BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of	)	
	)	
Amendment of Section 73.658(g) of	)	MM Docket No. 00-108
The Commission's Rules –	)	
The Dual Network Rule	)	

COMMENTS OF THE WB TELEVISION NETWORK

THE WB TELEVISION NETWORK

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Date: September 1, 2000

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TABLE OF CONTENTS

Summary

The Commission rightly seeks to promote certain operating efficiencies for emerging networks through modification of the Dual Network Rule. Unfortunately, elimination of just one outdated regulatory restriction will not achieve those goals for all emerging networks. The WB's growth and competitiveness, as well as its ability to maximize consumer benefits, is hindered not only by the Dual Network Rule, but also by the equally-antiquated broadcast station/cable system cross ownership rule (the "Cable Cross-Ownership Rule").

As an initial matter, the Commission must note that clear statutory language excludes The WB from the Dual Network Rule. Pursuant to the Telecommunications Act of 1996, the Commission may impose such a restriction only upon the common ownership of an established network and an emerging network that provides programming to television stations in markets reaching more than 75% of national television households. At that time, however, The WB provided programming to stations reaching less than 71% of television homes, well below the statutory threshold. Although The WB is therefore not subject to the Dual Network Rule, it fully supports the modification or elimination of that outdated regulation.

The Commission should repeal the Dual Network Rule as part of a comprehensive effort to meet 21st Century regulatory needs. Congress has instructed the Commission to regularly review its ownership rules de novo and eliminate those that, based on competitive developments, can no longer be justified as serving the public interest. The Dual Network Rule, first adopted over fifty years ago, is no longer justified by prevailing industry conditions. The level of diversity now present is at least equal to that which existed in the radio industry in 1977, when the Commission repealed the dual network restriction for radio.

Any effort at regulatory reform for emerging networks must go further, however. A

separate and independently managed division of the parent company of The WB's managing partner also owns happens to own and operate cable television systems. As a result, the Cable-Cross Ownership Rule prohibits The WB, unlike any other national broadcast network, from holding even non-controlling attributable interest in affiliated local broadcast stations serving many communities. Such owned and operated stations provide an important economic lifeline for any national broadcast network, particularly an emerging network. Thus, even with the elimination of the Dual Network Rule, The WB – unlike any of its competitors – would be unable to achieve all of the operating efficiencies and benefits intended in this proceeding.

The promotion of emerging networks has long been a matter of the highest priority for the Commission, and in recent years it has sought to promote this goal by relieving such networks from regulatory burdens. The Commission's current proposal falls short of that goal, however, because it will only benefit UPN. The WB, unlike its competitors, would not be able to enter into any creative business arrangement with an established network, all of which maintain O&Os.

The FCC must not, as a matter of sound public policy, and as recognized by the courts, grant regulatory effective relief to one competitor but not equivalent relief to another. From the outset, The WB and Viacom have faced a number of virtually identical hurdles in their quest to provide competitive alternatives to the four entrenched broadcast networks. Moreover, The WB's affiliates face many of the same burdens as do UPN's affiliates. Because The WB has no stable of O&Os to generate profits to offset the network's substantial start-up losses, however, The WB has suffered from even greater regulatory disadvantages than UPN. This disparity will become even more pronounced if the Commission should eliminate the Dual Network Rule without providing The WB with relief from the Cable Cross-Ownership Rule.

The failure to provide consistent regulatory relief to The WB would be particularly untenable, as the regulations from which The WB seeks such relief rest on outdated and unsupportable assumptions. Eight years ago, the Commission itself expressly concluded that the Cable Cross-Ownership Rule cannot be justified. Nearly four years ago, Congress, upon the Commission's recommendation, eliminated the statutory basis for the restriction. At this late date, it is beyond dispute that healthy competition and competitive alternatives to broadcast television do exist both locally and nationally. Elimination of the Cross-Ownership Rule is not only consistent with, but required by the logic of, recent FCC decisions loosening other local ownership rules.

The current competitive landscape further renders continued application of the Cable Cross-Ownership Rule unconstitutional. The Commission itself found that the ban was unjustifiable long ago, and the intervening years have borne witness to more and more competitive viewing options. In the analogous context of the telephone/cable cross-ownership prohibition, the Commission concluded that the concerns underlying the ban had become attenuated with time, after which numerous federal courts found the ban unconstitutional.

At the very least, the Commission should allow parties to elect to enter into a television station/cable system combination in lieu of taking advantage of the relaxed television duopoly or one-to-a-market rules. For example, under current regulations, an entity may elect to own two television stations and six commercial radio stations in lieu of owning one commercial televison station and seven radio stations. By the same rationale, an entity should be allowed to elect to offer cable service instead of owning another television station in the DMA. This conclusion is buttressed by the fact that, in determining the number of alternative media voices for purposes of the one-to-a-market rule, the Commission counts cable as one such voice in the DMA, regardless of the number of individual systems owned.

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COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits the following comments in response to the above-captioned Notice of Proposed Rule Making ("Dual Network NPRM").[1] Although the plain language of the Telecommunications Act of 1996 (the "Telecom Act") clearly exempts The WB from the Dual Network Rule,[2] The WB fully supports the FCC's goals in seeking the rule's modification. While the Commission rightly seeks to promote certain operating efficiencies for emerging networks, the elimination of just one outdated regulatory restriction is not sufficient to achieve these goals. The Commission's failure to address other unnecessary regulatory restrictions, contrary to both Congressional intent and the FCC's

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[1] In the Matter of Amendment of Section 73.658(g) of The Commission's Rules – The Dual Network Rule, Notice of Proposed Rule Making, 15 FCC Rcd 11253 (2000) ("Dual Network NPRM").

[2] 47 C.F.R. §73.658(g) ("Dual Network Rule").

longstanding policy, limit the growth of The WB as an emerging broadcast television network. Moreover, it will create unfair competitive advantages for certain other networks in violation of due process principals that all similarly situated parties must be treated equally. Any effort at regulatory reform must go further. The WB's growth and competitiveness, as well as its ability to maximize consumer benefits, is hindered not only by the current Dual Network Rule, but also the current television station/cable system cross-ownership rule.[3]

The WB Network is structured as a limited partnership. Its general managing partner is WB Communications, which is a division of Time Warner Entertainment Company, L.P. ("TWE").[4] A separate and *independently managed and operated* division of TWE, Time Warner Cable, operates numerous franchised cable systems across the country. The Cable Cross-Ownership Rule prevents The WB, unlike any of the other national broadcast networks, from holding even non-controlling attributable investment interests in affiliated local broadcast stations in many communities.[5] Such owned and operated ("O&O") stations provide an important economic lifeline for a national broadcast network, by assuring program carriage and contributing to a network's success so that it may better serve the public interest, convenience and necessity.

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[3]47 C.F.R. § 76.501(a) ("Cable Cross-Ownership Rule").

[4]The WB was launched on January 11, 1995, with two hours of prime time programming per week, carried by 48 affiliated stations nationwide. The WB is currently broadcasting thirteen hours of prime time programming on six nights, and carried by over 65 affiliated but independently owned local broadcast stations.

[5]Although an entity with a noncontrolling interest in The WB also owns television stations affiliated with The WB, The WB itself does not own or control any broadcast stations. In addition, SuperStation, Inc., an indirect subsidiary of Time Warner Inc., which indirectly controls TWE, is the licensee of WTBS(TV), Atlanta, Georgia. WTBS is not an affiliate of The WB and is operated independently of the network.

Thus, even with the elimination of the Dual Network Rule, The WB -- unlike any of its competitors -- would be unable to achieve all of the operating efficiencies and other benefits intended by the Dual Network NPRM.

Accordingly, The WB calls upon the Commission to eliminate not only the Dual Network Rule, but also the Cable Cross-Ownership restriction, in a comprehensive effort to address competitive conditions in the television industry at the outset of the 21st Century. In so doing, the Commission would maximize the public benefits sought by issuing the Dual Network NPRM and, at the same time, level the playing field among competitors and adhere more closely to both statutory intent and Constitutional mandates.

I. INTRODUCTION

Section 202(h) of the Telecommunications Act of 1996 mandates that the FCC must "repeal or modify any [ownership] regulation it determines to be no longer in the public interest."[6] As the Commission notes in its 1998 Biennial Review Report ("Biennial Report"), "[t]he context of Section 202(h) of the Telecom Act makes clear that the scope of the required ownership review . . . includes rules pertaining to cable as well as broadcast cross-ownership."[7] The focus of

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[6] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[7] In the Matter of 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and other rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (MM Docket 98-35), 15 FCC Rcd 11058 (2000) at ¶ 2, fn 1 ("Biennial Report").

this activity (the "Biennial Review") is a "public interest inquiry . . . based on examination of both competition and diversity issues."[8]

Through a merger between an emerging and established networks, these two public interest goals become intertwined. The Commission noted:

> Such a merger may produce significant efficiencies by internalizing the contentious issue of program production risk-sharing within a vertical relationship . . . a network program that fails, or is only marginally successful, on the major network's affiliated stations might succeed, however, when broadcast to the niche audience reached by the affiliates of the emerging network. Dual Network NPRM at ¶ 26.

However, the FCC will meet only part of its mandate -- and only part of its goals -- if it limits regulatory reform efforts for emerging networks to the Dual Network Rule as if it were an isolated regulation; it is actually one part of a larger regulatory tapestry that hinders improved competition and increased diversity.[9]

As will be amply demonstrated below, the Commission would more completely act to meet both its own stated goals and its legislative mandate by taking a more comprehensive approach to regulatory reform. In acting to simultaneously eliminate the current Cable Cross-Ownership Rule, it would also better comport its regulatory activities with both its governing statute and the United States Constitution.

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[8] Id. at ¶ 8.

[9] The record compiled pursuant to the Commission's recently completed Biennial Review amply demonstrated that changing competitive conditions have rendered various FCC media ownership rules obsolete. See, e.g., Emergency Petition for Relief of the Newspaper Association of America, filed August 23, 1999 ("NAA Petition") [attacking television station/newspaper cross-ownership rule]; Emergency Petition for Relief and Supplemental Comments of Fox Television Stations, Inc., filed November 18, 1999 ("Fox Petition") [attacking national television station ownership cap]; Comments of Viacom Inc., filed November 19, 1999 ("Viacom Comments") [attacking Dual Network Rule and national television station ownership cap].

II. CLEAR STATUTORY LANGUAGE EXCLUDES THE WB FROM THE DUAL NETWORK RULE; LEGISLATIVE HISTORY SIGNALS CONGRESSIONAL INTENT FOR DEREGULATION TO APPLY EQUALLY TO EMERGING NETWORKS.

The plain statutory language of Section 202(e) of the Telecom Act[10] directs the FCC to amend its Dual Network Rule to limit any restrictions on dual networks to: (1) two or more persons or entities that, on the date of enactment of the Telecom Act of 1996, are "networks" as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or (2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes as measured by a national ratings service. This statutory provision creates an upper limit on the Commission's jurisdiction to restrict common ownership interests among networks -- the Commission is powerless to impose restrictions going beyond the bright line test established by Congress. In the face of this clear statutory language, the Dual Network Rule does not apply to The WB, even under the most expansive reading. As has been previously demonstrated to the Commission,[11] when coverage through primary local affiliates, secondary local affiliates, and LPTV stations are aggregated, The WB, as of February 8, 1996, provided four or more hours of programming per week on a national basis pursuant to network affiliation agreements with local television broadcast stations in markets

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[10] Telecom Act, §202(e).

[11] Supplemental Comments of The WB Television Network, MM Docket No. 98-35.

reaching less than 71 percent of television homes, well below the 75 percent threshold. See Exhibit 1.

The Commission did not challenge the factual showing submitted by The WB in the Biennial Report proceeding. Moreover, in attempting to expand the rule to reach The WB, the Commission has ignored the rule of law that an administrative agency may not interpret away statutory directives when "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."[12] Although the Commission attempts to reconcile its acts with reference to legislative history,[13] such efforts are clearly contrary to established precedent. The Supreme Court has instructed administrative agencies not to rely on legislative history when statutory language clearly sets parameters. "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . . 'Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't.'"[14]

The FCC lacks authority in the matter at hand to exalt the legislative history over the plain statutory language. Thus, the FCC should acknowledge the plain intent of Congress expressed in unambiguous words: The Dual Network Rule can not apply to The WB. The FCC should,

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[12] Chevron U. S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-3 (1984).

[13] Dual Network NPRM at ¶ 4.

[14] City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 337 (1994) (citing Environmental Defense Fund, Inc., v. City of Chicago, 948 F.2d 345, 351 (7th Cir. 1991)).

however, derive context from the legislative history. Although The WB was clearly excluded from the Dual Network Rule itself, Congress made clear in legislative history that it intended to assist the emergence of both UPN and The WB *equally*. They were the only two emerging networks cited by name in the Conference Report accompanying the Act.[15] As Congress clearly exempted The WB from the statute, it could have only one purpose in citing it in the Conference Report: to ensure that it is given the same opportunities to flourish through regulatory reform designed to improve competition and increase diversity. But to fully achieve this Congressional goal, The WB requires more than the repeal of the Dual Network Rule alone; it requires Commission modification of other outdated regulations, notably the Cable Cross-Ownership Rule.

III. THE COMMISSION SHOULD REPEAL THE DUAL NETWORK RULE AS PART OF A COMPREHENSIVE EFFORT TO MEET 21ST CENTURY REGULATORY NEEDS.

Congress has instructed the Commission to regularly review all of its television broadcast ownership rules de novo, to determine whether such rules "are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."[16] As a result of the first such review, the Commission proposes repeal of the Dual Network Rule, as it applies to prevent common attributable ownership interests between an "established" network and "emerging" network. The rule, which was first established *over fifty years ago*, is no longer justified in light of prevailing conditions. However, elimination of this rule

[15] S. Rep. No. 230, 104th Cong. 2d. Sess at 163.

[16] 1996 Telecommunications Act, § 202(h).

alone will not meet the Commission's statutory mandate. The Commission must act, both in the public interest, and in the interests of fundamental fairness to level the playing field so all emerging networks may achieve the efficiencies envisioned -- to allow the public to enjoy the benefits that only a comprehensively updated regulatory framework can provide.

Prior to 1996, the Dual Network Rule prohibited a television broadcast station from entering into an affiliation agreement with a network that operated more than one broadcast TV network, unless the networks were not operated simultaneously or there was no substantial overlap in the territories served. The 1941 Report on Chain Broadcasting, by which the Commission adopted the Dual Network Rule, concluded that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be obligated to the established network entity.[17] The Commission also was concerned that such combinations could give a network too much competitive power.[18]

As communications technology changed historically, so too has communications regulation attempted to keep pace. In 1977, the Commission eliminated the Dual Network Rule for radio broadcasting, the industry for which it was originally adopted. The Commission

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[17]See Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (May 1941) at 48, modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. NBC v. United States, 47 F.Supp. 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943). The Dual Network Rule as enacted in 1941 only applied to radio networks. It was extended by the Commission to cover television networks in 1946. See Amendment of Part 3 of the Commission's Rules, 11 Fed. Reg. 33 (Jan. 1, 1946).

[18]Id.

determined that the rule "had little positive impact and may in the future hinder competition and restrict diversity."[19] Where once CBS, NBC's two networks, and the Mutual Broadcasting System represented "chain" broadcasting in America, by 1977, advancing distribution technology had made networking simpler and cheaper, fostering competition and diversity. The main news wire services, the Associated Press and United Press International, offered competing news feeds in competition with traditional networks. National Public Radio had come onto the scene with its eclectic cultural programming mix and strong commitment to news and information. Moreover, ABC had proven, with its original 4 radio network lineup in the 1970s, the potential of meeting the diverse needs of various segments of the listening public by offering them a variety of network products in a vernacular they prefer.[20]

In adopting the Telecom Act, Congress directed the Commission to revise the television Dual Network Rule in the face of similar dramatic changes in both ease of access to, and the underlying economics of the television industry. As previously noted, Congress instructed the Commission to permit a television broadcast station to affiliate with an entity that maintains two or more broadcast networks unless such networks are composed of either (1) two or more entities that were "networks" as of the day of enactment, or (2) any such network and an English-

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[19] See Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, Report, Statement of Policy and Order, 63 FCC 2d 674 (1977) at ¶34.

[20] E.g., ABC's American Contemporary network targeted youthful audiences in the face of the "generation gap" of the Vietnam War era, while its American Information network offered news, analysis and commentary targeted to a more mature demographic. The "Mutual Black Network " served African-American audiences from the Mutual Broadcasting System's newsroom – and was later spun off as part of minority owned Sheridan Broadcasting.

language program distribution service that, on the day of enactment, provided 4 or more hours of programming per week on a national basis and reaching more than 75 percent of national television households.[21] The Commission subsequently revised its rule to reflect this directive[22] (although it ignored the plain language of the Act by implying that The WB is subject to these rules governing network ownership).

The reality of the television industry today is that the level of diversity far exceeds the diversity present in radio in 1977. Given the presence of at least eight mainstream broadcast television networks and scores of cable networks, there can not be any valid concern about domination of programming by only one or two national networks. Moreover, it is important to realize the significant extent of viewer erosion that the established networks have experienced since the 1980/81 television season. At that time, ABC, CBS and NBC combined for an 85 audience share, but by the 1997/98 broadcast year their combined share was only half that, at 43. Thus, the broadcast networks no longer can or do dominate programming distribution. The development of internet-based video distribution will only further erode network distribution power.

While it is true that the proposed relaxation of the Dual Network Rule would further increase diversity and competition, this would only represent a partial – and therefore incomplete – response to changing competitive conditions by the Commission. Now more than ever, the

[21]Telecom Act, § 202(e).

[22]See Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 - National Broadcast Television Ownership and Dual Network Operations, Order, 11 FCC Rcd 12374 (1996).

Commission must permit the broadcast networks sufficient flexibility to adjust to changing competitive conditions -- especially the emerging networks which have long represented the best means to attain more competition and increased diversity in broadcast television.

In addition to modifying the Dual Network Rule, the Commission should modify or rescind the equally antiquated and counter-productive Cable Cross-Ownership Rule. Despite clear evidence supporting such action, the Commission expressly declined to do so in the recent Biennial Review. The Commission's reasoning for retaining the rule is that "the television industry has just begun adapting to the recent relaxation of our local television ownership . . . Prudence dictates that we monitor and ascertain the impact of these changes on diversity and competition before relaxing the cable/TV cross-ownership rule."[23] Unfortunately, this wait-and-see approach is not supported by the Commission's statutory mandate. The Commission has not demonstrated how the elimination of one ownership restriction -- and not the other -- will serve the public interest. To the extent the Commission is unable to articulate a valid public interest rationale for a rule regulating media ownership, such a rule must be eliminated.[24] As these comments demonstrate, no legitimate basis exists for retaining either rule. The Commission should repeal both antiquated rules at once to serve the public interest reflected in long-established policies that promote emerging networks.

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[23] Biennial Report at ¶ 109.

[24] Telecom Act, § 202(h).

IV. PROMOTION OF EMERGING BROADCAST NETWORKS HAS LONG BEEN A MATTER OF THE HIGHEST PRIORITY FOR THE COMMISSION.

A grant of regulatory relief through relaxation not only of the Dual Network Rule, but also the Cable Cross Ownership Rule, would serve longstanding Commission policy. For many years, the Commission has sought to promote the development of competitive new broadcast television networks, originally by imposing regulations on the dominant networks but most recently by relieving emerging networks from unnecessary regulatory burdens. As explained below, both the Commission's current Dual Network NPRM, and its Notice of Intent related to its 1998 Biennial Review, demonstrate that this goal continues as Commission policy.

As noted above, the original Dual Network Rule was based upon an existing radio ownership rule, which had been adopted to encourage the creation and growth of new networks.[25] In proposing to adopt new rules in 1965 to restrict the three television networks' ability to take financial interests in and to syndicate programming, the Commission voiced its hope that the rules would provide new program sources for additional UHF outlets, which in turn could form the basis for a new network.[26] The Commission adopted these "Fin-Syn" rules in 1970.[27] On reconsideration, it made clear that:

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[25] In The Matter of Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, 10 FCC Rcd 4538, ¶ 5 (1995) ("Network Ownership Report and Order") (eliminating the former Section 73.658(f) of the FCC rules).

[26] Competition and Responsibility in Network Television Broadcasting, Notice of Proposed Rulemaking, 30 Fed. Reg. 4065, ¶ 26 (1965).

[27] In The Matter of Amendment of Part 73 of the Commission's Rules and Regulations With Respect To Competition and Responsibility In Network Television Broadcasting, Report and Order, 23 FCC 2d 382, ¶ 21 (1970) (subsequent history omitted).