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VIA ELECTRONIC COMMENT FILING SYSTEM

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW- A325
Washington, DC 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:

As the application seeking to merge Univision Communications Inc. ("Univision") and Hispanic Broadcasting Corporation ("HBC") continues to pend at the Commission, opponents of the merger, having been unable to demonstrate that the merger is not in the public interest, are instead seeking to burden the merger with conditions that would make it economically unsound. Univision specifically responded on August 27, 2003 to unsupportable conditions on the merger grant being proposed by NBC/Telemundo, which is both a competitor of Univision and a jilted suitor of HBC. It now appears to have been suggested that the Commission condition grant of the merger on elimination of Univision's existing waiver of the network representation rule, 47 C.F.R. § 73.658(i), which was granted on a temporary basis in 1978, and made permanent in 1990 (the "National Spot Sales Waiver").[1] Aside from the fact that such an action disregards the meaning of the phrase "permanent waiver," the National Spot Sales Waiver bears no relation whatsoever to Univision's acquisition of the HBC radio stations, and any effort at eliminating the waiver would be harmful to Univision, extremely damaging to Univision's television affiliates, and ultimately harmful to the public, which could face the loss of local Spanish-language television programming and stations.

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[1] *See* Amendment of Section 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales, 5 FCC Rcd 7280 (1990) ("*Report and Order*") at ¶¶ 11-12.

As Univision has previously noted,[2] the record of this proceeding does not support the imposition of conditions by the Commission, and even jilted HBC suitor and competitor Spanish Broadcasting System, Inc. has "expressed doubt about whether the Commission could design and enforce conditions that would overcome the negative effects of the merger."[3] A condition involving the National Spot Sales Waiver is particularly unsupported, with NBC/Telemundo, the only entity to actually suggest on the record the imposition of conditions to the merger, stating that:

> Also, this [proposed] result, unlike Commission action affecting [Univision's] network sales representation waiver, is unlikely to have an adverse impact on Entravision. Entravision apparently benefits from Univision's national representation of Entravision's television stations or it would logically have already terminated that representation. Accordingly, any elimination of Entravision's ability to use Univision as a national representative is likely to harm Entravision. As a practical matter, a condition whose result is to harm Entravision makes little sense as a means of safeguarding Spanish-language consumers and others from inappropriate or unfair conduct by Univision.[4]

That even merger opponents recognize the harm to the public resulting from elimination of the National Spot Sales Waiver indicates the inappropriateness of such an action. Any Commission effort to eliminate Univision's permanent waiver would indeed be very harmful to the public interest. Specifically:

- Elimination of the permanent National Spot Sales Waiver would significantly harm Univision's business, change the fundamental economics of the HBC merger, and create disruption to investment in Spanish-formatted television operations.

- The continuing public interest benefits of the waiver were extolled by the Commission as recently as four months ago,[5] and are completely unaffected by Univision's acquisition of the HBC radio stations;

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[2] *See* Letter from Scott R. Flick, Counsel to Univision Communications Inc., to Secretary Marlene H. Dortch, MB Docket 02-235 (August 27, 2003).

[3] Letter from Phillip L. Verveer, Counsel to Spanish Broadcasting System, Inc., to Secretary Marlene H. Dortch, MB Docket 02-235 (August 7, 2003) at 1.

[4] Letter from F. William LeBeau, Counsel to NBC/Telemundo, to Secretary Marlene H. Dortch, MB Docket 02-235 (August 21, 2003) at 14.

[5] *See* Azteca International Corporation, 18 FCC Rcd 10662 (MB 2003).

- Entravision Communications Corporation ("Entravision"), a third-party to the proposed transaction, receives the greatest benefit from the National Spot Sales Waiver and would suffer the greatest harm from its elimination;

- The National Spot Sales Waiver provides national sales opportunities and revenues for Univision affiliates in small markets that are typically ignored by national spot advertisers, permitting the continued existence of a Spanish-formatted television service in many marginal markets and thereby serving the public interest;

- Univision's service as national spot sales representative for Entravision does not prevent Entravision from jointly selling advertising time on its own radio and television stations, completely undercutting any argument that the waiver prevents such joint sales or that Univision's acquisition of radio stations changes the public benefits of the waiver;

- Elimination of the National Spot Sales Waiver would require Univision to breach its contracts with Entravision and other affiliates who rely on this valuable service; and

- No ready substitute for Univision's national sales representation service is available to Entravision or other affiliates. Elimination of the waiver would therefore cause significant disruption to their core business and harm the public.

Termination of the Permanent Waiver Would be Harmful to Univision

As an initial matter, the proposed Univision/HBC merger involves the acquisition of radio stations, whereas the National Spot Sales Waiver is a pre-existing relationship between the Univision *television* network and its affiliated *television* stations. Thus, the existence or non-existence of Univision's permanent waiver is utterly unaffected by the proposed transaction and is irrelevant to consideration of the merger. In fact, while Univision's merger consent decree with the Department of Justice incorporates broad restrictions on Univision's relationship with Entravision *radio* stations, it does not upset the existing relationship between the Univision Network and the Entravision television stations affiliated with Univision.

Termination of the permanent waiver would substantially harm Univision and the economics of the merger itself. Univision's success as national sales representative for Entravision will generate approximately $7.5 million in additional revenue for Univision in 2003. Loss of this revenue would reduce Univision's earnings per share by approximately 3.85%, resulting in a potential decline in Univision's capitalization by $368 million. Stated differently, a merger grant conditioned on elimination of the National Spot Sales Waiver would reduce by nearly 10% the net cash flow being acquired in the merger, fundamentally changing the economics of the merger itself in a very negative way.

Such a fundamental tinkering with the economics of a broadcast transaction based upon the licensees' decision to serve to the best of their ability a minority audience is harmful to licensee discretion, and threatens the settled expectations of broadcast investors (who thought they understood the meaning of a permanent waiver and who voted to approve the HBC merger), thereby disrupting vital investment in the growth of broadcasters who choose to serve such audiences.

Aside from the direct loss of revenue to Univision from lost sales commissions, Univision would also be harmed by the financial difficulties that the Entravision affiliates would face as a result of the disruption of their national advertising revenues. Strong, economically healthy affiliates are essential to the success and competitiveness of any national network. If Entravision were forced to abandon Univision as its chosen national sales representative, it would have a profound financial impact on Univision's affiliate base, and therefore upon Univision's network operations. Such a result is harmful to both competition and the public, which benefits from healthy, free, over-the-air television networks and the programming they distribute.

Univision's Permanent Waiver of the Network Representation Rule Serves the Public Interest and Any Contrary Conclusion Is Unsupported by Fact or Law

Univision's National Spot Sales Waiver, which is also held by competitor networks Telemundo and Azteca America, was originally granted by the Commission as a temporary waiver in 1978.[6] In 1990, following a rulemaking that lasted nearly thirteen years that examined the continuing efficacy of the network representation rule, the Commission granted Univision and Telemundo permanent waivers of the network representation rule. Amendment of Section 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales, 5 FCC Rcd 7280 (1990). In making the waivers permanent, the Commission noted that without the waivers, "new foreign-language programming services would have been hampered, if not stifled completely, an outcome clearly inconsistent with the public interest." *Id.* at ¶ 12. Additionally, the Commission found that the waivers "further several of the Commission'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." *Id.*

The waiver of the network representation rule continues to foster these important goals, as recently recognized in Azteca International Corporation, 18 FCC Rcd 10662 (MB 2003). In the *Azteca* decision, the Media Bureau reiterated the continued importance of and rationale for waiving the network representation rule: "For the same reasons the Commission granted waivers to Univision and Telemundo, the Bureau finds good cause to grant Azteca America a permanent

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6 Memorandum Opinion and Order and Notice of Proposed Rule Making in BC Docket No. 78-309, 43 FR 45895 (Oct. 4, 1978).

waiver of the network representation prohibition in Section 73.658(i) of the Commission's rules." *Id.* at ¶ 5.

In originally granting permanent waivers of the network representation rule to Univision and Telemundo, the Commission relied primarily on the following reasons: (1) national sales firms' lack of skills and experience in marketing Spanish-language programming and (2) the economic harm to Univision and Telemundo affiliates from lost revenue and additional costs caused by the loss of skilled national sales representatives. *Report and Order* at ¶¶ 8-9. Importantly, the Commission's 1990 decision was not premised on the fact that Univision and Telemundo were new, small, or fledgling networks. Indeed, the Commission noted in granting the permanent waiver that, since grant of the temporary waiver in 1978, Univision "has grown substantially." *Id.* at ¶ 11.

As originally explained by the Commission's 1990 *Report and Order* and reaffirmed in the May 2003 *Azteca* decision, the reasons for granting Univision a permanent waiver of the network representation rule continue to exist. Moreover, they are completely unaffected by, and unrelated to, the HBC merger.

Univision's Permanent Waiver of the Network Representation Rule Is Beneficial to Entravision, and Termination of the Waiver Would Cause Extensive Harm to Both Entravision and the Public

As a result of the permanent waiver, and because of Univision's unique ability to persuade national advertisers of the benefits of advertising on Spanish-formatted stations, particularly in smaller markets where Entravision stations are often located and which are often overlooked by national advertisers, Entravision contracted with Univision to be its national spot sales representative. In order to provide national sales representation, Univision maintains a national sales group in eleven offices across the country employing well over one hundred people. If the Commission were to eliminate Univision's permanent waiver, it would effectively require that Univision breach its contract with Entravision and stop performance, all to Entravision's detriment. It is very unlikely that Entravision would find such a harmful change to its business model acceptable, particularly given that no other party could provide an equivalent service.

For example, by being prevented from participating in joint representation with the Univision stations for national spot sales, Entravision would lose revenue from national advertisers who were looking to run ads for a specific demographic in five key markets where Entravision had stations in only two of those markets. In other words, Entravision has benefitted from Univision's ability to offer advertisers access to a wider audience across all stations affiliated with Univision, rather than Entravision being limited to offering access to just those stations it owns.

Similarly, national advertisers frequently focus on reaching only the largest markets, where Univision stations tend to be, and not on the smaller and mid-size markets where

Entravision stations tend to be. As a result, Entravision would miss out on advertising revenue that it currently receives from national advertisers because Univision could no longer urge advertisers that come directly to Univision for large market ad sales to also look at ad buys in the Entravision markets, or offer such advertisers the "one stop shopping" they look for in national spot advertising buys.[7]

The impact of such lost revenue would be quite consequential to the public. Not only would reduced revenue force Entravision to cut back on its local programming initiatives, but it could well mean the difference between Entravision being able to offer a Spanish-formatted television service in a marginal market, and having such an operation be economically unsustainable – not because of inadequate audience demand for such programming, but because of the difficulty in attracting adequate advertising revenue to support it.

Thus, there can be no doubt that elimination of the National Spot Sales Waiver would be quite harmful to both Entravision and the public. Even more obvious, however, is that there is absolutely no countervailing public benefit. As Univision made clear in its June 25, 2003 letter,[8] both the Commission's existing and new ownership rules permit Univision to maintain an attributable ownership interest in the Entravision television stations. Since the purpose of Section 73.658(i) is to prevent networks from exercising undue influence over affiliated stations that they do not own, preventing Univision from serving as the national sales representative for stations in which it may legally have an attributable ownership interest, and in which it currently has such an interest, makes little sense. It would be a strange result for the Commission to effectively encourage Univision to acquire the Entravision television stations as the only way of complying with Section 73.658(i) while retaining its national advertising sales commissions for those stations.

Moreover, elimination of the National Spot Sales Waiver, while harming Entravision, has no conceivable connection to the HBC merger. Although NBC/Telemundo suggests that grant of the HBC merger, in combination with the effects of the consent decree, will allow Univision to sell radio and television advertising time jointly while preventing Entravision from doing the same,[9] this is completely false. As detailed in Univision and HBC's August 27, 2003 response to

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7 For example, a media buyer for a national advertiser is unlikely to be willing to expend the resources necessary to contract with one Univision affiliate in Laredo, Texas. That same media buyer, however, is much more likely to include Laredo in a national spot sales purchase when dealing with one national sales representative that can deliver advertising time on numerous affiliates, as there is virtually no increase in transaction costs. This arrangement thus produces a significant benefit for both the Laredo station and the advertiser.

8 Letter from Scott R. Flick, Counsel to Univision Communications Inc., to W. Kenneth Ferree, MB Docket 02-235 (June 25, 2003).

9 Letter from F. William LeBeau, Counsel to NBC/Telemundo, to Secretary Marlene H.

Footnote continued on next page

NBC/Telemundo,[10] Univision's representation agreement with Entravision does not prevent Entravision from selling its own advertising time on its radio and television stations jointly. In fact, Entravision already engages in such joint sales and will presumably continue to do so after Univision's merger with HBC.[11] Thus, the notion that the HBC merger will put Univision at a competitive advantage over Entravision in being able to jointly sell advertising on its television and radio stations is just plain false. Even if that were not the case, however, the harm to Entravision from elimination of the National Spot Sales Waiver would far outweigh any hypothetical harm of the merger to Entravision's joint television and radio advertising sales. Moreover, because Univision does not sell local television advertising time in any Entravision television market, there would not even be an opportunity to jointly sell television and radio advertising time in competition with Entravision's joint advertising sales.[12]

Thus, terminating Univision's permanent waiver of the national representation rule would put Entravision at a significant competitive and economic disadvantage against competitors, but would generate no countervailing public benefit. The harm to Entravision would be further compounded by the fact that all of its competitors, including Telemundo and Azteca America, could continue to use their chosen national sales representatives, while Entravision would effectively have to build a national sales operation from scratch, at immense expense and with limited prospects of regaining the national advertising revenue it currently enjoys.

It is difficult to imagine how such a result is in the public interest, particularly given the Commission's intent in granting the National Spot Sales Waiver of "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." With regard to Univision, grant of the permanent waiver has been a Commission

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Footnote continued from previous page

Dortch, MB Docket 02-235 (August 21, 2003) at 13-14.

10 Letter from Scott R. Flick, Counsel to Univision Communications Inc., to Secretary Marlene H. Dortch, MB Docket 02-235 (August 27, 2003) at 9-10, Exhibit 4.

11 Id.

12 In those few markets where both Univision and Entravision have a television station, Entravision sells local advertising on both stations pursuant to a joint sales agreement.

success story, resulting in all of those benefits, and it continues to do so. There is no basis for disrupting that benefit to the public, and certainly none having any connection whatsoever to the HBC merger.

Respectfully submitted,

Scott R. Flick

Scott R. Flick

cc (via hand delivery):

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