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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	

To the Commission:

PETITION FOR RECONSIDERATION

SINCLAIR BROADCAST GROUP, INC.

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Summary

The underlying predicate of "diversity"which the Commission uses to justify its actions in the recent *Local Ownership Order* is never clearly defined and ultimately, is fundamentally flawed. On reconsideration, the Commission should eliminate the local television ownership rule and allow television broadcasters to own duopolies within a market subject to the review of the Department of Justice. The Commission's selection of the "eight voices" standard for determining when television duopolies are in the public interest is arbitrary and capricious, and an analysis of anti-competitive issues surrounding any given acquisition is better left to an agency with greater expertise in that area. Furthermore, the Commission's rules will have a negative effect on the transferability of television stations.

Local marketing agreements ("LMAs") must be permanently grandfathered rather than eliminated. Congress has clearly indicated its support of LMAs, as well as its expectation that existing LMAs should be allowed to continue and to be renewed pursuant to the terms of the contract. As demonstrated by the record before the Commission in this rule making, LMAs have served the public interest admirably. These agreements continue to serve the public interest, and therefore should be permanently grandfathered. The Commission's decision to sunset LMAs is an unconstitutional taking of property under the Fifth Amendment, without compensation or justification. In addition, there is no justification for a 33% equity debt plus rule which will adversely affect investment in minority owned stations.

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To the Commission:

PETITION FOR RECONSIDERATION

I. Introduction

Sinclair Broadcast Group, Inc. ("Sinclair"), by counsel and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, hereby petitions the Commission for Reconsideration of its Report and Order in the above-referenced proceedings.[1] In particular, in this petition, Sinclair demonstrates that the predicate for revising the local ownership rules is flawed and the revised local television ownership rule is arbitrary and capricious, containing

[1] *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Report and Order*, MM Docket 91-221 & 87-8, FCC 99-209, released August 6, 1999 ("*Local Ownership Order*"); *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report and Order*, MM Docket No. 94-150, FCC 99-207, released August 6, 1999 ("*Attribution Order*").

numerous ambiguities. The Commission's decision to "sunset" rather than to permanently grandfather local marketing agreements ("LMAs") contravenes congressional intent and exceeds the FCC's authority. LMAs have served the public interest. The proposed elimination of LMAs constitutes governmental interference with private contractual rights in violation of the takings clause of the Fifth Amendment. Finally, the Commission has not advanced a justifiable rationale for adopting its 33% equity debt plus ("EDP") rule, and the EDP rule will undercut the Commission's objective of increasing minority ownership.

1. Section 1.429(a) of the Commission's Rules, 47 C.F. R. § 1.429(a), allows "any interested person" to file a Petition for Reconsideration of a final action taken in a rule making proceeding. The *Local Ownership Order* and the *Attribution Order* are final actions, as the rule making proceedings were terminated by the respective Orders.[2] Sinclair, a publicly-traded company with over one thousand shareholders and close to a billion dollar market capitalization, is among the nation's largest group television owners. Sinclair is the licensee of approximately sixty commercial television stations, and programs many others pursuant to time brokerage agreements. In addition, Sinclair has been an active participant in this rule making, filing comments in response to the Further Notice of Proposed Rule Making, Docket No. 91-221 & 87-8, 10 FCC Rcd 3524 (1995), as well as the Second Further Notice of Proposed Rule Making, MM Docket No. 91-221 & 87-8, FCC Rcd 21655 (1996). Thus, as Sinclair is directly affected by the Commission's rule changes, it has standing to seek reconsideration of the *Local Ownership Order* and the *Attribution Order* and does so herein.

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[2] *Local Ownership Order*, at ¶ 157; *Attribution Order*, at ¶ 182.

2. Petitions for Reconsideration of a final action by the Commission must be filed within 30 days of the date of public notice of the action. 47 C.F.R. §§ 1.429(d) and 1.4(b). Public Notice of both the *Local Ownership Order* and the *Attribution Order* was announced by publication in the Federal Register on September 17, 1999. Thus, petitions for reconsideration must be filed with the Commission on or before October 18, 1999. This petition, therefore, is timely filed.

II. Discussion

3. The Commission's *Local Ownership Order* regarding regulations governing television broadcasting contains a number of flaws which must be addressed on reconsideration.

A. The Predicate for the Revised Local Ownership Rules Is Fundamentally Flawed

4. In its *Local Ownership Order*, the Commission states that "[t]he ultimate objectives of our ownership rules are to promote diversity and to foster economic competition." The Order goes on to invoke repeatedly the mantra of "diversity." Yet the Order and Commission case precedent are singularly muddled as to just what kind of "diversity" the FCC has in mind and how the revised ownership rules will accomplish the objective of promoting "diversity." For instance, the Order refers to "maximum diversification of program and service viewpoints" (para. 15); "promoting diversification of programming sources and viewpoints" (para. 15); and "diversity in the ownership of broadcast stations so as to foster a diversity of viewpoints in the material presented over the airwaves" (para. 17).

5. On other occasions, the Commission has spoken of "diversity of voices" (*Jerry Szoka,* 1999 FCC Lexis 2775; *Stephen Paul Dunifer,* 11 FCC Rcd 718, 724 (1995)); "the level of

diversity and competition in the relevant market" (*Shareholders of Jacor Comms, Inc.*, 14 FCC Rcd 6867, para. 59); "diversity of views" (*WLNY-TV, Inc.*, 14 CR 701 (1998)); "diversity goals" (*J.S. Kelly, L.L.C.*, 13 FCC Rcd 23632, para. 5); "diversity in video programming and carriage" (*World Satellite Network, Inc. v. Tele-Communications, Inc., 1999 Lexis 3789);* and "diversity of educational and social opportunity" (Statement of Chairman Kennard in the matter of *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act*, 13 FCC Rcd 23254 (1996)).

6. With all due respect, the FCC's formulation of the objective for the local ownership rules is simply too imprecise to be meaningful. Does the Commission desire diverse owners (and, if so, is this diversity based on race, sex, religion, big vs. small, mid-western vs. eastern?). Or is the Commission looking for different programming, e.g. syndicated vs. network, local vs. non-local, news vs. entertainment? Or does the Commission want different views, e.g. conservative vs. liberal, local vs. national? In *Lutheran Church-Missouri Synod v. FCC,* 141 F.3d 344 (D.C. Cir. 1998), the U.S. Court of Appeals for the District of Columbia Circuit criticized the FCC for stating that its EEO regulations rest solely on its desire to foster "diverse" programming content but "never defin[ing] exactly what it means by 'diverse programming.'" *Id.* at p.354. Moreover, the Court observed that "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment." *Id.* at p. 354.

7. While acknowledging that "[s]ome question whether diverse outlets and sources lead to diverse viewpoints, or whether [the Commission's] rules are necessary to promote diversity," (*Local Ownership Order* at para. 22), the Commission nevertheless states that "we

think intuitive logic and common sense support our belief that the identity and viewpoint of a station's owner can in fact influence the station's programming." *Id.*

8. Even assuming for the sake of argument that "intuitive logic" or " common sense" were as the Commission believes, they are not sufficient foundations upon which to craft local ownership rules that will govern the broadcast industry. The Commission has simply not identified just what it is attempting to achieve or how its revised rules will accomplish that goal. If the Commission is attempting to achieve diversity of programming, it has not explained how it will achieve that objective when most television stations are affiliated with a national network which programs a substantial portion of the affiliates' time. Moreover, any Commission oversight of programming is seriously constrained by the First Amendment.

9. The assertion that the identity and viewpoint of a station's owner can influence programming has not been supported. In *Lamprecht v. FCC*, 958 F.2d 383 (1992), *reconsid. on remand, Jerome Thomas Lamprecht*, 7 FCC Rcd 6794 (1992), the Court of Appeals ruled that sex-based preferences were unconstitutional because the FCC failed to introduce evidence of any connection between female ownership and "female programming." Thereafter, in *Bechtel v. FCC*, 10 F.3d 875, 877, 887 (D.C. Cir. 1993), the D.C. Circuit held that the integration criterion of the standard comparative issue, upon which minority/female preferences were based, was arbitrary and capricious. The Commission has no concrete evidence supporting its speculative thesis that an owner's sex, race or nationality will influence a station's programming. Indeed, in this day of large publicly-held corporate broadcasters, it is extremely unlikely that any particular owner will influence programming. Rather, programming is determined by an amalgam of interests including networks, the audience, ratings, consultants and advertisers.

10. In sum, the Commission has not specified what it means by diversity or how its revised rules will fulfill the objective of "diversity." Given the numerous formulations of "diversity" articulated by the Commission in the past, the Commission cannot possibly arrive at a logical supportable definition of "diversity" that will sustain its new rules.

B. The Local Television Ownership Rule Should Be Eliminated

11. In its *Local Ownership Order*, the Commission modified the local television ownership rule (the "Local TV Rule") to permit television duopolies if a certain standard is met. That standard, the so-called "Eight Voice/Top Four-Ranked Station Standard," permits a single entity to own two television stations in the same market if at least eight independently owned and operating full-power commercial and non-commercial TV stations would remain post-merger in the DMA in question, and if the two stations are not both among the top four-ranked stations in the market, as measured by audience share.[3] According to the Commission, "the station rank and voice criteria are designed to protect both our core competition and diversity concerns."[4] As demonstrated below, however, the Local TV Rule is fundamentally flawed. Television duopolies should be permitted subject to the decision of the Justice Department's Anti-trust Division. Such a procedure will satisfy the FCC's concerns about protecting core competition.

1. The Commission's Selection of the Eight Voices Standard is Arbitrary and Capricious

12. The Commission's adoption of the eight voices standard in the *Local Ownership Order* is an arbitrary and capricious decision, lacking any rational basis or support. Under the

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3 *Local Ownership Order* at ¶64 - 70.

4 *Id.* at ¶ 65.

Administrative Procedure Act, an agency's actions, findings or conclusions may be set aside if they are found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[5] Furthermore, as the Supreme Court has held, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[6] In other words, an agency must "offer a reasoned explanation that is supported by the record."[7] In the instant case, the *Local Ownership Order* provides no reasoning or insight as to how the Commission selected the number eight. Instead, the Commission simply states that, "the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the effectiveness of television duopolies while at the same time ensuring a robust level of diversity."[8] There is no explanation as to why eight or more voices is good while seven is not, nor is there any relationship between the number selected by the Commission and the varying characteristics of the markets to which it will be applied.

13. The Commission's eight voice standard is particularly harmful to smaller markets, as television stations in these markets are most likely to require duopolies for economic viability. It also unfairly penalizes a smaller DMA adjacent to a larger DMA. For instance, Baltimore

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[5] 5 U.S.C. Sec. 706(2)(A).

[6] *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Inc. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[7] *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C.Cir. 1992).

[8] *Local Ownership Order* at ¶67.

(DMA rank 24) is adjacent to Washington, D.C. (DMA rank 8). Baltimore has only eight independently owned and operating full power commercial and noncommercial TV stations, whereas Washington has numerous stations. Washington's proximity to Baltimore has limited the number of signals available to Baltimore. The FCC's rule will not permit any duopolies in Baltimore but will permit a number of duopolies in the Washington DMA. Such a result is extremely unfair given the fact that a large number of Baltimore DMA residents receive Washington stations over the air or on cable.

14. In addition, the eight voice standard only counts independently owned and operating full-power television stations. The standard completely ignores the many other non-television voices that are available in the market, such as AM and FM radio, cable television, Direct Broadcast Satellite service (DBS), multichannel multi-point distribution service (MMDS), daily newspapers, magazines, VCRs, DVD players, and the Internet.[9] The Commission fails to provide a rational explanation for excluding non-television voices from the eight voice standard.

15. At the same time that the Commission has selected eight voices as the standard for television duopolies, ignoring the other voices mentioned above within the television market, the Commission has adopted rules for radio-television cross ownership that count several voices besides independently-owned full-power television stations. In addition to full power TV stations, the voice count for the radio-television cross ownership analysis includes independently

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[9] In acknowledgment of the fact that DBS is a significant competitor of cable television, the Commission recently modified its Cable Horizontal Ownership and Attribution Rules to include nationwide subscribers of DBS and other multi-channel video programming distributors (MVPDs) in its calculation of total horizontal ownership. *See*, *Cable Horizontal Ownership Rule*, *Report and Order*, MM Docket No. 92-264, FCC 99-288 (released October 8, 1999).

owned and operating commercial and noncommercial radio stations, daily newspapers, and cable television systems.[10] The Commission has provided no rationale justifying the creation of two different strategies -- one for radio-television cross ownership and the other for television duopolies. Once again, the Commission's decision lacks any rational basis and is arbitrary and capricious.

16. Furthermore, the *Local Ownership Order* contains additional inconsistencies -- for while the Supreme Court has indicated that cable television transmits the programming of others on a continuous and unedited basis, the Commission fails to count these numerous cable voices for the purposes of its eight-voices test or for its radio-television cross-ownership analysis. In *Turner I* the Court stated that, "[o]nce the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others."[11] Thus, as cable television is arguably a conduit for numerous voices rather than a voice itself, the Commission improperly includes only one voice for cable in its radio-television cross ownership rules, and fails to attribute any voice at all to cable for the purposes of the eight-voices test.

2. The Local Ownership Rule Contains Numerous Ambiguities

17. The television local ownership rule adopted by the Commission is likely to be virtually impossible to administer. Already, in response to the Commission's Public Notice, FCC 99-240, released September 9, 1999, which proposed to use a random selection method to process applications filed pursuant to the new rules, many commenters have pointed out

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10 *Id.* at ¶ 111.

11 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*").

substantial ambiguities in the rules. For instance, in a market with nine television stations, where there is a pre-existing LMA between two stations, on the effective date of the new rule, the LMA will become an attributable interest and the market will thus become an eight station market. But neither the *Local Ownership Order* nor the *Attribution Order* contain any indication of how the FCC will attempt to deal with this situation. Similarly, the *Local Ownership Order* and the *Attribution Order* contemplate that certain non-controlling interests will become attributable, but there is no indication of how the Commission plans to deal with those interests in its television duopoly rule. As Sinclair has argued in its comments responding to the Public Notice, LMAs in existence at the time that the *Local Ownership Order* was adopted should have priority, and non-controlling interests existing on that date that subsequently become attributable should be secondary to LMAs.

18. Furthermore, the *Local Ownership Order* announces that the FCC will use a DMA-only standard in administering the television duopoly rule, but the Order does not state how the DMA will be determined. Sinclair submits that the definition of DMA used for purposes of any ownership rule should be the same as the DMA definition used for the FCC's must carry rule at the time that the ownership rules were adopted. Specifically, Sinclair notes that Section 76.55(e)(2)(i) of the Commission's rules provides that for the October 1, 1999 must carry election, which becomes effective on January 1, 2000, DMA assignments specified in the 1997-98 DMA Market and Demographic Rank Report shall be used. For the sake of consistency and equity, the same definition of DMA should be used for the ownership rules for a term coterminous with the must carry election period.

3. The Commission's New Rules Will Have a Negative Effect on the Transferability of Television Stations

19. The top four-ranked station standard will have a negative effect on the transferability of television stations. If an entity acquires a duopoly and the two commonly-owned stations subsequently are ranked among the top four stations in the market as measured by audience share, under the Commission's rules, the licensee cannot transfer the stations as a pair.[12] This practice discourages both the rehabilitation of failing stations and the improvement of stations since it punishes anyone who lifts a lower ranked station into the top four in the market. The top four-ranked station standard also makes little sense because, pragmatically, if a single entity owns two of the top stations in a market, it will not program them with the same material. Furthermore, network affiliates have little ability to make substantial changes to network programming. Indeed, typical network affiliation agreements on file with the Commission explicitly prohibit a licensee from substantially modifying the station's programming and impose severe penalties for doing so. Accordingly, for a portion of the day's programming, duplicative programming on commonly-owned top four-ranked television stations is not a genuine concern.

4. Ensuring Competition is Beyond the FCC's Purview

20. Besides diversity, the *Local Ownership Order* purports to protect the goal of competition. Ensuring competition, however, is beyond the FCC's purview. The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have greater expertise in assessing the anti-competitive effects that a proposed merger may have on a particular market; therefore, the FCC should not squander its limited resources to duplicate a review that is better left to an

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[12] *Local Ownership Rule* at ¶ 64.

agency specializing in competitive issues. Indeed, Congress has mandated that the DOJ and the FTC enforce the anti-trust laws and address concerns regarding competition in trade and commerce.[13] In a time of ever-shrinking budgets, there is no reason for an overlapping of jurisdiction between the FCC and the DOJ or the FTC in this area.

21. As demonstrated above, the *Local Ownership Order* is fundamentally flawed. The objective of achieving "diversity" is an inadequate justification for the rule. The Commission acted arbitrarily in selecting the number eight for its voice standard. That standard is especially harmful to smaller markets and those markets adjacent to much larger markets. The top four ranked station standard has a negative impact on station transferability. The Local TV Rule is unclear. Ensuring competition, the other purported justification for the Local TV Rule, is best left to the Justice Department. Therefore, the Commission must reconsider the *Local Ownership Order* and should permit television duopolies subject to review by the DOJ's Anti-trust Division.

C. Local Marketing Agreements Must Be Permanently Grandfathered

22. The Commission should permanently grandfather LMAs which were in existence at the time the Commission adopted the instant *Local Ownership Order*. Permanently grandfathering LMAs is in the public interest because many LMAs, including those in which Sinclair is currently involved, have benefited the public by resuscitating failing stations, improving programming, and increasing the amount of local news and public affairs programming. The Commission intimates in the Report and Order that it will provide for the

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[13] *See*, The Sherman Act, 15 U.S.C.A.§§ 1-7 (as amended); The Clayton Act, 15 U.S.C.A. §§ 12-27.

grandfathering of LMAs; however, the Order in fact allows only for the *sunset* of LMAs. The Commission states:

> We adopt our proposal in the Second Further Notice to grandfather television LMAs entered into prior to November 5, 1996, the adoption date of that Notice, for purposes of compliance with our ownership rules. Television LMAs entered into on or after that date will have two years from the adoption date of this Report and Order to come into compliance with our rules or terminate. LMAs entered into before November 5, 1996 will be grandfathered until the conclusion of our 2004 biennial review, a period of approximately five years.[14]

In reality, the Order provides the parties to an LMA with a period of two or five years, depending on when the LMA was created, to come into compliance with the new rules or to terminate the agreement. This sunset provision will gradually phase LMAs out of existence. Had the Commission truly grandfathered these types of agreements, it would have granted a permanent waiver of the new rules to allow current LMAs to continue unchanged by the Commission's rules.

23. The Commission's action is inconsistent with the concept of "grandfathering." Black's Law Dictionary, Sixth Edition, defines a "grandfather clause" as a "[p]rovision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction."[15] In this instance, that would mean honoring the contractual agreements of parties currently engaged in LMAs. Rather than adopting this course of action, the Commission misuses the term "grandfather" to describe its

[14] *Local Ownership Order*, at ¶133.

[15] *Black's Law Dictionary* (6th ed. 1990), p. 699.

actions. The Commission should correct this by truly grandfathering LMAs, i.e. allowing the continuation and renewal of existing television LMAs.

24. The Commission has approved the use of local marketing agreements in television broadcasting since as early as 1991. The public record contains ample support for parties to conclude that LMAs are in the public interest, and indeed, there are no reported cases between 1991 and 1999 where the Commission rejected an LMA which conformed to Commission policies. Similarly, LMAs have been employed in radio broadcasting for many years. The Commission has never stated that television LMAs would be eliminated, nor has the Commission ever placed a freeze on new television LMAs. Broadcasters and the public have reasonably relied on the Commission's acceptance of television LMAs for nearly nine years, and it is inequitable for the Commission to now order the termination of these agreements without any warning or justification.

1. Congress Has Clearly Stated Its Support for Local Marketing Agreements

25. Congress has determined that local marketing agreements are in the public interest, as indicated by language in the Telecommunications Act of 1996 protecting LMAs, as well as by the legislative history associated with the statute.

a. The Commission's decision to "sunset" rather than grandfather television LMAs contravenes Congressional intent and exceeds the agency's authority

26. Section 202(g) of the 1996 Telecommunications Act provides that "[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 the regulations of the

Commission."[16] There are two possible ways to interpret this section of the statute. The first possible interpretation is that because there were no Commission regulations governing LMAs on the day the legislation was passed, all LMAs are therefore grandfathered. The second possible reading, which is the way the Commission has interpreted the section, is that LMAs are grandfathered, but only so long as they are consistent with the new rules that the Commission will promulgate.

27. The Conference Report accompanying the Telecom Act reveals the correct interpretation of Section 202(g) as it plainly states that:

> [Section 202(g)] <u>grandfathers LMAs currently in existence upon enactment of this legislation</u> and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions 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.[17] (Emphasis added).

Thus, the plain intent of Congress, as expressed in the Conference Report, was to allow parties engaged in television LMAs to continue these agreements, notwithstanding any changes in the Commission's Regulations that might seek to prevent LMAs. This is entirely consistent with the language of Section 202(g) itself. The statutory provision expressly allows the "continuation" and the "renewal" of any television LMA "that is in compliance with the rules of the Commission." Since the Telecom Act was enacted on February 8, 1996, and since television LMAs were permissible at the time (and, indeed, continue to be permissible), the Telecom Act by

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[16] Telecommunications Act of 1996, Section 202(g) ("Telecom Act").

[17] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163, 164 (1996) ("Conference Report").

its plain language allows LMAs in effect as of February 8, 1996, not only to be continued, but to be renewed in the future.

28. The Commission's action sunsetting television LMAs bears no resemblance to what Congress intended by drafting Section 202(g) of the Telecom Act. Congress did not leave it up to the Commission to change the definition of "grandfather," or to adopt new rules prohibiting LMAs. As noted above, Congress intended Section 202(g) to "grandfather" LMAs in existence upon enactment of the Telecom Act. Under its recognized definition, "grandfathering" means allowing such LMAs to continue to be performed despite a future regulation that might not allow them. The Commission's decision, however, disregards Congressional intent and the statutory language by instead providing for the sunset of all LMAs.

29. The *Local Ownership Order* reasons that when Congress stated that Section 202(g) "grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future," it did not really mean that LMAs should be *permanently* grandfathered. While the statute itself does not literally instruct the Commission to "permanently" grandfather LMAs, the term "grandfather" has a legal meaning which must be observed. There is no indication that Congress was endorsing a change in the definition of the term. The Commission's decision in the *Local Ownership Order* to sunset LMAs and phase them out of existence "prohibits" the continuation of LMAs, in direct contradiction to the mandate of Section 202(g). Section 202(g)'s instructions to protect LMAs, combined with the Conference Report describing the legislation as "grandfather[ing] LMAs currently in existence," demonstrates Congress's intent to permanently grandfather these arrangements. The Commission's labored rationalization finding otherwise is a fabrication which exceeds its authority as an independent

agency. Rather than following Congress's explicit instructions, the Commission has distorted Section 202(g) and the legislative history in order to prevent the continuation of Congressionally sanctioned local marketing agreements.

b. LMAs in existence prior to the Commission's new Local Ownership Order were in compliance with the regulations of the Commission

30. At the time Congress passed the Telecommunications Act of 1996 containing Section 202(g), the Commission had no regulations governing LMAs. For the Commission to now apply its new regulations *ex post facto* to LMAs which have been in existence for years is unjust. Section 202(g) provides for the grandfathering of "any local marketing agreement that is in compliance with the regulations of the Commission." Therefore, the Commission cannot simply change its regulations and require LMAs to comply with an entirely new set of rules in order to continue in the future. The Report and Order states that LMAs entered into prior to November 5, 1996 will be reviewed as part of the Commission's 2004 biennial review, at which time they will be reevaluated on a case-by-case basis to determine if the agreements meet a sufficient number of factors to justify their continuation.[18] This inequitable retroactive application of the Commission's new regulations contravenes the clear intent of Congress to permanently grandfather LMAs.

2. LMAs Have Served the Public Interest

31. Local marketing agreements currently serve the public interest in an admirable fashion. This benefit to the public interest should not be overlooked. Broadcasters have

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[18] *Local Ownership Order*, at ¶ 148.

expended considerable resources in order to operate under these agreements, and, as demonstrated by Sinclair's experiences set forth below, they have had great success in resuscitating marginal stations, upgrading transmission equipment, and creating new local news and public affairs programming. The following information comes from materials that are part of the record in this proceeding[19]:

- In December 1991, Sinclair entered into an LMA with station WPTT(TV), Pittsburgh, Pennsylvania. Before the LMA, WPTT(TV) was a home shopping station operating on a marginal basis. As a result of the LMA, WPTT(TV) has become profitable. WPTT(TV) has expanded its entertainment programming each year to the point where it is now airing 20 hours per day. Through the LMA, WPTT(TV) has been able to secure better syndicated programming. In addition, the station has strengthened its lineup of children's programming. As of the third quarter of 1996, WPTT(TV) aired 4½ hours of core children's programming per week. In 1997, WPTT(TV) won the rights to broadcast 12 hockey games. From the start of the LMA in 1991 to February 1997, the station's ratings/share went from 0/0 to 1/3.

- In March 1993, Sinclair entered into an LMA with station WVTV(TV), Milwaukee, Wisconsin. Prior to the LMA, WVTV(TV) was barely breaking even. Now, it has become profitable. WVTV(TV) is now able to draw upon an extensive movie library, and has acquired the rights to popular programming such as "Seinfeld," "Martin," "Living Single," "Frasier," "Friends," and "Family Matters," and it increased its children's programming from ½ hour a week in 1993 to 4½ hours a week in 1996. Moreover, WVTV(TV) was able to add 68 Milwaukee Brewers baseball games and 35 Milwaukee Bucks games to its schedule. In February 1993, before the LMA, WVTV(TV)'s ratings/share was 0/0. In February 1996, it was 3/7.

- In May 1994, Sinclair entered into an LMA with station WNUV-TV, Baltimore, Maryland. Before the LMA, WNUV-TV was only a marginally profitable station. It was running tired programming, and its community involvement essentially consisted of airing public service announcements. However, in April 1997, WNUV-TV began a 6:30 p.m. local newscast -- the latest evening news of any station in the market. As of the third quarter of 1996, WNUV-TV's core

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19 *See, Comments*, MM Docket No. 91-221 & 94-150 filed by Sinclair Broadcast Group, Inc. on February 7, 1997. Sinclair has more recent data available should the Commission have an interest in further updating its records.

children's programming amounted to 6½ hours per week. The station engaged in five community service projects in 1996 (including an African-American history salute and a legal aid campaign), and targeted a minimum of six such projects for 1997. WNUV-TV also won the rights to preseason Baltimore Ravens football games.

- In March 1995, Sinclair entered into an LMA with station WRDC(TV), Durham, North Carolina. Formerly, WRDC(TV) aired very little local public affairs programming. Now, the station has a public affairs director and conducted highly successful "Toys for Tots" campaigns in 1995 and 1996. The LMA has also allowed WRDC(TV) to improve its children's programming. The station added three children's programs in 1997 and produces local segments for one of its children's shows.

- In May 1995, Sinclair entered into an LMA with station WABM(TV), Birmingham, Alabama. At the time, WABM(TV) was in bankruptcy and was unable to purchase programming product because of its poor financial state. All of the shows that aired were barter shows, and, in the course of a day, it was not unusual to see a show three times in one day. Now, WABM(TV) is a UPN affiliate. It airs first-run and top syndicated programs throughout the broadcast day. As of the third quarter of 1996, WABM(TV) was airing 6½ hours of core children's programming per week. WABM(TV) went from a 0/0 ratings/share in May 1994 to a 1/3 ratings/share in November 1996. Moreover, WABM has been able to engage in public service and outreach projects to its service area that it could never have undertaken before.

As demonstrated by Sinclair's experience, LMAs serve the public interest and must not be eliminated. By allowing these contractual agreements to continue and be renewed according to their terms, the Commission will ensure that those television stations currently operating under an LMA will continue to serve the public interest.

D. The FCC's Elimination of LMAs is a Taking Without Justification or Compensation

32. The Commission's decision to eliminate LMAs is an unconstitutional taking without justification or compensation. The Takings Clause of the Fifth Amendment prohibits the

government from taking private property "for public use, without just compensation."[20] Local marketing agreements are business contracts which form the property of the parties to these agreements.[21] By voiding these contracts, the Commission's regulations act as a taking of the parties' property. In *Connolly v. Pension Benefit Guaranty Corporation*, the Supreme Court reviewed a challenge claiming that an Act passed by Congress, namely the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), imposing liability on employers for withdrawals from pension trusts formed an unconstitutional taking under the Fifth Amendment.[22] While the Court ultimately held that the MPPAA was not an unconstitutional taking, it indicated that contractual rights are property rights, the appropriation or destruction of which can rise to an illegal taking by the government.[23]

33. Furthermore, the Court has held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[24] While there is no set formula for determining if a regulation has gone "too far," the courts make such determinations on a case-by-case basis. Generally, three factors are used to determine whether a regulation is a

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[20] U.S. Constitution, Amendment V.

[21] *See, United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977).

[22] *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1985).

[23] *Id.* at p. 224. *See also, Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (stating that "[a]lthough takings problems are more commonly presented when 'the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good,' economic regulation such as the Coal Act may nonetheless effect a taking.")

[24] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

taking of property, namely: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action"[25]

34. First, with respect to the economic impact of the Commission's action on broadcasters, the action is severe as it will render LMAs entered into post-November 5, 1996 completely worthless, and potentially have the same effect on pre-November 5, 1996 agreements as well. Second, the new rules interfere with reasonable investment backed expectations as they undermine broadcasters', the public's, and the investment community's reliance on these types of contractual agreements. Financial institutions and public shareholders have invested funds in the television industry in reliance on the fact that the Commission's rules permit LMAs. Similarly, banks have loaned money, and institutions and individuals have invested in public media companies, in the expectation that the LMAs into which those companies have entered would enhance cash flow over the full life of the contractual agreement. Finally, looking to the character of the governmental action, while the Commission's actions do not physically invade or permanently appropriate petitioner's property, the sunset provision does void LMAs, thereby completely depriving the parties of any benefits arising from such contracts. Ironically, although LMAs are similar in nature to network affiliation contracts, the FCC has never attempted to void those agreements. Based on the application of the factors set forth above, the Commission's actions sunsetting LMAs rises to the level of a taking under the Fifth Amendment, as the contractual rights that parties hold in LMAs will be voided by the Commission's regulations.

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[25] *Connolly,* 475 U.S. at 225. (citations omitted).

The parties to an LMA have entered into a contract which forms an important asset of the respective companies; for the Commission to simply void all such agreements is a taking of the parties' property without just cause or compensation.

E. There Is No Justification for a 33% Equity Debt Plus Rule and The Rule Will Adversely Affect Investment in Minority Owned Stations

35. In its *Attribution Order,* the Commission has established a new Equity Debt Plus ("EDP") rule. The Order announces that the FCC will find an interest attributable where an investor is a major program supplier or a same-market media entity and its interest in a licensee or other media entity in that market exceeds 33% of the total asset value (equity plus debt) of the licensee or media entity. However, the Commission does not support this pronouncement with any evidence demonstrating that 33% is the magic number that is appropriate. Nor has the Commission explained how an investment interest that is less than controlling can harm the public interest or competition in the marketplace. In fact, if the goal of the Commission is to increase minority ownership, there is a real danger that the new rule will undercut this objective. The more ownership in a broadcast entity is fractionalized, the less security there is to satisfy creditors. Moreover, the Commission has not explained what a licensee is to do if its investor has an EDP level of 33% and the station is in financial trouble and needs more money. If the investor is ready, willing and able to loan more money, must the licensee nevertheless refuse it? The only remedy for a creditor up against the 33% benchmark will be to foreclose, as opposed to increasing its debt or equity interest. Measuring equity and debt is also problematic as it could involve investors in unconscious violations of the rule. In short, the rule is overly broad and will be extremely difficult to apply.

III. Conclusion

For the reasons set forth above, the Commission should reconsider its local television ownership rule, its decision to sunset LMAs, and its 33% equity debt plus rule. Television duopolies should be permitted subject to the decision of the Justice Department's Antitrust Division and LMAs should be grandfathered as contemplated by Congress. The benchmark for attribution should be revisited.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **"PETITION FOR RECONSIDERATION"** were sent this 18th day of October 1999, by hand-delivery to the following:

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