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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Applications for Transfer of Control of Hispanic Broadcasting Corp., and Certain Subsidiaries, Licensees of KGBT (AM, Harlingen, Texas et al. (Docket No. MB 02-235, FCC File Nos. BTC-20020723ABL, et al.)

Dear Ms. Dortch:

Spanish Broadcasting System, Inc. (“SBS”) has submitted several filings for the record of this proceeding demonstrating that Spanish-language media constitute separate markets for competition and diversity purposes. The Applicants have argued that the Commission has ruled “that there is no separate Spanish-language market, and that stations that air programming in a Spanish format are to be treated the same as stations with any other format for multiple ownership purposes,” and go so far as to state that “Spanish-language programming is merely another programming format.”¹ These arguments share the essential qualities of an urban myth: oft-repeated and always wrong. Indeed, the Applicants’ assertions on this matter do not survive examination of the Commission precedent they cite.

On the contrary, for thirty years the Commission’s precedents have acknowledged that foreign-language stations, and Spanish-language stations in particular, serve a distinct audience. Indeed, as recently as April 2002, the Commission observed that Spanish-language stations serve a “different

¹ *Ex parte* letter from Scott Flick, Counsel for Univision Communications, Inc. and Roy Russo, Counsel for Hispanic Broadcasting Corp., to Chairman Powell, FCC, Docket No. MB 02-235, FCC File Nos. BTC-20020723ABL, *et al.*, at 5 (May 14, 2003) (“Univision-HBC May 14 Letter”).

audience” from their English-language counterparts for diversity purposes,² and “do not compete directly” with English-language stations for advertising dollars.³ Moreover, the Commission has long held that its *laissez faire* policy on entertainment format changes was not intended to apply to news, public affairs and informational programming and that foreign-language programming in particular raises issues that should not be swept within the ambit of the entertainment format policy.

We first examine the spurious claim that the Commission has held “that there is no separate Spanish-language market.” The Applicants’ citation to *Spanish Radio Network and Licensee Corporation #1 and Licensee Corporation #2*, 10 FCC Rcd 9954 (1995), *see* Univision-HBC May 14 Letter at 5, actually provides an example of the longstanding FCC recognition of the uniqueness of Spanish-language programming. In that decision, the FCC expressly noted that “Spanish speakers may be perceived by those seeking to reach them as a distinct market...” *Id.* ¶8. Moreover, the Commission went on to reject petitioners’ arguments to apply the general media ownership rules and their metrics by counting only Spanish-language stations because, it observed, the multiple ownership rules were written for the general media markets and were not “geared toward such a market definition” and, therefore, unintended negative consequences might result. *Id.* ¶¶8-9. Thus, far from finding that a separate Spanish-language market did not exist, the Commission effectively found that *despite* the fact that Spanish speakers may be perceived as a distinct market, its multiple ownership rules were not geared to account for that fact.⁴ Indeed, *Spanish Radio Network* confirms that detailed analysis of this merger for diversity and competition purposes cannot be swept away with a reference to the Commission’s media ownership rules, which are based on an evaluation of market concentration and entry barriers in English-language broadcasting, not Spanish.

Moreover, the Commission has in fact relied on the distinction between English-language and Spanish-language stations in its analysis of the diversity and competition policies underlying its

² *See Telemundo Communications, Inc. (Transferor) and TN Acquisition Corp. (Transferee)*, 17 FCC Rcd 6958, 6977 (2002).

³ *Id.* at 6978-79.

⁴ The *Spanish Radio Network* decision ruled that the transactions were in compliance with the rules, but it did not consider the matter further; it did not analyze the public interest implications, notwithstanding technical compliance with its ownership regulations. Here, where a record has been amassed to establish the public interest harms that would follow from the proposed transaction, the FCC has clear statutory obligations to consider the matter further. *See* Section 309(d)(1), (2), 47 U.S.C. § 309(d)(1), (2); *see also Astroline Communications Co., L.P. v. FCC*, 857 F.2d 1556, 1570 (D.C. Cir. 1988) (“[W]e cannot approve the Commission’s failure to explain whether and how evidence of extreme market concentration would relate to its generalized duty to consider anti-competitive effects of license transfers” or how such concentration would relate to the Commission’s ownership regulations, related precedents and the public interest) (*citing U.S. v. FCC*, 652 F.2d 72, 81-88, 102-04 (D.C. Cir. 1980)).

broadcast multiple ownership rules. In *Telemundo*, the Commission granted a 12-month waiver of the TV duopoly rule to permit common ownership of three TV stations in the Los Angeles market. In doing so, the FCC found that diversity would not be adversely affected because, *inter alia*, the Telemundo stations “each have a different set of programming designed for Spanish-language viewers and are among twenty-two different radio and television stations that are programmed towards the Hispanic audience in the Los Angeles market,”⁵ and that, “[o]n the other hand, KNBC broadcasts to a wider audience exclusively in English.”⁶ Similarly, the Commission determined that “we are not as concerned in this case that the competition for advertising dollars will be diminished because the Spanish-language format of the Telemundo stations means that *they do not compete directly with NBC’s station.*”⁷ Thus, in direct contradiction to the facile arguments of the Applicants, the Commission has already determined that (1) Spanish-language broadcast stations serve a separate audience for diversity purposes, and (2) Spanish-language broadcast stations do not compete directly with English-language stations—in other words, that they constitute a separate market.

As a matter of policy, the importance of language to the goals of national communications policy is well-established and has been consistently recognized and respected by the FCC. Indeed, for more than three decades the FCC has consistently observed that Spanish-language stations serve a distinct audience as compared to English-language stations. In 1972, the FCC adopted rules governing cable system carriage of broadcast television signals that allowed cable systems to carry distant foreign-language stations without counting such stations against their quota of distant non-network stations. This action was justified, the FCC explained, because foreign-language stations “fulfill an important need for what generally is an audience limited in number,” and thus the importation of such distant signals would not “have significant impact on the totality of local television service.”⁸

In a subsequent 1976 rulemaking on specialty stations, Spanish International Communications Corporation (“SICC”) sought greater protection for local Spanish-language stations from competing imported distant Spanish-language stations. In affirming its treatment of foreign-language stations, the FCC determined:

What we seek to isolate in the instant proceeding is programming which, by virtue of its nature or its content, is not of general interest to the average viewer. To subscribe to SICC’s argument we must hold that the

⁵ *Telemundo*, 17 FCC Rcd at 6977.

⁶ *Id.*

⁷ *Id.* at 6978-79 (emphasis added).

⁸ *Amendment of Part 74, Subpart K of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems, et seq.*, Cable Television Report and Order, 36 FCC 2d 143, 180-81 (1972).

average television viewer would find a film, news program, or sporting event of equal interest regardless of whether it is presented in English or Spanish. Suffice it to say we cannot so decide: *a program broadcast in a foreign language is of little interest to any but those fluent in the language.*⁹

Similarly, when the FCC adopted the newspaper/broadcast cross-ownership prohibition, 47 C.F.R. § 73.3555(d), it excluded foreign-language newspapers from the rule because “[t]heir situation would be different, for much of the audience of a station owned by such an entity would receive that entity’s views for the first time.”¹⁰ Thus, only “English” daily newspapers are encompassed by the rule.

The FCC also has acknowledged policy distinctions for foreign-language broadcasters in the context of modifications of Designated Market Areas (“DMAs”) for the purpose of the must carry rules. Beginning at least in 1995, and continuing to the present, the FCC has taken into account the relatively more limited audience of a foreign-language broadcast station in the context of determining a station’s “historical viewing” for purpose of modifying the cable carriage rights of such stations. As the Cable Services Bureau observed,

[w]e have previously recognized that Spanish-language stations . . . are capable of offering desirable diversity of programming, yet typically attract limited audiences. We continue to believe. . . that the fact that

⁹ *Amendment of Part 76, Subparts A and D of the Commission's Rules and Regulations Relative to Adding a New Definition for “Specialty Station” and “Specialty Format Programming” and Amending the Appropriate Signal Carriage Rules, First Report and Order*, 58 FCC 2d 442, ¶24 (1976) (emphasis added).

On reconsideration, the Commission pointed out that it addressed on an *ad hoc* basis situations in which the importation of a distant foreign-language station adversely affected a local station competitively, including specifically with respect to Spanish-language stations. See *Amendment of Part 76, Subparts A and D of the Commission's Rules and Regulations Relative to Adding a New Definition for “Specialty Station” and “Specialty Format Programming” and Amending the Appropriate Signal Carriage Rules, Memorandum Opinion and Order*, 608 FCC 2d 661, ¶9 (1976) (“We noted in the First Report and Order that where cable carriage of distant Spanish-language programming has been shown to produce a critically adverse effect on a local Spanish-language station, relief has been granted.”) (citations omitted).

¹⁰ *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 FCC 2d 1046, ¶101 (1975), *aff’d sub. nom. FCC v. National Citizens Committee for Broadcasting, et al.*, 436 U.S. 775 (1978).

such stations attract limited audiences must be taken into account in determining the equities concerning such stations' rights to cable carriage. (Internal quotation marks omitted).¹¹

And the Media Bureau has repeatedly followed this analysis up to the present.¹²

In addition, Spanish-language networks hold a permanent waiver of the rule prohibiting networks from representing affiliated stations in national spot sales. In granting the permanent waiver, the FCC stated that in the absence of the prior temporary waiver (originally granted in 1978 to Univision's predecessor in interest), the development of new foreign-language programming services would have been hampered, and that the waiver continues to further the FCC's "longstanding goals; encouraging the growth and development of new networks; fostering foreign-language programming; increasing programming diversity; strengthening competition among stations; and fostering a competitive UHF service."¹³ These goals were once again confirmed in the Media Bureau's grant of a waiver to Azteca America late last month.¹⁴ Again, if the FCC did not intend here to reassert its consistent historical position that Spanish-language broadcasting is distinct from general media, its continued carveout under the national spot sales rule is irrational.

Ignoring this significant history, the Applicants have attempted to trivialize Hispanic programming as "merely another program format" and thus an issue of supposed indifference to this agency.¹⁵ But their reference to the Commission's policy on licensee changes in entertainment format is inapposite to the question of whether the public interest in ensuring that the Spanish-speaking community's need for informational programming and access to information from independent sources is adequately met.¹⁶

¹¹ *Tele-Media Co.*, 10 FCC Rcd 8615, 8617 (CSB 1995).

¹² *See, e.g., Norwell Television, LLC*, 17 FCC Rcd 16085, ¶13 (MB 2002); *Coxcom, Inc.*, 17 FCC Rcd 17192, ¶¶8, 12 (MB 2002); *Comcast Cablevision of Danbury*, 18 FCC Rcd 274, ¶8 (MB 2003).

¹³ *Amendment of Section 73.658(i) of the Commission's Rules*, 5 FCC Rcd 7280, ¶12 (1990) (citations omitted).

¹⁴ *See Azteca International Corporation (Azteca America)*, 18 FCC Rcd 10662, ¶¶2, 4 (MB 2003).

¹⁵ Univision-HBC May 14 Letter at 5.

¹⁶ Recent U.S. Census Bureau data report that there are more than 38 million Hispanic Americans, now the single largest minority group in the U.S. The record in this proceeding demonstrates that 25% of Spanish-speaking Americans rely on Spanish-language broadcast

At the foundation of its decision to no longer consider format changes, the FCC made clear that news and information programming, including foreign-language programming, are far more than a mere entertainment format. In its *Format Changes Policy* proceedings, the Commission distinguished between non-entertainment programming such as news, public affairs and informational services and the entertainment programming that was the subject of the proceeding.¹⁷ Significantly, when challenged before the Supreme Court on the grounds that the FCC's entertainment format policy made no provision for the role of foreign-language programming in providing information to non-English-speaking citizens, the FCC (in oral argument) responded that the policy in question applied only to entertainment programming, not to informational programming.¹⁸

More recently, the FCC reserved judgment on the question of whether the "general policy of declining to take proposed format changes into account when reviewing assignment or transfer applications should be altered where the proposed transaction may deprive the listening public of foreign-language or ethnic informational programming," because, *inter alia*, in that case the assignor planned to continue the foreign-language programming in question on another station it owned in the

media exclusively for news and information programming, while 40% of Spanish-speaking Americans predominantly rely on Spanish-language broadcast media for such programming, and even bilingual Spanish-speaking Americans (an additional 28% of Spanish-speaking Americans) predominantly choose to obtain television news, variety, and talk programs from Spanish-language broadcast outlets. See Letter of Philip L. Verveer, *et al.*, to Marlene H. Dortch, Secretary, FCC, Docket No. MB 02-235, FCC File Nos. BTC-20020723ABL, *et. al.*, at 2-4 (June 20, 2003). That letter further explained that such use of Spanish-language broadcast media is no mere preference, but reflects a need for culturally meaningful and comprehensible news and information. See *id.* at 4-7. Thus, from the perspective of Spanish-speaking Americans, broadcasting in the Spanish-language is no "mere format."

¹⁷ See *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Notice of Inquiry*, 57 FCC 2d 580, ¶4 (1976) (contrasting the Commission's treatment of news, public affairs, and informational programming with its treatment of entertainment programming); see also *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order*, 60 FCC 2d 858, ¶1, *passim* (1976) ("*Format Policy MO&O*") (proceeding addresses policies with respect to "entertainment formats of broadcast stations," and the order consistently refers to "entertainment formats" as the subject of its substantive discussion); *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order [On Reconsideration]*, 66 FCC 2d 78, ¶1, *passim* (1976).

¹⁸ See *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 604 n.46 (1981).

market.¹⁹ This stance is consistent with the Supreme Court's admonition in *WNCN Listener's Guild* that "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."²⁰ Plainly, foreign-language broadcasting cannot be said to be a mere "format" in the same sense as "classical music" or "progressive rock" entertainment programming.

Thus, the Commission's consideration of format changes in the context of Spanish-language broadcasting cannot be understood as a finding "that Spanish-language programming is merely another program format."²¹ Indeed, in the case cited by the Applicants, *Applications of Brawley Broadcasting Co. and KAMP, Inc. (Assignor's) and Entravision Holdings, LLC (Assignee)*, 13 FCC Rcd 21119 (1998) ("*Brawley-Entravision*"), the petitioner challenged the transaction on the basis that the acquisition would "come[] pretty close to a monopoly" in the market in question, and that Entravision would convert two of the radio stations being acquired to Spanish-language programming.²² Entravision countered that the TV station it owned was a "Spanish-language station that is specifically tailored to the Spanish speaking community rather than to the market in general,"²³ thereby effectively arguing that such stations are not part of the "general" market. While the FCC agreed that a licensee has discretion to change formats so long as it does not abuse that discretion, it went on to cite with approval Entravision's plans to increase local news and weather coverage as well as local public affairs programming and PSAs in both Spanish and English.²⁴ The transaction was approved at least in part, therefore, on the basis that the quality and quantity of information available to the Spanish-speaking community would be enhanced. Plainly, this holding cannot be construed as a broad finding that Spanish-language broadcasting is a "mere format;" rather, it correctly acknowledges that the diversity issues implicated by foreign-language broadcasting go well beyond mere changes in entertainment format.

At base, the Applicants' argument raises a true red herring, since the pending application does not involve a change of format. What it does involve is a dramatic reduction in the number of independent "voices" available to Hispanic Americans. The Commission's conclusion that "the

¹⁹ *Applications of Multicultural Radio Broadcasting, Inc. (Assignor) and WADO-AM License Corp. (Assignee)*, Memorandum Opinion and Order and Notice of Apparent Liability, 15 FCC Rcd 20630, ¶11 (2000).

²⁰ *WNCN Listener's Guild*, 450 U.S. at 603.

²¹ Univision-HBC May 14 Letter at 5.

²² *Brawley-Entravision* ¶3.

²³ *Id.* ¶10.

²⁴ *Id.* ¶14.

marketplace is the best way to allocate entertainment formats in radio”²⁵ and thereby “promot[e] the greatest diversity of listening choices for the public”²⁶ is undoubtedly correct. But in order to rely upon the marketplace to achieve those results, the FCC must (where possible) deter and prevent the occurrence of market failures—here the acquisition of monopoly power.

In sum, equating language preference to broadcast format, as the Applicants have done, is akin to equating the Commission’s document translation rules, 47 C.F.R. § 1.355, to its document format rules, 47 C.F.R. § 1.49. The first is essential if the Commission staff is going to understand submitted materials. The second is merely a standardized preference.

To meet its public interest review obligations under the Communications Act, the FCC must undertake a detailed analysis of diversity and competition specific to the Spanish-language broadcast markets implicated by this merger. In conducting this analysis, the Commission must take into account its long-held and often-expressed understanding that foreign-language stations, and Spanish-language stations in particular, serve a distinct audience. The Commission’s policy on changes in entertainment formats will plainly not be offended by such an analysis, as it is simply not implicated. Spanish-speaking Americans’ access to meaningful communication in the form of news and

²⁵ *Format Policy MO&O* ¶16.

²⁶ *Id.*

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information from a diversity of broadcast sources is specifically implicated, however, and substantially threatened by the proposed merger.

Respectfully submitted,

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