

networks in appealing to and reaching the African-American audience. Last season, for example, while UPN had a disappointing 2.0 overall rating, it earned a 5.8 rating among African-American households. This season, the popularity of UPN programming among African-Americans has risen still further. In September, for example, UPN's overall rating was 2.1, but its rating in African-American households reached 7.0. And a number of UPN programs are exceeding double-digit ratings figures among African-Americans: "The Parkers" (17.7), "Malcolm & Eddie" (17.1), "Grown Ups" (16.4), and "Moesha" (14.2). Similarly, "Star Trek: Voyager," "7 Days," and "Dilbert" have substantially higher ratings in black households than they achieve overall.⁸⁵ In fact, ten of the top 50 rated television network programs among African-American households air on UPN.⁸⁶ Moreover, UPN was not among the networks that were targeted either by the NAACP for lack of casting diversity in the 1999 fall lineup or by Hispanic leaders in the recent boycott of television networks.⁸⁷

UPN's new programming and its programming in development continue the network's emphasis on providing opportunities for minorities to find outlets for their creative talents. UPN's Fall 1999 primetime lineup includes "The Parkers," a new comedy series co-created by Ralph Farquhar, Sara V. Finney, and Vida Spears, all of whom are African-American. "The Parkers" is a spin-off from the popular sitcom "Moesha," which Farquhar and Finney also co-

⁸⁵ Nielsen Market Research, Network Primetime Rank for the period Aug. 30, 1999 through Sept. 26, 1999.

⁸⁶ Nielsen Market Research, Network Primetime Rank for the period Aug. 31, 1998 through May 30, 1999.

⁸⁷ See Joe Schlosser, "Nets Plan Meeting with NAACP," *Broadcasting & Cable*, Jul. 26, 1999, at 12; Dan Trigoboff, "Latinos Set Net Boycott," *Broadcasting & Cable*, Jul. 30, 1999, www.broadcastingcable.com.

created and for which each has served as executive producer. Both series feature African-Americans in leading roles, including pop singer Brandy in the title role in "Moesha." Sheryl Lee Ralph, an African-American, portrays Dee Mitchell, a dedicated educator, wife and stepmother on "Moesha." Based on her broad experience in the entertainment industry as an actress, singer and producer, Ms. Ralph concludes that "[n]o other network has shown a comparable commitment to increasing opportunities for minorities in all facets of the industry."⁸⁸ In addition, UPN just purchased the pilot for "The Fighter," a drama from well-known actor/writer Tim Reid, which features a predominately African-American and Hispanic cast. In short, UPN has greatly augmented the quantity and quality of opportunities available to minorities in all areas of the entertainment business. To that end, UPN provides a major outlet for expression of minority culture over-the-air and has raised the profile of many minority actors, writers, and producers.

Finally, despite the significant ratings and financial struggles discussed below, UPN has undertaken a significant public affairs initiative aimed at the youth audience. The "Teen Files" is a series of programs from the creator of "Scared Straight," directed to teens and addressing topics such as violence, alcohol and drug abuse, tobacco, and sex. One segment, titled "The Truth About Drinking," received a 1999 Emmy award for "Children's Program." The programs in this series are augmented by local outreach programs at each of the Paramount stations.⁸⁹

⁸⁸ Declaration of Sheryl Lee Ralph at ¶ 3.

⁸⁹ UPN's success in developing a unique voice for a traditionally underserved audience is precisely the type of activity the Commission seeks to foster. The FCC has stated that the "[e]ncouragement of the development of additional networks to supplement or compete with
(Continued...)

3. Notwithstanding Its Programming Efforts, UPN Lags Well Behind the Other Networks in Audience Ratings and Is Not Self-Supporting

Since its inception five years ago, UPN has been disadvantaged by the inherent limitations of its affiliate line-up. As noted above, the great majority of UPN's affiliates are relatively weaker UHF stations,⁹⁰ and a substantial number are LPTVs which, of course, provide very limited coverage. Further, over the past several years, several key affiliates have switched from UPN to other networks, including the WB. In some cases, UPN has been unable to secure a replacement outlet. Moreover, the struggling network has been hindered by consistently low ratings and has suffered substantial financial losses in every year of its existence.

According to UPN's records, its primary full power affiliates reached 73.1 percent of television households as of January 15, 1996 and 73.7 percent of television households as of

(...Continued)

existing networks is a desirable objective and has long been the policy of this Commission." *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC2d 318, 333 (1970). Indeed the Commission has acknowledged the public interest contributions made by the Fox network, including the introduction of new programming; the provision of economic, programming and marketing support to independent UHF stations to enable them to become profitable and self-sufficient; and the opportunity to broadcast niche- and minority-oriented programming and to feature, on a national scale, the works of minority producers, writers and actors. *See Fox Television Stations, Inc.*, 11 FCC Rcd 5714, 5731-32 (1995) (Separate Statement of Commissioner James Quello). UPN has provided all of these public interest benefits since its inception – benefits which have been funded by Viacom and its partner and which should not be discouraged.

⁹⁰ Indeed, with one exception, Viacom's Paramount Stations are all UHF facilities. KSTW in Tacoma/Seattle is the only VHF station.

March 12, 1996. During that timeframe – immediately before and after the February 8, 1996 operative date for the dual network rule – UPN relied upon secondary affiliates to reach approximately 18.0 to 18.5 percent of the nation’s television households. Today, UPN reaches approximately 74 percent of the country through full power primary affiliates. The network relies on LPTVs as primary affiliates for approximately eight percent of the country, and on cable-only coverage for an additional 1.6 percent. Secondary affiliates, which air whatever amount of programming they wish (usually during non-primetime hours), today account for approximately 13 percent.⁹¹ (Those secondary affiliates carry UPN programs out of pattern, not on a simultaneous basis with other affiliates according to the network’s schedule and, therefore, cannot be considered affiliates in the true sense of the word under industry standards.)⁹²

In substantial part as a result of its limited national coverage, UPN has lagged in audience ratings. For the last two seasons, UPN has ranked last during primetime among the six broadcast networks, earning only a 2.9 rating for 1997-98, a 2.0 rating for 1998-99, and a 2.7 rating season-to-date. While UPN’s ratings have substantially increased this season, its ratings this fall still place it sixth among broadcast networks – and represent less than one-third of the audience garnered by the only network that currently operates at a profit (NBC).⁹³

⁹¹ Of these secondary affiliates, only seven percent carry four or more hours of UPN programming. See Section III.D, *infra*.

⁹² By way of comparison, the new PAX TV network, which only came into existence last year and is not covered by Section 73.658(g), claims 72 O&Os and an additional 51 affiliates with an aggregate audience reach of 76 percent. See www.paxson.com/cities.htm; see also Section III.D, *infra*;

⁹³ See Wayne Friedman, “ABC Sweeps Week; Can ‘Millionaire’ Fever Last for Long?”

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Lower ratings and a smaller distribution chain have inevitably led to low advertising revenues for UPN and its affiliates. Published sources reported that UPN sold about \$150 million in advertising during primetime last season.⁹⁴ To put this in perspective, NBC led the market, billing over \$2 billion and ABC billed \$1.6 billion for prime time advertising during the 1998-99 season.⁹⁵ UPN lost over \$177 million dollars last year alone.⁹⁶ Its cumulative losses to date exceed \$750 million.

Not only is the UPN network experiencing financial difficulties, but its affiliates, many of which were struggling unaffiliated UHF stations, tend also to be among the financially weaker stations in their markets. As discussed more fully below, these affiliates depend on UPN for programming, branding and marketing. A weakening of the network could have serious economic consequences for these stations.

B. The Existence of the Outdated National Ownership Rules Threatens The Stability and Future of This Unique But Financially Struggling Program Service

Against the backdrop of intense competition and extraordinary change in the media marketplace, the dual network and audience cap rules are unnecessary to ensure competition

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Electronic Media, Nov. 15, 1999, at 29 (citing Nielsen Media Research, season premier to date ranking).

⁹⁴ Stuart Elliott, "Fewer Viewers, More Commercials," *New York Times*, Jun. 8, 1999 (citing The Myers Report).

⁹⁵ *Id.* Since CBS billed \$1.2 billion during the same period, CBS/UPN combined had lower revenues than either NBC or ABC last season. *Id.*

⁹⁶ See Steve McClellan, "Networks Drag Big 4 Earnings," *Broadcasting & Cable*, Mar. 8, 1999, at 11.

and diversity in the media marketplace. And not only are the rules unnecessary; their existence can operate in this cutthroat marketplace to endanger competition and diversity. For example, as demonstrated above, UPN is financially struggling and needs to take advantage of new operating efficiencies in order to continue to develop.⁹⁷ Without the support of a company like Viacom/CBS, however, there is a substantial risk to the future of this emerging network.⁹⁸

Viacom and CBS are precisely the kind of enterprises that are well-equipped to assist in nurturing a nascent network like UPN, especially in light of its history of financial losses. For example, the combined Viacom/CBS could make available to UPN (subject to the concurrence of Chris-Craft) extensive libraries of programming, valuable brands, and the resources and expertise to develop and distribute new programming efficiently. Further, the new Viacom would have strong incentives to continue enhancing the value of the Paramount Stations, whose success is inextricably tied to that of UPN.

Viacom and CBS also could call upon their combined resources and experience to offer UPN substantial savings (subject to the concurrence of Chris-Craft) by combining “backroom” operations such as accounting, traffic, business affairs, financial reporting, and engineering. Indeed, the latter may be especially helpful in speeding the transition to digital operations at

⁹⁷ The UPN network is off to a much improved start this year. The efficiencies, resources, and network experiences that CBS could bring to the table could be the boost that UPN needs to continue its rise and make it a successful network in terms of both business and public interest considerations.

⁹⁸ Indeed, it should be recognized that UPN’s economic fragility could severely frustrate any effort to dispose of Viacom’s interest in the network. Such efforts would also be complicated by the fact that Viacom is only a 50 percent partner in UPN.

the two networks and their respective owned and operated station groups.⁹⁹ UPN also could take advantage of marketing opportunities that the existing operations of Viacom and CBS could provide. Companies like a combined Viacom/CBS should be encouraged to use, and not be barred from using, their resources and expertise to strengthen a nascent network like UPN.

C. The Economic Health of the Numerous O&O and Affiliated Stations That Are Financially Reliant on the Network Is Also Imperiled by the Existence of the National Ownership Rules

It must be recognized, moreover, that an injury to a new network such as UPN would reverberate far beyond its owners. For example, UPN's program suppliers — and their writers, directors, actors, and other creative personnel — would face significant hurdles in making alternative business arrangements if UPN were forced to close or reduce its scale. In addition, many of the network's affiliates, especially weaker UHF and LPTV stations in small and medium-sized markets, depend on UPN for quality prime-time programming, branding, and marketing support that is critical to their success.

The UPN affiliates that were previously independent stations and those that were start-up stations faced similar problems prior to their affiliations with UPN, and they now justifiably fear a repeat of those issues. As Caroline Powley, Owner/General Manager of UPN affiliate WNGS in Springville, New York, indicates, independents and start-ups typically have experienced great difficulty in obtaining quality, first-run programming to fill their

⁹⁹ The Commission has recognized that common ownership can improve programming, enable a struggling station to survive, and create new jobs. *TV R&O* at ¶ 36. Since television duopolies are now permitted, the synergistic benefits of common ownership surely should be available to national broadcast networks and their O&O station groups as well. *Id.* at ¶ 34.

prime-time slots, programming which UPN now provides for these stations.¹⁰⁰ Similarly, LIN Television Vice President Paul Karpowicz states that, in his experience, “UPN is an extremely important resource for start-up television stations and for struggling independent stations.”¹⁰¹ According to Mr. Karpowicz, “[t]hese stations would not otherwise have access, at affordable prices, to quality, first-run programming....”¹⁰² A reduction in the availability of such attractive programming would, of course, seriously undermine the ability of these stations to draw viewers and generate advertising revenues.¹⁰³

In addition to providing programming to the affiliates, affiliation with UPN – even for stations in the nation’s largest markets – provides independents and start-ups with a recognizable identity, which also serves to make the stations more attractive to viewers and advertisers. As Mr. Karpowicz observes, without network programming and support, “it would be very difficult to establish a local identity in the face of stiff competition from four or five network-affiliated stations.”¹⁰⁴ Similarly, Al Devaney, President of Newsweb Broadcasting, states that WPWR(TV) in Chicago was not able to “achieve true ‘brand’ status in the minds of advertisers” until it became affiliated with UPN.¹⁰⁵ An affiliation with UPN

¹⁰⁰ Declaration of Carolina Powley, dated Nov. 17, 1999, at ¶ 4; *see also* Declaration of Carlos Lopez, dated Nov. 16, 1999.

¹⁰¹ Declaration of Paul Karpowicz, dated Nov. 15, 1999, at ¶ 3.

¹⁰² *Id.*

¹⁰³ *See* Declaration of Caroline Powley at ¶ 6.

¹⁰⁴ Declaration of Paul Karpowicz at ¶ 3.

¹⁰⁵ Declaration of Al Devaney, dated Nov. 12, 1999, at ¶ 2.; *see also* Declaration of Caroline Powley at ¶ 5 (“the affiliation gives our family-run station a very recognizable identity that we

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also makes independents and start-ups more attractive to cable systems, increasing the stations' opportunities to secure carriage on the systems.¹⁰⁶

Indeed, the availability of a UPN affiliation has even made it possible in several markets for LPTV stations to establish themselves as additional local voices where none existed before. For example, in Springfield, Illinois, two LPTVs now simulcast UPN programming and have become "in effect the 'fifth station' in [what was previously] a four station market."¹⁰⁷ Although these facilities do not enjoy must carry status, the new UPN affiliate recently completed a deal for carriage on the local cable system. "The major contributing factor to our obtaining cable carriage was the UPN affiliation. We are the only UPN affiliate in the local market, and there was a steady stream of people in the community wanting UPN."¹⁰⁸

Accordingly, in the absence of their affiliations with UPN, these stations could face severe financial difficulties. Without UPN's "brand" identity and its continuing supply of network programming, they would be at a severe competitive disadvantage as compared to other stations in their markets.¹⁰⁹ Furthermore, the "favorable economics of network

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do not have the resources to create on our own.")

¹⁰⁶ See Declaration of Caroline Powley at ¶ 2.

¹⁰⁷ Declaration of Paul Miller, dated Nov. 16, 1999, at ¶ 1.

¹⁰⁸ *Id.* at ¶ 2. The new "voice" also airs a weather service and a community news report. *Id.* at ¶ 3. See also Declaration of Paul Karpowicz, dated Nov. 15, 1999 (describing the creation of a new "virtual station" affiliated with UPN in the Grand Rapids-Kalamazoo-Battle Creek, Michigan market by linking a group of LPTV facilities).

¹⁰⁹ See Declaration of Al Devaney at ¶ 4; see also Declaration of Paul Karpowicz, at ¶ 4.

affiliation can strengthen these stations sufficiently to enable them to “devote resources to local programming, such as news and sports.”¹¹⁰ Affiliation with a new network such as UPN thus provides a variety of efficiencies to which independent and start-up stations would not otherwise have access. Without a network affiliation, many of these stations would face a real threat to their economic viability – especially in small markets, which are in greatest need of additional over-the-air resources. The dependence of affiliates on the support of a network thus provides another powerful reason to encourage, rather than discourage, investment in new over-the-air services and, thus, to repeal these rules.

D. The Existing Dual Network Rule Unfairly Discriminates Against Emerging Networks.

The dual network restriction, in its current form, *allows* the maintenance of two or more networks by the same party, subject only to two narrow exceptions. As discussed above, these exceptions prohibit joint ownership of two of the “Big Four” networks, or of one of them and one of the “emerging” networks, in existence on February 8, 1996, that provided four hours or more of English-language programming per week pursuant to network arrangements with television broadcast stations reaching, in the aggregate, more than 75 percent of U.S. television homes. Although this definition seems to be straightforward, the Commission should act immediately to clarify or reconsider the scope of the rule.

For example, although the Commission has assumed that this second restriction is applicable to the UPN and WB networks, it is by no means clear that UPN, with its line-up of UHF, LPTV, and cable affiliates and a mixture of primary and secondary affiliations, in fact

¹¹⁰ See Declaration of Paul Karpowicz at ¶ 3.

meets the 75 percent reach test today – or, indeed, that it did on February 8, 1996 (the date the 1996 Act went into effect and the operative date for determining whether a particular network is covered by the rule). As shown above, UPN today covers only approximately 74 percent of the country with service by full power TV stations under primary affiliation agreements. Moreover, on February 8, 1996, the effective date of the 1996 Act and the operative date under Section 73.658 (g)(2), UPN’s full power primary affiliate lineup provided just above 73 percent coverage; another 18 percent was attributable to secondary affiliations.

As noted above, UPN’s secondary affiliates air whatever amount of the network’s programming they desire, usually outside primetime hours and not on a simultaneous basis with primary affiliates.¹¹¹ The Big Four networks, by contrast, rely almost exclusively on primary affiliates – it is only the emerging networks that require secondary affiliates in order to help extend their coverage. In fact, secondary affiliations are more akin to syndication arrangements, which are not encompassed by Section 73.658(g), and enable programming to be run out of pattern.

This distinction is significant in order to achieve an accurate assessment of coverage relative to the apparent intent of the statute. Stations with which UPN has secondary affiliation agreements are the primary affiliates of *other* networks, and therefore have already been counted as having “network affiliation arrangements” for purposes of the dual network rule. Logically, then, only primary affiliation agreements with full power stations, consistent with the general industry practice of the major networks, should properly be considered for

¹¹¹ As noted previously, only *seven* percent of these secondary affiliates carry four or more hours of UPN programming.

purposes of Section 73.658(g). To do otherwise would be to count a secondary affiliation twice – once for the primary network affiliation and again for the secondary arrangement.¹¹²

Moreover, the dual network rule's assumed applicability to UPN (and WB) is based solely on a "snapshot" of the television industry taken in early 1996, and wholly ignores subsequent developments, including the emergence of other competing networks, which must be considered by the FCC in its assessment of current marketplace realities. In a development that is of particular importance, the PAX TV network today boasts a national distribution chain virtually equal to that of UPN – 73 owned and operated stations and an additional 51 independently owned affiliates reaching a total of 76 percent of all Nielsen national television households, according to Pax TV's own website.¹¹³ In addition, Paxson Communications Corporation and NBC, which already maintains the most profitable television network, have entered into a series of financial, programming, and other agreements that appear to provide the parties with benefits that are functionally similar to the interests of Viacom/CBS in UPN – including providing NBC with access to and significant control over a second over-the-air network with a national reach comparable to that of UPN.¹¹⁴ However, because NBC will

¹¹² In addition, Viacom is only a 50 percent partner in UPN and, thus, does not enjoy positive control over the network. In these circumstances, it is not clear that Viacom can accurately be said to be "maintaining" a network, as contemplated by the rule.

¹¹³ Paxson Reports Second Quarter 1999 Results. www.businesswire.com (Aug. 16, 1999); see also www.paxson.com/finance_new.htm.

¹¹⁴ On Sep. 16, 1999, NBC acquired a 32 percent stake in Paxson Communications Corporation ("Paxson"). While NBC technically became a minority shareholder in Paxson on Sep. 16, "NBC's control over Paxson is far more extensive than its 32% stake in the company would suggest." Steve McClellan, "The Peacocking of Pax - NBC will have wide-ranging impact on new partnership despite owning only 32 percent," *Broadcasting & Cable*, Oct. 11, 1999, at 68. For example, NBC's approval is required for major Paxson decisions including

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attain, initially, only a 32 percent interest in PaxNet's owned and operated stations, that transaction apparently will not require prior FCC approval. And because PaxNet came into being *after* February 8, 1996, NBC could obtain control of UPN's new rival without regard to the dual network rule. Indeed, any of the Big Four networks could establish a second network without implicating the rule; only combinations among the four older networks themselves or between a Big Four network and UPN or WB may be constrained.¹¹⁵

The distinction between syndication agreements and the network affiliation agreements used by UPN and WB is a fine one. The similarities are closer still in the case of secondary affiliations, under which programming is not run in pattern but, like syndicated programming, is scheduled around primary network fare. In short, the lack of any justification for the rule, the opportunity of other similarly situated services to create new networks without regulatory

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budgets, program acquisitions, digital spectrum plans, by-laws amendments, and certain employee hires. Paxson Communications Corporation, SEC Form 8-K (Sept. 24, 1999). In addition, for the next ten years, NBC has the right to convert any Paxson stations in the top 50 markets to NBC affiliates. *Id.* A converted station would not receive any compensation from NBC, would be required to pay NBC for "special event programming," and would be forbidden to pre-empt NBC programming. *Id.* Moreover, Paxson stations, which are not converted to NBC affiliates, are obligated to carry up to 35 hours of programming a year that is pre-empted by the NBC affiliates in their markets. *Id.* Paxson and NBC will also work closely on advertising sales at the network and local levels. The media and Paxson itself characterize the NBC-Paxson deal as providing NBC with "a second national television channel for entertainment programs." Bill Carter, "NBC Completes Acquisition of 32% Stake in Paxson," *New York Times*, Sept. 17, 1999, at C6; "NBC Makes Strategic Investment in Paxson Communications, Creating Path to Second National Distribution Outlet," Sept. 16, 1999, www.paxtv.com/press/default2.htm.

¹¹⁵ Fundamental fairness and basic principles of administrative law require that the Commission accord comparable treatment to parties that are similarly situated. See *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).

impediment, and the extraordinary level of competition in the media marketplace, fully justify the repeal of the dual network rule in general, and particularly its application to “emerging networks.”

E. The UPN Situation Provides a Compelling Example of How the National Television Ownership Limit Serves Only to Frustrate the Commission’s Goal of Promoting Competition and Diversity

In order to sustain itself, a network must retain assets that are critical to its survival. For example, affiliation with the Viacom/Paramount broadcast station group is without question a vital asset for UPN, without which there would be no over-the-air means of distribution in areas serving a significant portion of the national viewing audience. Owned and operated stations provide the *only* real guarantee of long-term carriage of a network’s programming. A substantial core of O&Os is essential to ensuring adequate clearance of network programming and serves to stabilize the decision-making process on program acquisitions.¹¹⁶ Moreover, in today’s marketplace, O&Os are typically the principal, if not the only source, of a network operator’s profits. In these circumstances, the existence of the 35 percent national cap threatens UPN’s access to its most critical assets, which make the network operation viable as part of an integrated business.

¹¹⁶ Indeed, a recent analysis concluded that “the national ownership cap limits the ability of networks and the stations that broadcast their programming to coordinate their programming and promotional activities and to align their economic incentives.” Katz Study at 55-56. Artificially limiting ownership of stations and forcing networks to forego their profits decrease the network’s willingness and ability to bid for new and expensive programming. *Id.* at 56. Otherwise, the network is forced to “bear all the costs of investing in higher quality programming,” while “receiv[ing] only a fraction of the benefits.” *Id.* at 57.

The Commission has long recognized the importance of a strong O&O group to a network's health. As early as its 1941 *Chain Broadcasting Report*, the agency observed that network-owned stations in larger markets "make available a substantial minimum audience for network sustaining programs... [and] permit the networks to experiment with new technologies of program production and new ideas in program content."¹¹⁷ Similarly, in 1954, a time when far less diversity and competition existed, the FCC observed that "[t]he ownership of broadcast stations in major markets by the networks is an important element of network broadcasting."¹¹⁸

More recently, in its 1983 *Notice of Proposed Rulemaking* to consider raising the then seven-station limit to twelve, the Commission stated:

Ownership of a sufficient number of stations to generate a base for quality program production might well facilitate development of a new over-the-air television network in the future. It is likely in any case to lead to expanded production of programming, including non-entertainment programming, for national, regional, and group presentation to the viewing and listening publics. The access to a larger potential audience which a group owner enjoys reduces the level of difficulty involved in getting initial distribution of an unproven first-run show or series, cuts marketing expenses, and assists in generating revenues that could be used to finance even more attractive, higher quality programming. Cooperative production or distribution by larger groups is another possible vehicle by which enhanced programming options can be provided.¹¹⁹

¹¹⁷ *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, at 66-67 (1941).

¹¹⁸ *Amendment of Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations*, 43 FCC 2797, 2801 (1951).

¹¹⁹ *Notice of Proposed Rulemaking, Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast*

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And in its 1984 *Report and Order* raising the national ownership limit, the agency expressly rejected suggestions to impose a lower numerical limit on the networks.¹²⁰

Unlike Viacom's stations, most of the CBS O&Os are stronger VHF facilities in major markets. Viacom's stations – all but one of which are UHF stations – tend to be less lucrative than most of the CBS O&Os. Accordingly, in order to come into compliance with the national cap as currently implemented and interpreted, a combined Viacom/CBS would likely principally sell weaker, small-market stations which are affiliated with UPN. Divestiture of such O&Os therefore would threaten a critical link in UPN's distribution chain – a result directly contrary to the FCC's intent, in maintaining a percentage audience cap, to avoid “dislocation in the television industry.”¹²¹

The impact of these rules on companies like a merged Viacom and CBS is especially perverse in view of the fact that common ownership of UPN and CBS would have no appreciable impact on competition. National video programmers abound; in addition to CBS and the struggling UPN, television viewers and national advertisers can turn to at least seven other off-air broadcast networks, literally hundreds of cable and satellite networks, and the exploding new medium of the Internet. In light of UPN's sixth-place finish among networks and comparably low advertising revenue, the merger Viacom/CBS company clearly will not have the ability to dominate the marketplace; thus, no undue concentration of control could

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Stations, 95 FCC 2d 360, 382 (1983).

¹²⁰ *1984 Multiple Ownership R&O*, 100 FCC 2d at 53-54.

¹²¹ *TV Further Notice*, 10 FCC Rcd at 3567.

possibly result. Moreover, given the dissimilar nature of CBS and UPN in reach, demographic targets, and programming, even these figures overstate the potential impact on competition of combining the ownership of the networks. Similarly, the common ownership of TV stations in excess of the national cap should not raise any competition issues, since all stations exceeding the cap would compete in separate local markets. Indeed, the Commission has noted that its “concern with diversity is most acute with respect to local ownership issues.”¹²²

The Commission has long recognized that group ownership promotes marketplace economies which, in the highly competitive environment of broadcasting, are most likely to translate into improved programming and generally enhanced use of the broadcast spectrum. Indeed, the FCC also has acknowledged that group owners typically do a “superior job of responding to viewer demand for news” as compared with individually owned stations. It also has concluded that the efficiencies provided by greater group ownership would result in various service improvements to the community, especially with respect to news and informational programming.¹²³

¹²² *TV Ownership* at 6.

¹²³ *1984 Multiple Ownership R&O*, 100 FCC 2d at 31, 44-46. The Commission has repeatedly confirmed this view. See, e.g., *Amendment of Section 73.3555 of the Commission’s Rules*, 4 FCC Rcd 1741, 1746-50 (1989) (TV/Radio Cross-Ownership); *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2766 (1992).

IV. Conclusion

The marketplace has evolved substantially since the creation of the decades-old dual network and national television ownership rules. In this new environment, it is clear that these rules have outlived their usefulness. The Viacom/CBS transaction is a powerful example of how these rules fail to achieve their original objectives.¹²⁴

Respectfully submitted,

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November 19, 1999

¹²⁴ Even prior to Congressional establishment of the biennial review mandate, it was clear that, if the circumstances that existed at the time that a rule was issued change in a significant way, an agency is obligated to review that rule and consider whether its application remains in the public interest. *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979). As the D.C. Circuit noted in *Home Box Office v. FCC*, even “a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist. 567 F.2d 9, 9 (D.C. Cir. 1977) (quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971)), *cert. denied*, 434 U.S. 829 (1997).

DECLARATION OF TIM RUSS

Tim Russ hereby declares as follows:

1. I am an African-American actor who currently portrays Starfleet Tactical/Security Officer Tuvak on Paramount Network Television's *Star Trek: Voyager*, which airs on UPN. In recent years, I have had other *Star Trek* roles, including in episodes of *Star Trek: The Next Generation*, *Star Trek: Deep Space Nine*, and the feature film *Star Trek: Generations*. Most recently, I directed an episode of *Star Trek: Voyager*.

2. While I have played several smaller parts on various television shows over the years, my most important role as a television actor has been with UPN, as Tuvok. In my experience, and especially recently, many television networks and production companies have been reluctant to hire African-American actors other than for programs featuring predominantly African-American casts. Since its inception in 1995, UPN has been the exception to that pattern and has shown a great willingness to present a diversity of backgrounds on its television shows.

3. I am very concerned about what the demise of or a change of ownership of UPN will mean for cultural diversity in television programming. Tolerance and understanding have always been part of the central story of the *Star Trek* programs. To my knowledge, the current series is the only network program that presents an African-American, an Asian-American, and a Native American in nonstereotypical roles and with a woman in command, working together constructively to overcome challenges.

4. UPN's commitment to diversity goes much further than just on-air talent. I recently had my first opportunity to direct a television program for an episode of *Star Trek: Voyager*. Much more significantly, I believe the UPN series *Moesha* and *The Parkers*, which are produced by African-Americans, employ more African-American writers than almost any other broadcast television programs, and UPN deserves much praise for its contributions to diversity in programming.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.



Tim Russ

November 12, 1999

DECLARATION OF GARRETT WANG

Garrett Wang hereby declares as follows:

1. I am an Asian-American actor currently portraying Ops/Communications Officer Harry Kim on Paramount Network Television's *Star Trek: Voyager*, which airs on UPN. As such, I am one of very few Asian-Americans who has had an opportunity to portray an Asian in a nonstereotyped role in American television.
2. My parents both emigrated to the United States and ultimately settled in Tennessee. Growing up, I was often a target of ignorance and insensitivity, and on television, the only Asian-Americans I regularly saw in nonstereotypical roles appeared in the original *Star Trek* series, episodes of *Barney Miller* and *21 Jumpstreet*.
3. I believe that at UPN, I have a great opportunity and a great responsibility to the public. Trite as it may seem, "Sulu" on the original *Star Trek* show was an important role model for me, a living symbol of the promise of America. I see myself as carrying forward that role today.
4. *Star Trek: Voyager* is culturally significant because of the diversity of its cast. It is at its core a story about people from very different backgrounds respecting each other, affirming each other, and working together, under the leadership of a female Captain.
5. If UPN were to cease operations, *Star Trek: Voyager* would be left with an uncertain future. Additionally, the other series broadcast on UPN that have minorities in major on-camera and behind-the-scenes roles would be left in an equally precarious position.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.


Garrett Wang

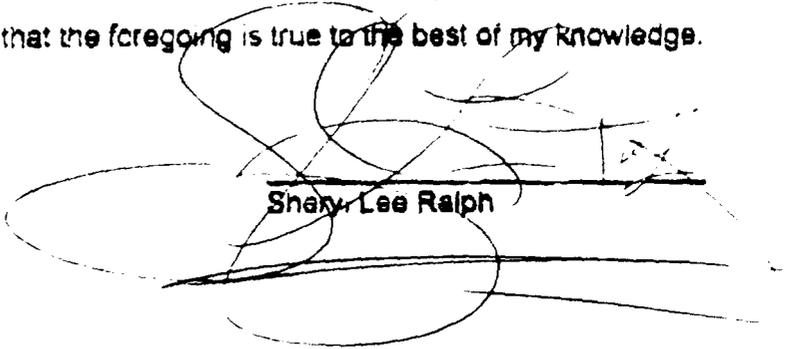
November 12, 1999

DECLARATION OF SHERYL LEE RALPH

Sheryl Lee Ralph hereby declares as follows:

1. I am an African-American actress who currently portrays Dee Mitchell, a dedicated educator, wife, and stepmother, on UPN's popular comedy series *Moesha*.
2. I have appeared in a variety of entertainment genres, including the theater, on television, and in films. I was nominated for a Tony award for my performance as Deena Jones in the musical *Dreamgirls*; I won an independent Spirit "Best Supporting Actress" award for my role in *To Sleep with Anger*, with Danny Glover; and, I have appeared in feature films with Harry Belafonte, Whoopi Goldberg, Robert DeNiro, John Travolta, and Denzel Washington. Additionally, as a producer, I created the acclaimed *Divas Simply Singing*, which has become one of the most important AIDS fundraisers in Hollywood.
3. Having had broad experience in the entertainment business as an actress, singer, and producer, I have seen first-hand how difficult it can be for African-Americans to break into this industry, and particularly into television. I applaud the efforts that UPN has made to increase the participation of African-Americans both behind the scenes and on camera. No other network has shown a comparable commitment to increasing opportunities for minorities in all facets of the industry. In addition to on-air characters, UPN airs five shows that employ African-American writers. *Moesha* has eight African-American writers, and *The Parkers* has ten.
4. As the mother of two young children, I am particularly concerned about the general absence of positive role models on television for African-American and other minority children. Except at UPN, the gulf appears to be widening.
5. Programs like *Moesha* and its new spin-off, *The Parkers*, both produced by an African-American woman, depict African-Americans in positive familial situations, employing themes that are universal. With the presence of African-Americans on television this season in particular, I fear that if the operations of UPN were terminated young children and teenagers in the viewing audience would be left with even fewer African-American role models.

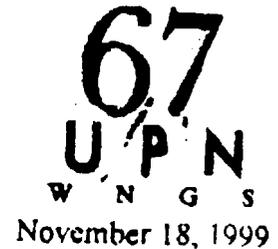
I declare under penalty of perjury that the foregoing is true to the best of my knowledge.



Sheryl Lee Ralph

November 15, 1999

WNGS-TV
9279 Dutch Hill Road
West Valley, NY 14171



Caroline K. Powley hereby declares as follows:

1. I am General Manager and Owner of WNGS, channel 67, in Springville, New York, a suburb of Buffalo, NY. WNGS is the primary UPN affiliate for the Buffalo DMA.
2. I applied for the station in 1991, the Federal Communications Commission issued the Construction Permit in 1994, and the station has been operating since September 1996. Although WNGS is a "must carry" station in Buffalo, we initially had difficulty obtaining carriage on the cable systems. The Buffalo cable operators appeared to drag their feet until we had a programming lineup they found appealing. Procuring the primary UPN affiliation in April 1998 was key to turning the cable systems around and acquiring carriage on the cable systems.
3. WNGS is solely owned and operated by my husband and myself. If we did not have the affiliation with UPN, our station would not be able to survive.
4. It is extremely difficult to acquire programming as an independent station. UPN provides high-quality first-run programming which we would be otherwise unable to obtain. Specifically, UPN furnishes two hours of quality prime time programming per night and three hours of children's educational and informational programming per week, including the popular program Doug. Without UPN programming, we were at a loss as to what to broadcast during prime-time viewing hours. High-quality movies are not a viable alternative to us because cash movie packages are far too expensive and because other stations in our market have already secured exclusive rights to the better packages.
5. UPN provides WNGS with a kind of efficiency that we could not obtain elsewhere. Moreover, the affiliation gives our family-run station a very recognizable identity that we do not have the resources to create on our own.
6. Without the UPN affiliation, WNGS would be struggling financially, whereas now the station is doing slightly better than breaking even. We would not have high quality programming to fill the time slots and would likely be airing low quality movies. This type of programming does not attract large numbers of viewers and advertisers, a situation which would place the station in a tenuous financial position.

7. Through the relationship developed with UPN in Buffalo, We recently were able to assist my mother, Sandra Powley, in obtaining a primary UPN affiliation for her Low Power TV station in Lexington, KY, a market in which only CBS, NBC, ABC and FOX were present. My mother's LPTV station is now the primary UPN affiliate in Lexington. The UPN affiliation was instrumental in getting the Lexington station on the air and on the local cable systems, which are not currently required to include LPTV's in their lineups.
8. It is very difficult to develop startup stations in today's group owner environment. UPN was willing to take a chance on us and help us develop our station to the point where we truly compete for the advertising dollars in Buffalo. UPN has provided opportunities like this, not only for us, but for many smaller independently owned stations around the country. Dismantling UPN will not only have an adverse effect on the network, it will cause significant hardship to many smaller station groups/owners.

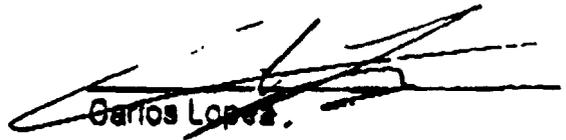
Caroline K. Powley
Caroline K. Powley

DECLARATION OF CARLOS LOPEZ

Carlos Lopez hereby declares as follows:

1. I am the General Manager of KTMV, UPN channel 8 in Corpus Christi, Texas and KVHM UPN TV-31 in Victoria, Texas. My family of 12 owns these two television and four radio stations, and we have built all of the stations from their inception. I am the youngest Hispanic owner of a radio station in the United States, and my family is one of the few Hispanic owners of television stations in the United States.
2. We launched KTMV in Corpus Christi in May, 1997 and became a UPN affiliate in October of the same year. Because of our successful affiliation in Corpus Christi, we acquired a UPN affiliation this past summer for KVHM in Victoria after that station was established in January of this year.
3. As Hispanic television station owners, the affiliation with UPN is of particular importance to us. UPN offers highly diversified programming and serves as a voice for the minority community as a whole. We are delighted to be a part of the UPN family, as they provide our stations with a genuine identity and a solid reputation. Paramount's commitment to family values and programming aimed at minorities greatly appeals to us and the direction in which we want to take our stations.
4. Obtaining affiliation with UPN was something we desperately needed in order to successfully launch our television stations, and it remains something we need to continue to flourish. UPN was the network that gave us, as Hispanic station owners, a chance to succeed in allowing us to become a member of their network. The affiliation with UPN is essential because UPN provides top quality programming to our start-up operations, which helped us to attract local advertisers to our stations and establish an identity. Currently, both of our stations are doing slightly better than breaking even.
5. While a recent shift of affiliations in the Corpus Christi market will result in our losing the UPN affiliation there, we are hopeful that, with the benefit of the start we made with UPN's support, we can still succeed in that market with a heavy emphasis on Hispanic programming. In contrast, the ethnic composition of the community in Victoria is quite different. If we were to lose the benefits we derive from UPN programming for that station, it would be very difficult for us to continue to compete.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.


Carlos Lopez.

November 17th 1999

DECLARATION OF PAUL KARPOWICZ

Paul Karpowicz hereby declares as follows:

1. I have nearly 25 years of experience in the television industry, I am presently the Vice President of LIN Television. I also serve as Chairman of the CBS Affiliates Board and as Television Vice Chairman of the National Association of Broadcasters, and I have worked at numerous affiliate stations over the years. At LIN Television, I currently oversee a combination of 13 stations which are affiliated with one or another of all six of the networks: 3 CBS, 3 NBC, 3 ABC, 1 FOX, 2 WB, and 1 UPN.

2. LIN Television is in the midst of creating a new "virtual" television station in the Grand Rapids-Kalamazoo-Battle Creek market by linking a group of low power television stations serving the major communities in the market. LIN anticipates that the programming on the new station will include a disproportionate amount of local programming, including local college (Western Michigan University) and high school sports, local cooking and variety programs, and local news and public affairs programming. But the station would clearly not be viable, and LIN would not have attempted to launch it, but for the fact that the station will also be affiliated with UPN, which does not have a full-power option in this market.

3. In my experience, UPN is an extremely important resource for start-up television stations and for struggling independent stations. These stations would not otherwise have access, at affordable prices, to quality, first-run programming, and it would be very difficult to establish a local identity in the face of stiff competition from four or five network-affiliated stations. In addition, the favorable economics of network affiliation permit these stations to devote resources to local programming, such as news and sports.

4. Without a network service like UPN, the least well-established stations in many markets would not be able to compete effectively.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge



Paul Karpowicz

November 15, 1999

DECLARATION OF AL DEVANEY

Al DeVaney hereby declares as follows:

1. I am President of Newsweb Broadcasting, a company which owns WPWR, the UPN affiliate in Chicago, Illinois, and KTVD, the UPN affiliate in Denver, Colorado. I have held a variety of positions in the independent television business since 1972, having served in the capacity of General Manager or above since 1986. Prior to my present position, I worked for Metromedia for 16 years.

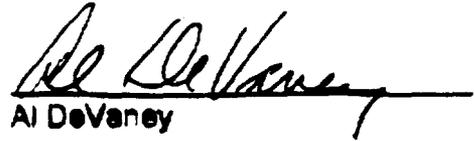
2. WPWR in Chicago affiliated with UPN when the network commenced in January, 1995. WPWR had previously operated as an independent station for a number of years, but Newsweb felt it needed high quality, first-run, prime-time programming to increase its advertising revenues and its viewership. Independent television stations experience great difficulty in obtaining high quality, first-run programming that enable them to compete effectively in the marketplace. In its prior incarnation as an independent station, WPWR, although somewhat financially successful, was never able to achieve true "brand" status in the minds of advertisers. Quite simply, the most efficient and effective way to acquire attractive programming is to affiliate with a network. When UPN was being launched, Newsweb believed in Paramount as a studio and felt the network had a strong future.

3. If WPWR lost its affiliation with UPN, Newsweb would have to search for replacements for the two daily prime-time hours of weekday programming UPN now provides. This replacement programming may not be as marketable to advertisers and to viewers as the shows supplied by UPN. Because the programming might not be as attractive, the station would be placed at a competitive disadvantage as compared to the other stations in the Chicago market. Further, to effectively compete with the growth of the WB, WPWR needs the network affiliation of UPN.

4. The prospect of a UPN affiliation in Denver was a prime factor in our acquisition of KTVD in that market. KTVD was a bankrupt television station when Newsweb purchased the station at a bankruptcy auction in 1993, where there was only one other bidder. This is remarkable for a station in a top-20 market, but it highlights the importance of a network affiliation. Newsweb's business plan for KTVD was based in part on being able to obtain an affiliation with the then-proposed UPN network for the Denver station.

5. Newsweb has taken the Denver station from a money-losing proposition to a viable venture. A key part of making this station viable was obtaining the UPN affiliation.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.


Al DeVaney

November 12, 1999

DECLARATION OF PAUL MILLER

Paul Miller hereby declares as follows:

1. I am a co-owner of Miller Family Broadcasting, which operates two UPN affiliates, one in Springfield, Missouri, and the other in Peoria, Illinois. This is my first venture into the broadcasting industry. To create the Springfield affiliate, we combined two Low Power Television (LPTV) stations that now simulcast UPN during prime-time hours and air syndicated programming during the day and sports on the weekends. In Springfield, we are in effect the "fifth station" in a four-station market, and we cover the Springfield DMA. In Peoria, we are the fifth full power station.
2. We acquired the licenses for the Springfield stations in December, 1998, and the combined LPTV stations have now been in operation for nearly one year. Our business plan in acquiring the licenses was to obtain a UPN affiliation, and we would not have undertaken the operation had we not been able to procure the affiliation. Although we are not a "must-carry" in Springfield, we recently completed a deal for carriage on the local cable system. A major contributing factor to our obtaining cable carriage was the UPN affiliation. We are the only UPN affiliate in the local market, and there was a steady stream of people in the community wanting UPN.
3. Affiliation with UPN enabled us, as small businessmen, to create a viable local television operation, at a relatively low cost, and to devote more resources to local programming. In addition to broadcasting the UPN prime-time programming, our stations air a weather service and a community news report to better serve the Springfield community. We expect that our one-year-old station combination will be making money by the end of the first quarter of 2000.
4. We would not have acquired the low power stations in Springfield without the assurance of the UPN affiliation, and similarly, we would not have acquired the full power station in Peoria without an affiliation. I believe that independent stations are truly a thing of the past. The niche that independent stations once filled is covered by cable today. For a station to achieve viability and survive in today's competitive market, it needs the support of a network affiliation.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.



Paul Miller

November 16, 1999