

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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DEC 15 1999

In the Matter of )  
 )  
 Review of the Commission's Regulations )  
 Governing Television Broadcasting )  
 )  
 Television Satellite Stations Review of )  
 Policy and Rules )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 91-221

MM Docket No. 87-8

To: The Commission

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

Kenkel & Associates ("Kenkel"), a law firm representing various broadcasters before the Federal Communications Commission (the "Commission"), hereby submits its reply to the Opposition and Response to Petitions for Reconsideration of UCC *et al.* (the "Opposition") filed in response to several petitions for reconsideration requesting the Commission to reconsider its Report and Order in the above-captioned proceeding, adopted August 5, 1999, and released August 6, 1999, 64 Fed. Reg. 50651 (1999) (the "Report and Order"). Kenkel submitted its Petition for Partial Reconsideration ("Kenkel's Petition") of the Report and Order on October 18, 1999. Although the Opposition does not directly reference Kenkel's Petition, a copy of the Opposition was served upon Kenkel, and several of the issues raised in the Opposition have bearing on matters raised in Kenkel's Petition.

1. Kenkel's Petition explained why the Commission's decision to allow waivers of the duopoly rule and to allow same-market licensees to own unbuilt analog stations only under certain, limited circumstances is too narrow in focus and why such ownership should be permitted in all cases. Furthermore, Kenkel contended that regardless of the number of voices in the market, acquisitions of all unbuilt analog stations should be exempt from the Commission's duopoly rule, and, once they are constructed, the Commission should permit sales of such duopolies as a single group.

2. In particular, Kenkel stated that the "eight independent voice" component of the Report and Order's modification of the television duopoly rule makes relief from the rule unlikely in many mid-sized and virtually all smaller markets, where such relief is arguably most needed, and that the Commission's new duopoly rule should be revised to afford relief to broadcasters in such markets. Kenkel's views on this issue find strong support in other petitions for reconsideration filed in this proceeding. Numerous other petitioners have sought similar redress in their petitions. *See* Petition for Partial Reconsideration and Clarification of the Revised Broadcast Local Ownership and Attribution Rules Submitted by the National Association of Broadcasters ("NAB Petition") at 3-6 ("despite this recognition of the economic efficiencies and public interest benefits generated by common ownership, the Commission adopted voice tests that will prevent broadcasters in smaller markets from achieving these efficiencies and providing these benefits"); Petition for Reconsideration Submitted by the Association of Local Television Stations, Inc. ("ALTV Petition") at 28-30 ("the economics of small and medium sized markets make it extremely difficult for a full complement of

independently owned television stations to survive”); Petition for Reconsideration by the Local Station Ownership Coalition (“LSOC Petition”) at 17-18; Petition for Reconsideration of Sinclair Broadcast Group, Inc. (“Sinclair Petition”) at ¶ 13 (“[t]he Commission’s eight voice standard is particularly harmful to smaller markets, as television stations in these markets are most likely to require duopolies for economic viability”); Petition for Reconsideration of Pegasus Communications Corporation (the “Pegasus Petition”) at 21-32 (“[t]he Commission’s decision to permit duopolies only in those markets where 8 independently owned television stations would still remain following the combination exalts form over substance in smaller markets by elevating ownership diversity over any other diversity objective identified by the Commission”); Petition for Reconsideration of Blade Communications, Inc. (“Blade Petition”) at 22-23; Petition for Reconsideration of Paxson Communications Corporation (“Paxson Petition”) at 21-22.

3. Although the Opposition does not directly cite Kenkel’s Petition, it makes clear that UCC would like to constrict the new television duopoly rule, by limiting the voices that count under the “eight independent voice” component of the rule or by restricting waivers of the rule. Opposition at 2-10. Kenkel, however, believes there is substantial merit in various petitioners’ suggestions that the eight independent voice component of the rule should be modified to allow additional types of media to count as “voices” (*see* NAB Petition at 6-12 (“NAB requests that the Commission correct [its] error by counting radio, daily newspapers and cable systems as voices for purposes of the duopoly rule”); ALTV Petition at 16-26 (“[t]here is no evidence to demonstrate that television broadcasting does not compete with cable, DBS, MMDS, newspapers, magazines, billboards and the Internet”); LSOC Petition at 4-16; Sinclair

Petition at ¶¶14-16; Blade Petition at 5-12; Paxson Petition at 6-12, 16-17; Petition for Reconsideration of Clear Channel Communications, Inc. at 2-4; Petition for Reconsideration of Aries Telecommunication Corporation (“Aries Petition”) at 4-12) and that the duopoly waiver policy should be revised and liberalized (*see* NAB Petition at 12-19 (“[NAB] objects to certain overly burdensome terms of the waiver criteria”); ALTV Petition at 30-34 (“[u]nfortunately, the current waiver process brings stations in small and medium sized markets to the brink of economic disaster before providing any relief”); LSOC Petition at 19-22). Such changes would have a beneficial effect on the viability of ownership and construction of new NTSC stations in mid-size and smaller markets, which remains Kenkel’s principal focus.

4. Like Kenkel, many petitioners have also called for a relaxation of the Commission’s restrictions on the transferability of TV duopolies. *See* NAB Petition at 19-21 (“NAB is . . . concerned about the limits placed on the transferability of station combinations formed under the television duopoly [rule]”); ALTV Petition at 35-37 (“[o]ne of the more irrational components of the *Report and Order* is its treatment of new duopoly combinations when they are subsequently transferred”); LSOC Petition at 22-24; Pegasus Petition at 39-41; Aries Petition at 4-12 (“[t]he Commission should permit the transfer of smaller market television duopolies that benefit the public interest”). UCC argues against a relaxation of the standard for transferring duopolies, stating that it would “hamstring the Commission’s goal of ensuring a multiplicity of voices at the local level.” Opposition at 11. However, UCC does not take into account the fact that without the unfettered ability to sell intact duopolies created by the construction of unbuilt stations, licensees might never undertake construction of unbuilt stations

at all, nor does UCC acknowledge the particular equitable considerations that apply where an unbuilt station is constructed as part of a duopoly. *See* Kenkel's Petition at 5-6. Kenkel supports any change in the Commission's rules that will facilitate the transfer of duopolies, particularly those created as a result of the purchase and construction of an unbuilt analog station.

### **CONCLUSION**

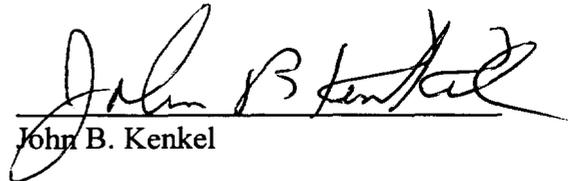
5. As the Commission itself has stated: "A station that has gone unbuilt . . . cannot contribute to the diversity of competition. On the other hand, activation of a construction permit and construction of a station, even by the owner of another television station in the market . . . increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising time available for sale in the market." Report and Order at ¶ 85. By allowing the creation and subsequent transfer of duopolies involving unbuilt stations, the Commission will facilitate an increase in the number of stations in a given market, particularly small and mid-sized markets, without *any risk* of decreasing the number of voices already heard. UCC's Opposition unwisely seeks to eliminate such opportunities. Accordingly, the Commission should ensure the

construction and viability of such stations by implementing the relief requested in Kenkel's  
Petition and the petitions cited herein.

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## CERTIFICATE OF SERVICE

I, John B. Kenkel, do hereby certify that a true copy of the foregoing *Reply to Opposition and Response to Petitions for Reconsideration of UCC et al.*, was mailed by first-class mail, postage prepaid, this 15th day of December, 1999, to the following:

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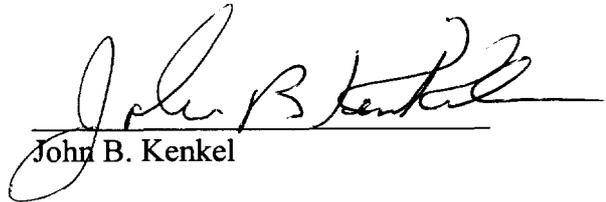
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