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**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| 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 |

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To: The Commission

# PETITION FOR RECONSIDERATION


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## SUMMARY

The Commission must reconsider its new "TV duopoly" rule because, as adopted, it is arbitrary and capricious, not in the public interest, irrationally unfair to television broadcasters, and hopelessly out of date before it has even taken effect. Specifically, by limiting the "voices" test to 8 TV voices in a particular market, the new rule is out of step with the reality of competition from many other media sources faced by television broadcasters today, out of step with the Commission's own pronouncements regarding dramatically changed competitive conditions in the media world, and wholly and inexplicably inconsistent with the Commission's new "one-to-a-market" rule governing same-market TV/radio combinations, covered by the same *TV Local Ownership Order*.

Based on the evidence of record in this eight-year long rulemaking proceeding, the Commission must adopt instead a voices test that takes into account, at a minimum, cable television, broadcast radio, and daily newspapers as well as broadcast television. It is especially remarkable and nonsensical that, in an Order addressing the provision of video services, the Commission does not even include cable television, a pervasive video service medium whose strength as a competitor to broadcast television was a primary reason for launching this proceeding in 1991. The Internet is by now also a well-established media competitor that should be included in the voices test for <u>both</u> the TV duopoly and one-to-a-market rules. In any event, the choice of the number "8" for purposes of the duopoly rule is completely arbitrary, appearing to be based on a hunch rather than on any analysis of factual evidence.

Under well established precedent, the Commission must articulate a rational basis for its decisions, and particularly where it takes an inconsistent approach, it must explain adequately the reasons for doing so. In this case, not only has the Commission not provided a rational basis for

choosing 8 TV-only voices in contrast to the radio/TV cross-ownership rule's voice test; it cannot possibly provide such a basis in the face of overwhelming evidence, clearly recognized by the Commission, concerning the "growth in the number and variety of media outlets in local markets" that compete with television broadcasters. As such, the Commission's decision is arbitrary and capricious and cannot be sustained.

Failing a modification of the new TV duopoly rule as proposed herein, the public interest benefits intended by the Commission in adopting it, such as the economic efficiencies of same-market TV station ownership that can lead to cost savings, which in turn can lead to programming and other service benefits, will be lost to the public and broadcasters alike. Furthermore, the new rule is likely to be anti-competitive, disadvantaging new entrants and small and/or minority- and women-owned businesses, who would likely be more financially able to acquire stations in smaller markets where duopoly transactions will be foreclosed because of the arbitrary 8 TV voice threshold.

If the Commission insists on retaining the 8 TV voice test, it should at least adopt an additional waiver criterion to permit broadcasters with existing attributable TV LMAs to rationalize their same-market interests into duopoly ownership situations regardless of how many TV voices will remain in the market post-merger, consistent with the Commission's stated goal to eliminate TV LMAs. Finally, as the Commission appears so uncomfortable evaluating media competition and diversity, it should perhaps consider deferring to the Antitrust Division of the U.S. Department of Justice in the broadcast station merger context.

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To: The Commission

## PETITION FOR RECONSIDERATION

Paxson Communications Corporation ("PCC"), by its counsel, files this Petition for Reconsideration ("Petition") of the Commission's *TV Local Ownership Order* in the above-referenced proceeding regarding local television broadcast ownership.[1] PCC is the largest owner of broadcast television stations in various U.S. markets[2] and is party to newly attributable local

[1] *See Report and Order* in MM Docket Nos. 91-221 & 87-8, FCC-209 (adopted August 5, 1999) ("*TV Local Ownership Order*"), as also published in summary form in the *Federal Register* on September 17, 1999, *see* 64 Fed. Reg. 50,651 (FCC) (Sept. 17, 1999) ("*Federal Register Notice*"). Pursuant to the *Federal Register Notice*, the new rules announced in the *TV Local Ownership Order* are to take effect November 16, 1999. This Petition for Reconsideration is timely filed pursuant to Section 1.429(d) of the Commission's rules. *See* 47 C.F.R. § 1.429(f) (1999).

[2] Upon completion of pending acquisitions, construction projects and other transactions, PCC will own, operate or have an economic interest in 72 television stations.

marketing agreements ("LMAs').[3] Specifically, PCC urges the Commission to abandon the "8 TV voice" prong of the new TV duopoly rule[4] because it is arbitrary and capricious, lacking any rational basis, and does not serve the public interest. As explained further below, the Commission must adopt a new voices test that takes into account non-broadcast television media outlets as well as broadcast television voices in an individual market. If the Commission nonetheless retains the rule as is, it should adopt an additional waiver criterion to permit TV duopolies to be created from existing owned station/LMA combinations. The Commission might also consider deferring to the Department of Justice Antitrust Division for analysis of the competitive effects of broadcast station mergers.

## I. INTRODUCTION AND BACKGROUND

Numerous statements made in the Commission's *TV Local Ownership Order* and by individual Commissioners attest to the significant competition faced by broadcast television licensees from various other media sources. A few examples are offered here:

> In this *Report and Order*, we revise our local television ownership rules -- the "TV duopoly" rule and the radio-television cross-ownership or "one-to-a-market" rule -- to respond to ongoing changes in the broadcast television industry. The new rules we adopt today reflect a recognition of the growth in the number and variety of media outlets in local markets . . . .[5]
>
> The record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable to compete more effectively for advertising dollars.[6]

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3 PCC also has submitted comments in prior stages of this proceeding.

4 *See TV Local Ownership Order,* ¶¶ 42-91 (addressing the "8 TV Voice" prong specifically at ¶¶ 64-70).

5 *TV Local Ownership Order,* ¶ 1.

6 *Id.* ¶ 7 (and repeated verbatim in ¶ 37).

> We must also take into account marketplace developments and the increased competition broadcasters are facing from other mass media outlets.[7]
>
> [We] agree . . . that different types of media, such as radio, cable television, VCR's, MMDS, and newspapers, may [at least] to some extent, be substitutes for broadcast television. . . .[8]
>
> . . . we believe that [daily newspapers and cable systems] are an important source of news and information on issues of local concern and compete with radio and television . . . .[9]
>
> . . . we are adopting commonsense rules that recognize the dramatic changes that the media marketplace has undergone since our broadcast ownership rules were adopted 30 years ago . . . we are clearly entering a new media age [in which] we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace . . . [to] help them compete with the growing number of alternative media.[10]
>
> The media landscape has changed enormously since . . . 1994. . . There is the now-significant presence of DBS . . . There is the continued growth of cable . . . The Internet is experiencing explosive growth . . . our rules and policies must be based on the present and future characteristics of broadcasting, not our perceptions of the medium as it existed 50 or even five years ago.[11]

The local television ownership rule currently in effect, at least until November 16, 1999[12] -- the so-called "TV duopoly rule,"[13] -- dates back to 1964.[14] In the ensuing decades, the media world has changed by uncountable leaps and bounds indeed. In 1991, when this rulemaking proceeding was launched, the Commission recognized "changes in the state of the

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7 *Id.* ¶ 16.

8 *Id.* ¶ 69.

9 *Id.* ¶ 113.

10 *Id., Separate Statement of Chairman William E. Kennard ("Kennard Statement").*

11 *Id., Separate Statement of Commissioner Susan Ness ("Ness Statement").*

12 *See supra* note 1.

13 *See* 47 C.F.R. § 73.3555(b) (1998).

14 *See TV Local Ownership Order,* ¶ 15.

video marketplace," resulting in "increasing competition in, and fragmentation of, [that] marketplace."[15] The proceeding was intended to be a forward-looking provocative initiative, to address the fact that "television broadcasting . . . exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead."[16] The Commission's new rule governing TV/TV ownership combinations, announced on August 5, 1999, is supposed to represent the culmination of "a broad-reaching examination of these and other broadcast media ownership rules first initiated by the Commission in 1991, and more recently guided by the statutory directives of the Telecommunications Act of 1996."[17] Yet, upon review of the new TV duopoly rule and its underlying justification, or rather, lack thereof, one would think the media world had not changed a bit. There is a disturbing disconnect between the Commission's and individual Commissioners' statements concerning media market conditions today, and the TV/TV ownership rule now promulgated.

The new duopoly rule requires that, where two television stations are within the same Nielsen Designated Market Area ("DMA") and their Grade B signal contours overlap, the Commission will permit common ownership of the two stations in that market only where the following criteria are met at the time the application to acquire or construct the station(s) is filed:

(i) at least **eight** independently owned and operating full-power commercial and noncommercial **TV stations** would remain post-merger in the DMA in which the communities of license of the TV stations in question are located, *and*

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15 *See In the Matter of Policy Implications of the Changing Video Marketplace, Notice of Inquiry,* MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) (*"NOI"),* ¶¶ 1-2.

16 *See id.*, ¶ 3.

17 *See TV Local Ownership Order,* ¶ 1 (citing to Pub. L. No. 104-104, 110 Stat. 56 (1996)).

(ii) the two merging stations are not both among the top four-ranked stations in the market, as measured by audience share.[18]

The same day that the Commission announced its new TV duopoly rule, it also announced a new radio/television cross-ownership rule, also known as the "one-to-a-market" rule.[19] This new rule entails a voices test not limited to TV only, which quite rationally takes into account all the following media outlets:

> (1) all independently owned and operating full-power commercial and noncommercial broadcast **television stations** licensed to a community in the DMA in which the television station's community of license is located;
>
> (2) all independently owned and operating commercial and noncommercial broadcast **radio stations** licensed to a community within the radio metro market in which the television station's community of license is located, as well as broadcast radio stations located outside the radio metro market that have a reportable share in the metro market according to Arbitron or another nationally-recognized audience rating service. In areas that are not classified as a radio metro market, the radio stations located in an area that would be the "functional equivalent" of a radio market should be counted;
>
> (3) all independently owned **daily newspapers** published in the DMA that have a circulation exceeding five percent of the households in the DMA, with "daily newspapers" defined as English language newspapers published four or more days per week; and
>
> (4) **cable systems**, where cable service generally is available to television households in the DMA (with cable television to be counted as a single voice).[20]

Clearly the "8 TV voice" prong of the new TV duopoly rule is inexplicably inconsistent with the Commission's approach in the context of radio/TV cross-ownership and, moreover, with the Commission's own pronouncements regarding competing media in a market.

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18 *See id.*, ¶ 64 (explaining modification of 47 C.F.R. § 73.3555(b), *see TV Local Ownership Order* at 73 (Appendix B, "Rules")).

19 *See id.*, ¶¶ 92-125.

20 *See id.*, ¶ 111 (explaining modification of 47 C.F.R. § 73.3555(c), *see TV Local Ownership Order* at 73-75 (Appendix B, "Rules")).

Such pronouncements completely contradict the Commission's insistence on counting only television voices for purposes of diversity and competition when evaluating proposed TV/TV ownership combinations in a world in which so many different media outlets offer a source of news, public affairs, and entertainment programming. The Commission's selection of 8 TV voices, in any event, as somehow the "right number" of independent television voices to count is unfounded. Ultimately, the new TV duopoly rule is hopelessly outdated before its effective date and may in many cases be anti-competitive, contrary to the goals stated by the Commission in pronouncing this rule.

## II. THE TV-ONLY VOICE TEST IS COMPLETELY AT ODDS WITH THE COMMISSION'S OWN STATEMENTS REGARDING MEDIA DIVERSITY AND COMPETITION.

### A. The Commission Acknowledges That Television Broadcasters Face Competition From A Variety Of Media Sources.

The Commission throughout its *TV Local Ownership Order* emphasizes the dramatic developments in media technologies over the past three decades, acknowledging the resulting increased competition from non-broadcast and broadcast sources alike, as indicated in Section I of this Petition. Some of those statements bear repeating here. For example, at the very outset of the *TV Local Ownership Order,* the Commission states: "The new rules we adopt today reflect a recognition of the growth in the <u>number and variety of media outlets</u> in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership."[21] Further on, the Commission reiterates that "there has been an increase in the <u>number and types</u> of media outlets available to local communities."[22] The Commission

[21] *TV Local Ownership Order*, ¶ 1 (emphasis added).

[22] *Id.*, ¶ 8 (emphasis added).

recognizes that it "must also take into account marketplace development and increased competition broadcasters are facing from other mass media outlets."[23] And the Commission recounts its own successful efforts to foster increased competition and the range of choices for consumers, noting it has, for example, "increased the number of licensed broadcast television and radio stations, . . . facilitated the development of alternative technologies such as cable television . . . [as well as] direct broadcast satellite ("DBS") service, digital audio radio satellite ("DARS") service, multichannel multipoint distributions service ("MMDS"), and open video systems ("OVS") to increase the range of choices open to advertisers, viewers and listeners."[24] The Commission does not refute or attempt to discredit the commenters who provided data on the success of these various technologies. The Commission accepts the fact that "daily newspapers . . . are an important source of news and information on issues of local concern and compete with radio and television . . . ."[25] With respect to cable television, the Commission observed that "currently 11,600 cable systems pass[ ] more than 94 million homes and serv[e] almost 65 million households"[26] Notably, in 1991, when this proceeding commenced, cable already "pass[ed] over 90 percent of television households," which was one of the main reasons for the inquiry in the first place.[27]

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23 *Id.*, ¶ 16.

24 *Id.*, ¶ 28.

25 *Id.*, ¶ 113.

26 *Id.*, ¶ 29 (citing *1999 Broadcasting & Cable Yearbook* 40).

27 *See NOI,* ¶ 3 (citing as being among the "principal changes that have taken place" the "expansion in the availability and channel capacity of multichannel video service providers, in particular increases in cable availability and channel capacity . . .").

To then ignore these various sources of competition in the TV duopoly rule context is to nullify the very successes that the Commission has achieved in enhancing competition and diversity for consumers. This makes no sense.

As Commission Chairman Kennard observed, when the TV duopoly rule was originally adopted,

> . . . there were three broadcast networks; cable was still a novelty; and interactive TV meant yelling at your kids to turn it down. Now, cable systems serve almost 65 million TV households; other multi-channel video programmers – such as Direct Broadcast Satellite – offer hundreds of channels to viewers; since 1970, the number of radio and television stations has increased by more than 85 percent; and people are watching everything from hip-replacement surgery to the local weather on their PC's linked to the Internet. As we cross over into the next millennium, we are clearly entering a new media age . . . ."[28]

PCC could not agree more with Chairman Kennard's observation about the changes in the media world. The technologies that exist to offer consumers information today were unthinkable in 1964, both in number and type. But PCC could not disagree more with the Chairman's statement, made in the same breath, that the new rules "will . . . help [broadcasters] compete with the growing number of alternative media."[29] Indeed, PCC is baffled by the contradiction in the Commission's and Chairman's statements, on the one hand, and the TV duopoly rule that has been adopted, on the other. It is particularly odd that the Commission does not even count cable television -- a primary source of video programming -- in a rule concerning video service ownership. The Commission's new rule also represents a departure from the direction it was taking in the preceding phase of this rulemaking. As the Commission itself

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28 *TV Local Ownership Order*, *"Kennard Statement."*

29 *See id.*

recalls, in the *TV Ownership Further Notice*,[30] the Commission notified broadcasters that, "for the purpose of competition analysis, [it] would tentatively consider local advertising markets to include broadcast <u>and cable</u> television advertising, <u>radio</u> advertising, <u>and newspaper</u> advertising."[31] The Commission continues to acknowledge that broadcast television now faces competition from a wide variety of media -- both traditional and new, and yet has developed the 8 TV voice test as if no such competition exists to over-the-air terrestrial television.

### B. There Is No Rational Basis For Limiting The Voices Test To Broadcast Television.

The Commission's main reason for now switching gears, believing that the duopoly voice test should be limited to broadcast television voices, appears to be the inability "to reach a definitive conclusion at this time as to the <u>extent</u> to which other media serve as readily available substitutes for broadcast television."[32] In fact, that they do serve as readily available substitutes is supported by the evidence on the record and accepted by the Commission.

The Commission was presented with data developed by two economic research organizations on this very issue.[33] Based on a study of the New York, Cleveland, Portland, Richmond and Amarillo DMAs, for example, Economists Inc. concluded that "the product market proposed by the Commission includes [television] broadcast stations, cable systems,

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30 *In the Matter of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making,* MM Docket Nos. 91-221 & 87-8, 10 FCC Rcd 3524 (1995).

31 *TV Local Ownership Order,* ¶ 69.

32 *Id.,* ¶ 69.

33 *See id.,* ¶ 31 (discussing National Economic Research Associates, Inc. ("NERA"), which gathered evidence "sufficient to conclude that the relevant product market in Cleveland "includes . . . radio, broadcast television, cable television, direct mail, newspapers, magazines, yellow pages and billboards), and ¶ 32 (discussing data presented by Economists, Inc.).

radio stations [and] local newspapers, . . . " and that "there is abundant evidence of competition between different types of advertising media."[34] The Commission noted that no studies were presented to "demonstrate quantitatively the extent of substitution by advertisers among various types of advertising."[35] Yet, the Commission recognizes that such data are virtually impossible to come by, as transaction prices are negotiated contract-by-contract "and are not publicly available."[36] The Commission's near-obsession with pinning down quantifiably the extent of competition faced by television broadcasters sounds suspiciously like a pretext for adopting an extremely limited expansion of the TV duopoly rule. At the very least, it is not rational, particularly when the Commission expresses no such concern in its discussion of the new TV/radio ownership rule, discussed further below.

The only other reason proffered by the Commission for limiting the media count to broadcast television is a belief based on a Roper Starch Worldwide Inc. ("Roper") publication "America's Watching," reporting in early 1997 that "almost 70 percent of adults said they get most of their news from television -- almost twice the number that list newspapers as their main news source."[37] The Commission relies on the same publication to support its statement that "broadcast television remains the primary source of news and information for most Americans."[38] PCC was unable to find, despite its best efforts, the publication cited by the Commission. However, PCC uncovered a news article reporting on a 1997 Roper study,

34 *Id.*, ¶ 32 (emphasis added).

35 *Id.* (emphasis added).

36 *See id.*

37 *See id.*, ¶ 34 (citing "America's Watching," March/April 1997, Roper Starch Worldwide, Inc.).

38 *See id.*, ¶ 119 (citing again to the Roper publication).

"America's Watching."[39] Assuming that this is the same study referenced by the Commission, PCC observes first of all that the publication may not clearly distinguish broadcast television from cable television.[40] Second, the 1997 Roper survey was sponsored by the ABC, CBS, and NBC television networks, which might explain any pro-broadcast tilt.[41]

Of course the report relied upon by the Commission is but one source, and a non-independent source at that. Reality supports a conclusion that, by the term "television," a huge segment of the American population is including cable television, because both broadcast and cable television programming are displayed on the same equipment. As more and more households throughout the United States are subscribing to cable, as documented by the Commission, more and more consumers have access not only to well-known national and international cable news and weather sources, but also to many local cable channels that offer local news and community affairs programming,[42] including local government meetings in session, and local arts and entertainment groups, for example. For cable television subscribers, who receive network broadcast television channels, other over-the-air broadcast channels, and cable channels all through their cable service, use of the term "television" quite naturally becomes a generic term for all the video programming on their TV sets.

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39 *See* "TV is Leader for News, Credibility," August 1997, Roper Starch Worldwide Inc. (Lexis-Nexis Universe).

40 The news article uncovered by PCC uses the generic term "television" and PCC has been unable to determine whether the underlying Roper publication distinguishes between cable television or broadcast television, or even more specifically, broadcast network television. *See id.*

41 *See supra* note 39.

42 *See, e.g., TV Local Ownership Order,* ¶ 113 (Commission noting "there are PEG and other channels on cable systems that present local informational and public affairs programming to the public").

However, even if the Roper survey data were to be confirmed by independent sources, it does not logically follow that, therefore, other media should be discounted in a voices test for duopolies. The overwhelming evidence acknowledged by the Commission is that diverse media compete with broadcast television and should be counted in the voices test.

### C. The 8 TV Voice Test Unfairly Hinders Broadcasters From Competing More Effectively With Other Media Outlets.

One of the Commission's goals is purportedly to provide television broadcasters with more flexibility to meet the challenges of "changes in the competitive market conditions facing broadcast licensees."[43] "In such an age," Chairman Kennard stated, "we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace."[44] The new rule is unfair to television broadcasters because it means that, while the Commission agrees they must contend with growing competition from other sources, they will be robbed by the Commission of the opportunity to take advantage of duopoly ownership to compete more effectively with these other media in numerous markets where, despite robust media competition and diversity, the 8 TV voice test cannot be met. Once again, the outcome of the rulemaking proceeding squarely contradicts the Commission's purported goals. When all is said and done, the Commission's pronouncements about increased diversity and competition from other non-broadcast television are sadly rendered mere lip-service by a test that ignores all but broadcast television voices.

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43 *See TV Local Ownership Order,* ¶ 3. *See also id.,* ¶ 16.

44 *See id., Kennard Statement.*

## III. THE COMMISSION'S TV DUOPOLY RULE IS INCONSISTENT WITH ITS RADIO/TELEVISION CROSS-OWNERSHIP RULE WITHOUT A RATIONAL BASIS FOR THE DISTINCTION.

The failure to count non-broadcast television voices for purposes of the TV duopoly rule is not only arbitrary and unfair in and of itself, but takes on an added dimension of whimsy in the face of the Commission's decision regarding TV/radio cross-ownership.

### A. The New Radio/TV Rule Rationally Takes Into Account Competition From Various Media Sources.

As noted above in Section I of this Petition, the media to be counted in the voices test for purposes of the radio/TV cross-ownership (or so-called "one-to-a-market") rule include not only broadcast television, but also broadcast radio, cable television, and daily newspapers.[45] In explaining the rationale for the rule, the Commission reasonably concludes that this measure of independent voices "more accurately reflects the actual level of diversity and competition in the market."[46] The Commission again acknowledges that radio and television compete with one another, noting that the "public continues to rely on both radio and television for news and information, suggesting the two media both contribute to the 'marketplace of ideas' and compete in the same diversity market."[47] The Commission further acknowledges, as it does in its Introduction, that "newspapers and cable systems . . . are an important source of news and information on issues of local concern <u>and compete with</u> radio and <u>television</u>, at least to some extent, as advertising outlets," adding that "cable service is generally available to households throughout the U.S."[48] Likewise, the Commission echoes another statement from its

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45 *See id.*, ¶ 111.

46 *Id.*, ¶ 107.

47 *Id.*, ¶ 103 (emphasis added).

48 *Id.*, ¶ 113 (emphasis added).

Introduction to the *TV Local Ownership Order*: "The relaxed rule recognizes the growth in the number and types of media outlets [and] the clustering of cable systems in major population centers. . . ."[49]

It is utterly astounding that such findings and conclusions could form so reasonable a basis for one multiple ownership rule, and be brushed aside for purposes of another multiple ownership rule, particularly where both rules address the delivery of the same service -- namely, video service. As stated at the outset of this Petition, PCC believes that the definition of "media voices" for purposes of both of the multiple ownership rules at issue here must include, at a minimum, radio, television, cable television, and daily newspapers, and urges also the inclusion of the Internet, for both rules, as an established and increasingly competitive source of news and information for a growing segment of the population. The Commission's inconsistent approach to the two multiple ownership rules is unsupported by the extensive record in this proceeding, and the Commission provides no rational explanation for making such a distinction between the two rules. Notably also, the Commission's concern with pinning down quantifiably the extent of competition among the various media for purposes of the duopoly rule is absent from the Commission's analysis in the radio/TV context. Again, the inconsistency is unexplained.

### B. Judicial Precedent Requires That The Commission Adopt A Consistent Approach To The TV Local Ownership Rules.

It is well established that the Commission must, at a minimum, explain its reasons for inconsistent treatment in similar scenarios. In *Melody Music, Inc. v. FCC*, the court could not sustain the Commission's inconsistent decision concerning an application for broadcast license

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[49] *Id.*, ¶ 102.

renewal because "the Commission ha[d] not explained its decision with the simplicity and clearness through which a halting impression ripens into reasonable certitude."[50] The court has likewise required that the Commission "adequately" explain why, in adopting a particular rule, it has reached a different conclusion compared to other rulemaking decisions.[51] In taking completely inconsistent approaches to the two local television ownership rules adopted in the *TV Local Ownership Order*, the Commission has not offered any explanation, let alone an "adequate" one, or one with "simplicity and clearness." In this case, the Commission has not even enumerated any "factual differences" concerning the intermedia competition for purposes of the two rules.[52] On the contrary, as demonstrated above, the Commission has premised both rules on the very same findings regarding market conditions today, the advancements in new technologies, and competition faced by "broadcasters" in general – including both radio and television broadcasters – from other media sources. Chairman Kennard affirmed this: "For [the] . . . same reasons" that the TV duopoly rule is being relaxed, "we are also relaxing our radio-television cross-ownership rule."[53] Even if the Commission had enumerated factual differences regarding market competition and diversity, this would not be sufficient to sustain the startling inconsistency in the two rules: the Commission would need to go further and "explain the relevance of those differences to the purposes of the . . . Communications Act."[54]

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[50] 345 F.2d 730, 733 (D.C. Cir. 1965) ("*Melody Music*"). *See also Radio-Television Directors Association v. FCC*, 184 F.3d 872, 886 (D.C. Cir. 1999) (noting that "agency must offer clear, cogent explanation for treating . . . two cases differently").

[51] *See, e.g., Melcher v. FCC,* 134 F.3d 1143, 1149 (D.C. Cir. 1998).

[52] *See, e.g., Melody Music,* 345 F.2d at 733.

[53] *See TV Local Ownership Order, Kennard Statement* (emphasis added).

[54] *See Melody Music,* 345 F.2d at 733.

The Commission's decision to define "media voices" completely differently for purposes of the TV duopoly rule, on the one hand, and the one-to-a-market rule cannot be sustained. The Commission has not explained any basis for the distinction, and clearly cannot do so. The record overwhelmingly supports taking a consistent approach and defining "media voices" to include, at the very least, cable television, newspapers, and radio and television broadcast for purposes of both rules.

## IV. THE INTERNET SHOULD BE ADDED TO THE VOICE TEST FOR BOTH RULES.

PCC is struck by yet another baffling deficiency in the Commission's new broadcast ownership rules: neither the TV duopoly rule nor the one-to-a-market rule counts the Internet as a competing media voice. Yet, Commissioners stated emphatically that the Internet is an established competing presence in the media market. For example, Chairman Kennard commented the day the new rules were announced, " . . . people are watching everything from hip-replacement surgery to the local weather on their PC's linked to the Internet."[55] Commissioner Ness, also the same day, commented: "The Internet is experiencing explosive growth," and is among the "other media that arguably serve as a source of competition and diversity in the market . . . ."[56]

How, then, does the Commission come to the absurd conclusion that "it is premature to consider the Internet a 'voice' for purposes of [the] new rule"?[57] PCC concurs with Commissioner Furchtgott-Roth that the list of media voices being counted by the Commission

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55 *TV Local Ownership Order, Kennard Statement* (emphasis added).

56 *See id., Ness Statement.*

57 *See id.*, ¶ 114.

for purposes of the one-to-a-market rule "is scarcely different from the one that one might have drawn up after surveying the industry 40 years ago."[58] In the TV duopoly context, the fact that the voice test does not count any other media besides broadcast television voices renders it even more antiquated. Many parties who have participated in this rulemaking proceeding throughout its various stages have urged the Commission to count, among other media, the Internet for purposes of its broadcast ownership voices tests.[59] By ignoring the Internet as not only an established source, but a growing source of competition to television broadcasters, the Commission has adopted a rule that, rather than looking to the "new millennium," takes us back to an older age. This is a serious deficiency that must be corrected on reconsideration of the rules.

## V. THE SELECTION OF "EIGHT" TELEVISION VOICES IS COMPLETELY ARBITRARY AND POTENTIALLY ANTI-COMPETITIVE.

### A. The Commission's Choice Is Unsupported By The Record.

The Commission's new TV duopoly rule is also deficient and unsupported by the record with respect to the number of independent television voices that must exist in a particular market. The Commission somehow arrived at the number "eight" in establishing this new rule. After reading carefully the entire *TV Local Ownership Order,* the question remains: Why "eight"? Why not seven, six, or five? The Commission states that it seeks to "ensure a sufficient number of independently owned outlets to attempt to maximize the available independent viewpoints in a given local market."[60] However, the Commission never articulates why "eight" television voices is necessary (no matter the type, *e.g.*, UHV vs. VHF, market strength, or format

58 *See id., Dissenting Statement of Commissioner Harold W. Furchtgott-Roth.*

59 *See, e.g., id.*, ¶ 62.

60 *Id.*, ¶ 25.

of the particular full power stations in the market). A rule adopted by the Commission cannot be based on intuition or a hunch. The Commission is required to provide information on the relevant factors it considered in arriving at a particular choice.[61] Where, as here, the Commission has not "articulated a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made,'" the decision cannot stand.[62]

### B. The Significance Of "Eight Voices" Is Undermined By Various Features Of The Rule.

At the same time that the Commission appears, without rational basis, wedded to the number "eight," several features of the new TV duoply rule undermine this number as being critical. For example, the rule as adopted requires that the 8 TV voice test be met only as of the date the application is submitted. If something happens subsequently in the market to change the ownership picture, the Commission will nevertheless process the application as if there were still enough independent voices in that market.[63] Likewise, once a duopoly is granted, the Commission will not monitor the market to ensure that any particular number of independent television voices is maintained. On the contrary, the Commission has expressly stated that the duopoly entity "will not later be required to divest if the number of operating television voices within the market falls below eight . . . ."[64]

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61 *See, e.g., Sangre de Cristo Communications, Inc. v. FCC*, 139 F.3d 953, 957-958 (D.C. Cir. 1998) (remanding decision because the court could not "discern with precision on what basis the FCC made its ruling" and it was unclear what the FCC believed to be the "relevant factors"); *United States Telephone Association v. FCC,* 1999 WL 317035 (D.C. Cir. May 21,1999) (remanding for failure to state a "coherent theory supporting [FCC's] choice of 6.0%" in access charge methodology).

62 *Cf. United Video, Inc. v. FCC,* 890 F.2d 1173, 1177 (D.C. Cir. 1989) (articulating standard of review).

63 *See TV Local Ownership Order,* ¶ 64.

64 *Id.*

PCC agrees that it makes eminent sense not to hold a TV duopoly applicant to any particular market status-quo, not even until such time as its application is processed to completion at the Commission, and certainly not throughout the life-time of that particular party's duopoly.[65] No one can predict changes in the broadcast market. The Commission's very reasonable implicit recognition of this fact nevertheless undermines any argument that there is something especially "correct" about the number eight to begin with.

Likewise, the Commission's decision to "grandfather" television LMAs entered into prior to November 5, 1996 for a minimum of five years and possibly longer, even where they "do not comply with [the] new duopoly rule and waiver policies,"[66] indicates that the Commission is prepared to accept less than eight independent television voices in a number of markets. In other words, in markets where such grandfathered LMAs bring the independent television voice count down below eight already, although no one would be able to apply for a formal TV duopoly in light of the 8 TV voice prong of the new rule, the Commission is obviously prepared to accept *de facto* duopolies, given that such LMAs will now be attributable under the multiple ownership rules.

Furthermore, the Commission's new rule legalizes duopolies within the same DMA so long as there is no Grade B overlap.[67] It is not inconceivable that there may be DMAs with a low number of full power commercial television stations today. In these markets, the Commission will not concern itself with how many independent television voices are left as a

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65 The Commission has stated it will, however, require that the 8 TV voice test be satisfied if the duopoly is to be transferred to a new owner. *See id.*

66 *Id.*, ¶ 12.

67 *See id.*, ¶ 53.

result of same DMA/no Grade B overlap duopoly transactions; these transactions will be permitted by rule.[68]

In these various instances, where the number of independent television voices is reduced because of grandfathered LMAs, post-application or post-merger changes in the market, or same DMA/no Grade B overlap combinations, the Commission is apparently and rightfully relying on the plethora of other, non-broadcast television media outlets to maintain robust competition to the benefit of consumers within a given community. The Commission should do likewise in other markets where, for whatever other reason, as in so many smaller markets, there are not enough independent television voices to satisfy the 8 TV voice test. The Commission should permit TV duopolies so long as the various media outlets -- counting at the very least broadcast radio and television, cable television, and daily newspapers -- meet a certain threshold in the aggregate, as in the case of the radio/television cross-ownership rule.

### C. The 8 TV Voice Test Is Contrary To The Commission's Public Interest Goals.

The Commission's analysis of market conditions for purposes of promulgating the new multiple ownership rules led it to conclude that "there is evidence concerning the efficiencies inherent in joint ownership and operation of <u>television stations in the same market</u> . . . These efficiencies can lead to cost savings, which in turn can lead to programming and other service benefits that serve the public interest."[69] In fact, the Commission states that ". . . the <u>greatest</u> benefits of common ownership likely occur between stations located <u>in the same market</u> . . . ."[70] One of the key goals stated by the Commission in adopting the new rules is

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68 *See id.*, ¶ 53 and n. 97.

69 *TV Local Ownership Order*, ¶ 37 (emphasis added). *See also id.*, ¶ 57.

70 *See id.*, ¶ 34 (emphasis added).

"to allow broadcasters and the public to realize [these] economic efficiencies and public interest benefits generated by common ownership."[71] The new TV duopoly rule, however, does just the opposite: it prevents the achievement of such public interest benefits by creating an extremely limited set of circumstances, namely, markets in which there are more than 8 TV voices, under which such joint television station ownership can become a reality.. Consequently, only a very narrow segment of the U.S. population will reap the enhanced programming and other service benefits that the Commission purports to promote. Surely the Commission cannot have intended a rule that contradicts its very laudable goals.

Finally, the Commission's choice of "eight" for purposes of this test is arguably anti-competitive, and thus contrary to the Commission's own goal to "serve a vital public interest by promoting competition and diversity in the mass media."[72] The Commission has recognized "the importance of promoting new entry into the broadcast industry as a means of promoting competition and diversity."[73] However, in smaller markets, where the capital required to acquire and operate a television station is likely to be lower than in the larger markets, the number of television voices is likely to be lower as well. Whereas new entrants and smaller businesses, including those that are minority and/or women-owned, are likely to be more attracted to the smaller markets because of more limited financial resources, they will be shut out in many instances precisely because of the 8 TV voice test. They will be disadvantaged further insofar as smaller companies are less likely to be able to arrange financing in time to meet the Commission's November 16, 1999 effective date, when applicants will for the first time be able

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[71] *Id.*, ¶ 39.

[72] *Id.*, ¶ 7.

[73] *Id.*, ¶ 15.

to submit TV duopoly applications under the new rule. The larger companies will no doubt be in a better position to raise capital quickly. Thus, the November 16, 1999 "race to the courthouse" will hurt many smaller or new competitors where the market has only nine or ten independent television voices, because by the time smaller companies and/or new entrants are able to arrange duopoly acquisitions, the number of independent broadcast television voices may well have dropped below the Commission's arbitrary threshold.

## VI. IF THE 8 TV VOICE TEST IS RETAINED AS IS, THE COMMISSION SHOULD PERMIT TV DUOPOLIES FROM EXISTING LMAs.

If the Commission, notwithstanding the overwhelming evidence on the record, retains the 8 TV voice test rather than counting other media for purposes of the TV duopoly rule, it should adopt an additional waiver criterion to take into account existing LMA interests. Specifically, where a broadcaster owns one television station and provides programming to another in the same market pursuant to an LMA, yet cannot, under strict application of the 8 TV voice test, qualify for a duopoly under the new rule (as, for example, in a market in which there may be 10 or 11 stations, but for whatever reason, not 8 independent TV "voices" post-merger according to the Commission's counting methodology), the 8 TV voice requirement should be waived to permit that broadcaster to rationalize its existing two-station interest by creating a formal TV duopoly. As discussed above, adoption of such a waiver policy would be consistent with the Commission's stated goals regarding LMAs[74] and would acknowledge the demonstrated service commitment by the broadcaster in that market. Moreover, the community served by that broadcaster would be assured of <u>continued</u> public service benefits that the Commission recognizes can derive from joint station ownership.

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[74] *See supra* Section V.B.

## VII. ASSESSING THE COMPETITION ASPECTS OF BROADCAST STATION MERGERS MAY BEST BE LEFT TO THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION.

The *TV Local Ownership Order* suggests that the Commission is uncomfortable with the evaluation of competition and diversity in the market. As also discussed above, the Commission states repeatedly that it did not receive enough data to quantify the extent of the competition from non-broadcast media faced by broadcasters, for example. Perhaps this discomfort is an indication that the Commission should not attempt to make competition decisions, leaving them instead to the U.S. Department of Justice's Antitrust Division ("DOJ"). DOJ has the greater expertise in assessing anticompetitive effects of a proposed merger in a particular market and conducts merger analyses routinely, notwithstanding the absence of the statistical "proof" that the Commission so ardently seeks. The Commission should consider deferring to DOJ in the TV duopoly and one-to-a-market contexts and abandoning the expenditure of its own limited resources on competition analyses in the broadcast station merger context.

## VIII. CONCLUSION

PCC wholeheartedly endorses Chairman Kennard's comment that "rule changes are long overdue" in the realm of mass media multiple ownership.[75] Broadcast licensees and the public should not be forced to wait any longer for local television ownership rules that make sense and are supported by the evidence on the record. Surely the Commission should not "punt" on this matter until, for example, the next biennial review.[76] Change is needed now, and any change adopted by the Commission must reflect the reality of the media world in which we

75 *See id., Kennard Statement.*

76 *See id.*, ¶ 41.

live today. It also must live up to eight long years of deliberation and analysis in which the Commission, PCC, and so many other broadcasters and non-broadcasters alike have invested a great deal of time and effort. The new TV duopoly rule does neither. Even if the Commission is eager for a "bright-line" test in evaluating television duopoly applications, there is simply no reason why the approach it has developed in the one-to-a-market context, whereby multi-media voices are counted for purposes of evaluating competition and diversity in the market, should not be used in the TV/TV context. Moreover, there is no good reason why the Commission should not be counting the Internet as a voice for purposes of both rules.

For all the reasons discussed above, PCC urges the Commission to reconsider its 8 TV voice test and adopt the multi-media voice test proposed herein, which is rational, fair, and in the public interest.

Respectfully submitted,

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October 18, 1999

**CERTIFICATE OF SERVICE**

I the undersigned hereby certify that the attached "Petition for Reconsideration" was served by hand on this 18th day of October, 1999 to the following:

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