDP rule will likely have on the flow of capital to prospective new entrants and their ability to participate in the broadcast industry, NAB asks the Commission to reconsider this rule, at least to the extent that it attributes pure debt relationships. In light of the difficulties that small businesses (especially those owned by minorities and women) face in obtaining financing, the Commission should reexamine its decision to attribute more types of investments (especially pure debt) under the EDP rule.

B. The EDP Rule Will Have Inconsistent Effects, Depending Upon The Capitalization Structures Of Broadcast Companies.

NAB also observes that the EDP rule, as adopted, will have an inconsistent impact on regulated entities, depending upon their capitalization structures. Consider, for example, one company that is 100% equity financed. An investor with 34% of the equity in such a company would exceed the attribution threshold under the EDP rule because 34% of the equity would constitute 34% of the total assets of the company, due to this company's lack of debt. Conversely, a larger equity interest in a highly leveraged company would not exceed the 33% EDP threshold. For example, assume that an investor has 49% of the equity in a company that is primarily debt financed (*e.g.*, 20% equity financed and 80% debt financed). This investor with nearly half of the company's equity would not exceed the EDP threshold because 49% of the equity would constitute

---

Clear Channel has a "track record" of selling stations to minorities. *Broadcasting and Cable*, October 11, 1999 at 16.

only approximately 10% of the total assets of the company, given this company's high debt level.

As illustrated, the EDP rule will clearly have an erratic regulatory impact. Investor relationships that are functionally equivalent may be attributable under the EDP rule in one instance but not another, depending on the capitalization structures of the entities at issue. In particular, equivalent equity interests in two different entities may be treated differently under the EDP rule, if the two companies have divergent debt levels. Because equity investments in more highly leveraged companies are less likely to be attributable under the EDP rule, this rule may operate to the advantage of less conservatively financed and highly leveraged entities. NAB does not believe that this inconsistent regulatory impact of the EDP rule will serve the public interest, and asks the Commission to reexamine the operation of the rule.

IV. CONCLUSION

For the foregoing reasons, NAB respectfully requests that the Commission reconsider and clarify certain issues in its *Ownership Order* and *Attribution Order*.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

Jerianne Timmerman

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

October 18, 1999