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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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 AND RESPONSE TO PETITIONS FOR RECONSIDERATION OF UCC *et al.*

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Brian N. Gibson
Law Student
Georgetown University Law Center

Cathy Yacoub
Law Student
Georgetown University Law Center

Angela J. Campbell
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W., Suite 312
Washington, DC 20001
(202) 662-9535

Andrew Jay Schwartzman
Harold Feld
Media Access Project
950 18th Street, Suite 220
Washington, D.C. 20006
(202) 454-6581

December 2, 1999

Counsel for UCC *et al.*

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Summary

UCC *et al.* submit this pleading to strongly oppose the petitions of several broadcasters asking the Commission to broaden the eight voice/top four ranked station standard to include almost all media forms, from newspapers to DBS, as local voices. Counting such a wide array of media would greatly overstate the true range of local programming choices available to the viewing public and render the underlying duoploy rule meaningless. Relying on the intrinsic differences between broadcast television and other forms of media, the Commission properly chose to limit the duopoly voice count to independent broadcast television stations. Also, the Commission should not grant Clear Channel's petition which seeks to include stations located outside a DMA in the local voice count because such stations generally do not provide local programming to viewers in the DMA.

In addition to maintaining the narrow voice test, UCC *et al.* oppose NAB's petition urging the application of the failed, failing, and unbuilt television duopoly rule waiver standard to the radio/cross-ownership rule. Despite NAB's contentions to the contrary, the Commission has provided several rationales for limiting the waiver standard of the radio/television cross-ownership rule to only failed stations. The Commission should also reject NAB's argument that the proposed documentation requirements for obtaining a failed, failing and unbuilt station waiver are unduly burdensome and possibly inconsistent with section 310(d) of the Telecommunications Act. As all regulations are burdensome to some extent, the relevant issue is their reasonableness. In this case, the requirements are rationally related to supporting the duopoly rule and in no way suggest that the Commission would be engaging in a comparative hearing process.

UCC *et al.* further oppose several petitions that request the Commission to eliminate or modify the prohibition against the transfer of a duopoly that does not meet the minimum voice test at the time of transfer. Maintaining the bar against the transfer of duopolies in markets that fall below the Commission's diversity and competition requirements is a critical component of the new rules. The Commission must not sacrifice its oft-stated goals of diversity and competition merely because some broadcasters believe they can profit more from the sale of a duopoly than from selling each station individually.

Finally, the Commission should quickly dismiss the arguments of Pegasus and Sinclair who challenge the basic premise of all ownership rules, alleging that there is no nexus between ownership and content. The Commission has traditionally recognized the close relationship between the ownership of a licensee and the programming the licensee provides. The Commission's stance is not only underscored by a long line of Supreme Court precedent, but also an even longer string of everyday examples that exemplify the connection between who owns a station and what is programmed on its airwaves.

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TO: The Commission

OPPOSITION AND RESPONSE TO
PETITIONS FOR RECONSIDERATION
of UCC *et al.*

Pursuant to Section 1.429 of the Commission's Rules, the Office of Communication, Inc. of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation (IPR) and the Media Access Project (MAP), submit the following Opposition and Response to Petitions for Reconsideration regarding the *Review of the Commission's Regulations Governing Television Broadcasting, Report and Order,* FCC 99-209 (rel. Aug. 6, 1999) ("*Local Ownership Order*"). UCC *et al.* primarily submit this pleading to oppose the petitions of various parties who seek to further relax

the already lenient eight voice/top four ranked station duopoly rule and its corresponding waivers.[1]

I. THE COMMISSION PROPERLY RESTRICTED THE DEFINITION OF LOCAL VOICES TO FULL POWER BROADCAST TELEVISION STATIONS FOR PURPOSES OF THE DUOPOLY RULE.

Many broadcasters urge the Commission to reconsider its decision to limit the definition of local voices for the purposes of the television duopoly rule to full power independent television stations located within the DMA.[2] Petitioners ask the Commission to expand the definition of local voices to include other media such as cable and DBS, and in some cases, even additional stations from outside the pertinent DMAs. UCC *et al.* do not support either the DMA geographical standard nor the eight voice/top four ranked station standard. *See* UCC *et al.* Petition at 15. However, if the Commission is going to employ a voice count, we agree with the Commission that the inclusion of other media and broadcast stations outside the DMA as local voices would significantly overstate the actual number of local programming choices available to the public. *See Local Ownership Order* at ¶ 18-19.

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[1] *See* Petition for Reconsideration of National Association of Broadcasters (NAB Petition), MM Dkt. No. 91-221, filed October 18, 1999 (NAB Petition); Petition for Reconsideration of Sinclair Broadcast Group, MM Dkt. No. 91-221, filed October 18, 1999 (Sinclair Petition); Petition for Reconsideration of Association of Local Television Stations, MM Dkt. No. 91-221, filed October 18, 1999 (ALTV Petition); Petition for Reconsideration of Blade Communications Inc., MM Dkt. No. 91-221, filed October 18, 1999 (Blade Petition); Petition for Reconsideration of Local Station Ownership Coalition, MM Dkt. No. 91-221, filed October 18, 1999 (LSOC Petition); Petition for Reconsideration of Paxson Communications Group, MM Dkt. No. 91-221, filed October 18, 1999 (Paxson Petition); Petition for Reconsideration of Pegasus Communications Corporation, MM Dkt. No. 91-221, filed October 18, 1999 (Pegasus Petition).

[2] *See generally* NAB Petition 6-12, Sinclair Petition at 6-11, ALTV Petition at 14-28, Paxson Petition at 6-22, LSOC Petition at 2-17, Pegasus Petition 14, Blade Petition at 5-11.

A. Other Media Are Not Effective Substitutes For Broadcast Television.

Specifically, petitioners ask the Commission to count cable television, radio stations, newspapers and new electronic media as local voices.[3] As the Commission is well aware, these arguments are not new and have been raised repeatedly and unpersuasively by broadcasters throughout this eight-year rulemaking process. Furthermore, broadcasters' collective petitions fail to provide any new information or analysis that would justify revisiting the issue. In previous submissions to the Commission, UCC *et al.* and other public interest groups have consistently explained in great detail why other types of media are not effective substitutes for broadcast television and therefore should not be included in local voice counts. *See e.g.*, Comments of Black Citizens for a Fair Media, *et al.*, MM Dkt. 91-221, 87-8, filed Oct. 13, 1993 ("BCFM Comments"). And in large part, the Commission agreed with this analysis in the *Local Ownership Order. See Local Ownership Order* at ¶ 68. Broadcast television remains a unique medium in that it is available at no cost, penetrates nearly every household in the U.S. and reaches all demographic groups.[4] While these same attributes may also apply to radio, radio lacks the visual power and the advertising demand of television. Moreover, due to the growing concentration of radio station ownership and syndication of programming,[5] radio increasingly provides less and less locally originated programming to local communities.

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[3] *See id.*

[4] Statistics routinely relied on by the broadcasting industry demonstrate that 98% of U.S. household have at least one television receiver. (Last visited 11/05/99) *<http://www.nab.org/Research/RIbriefs/Presentations/keio/sld004.htm>*

[5] *See e.g.* Elizabeth A. Rathbun, *Radio Control: Top 25 Claim 19% of Stations*, BROADCASTING AND CABLE, Aug. 30, 1999, at 26-28.

All other media touted as substitutes to broadcast television come at a significant cost to the public and are not as widely available. With respect to newer media technologies, it is widely acknowledged that there is and will continue to be a significant "digital divide" among Americans. *See Falling Through the Net* (Last visited 11/05/99) *<http://www.ntia.doc.gov>*. Moreover, despite development of new electronic media and the growth in cable television, broadcast television is still the primary source of news and information for the vast majority of Americans. *See Local Ownership Order* at ¶ 68. In fact, according to research compiled by NAB, television is the main news source for 70% of the American public. *See Television Viewing Statistics* (Last visited 11/05/99) *<http://www.nab.org/Research/RIbriefs/Presentations/keio/sld004.htm>*.

Most broadcasters resurrect the old argument that cable television should be counted as a local voice. *See* e.g, NAB Petition at 7-8. A few even advocate treating cable as multiple voices. *See* ALTV Petition at 26, LSOC Petition at 15. One petitioner points to the fact that there are cable systems offering channels with local news content as evidence that cable is a substitute for broadcast television. *See* Paxson Petition at 11.

But petitioners' contentions fail because they refuse to acknowledge the basic fact that only broadcast television delivers genuine local programming to communities across the U.S. on a regular basis. Other than citing the Commission's reference to cable PEG and public access channels, broadcasters provide no concrete examples of where cable is providing original, regularly scheduled local content programming. *See id.* And even the local cable news channels that broadcasters have offered in the past as proof that cable provides a genuinely local voice are few in number, located only in major metropolitan areas and in some instances share ownership

with broadcast stations in the same local market. *See* BCFM Comments at 23. Given this common ownership, it is not convincing to argue that such local cable news channels add much to diversity or additional viewpoints. Therefore, since "local" cable programming is not widespread and, in many instances is not an independent local voice within the DMA, cable should not be counted as a local voice on the same level as broadcast television.

In addition, several petitioners urge the Commission to count newer media forms, such as DBS, as local voices.[6] However, the bottom line is that DBS has never provided locally originated programming to the public. Even in light of the new Satellite Home Viewer Act, DBS will still only retransmit local programming to viewers in the limited areas where it is supplying local-into-local programming. *See Clinton Signs SHVA*, COMM DAILY, vol. 19, NO. 229 (Nov. 30, 1999).[7] Thus, DBS cannot be considered a local voice for duopoly purposes because it does not add any diversity to the locally originated programming available to the public. In light of such strong evidence, the Commission correctly concluded that there was a lack of convincing support for the proposition that DBS is an adequate substitute for broadcast television for purposes of diversity. *See Local Ownership Order* at ¶ 69.

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[6] *See generally* NAB Petition at 6-12, Sinclair Petition at 6-11, ALTV Petition at 14-28, Paxson Petition at 6-22, LSOC Petition at 2-17, Pegasus Petition at 14, and Blade Petition at 5-11.

[7] In addition, DBS providers are supplying the new local-into-local retransmission service to a few select markets and charging extra monthly fees for such service. *See e.g, DIRECT TV Commences Local Broadcast Network Channels Offering in New York and Los Angeles*, http://www.dishnetwork.com/profile/press/press/press262.htm (Last Visited December 1, 1999).

B. The Commission Should Only Include Television Stations That Are Truly Local in the Local Voice Count.

Not only do petitioners argue for the inclusion of other media that would overstate the number of local voices in a DMA, Clear Channel urges the Commission to include stations outside the DMA with a reportable rating share within the DMA in the local voice count. *See* Clear Channel Petition at 2. This proposal goes against the Commission's basic policy of encouraging and ensuring localism, as well as diversity. *See Local Ownership Order* at ¶ 19. Clear Channel's argument rests on the false assumption that the existence of a small number of viewers in a given DMA who may watch a broadcast from a station in a distant city necessarily means that the station should be counted as a local voice. But a station outside a DMA should not be considered local, irrespective of its viewership, because such stations generally do not provide local-oriented programming to the public in the neighboring DMA.

Furthermore, the Commission's primary reason for adopting the DMA standard was its belief that DMAs are the most accurate reflection of viewing patterns. *See Local Ownership Order* at ¶ 48. To allow non-DMA stations to be included in the local voice test would in effect abandon the DMA standard upon which the new duopoly rule is based. Moreover, there are numerous existing examples where stations that are not truly local voices are already included in a DMA. *See* UCC *et al.* Petition at 3-12. Thus, it makes little sense to even consider stations that fall outside the DMA as local voices.

In sum, the Commission has reviewed, for a number of years, the pros and cons of including other media in the local voice count and defining a local television market for purposes of the revised duopoly rule. After having carefully weighed all the relevant issues, the

Commission correctly decided that only full-power television broadcast stations located within the DMA should be included in a local voice count that determines the permissibility of possessing a local television duopoly.

II. THE COMMISSION SHOULD ADOPT THE RADIO/TELEVISION CROSS-OWNERSHIP WAIVER STANDARD FOR THE LOCAL TELEVISION OWNERSHIP RULE.

NAB also argues that there is no justification for having different waiver standards for the revised television duopoly and radio/television cross-ownership rules. *See* NAB Petition at 13-19. UCC *et al.* agree with this assessment, but disagree with NAB's solution. Instead of allowing waivers for failing and unbuilt television stations, UCC *et al.* again urge the Commission to adopt the radio/television cross-ownership waiver standard for the new television duopoly rule. *See* UCC *et al.* Petition at 21. The radio/television cross-ownership rule restricting such waivers to only failed stations is a simpler standard than the three different waiver standards (each with its own separate test) of the revised duopoly rule. Moreover, such distressed properties "could offer minority, female and other independently-owned voices (who traditionally have less access to capital) an opportunity to enter an increasingly expensive broadcast marketplace." *See* Comments of Media Access Project, *et al.* at 18, MM Docket 91-221, filed Feb. 1997 ("MAP Comments").

NAB alleges that the Commission fails to provide a rational basis for deciding to restrict waivers in the radio/television cross-ownership context to only failed stations. *See* NAB Petition at 13. But in fact, the Commission provided two rationales for adopting a narrower waiver standard. First, the Commission pointed out that "evidence that a station is losing money (i.e., a negative cash flow) is not adequate to qualify for the waiver." *Local Ownership Order* at ¶ 118.

Second, because a waiver is a form of further liberalization of the rules, the Commission chose to have only a failed station waiver in light of the significant relaxations of the radio/television cross-ownership rule in the instant order and the 1996 Telecommunications Act. *See id.* While NAB may not agree with the reasoning, there is no question that the Commission has provided a rational basis for adopting a narrow waiver for the radio/television cross-ownership rule.

In addition, NAB argues that the waiver criteria for a failed station are "unduly burdensome," particularly the requirement to document efforts to sell the station out-of-market. *See* NAB Petition at 14-15. While these requirements may be burdensome to some degree, they are by no means undue. In applying for a waiver of the rules, it is the norm that applicants bear the burden of proof. Without this documentation, the Commission would have no means of assessing the merits of a proposed license transfer in light of its new duopoly rule. Furthermore, the absence of such requirements would invite some licensees to attempt an end-run around the revised waiver/duopoly rule by merely applying for a waiver outright without making any effort to preserve the integrity of the duopoly rule. Consequently, intra-market transfers and consolidation would occur even though there may be eligible out-of-market buyers.

NAB further urges the Commission to establish a special exemption from the documentation requirements for unbuilt stations. *See* NAB at 16-17. UCC *et al.* have serious concerns about such a proposal because there is a fear that it could lead to a number of sham applications and the commodification of station building permits. For instance, an entity with absolutely no intention of constructing a station could apply for a building permit in hopes of reselling it to an in-market buyer at a high premium. The end result would be that an in-market

station owner could then acquire a second broadcast license that would have otherwise been off-limits if applied for directly.

Finally, NAB and ALTV argue that requiring a licensee to demonstrate that there are no acceptable out-of-market buyers before being allowed to sell to an in-market buyer implicates Section 310(d) of the Communications Act of 1934. *See* NAB Petition at 18, ALTV Petition at 32-34. Petitioners suggest that this requirement establishes a *de facto* comparative hearing process by which the Commission passes judgment on different potential buyers. *See id.* But this is simply not the case. A licensee of a failed, failing or unbuilt station who wants to sell its station in-market must first attempt to comply with the rule itself and meet the eight voice/top four ranked station standard. If the sale implicates the voice test, the Commission reasonably determined that the most logical way to maintain the integrity of the rules is requiring the licensee to first offer the station to an out-of-market buyer, just like any other licensee seeking to sell a station. *See Local Ownership Order* at ¶¶ 77, 81, and 86. Only after a failed, failing or unbuilt station licensee has failed to locate an out-of-market buyer can the waiver application even be considered by the Commission. To ensure that a licensee honors this threshold requirement, the Commission reasonably required the licensee to provide *de minimus* documentation of its efforts. *See id.* In light of the mechanics of the rule, it is clear that the Commission is not reviewing potential buyers for a particular transfer. The Commission is merely setting forth a bar by which any licensee who wishes to waive past the eight voice/top four ranked station standard must surpass.

In sum, the Commission has provided a rational basis for adopting a narrow waiver standard that should be applied in both the television duopoly and radio/television cross-

ownership contexts. The documentation requirement is part of the normal evidentiary showing waiver applicants must provide and this process does not fall afoul of Section 310(d) of the Communications at of 1934.

III. THE COMMISSION SHOULD NOT CREATE A NEW WAIVER FOR THE TRANSFER OF DUOPOLIES.

In addition to voicing concerns about the voice count and waiver standards, a number of broadcasters argue for the elimination or modification of the provision that bars transfers of duopolies that do not meet the new duopoly rule or waiver standards.[8] NAB, LSOC and ALTV urge the Commission to eliminate outright the bar against transferring duopolies that do not, post merger, meet either the minimum voice test or new waiver standard. *See* NAB Petition at 19, ALTV Petition at 34-36, LSOC Petition at 22-25. Aries and Pegasus argue that the Commission should waive the bar against transferability of duopolies created in smaller markets. *See* Aries Petition at 8-10, Pegasus at 39- 41. ALTV and LSOC contend that any limitations on selling stations as a combination, may lead to owners going to such lengths as not investing in top quality programming or purposely driving down the ratings of one of the stations. *See* ALTV Petition at 34- 36, LSOC Petition at 22-25. Finally, many petitioners suggest that limits on duopoly transferability will discourage investment and reverse efficiencies gained through joint ownership. *See* e.g., NAB Petition at 20.

Petitioners' proposition that the Commission should eliminate the bar against transferring duopolies that do not satisfy the duopoly rule at the time of transfer would seriously

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[8] *See* NAB Petition at 19, Aries Petition at 4-9, ALTV Petition at 35-36, LSOC at 22-25 Pegasus at 39-41.

hamstring the Commission's goal of ensuring a multiplicity of voices at the local level. If the Commission is not able to measure the merits of a license transfer application against the revised duopoly and waiver rules it would essentially render such rules meaningless. For the Commission to promote diversity, competition and the public interest, it must be able to scrutinize every license transfer in light of the ownership rules developed during the public rulemaking process.

Aries and Pegasus advocate for the establishment of a transferability waiver for small markets. *See* Aries Petition at 8-10, Pegasus Petition at 39- 41. They reason that failed and failing stations are more likely to occur in smaller television markets and therefore the transferability rule should be relaxed in these markets as a way of encouraging investment in such stations. *See id.*

However, petitioners miss the basic point that it is precisely in the smaller markets that the Commission should be most vigilant in enforcing the minimum voices test. Aries attempts to buttress its position by citing that the Commission adopted the waivers because it recognized that such troubled stations can benefit from the efficiency gains and costs savings associated with joint ownership, without diminishing diversity and competition. *See* Aries Petition at 5. But this is only half of the story. In the same paragraph, the Commission also observes that "it is in these small markets that consolidation of broadcast television ownership could most undermine our competition and diversity goals." *See Local Ownership Order* at ¶ 70. An outright transferability duopoly waiver for small markets would upset the balance the Commission has sought in these arenas.

With regard to the assertion that duopoly non-transferability will lead to irrational results, ALTV offers no evidence to support the unlikely scenario that owners would sabotage their own stations in order to selling them as a duopoly. Although duopolies will not be automatically transferable, there is no bar against selling the stations separately. Therefore, instead of the unlikely sabotage scenario painted by ALTV, it is more logical to conclude that owners would endeavor to make their stations more valuable through investments in quality programming and improved ratings irrespective of their ability to sell their stations as a combination. In so criticizing the Commission's transferability policy, NAB, ALTV and others have improperly framed the debate by failing to realize that the fundamental purpose of FCC regulations is not to shield and promote the broadcast industry's business interests but rather to protect the public interest.

Finally, UCC *et al.* disagree with the broadcasters' contention that limits on duopoly transferability will discourage investment. UCC *et al.* and other public interest groups have long advocated that genuine investors, not speculators, who are clearly interested in the local market and plan to hold the properties for the long-term, will not be deterred by concerns about transferability. *See e.g.,* MAP Comments at 12 -16. Furthermore, with the publication of the new duopoly rule and waivers, broadcasters and investors are fully aware of future transferability issues concerning television duopolies and should therefore prudently incorporate such issues into their business plans.

NAB argues that the transferability policy will discourage investment in failed, failing and unbuilt stations. *See* NAB Petition at 20. But it is quite possible, perhaps probable, that once investors carefully weigh the costs and benefits of these types of transactions, the

immediate efficiencies and profitability that duopolies promise will override any worries about future transferability. In any event, even if limits on the transferability of duopolies would discourage investment in failed, failing or unbuilt stations to some degree, the public interest might be better served if such investments were less attractive and as a result these licenses became less expensive. For instance, new entrants, particularly undercapitalized prospective women and minority investors, would have a better chance of acquiring a broadcast station.

In sum, after having reviewed the record, the Commission properly decided that the transferability of any duopoly must meet the eight voice/top four ranked station rules or the new waiver standard. *See Local Ownership Order* at ¶¶ 64, 71, 81 and 86. Various petitioners have failed to provide any evidence to support their numerous proposals to modify or eliminate the Commission's duopoly transfer policy.

IV. THE COMMISSION PROPERLY RECOGNIZED THE NEXUS BETWEEN OWNERSHIP AND CONTENT.

In seeking reconsideration of the eight voice/top four ranked station standard, Pegasus and Sinclair maintain that the Commission erred in its conclusion that different broadcast station owners will increase the diversity of content on the airwaves. *See* Pegasus Petition at 21, Sinclair Petition at 5. However, the nexus between diversity in broadcast ownership and diversity in programming is one that has been repeatedly recognized and reaffirmed by the Commission and the Supreme Court.[9] Moreover, there is ample anecdotal evidence demonstrating the connection

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[9] Pegasus cites *U.S. West, Inc. v. United States*, 48 F. 3d 1092 (9th Cir. 1994), *vacated in*, 84 F. 3d 1153 (1996) and *Chesapeake & Potomac Tel. Co. v. United States*, 42 F. 3d 181 (4th Cir. 1994), *vacated in,* 516 U.S. 415 (1996) for the proposition that federal courts would apply intermediate scrutiny to any broadcast ownership rule, requiring a close nexus between the rule and the interest to be served. *See* Pegasus Petition at 20. These two cases are moot and

between ownership and content. Broadcasters use their editorial judgment everyday to determine content in numerous ways, including shaping news coverage and selecting programming. Furthermore, it is only natural that journalists take into account the viewpoints and dispositions of the owners who employ them when writing and presenting stories, since it is those owners who make final decisions about what is broadcast on their stations.

A. The Commission Properly Reaffirmed the Traditional Connection Between Diversity of Ownership and Diversity of Content.

The Commission has consistently determined that station ownership has a strong influence on programming and therefore has strived to promote diversity on the public airwaves through diversity of ownership. Recently, in the Commission's first biennial review of its broadcast ownership rules, the Commission prefaced its discussion by stating that "promoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers." *See 1998 Notice of Inquiry on Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 98-35, at ¶ 4 (rel. March 13, 1998).

Achieving a diversity of viewpoints is an "important part of the Commission's public interest mandate." *See id.* And historically, that mandate is accomplished in part through

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obviously of no precedential value. In any event, they are inapposite because they do not address broadcast ownership issues, rather they involve telephone companies. The Commission and the courts have consistently applied different ownership rules to disparate media. *See generally* ZUCKERMAN, HARVEY *et al.* MODERN COMMUNICATIONS LAW, 1196 - 1213 (1999).

promoting diversity in ownership.[10] Relying on this history and several studies, as well as Supreme Court precedent, the Commission correctly reaffirmed the nexus in the *Local Ownership Order,* concluding that "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." *See Local Ownership Order* at ¶ 22.

B. The Supreme Court Recognizes the Nexus Between Ownership and Programming.

Time and time again, the Supreme Court has indicated that a nexus between ownership and content inevitably exists as a result of the editorial discretion protected by the First Amendment.[11] The Court has recognized that ensuring public access to a multiplicity of information sources is a governmental purpose of the "highest order." *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 636 (1997). The Court has also long considered that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *See id* at 636 (*citing Associated Press v. United States*, 326 U.S. 1, 20 (1945)). In pursuance of this First Amendment principle, the Court has upheld the Commission's ownership rules finding that the FCC "acted rationally in finding that diversification of ownership would enhance the possibility of achieving

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[10] *See e.g., Second Report and Order, In the Matter of Amendment of Sections 73.34, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 FCC 2d 1079-1080, ¶ 111 (1975).

[11] *See generally, Miami Herald Publishing Co. Tornillo*, 418 U.S. 241, 254 (1974) (reaffirming the protection afforded to editorial judgement); *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 393 (1969) (upholding regulations requiring a broadcaster to afford a right of reply partially because of a finding that such regulations do not interfere with the broadcasters broader editorial discretion).

greater diversity of viewpoints." *FCC v. National Citizens Committee for Broadcasting et al.*, 436 U.S. 775, 795 (1978) (upholding the ban on common ownership of newspapers and broadcast stations in a local market).

Most recently, the Court explained that the nexus is merely a natural consequence of our broadcasting system under the First Amendment since broadcasters are "required to exercise substantial editorial discretion in the selection and presentation of their programming."*Arkansas v. Forbes*, 118 S. Ct. 1633, 1639 (1998). In *Forbes*, the Court affirmed the connection between who is in charge of a station and the content on that station when it rejected giving outside speakers broad rights of access to a television broadcasting station. *See id.* Concluding that a broadcaster by its nature "will facilitate the expression of some viewpoints instead of others," the Court refused to set up "pre-established criteria for access" for fear that it would interfere with the "exercise of journalistic discretion." *Id* at 1639.

C. Anecdotal Evidence Continues to Demonstrates That the Content and Presentation of Programming is Strongly Affected by Ownership.

Everyday experience demonstrates that diversity in ownership affects the diversity of programming available to the public. By exercising their indisputable editorial discretion, media owners inevitably shape the viewpoints presented on their broadcast stations. Consequently, it is inevitable that as media ownership becomes more and more concentrated, divergent viewpoints will be more limited and less diverse.

There are numerous examples that demonstrate how ownership impacts television. Network owners consistently act as filters for stories on news programs and use their editorial discretion to promote certain viewpoints over others. Most of the time, owners exercise this

control in a responsible manner, as is required by their role as public trustees of the airwaves. But occasionally an owner's selection of programming runs afoul of its public interest obligations and vividly illustrates the connection between ownership and content. For example, last year ABC News, owned by Disney, refused to air a "20/20" investigative story that involved accounts of pedophilia and lax security at theme park resorts, including Walt Disney World. *See* Lawrie Mifflin, *ABC News Shelves Critical Report on Disney*, N.Y. TIMES NEWS SERVICE, Oct. 19, 1998 (Last visited Nov. 1999) <http://www.cjonline.com/stories/101998/bus_abcdisney.html>. While Disney issued a statement saying its executives had nothing to do with the decision, chief spokeswoman for ABC News, Eileen Murphy, stated that the news division "would generally not embark on an investigation that focused solely on Disney..." *Id.* Conversely, various shows on the ABC network, "have devoted a great deal of time to several movies produced by Disney, although the network has maintained in each instance that there was no justified journalistic interest in the films." Robert McChesney, *Oligopoly: The Big Media Game has Fewer and Fewer Players* (Last visited Nov. 1999) <http://www.progressive.org/mcc1199.html>.

And ABC is not alone. When NBC's "Today" show ran a segment on boycotts in the early 1990's, the report failed to mention an existing boycott of G.E., NBC's parent company, for its production of nuclear weapons. *See* Jeff Cohen, *Stories TV Doesn't Tell*, THE NATION, June 8, 1998, at 7. In addition, similar to ABC's promotion of Disney films, NBC News promotes the interests of the network and its owner. For example, in 1996, "the news story that NBC gave the most time to was the Summer Olympics in Atlanta, an event that did not even rank among the top ten stories covered by CBS, ABC, or CNN." *See* Robert McChesney, *Rich Media, Poor Democracy*, UNIVERSITY OF ILLINOIS PRESS, 1999, at 53-54. It is no coincidence that NBC held the

television rights to the 1996 Olympic games. In fact, critics maintain that NBC "used its nightly news to pump up the ratings for its prime-time coverage." *Id.*[12]

Instances of ownership affecting editorial discretion are no less prevalent on News Corp.'s Fox network. Rupert Murdoch's conservative politics have consistently illustrated the connection between ownership and content.[13] Murdoch's political persuasion allegedly also affects the hiring decisions at the network, as well as programming decisions. There are reports that "journalists interviewing for jobs with Fox News Channel were allegedly quizzed on whether they were registered Republicans or not." *See* Jim Naureckas, *From the Top: What Are the Politics of Network Bosses?* EXTRA! July/August 1998, (Last visited Nov. 1999) <http://www.fair.org/extra/9807/from-the-top.html>. And at least one reporter, after leaving the Fox News Channel, has claimed that in comparison to the editorial discretion exercised with respect to other controversial stories, "Rupert Murdoch's network appears to have looser standards for material critical of President Clinton." *See* Howard Kurtz, *The Going Gets Tough, and Matt Drudge Gets Going*, THE WASHINGTON POST, Nov. 15, 1999, at CO1.

Finally, the owners of CBS also determine to some degree what content is presented on the network. For instance, CBS's "America Tonight" provided a segment on Canadian cigarette taxes "that couldn't have been more one-sided if it had been paid for by the Tobacco Institute . . .

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[12] For other examples of NBC News self-censoring its content to appease its parent GE, as well as other instances of ownership determining content *see* Comments of CME, *et al.*, 1998 Biennial Regulatory Review, MM Dkt. No. 98-35 at 4-8, Filed July 21, 1998 (CME Comments).

[13] *See* CME Comments at 4-6 (outlining several examples where News Corp.'s ownership interests determined the extent of coverage of an issue by News Corp.'s television stations and newspapers).

not a single source appeared who defended cigarette taxes or criticized the tobacco industry." *See* Jim Naureckas, *Smoke Screens: When Journalists Boost the Tobacco Industry, Follow the Money*, Extra! September/October 1994 (Last visited Nov. 1999) <http://www.fair.org/extra/9409/smoke.html>. Loews Corporation owns Lorrilard tobacco and holds a controlling stake in CBS.

The above examples are the exceptions rather than the rule. Usually station and network owners exercise their editorial control responsibly. It is those instances where such editorial control is abused that makes the news. The fact that these abuses do exist, illustrate the danger in allowing excessive concentration of control and crystallize the connection between ownership and content.

In sum, the Commission's conclusion that there is a connection between diversity of ownership and content is well supported by traditional Commission doctrine and Supreme Court precedent. Moreover, everyday anecdotal evidence continues to demonstrate that the ownership of a station will determine its content. This phenomenon is most prevalent when television news reporters self-censor reports to appease the interests of their owners.

CONCLUSION

The Commission was correct in restricting the definition of local voices to only full power broadcast television stations located in a single DMA. Furthermore, the Commission should adopt the radio/television cross-ownership standard for the local televison ownership rule and not create a special new waiver for the transfer of duopolies. Finally, in providing a rational basis for establishing a narrow voice test and waiver standard, the Commission properly reaffirmed the nexus between diversity of ownership and diversity of content.

Respectfully submitted,

Angela J. Campbell

Angela J. Campbell
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W. - Suite 312
Washington, DC 20001
(202) 662-9535

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Brian N. Gibson
Law Student
Georgetown University Law Center

Cathy Yacoub
Law Student
Georgetown University Law Center

Andrew Jay Schwartzman
Harold Feld
Media Access Project
1707 L Street, N.W. - Suite 400
Washington, D.C. 20036
(202) 232-4300

December 2, 1999

Counsel for UCC *et al.*

Certificate of Service

I, Martha L. Rodriguez, hereby certify that a copy of the foregoing "Opposition and Response to Petitions for Reconsideration of UCC *et al.*," was sent this Thursday, December 2, 1999 via first class mail, postage prepaid to:

David D. Oxenford
Veronica D. McLaughlin
FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W. - Suite 400
Washington, D.C. 20006
Counsel for Aries Telecommunications Corporation

David L. Donovan
ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.
1320 19th Street, N.W.
Washington, D.C. 20036

John R. Feore, Jr.
Nina Shafran
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Ave., NW - Suite 800
Washington, D.C. 20036
Counsel for Blade Communications, Inc.

Kenneth Wyker
CLEAR CHANNEL COMMUNICATIONS, INC.
200 Concord Plaza - Suite 600
San Antonio, TX 78216

John B. Kenkel
Kenkel & Associates
1901 L Street, N.W. - Suite 290
Washington, D.C. 20036-3506

William H. Fitz
Stanford K. McCoy
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Lin Television Corporation

David L. Donovan
LOCAL STATION OWNERSHIP COALITION
1320 19th Street - Suite 300
Washington, D.C. 20036

David Earl Honig
Minority Media and Telecommunications Council
3636 16th Street, N.W. - Suite BG-54
Washington, D.C. 20010

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

John R. Feore, Jr.
Nina Shafran
DOW, LOHNES & ALBERTSON, PLLC.
1200 New Hampshire Ave., N.W. - Suite 800
Washington, D.C. 20036
Counsel for Paxson Communications Corporation

R. Clark Wadlow
Thomas P. Van Wazer
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
Counsel for Pegasus Communications Corp.

Martin R. Leader
Kathyrn R. Schmeltzer
Carroll J. Yung
Brendan Holland
FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W. - Suite 400
Washington, D.C. 20006-1851
Counsel for Sinclair Broadcast Group, Inc.

David D. Oxenford
FISHER WAYLAND COOPER LEADER & ZARAGOZA, L.L.P.
2001 Pennsylvania Avenue, N.W. - Suite 400
Washington, D.C. 20006
Counsel for Wells Fargo Communications Finance, Division of Norwest Bank MN, NA

December 2, 1999

Martha L. Rodriguez

Martha L. Rodriguez