

September 5, 2003

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:

The status of the Univision Communications-Hispanic Broadcasting transfer application following the Third Circuit's imposition of a stay of the new media ownership rules in *Prometheus Radio Project*¹ is this:

1. The FCC cannot go forward under the new rules because they have been stayed.
2. The FCC cannot go forward under the old rules because the FCC itself has thoroughly discredited them, finding them inadequate in several ways immediately relevant to this transaction.
3. The only permissible course is a specific review of the proposed transfer of the kind required by Section 309(e) of the Communications Act.

Spanish Broadcasting System, Inc. ("SBS") has demonstrated that the proposed merger will dramatically harm both competition and diversity in the Spanish-language broadcasting market, and that to meet its obligations under the Communications Act, the Commission must consider and fully evaluate the merger's effects on consumers of Spanish-language programming and the clear loss to diversity and competition it portends. The implications of the recent decision of the Third Circuit to stay the effective date of the Commission's new media ownership rules pending judicial review on the merits highlights the critical importance of this statutorily-mandated review.

SBS has demonstrated that neither the existing ownership rules nor the now-stayed new ownership rules account for the unique diversity and competition concerns for Spanish-language

¹ See *Prometheus Radio Project v. Fed. Communications Comm'n*, No. 03-3388 (3d Cir. Sept. 3, 2003) (order granting stay).

broadcasting presented by the proposed merger. Thus, even in the absence of the stay, rote application of the rules to this merger would be illegal. This fact is placed in stark relief by the stay of the new rules, because the new rules were intended, *inter alia*, to cure certain important deficiencies in the old regulations. These deficiencies are described in the Media Ownership Order and in statements of the FCC Commissioners voting to approve the new rules.²

For example, the Commission found that “the current local radio ownership rule does not serve the public interest as it relates to competition...,” because “...the current rule uses a methodology for defining radio markets and counting the number of radio stations in a market that has not protected against undue concentration in local radio markets.” Media Ownership Order ¶ 241. Specifically, the FCC concluded “that the contour-overlap system should be replaced by a more rational and coherent methodology based on geographically-determined markets to promote more effectively our competition policy goals.” *Id.* ¶ 249. The FCC made clear that its action was necessary even if it could not be demonstrated that actual harm had resulted from the current market definition:

We do not agree that we must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.

Id. ¶ 261. The Commission simply cannot approve a merger by applying a rule that relies on a market definition found by the Commission to be irrational, incoherent, and distorted. In his separate statement, Chairman Powell reiterated this finding, acknowledging that the current definition for radio markets “is unsound and produces anomalous and irrational results, undermining the purpose of the rule.” Media Ownership Order, Separate Statement of Chairman Powell, at 7.

Chairman Powell’s separate statement also pointed out the deficiencies of the existing media ownership regulations in a more general sense, stating:

The most important public interest benefit, however, is that we have reinstated meaningful limits that are once again enforceable - the existing rules largely having been taken out of action, suffering from their judicially-delivered wounds.

Id. at 5, and

Given the court’s requirement that we consider the current competitive market, keeping all of the rules in their current form simply could not be justified as “*necessary in the public interest.*” Those rules failed to account for the dramatic changes in the media

² 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, MB Dkt. Nos. 02-277 and 03-130; MM Dkt. Nos. 01-235; 01-317; and 00-244, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) (“Media Ownership Order”).

landscape over the last several decades, and suffered from inconsistency and incoherency that could not be squared with the statute or the court decisions without modification.

Id. at 2 (emphasis in original). Chairman Powell further characterized the new rules as a more sophisticated approach to competition, diversity and localism:

We adopted a more sophisticated way to measure the competitiveness of media markets; the robustness of the marketplace of ideas; and the responsiveness of broadcasters to local needs. The new broadcast ownership limits adopted today, are carefully balanced to foster a vibrant marketplace of ideas, promote vigorous competition and ensure that broadcasters continue to serve the interests of their local communities.

Id. at 5. Chairman Powell provided further detail on the failure of the existing rules to provide a “consistent and rational” metric for protecting diversity:

The principal shortcoming of our prior diversity analysis was the failure to capture in a reasonable way the relative importance of different outlets for purposes of viewpoint diversity... Our Diversity Index dramatically improves upon those frameworks by assigning weights to different outlet types... In weighting different outlets according to their relative value to citizens, the DI provides the Commission with a far more consistent and rational metric for evaluating each ownership limit and, where necessary, establishing new limits.

Id. at 8. The Chairman also noted that the new rules created greater opportunities for minorities:

We embrace our longstanding objective of encouraging greater ownership of broadcast stations by women and minorities. We further this objective by creating greater opportunities for new entrants in the broadcasting industry by carving out special transactional opportunities for small businesses, many of which are owned by minorities and women.

Id. at 6.

Commissioner Abernathy stated that “[w]e have modified these restrictions because, not only do the former rules fail to promote competition, localism, and diversity, but they may actually be *harming* these goals.” Media Ownership Order, Separate Statement of Commissioner Abernathy, at 2 (emphasis in original). Moreover, Commissioner Abernathy argued that the new rules provided greater opportunities for minorities, stating that the Media Ownership Order “also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned.” *Id.* at 4.

The evidence in the record of this proceeding demonstrates that the proposed merger of Univision and HBC will harm competition in the Spanish-language broadcasting market, and will dramatically reduce the diversity of sources of Spanish-language broadcasting available to the millions of Hispanic Americans who rely on such stations for their news and information. In these

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circumstances, the Commission cannot grant the application consistent with its obligations under Section 309 of the Communications Act. This is all the more true in light of the stay of the new media ownership rules and the Commission's findings as to the inadequacies of the existing rules in protecting diversity, competition, and opportunities for minorities. A hearing on the merger application pursuant to Section 309 is the only way to proceed with the FCC's review of this merger.

Respectfully submitted,

/s/ Michael G. Jones

Philip L. Verveer
Sue D. Blumenfeld
Michael G. Jones
David M. Don
WILLKIE FARR & GALLAGHER
1875 K Street NW
Washington, DC 20006
Telephone: (202) 303-1000

Attorneys for Spanish Broadcasting System, Inc.

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Paul Gallant
Stacy R. Robinson
Jordan B. Goldstein
Dan Gonzalez
Tony Dale
Johanna Mikes
Eric Bash
W. Kenneth Ferree
Robert Ratcliffe
David Brown
Scott R. Flick, Counsel for Univision Communications, Inc.
Roy R. Russo, Counsel for Hispanic Broadcasting Corp.
Harry F. Cole, Counsel for Elgin FM Limited Partnership
Arthur V. Belendiuk, Counsel for National Hispanic Policy Institute, Inc.