

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Part 73 of the Commission's)
Rules to Modify Section 73.3555(b) of the)
Regulations Concerning Multiple Ownership of)
Broadcast Stations (The Local Television)
Ownership Rule))

RM-_____

To: The Commission

PETITION FOR RULE MAKING

NATIONAL BROADCASTING
COMPANY, INC.

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August 26, 2002

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Table of Contents

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. NBC'S INTEREST IN THE MEDIA OWNERSHIP RULES	5
III. THE CURRENT LOCAL TELEVISION OWNERSHIP RULE DRAWS ARBITRARY LINES AND UNLAWFULLY DISCRIMINATES AGAINST OWNERS AND OPERATORS OF TELEVISION STATIONS	5
IV. CONCLUSION	11
EXHIBITS	

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To: The Commission

**PETITION FOR RULE MAKING OF
NATIONAL BROADCASTING COMPANY, INC.**

I. INTRODUCTION AND SUMMARY

On June 17, 2002, the Chief of the Media Bureau announced that the Federal Communications Commission ("FCC" or "Commission") intends to commence an omnibus rule making proceeding for the purpose of reexamining a number of its media ownership rules. These rules include the national ownership limits for television stations, the television duopoly rule, the local radio ownership rule, the radio-television cross-ownership rule, the newspaper-broadcast cross-ownership rule, and the dual network rule.¹ This comprehensive review of the ownership rules was prompted in part by decisions of the U.S. Court of Appeals for the District of Columbia Circuit finding that certain of these rules – specifically, the national television ownership limits and the local television ownership rule – were arbitrary and capricious and remanding them to the FCC

¹ See Yochi J. Dreazen, *FCC Sets Simultaneous Review of Its Media-Ownership Rules*, WALL ST. J., June 18, 2002, at A2 ("*Media-Ownership Rules Review*").

for further consideration.² Other rules are being included in the review because they were the subject of ongoing rule making proceedings at the time of the court rulings,³ had already been flagged for a future rule making,⁴ or were the subject of a pending petition for rule making.⁵ The Commission intends to conduct this review under the umbrella of the third biennial review of all of its media ownership rules as mandated by the Telecommunications Act of 1996.⁶

The upcoming omnibus/biennial review will take place under the watchful eye of a reviewing court that will require the FCC to justify any media ownership rule which it wishes to retain.⁷ The Chairman has pledged to “get the right answers”⁸ through the

² See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), on rehearing, 293 F.3d 537 (D.C. Cir. 2002) (“*Fox*”). The *Fox* case involved five separate petitions for review and one appeal from the FCC’s 1998 decision not to repeal or modify the national television station ownership rule or the cable/television cross-ownership rule. The court of appeals found that the FCC’s decision to retain the national cap was arbitrary and capricious based on the Commission’s proffered justification for such retention and remanded “the question whether to retain the Rule” to the Commission for further consideration. *Fox*, 280 F.3d at 1053. With respect to the cable/television cross-ownership rule, however, the court concluded that the probability that the Commission, on remand, would be able to justify retaining the rule was low and therefore directed the FCC “to repeal the . . . [r]ule forthwith.” *Id.* In *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (“*Sinclair*”), the court of appeals ruled, *inter alia*, that the FCC’s definition of “voices” for purposes of the duopoly rule’s “eight independent voices” test is arbitrary and capricious and remanded the rule to the agency for further consideration.

³ See *Cross-Ownership of Broadcast Stations and Newspapers*, Order and Notice of Proposed Rule Making, 16 FCC Rcd 17283 (2001) (newspaper-broadcast cross-ownership); *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, 16 FCC Rcd 19861 (2001) (local radio ownership rules).

⁴ See *Amendment of Section 73.658(g) of the Commission’s Rules (The Dual Network Rule)*, Report and Order, 16 FCC Rcd 11114 (2001) (“We will reexamine that part of the dual network rule that prohibits mergers between the major networks in a future proceeding . . .”).

⁵ See Petition for Rule Making filed by Viacom Inc. (May 23, 2002) (requesting the FCC to repeal or modify the radio-television cross-ownership rule) (“*Viacom Petition*”).

⁶ 47 U.S.C. § 161; Telecommunications Act of 1996, Pub. Law No. 104-104, § 202, 110 Stat. 56 (1996).

⁷ See *Fox*, *supra* note 2.

⁸ Doug Halonen, *FCC Won’t Hurry on Ownership*, ELECTRONIC MEDIA, Apr. 15, 2002, at 4 (quoting Chairman Powell at a briefing at the National Association of Broadcasters’ annual convention in April 2002).

proposed omnibus rule making proceeding and has committed the Commission to crafting internally consistent and judicially sustainable media ownership rules.

National Broadcasting Company, Inc. (“NBC”) fully supports the Commission’s conclusion that a comprehensive review of the rules is needed and its decision to examine the major ownership rules in a single proceeding. As the Commission recognizes, the factual record developed in the context of reviewing one of the rules will be relevant to an examination of other rules.⁹ The Commission also noted that a simultaneous review is needed to avoid the danger that a piecemeal review process could give any one sector of the media industry a market advantage due to the sequence and timing of rule changes.¹⁰ Finally, a single comprehensive rule making proceeding is desirable because it will make it more difficult for stakeholders to take inconsistent positions with respect to the same factual record to advance their own interests at the expense of their competitors.¹¹

In short, we applaud the Commission for pursuing a single, omnibus proceeding. Each of the foregoing considerations – common factual record, level playing field, consistency of viewpoint – underscores the interrelated nature of the FCC’s media ownership rules and the importance of developing consistent and evenhanded regulations. The latter point cannot be overemphasized: it is crucial that the ultimate rules adopted do not favor one form of communications media over another, or burden certain segments of

⁹ See *Media-Ownership Rules Review*, *supra* note 1, at 1.

¹⁰ See Mark Wigfield, *FCC Confirms It Will Comprehensively Rewrite Media Rules*, DOW JONES NEWS SERVICE, June 17, 2002 (“*Media Rules Rewrite*”). Although the FCC has not announced that it will consider the repeal of the cable/television cross-ownership rule in the omnibus proceeding, NBC is concerned about the marketplace distortions that could result if the rule is repealed while the other media ownership rules are still under consideration. See *infra* pp. 9-10.

¹¹ *Media Rules Rewrite*, *supra* note 10.

the industry with outmoded and competitively harmful ownership restrictions while leaving others unfettered by such restrictions.

With respect to the local television ownership rule, it is widely believed that, consistent with these public announcements, the Commission will review all aspects of the rule as part of the omnibus proceeding. In particular, NBC presumes that such a review will include a reexamination of the current limitation of two full-power stations per market without regard to market size or competition. While the majority opinion in the *Sinclair* decision focused specifically on the “voices” portion of the rule,¹² an isolated review of just this aspect of the rule would not advance the Commission’s stated objective of rationalizing the ownership rules as a whole and “getting it right.”¹³ In the unlikely event that the Commission does not contemplate including such a thorough review of the local television ownership rule as part of the omnibus proceeding, NBC by this petition for rule making filed pursuant to 47 C.F.R. § 1.401 (2001) urges the Commission to expand that portion of the omnibus review and subject the local television ownership rule to the same rigorous examination, based on a complete and current factual record, that it intends to apply to the other rules at issue in the omnibus proceeding.

¹² Cf. Statement of Judge Sentelle, concurring in part and dissenting in part (stating that he would vacate the local ownership rule because “the Commission has failed to justify affirmatively the need for any duopoly rule, with or without an eight voices exception . . .”). *Sinclair*, 284 F.3d at 171-2.

¹³ We note, however, that in the FCC’s response to Sinclair’s petition for rehearing, the Commission characterized the defect in the local ownership rule as “easily remediable,” suggesting that the Commission viewed the remedy as simply expanding the categories of relevant voices to be consistent with the radio-television cross-ownership rule. See Opposition of Respondents to Sinclair’s Petition for Rehearing or Rehearing En Banc filed by Federal Communications Commission (June 18, 2002). For the reasons discussed herein, such an approach would not be consistent with the FCC’s desire to craft consistent, judicially sustainable rules.

II. NBC'S INTEREST IN THE MEDIA OWNERSHIP RULES

NBC is a large and diverse international media company with a substantial interest in the FCC's media ownership rules. In addition to the NBC Television Network, the company, through the NBC Television Stations Division, owns and operates 14 NBC-affiliated television stations. In April 2002, NBC purchased Telemundo Communications Group, Inc., the second-largest U.S. Spanish-language television network. In addition to its network activities, Telemundo owns and operates 11 television stations affiliated with the Telemundo network.¹⁴ NBC's acquisition of Telemundo resulted in the creation of duopolies in five Designated Market Areas ("DMAs"): New York, Los Angeles, Chicago, Dallas, and Miami. NBC's subsequent acquisition of Station KNTV, San Jose, created a sixth duopoly for the company in the San Francisco-Oakland-San Jose DMA. In addition, because Telemundo owned two stations in the Los Angeles DMA at the time of the merger, NBC sought and was granted a 12-month waiver in which to come into compliance with the duopoly rule in Los Angeles.¹⁵

III. THE CURRENT LOCAL TELEVISION OWNERSHIP RULE DRAWS ARBITRARY LINES AND UNLAWFULLY DISCRIMINATES AGAINST OWNERS AND OPERATORS OF TELEVISION STATIONS

The FCC's current local television ownership rule prohibits a party from owning more than one full-power television station in a DMA unless it can demonstrate that after its acquisition of a second station in the DMA, eight independently owned full power

¹⁴ NBC also owns CNBC, a business and financial news channel, reaching 198 million homes worldwide, and (in partnership with Microsoft), MSNBC, a cable-news channel and a preeminent news site on the Internet. NBC's operations include additional investment and programming activities, including CNBC Europe and CNBC Asia; equity investments in Arts & Entertainment, the History Channel, ValueVision, Inc. (ShopNBC), Rainbow Media Holdings, Inc., and Rainbow Media Group; and a non-voting interest in Paxson Communications Corporation.

¹⁵ See *Telemundo Communications Group, Inc. and TN Acquisition Corp.*, 17 FCC Rcd 6958 (2002) ("Telemundo").

television stations will remain in the DMA (the Grade B contours of which overlap the Grade B contours of at least one of the stations in the proposed combination) and at least one of the two stations to be commonly owned is not among the four highest-ranked stations in the market based on audience share.¹⁶ The rule generally does not permit the common ownership of more than two full-power television stations in the same DMA regardless of the size of the market or the number of independent stations remaining post-merger.¹⁷

The form and structure of this rule, and in particular its resort to a number of arbitrarily drawn distinctions, very much resemble the other ownership rules which will be the subject of the FCC's omnibus review. In particular, the general prohibition against owning more than two television stations in a single market – without giving any consideration to market size, concentration or competition – is on its face no less arbitrary than the other ownership rules that the FCC will be examining. Therefore, the omnibus rulemaking logically must include a reexamination of this aspect as part of the Commission's overall effort to rationalize the ownership rules as a whole. An isolated reconsideration of the definition of independent voices – already mandated by the *Sinclair* decision – would leave in place other arbitrary distinctions that produce irrational results and discriminate against station owners.

¹⁶ 47 C.F.R. § 73.3555(b) (2001).

¹⁷ It is possible to seek and obtain waivers from this rule. In addition, because satellite stations are not counted as attributable full-power stations for purposes of the duopoly rule, 47 C.F.R. § 73.3555, Note 5 (2001), it is possible for a single entity to own two full-power television stations and one or more satellite stations in the same television market. See *Paxson Communications of San Juan, Inc. and LIN Television Corp.*, 16 FCC Rcd 14139 (2001); *Television Satellite Stations Review of Policy and Rules*, 6 FCC Rcd 4212 (1991). Satellite status is determined on a case-by-case basis in accordance with criteria established by the Commission. These criteria include the inability of the station to operate on a standalone basis and the unwillingness of a buyer to acquire the station as a standalone facility. The satellite policy thus rests in part on the questionable financial viability of the satellite station as a standalone facility.

Definition of Voices. As noted above, the Commission has been directed by the court of appeals in *Sinclair* to justify or reconsider the definition of “voices” in the local television ownership rule. The court concluded that, unlike the radio/television cross ownership rules, the local television ownership rule improperly ignores the availability of other media in addition to full-power television stations in assessing the competitive impact of a proposed combination. Indeed, the proliferation of media voices that has arisen since the adoption of the local television ownership rule cannot be overstated. As Exhibit 1 attached hereto demonstrates, in the top 15 markets, television stations comprise on average less than 20% of the total separately owned media outlets serving these markets, taking into account only radio stations, full-power television stations, English-language newspapers, and cable television systems.¹⁸ Clearly, any rational local ownership restriction must reflect the current realities of the media sector.

Number of Voices. A related issue concerns the requirement that there must be eight independent voices to permit the ownership of more than one station in a market. In *Sinclair*, the petitioner challenged this aspect of the rule as well, and argued that the Commission had “plucked the number eight out of thin air.”¹⁹ Ultimately, the court elected not to address the issue, but it properly noted that “[t]here is an obvious interrelatedness between the Commission’s choice of eight and its definition of ‘voices’”

¹⁸ Exhibit 1 includes each owner of television stations, radio stations, cable systems and daily English-language newspapers as a separate voice in each DMA.

¹⁹ *Sinclair*, 248 F.3d at 158.

and that on remand, “the Commission conceivably may determine to adjust not only the definition of ‘voices’ but also the numerical limit.”²⁰

Limitation on Two Stations. Perhaps most importantly, the current rule effectively caps local ownership at two full-power television stations. This limit applies to all markets with eight or more voices, without taking any account of differences among these markets in terms of their size, the number of independent voices, or any other indicator of diversity or competition. It therefore arbitrarily treats as identical all markets with at least eight voices, whether the market is Los Angeles, which has 20 independent television stations, or Birmingham, which has only nine independent television stations. (*See Exhibit 1*)

If the definition of independent voices were expanded to include radio, cable operators and newspapers, which is a more accurate and updated measure of the availability of media outlets, the contrasts would be even starker: the rule would treat Los Angeles, which would have 94 voices, as identical to Detroit, which would have 44 voices. (*See Exhibit 1*) The Commission itself has acknowledged in other contexts that the size of the market makes a material difference in making decisions based on assessments of media concentration and diversity.²¹ Yet the local television ownership rule ignores this factor entirely in the context of markets with more than eight voices.

By disregarding differences in actual market size, the rule produces perverse results that cannot be reconciled with competitive or diversity considerations. On its

²⁰ *Id.* at 162.

²¹ *See Fidelity Television, Inc. and Viacom Television Stations Group of Los Angeles, LLC*, 17 FCC Rcd 8567 (2002); *Telemundo*, *supra* note 15, at 5.

face, the rule prohibits “triopolies” (absent a waiver) which by any conventional measure would produce less concentration than many permitted duopolies. For example, in the Chicago DMA, a permitted duopoly consisting of Fox’s Station WFLD and NewsWeb’s Station WPWR-TV²² would control more ad dollars (23%) than would a triopoly consisting of NBC’s Station WMAQ, Telemundo’s Station WSNS-TV and Paxson’s Station WCPX(TV), whose combined advertising revenues in that market would total 19%. (See Exhibit 2) Similarly, a hypothetical triopoly in Los Angeles consisting of Fox’s KTTV and KCOP (UPN) combined with Entravision’s KJLA (HTV) would give Fox a combined 21.1% share of advertising revenues, while in the smaller Birmingham, Alabama, market, a permitted duopoly comprised of Fox’s Station WBRC and UPN affiliate Station WABM would give Fox a 37% share of the advertising revenues in that market.²³ (See Exhibit 3)

In addition to arbitrarily ignoring market size, the rule unfairly and irrationally discriminates against television station owners that do not also own video programming distribution services. If and when the FCC implements the court of appeals’ directive in *Fox* to vacate the cable/television cross-ownership rule, an entity which owns or controls a cable system with hundreds of channels of programming will be able to acquire up to two full-power television stations in the same market. Moreover, that entity also could own satellite stations in that market and be a supplier of programming to both the television stations *and* the cable system. Yet a competitor entity which happens not to own any cable systems or satellite stations (such as NBC) cannot respond to this

²² An application for consent to the transfer of control of Station WPWR-TV from NewsWeb to Fox was granted by the Commission on August 12, 2002. See FCC File No. BALCT-20020628AAF.

increased competition by acquiring a third full-power television stations in that market (absent an FCC waiver). This result makes no sense and cannot be justified by any appeal to competitive or diversity objectives. It is no answer that the competitor is free to acquire a cable system, since the FCC's rules should not dictate the adoption of a particular business model as the only viable competitive alternative.

Many of the foregoing issues have recently been raised in a different context by Viacom with respect to the radio-television cross-ownership rule.²⁴ That rule is structured similarly to the local television ownership rule. It also involves the application of an identical absolute ownership cap to markets that exceed a numerical threshold of independent voices (in that case 20 voices), without regard to differences in the actual sizes of the markets.²⁵ Viacom argued that the rule arbitrarily treats alike markets of vastly different characteristics and, in combination with the repeal of the cable/broadcast cross-ownership rule, could produce anomalous results that run counter to the Commission's stated intention of crafting internally consistent, evenhanded regulations based on the realities of today's media marketplace. The Commission has determined to include the radio-television cross-ownership rules in the upcoming omnibus proceeding.²⁶ The same logic dictates that the entirety of the local television ownership rules – including the prohibition on owning three or more stations regardless of market size – also be included in the omnibus proceeding.

²³ The foregoing examples are hypothetical and are intended only to illustrate the operation of the existing rule. NBC is not expressing, and is not asking the FCC to express, any view regarding the hypothetical transactions.

²⁴ See *Viacom Petition*, *supra* note 5, at 2.

²⁵ The current radio-television station cross-ownership rule, however, permits the common ownership of substantially more broadcast stations in a market (potentially up to a maximum of eight stations) than does the television local ownership rule, which is capped at two.

²⁶ See *Media-Ownership Rules Review*, *supra* note 1, at 1.

The time has come for the agency to develop a more precise and sophisticated tool for assessing competition and diversity in the media marketplace. The local television ownership rule, like the other rules under review in the omnibus proceeding, clearly will benefit from the development of an objective and standardized measure of the competitive impact of proposed media combinations based on a solid factual record. One of the Commission's stated goals in conducting an omnibus proceeding on the ownership rules is to achieve consistency in its rules by basing them on a sound evidentiary foundation, and the Commission has launched an ambitious and laudable effort to collect the relevant information. The upcoming rule making proceeding thus presents a unique opportunity, in the Chairman's words, to "get the right answers" with respect to all of the rules at issue, including all aspects of the local television ownership rule, based on a fresh and comprehensive factual record.

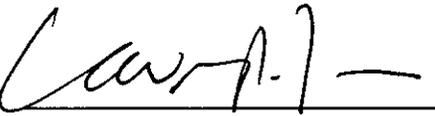
IV. CONCLUSION

For the foregoing reasons, NBC urges the Commission to take advantage of the opportunity afforded by the upcoming omnibus media ownership rule making proceeding to reexamine the local television ownership rule in a comprehensive fashion, including in particular a review of the limitation of two full-power stations in each market. As part of that review, the Commission should abandon the current rule which is based on arbitrary line-drawing. Instead, to the extent that any rules are necessary, they must be based on sound factual and empirical data and must be scaled to reflect the size and diversity of each television market. NBC stands ready to participate in that rule making proceeding

and to assist the Commission in the critical task of bringing the Commission's regulatory framework in line with the 21st century media marketplace.

Respectfully submitted,

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August 26, 2002



Exhibit 1: Breadth of Local Media Voices

DMA	Television Voices ⁽¹⁾	Cable Operators ⁽²⁾	Radio Voices ⁽³⁾	Newspaper Voices ⁽⁴⁾	Total Market	% TV of Media Voices
1 New York	17	9	30	29	85	20%
2 Los Angeles	20	23	28	23	94	21%
3 Chicago	14	17	42	18	91	15%
4 Philadelphia	18	8	26	21	73	25%
5 San Francisco	18	15	24	16	73	25%
6 Boston	14	15	38	27	94	15%
7 Dallas	13	20	22	17	72	18%
8 Washington	14	23	21	21	79	18%
9 Atlanta	13	22	36	15	86	15%
10 Detroit	8	9	18	9	44	18%
11 Houston	15	19	25	11	70	21%
12 Seattle	14	24	28	12	78	18%
13 Minneapolis	10	47	19	10	86	12%
14 Tampa	14	14	19	8	55	25%
15 Miami	13	9	20	2	44	30%
Total	215	274	396	239	1,124	19%
39 Birmingham	9	20	19	9	57	16%

Notes:

(1) From BIA TV Market Report 2002; each station group owner counts as one voice.

(2) From Cable Online; each cable operator serving a DMA counts as one voice.

(3) From BIA Radio Market Report 2002; each station group owner counts as one voice.

(4) From Bacon's Newspaper Directory; each newspaper group owner with a daily, English-language circulation counts as one voice.

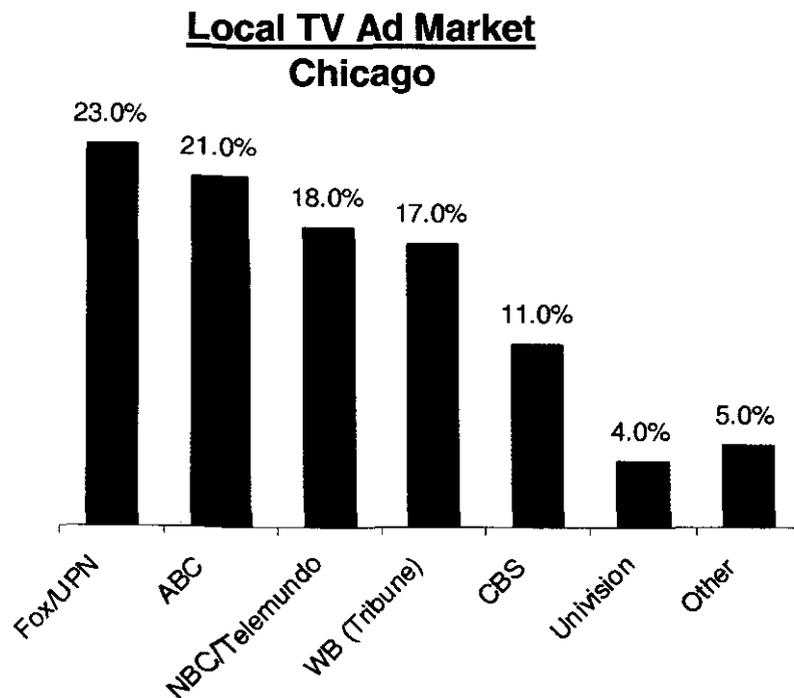
**TV Voices Comprise on Average Less Than 20% of Media Voices
Available in Top 15 DMAs**



Exhibit 2: Chicago Triopoly Case – Local Ad Share Impact (Hypothetical Illustration)

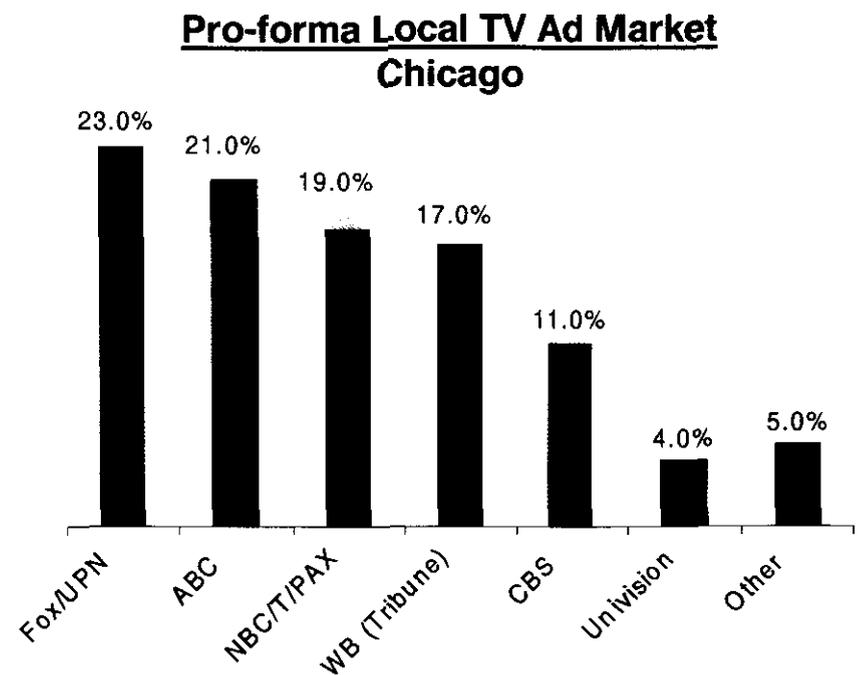
Permissible Combination:

Fox acquired the NewsWeb UPN affiliate



Combination Requiring Waiver:

NBC / Telemundo acquires Paxson's WCPX (Hypothetical)



**Permitted Fox/UPN Duopoly Will Result in Greater
Ad Share than NBC/TLMD/PAX Triopoly**



Exhibit 3: Birmingham vs LA Case – Local Ad Share Impact (Hypothetical Illustration)

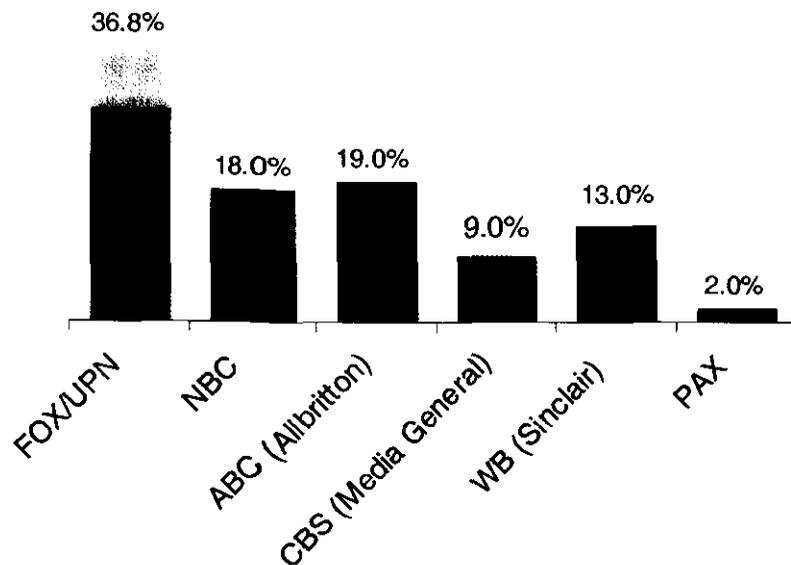
Permissible Combination:

NewsCorp owns WBBC (Fox) acquires
Sinclair's UPN Affiliate (WAB)
(Hypothetical)

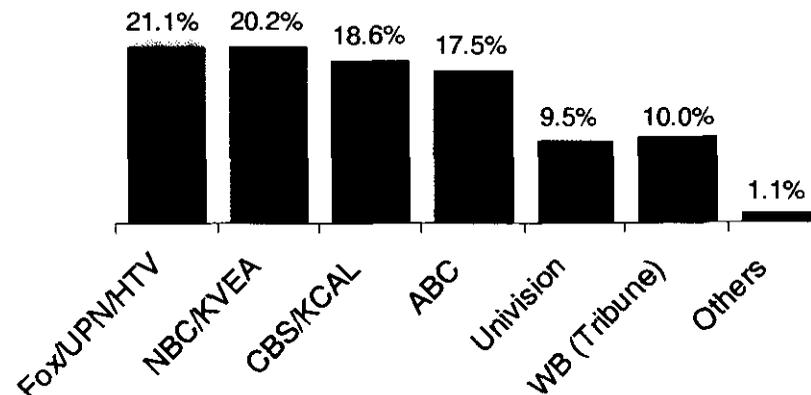
Combination Requiring Waiver:

NewsCorp owns KTTV (FOX) and KCOP
(UPN) acquires Entravision's KJLA (HTV)
(Hypothetical)

Pro-forma Local TV Ad Market Birmingham



Pro-forma Local TV Ad Market Los Angeles



**Permitted FOX/UPN Duopoly in Birmingham Would Result in Substantially
Greater Ad Share Concentration than FOX/UPN/HTV Triopoly in LA**

EXHIBITS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petition for Rulemaking" of National Broadcasting Company, Inc. was served by electronic mail this 26th day of August, 2002, upon the following:

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