> *Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission.* Hence we have redefined the term "network" in the Prime Time Access Rule to apply only to the major national television networks. This will remove any doubt that our actions are intended to encourage the competitive development of additional networks as well as other alternative program sources.[28]

Even when the Commission later expressed doubts regarding its Fin-Syn rules, it reaffirmed the goal of fostering the creation of additional television networks. For example, in 1983 the Commission voiced concern that these rules could actually inhibit the formation of new competing networks, particularly "hybrid" networks with both broadcast and cable affiliates.[29]

The Commission also has repeatedly granted emerging networks relief from regulatory burdens. In 1990, for example, the Fox Broadcasting Company received a temporary waiver of the Fin-Syn rules to further "significant public interest objectives," including advancement of "the Commission's oft-stated public interest objective of encouraging new national networks."[30] Subsequently, in amending its Fin-Syn rules in 1991, the Commission adopted special transitional rules for "emerging networks." It reasoned that:

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[28]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, Memorandum Opinion and Order, 25 FCC 2d 318, ¶ 34 (1970) (emphasis added and subsequent history omitted).

[29]In the Matter of Amendment of 47 C.F.R. Sec. 73.658(j)(1)(i) and (ii), The Syndication and Financial Interest Rules, Tentative Decision and Request for Further Comments, 94 FCC 2d 1019, ¶¶ 185-88 (1983) (subsequent history omitted).

[30]In The Matter of Fox Broadcasting Company, 5 FCC Rcd 3211, ¶ 4 (1990) (footnote omitted).

> An important goal in this proceeding in to encourage the development of emerging networks. Indeed, promoting establishment of a fourth or even fifth national network has been a consistent interest of the FCC for many years . . . . We find that new networks will provide an increase in the amount and diversity of prime time entertainment programming that will ultimately benefit the public and lessen the need for future regulation of broadcast networks.[31]

Nor has this longstanding public interest goal been negated by the establishment of Fox as a full-fledged network and the continued emergence of The WB and UPN networks. Thus, in 1995 the Commission eliminated its prohibition on network ownership of television stations in certain small communities only after concluding that "it is not likely that network ownership of a station in these small markets can effectively be used to block the emergence of competing new networks," citing the development of The WB and UPN networks.[32] Indeed, in initiating its biennial review, the Commission specifically sought comment on the effect of the 35% national television ownership cap on "existing television networks or the formation of new networks."[33] Because The WB and UPN remain fledgling networks, it continues to be in the public interest to promote their economic viability and continued growth. However, the Commission's proposal falls short by half as it will only benefit UPN – and not The WB.

UPN's parent, Viacom, has merged with CBS. The Commission's proposed modification of the Dual Network Rule will allow Viacom to maintain an interest both in the established CBS

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[31] In The Matter of Evaluation of the Syndication and Financial Interest Rules, Report and Order, 6 FCC Rcd 3094, ¶ 159 (1991) (footnote omitted), vacated, Schurz Communications v. FCC, 982 F.2d 1043 (7th Cir. 1992) (subsequent history omitted).

[32] Network Ownership Report and Order at ¶ 9.

[33] 1998 Biennial Review NOI at ¶ 16.

Television Network and the emerging UPN service. Viacom's Comments in the 1998 Biennial Review offered a persuasive showing regarding the economic efficiencies and other benefits which might flow from common ownership or other strategic alliances between an established network and an emerging network.[34]

The WB fully agrees that substantial benefits can flow from a combination or strategic alliance between an emerging network like UPN or The WB and an established network. However, unlike UPN, The WB appears to be severely restricted in its ability to enter into similar creative business arrangements with an established network, because the Cable Cross-Ownership Rule stands in the way. All the established networks maintain O&Os. WB seemingly cannot enter into strategic ventures involving attributable ownership interests with any of them because such an interest would be impermissible under this rule due to the established networks' status as station licensees. Therefore, The WB would be unable to make the progress both Congress and now the Commission have endorsed as sound public policy. As the Commission noted in its recent Biennial Report: "allowing such mergers may permit realization of substantial economic efficiencies without undue harm to our diversity and competition goals."[35] However, these will only arise if UPN and The WB are operating on a level regulatory playing field.

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[34] Comments of Viacom, Inc., filed Nov. 19, 1999 ("Viacom Comments") at 18.

[35] Biennial Report ¶ 77.

V. THE FCC SHOULD NOT AS A MATTER OF POLICY, AND CANNOT AS A MATTER OF LAW, GRANT REGULATORY RELIEF TO CERTAIN COMPETITORS BUT NOT EQUIVALENT RELIEF TO OTHERS.

The Commission has concluded that both UPN and The WB are be worthy of relaxed regulatory treatment.[36] As a matter of sound public policy, equivalent regulatory relief should be applied to all such competitors, regardless of the other entities with which they might ultimately be affiliated, in order to establish a level playing field. Thus, The WB should have the same flexibility as any other emerging network to enter into a joint venture or strategic alliance with an established network, even if such arrangements would cause TWE to acquire an attributable interest in the broadcast stations of that established network.

The importance of such flexibility is demonstrated in the Comments of Viacom, Inc. filed November 19, 1999, as part of the Biennial Review, before its merger with CBS. Those Comments offered a persuasive showing regarding the economic efficiencies and other benefits which flow from common ownership or other strategic alliances between an established network and an emerging network. For example, Viacom noted that:

> The Commission has long recognized the efficiencies that can be derived from common ownership, including: joint financial, legal, research, and administrative and support functions; joint purchasing of equipment (especially with the high cost of digital conversion); joint purchasing of services (e.g., programming consultants, ratings services); joint negotiation for exhibition rights to syndicated programming; fluidity in the allocation of scare human resources, such as on-air talent and specialized management; and sharing of news and program resources among stations.[37]

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[36] Biennial Report ¶ 77

[37] Viacom Comments at 18; Dual Network NPRM.

When explaining the specific benefits which might flow to UPN, Viacom asserted that a combined Viacom/CBS could make available to UPN "extensive libraries of programming, valuable brands, and the resources and expertise to develop and distribute new programming efficiently."[38] Moreover, Viacom noted that a UPN/CBS combination would experience substantial savings "by combining 'backroom' operations such as accounting, traffic, business affairs, financial reporting, and engineering.[39] The WB fully agrees that substantial benefits can flow from a combination or strategic alliance between an emerging network like UPN or The WB and an established network. The WB also concurs with Viacom that antiquated regulatory barriers restrict full realization of such benefits.

In its Biennial Review Comments, Viacom focused exclusively on the Dual Network Rule and the national audience cap, given that these restrictions both posed significant barriers to Viacom's proposed acquisition of CBS (and may still entail future adjustments to the combined company's post-merger assets.) In the case of The WB, in addition to the Dual Network Rule, it is the television station/cable system cross-ownership rule which stands in the way of similar creative business arrangements with an established network. This divergence occurs even though a review of their history demonstrates that UPN and The WB have faced virtually identical initial hurdles in their quests to provide competitive over-the-air alternatives to the four entrenched broadcast networks:

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[38] Id. at 34

[39] Id.

- Like UPN, The WB was developed in 1994 as a co-venture between a studio (Warner Bros.) and a TV group owner (Tribune). See Viacom Comments at 25.

- Like UPN, and unlike the four established networks, The WB does not pay compensation to its affiliates. Thus, like UPN, The WB must attract affiliates on the merits of its programming alone. See id. at 26.

- Like UPN, The WB "was forced to cobble together a national network of affiliates comprised of less desirable UHF stations and . . . of LPTV facilities, most of which are at a substantial coverage disadvantage vis-a-vis competing stations affiliated with the established 'Big Four' networks." Id.

- Like UPN, in some communities, The WB "was not able to secure an over-the-air affiliate at all and, instead, attempted to arrange fill-in cable carriage." Id.

- Like UPN, some of The WB's "affiliates agreed to carry the new network's programming only on a secondary basis, reserving their prime-time hours to the carriage of their primary networks." Id.

- Like UPN, The WB "has endeavored to carve a niche for itself in the highly competitive television industry and, in doing so, has presented programming that appeals to traditionally underserved audiences." See id. at 27.

- Like UPN, The WB "has suffered significant financial losses in every year of its existence." See id. at 4, 33.

- Like UPN, The WB, since its inception, "has been disadvantaged by the inherent limitations of its affiliate line-up." See id. at 31.

In addition, The WB's affiliates face the same burdens as UPN's affiliates:

- Like UPN, in certain instances The WB's affiliates tend "to be among the financially weaker stations." Like UPN, such affiliates depend on The WB "for programming branding and marketing. A weakening of the network could have serious economic consequences for these stations." See Viacom Comments at 33.

- Like UPN, The WB "is an extremely important resource for start-up television stations and for struggling independent stations." See id. at 36.

But as each network worked to overcome common hurdles, one significant difference set the two emerging networks apart: The WB, unlike UPN, could not be part of a corporate family with any attributable interests in licensed broadcast stations in numerous major DMAs. Thus, while "Viacom owned and operated stations have been especially critical because they provide a source of profits to fund network development and program distribution,"[40] The WB has had no stable of O&Os to generate profits to offset the network's substantial start-up losses.[41] Thus, The WB has suffered from regulatory disadvantages far greater than those outlined by Viacom with respect to UPN.

The net effect of such regulatory disadvantages is discrimination that prevents The WB from competing on an equal footing. This disparity will become even more pronounced, in the face of the CBS/Viacom merger, should the Commission modify the Dual Network Rule without providing equivalent regulatory reform of the Cable Cross-Ownership Rule. While UPN may achieve all the efficiencies made possible by its combination with CBS, The WB would continue to be hamstrung because it would be prohibited from forging a similar alliance with any other established network. This amounts to a double blow against The WB, as it can neither improve its success potential through the addition of O&Os, nor achieve efficiencies related to an alliance with an established network. Such a situation violates a rule of law that the Commission must not

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[40]See Viacom Comments at 4.

[41]While Tribune Broadcasting Company owns approximately 25% of The WB and also owns several television broadcast stations, none of the revenues derived by the Tribune stations inure to the benefit of The WB, unlike the scenario described by Viacom with respect to its O&Os.

unfairly discriminate among or against emerging networks: "fundamental fairness and basic principles of administrative law require that the Commission accord comparable treatment to parties that are similarly situated."[42] Thus, if the Commission elects to afford Viacom regulatory relief through elimination of the Dual Network Rule, it must simultaneously afford The WB relief from the television station/cable system cross-ownership rule. Only modification *of both rules* will allow The WB the same degree of flexibility to explore a combination or strategic alliance with an established network.[43] As emerging networks that have faced -- and continue to face -- many of the same hurdles, UPN and The WB are similarly-situated for purposes of receiving badly-needed regulatory relief -- which the Commission should grant in full.

Indeed, the U.S. Court of Appeals for the D.C. Circuit has recognized that it would be arbitrary and capricious for the Commission to grant regulatory relief to one applicant but deny equivalent relief to another in similar circumstances. In Tribune Company v. FCC, 133 F.3d 61 (D.C. Cir. 1998), Tribune appealed the Commission's refusal to grant it a temporary waiver of the television station/newspaper cross-ownership rule pending the outcome of a future rule making regarding that prohibition or a related waiver policy, following Tribune's merger with a TV licensee. (Tribune had been granted a brief, temporary waiver for divestiture purposes only, which would likely have expired prior to the end of any such rule making.) The Court of Appeals

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[42]Viacom Comments at 41, citing Melody Music Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965); Cable Television Syndicated Program Exclusivity Rules, 79 FCC 2d 663, 797 n. 309 (1980).

[43] In making this argument, The WB wishes to make it perfectly clear that it is only arguing this point on principle and does not contemplate or know of any transaction with another network or station group which might be subject to this restriction.

found that Tribune's "most compelling" argument was that the Commission had been arbitrary and capricious for not staying the divestiture period pending a rule making, when it had previously allowed the combined Capital Cities/Walt Disney Company to retain a daily newspaper/radio combination until six months after the conclusion of a proceeding to review the newspaper/radio cross-ownership waiver policy. Although the court ultimately concluded that it was foreclosed from hearing Tribune's claim, based upon the appellant's failure to exhaust its administrative remedies, the court made clear its belief that the two applicants warranted equivalent regulatory treatment, although two different newspaper cross-ownership rules -- one applicable to radio and one to television -- were actually involved.[44]

Through this proceeding, the Commission can provide even-handed relief to all emerging networks.[45] If the Commission allows the combined Viacom/CBS to retain an attributable interest in the UPN Network, then it must also now act to provide a similarly-situated network, The WB, with equivalent regulatory relief, by either: (1) eliminating the television station/cable system cross-ownership rule outright or (2) exempting entities with interests in emerging television networks such as The WB from that prohibition. Moreover, the failure to provide consistent regulatory relief in The WB's case would be particularly untenable. As discussed below, the

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[44]Tribune Company v. FCC, 133 F.3d at 70. Subsequently, the Commission's Mass Media Bureau extended Tribune's temporary waiver for a period to expire six months after completion of the Commission's review of the television station/newspaper cross-ownership rule as part of the Biennial Review. In re Stockholders of Renaissance Communications Corporation, 13 FCC Rcd 4717 (1998).

[45]See, e.g., Capital Cities/ABC, Inc. and The Walt Disney Company, 11 FCC Rcd 5841, 5917 (1996), Separate Statement of Commissioner Susan Ness (rules should not be changed on an *ad hoc* basis apart from public comment by all affected parties).

regulations from which The WB seeks such relief rest upon outdated and unsupportable assumptions, and no longer further the public interest.

VI. THE TELEVISION STATION/CABLE SYSTEM CROSS-OWNERSHIP RULE IS CONTRARY TO THE PUBLIC INTEREST.

Despite clear evidence to the contrary, the Commission's reasoning for retaining the Cable Cross-Ownership rule at the conclusion of its biennial review was 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."[46] In espousing this wait-and-see approach, the Commission has not stated how elimination of one ownership restriction -- and not the other -- will serve the public interest. To the extent the Commission is unable to articulate the public interest underlying an ownership rule, it must be eliminated.[47]

In this instance, the Commission proposes modifying the Dual Network Rule to allow a merger between established and emerging networks because such a merger would "result in net [economic] benefits to both viewers and advertisers . . . [while] our local broadcast ownership rules will continue to ensure outlet diversity in local broadcasting."[48] Yet, the Commission ignores these facts and findings in declining to modify the Cable Cross-Ownership Rule because "consolidation of local television broadcast stations will reduce the number of independent

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[46] Biennial Report at ¶ 109.

[47] 1996 Telecommunications Act, §202(h).

[48] Dual Network NPRM, ¶ 27.

voices."[49] The Commission cannot have it both ways. Either there is in fact diversity in the television industry or there is not. If not, the Commission should leave both rules intact. Otherwise, it should modify both rules accordingly.

The weight of the Commission's own findings militate for modification or elimination of both rules, to order to put all emerging networks on the same footing. Indeed, it has been eight years since the Commission itself expressly concluded that the Cable Cross-Ownership Rule can not be justified:

> [W]e believe that the rationale for an absolute prohibition on broadcast-cable cross-ownership is no longer valid in light of the ongoing changes in the video marketplace. . . . [W]e recommend that Congress repeal the broadcast-cable cross-ownership rule to permit us to allow local broadcasters to own cable systems in their service areas.[50]

It has been nearly four years since Congress implemented the Commission's recommendation and removed the underlying statutory basis for the Commission's Cable Cross-Ownership Rule,[51] thus leaving only the FCC rule which the Commission itself had already found invalid. Professing "prudence" in maintaining the status quo, in the face of clear evidence to the contrary, does not fulfill the Commission's statutory directive. Such inaction will unfairly hinder the development of at least one emerging network. As the Commission and Congress have determined that the public interest is met by fostering all emerging networks, the harms produced

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[49] Biennial Report, ¶ 109.

[50] In the Matter of Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 7 FCC Rcd 6156, ¶ 17 (1992).

[51] 1996 Telecommunications Act, § 202(i), repealing 47 U.S.C. § 613(a)(1).

by inaction are simply unsupportable. The Commission's appeal to "prudence" fails to accomplish its statutory mandate to conduct a *de novo* review of all of its broadcast ownership rules affirmatively find that such rules "are necessary in the public interest as the result of competition," or "repeal or modify any regulation it determines to be no longer in the public interest."[52]

Indeed, the facts militate for reforming these regulations more comprehensively. The prevailing competitive conditions leading to the original cross-ownership rule, like those underlying the Dual Network Rule, simply do not exist today. It is beyond dispute that healthy competition and competitive alternatives to broadcast television currently exist both locally and nationwide. There are now six significant national commercial television networks, an increase of 100 percent from the time of the initial adoption of the Cable Cross-Ownership Rule. The four largest television broadcast networks currently account for only a combined 52 percent share of prime time viewing among all television households, a decline of over 43 share points since Commission adopted the Cable Cross-Ownership Rule.[53] This decline in audience share is attributable to the fact that, in the years that have passed since the rule's adoption, several new video delivery systems have been introduced, including DBS, SMATV and wireless cable (MDS/MMDS), leading to unprecedented levels of local competition among television broadcasters and a variety of MVPD alternatives.

Of these new delivery systems, DBS in particular has experienced explosive growth. The Commission's recent annual competition report noted that DBS providers served more than 10

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[52]1996 Telecommunications Act, § 202(h).

[53]Sixth Annual Competition Report at ¶ 102.

million subscribers nationwide as of June 1999, representing 12.46% of the total multichannel video programming distributor ("MVPD") subscribers nationwide at that time.[54] As of January 4, 2000, DBS subscribership nationwide has topped 11.1 million.[55] DBS subscribership can be expected to increase even more significantly as a result of recent congressional amendments to the Satellite Home Viewer Act ("SHVA"), which establish a permanent compulsory copyright license allowing DBS providers to retransmit local broadcast television signals to subscribers who reside inside a television station's DMA. As a result of this legislation, the service offerings of cable operators and DBS providers are undoubtedly reasonable substitutes, resulting in even more competition between cable operators and DBS providers for MVPD subscribers. In fact, analysts predict that the number of DBS subscribers nationwide will grow to an estimated 46.1 million by the year 2008 as a result of the recent SHVA amendments.[56]

Thus, a competitive environment now exists where there are not only a greater number of local media competitors, but also a distribution of viewership among broadcasters, cable operators and other video delivery entities that is far more balanced than the viewership distribution in 1970 at the time of the adoption of the television station/cable system cross-ownership rule. In fact, elimination of the Cable Cross-Ownership Rule is consistent with, and required by the logic of, recent Commission decisions loosening other local ownership rules. For example, the

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[54]Id. at ¶ 70 and Table C-1.

[55]See http://www.dbsdish.com/dbsdata.html (DBS subscribership as of Jan. 4, 2000).

[56]"Industry Divided Over Role of SHVIA in Big Dec. DBS Sales," Communications Daily, Jan. 7, 2000, at 5-6.

Commission recently relaxed the application of both its television duopoly and its one-to-a-market rules as a result of its recognition of the "increase in the number and types of media outlets available to local communities" and the resultant increase in the competition faced by broadcast stations at the local level.[57] Chairman Kennard noted in his separate statement in that proceeding that:

> [W]e are adopting commonsense rules that recognize the dramatic changes that the media marketplace has undergone since our broadcast ownership rules were adopted 30 years ago. . . . In such an age, we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace. These items will not only help them compete with the growing number of alternative media. They will also help preserve free local broadcast service."[58]

As described earlier, the Cable Cross-Ownership Rule particularly affects the ability of an emerging network, such as The WB, to compete in today's environment given its distant connection with a cable operator. Moreover, just as a concern with preserving "free local broadcast service" led to the recent relaxation of both the duopoly and the one-to-a-market rules, the elimination of the Cable Cross-Ownership Rule would create new opportunities for localism, especially in smaller communities, as co-owned television stations and cable systems combined resources to provide more local programming (*e.g.*, coverage of community affairs, news or local high school sports). Thus, the same logic that compelled the Commission to loosen the duopoly and the one-to-a-market rules dictates complete elimination of the Cable System Cross-Ownership

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[57]In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, 14 FCC Rcd 12903, ¶¶ 28-29, 37 (1999) ("Television Broadcasting Order").

[58]Id., Separate Statement of Chairman William E. Kennard (Aug. 5, 1999).

Rule, particularly in light of the Commission's longstanding, publicly stated belief that repeal is in the public interest.

At the very least, while the Commission considers the long-overdue elimination of the ban, parties should be allowed to elect to enter into a television station/cable system combination in lieu of taking advantage of the relaxed duopoly or one-to-a-market rules in that particular DMA. For example, under the current regulatory scheme, an entity is eligible under the relaxed duopoly rule to own two television stations licensed in the same DMA under certain circumstances.[59] An entity is also eligible to own up to two commercial television stations (if eligible under the relaxed duopoly rule) and six commercial radio stations in the same DMA under the relaxed one-to-a-market rule if at least twenty independently owned media voices would remain in the DMA post-merger.[60] However, an entity eligible to own two commercial television stations and six commercial radio stations can elect instead to own just one commercial television station and seven commercial radio stations in the same DMA, effectively substituting an extra radio station for the extra television station.[61] In allowing for this substitution, the Commission first noted that "broadcast television is the single most important source of news for the majority of Americans" and determined as a result that in areas "where there is sufficient competition and diversity to

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[59]47 C.F.R. § 73.3555(b).

[60]47 C.F.R. § 73.3555(c)(2)(i)(A).

[61]47 C.F.R. § 73.3555(c)(2)(i)(B).

justify combinations involving two *television* stations and six radio stations, broadcasters should have the flexibility to purchase an additional *radio* station instead of a second television station."[62]

The same rationale applies in allowing an entity to elect, for example, to offer cable service in the applicable DMA instead of owning another television station in taking advantage of the new duopoly or one-to-a-market rules. Thus, for example, an entity eligible to own two commercial television stations in the same DMA should have flexibility to elect instead to own one commercial television station and also own cable systems in the DMA in lieu of a second television station. This conclusion is buttressed by the fact that, in determining whether at least twenty independently owned media voices would remain for purposes of the one-to-a-market rule, cable television counts as one voice in the DMA, regardless of the number of individual cable systems operating in that DMA.[63] If an entity can substitute one commercial radio station as its extra voice instead of an additional commercial television station for purposes of the one-to-a-market rule, then that entity should also be allowed to choose to substitute ownership of local cable systems as its extra voice in that DMA in lieu of an additional commercial television station.

Such an interim solution will avoid compounding the current competitive harm borne by The WB in complying with a cross-ownership rule that the Commission has already determined to be unnecessary. Indeed, may MPVDs have begun to offer local news, information, sports and public affairs -- once wholly the preserve of over-the-air broadcasters. Add the development of new sources of localized programming on the Internet, and the increasingly seamless convergence

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[62]Television Broadcasting Order at ¶ 108.

[63]47 C.F.R. § 73.3555(c)(3)(iv).

of once discrete media into inter-linked multi-media sources of information and entertainment, the distinctions of old appear as nothing more than antiquated, hollow taxonomy that only serves to hinder meaningful, workable regulation for the new century.

VII. CONTINUED APPLICATION OF THE TELEVISION STATION/CABLE SYSTEM CROSS-OWNERSHIP RULE IS UNCONSTITUTIONAL.

The current competitive landscape further renders continued application of the Cable Cross-Ownership Rule unconstitutional. As a direct restriction on both television broadcasters' and cable operators' speech, the Cable System Cross-Ownership Rule is properly judged under strict constitutional scrutiny, requiring the Commission to prove that the ban advances a compelling government interest through an almost precise fit.[64] At the very least, the ban is subject to intermediate scrutiny,[65] under which the Commission must demonstrate that the restriction on speech furthers an important or substantial governmental interest and is narrowly tailored to the furtherance of that interest.[66]

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[64]See, e.g., Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[65]Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642-43 (1994). Although in the broadcast context, courts may apply a less demanding standard, that standard is derived from the inherent scarcity of spectrum allocated for broadcast use and is inapplicable when considering an entity's right to deliver cable television programming or services. Id. at 637-39.

[66]U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

In its Notice of Inquiry initiating its biennial review, the Commission advanced diversity[67] and competition as the governmental interests to be served by the Cable System Cross-Ownership Rule.[68] However, as noted above, the Commission determined seven years ago that the video marketplace had changed to such an extent that the ban could no longer be justified. The intervening seven years have borne witness to an even more rapidly-accelerating proliferation of video delivery sources and the concomitant explosion of programming options. Indeed, to the extent that an argument could have been made in the past that cable operators possessed the power to serve as a competitive bottleneck, a majority of the Supreme Court has agreed that this rationale no longer applies in today's environment.[69] In any event, the Commission's own recognition in 1992 that the competitive landscape had changed to such an extent that it felt compelled to recommend that Congress repeal the Cable Cross-Ownership Rule serves as undeniable proof that the ban is not necessary, and thus, not narrowly tailored to serve the governmental interests in competition and diversity. Without question, competition is even more

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[67]Section 202(h) of the 1996 Act by its terms restricts the Commission review of broadcast ownership rules "to determine whether any of such rules are necessary in the public interest *as the result of competition*." 1996 Telecommunications Act, § 202(h) (emphasis added). Thus, diversity - - as opposed to competition - - arguably is not a legitimate focus of the inquiry into broadcast ownership under Section 202(h). Moreover, the D.C. Circuit has cast doubt on the constitutionality of broadcast regulation as a tool to advance diversity. Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Lutheran Church – Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), pet. for reh'g denied, 154 F.3d 487, pet. for reh'g *en banc* denied, 154 F.3d 494 (D.C. Cir. 1998). In any event, the current competitive landscape, in which numerous and diverse types of video delivery technologies compete for consumers' attention (as noted above), ensures that the American public is exposed to a diverse selection of programming.

[68]1998 Biennial Review NOI at ¶¶ 4-6.

[69]Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).

vibrant today than it was in 1992. In the analogous context of the telephone/cable cross-ownership prohibition, the Commission found that the concerns originally justifying the ban had become "attenuated" due to competitive developments, and accordingly recommended that Congress repeal the statutory prohibition.[70] Based in part on the Commission's own determination that the telephone/cable cross-ownership ban no longer served a significant government interest, numerous federal courts held the prohibition to be unconstitutional.[71] For example, in Ameritech Corp. *et al.* v. United States, the court noted that the FCC had recommended repeal of the telephone/cable cross-ownership ban based on its finding that the prohibition no longer furthered the achievement of its original objectives in light of changed competitive circumstances.[72] Accordingly, the court held that the ban "imposes a greater-than-necessary burden on plaintiffs' speech and therefore is not narrowly tailored to serve the Government's significant interest."[73]

Just as the telephone/cable cross-ownership rule was declared unconstitutional in light of changed competitive circumstances, in today's environment the Cable Cross-Ownership Rule

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[70]In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781, ¶¶ 135-41 (1992).

[71]See, e.g., Chesapeake and Potomac Tel. Co. of Virginia v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 181 (4th Cir. 1994), vacated and remanded, 516 U.S. 415 (1996); US West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash 1994), aff'd, 48 F.3d 1092 (9th Cir. 1994), vacated and remanded, 516 U.S. 1155 (1996); Southern New England Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995); Bellsouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994).

[72]867 F. Supp. 721, 734-736 (N.D. Ill. 1994).

[73]Id. at 736.

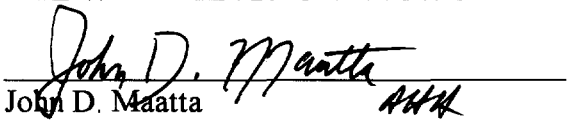
cannot be considered narrowly tailored to advance a significant government interest, particularly in light of the Commission's own finding that the original justifications for the rule are no longer valid. Therefore, the rule cannot survive constitutional scrutiny.

VIII CONCLUSION

WHEREFORE, for the foregoing reasons, The WB respectfully requests that the Commission act in a comprehensive way to eliminate or substantially relax the television station/cable system cross-ownership rule as well as the Dual Network Rule. Notwithstanding such a comprehensive reform of ownership rules, the Commission should declare its fealty to the plain language of the Communications Act and the United States Constitution and acknowledge that the Dual Network Rule is inapplicable to The WB, as a matter of law.

Respectfully submitted,

THE WB TELEVISION NETWORK



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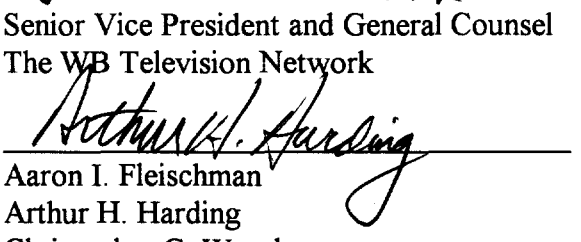

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EXHIBIT 1

WB OVER-THE-AIR COVERAGE

(as of 4/96)

Full Power Affiliates (Primary)

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
WPIX	New York, NY (1)	New York, NY	6,711,450
KTLA	Los Angeles, CA (2)	Los Angeles, CA	4,942,440
WCIU	Chicago, IL (3)	Chicago, IL	3,124,340
WGN	Chicago, IL (3)	Chicago, IL	--
WPHL	Philadelphia, PA (4)	Philadelphia, PA	2,654,080
KBWB (formerly KOFY)	San Francisco, CA (5)	San Francisco, CA	2,278,480
WLVI	Boston, MA (6)	Cambridge-Boston, MA	2,150,110
WBDC	Washington, DC (7)	Washington, DC	1,908,470
WJAL	Washington, DC (7)	Washington, DC	--
KDAF	Dallas-Ft. Worth, TX (8)	Dallas, TX	1,848,550
WDWB (formerly WXON)	Detroit, MI (9)	Detroit, MI	1,771,950
WATL	Atlanta, GA (10)	Atlanta, GA	1,625,230
KHTV	Houston, TX (11)	Houston, TX	1,595,350
KTZZ	Seattle-Tacoma, WA (12)	Seattle, WA	1,492,300
KLGT	Minneapolis-St. Paul, MN (14)	Minneapolis-St. Paul, MN	1,428,100

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
WWWB (formerly WTMV)	Tampa-St. Petersburg-Sarasota, FL (15)	Lakeland-Tampa, FL	1,411,440
WBZL (formerly WDZL)	Miami-Ft. Lauderdale, FL (16)	Miami-Ft. Lauderdale, FL	1,363,260
KASW	Phoenix, AZ (17)	Phoenix, AZ	1,212,850
KMOH	Phoenix, AZ (17)	Kingman, AZ	--
KWGN	Denver, CO (18)	Denver, CO	1,185,410
KMAX (formerly KPWB)	Sacramento-Stockton-Modesto, CA (20)	Sacramento-Stockton, CA	1,115,460
KPLR	St. Louis, MO (21)	St. Louis, MO	1,110,150
WKCF	Orlando-Daytona Beach-Melbourne, FL (22)	Clermont-Orlando, FL	1,021,970
KWBP	Portland, OR (24)	Salem, OR	952,690
WNDY	Indianapolis, IN (25)	Marion-Indianapolis, IN	938,920
KSWB (formerly KTTY)	San Diego, CA (26)	San Diego, CA	917,180
WBNE (formerly WTVU)	Hartford & New Haven, CT (27)	New Haven, CT	915,710
WFVT	Charlotte, NC (28)	Rock Hill, SC	817,510
WRAZ	Raleigh-Durham, NC (29)	Raleigh, NC	814,730
KNPX (formerly WKZX)	Nashville, TN (33)	Cookeville, TN	782,940
WNAB	Nashville, TN (33)	Nashville, TN	--
WWHO	Columbus, OH (34)	Chillicothe, OH	735,390

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
KUWB (formerly KOOG)	Salt Lake City, UT (36)	Ogden, UT	670,650
WVBT	Norfolk-Portsmouth-Newport News, VA (40)	Virginia Beach-Norfolk, VA	631,720
WNOL	New Orleans, LA (41)	New Orleans, LA	620,760
WBFX (formerly WEJC)	Greensboro-High Point-Winston Salem, NC (46)	Lexington, NC	567,740
WBNA	Louisville, KY (50)	Louisville, KY	550,390
WBSG	Jacksonville, FL-Brunswick, GA (54)	Brunswick, GA	493,160
KGMC	Fresno-Visalia, CA (55)	Clovis-Fresno, CA	491,290
WUPV (formerly WAWB)	Richmond-Petersburg, VA (59)	Ashland, VA	460,890
KNVA	Austin, TX (63)	Austin, TX	436,210
KFBT	Las Vegas, NV (64)	Las Vegas, NV	427,330
WDRL (formerly WDRG)	Roanoke-Lynchburg, VA (67)	Danville, VA	398,760
WACY	Green Bay-Appleton, WI (70)	Appleton, WI	376,380
KXVO	Omaha, NE (75)	Omaha, NE	364,960
KSHV	Shreveport, LA (77)	Shreveport, LA	360,450
WYLE	Huntsville-Decatur-Florence, AL (81)	Florence, AL	325,840
KYLE	Waco-Temple-Bryan, TX (94)	Bryan, TX	281,570

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
KKWB (formerly KJLF)	El Paso, TX (99)	El Paso, TX	262,410
WGSA (formerly WUBI)	Savannah, GA (100)	Baxley, GA	255,740
WMMP (formerly WBNU)	Charleston, SC (109)	Charleston, SC	223,730
WGSE	Florence-Myrtle Beach, SC (116)	Myrtle Beach, SC	212,610
KREN	Reno, NV (119)	Reno, NV	209,060
KTVC (formerly KROZ)	Eugene, OR (120)	Roseburg, OR	206,360
KEPR	Yakima-Pasco-Richland-Kennewick, WA (123)	Pasco-Kennewick-Richland, WA	197,130
WSWS	Columbus, GA (125)	Opelika-Auburn, AL	187,060
KNLJ	Columbia-Jefferson City, MO (145)	Jefferson City, MO	146,520
WGVP	Albany, GA (150)	Valdosta, GA	133,420
WPXH (formerly WNAL)	Anniston, AL (201)	Gadsden, AL	42,960

Full Power Primary Total **58,361,560 = 60.21%**

Full Power Affiliates (Secondary)

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
WUAB	Cleveland, OH (13)	Lorain-Cleveland, OH	1,461,410
WTVX	West Palm Beach-Ft. Pierce, FL (44)	Ft. Pierce-Stuart-Vero Beach-Palm Beach, FL	587,120
KASY	Albuquerque-Santa Fe, NM (48)	Albuquerque, NM	554,290
KYES	Anchorage, AK (156)	Anchorage, AK	123,200
KYUS	Billings, MT (167)	Miles City, MT	94,360
WYDC	Elmira, NY (170)	Corning, NY	93,240
KKTU	Cheyenne, WY-Scottsbluff, NE-Sterling, CO (194)	Cheyenne, WY	50,090
KTWO	Casper-Riverton, WY (197)	Casper, WY	47,660

Full Power Secondary Total **3,011,370 = 3.11%**

Full Power Primary and Secondary Total **61,372,930 = 63.32%**

Low Power Affiliates (Primary)

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
WBPA-LP	Pittsburgh, PA (19)	Pittsburgh, PA	1,148,860
WMJF-LP	Baltimore, MD (23)	Towson, MD	989,470
WBQC-LP	Cincinnati, OH (30)	Cincinnati, OH	800,890
WYLN-LP	Wilkes Barre-Scranton, PA (49)	Hazelton, PA	552,870
WUCT-LP	Dayton, OH (53)	Dayton, OH	502,850
WBQP-LP	Mobile, AL-Pensacola, FL (61)	Pensacola, FL	448,780
W21BF	Toledo, OH (66)	Fremont, OH	407,170
KWBS-LP	Springfield, MO (76)	Springfield, MO	362,270
WQTV-LP	Paducah, KY-Cape Girardeau, MO-Harrisburg-Mount Vernon, IL (79)	Murray, KY	354,080
WYHB-LP	Chattanooga, TN (87)	Chattanooga, TN	305,980
W51CB	Burlington, VT-Plattsburgh, NY (91)	Burlington, VT	292,870
KWBJ-LP	Baton Rouge, LA (98)	Morgan City, LA	266,640
KTTE-LP (formerly K11TT)	Baton Rouge, LA (98)	Baton Rouge, LA	--
KTPN-LP	Tyler-Longview, TX (108)	Tyler, TX	229,080
KBSC-LP	Medford-Klamath Falls, OR (144)	Brookings, OR	150,900

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
WBGR-LP	Bangor, ME (155)	Bangor, ME	127,160
KSCT-LP	Anchorage, AK (156)	Sitka, AK	--

Low Power Primary Total **6,939,870 = 7.16 %**

Low Power Affiliates (Secondary)

Call Sign	DMA (Rank)	City of License	TVHH (1995-96)*
WWAZ-LP (formerly W52AZ)	Evansville, IN (97)	Evansville, IN	273,000
KLAF-LP	Lafayette, LA (121)	Lafayette, LA	203,880

Low Power Secondary Total **476,880 = 0.49 %**

Low Power Primary and Secondary Total 7,416,750 = 7.65 %

Full and Low Power Total **68,789,680 = 70.97 %**

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