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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20054

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

**REPLY OF THE
NATIONAL ASSOCIATION OF BROADCASTERS TO
OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

The National Association of Broadcasters ("NAB")¹ submits this reply to certain oppositions to 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

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*").

radio/television cross-ownership rules.³ In its petition for partial reconsideration and clarification of the *Ownership Order* and *Attribution Order*, NAB, in agreement with a number of other petitioners, generally emphasized the growth in the number and variety of media outlets and the changes in the competitive landscape of the video marketplace. NAB also sought several specific adjustments and clarifications so as to resolve inconsistencies within the revised rules and to forestall the adverse consequences that would result from application of some of the rules. Although most petitioners agreed with NAB's more specific criticisms of the *Ownership Order* and *Attribution Order*, UCC *et al.* ("UCC") opposed NAB's reconsideration petition, as well as the petitions filed by almost all other petitioners. NAB now replies to several particular points raised by UCC in its oppositions.

I. NAB's Valid Criticisms of the Inconsistencies and Other Problems in the *Ownership Order* Remain Unrefuted.

In its petition, NAB sought reconsideration of, *inter alia*, the inconsistent and burdensome waiver standards adopted for the revised television duopoly and radio/television cross-ownership rules, and the restrictions placed on the transferability of station combinations formed under the amended rules. With regard to the waiver criteria, NAB asserted that providing a presumptive waiver of the cross-ownership rule only for "failed" stations, while waiving the duopoly rule for "failed," "failing" and "unbuilt" stations, was unjustified. In its opposition, UCC argued that the Commission, in ¶ 118 of the *Ownership Order*, provided two rationales for adopting a narrower waiver standard under the cross-ownership rule.⁴ In this paragraph of the *Ownership Order*, the Commission first stated that the cross-ownership waiver

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

standard “will not be extended to failing or unbuilt stations. Thus, evidence that a station is losing money (*i.e.*, a negative cash flow) is not adequate to qualify for the waiver.” *Ownership Order* at ¶ 118. Contrary to UCC’s assertions, this is not a rationale at all, but only a descriptive statement. In particular, no reason is given as to *why* a station that has had a negative cash flow for several years should not qualify for a waiver of the cross-ownership rule, when such a station could qualify for a “failing” station waiver under the duopoly rule.

The Commission also stated in ¶ 118 of the *Ownership Order* that it was not “necessary” to allow “additional waivers in view of the measured liberalization” of the cross-ownership rule and the 1996 Telecommunications Act’s “liberalization of the local radio ownership limits.” *Id.* This conclusory assertion does not, however, adequately explain or justify the Commission’s refusal to provide waivers of the cross-ownership rule for failing or unbuilt stations. After all, the Commission liberalized the duopoly rule in the *Ownership Order* as well, yet still provided waivers for failing and unbuilt stations. Moreover, in liberalizing the local radio ownership limits in the 1996 Telecommunications Act, Congress expressly provided an exception permitting the Commission to allow ownership of radio stations in excess of the relaxed ownership limits if so doing would “result in an increase in the number of radio broadcast stations in operation.”⁵ Allowing a waiver of the radio/television cross-ownership rule for unbuilt stations (in addition to failed stations) would result in an increase in the number of broadcast stations in operation, an outcome Congress clearly supports.⁶ For these reasons, NAB

⁴ See UCC Opposition to Petitions for Reconsideration of *Ownership Order* at 7-8.

⁵ Section 202(b)(2) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁶ Permitting a waiver for failing stations as well could help prevent struggling stations from actually falling into bankruptcy and/or going dark, thereby causing a reduction in the number of stations. Even if a failing station did not completely fail or go dark, the Commission has

disagrees with UCC's contention that the Commission has provided a sufficient rationale for refusing to allow waivers for failing and unbuilt stations in the cross-ownership context. The Commission should accordingly grant NAB's request to harmonize the currently inconsistent waiver criteria under the local ownership rules.

UCC also objected to NAB's request that the Commission reexamine certain burdensome documentation requirements with regard to unbuilt stations seeking a waiver under the duopoly or cross-ownership rules.⁷ UCC expressed "serious concerns" about NAB's request with regard to unbuilt stations because "it could lead to a number of sham applications and the commodification of station building permits." According to UCC, "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," thereby resulting in the in-market buyer acquiring "a second broadcast license that would have otherwise been off-limits if applied for directly."⁸

NAB believes that UCC's concerns are misplaced. As an initial matter, UCC has apparently assumed that an entity in this situation would be able to qualify for an unbuilt station

correctly recognized that marginally performing stations rarely have the resources to provide any local news programming or significant local programming at all. *See Ownership Order* at ¶ 79. Thus, allowing a waiver under the cross-ownership rule for such failing stations "should pose minimal harm" to the Commission's "diversity and competition goals." *Id.*

⁷ Specifically, NAB questioned the requirement that all waiver applicants must demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to acquire and operate (or construct) the station, and that sale to an out-of-market buyer would result in an artificially depressed price. To make this showing, the Commission stated that a waiver applicant can provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station or permit, and that no reasonable offer from an entity outside the market has been received. NAB asked the Commission to reconsider this showing generally, but particularly argued that the requirement was especially burdensome and sterile in situations involving unbuilt stations or stations converting from time-brokerage arrangements into duopolies.

⁸ UCC Opposition to Petitions for Reconsideration of *Ownership Order* at 8-9.

waiver, which requires the applicant to demonstrate that it has made reasonable efforts to construct but has been unable to do so. In addition, UCC seemed to ignore the fact that broadcast construction permits are now awarded by competitive bidding. An applicant cannot simply “apply for a building permit” at any time, obtain it, and then resell it at a “high premium.” Any applicant must, in fact, file an application in a broadcast auction window, and, if competing applications are filed, submit the high bid in an auction to obtain a construction permit. The requirements of the broadcast auction process (including upfront payments, minimum opening bids, bid withdrawal and default penalties, and full payment of winning bids prior to the grant of any permit) necessarily tend to discourage “sham” applications.⁹ Moreover, if an applicant has paid the market price for a broadcast construction permit in an auction, it appears unlikely that it could quickly sell the permit for the unbuilt station “to an in-market buyer at a high premium,” as UCC suggested. For these reasons, eliminating the requirement for waiver applicants to document their attempts to find out-of-market buyers for unbuilt stations should not lead to an increase in the grant of broadcast construction permits to “sham” applicants and the ultimate purchase of these permits by in-market buyers. UCC has, in sum, not demonstrated any reasons for the Commission to refrain from reexamining its documentation requirements for waiver applicants in the context of unbuilt stations, or indeed more generally.

With regard to restrictions placed on the transferability of station combinations formed under the amended local ownership rules, UCC opposed NAB’s request that the Commission

⁹ See, e.g., *FCC Report to Congress on Spectrum Auctions* in WT Docket No. 97-150, FCC 97-353 at 8 (1997) (auctions were intended to correct problems associated with prior licensing methodologies, as “the cost of winning an auction would dissuade speculators”); *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2378-82 (1994) (in adopting payment requirements under general auction rules, Commission emphasized importance of deterring frivolous or insincere bidding and of assuring that each bidder was a *bona fide* applicant).

eliminate these limitations.¹⁰ In opposing NAB's petition on this point, UCC mischaracterized NAB's request for reconsideration as seeking to "create a new waiver for the transfer of duopolies."¹¹ In fact, NAB has merely asked the Commission to allow the free transfer of station combinations that are properly formed under the terms of the revised local ownership rules or waiver standards.

UCC also opposed NAB's request as "promot[ing] the broadcast industry's business interests" rather than "protect[ing] the public interest."¹² But in fact, the Commission has previously recognized the public interest benefits served by *not* requiring the break up of station groups upon transfer or assignment.¹³ In this earlier radio ownership proceeding, the Commission determined not to "require a multiple owner which acquired its stations in compliance with the audience share and numerical station limits . . . to break up its station group upon transfer or assignment because the combined share of the group has grown to a level exceeding the [audience share] limit or the applicable numerical limit has changed." The Commission concluded that adopting such a requirement "would in essence punish stations . . . for excellence in serving the local community, as reflected by listenership gains."¹⁴ This

¹⁰ The Commission specifically stated in the *Ownership Order* that a television duopoly or radio/television combination formed under the revised local ownership rules may not be transferred to a new owner if the market does not satisfy the applicable voice test at the time of sale. *Id.* at ¶¶ 64, 100. NAB asked the Commission to reconsider this restrictive approach, and to make all combinations properly formed under the local ownership rules freely transferable.

¹¹ UCC Opposition to Petitions for Reconsideration of *Ownership Order* at 10.

¹² *Id.* at 12.

¹³ See *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part and denied in part, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992) (revising radio duopoly rules to include both numerical and audience share limitations).

¹⁴ *Report and Order*, 7 FCC Rcd at 2783.

decision was, moreover, upheld on reconsideration, with the Commission commenting that “our goal is to promote robust competition, and we do not believe that penalizing enterprises that grow into stronger competitors is consistent with this objective.”¹⁵ Contrary to UCC’s assertion, the Commission has explicitly recognized that requiring the break up of station combinations upon transfer does not protect the public interest because it penalizes competitive stations that serve their local communities. Thus, for all the reasons stated here and in NAB’s petition, the Commission should remove the restrictions placed on the transferability of station combinations properly formed under the duopoly and cross-ownership rules and waiver standards.

II. NAB Has Shown that the Equity/Debt Plus Rule Will Likely Produce Adverse Unintended Consequences for the Broadcast Industry.

NAB sought reconsideration of the “equity/debt plus” (“EDP”) attribution rule because it would discourage broadcasters from investing in new entrants (including minority- and women-owned businesses), and would have inconsistent regulatory effects, depending primarily on the capitalization structure of the regulated broadcast companies. At the least, NAB urged the Commission to limit the rule’s breadth by applying the rule only to investors that are also major program suppliers, or by determining not to attribute investments of pure debt. UCC opposed NAB’s petition on this point, contending that the EDP rule would not impede investment in broadcasting and that the rule should be tightened, rather than relaxed, so as to address more adequately all issues of control.¹⁶

UCC’s arguments supporting the EDP rule are unconvincing. For example, UCC cited the creation by prominent broadcasters of the Prism Fund, an investment fund devoted to

¹⁵ *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd at 6397.

¹⁶ See UCC’s *Opposition to Petitions for Reconsideration of Attribution Order* at 13-17.

providing capital for media businesses owned by women and minorities, as evidence that the EDP rule will not impede broadcasters from investing in new entrants. NAB points out that the operation of the Prism Fund could in fact be adversely impacted by the EDP rule.¹⁷ Moreover, the EDP rule will clearly discourage other types of investments in new entrants, particularly the financing by broadcasters of stations that are spun off as part of station mergers.

In addition, UCC agreed with NAB that application of the EDP rule could have inconsistent regulatory effects, depending on the relative debt and equity levels of the regulated entities. Rather than questioning the rule itself, however, UCC suggested amending the EDP rule “so that it equally affects owners of either debt or equity in a licensee.”¹⁸ UCC did not – or could not – explain *how* the EDP rule should be amended so that it would no longer have such an erratic regulatory impact. This omission suggests that the rule cannot, in fact, be reformed.

Instead of attempting to fix a flawed rule that, *inter alia*, impedes broadcaster investment in new entrants, the Commission should reexamine the EDP rule, and, at the 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.¹⁹ As NAB explained in its reconsideration

¹⁷ Assume, for instance, that a director of the Prism Fund has an attributable interest in Station A in a certain community. The Fund then makes an equity investment in Station B in that same community. Thus, the Fund could run afoul of the EDP rule, even if the equity investment in Station B consisted solely of nonvoting stock.

¹⁸ UCC Opposition to Petitions for Reconsideration of *Attribution Order* at 16.

¹⁹ In opposing NAB’s suggestion that pure debt investments should not be attributable under the EDP rule, UCC relied specifically on examples and authorities involving debt securities convertible to corporate stock. See UCC Opposition to Petitions for Reconsideration of *Attribution Order* at 15 and notes 10 & 11. NAB contends that these examples are inapposite to its position that pure debt (*e.g.*, loans) should not fall under the purview of the EDP rule. UCC also exaggerated the influence that lenders are likely to exert over licensees. Although, as UCC indicated, the “need to stay current on a debt” may impact a licensee’s decisions on “how to use its resources” (*id.* at 15), such general financial and resource constraints (which all licensees

petition and opposition in these proceedings, limiting the EDP rule in either one of these ways would better focus the rule's application, make the rule easier for licensees and the Commission to apply, and ameliorate its negative impact on minorities and other new entrants.

III. Conclusion

For the reasons set forth above, NAB respectfully requests that the Commission reconsider the issues raised in NAB's petition for partial reconsideration and clarification of the *Ownership Order* and *Attribution Order*.

Respectfully submitted,

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must face to some degree) should not be regarded as conferring upon lenders the realistic potential to affect the programming decisions or other core operating functions of licensees.

CERTIFICATE OF SERVICE

I, Stacey Nelson, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply of the National Association of Broadcasters was sent this 13th day of December, 1999, by first class mail, postage prepaid, to the following:

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