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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

OPPOSITION OF CLEAR CHANNEL COMMUNICATIONS, INC.

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December 2, 1999

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SUMMARY

Clear Channel Communications, Inc. ("Clear Channel") respectfully submits this Opposition in response to certain Petitions for Reconsideration filed regarding the *Report and Order* in the above-captioned proceeding, which, among other items, revised the rules governing the common ownership of local broadcast media (the "Amended Ownership Rules"), including Section 73.3555(b) (the "Local Television Ownership Rule"), and Section 73.3555(c) (the "Radio-Television Cross Ownership Rule").

The consensus of the Petitions for Reconsideration in this proceeding underscores that the Commission should clarify the Amended Ownership Rules so that these Rules may better reflect the extensive media diversity and competition enjoyed by American consumers. In light of such a broad consensus, the Commission should reject the arguments of a single petitioner, the United Church of Christ, et.al. (the "UCC"), which argue that the Commission should rewrite significant elements of the Amended Ownership Rules in order to further burden, through heavier regulation, the freedom of parties to pursue efficiencies and otherwise serve the public interest.

At a minimum, the Commission should clarify the Amended Ownership Rules so that the Rules will:

- more accurately assess, within the Commission's adopted model, the level of media diversity and competition in a particular market; and
- more rationally evaluate which combinations are consistent with the sense and purpose of the Rules.

Specifically, the Commission should clarify that, in adopting the Amended Ownership Rules, it intended:

- to count, as independent television and media voices, all television stations with a reportable share in the relevant Designated Market Area ("DMA"), as well as all television stations actually located and operating within the DMA;

- to count, as an independent media voice, any newspaper entity which owns a number of daily, English-language newspapers that have an aggregate circulation equal to or greater than 5 percent of the households in that DMA;

- to count, toward the radio-television numerical limits, only those radio stations that are licensed to the television station's DMA;

- to view the overlapping contours of a single television station and several radio stations, if the radio stations involved are in separate radio markets, as creating several distinct radio-television combinations; and

- to authorize the permanent ownership of one television station and 7 radio stations in any market where at least 8 independent television voices and 20 independent broadcast voices remain in the relevant market following the authorization of the combination.

Because these clarifications would enable the Amended Ownership Rules to conform to their stated purposes, would ensure that the Rules reflect the wealth of competing media outlets actually available to the American public, and would afford fairer treatment to a number of existing or proposed station combinations, the Commission should adopt these clarifications as soon as possible.

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To: the Commission

OPPOSITION OF CLEAR CHANNEL COMMUNICATIONS, INC.

Clear Channel Communications, Inc. ("Clear Channel"), pursuant to Section 1.429 of the Commission's Rules, respectfully submits this Opposition in response to certain Petitions for Reconsideration filed regarding the *Report and Order* in the above-captioned proceeding, which, among other items, revised the rules governing the common ownership of local broadcast media (the "Amended Ownership Rules"). 1/ Specifically, the *Broadcast Ownership Order* amended Section 73.3555(b), which limits the number of local television stations that a party may own (the "Local Television Ownership Rule"), and Section 73.3555(c), which limits the number of local television and radio stations that a party may own (the "Radio-Television Cross Ownership Rule").

1/ *Report and Order, In the Matter Review of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 & 87-8 (released August 5, 1999) ("*Broadcast Ownership Order*").

The consensus of the Petitions for Reconsideration in this proceeding underscores that the Commission should make several adjustments or clarifications to the Amended Ownership Rules so that these Rules may better reflect the extensive media diversity and competition enjoyed by American consumers. 2/ In light of such a broad consensus, the Commission should reject the arguments of a single petitioner, the United Church of Christ, et.al. (the "UCC"), which argue that the Commission should rewrite significant elements of the Amended Ownership Rules in order to further burden, through heavier regulation, the freedom of parties to pursue efficiencies and otherwise serve the public interest. 3/

Consistent with the petitioners' general consensus, and contrary to the UCC's arguments, the Commission did not err when it replaced the overbroad Grade B standard of the former Local Television Ownership Rule and the unreasonably restrictive standard of the former Radio-Television Cross Ownership Rule with what generally are more reasonable regulations. If anything, the Amended Ownership Rules, as currently written, fail to take into sufficient account the many new media and forms of media -- ranging from cable television systems with hundreds of channels to the Internet to satellite television services -- that are

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2/ *See, e.g.*, Petition for Reconsideration of Paxson Communications, Inc. at 6-18; Blade Communications, Inc., Petition for Reconsideration at 5-18; Petition for Reconsideration by the Local Station Ownership Coalition at 2-8; Petition for Partial Reconsideration and Clarification by the National Association of Broadcasters at 3-12; Petition for Reconsideration of Sinclair Broadcast Group, Inc. at 6-8.

3/ *See* Petition for Reconsideration of UCC et.al., MM Docket Nos. 91-221 & 87-8 (submitted Oct. 20, 1999). This Opposition to UCC's Petition for Reconsideration is timely filed pursuant to Section 1.429 of the Commission's Rules.

a practical reality in localities throughout the United States. At a minimum, however, the Commission should clarify the Amended Ownership Rules so that the Rules will:

- more accurately assess, within the Commission's adopted model, the level of media diversity and competition in a particular market; and
- more rationally evaluate which combinations are consistent with the sense and purpose of the Rules.

Specifically, the Commission should clarify that, in adopting the Amended Ownership Rules, it intended:

- to count, as independent television and media voices, all television stations with a reportable share in the relevant Designated Market Area ("DMA"), as well as all television stations actually located and operating within the DMA;
- to count, as an independent media voice, any newspaper entity which owns a number of daily, English-language newspapers that have an aggregate circulation equal to or greater than 5 percent of the households in that DMA;
- to count, toward the radio-television numerical limits, only those radio stations that are licensed to the television station's DMA;
- to view the overlapping contours of a single television station and several radio stations, if the radio stations involved are in separate radio markets, as creating several distinct radio-television combinations; and
- to authorize the permanent ownership of one television station and 7 radio stations in any market where at least 8 independent television voices and 20 independent broadcast voices remain in the relevant market following the authorization of the combination.

Because these clarifications would enable the Amended Ownership Rules to conform to their stated purposes, would ensure that the Rules reflect the wealth of competing media outlets actually available to the American public, and would afford fairer treatment to a number of existing or proposed station combinations, the Commission should adopt these clarifications as soon as possible.

I. CONTRARY TO THE ARGUMENTS OF THE UCC, THE COMMISSION SHOULD NOT UNREASONABLY RESTRICT COMMON OWNERSHIP OF BROADCAST STATIONS.

As a number of petitioners note, the types and numbers of media outlets have exploded during the pendency of aspects of this proceeding. 4/ The commercial advent of direct broadcast satellite services ("DBS"), digital cable, video play-back services like TiVo and Replay Networks, and the Internet, already have created a vast menu of new media choices for U.S. consumers and advertisers. Nonetheless, the UCC urges that the Commission waste substantial resources in order to add additional levels of complicated regulatory analysis in order to burden a particular sector of the highly competitive media marketplace. 5/ The UCC demands that the Commission misconstrue Congress's clear intent when, more than three years ago, it ordered the Commission to relax the burdens on certain types of cross-media ownership. 6/

4/ *See, e.g.*, *supra* note 2.

5/ *See* UCC Petition at 13-15, 19-21.

6/ *See* UCC Petition at 17-19.

The UCC Petition does not demonstrate that the Commission should impose additional ownership regulation on U.S. broadcasters. It does not refute what Congress and the Commission already have recognized: that the broadcasting sector, which is being forced to compete with more and more media entities for the advertising it needs to remain a quality source of free news and information, requires more reasonable ownership limits. However, the UCC Petition does demonstrate that, despite the epochal changes in the media landscape -- changes that even are causing the Commission to effect a major reorganization of its regulatory focus and structure -- some parties will continue to pressure the Commission to expand the regulatory burdens that apply only to terrestrial broadcast licensees. Accordingly, the Commission should take immediate steps to clarify the Amended Ownership Rules so as to ensure that they burden transactions between broadcasters no more than absolutely necessary.

II. THE COMMISSION SHOULD ACT NOW TO ENSURE THAT THE AMENDED OWNERSHIP RULES WILL BE REASONABLY APPLIED.

A. The Commission Should Not Unnecessarily Limit Eligible Voices For Purposes Of Any Independent Voice Test.

The Amended Ownership Rules restrict what types and forms of media qualify as independent voices for purposes of the Rules. 7/ In general, the Commission has refused to count commonly owned voices as independent voices,

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7/ 47 C.F.R. § 73.3555(c)(3). *See* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *Broadcast Ownership Order*, at 99 (noting the incongruity of government defining what constitutes an "independent voice").

regardless of those voices' actual content, and has refused to consider newer forms of content distribution -- such as DBS or the Internet -- as competitive media with regard to any local market.

Because the Amended Ownership Rules ignore a number of newer video programming services (and other media) actually available to consumers, the Rules should not hesitate to count as independent voices traditional media outlets that provide measurable service to the relevant market. Accordingly, Clear Channel, in its Petition for Reconsideration, requested that the Commission count as an independent television voice any independently owned television station that has a reportable Nielsen share in the relevant DMA, even if the station is not licensed to that DMA. Such a rule would be consistent with the Commission's treatment of out-of-market radio stations for the radio-television rule, and would comport with the purpose of the independent voice test: to count the number of free television stations that serve the DMA as a distinct programming option.

In a similar vein, the Commission also should clarify the rule governing when a newspaper entity may be counted as an independent media voice in a DMA. Unlike broadcast entities, a newspaper entity may own as many press outlets in a DMA as it chooses. To the extent that the Commission considers common ownership to be proof of common viewpoint, such commonly owned newspapers should, for the Commission's purposes, be treated as a single voice. Accordingly, even if such commonly owned newspapers individually reach only a few percent of the households in a particular DMA, the newspaper entity should be counted as an independent media voice if the aggregate circulation of its commonly

owned newspapers exceed the five percent threshold established in Section 73.3555(c)(3)(iii).

These changes are not the only ones the Commission should consider. Certain petitioners demonstrate that the Commission should include at least one cable system for purposes of counting the number of independent video media voices under the Local Television Ownership Rule. 8/ Others cogently argue that the eight independent voice standard of that Rule itself should be relaxed. 9/ At the very least, however, the Commission should adopt the two clarifications described above, lest the Amended Ownership Rules fail to fairly reflect actual competition in local media markets and deny the presence of independent voices that measurably add to the media options available in a particular market.

B. The Commission Should Ensure That The Scope Of The Radio-Television Cross Ownership Rule Better Reflects Market Reality.

1. The Commission Should Not Rely Solely on Contours to Determine Relevant Combinations With Regard to A Rule That Focuses on the Competitiveness of Specific Markets.

The Radio-Television Cross Ownership Rule intends to protect the competition and diversity of local media markets. 10/ Accordingly, in the *Broadcast Ownership Order*, the Commission attempted to focus application of the Rule on the

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8/ *See, e.g.*, Petition for Reconsideration of Aries Telecommunication Corporation at 13.

9/ *See, e.g.*, Petition for Reconsideration of Paxson Communications, Inc. at 17-22.

10/ *See Broadcast Ownership Order* at ¶ 103 (noting that the rule ensures "that the local market remains sufficiently diverse and competitive").

effect a proposed combination might have on each relevant local television market (as defined by Nielsen DMA) in conjunction with each relevant local radio metro market (as defined by Arbitron). 11/

The *Broadcast Ownership Order* overlooked one change necessary to effectuate its intended shift to a market-based methodology. The *Order* maintained, without discussion or explanation, a contour-based methodology for defining what commonly owned stations were part of a proposed combination. 12/ It failed to specify that the Commission would consider, as part of any combination under analysis, only those stations that are relevant to a particular local market in assessing the risks that the common ownership of those stations may pose to that market's competition and diversity.

On this point, CBS, in its Petition for Reconsideration, explained that the Commission's definition of what stations are implicated in a radio-television combination was inconsistent with the Rule's intended market focus. CBS noted that the *Order*'s failure to narrow the contour-based methodology of the Rule threatened to disrupt combinations that have existed for a number of years, even though no party has demonstrated that these combinations actually endangered the diversity or competition within their local media markets. 13/ Accordingly, CBS proposed that the Commission clarify that radio stations located outside the DMA of

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11/ *Id.* at ¶ 111 & n.173 (explaining that each radio metro market in a DMA must be analyzed).

12/ *See Broadcast Ownership Order* at ¶ 100 & n. 159.

13/ *See* Petition for Reconsideration of CBS, Inc., at 5-7 ("CBS Petition").

a commonly owned television station should not implicate the Radio-Television Cross Ownership Rule with regard to that television station. It reasoned that a radio station aims to serve listeners in its own market, not those in neighboring markets, and certainly not those in neighboring DMAs. Accordingly, ownership of such a radio station does not pose any material risk to the media diversity or competition of a neighboring DMA, and should not be counted as part of a combination being analyzed with regard to that neighboring DMA.

Clear Channel agrees that CBS's proposal is a necessary step with regard to radio stations located in a separate DMA from a commonly owned television station. As discussed next, whether or not the CBS proposal is adopted, the Commission should clarify that the overlapping contours of a single television station and several radio stations, if the radio stations involved are in separate radio markets, create several distinct radio-television combinations for purposes of the Rule.

2. The Commission Should Clarify That Radio-Television Combinations Are Evaluated Separately In Each Distinct Radio Metro Market.

In the *Order*, the Commission acknowledged that "[m]any DMAs have more than one Arbitron radio market located within them." 14/ The Commission should state that the overlapping contours of a single television station and several radio stations, if the radio stations involved are in separate radio markets create several distinct radio-television combinations. Further, the Commission should

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14/ *Broadcast Ownership Order* at n. 173.

clarify that each such radio-television combination is to be separately evaluated for compliance with both the independent voice test and the numerical limits of the Rule. That is, radio stations in different radio metro markets will not be counted together when applying the numerical limit to radio-television combinations.

For example, in the one DMA, it is proposed that Television Station A be commonly owned with Radio Stations B, C, D and E, which are located in radio metro market F. Radio market F has over 10 independent voices, so that the combination is acceptable under the one television, 4 radio station numerical limit. Television Station A also is to be commonly owned with Radio Stations G, H, I and J, which are located in the same DMA as A, B, C, D, and E, but which are located in radio metro market K. Radio metro market K also has over 10 independent media voices, and so the A, G, H, I and J combination individually complies with the Rule. The Commission should clarify that radio stations B, C, D, E, G, H, I and J are *not* counted together and thereby deemed to exceed the applicable radio-television station limit.

In sum, commonly owned radio stations outside the radio metro market but inside the DMA would not be counted when analyzing the radio-television combination in that radio metro market. Those out-of-market radio stations will be counted, however, but only when their market-specific radio-television combination is reviewed separately for compliance with the numerical and independent voices tests of the Rule.

This clarification will make certain that a proposed radio-television combination is reviewed only with regard to its actual effect on the competition and diversity in its target market.

3. The Commission Also Should Ensure That Application of the Radio-Television Cross Ownership Rule Comports With the Clear Sense of the Rule.

Separately, Clear Channel also urges the Commission to take this opportunity to clarify one other aspect of the application of the Radio-Television Cross Ownership Rule. Revised Section 73.3555(c)(2)(i)(b) states that a party may own:

> one commercial TV and 7 commercial radio stations (to the extent that an entity would be permitted to own 2 commercial TV and 6 commercial radio stations under paragraph (c)(2)(i)(a) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

Further, the text of paragraph (c)(2)(i)(a) states that:

> if at least 20 independently owned media voices remain in the market, an entity can directly or indirectly own, operate, or control up to . . . 2 commercial TV and 6 commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

Accordingly, based solely on the clear language of the two paragraphs, a party may commonly own one television station and seven radio stations if there are at least 20 independently owned media voices remaining in the market and the common ownership would be permitted by the local *radio* multiple ownership rule. With regard to this segment of the Rule, no reference is made to the local television multiple ownership rule.

Notwithstanding this clear language of Section 73.3555(c)(2)(i)(b), the Commission Staff recently has suggested that this paragraph also is meant to require a party wishing to own one television and seven radio stations in a market to first determine whether it actually could acquire two television stations under the Local Television Ownership Rule, which requires any party wishing to buy two television stations with overlapping Grade B contours in the same DMA to demonstrate that there remain at least 8 independent television voices in the DMA after the proposed acquisition.

Not only has the Commission Staff read into this subsection of Section 73.3555(c) a cross-reference to the television duopoly section, Section 73.3555(b), but it also has informally interpreted a further stretch of the plain language of the Rule. That is, the Commission staff has informally opined that having 8 independent television voices remaining after grant of a permanent one TV and 7 radio station combination (in a market with over 20 voices) is insufficient. Instead, the staff is of the opinion that although no television stations are being combined, there must be prior, and after the unconditional grant of such a radio-television combination, *9 independent television voices* in the DMA.

Such an interpretation is unreasonable and arbitrary, and must be corrected. Even assuming that the text of the Rule may be read to require a party to meet the 8 independent television voice test of the Local Television Ownership Rule before it can own a single television station and 7 radio stations, the Radio-Television Cross Ownership Rule cannot be construed to require the existence of

9 independent television voices before the proposed acquisition (or change in waiver status) may be authorized. So long as after the one TV and 7 radio station combination is effectuated there are in fact 8 independent TV voices, and there are 20 independent media voices, the combination must be approved.

A hypothetical comparison demonstrates the flaw in the proposed interpretation. Assume a market with 9 independent television voices and 28 total independent voices. Under the Amended Ownership Rules, in this market, a party with no prior media interests in the market may buy two television stations (assuming one is not among the top-four ranked stations in the market) and 6 radio stations (assuming that such an acquisition would be consistent with the local radio multiple ownership rule). If it is further assumed, for the sake of simplicity, that all the stations to be acquired currently are owned by different parties, the proposed acquisition would reduce the total number of independent television voices to 8 and the total number of independent voices in the market to 21. Accordingly, such an acquisition would be entirely consistent with the Amended Ownership Rules.

Now, consider the same party wishing to acquire only a single television station and 7 radio stations in a market that has 8 independent television voices and 28 total independent voices. If it again is assumed that all the stations to be acquired are owned by different parties, the proposed transaction again would result in a market having 8 independent television voices and 21 total independent voices. Yet, this proposed transaction, which would leave the market with the same number of independent television voices and total independent voices as the prior scenario, would violate the Radio-Television Cross Ownership Rule, at least

according to the interpretation of the Rule that has been suggested by Commission Staff.

Clear Channel urges that the Commission state that the common ownership of one television station and 7 radio stations may be permanently authorized in any local market where there also exists at least 20 independent media voices following the proposed acquisition or change in status. At a minimum, if the television duopoly 8 television voice test is deemed applicable, the Commission should correct the Staff's suggested interpretation and clarify that one television-7 radio station combinations comply with the Radio-Television Cross Ownership Rule when, following such a combination, 8 independent voices remain. Such clarification would make the Rule consistent with the Commission's determination that no more than 8 independent television voices are necessary to protect media diversity and competition in any local market.

III. CONCLUSION

The Commission has spent many years determining how and to what extent it should burden the ability of parties to acquire broadcast stations in particular markets. The following five clarifications would help to ensure that these revisions are not read in a manner that would unreasonably undercount the wealth of media choices available to American consumers and unnecessarily disturb established combinations, including those combinations that have not been shown to impair competition and diversity in a particular market:

- to count, as independent television and media voices, all television stations with a reportable share in the relevant Designated Market Area ("DMA"), as well as all television stations actually located within the DMA;
- to count, as independent media voices, any newspaper entity which owns a number of daily, English-language newspapers that collectively have an aggregate circulation equal to or greater than 5 percent of the households in that DMA;
- to count, toward the radio-television numerical limits, only those radio stations that are licensed to the television station's DMA;
- to view the overlapping contours of a single television station and several radio stations, if the radio stations involved are in separate radio markets, as creating several distinct radio-television combinations; and
- to authorize the permanent ownership of one television station and 7 radio stations in any market where at least 8 independent television voices and 20 independent broadcast voices would remain in the relevant market following the grant.

Accordingly, Clear Channel respectfully requests that the Commission adopt such clarifications.

Respectfully submitted,

CLEAR CHANNEL COMMUNICATIONS, INC.

By: _____
Kenneth E. Wyker
Senior Vice President

December 2, 1999

CERTIFICATE OF SERVICE

I, Janine L. Jeter, hereby certify that on this 2nd day of December, 1999, a copy of the foregoing Opposition of Clear Channel Communications, Inc., has been served by hand delivery to:

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