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Federal Communications Commission
Washington, DC 20054

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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
)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry)	MM Docket No. 92-51
)	
Reexamination of the Commission's Cross-Interest Policy)	MM Docket No. 87-154
)	

TO: The Commission

**OPPOSITION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS TO
PETITIONS FOR RECONSIDERATION**

The National Association of Broadcasters ("NAB")¹ submits this opposition to certain petitions requesting reconsideration of the Commission's orders adopted in the broadcast ownership and attribution rulemaking proceedings. In these proceedings, the Commission amended its rules for defining the types of interests that are cognizable under the broadcast multiple ownership rules,² and substantially revised the television duopoly and radio/television

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *Report and Order* in MM Docket Nos. 94-150, 92-51 and 87-154, FCC 99-207 (rel. Aug. 6, 1999) ("*Attribution Order*").

cross-ownership rules.³ In its petition for partial reconsideration and clarification of the *Ownership Order* and *Attribution Order*, NAB sought a number of necessary adjustments and clarifications so as to resolve inconsistencies within the revised rules and to forestall the adverse consequences that will result from application of some of the rules. In this opposition, NAB urges the Commission to reject certain petitions that are fundamentally inconsistent with the basic premise of the revised rules – “a recognition of the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership.” *Ownership Order* at ¶ 1. NAB also notes that most petitions for reconsideration filed in these proceedings agreed with the specific arguments made by NAB in its reconsideration petition.

I. Petitions Fundamentally Inconsistent With The Underlying Premise Of The Commission’s Decisions In These Proceedings Should Be Rejected.

The Commission began its reexamination of the broadcast ownership rules in 1991 by soliciting comment on whether existing television ownership rules and related policies should be revised in light of ongoing changes in the competitive market conditions facing broadcast licensees.⁴ Following the issuance of three notices of proposed rulemaking and the receipt of voluminous comments, the Commission ultimately concluded that

The record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable to compete more effectively for advertising dollars. . . . There is evidence concerning the efficiencies inherent in joint ownership and operation of television stations in the same market, and of radio-television combinations. These efficiencies can lead to cost savings, which in turn can

³ *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 (rel. Aug. 6, 1999) (“*Ownership Order*”).

⁴ *See Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Red 4961 (1991).

lead to programming and other service benefits that serve the public interest.

Ownership Order at ¶ 37. Based explicitly on these considerations, the Commission determined to relax the broadcast local ownership rules. *See id.* at ¶¶ 1, 7, 37, 41.⁵

Because the Commission's revised ownership rules are based on the recognition of the continued growth in the number and variety of mass media outlets and the public interest benefits generated by common ownership of media facilities, petitions raising arguments fundamentally inconsistent with this underlying premise should be denied. In particular, the requests for reconsideration made by UCC *et al.* ("UCC") should be rejected, as these requests are based on a clearly outdated view of the broadcast marketplace. For example, UCC opposed relaxation of the television duopoly rule as a threat to competition and diversity and urged the Commission to return to the Grade B contour standard.⁶ Thus, UCC is advocating that the Commission reinstate the version of the duopoly rule first adopted in 1964, when "the video marketplace consisted solely of 649 television stations and a small number of cable systems whose primary purpose was to retransmit the signals of over-the-air broadcast stations."⁷ In contrast, today's video marketplace consists of 1616 full power television stations, 2194 low power television stations, and approximately 11,600 cable systems serving almost 65 million

⁵ Specifically, under the revised duopoly rule, common ownership of two television stations is permitted without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas ("DMAs"). Common ownership of two television stations in the same DMA is allowed if eight independently owned, full power television stations will remain in the DMA post-merger, and one of the stations is not among the top four-ranked stations in the market. With respect to the radio/television cross-ownership rule, one party may now own a television station and a varying number of radio stations in the same market, depending on the number of "independent voices" (*i.e.*, television and radio stations, daily newspapers and cable systems) remaining post-merger.

⁶ *See* Petition of UCC for Reconsideration of *Ownership Order* at 3-15.

⁷ *Notice of Proposed Rulemaking* in MM Docket No. 91-221, 7 FCC Rcd 4111, 4114 (1992).

television households, as well as other multichannel video providers (such as Direct Broadcast Satellite) that serve millions of subscribers.⁸ UCC's opposition to relaxing the duopoly rule appears to ignore this tremendous growth in the number and variety of video outlets that has occurred in the past 35 years. UCC also opposed loosening the cross-ownership rule to allow radio/television combinations in all markets,⁹ similarly ignoring the fact that since 1970, when the rule was adopted by a divided Commission, the total number of radio and television stations has increased by over 85 percent. *See Ownership Order* at ¶ 29. Because UCC essentially supports an outmoded regulatory regime originally formulated decades ago for a much less competitive and diverse media marketplace, NAB believes that UCC's requests for reconsideration should be rejected as inconsistent with the Commission's basic premise for revising the local ownership rules.

In requesting reconsideration of the Commission's decisions with regard to Local Marketing Agreements ("LMAs"), UCC's petitions also raise arguments totally inconsistent with the Commission's findings with regard to the public interest benefits generated by joint operation of broadcast facilities.¹⁰ Despite these specific findings in the *Ownership Order*, UCC baldly asserted that "LMAs were never in the public interest" and "are no longer useful to broadcasters in any sense," and requested the Commission to "clarify" that LMAs will no longer be

⁸ See FCC News Release, "Broadcast Station Totals as of September 30, 1999" (rel. Nov. 22, 1999); *Ownership Order* at ¶ 29.

⁹ See Petition of UCC for Reconsideration of *Ownership Order* at 16-20.

¹⁰ Specifically, the Commission found that "the record shows that a number of television LMAs resulted in public interest benefits." *Ownership Order* at ¶ 145. Moreover, when reviewing grandfathered television LMAs a part of the 2004 biennial review, the Commission stated that it "will assess the extent to which parties, by virtue of their joint operation, have achieved certain efficiencies allowing them, in turn, to produce specific and demonstrable benefits to the public." *Id.* at ¶ 148.

permitted.¹¹ UCC's request with regard to LMAs should be rejected, as it is obviously based on a factual premise contrary to the Commission's explicit findings concerning television LMAs.

Similarly, the Commission should reject the Minority Media and Telecommunications Council's ("MMTC") argument that all LMAs should be terminated if ownership of television stations by small entities or minorities is "endangered." MMTC contended that the Commission, "having found that LMAs have little to recommend them," should end all LMAs if minority station ownership declines.¹² But, as explained above, the Commission in fact found that television LMAs produce operating efficiencies and public interest benefits. Thus, MMTC's argument, like UCC's, is based on a factual premise contrary to the Commission's findings.¹³

II. Other Petitioners Agreed With NAB's Arguments Regarding Necessary Adjustments And Clarifications To The *Ownership Order* And *Attribution Order*.

NAB notes that no other petitioners agreed with UCC's arguments in support of an outdated broadcast ownership regulatory regime. Instead, other petitions filed in these proceedings generally emphasized the growth in the number and variety of mass media outlets and the changes in the competitive landscape of the video marketplace. These other petitioners also agreed with most of the specific points made by NAB in its petition for reconsideration.

¹¹ See Petition of UCC for Reconsideration of *Attribution Order* at 18-22.

¹² See Petition of MMTC for Reconsideration of *Ownership Order* at 11-12.

¹³ NAB also expresses reservations about MMTC's discussion of the effects of the Commission's licensing and other policies on the advancement of minority broadcasters. See Petition of MMTC for Reconsideration of *Ownership Order* at 2-11. This discussion would be more appropriately offered in the context of a Commission proceeding specifically examining ways to expand opportunities for minorities in the broadcast industry, consistent with current constitutional standards. The Commission in fact contemplates undertaking this examination following the completion of certain pending studies. See *Ownership Order* at ¶ 14.

A. Petitioners Agreed with NAB's Criticisms of the Voice Tests, Waiver Criteria and Transferability Restrictions Adopted in the *Ownership Order*.

With regard to the amended television duopoly and radio/television cross-ownership rules, NAB emphasized in its petition that the utilization of “voice” tests will prove disadvantageous to small market broadcasters, and noted significant inconsistencies in the differing voice count requirements for the revised rules. In particular, NAB asked the Commission to reconsider its overly restrictive method of counting media voices under the duopoly rule by including additional types of media (especially cable television). Other petitioners agreed with NAB’s general criticism of voice tests, and expressly argued that such tests (particularly the eight voice duopoly standard) would harm programming diversity in smaller markets.¹⁴ Several petitioners also agreed with NAB that additional types of media (especially cable television) must be counted as voices under the amended duopoly rule, particularly in light of the fact that other media were counted as voices under the revised cross-ownership rule.¹⁵ Indeed, petitioners agreed that the Commission’s decision to count only broadcast television stations as voices under the duopoly rule was arbitrary and irrational.¹⁶

With regard to the waiver criteria adopted under the revised local ownership rules, NAB contended that requiring all waiver applicants to make an active and serious effort to sell the station concerned to an out-of-market buyer was needlessly burdensome and unlikely to promote

¹⁴ See Petitions for Reconsideration of *Ownership Order* filed by Local Station Ownership Coalition (“LSOC”) at 17-18; Association of Local Television Stations, Inc. (“ALTV”) at 28-30; Pegasus Communications Corporation (“Pegasus”) at 27-37.

¹⁵ See Petitions for Reconsideration of *Ownership Order* filed by Paxson Communications Corporation (“Paxson”) at 6-16; Blade Communications, Inc. (“Blade”) at 5-15; LSOC at 4-16; ALTV at 16-28.

¹⁶ See Petitions for Reconsideration of *Ownership Order* filed by Paxson at 13-16; Blade at 12-15; LSOC at 13-14; ALTV at 25-26.

competition and diversity. Other petitioners similarly objected to the Commission's waiver criteria (including this "out-of-market buyer" showing) as "vague" or "counter-productive."¹⁷ Two petitioners moreover agreed with NAB that this requirement for waiver applicants to document their attempts to sell their stations to out-of-market buyers raised serious questions as to compliance with Section 310(d) of the Communications Act.¹⁸ Given the various problems already identified by petitioners with this "out-of-market buyer" showing, NAB opposes MMTC's petition suggesting that applicants seeking a waiver for failed, failing or unbuilt stations should *also* be required to market their stations to socially and economically disadvantaged small business concerns ("SDBs").¹⁹ NAB questions how this proposal would work in combination with the existing requirement for waiver applicants to attempt to sell their stations to out-of-market buyers.²⁰ In addition, MMTC's proposal raises similar compliance questions under Section 310(d), as requiring licensees to document efforts to sell their stations to certain specified entities essentially constitutes comparative consideration.

¹⁷ See Petitions for Reconsideration of *Ownership Order* filed by Pegasus at 34-35; LSOC at 19-20; ALTV at 30-32.

¹⁸ See Petitions for Reconsideration of *Ownership Order* filed by LSOC at 20-22; ALTV at 32-34. This section provides that, in acting on an application for transfer or assignment of a station license or construction permit, the Commission "may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." 47 U.S.C. § 310(d).

¹⁹ See Petition of MMTC for Reconsideration of *Ownership Order* at 12-14.

²⁰ For example, if a prospective SDB buyer were in-market, would this supersede the requirement to make an active and serious effort to sell the station to an out-of-market buyer? NAB also wonders about the time limitations on waiver applicants seeking to sell unbuilt stations. Because broadcast permittees now have only a strict three-year period in which to construct their stations, permittees who try for nearly three years but fail to complete construction would have a very limited period of time in which to attempt to sell their permits to *both* out-of-market buyers and to SDBs.

Finally, numerous petitioners objected to the restrictions placed on the transferability of station combinations formed under the revised local ownership rules. The petitioners agreed with NAB that these restrictions would, *inter alia*, discourage investment in broadcast stations and should be eliminated.²¹ NAB also notes its agreement with the petition filed by LIN Television Corporation (“LIN”), which emphasized the disparity of treatment between television duopolies and television LMAs with regard to transferability.²² Petitioners pointed out that this arbitrarily disparate treatment would create an incentive for television stations to retain their LMA status, rather than convert their time brokerage arrangement into a duopoly.²³ For these reasons, NAB reemphasizes here the importance of eliminating the limitations on the transfer of station combinations properly formed under the revised duopoly and cross-ownership rules.²⁴

B. Petitioners Also Expressed Reservations Similar to NAB’s Concerning the “Equity/Debt Plus” Rule Adopted in the *Attribution Order*.

NAB’s petition expressed serious reservations about the “equity/debt plus” (“EDP”) rule adopted in the *Attribution Order*, in large part because the rule will diminish the flow of capital to minorities, women and other new entrants in the broadcast industry. MMTC agreed in its

²¹ See Petitions for Reconsideration of *Ownership Order* filed by Pegasus at 39-41; ALTV at 35-37; LSOC at 22-24; and Aries Telecommunications Corporation at 4-12.

²² Specifically, the Commission determined to allow grandfathered LMAs to be transferred and renewed by the parties. See *Ownership Order* at ¶ 146. Thus, a licensee with a grandfathered LMA may freely transfer it to another party, but if the licensee converts the LMA into a duopoly, then the combination may have to be split apart in a transfer because duopolies may not automatically be transferred to a single buyer.

²³ See Petitions for Reconsideration of *Ownership Order* filed by ALTV at 36; LSOC at 23-24; LIN at 3.

²⁴ In this regard, NAB does not object to MMTC’s petition urging the Commission to permit the owner of any television duopoly or radio/television combination to sell the stations together to an SDB. See Petition of MMTC for Reconsideration of *Ownership Order* at 15-17. Although NAB would go further, so that station owners would be allowed to transfer station combinations freely to any purchaser, whether an SDB or not, NAB does not oppose MMTC’s petition.

petition that the EDP rule may have the “unintended consequence” of discouraging broadcasters from providing investment to socially and economically disadvantaged small businesses.²⁵

Given this “unintended consequence” of the EDP rule, NAB again urges the Commission to reconsider this rule.²⁶

In addition to impeding investment in new entrants, NAB also believes the standards for applying the EDP rule to be disturbingly vague and the scope of the rule to be unnecessarily wide. Assume, for example, that John Doe is an officer of B.I.G. Bank and sits on the board of directors of X.Y.Z. Broadcasting Company. The Bank then loans funds to (and/or, like petitioner Wells Fargo Communications Finance, has a venture capital subsidiary with investments in) another broadcaster in the same market as X.Y.Z. This not unlikely scenario clearly would result in an attributable relationship where no likelihood of control actually exists. Many similar scenarios could easily be envisioned. In this regard, NAB agrees with the petition filed by Wells Fargo, which discussed the “logistical nightmare” created by the EDP rule for large bank holding companies and the rule’s lack of clarity.²⁷ More generally, the EDP rule will likely create a “nightmare” both for licensees attempting to discern all attributable interests and comply with the multiple ownership rules, and for the Commission attempting to administer and enforce its attribution and ownership rules.

Moreover, the justification for adopting the overly broad EDP rule appears less than convincing. According to the Commission, its decision to attribute currently non-attributable

²⁵ See Petition of MMTC for Reconsideration of *Attribution Order* at 1-5.

²⁶ It is ironic that, while the Commission has expressed concerns with the Department of Justice’s policies that impede financing by broadcasters of stations that are spun off to minorities or new entrants, the Commission itself adopts a rule that has the same consequences.

²⁷ See Petition of Wells Fargo for Reconsideration of *Attribution Order* at 4-12.

interests held by program suppliers and same-market broadcasters did “not rest on a specific finding that [the interest] is harmful *per se*,” but was based “rather on a finding that it is the sort of interest that should be counted in applying the multiple ownership rules.” *Attribution Order* at ¶ 40. This reasoning is circular at best, with the Commission in essence contending that the EDP interests should be attributable because they are the sort of interests that should be attributed.

For all these reasons, the Commission should reexamine the operation of the rule, and, at the very least, limit its breadth by applying the rule only to investors that are also major program suppliers, or by determining not to attribute investments of pure debt. We believe that limiting the EDP rule in either one of these ways would better focus the rule’s application, make the rule easier to apply, and ameliorate its adverse impact on minorities and other new entrants.²⁸

III. Conclusion

For the reasons set forth, NAB respectfully requests that the Commission deny petitions for reconsideration of the *Ownership Order* and the *Attribution Order* that are fundamentally inconsistent with the basic premises of the Commission’s decisions in these proceedings.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430



Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

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²⁸ Given the overbreadth of the EDP rule as adopted, NAB opposes UCC’s petition complaining about “gaps” in the rule and asking the Commission to attribute additional ownership interests. See Petition of UCC for Reconsideration of *Attribution Order* at 4-13.

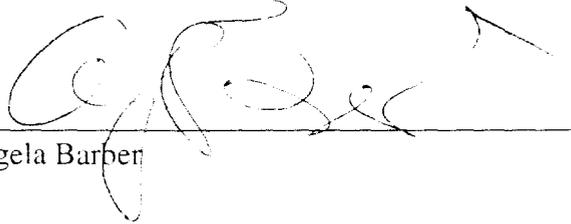
CERTIFICATE OF SERVICE

I, Angela Barber, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Opposition of the National Association of Broadcasters was sent this 2nd day of December, 1999, by first class mail, postage prepaid, to the following:

Angela J. Campbell
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001

Andrew Jay Schwartzman
Harold Feld
Media Access Project
1707 L Street, NW, Suite 400
Washington, DC 20036

David Earl Honig
Executive Director
Minority Media and Telecommunications Council
3636 16th Street, NW, Suite BG-54
Washington, DC 20010



Angela Barber