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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of **Review of the Commission's Regulations Governing Broadcasting**	**MM Docket No. 91-221**
Television Satellite Stations Review of Policy and Rules	**MM Docket No. 87-8**

PETITION FOR RECONSIDERATION BY THE LOCAL STATION OWNERSHIP COALITION

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Local Station Ownership Coalition
Executive Summary

The Local Station Ownership Coalition recognizes that the FCC's local ownership decision was a step in the right direction. Nonetheless, there are several important aspects of the decision that need to be revised. We respectfully request the Commission make the following modification to its *Report and Order.*

- The eight independent voice standard should be revised to reflect marketplace realities in both large and small markets.
- If the Commission retains the voice standard, it must count other media, such as cable systems, radio, DBS, MMDS, newspapers, magazines and the Internet as a voice. Multichannel media should not be counted as a single voice. Because these services provide multiple channels of service, each channel should be counted as a voice in the market.
- The FCC's waiver policy for smaller markets must be revised. Stations should not be pushed to the brink of financial disaster before being able to combine with another station in the market. The requirement that the station could not be sold to other "out-of-market" owners should be eliminated.
- Restrictions on the transferability of newly created duopoly combinations should be eliminated. Once formed, there is no sound public policy reason for requiring these combinations to be divested upon a subsequent transfer.
- Local marketing agreements (LMAs) should be permanently grandfathered.

The Commission has an opportunity to revise its decision to more accurately reflect marketplace realities. In today's highly competitive environment, the local over-the-air television broadcasters should have the freedom to meet these competitive challenges.

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PETITION FOR RECONSIDERATION BY THE LOCAL STATION OWNERSHIP COALITION

The Local Station Ownership Coalition (hereinafter LSOC) hereby files this Petition for Reconsideration in the above captioned matter. LSOC is a coalition of local television broadcast station licensees and associations, formed to seek meaningful relaxation of the Commission's television duopoly rule. We have been active participants throughout this proceeding.[1]

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[1]*See e.g.,* Comments of the Local Station Ownership Coalition in MM Docket No. 91-221, February 7, 1997.

Last August, the FCC issued a *Report and Order* in this proceeding revising its local television ownership rules.[2] LSOC congratulates the Commission for resolving many complex issues in this proceeding. The new local television ownership rules appear to be a step in the right direction. Nonetheless, several important parts of the decision can be improved. It is not our intention to discuss every element of the *Report and Order*. Instead this *Petition for Reconsideration* will focus on those issues which we believe should be revised.

I. The "Eight Independent Voice" Should be Revised to Reflect Market Place Realities

The *Report and Order* leaves little doubt that the Commission's primary regulatory objective in this proceeding is the pursuit of a diverse broadcast system. As the *Report and Order* concedes, however, the Commission has no hard evidence to demonstrate a nexus between independent ownership and a greater diversity of program content. To the contrary, the Commission acknowledges that such a nexus is an intuitive "belief" that a greater diversity of ownership will automatically yield greater diversity in program content.[3] In recent years, the courts and others have begun to question this nexus.[4] As the record in this proceeding

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[2]*In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules,* MM Docket No. 91-221, 87-8, FCC 99-209, (released August 6, 1999) (hereinafter *Report and Order*). The Commission has issued an errata modifying portions of the Report and Order on August 13, 1999 and September 7, 1999. The Commission also issues a Public Notice, FCC 99-240 (released September 9,1999) soliciting comment on "tie breaker" procedures for applications filed pursuant to the new rules.

[3]Report and Order at ¶ 22. (We think intuitive logic and common sense support our belief...)

[4]*See e.g., Lutheran Church v. FCC*, 141 F.3d, 344, 354 (D.C. Cir.) 1998; Dissenting Statement of Commissioner Harold Furchtgott Roth, *In the Matter of Review of the*

demonstrated, pursuing a goal of independent ownership will not necessarily foster diversity of program content. In many markets, program diversity can be enhanced only through local market combinations.

Pursuant to the FCC's new rules, an entity is able to own two television stations in the same market provided 1) there are eight independent voices in the market, and 2) the top four stations in the market (as measured by ratings) cannot combine with each other. The "eight independent voice" standard is the cornerstone of the Commission's new rule. Broadcasters seeking to acquire local market television combinations in markets that fall below this "eight voice" threshold must secure a waiver of the rules. The Commission's standard is arbitrary and inconsistent with the public interest.

A. No Justification is Provided for Selecting "Eight" Voices as the Standard for Measuring Diversity

The *Report and Order* provides little or no analysis for selecting "eight" voices as the baseline standard for the new duopoly rule. As the Commission observed, "Our decision today is an exercise in line drawing -- perennially one of the most difficult inevitable challenges facing a government agency."[5] Nonetheless, administrative line drawing must be predicated on some rational basis. The Commission could have selected five, six or seven voices as the diversity

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Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket No. 91-221, 87-8, FCC 99-209, (released August 6, 1999).

[5]*Report and Order* at ¶ 21

baseline. The only justification for selecting "eight" is a generalized statement that it was balancing competing interests.

> Taking into account current marketplace conditions, the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity.[6]

The *Report and Order* makes no attempt to find a nexus between its need to balance conflicting policies and the specific selection of "eight voices" as the baseline for competition and diversity in a local market. Selecting "eight" independent voices as the diversity and competitive baseline for the television duopoly rule is inconsistent with other FCC rules. In the context of radio and television cross ownership, the *Report and Order* believes that twenty voices are an appropriate baseline in larger markets, whereas ten voices are more appropriate in other markets.[7] The number "eight" appears to have been pulled out of thin air.

B. The FCC's Definition of What Constitutes a Voice Should Not be Limited to Over-the-air Television Stations

The FCC will count only independently owned commercial and non-commercial stations as voices when applying the "eight independent voice" standard. Other media, such as cable systems, radio stations, newspapers, magazines, billboards, direct broadcast satellite systems and the Internet are simply not counted. The approach is inconsistent with past commission decisions, existing rules and other parts of the *Report and Order*.

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[6] *Report and Order* at ¶ 67.

[7] *Report and Order* at ¶ 9.

1. Competing media are diversity substitutes.

The Commission's decision to count only free, over-the-air television stations as voices in the market is predicated on two assumptions. According to the Commission, broadcast television continues to have a "special and pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."[8] Second, according to the FCC, "[W]e are unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television."[9] Both justifications are unpersuasive.

The FCC's first justification is nothing more than a statement that we must regulate broadcast ownership because it is an important medium. However, as an information source there are many sources of information available in the market. Broadcast television is not even the most pervasive form of media distribution in the country. Indeed, over 65 million television households receive their local broadcast signals through cable. More than seven million consumers subscribe to direct broadcast satellite services. Some of these services are already receiving a local to local satellite service. The point is that while local broadcast stations remain important, most consumers are receiving these signals through another multi-channel medium. This means that the vast majority of Americans can shift from broadcast television to other cable or satellite channels with the flick of a button on remote control.

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[8] *Id.* at ¶ 68.

[9] *Id.* at ¶ 69.

It is not enough to say that over-the-air television remains as an important source of news and information. From a diversity and competitive standpoint, the more relevant question is whether there are competing sources of information.

As for the second justification, the vast majority of the American people receive their information from a number of information outlets and programs. To illustrate the point, Bear Stearns recently reported the cumulative ratings between broadcast television and cable systems.

Comparative Prime Time Ratings
for Broadcast Networks, Pay Cable and Basic Cable Networks

	Nov. 1982 Ratings/Share	**Nov. 1990 Ratings/Share**	**Nov. 1997 Ratings/Share**
Network Affiliates	49.6/80	38.1/61.9	30.1/45
Independents	8.7/14	13.0/22	7.4/12
PBS	2.4/4.0	2.3/4.0	2.5/4.0
Pay Cable	3.1/5.0	3.1/5.0	3.5/6.0
Cable Networks	1.8/3.0	11.2/16.0	21.2/34.0

Source: Bear Stearns, Cable & Broadcast March 1999 at 102.

The data reveal that basic cable networks now have a combined audience rating and share close to the combined ratings and share of the big four broadcast television networks. There is no doubt that the audience share of the basic cable networks exceeds that of any *individual* big four broadcast network. Indeed, the ratings and share of the cable network audience exceeds the combined Independent and PBS share. The data demonstrate that as a source of video information, consumers believe that cable is a substitute for broadcast television.

Everyday of millions of people are turning to a plethora of cable news channels such as CNN, MSNBC, FoxNews, CNN, CNBC and HeadlineNews. This does not even include other cable channels such as MTV, USA, BET and the Family Channel which telecast news programs directly related to their target audiences.

Also, it is difficult to believe that consumers do not get information from newspapers, magazines and the Internet. Indeed, as reported by *Electronic Media,* a new study by Frank Magid points to the increasing substitutability between the Internet and broadcast television as an information source:

> The survey, from Frank N. Magid & Associates, warns particulary about attitude changes among viewers who are regular Internet users..."Those who are using the Internet regularly are naming local TV news less often as their primary source of news," said Maryann Schultze, director of Magid Media Futures.[10]

To the extent the FCC's new duopoly rule rests primarily on diversity, then its concerns about insufficient "substitutability" evidence are in error. There is absolutely no evidence in the record to challenge the fact that consumers select their information from a variety of sources. For example, the substitutability among the various electronic media are quantified on a daily basis through the Nielsen ratings.

On the other hand, the FCC cites to no hard evidence disputing the substitutability among the various and the diversity marketplace. The *Report and Order* devotes a single sentence to this issue.

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[10]*Electronic Media*, September 27, 1999 at 1, 44.

Nor is there a consensus on the extent to which various media are substitutes for purposes of diversity.[11]

This statement grossly misreads the record. The overwhelming majority of commenters in this proceeding found that broadcast television stations are in the same information market as cable systems, DBS, MMDS, newspapers, magazines and the Internet.[12]

2. The FCC misreads the economic evidence: Cable and other information sources compete with local broadcast television stations.

Even from the narrower economic context, the *Report and Order* simply ignores the significance of the studies that have been presented. The studies submitted into the record are more than sufficient to prove that local broadcast television competes and is a substitute for other media.

As the *Report and Order* acknowledged, the most extensive study in the record was provided by the National Economic Research Associates, Inc. (NERA). The NERA study found that the relevant product market for local advertising clearly includes radio, cable, print media and likely includes other media as well. As reported in the LSOC's comments, NERA concluded:

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[11]*Report and Order* at ¶ 69.

[12]None of the concerns raised by the FCC focus on alternative media as a source of "diverse" information. Rather the studies examined these alternate media sources as a substitute for advertising. In this regard the Commission performs an analytic "slight of hand." It bases its rule primarily on diversity concerns, claiming alternative media are insufficient substitutes as sources of diverse information. However, all of the data to support this contention relate to economic substitutability. *See Report and Order* at ¶ 30 to 33. In other words, the FCC's concern about lack of substitutability deals solely with advertising markets.

> [T]here is sufficient information from a variety of sources upon which to conclude that the product dimension of relevant markets for local advertising messages may well encompass all media, including both electronic media, e.g., radio, broadcast, and cable television, and nonelectronic media, e.g., direct mail, newspapers magazines, yellow pages and billboards.[13]

The conclusion of the study rested on the following facts:

- Sellers of print and electronic media advertising consider themselves in competition with each other, as evidenced by their efforts to sell against each other in the local market -- and their respective trade associations' efforts to help them promote themselves against competing media.[14]

- Buyers of advertising also use a variety of media and are or would be responsive to relative price changes.[15]

- Academic literature has recognized that various advertising media compete for advertising dollars.[16]

- While expenditures on broadcast television have increased, television has become less expensive relative to newspapers, thus indication that lowering advertising rates may affect advertisers' selection of media -- and that various media are substitutes for each other.[17]

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[13]LSOC Comments in MM Docket No. 99-221, February 7, 1997 citing, Addanki, Buetel, and Kitt, *Regulating Television Stations Acquisitions: An Assessment of the Duopoly Rule*, National Economic Research Associates (May 17, 1995) at 2, *submitted as Exhibit 1 to the LSOC comments*; *see also*, Kitt and Beutel, *An Economic Analysis of the Relevant Advertising Markets Within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement Between WUAB Channel 43 and WOIO Channel 19*, National Economic Research Associates (July 15, 1994) at 2, *submitted as Exhibit 5* to the Comments of Malrite Communications Group., Inc, MM Docket No. 91-221 (filed May 17, 1995) (herein after Malrite NERA).

[14]NERA at 11-2, Malrite NERA at 7-8.

[15]Malrite (NERA) at 8-11.

[16]NERA at 12-13, Malrite NERA at 11-14.

[17]NERA at 15.

The *Report and Order* does not dispute the conclusions of this study. There is no explanation why the findings of the NERA study are wrong.[18] The only complaint appears to be that the study did not provide statistical estimates of cross-elasticities of demand as the FCC purportedly demanded. This is because the market is formed from bilateral oral negotiations between advertising buyers and sellers.[19] To the extent such negotiations are oral, it is entirely possible that the Commission's call for statistical cross-elasticity studies imposes an impossible evidentiary burden. The Commission offers no reason why statistical cross-elasticity studies are the only means to demonstrate economic substitutability among the various media. In any event, it most certainly does not mean that these alternative media are not complete and full substitutes for television broadcasting.[20]

Another key economic study was submitted by Economists Inc., which concluded:

> The empirical evidence...indicates that other forms of advertising, such as yellow pages, outdoor, and direct mail, are substitutes for video, radio and newspaper advertising.[21]

The study observed further:

> At both the national and local levels, advertisers generally use an array of media...Advertisers that use broadcast television typically make use of other

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[18]*Report and Order* at ¶ 31.

[19]*Id.*

[20]Indeed, the Department of Justice, which is primarily responsible for ensuring competition in television markets, relied on NERAs competitive analysis when it approved the local marketing agreement between WUAB and WOIO. If the analysis is good enough for the Department of Justice, it should be good enough for the Commission.

[21]*An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules*, Economists Incorporated (May 17, 1995) at 23. (Hereinafter cited as the "E.I. Study").

> media as well. Also, over time there has been substantial shifts in advertising among media, for example, from print to television, and within television from network to syndicated and cable, in response to changes in the relative prices and efficacy of these media.[22]
>
> [T]here is no evidence to support a conclusion that other forms of advertising--including yellow pages, outdoor and direct mail--do not constrain the prices of video, radio and newspaper advertising. In sum, advertising markets are likely to be broader than those tentatively identified by the Commission.[23]

Again the FCC's only objection to this study appears to be that it failed to provide specific econometric evidence of the cross-elasticity among alternative media.[24] Nowhere does the FCC dispute the conclusions of the analysis or that the findings were erroneous. The only criticism appears to be that the studies did not perform the type of statistical analysis preferred by the FCC. However, as the *Report and Order* acknowledges, the data submitted in the study are more than sufficient for analyzing competition in the antitrust context. It is difficult to believe the FCC would essentially ignore evidence that is sufficient to analyze competition in the antitrust cases. The FCC's criticism of these studies is perplexing given the fact that there are no counter studies demonstrating that broadcast television and other media are not economic substitutes.[25] There is no evidence to demonstrate that television broadcasting does not compete with cable, DBS, MMDS, newspapers, magazines, billboards and the Internet. To the contrary,

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[22]*Id. at* 19.

[23]*Id at* 24.

[24]*Report and Order at* ¶ 32.

[25]In this regard the FCC cites to only one generalized article concerning radio advertising. competition in the radio markets. Even the FCC characterizes this study's conclusion as tentative. Report and Order at ¶ 33, n.61.

almost every television broadcaster commenting in this proceeding stated that they do compete with these alternative media.

In summary, there is simply no basis for the FCC's conclusion that it lacks "definitive evidence" as to the substitutability between broadcast television and other media. Moreover, the Commission performs an analytic slight of hand in its analysis. The FCC's criticisms of the studies submitted in the record refer to economic substitutability of advertising -- not diversity. The *Report and Order* does not dispute the overwhelming evidence proving that, from a diversity standpoint, these media are substitutes..

C. Not Counting Other Media as a Voice is Inconsistent With Existing FCC Rules and Decisions.

The decision not to count alternative media as a voice when applying the eight voice duopoly standard conflicts directly with other FCC rules and policies. The contradiction is glaring. In 1984, the Commission concluded that all these media are substitutes:

> The record in this proceeding supports the conclusion that the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media as well. In the Notice we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is, cable, newspapers, magazines and periodicals are substitutes in the provision of such information.[26]

Fifteen years later the Commission changes its mind. Even though competition has increased exponentially during this period, it now believes these media are not sufficient information substitutes.

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[26]*In the Matter of Amendment of Section 73.3555, Report and Order* in Gen Docket No. 83-1009, 100 FCC 2d 17, 25 (1984).

The most obvious inconsistency can be found in the *Report and Order*. Paragraph 69 concludes that other media are not substitutes for local broadcast television, and therefore should not be counted as a voice under the independent voice test.

> Thus while we agree with those commenters who argued that different types of media, such as radio, cable television, VCR, MMDS and newspapers may to some extent be substitutes for broadcast television, in the absence of factual data we requested, we have decided to exercise due caution by employing a minimum station count that includes only broadcast television stations.[27]

Less then twenty pages later, however, broadcast television is a sufficient competitor to radio to justify the continuation of the radio/television one-to-a-market rule.

> We stated in the *TV Ownership Further Notice* that elimination of the rule might be warranted if we concluded that radio and television stations do not compete in the same local advertising, program delivery, or diversity markets. Although radio and television may or may not compete in different advertising markets, we believe a radio-television cross-ownership rule continues to be necessary to promote diversity of viewpoints in the broadcast media. 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. As these two media do serve as substitutes at least to some degree for diversity purposes, we will retain a relaxed one-to-a-market rule to ensure that viewpoint diversity is adequately protected.[28]

The two statements are irreconcilable. The FCC cannot state that radio is not a competitor to television, hence not counted as a voice under the new duopoly rule, and at the same time, consider the mediums competitive, hence counting television as a voice under the new, revised one-to-a-market rule. If television is sufficiently competitive to radio to justify

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[27]*Report and Order* at ¶ 69.

[28]*Report and Order* at ¶ 104.

continuation of the one-to-a-market rule, and to be counted as a voice under that rule, then radio should be counted as a voice under the television duopoly rule.

The inconsistency does not end with the treatment of radio and television competition. In addition to television competing with radio, other alternative media are considered as competitors in the market.

> We will also include in our voice count daily newspapers and cable systems because we believe 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.[29]

If the above analysis is correct, then there is no reason not to count newspapers and cable systems as a voice under the new revised duopoly rule. It is irrational to consider cable and newspapers as important sources of news and information on issues of local concern for radio listeners and not for broadcast television viewers. It is impossible to reconcile this paragraph with the FCC's decision not to count these sources a competitors under the duopoly rule.

The FCC's decision not to count competing media as a voice in its duopoly rule is inconsistent with other FCC cross-ownership rules. For example, the Commission's newspaper/broadcast cross-ownership rule and its cable-broadcast cross-ownership rule are both premised on the fact that these media exist in the same diversity and economic markets. In other words, they are sufficiently substitutable to justify continuation of the rules. It is irrational for the FCC to hold that these media are sufficiently substitutable to justify a rule against common ownership and at the same time not count them as substitutes under the new duopoly rule.

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[29]*Id.* at ¶ 113.

D. Cable and Other Multichannel Media Should be Counted as Multiple Voices

The *Report and Order* also erred in how it treats multichannel voices.[30] Under the revised one-to-a-market rule cable is counted only as one voice. The *Report and Order* acknowledges, however, that cable systems offer multiple channels which contribute to diversity in local markets.

> We will also include wired cable television in the DMA as one voice, since cable service is generally available to households throughout the U.S. We believe it is appropriate to include at least one voice for cable, where cable passes most of the homes in the market, because there are PEG and other channels on cable systems that present local informational and public affairs programming to the public.[31]

The FCC however only counts cable as one voice because: 1) cable subscribers have only one cable system to choose from, and 2) despite a multiplicity of channels, most cable programming available to a household is controlled by a single entity -- the cable operator.[32] The analysis presumes that as a single gatekeeper, cable operators exercise editorial control the programming appearing on each channel appearing on the system. While the cable operator (more likely the MSO's corporate headquarters) decides which cable networks are carried, there is little or no control over the content of these channels. Each cable network or cable channel makes its own decision regarding the content that will appear on its channel. For example, CNN exercises editorial control over what appears on its news. The same is true for CNBC, Fox News

[30]We recognize that the *Report and Order* does not count multichannel providers at all under the duopoly rule's "eight independent voice standard." Nonetheless, to the extent the Commission decides to count these systems as voices on reconsideration, then each channel should be considered as a voice.

[31]*Report and Order* at ¶ 113.

[32]*Id.*

and MSNBC. Cable operators by law have limited control over what appears on their PEG channels. Unlike local broadcasters, local cable operators exercise no editorial control over specific programs appearing on a specific channel.

The very nature of the cable business dictates that a cable operator act as a passive conduit for multiple channels, hence multiple voices in a market. From the subscriber's perspective, each cable channel is a possible substitute for a local television station. Because news and information can be obtained from scores of cable channels in each market, it makes little sense to treat cable as a single voice.

The Commission's treatment of DBS and wireless cable is similarly flawed. The Commission states that these systems should not count because they do not provide local news and public affairs programming.[33] First, the Commission is incorrectly asserts that DBS systems are not distributing local news through the carriage of local television stations. At the present time Echostar is providing a local-to-local television service in the top 20 markets. DirecTV is planning to offer a similar service in the near future. There is no question that DBS systems provide multiple channels providing news and information.[34]

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[33]*Report and Order* at ¶ 114.

[34]The Commission should not dismiss DBS programs because they "allegedly" do not address local issues. To reach this conclusion, the Commission must somehow draw a distinction between local issues and other non-local issues. Do programs on youth violence, drugs, or gangs have any less importance to a local community because they appear on a nationally distributed satellite service? These are both local and national problems. The national debt and budget surpluses directly impact local services from road repairs to welfare distributions. It is simply impossible to draw such distinctions. Similarly, one cannot assume that the marketplace of ideas is limited to news and information channels. Ideas that contribute to a diversity of voices can appear equally through entertainment and other programs.

E. The Eight Independent Voice Standard Harms Diversity in Small and Medium Sized Markets

Throughout the long history of this proceeding, the Commission has focused on two aspects of diversity. The first is outlet diversity, which concerns the number of independently owned outlets. An equally important consideration is program diversity, which concerns the diversity of programming that is available to consumers in a local market. In the end, it is the availability of programming that should ultimately control the Commission's decision. The pursuit of independent ownership is meaningless if these independently owned stations cannot sustain themselves economically. As LSOC noted in this proceeding previously:

> The FCC's duopoly rule presumes that an industry comprised of separate owners promotes diversity by creating independent "antagonistic" owners in local markets. It assumes that an independent "antagonistic" ownership structure will ultimately create a diverse marketplace of ideas with respect to programming and editorial opinion broadcast over the airwaves. It is worth remembering, however, that the nexus between separate ownership in local markets and an increase in programming a viewpoint diversity is a *presumption*, not a hard fact.[35]
>
> At the core of the FCC's ownership policies is the goal that diverse ownership will lead to the broadcasting of diverse programming and opinions. It is the programming that conveys the thoughts and opinions so necessary to enhance the marketplace of ideas. But the marketplace of ideas is not enhanced, if in the name of a diverse ownership structure, a station lacks the economic vitality to present local news, public affairs and other programs. Continuing to impose an economically unsound industrial structure in local markets in the name of "ownership diversity" is simply counterproductive. In the long run, even the number of diverse owners will decline as firms leave the market and stations go off the air.[36]

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[35] *Local Marketing Agreements and the Public Interest: A Supplemental Report*, Association of Local Television Stations and Local Station Ownership Coalition, filed in MM Docket No. 91-221, May 1998 at 3. (hereinafter "LMA Supplemental Report")

[36] *Id.* at 5.

By focusing on a "voice count," the Commission's decision favors "outlet" diversity at the expense of programming diversity. It has supplanted the ultimate goal, providing diverse programming, with the means traditionally used to achieve that goal.

Nowhere is this more apparent than in those markets with less than eight television voices. The economics of small and medium sized markets make it extremely difficult for a full complement of independently owned television stations to survive. Indeed, the overwhelming majority of television local marketing agreements were located in small markets precisely because of the economic conditions found in these markets.[37] The smaller populations in these markets make it difficult to support additional independently owned television stations.

While the *Report and Order* recognizes that smaller markets can benefit from the efficiencies of local combinations, it nonetheless concludes that consolidation in these markets could most undermine competition and diversity goals because there are fewer stations in these markets.[38] Nowhere does the *Report and Order* address the compelling evidence that local market combinations are essential to providing a greater diversity of programming to consumers in these markets. Indeed, consolidation in these markets may be more important than in larger markets. The Commission appears to have sacrificed programming diversity in order to promote outlet diversity..

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[37]According to the FCC's LMA surveys, 83% of the LMAs existed outside the top 25 markets and 54% of the LMAs existed outside the top 50 markets. *LMA Supplemental Report* at 7. S*ee also*, Comments of Pegasus Communications Corporation.

[38]*Report and Order* at ¶ 70.

II. FCC Waiver Policy Is Contrary to the Public Interest

The Commission believes that its waiver policies will provide appropriate relief for small and medium sized markets. The waivers may not provide sufficient relief.

A. The Waiver Criteria Are Counter Productive

To qualify under the FCC's new waiver standards, stations located in markets with less than eight (actually nine) independent voices must be in some form of economic distress. In order to combine the station must either be a failed, failing or an unbuilt facility. Requiring a station to be in economic distress before permitting it to combine with another station in the market harms the viewing public. The Commission is telling viewers in these markets that they must endure declines in service quality for lengthy periods of time in the hope that an entity with no television holdings in that market will acquire the station.[39]

There is no question that, in the name of outlet diversity, the Commission has sacrificed service to the public in these communities. This policy will lead to declines in the diverse programming offerings in these markets.[40]

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[39]Under the FCC's "failed station test" consumers must actually lose a voice in the market (dark for four months) or wait until the station is in involuntary bankruptcy before another station in the market can acquire the facility. *Report and Order* at ¶ 75. Under the failing station standard a station must have a negative cash flow for *three years*. *Id.* at ¶ 36. Even with these financial conditions, the Commission requires a showing that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the stations. Moreover the seller must demonstrate that selling the station to an out-of-market buyer would result in an artificially depressed price. *Id.* at ¶ 81.

[40]One particular irony is that after requiring three years of negative cash flow under the failing station standard, the purchasing station must present a factual showing of the programming related benefits that will be derived from the combination. *Id.* at ¶ 81. In other words the FCC forces a local station to endure economic hardship with the associated declines in programming for three years, then requires the buyer to promise to improve programming once

We see no reason why consumers in small and medium sized markets should be forced to endure declines in program quality. The "eight independent voice" standard should be revised. At the very least, the FCC should liberalize the waiver standard to avoid financial ruin before a station can act..

B. The Waiver Standards Are Inconsistent with Section 310(d)

Under the failed, failing and unbuilt station waiver standards, a party seeking to sell its facility to an "in-market" broadcaster must demonstrate that no other out-of-market buyers were available. Waivers will be permitted where:

> [T]he in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed station waiver applicants, one way to satisfy this fourth criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.[41]

The *Report and Order* also indicates that parties may file a petition to deny to rebut such a waiver request.[42] Under the waiver standard the Commission is being forced to evaluate whether there are other interested out-of-market buyers. Such an examination is in direct conflict with the Communications Act.

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the station is acquired. One would think that the public would be better served by permitting the combination to take place before cash flow dries up and service declines.

[41]*Report and Order* at ¶ 81.

[42]*Id.* at ¶ 76.

Prior to 1952, the FCC began developing policies to compare buyers in the context of transfers.[43] However, comparing potential buyers was expressly prohibited by the 1952 Amendments to the Communications Act.[44] The House Report explains the amendment.

> It is provided that the Commission, in acting upon an application for approval of a transfer or assignment, "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." In other words, in applying the test of the public interest, convenience and necessity the Commission must do so as though the proposed transferee or assignee were applying for the construction permit or station licence and as though no other person were interested in securing such a permit or license.[45]

The importance of this amendment cannot be overstated:

> The last clause of the 1952 Amendments is often referred to as the "Avco" Amendment. It takes its name from a case involving The Aviation Corporation ("Avco"), in which the Commission stated that it intended to compare buyers proposed in applications with other interested buyers. In fact, the Commission adopted rules to govern such cases, but soon abandoned them. Congress insured that the Commission would not revert to its former practice by adding the "Avco" amendment to Section 310(b).[46]

Under the proposed waiver standard, the FCC is required to examine whether there is another potential buyer for the station. This raises complex factual questions requiring a detailed examination in each case. The Commission must examine whether the "third party," out-of-

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[43]*See, e.g.,* Assignment and Transfer of Control, 11 Fed. Reg. 9375 (1946); *Powell Crosley, Jr*, 11 FCC 3, 12-14 (1945).

[44]Pub. L. No. 82-554, 66 Stat.711, See e.g. S. Rep. No. 44, 82d Cong., 1st Sess. 8-9 (1951)

[45]H. Rep. No.1750, 82nd Cong. 2d Sess. (1952), 52 U.S.Code Cong. & Ad. News, 82nd Cong. 2d Sess. (1952) at 2245-2256.

[46]Sewell, Stephen F., *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Federal Communications Law Journal No.3 at 277, 384-285 (July 1991).

market station is a ready, willing, and able buyer. It also must examine whether it has made an offer to the seller that will not result in an artificially depressed price. Finally, the Commission will have to conduct the standard basic qualifications examination as required by Section 308 of the statute. Such an inquiry conflicts with both the letter and spirit of the 1952 Amendments.

The problems are exacerbated because the Commission will apparently accept petitions to deny on this issue. Unfortunately the *Report and Order* never outlines the requirements for making a *prima facie* case. Will the Commission accept a petition merely on a petitioner's assertion that there is another unnamed, potential out-of-market buyer for the station? Will the FCC require those filing petitions to deny to prove that there is a specific out-of-market buyer that meets all the requisite qualifications, including the ability to pay a reasonable price for the station?

Accepting petitions to deny on this specific waiver element will lead the FCC into a quagmire. The potential for mischief by competitors and other groups is tremendous. The result could be a complete breakdown of the transfer process. The 1952 Amendments were designed to permit the alienation of broadcast stations and get the FCC out of complex factual inquiries between competing purchasers in the transfer process. This element of the waiver process should be eliminated.

III. Restrictions on Transferability Should be Eliminated

One of the more troubling components of the *Report and Order* is its treatment of new duopoly combinations when they are subsequently transferred. According to the FCC, a combination may be transferred only if the combination meets either the new duopoly standard or comports with the waiver criteria at the time of the subsequent transfer. [47] This element leads to some inconsistent. Consider the following situations:

- Two stations combine in a market where there are eight independent voices. At some future time, however, the number of voices drops below eight. (This could occur if another station went dark or additional combinations were permitted under failed or failing station waivers.) Thus, due to circumstances beyond the combined stations' control, the stations may not be sold as a combination.

- A top four station with strong ratings/audience share acquires a weak station. After years of investment, the weak station becomes one of the top four stations in the market. Nonetheless, the stations may not be sold as a combination. The only way the stations may be sold as a combination is if one of the stations reverted to its "weak" station status.

- A station in a market with less than eight voices obtains a "failed or failing" station waiver and combines with another station. After significant investment the "failed or failing" station becomes profitable. In order to sell the stations as a combination, one of the stations must revert to its "failed or failing" status.

- Two stations in a small market entered into a local marketing agreement prior to November 1996. Under the FCC rules the stations may be sold to a third party and keep the LMA intact (at least for five years). However, if the same two stations convert to a duopoly, they cannot transfer the stations as a combination.

These situations demonstrate that the FCC's restrictions on the transfer of duopoly combinations can lead to some arbitrary results. In the first case mentioned above, future FCC decisions regarding other stations in a market would preclude a broadcaster from selling the stations as a combination. In the second and third instances, a broadcaster's investment in providing more highly rated programming or saving a financially distressed station would be rewarded by prohibiting the combination's sale. Finally after attempting to move away from

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[47] *See e.g., Report and Order* at ¶ 87.

local marketing agreements, the FCC's restrictions on the sale of duopolies, creates and incentive for stations to keep their LMA status.

Restrictions on alienation stifle investment. The very reason for combining in markets is to harness the efficiencies inherent in operating two stations. The whole is greater than the sum of its parts. The value is lost if the stations must be split up at the time of sale. Indeed, transfer restrictions will hamper up-front investment in these facilities. Investors are unlikely to invest if there may be limitations on a subsequent transfer.[48]

From a strict diversity standpoint, the transfer restrictions make little sense. By permitting the duopoly in the first place, Commission has essentially found that the public interest will be served by permitting a combination in a market. Once this is established, it should not matter who subsequently owns the station. The number of voices in the market would not be changed. The *Report and Order* provides no public interest justification for attempting to terminate these combinations simply because the combination is being sold to another party. On the contrary, forcing these combinations to "split apart" upon a sale, harms the public interest by disrupting service and eliminating the efficiencies which lead to higher levels of performance.

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[48]Apart from up-front investment, the transfer restrictions create a perverse incentive in the market. For example, an entity wishing to sell its stations as a combination has every incentive not to invest in top quality programming. This could happen in markets where a buyer must meet the failed or failing station test in order to acquire the stations as a combination. It could
also happen in cases where a station must lower its audience share below the top four, in order to be sold as a combination.

IV. Local Marketing Agreements Should Be Permanently Grandfathered

Contrary to Congressional directives, the *Report and Order* did not grandfather existing local marketing agreements. Rather, the FCC merely granted these combinations a temporary reprieve until the conclusion the 2004 biennial review.[49]

The Commission's decision not to permanently grandfather local marketing agreements is inconsistent with Section 202(g) of the 1996 Telecommunication Act. Section 202(g) states:

> [N]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with regulations of the Commission.[50]

There is no question that the statute intended to permanently grandfather LMAs. As the Conference Committee stated:

> Subsection (g) grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commissions rules. The conferees note the positive contribution of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.[51]

Similarly, the report of the House Commerce Committee on Commerce stated:

> Nothing in subsection [g] is to be construed to prohibit the continuation or renewal of any television local marketing agreement in effect on the date of enactment. The Committee wishes to note the positive contributions of television local marketing agreements and to assure that this legislation does not deprive the public of the benefits of existing local marketing agreements that were otherwise

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[49] *Report and Order* at ¶ 113.

[50] 47 U.S.C. Section 202(g)

[51] Conference Report 104-230, 104th Cong 2d Sess. 164.(1996) (hereinafter cited as Conference Report)

> in compliance with Commission regulations on the date of enactment of this legislation. The efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity, enabling stations to go on the air which would not otherwise be able to obtain financing, and saving failing stations which would otherwise go dark.[52]

Floor statements in both the House and Senate also confirm the Congressional intent to grandfather these combinations. For example, Senator Ford stated:

> In addition to the duopoly rule, I am also pleased to see that this conference report grandfathers local marketing agreements, or LMA's. Many local broadcasters have stayed competitive by entering into these LMA's with one another. These innovative joint ventures allow separately owned stations to function cooperatively, achieving economies of scale through combined sales and advertising efforts, and shared technical facilities. These local marketing agreements have served their communities in a number of ways: some have increased coverage of local news; others have increased coverage of local sports, particularly college sports; and, many LMA's have provided outlets for innovative local programming and children's programming.[53]

Representative Upton echoed similar concerns in the House:

> There are many important issues in the bill before us today. Let me take a moment to take note of an issue of particular concern to the people of southwest Michigan -- local marketing agreements, also known as LMA's....
>
> I'm fully in support of efforts to allow for the continuation of LMA's in the future and I'm pleased that these provisions are part of S.652.[54]

Indeed, a colloquy between Representative Stearns of Florida and then House Telecommunications Subcommittee Chairman Jack Fields summed up congressional intent:

> Such agreements enable separately owned stations to function cooperatively, achieving significant economies of scale via combined sales and advertising

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[52]H. Rep 104-204, [100th] Cong. 1[st] Sess. (1995) at 119-120

[53]142 CONG. REC. S687, S705 (Daily ed. Feb 1, 1996)

[54]142 CONG. REC. H1145, H1177 (daily ed. Feb 1, 1996)

> efforts, shared technical facilities and increasing station access to diverse programming. I'm pleased this legislation recognizes the benefits of LMA's and grandfathers them. By grandfathering LMA's, we are allowing broadcasters to continue to use a tool that has helped them meet the challenges of today and tomorrow.[55]

Further clarification of the legislation's intent was provided in the 1997 Budget Reconciliation Act. The Budget Act waived the duopoly rule to permit stations to bid on returned analog spectrum in their own local markets. In explaining this provision, Congress made it clear that such a revision to the duopoly rule did not relieve the Commission of its duty to move forward with more timely relaxation of the duopoly rule. Its expectations of the FCC were quite clear:

> [The conferees]...expect that the Commission will provide additional relief (e.g., VHF/UHF combinations) that it finds to be in the public interest, and will implement the permanent grandfathering requirement for local marketing agreements as provided in the Telecommunications Act of 1996.[56]

Despite the unequivocal language in two statutes, the *Report and Order* did not grandfather local marketing agreements. According to the FCC, the language does not necessarily require the FCC to extend permanent grandfathering to television LMAs. In this regard, the FCC believes the statutory language left to the "Commission to decide whether and how to regulate them, including as appropriate prohibiting them, phasing them out, grandfathering them or permitting them."[57]

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[55]142 CONG. REC. H1145, H1165 (daily ed. Feb. 1, 1996)

[56]H. Conf. Rep., 105th Cong. 1st Sess., 143 CONG. REC. At H 6175 (1997)

[57]*Report and Order* at ¶ 136.

The Commission's position is premised on the notion that Section 202(g) of the 1996 Telecommunications Act gives the FCC the discretion to prohibit or continue LMAs that are in *compliance with the regulations* of the Commission. Under this construction, the FCC has the authority to limit the rights of stations involved in local marketing agreements by making them comply with regulations that did not exist in 1996. In essence, the FCC reads the statute as authorizing the *post hoc* application of a new set of rules limiting and even eliminating the rights of stations involved in LMA agreements. The statute should not be read to apply the new restrictions retroactively.

A better reading of the statute is that all LMAs that complied with the FCC rules, as those rules existed in 1996, were grandfathered by the 1996 Telecommunications Act. As noted above, this construction finds ample support in the legislative record. It must be remembered that in 1996, these arrangements were perfectly legal. They were in compliance with the FCC's policies existing at that time. Accordingly, for these LMAs the FCC could adopt no rule that would prohibit the origination, continuation or renewal of these local marketing agreements.

The Commission's treatment of LMAs in the *Report and Order* conflicts with this Congressional directive. The FCC has enacted rules that limit the continuation and renewal of these local marketing agreements. While the *Report and Order* contemplates a further review of the subject in 2004, it is possible that LMAs may not be permitted beyond this date. Indeed, in order to continue, these LMAs must meet the future biennial review criteria.[58] During the interim, renewal may not extend beyond the date for the 2004 biennial review. Moreover, even if

[58]*Report and Order* at ¶ 133.

existing local marketing agreements meet these criteria, it is not clear what a station receives. For example, the FCC is not clear whether LMAs meeting the criteria will receive a permanent grandfather, another temporary reprieve or duopoly status. Such a result is in direct conflict with the statute's provisions that prohibit limitations on the continuation and renewal of existing local marketing agreements.

V. Conclusion

In summary, members of the Local Station Ownership Coalition respectfully request that the Commission make the following changes to its *Report and Order*.

- The eight independent voice standard should be revised to reflect market place realities in both large and small markets..

- If the Commission retains the voice standard, it must count other media, such as cable systems, radio, DBS, MMDS, newspapers, magazines and the Internet as a voice. Multichannel media should not be counted as a single voice. Because these services provide multiple channels of service, each channel should be counted as a voice in the market.

- The FCC's waiver policy for smaller markets must be revised. Stations should not be pushed to the brink of financial disaster before being able to combine with another station in the market. The requirement that the station could not be sold to other "out-of-market" owners should be eliminated.

- Restrictions on the transferability of newly created duopoly combinations should be eliminated. Once formed there is no sound public policy reason for requiring these combinations to be divested upon a subsequent transfer. The standards applied to the combination when it was formed initially, should not be applied at the time of transfer.

- Local marketing agreements (LMAs) should be permanently grandfathered.

The Commission has an opportunity to revise its decision to more accurately reflect marketplace realities. In today's highly competitive environment, the local over-the-air television broadcasters should have the freedom to meet these competitive challenges. On behalf of the members of the Local Station Ownership Coalition, we trust the Commission will adopt these recommendations.

Respectfully submitted,
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