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

In the Matter of	)
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Liberman Television LLC	)
Petition for Waiver of Section 73.658(i) of the Commission's Rules	)
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JUN 29 2009
Federal Communications Commission
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To: The Chief, Media Bureau

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Commission's Rules,[1] Liberman Television LLC ("Liberman") hereby respectfully requests a permanent waiver of 73.658(i) of the Commission's Rules,[2] the so-called "Network Representation Rule." That rule generally prohibits a television network from representing television stations (other than those that it owns and operates) in the national non-network (spot) advertising sales market, but consistently has been waived in order to foster the development of new foreign-language networks.

Liberman is in the process of launching a new national Spanish-language television broadcast network, Estrella TV. As explained below, the requested waiver will serve the public interest by encouraging the growth of this new network which, in turn, will enhance diversity

[1] 47 C.F.R. § 1.3 (providing that the Commission may waive its rules upon a showing of "good cause"); *see Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (waiver of FCC rules is appropriate "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.") (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)).

[2] 47 C.F.R. § 73.658(i).

and competition, and is necessary in order to ensure the ability of Estrella TV to compete with existing Spanish-language networks Univision, Telemundo, and Azteca, all of which have previously been granted permanent waivers of Section 73.658(i).

I. BACKGROUND

A. Estrella TV and the Spanish-Language Television Network Programming Market.

Estrella TV is a new Spanish-language television network that will aim to serve the needs and interests of the ever-growing Hispanic population in the United States with new, innovative programming. Estrella TV will begin by offering 56 hours of original programming per week, including news and original entertainment programming. Certain of the programming that will comprise Estrella TV is presently aired on Liberman-owned television stations,[3] and the network launch is planned for August. Liberman is currently negotiating or has entered into affiliation agreements with independently-owned stations in numerous markets across the country, including for carriage of Estrella TV on digital multicast channels. This new network will bring much needed competition to the Spanish-language television programming market, which is currently, and has long been, dominated by two major players: Univision and Telemundo. Univision reaches nearly all Hispanic television households in the country, with 97% coverage, while Telemundo reaches 93%.[4] Univision-owned Telefutura follows with 85% reach, and Azteca, while a distant fourth, operates in 66 markets.[5] Univision clearly dominates in terms of

[3] Liberman's sale of national spots on these stations is not subject to the Network Representation Rule, because it expressly exempts "stations licensed to a network organization or to a subsidiary of a network organization." *Id.*

[4] *See Liberman's Estrella TV Signs Up Texas Affiliates*, Hispanic Market Weekly, Feb. 9, 2009, *available at* http://www.hispanicmarketweekly.com/article.cms?id=10385.

[5] *See id.* LATV, another national Spanish-language television network, operates in 35 markets. *See* Michael Malone, *LATV's Strategic Shift*, Broadcasting & Cable, May 2, 2009, *available at* http://www.broadcastingcable.com/article/print/231028-LATV_s_Strategic_Shift.php.

actual market share, with some estimates approaching 80% of all Hispanic television advertising dollars.[6] To the best of LBI's knowledge Univision and Telemundo together enjoy at least an 85% share of the market.

Even apart from the unique challenges that these market dynamics produce for a company seeking to launch a new Spanish-language television network, Spanish-language broadcast stations on the whole struggle to compete with their English-language counterparts for advertising dollars. This is due to the simple fact that "the advertising industry pays more for English-speaking than Spanish-speaking audiences."[7] As a result, "stations that target programming to minority listeners are unable to earn as much revenue per listener as stations that air general market programming."[8] Further, minority-owned stations, which often include foreign-language stations, are often subject to discrimination by advertisers. It has been estimated that discrimination in advertising sales costs minority broadcasters approximately $200 million annually, and that this practice accounts for a 5 to 10 percent loss to minority broadcasting that directly affects access to capital.[9] As such, any Spanish-language station seeking to compete for national advertising revenue begins from a disadvantaged position.

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[6] Laura Martínez, *Univision Stars in Its Own Soap Opera*, Broadcasting & Cable, Dec. 8, 2008, *available at* http://www.broadcastingcable.com/article/print/160357-Univision_Stars_in_Its_Own_Soap_Opera.php.

[7] Catherine J.K. Sandoval, *Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market by a Broadcast's Language, and its Implications for Audiences, Competition, and Democracy*, 60 Fed. Comm. L.J. 407, 439 (2008).

[8] Kofi Asiedu Ofori, *When Being No. 1 Is Not Enough: The Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations*, Synopsis (2003), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/adsynopsis.html (last visited June 1, 2009).

[9] *See, e.g.*, *Petition for Rulemaking to Expand the Commission's Broadcast Advertising Nondiscrimination Rule to Cable, Satellite and Telecommunications Services*, Petition for Rulemaking, PRM09MB, at 4 (filed Feb. 17, 2009); Notice of Ex Parte Communication of Minority Media & Telecommunications Council, MB Docket No. 07-294, at 1 (filed July 3, 2008); Letter from David Honig, Executive Director, Minority Media & Telecommunications

B. The Network Representation Rule.

The Network Representation Rule prohibits a "network organization," defined for purposes of the rule as "any organization that provides an identical program to be broadcast simultaneously by two or more interconnected stations,"[10] from representing non-owned affiliates in the national non-network (spot) advertising sales market.[11] It was adopted in 1959 – long before the launch of a *single* foreign-language television network – based "upon the potential power and ability of the [then-existing] television networks to restrain competition rather than upon actual evidence of abuse."[12] Despite the fact that CBS and NBC had, at that time, long participated in the national spot sales market and the absence of any actual evidence of anticompetitive behavior, the Commission adopted the rule as a prophylactic measure to protect broadcast network affiliates from undue network influence over affiliate programming decisions, and to promote competition in the national television advertising market.[13]

Council, to Chairman Kevin J. Martin, MB Docket No. 07-294 (July 15, 2007); see also *Initial Comments of Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking*, MB Docket No. 06-121, at 26-28 (filed Oct. 1, 2007).

[10] *Amendment of Section 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales; Request of Spanish International Network (SIN) for Waiver of Section 73.658(i)*, Further Notice of Proposed Rulemaking, 3 FCC Rcd 2746 (¶ 4) (1988) ("*Network Representation FNPRM*").

[11] 47 C.F.R. § 73.658(i).

[12] *Network Representation FNPRM*, 3 FCC Rcd at 2747 (¶ 6).

[13] *See id.* at 2746-47 (¶ 5). Since 1995, the Commission has had open a proceeding regarding the Network Representation Rule in which it sought comments on whether to modify, repeal, or retain the rule intact. *See Review of the Commission's Regulations Governing Broadcast Television Advertising*, Notice of Proposed Rulemaking, MM Docket No. 95-90, FCC 95-226 (June 14, 1995). The comment cycle closed in September of 1995, but the proceeding remains pending.

C. The FCC's Grants of Waivers of the Network Representation Rule to Univision, Telemundo, and Azteca.

In 1978, the Commission granted a temporary waiver of the Network Representation Rule to Univision.[14] Telemundo received a similar temporary waiver in 1987.[15] These waivers were made permanent in 1990.[16] In granting the permanent waivers, the FCC relied on two principal factors. First, it found that the temporary waivers had enabled the three networks to grow competitively, and that, in fact, "had [the FCC] not waived the network representation rule . . . the development of the . . . new foreign language programming services [provided by these networks] would have been hampered, if not stifled completely, an outcome clearly contrary to the public interest."[17] Second, the Commission determined that the waivers "continue to provide additional benefits in that they 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."[18] Accordingly, the agency concluded that there was "good cause" to make the temporary waivers it had previously granted permanent.[19]

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[14] *Network Representation of TV Stations in National Spot Sales; Request of Spanish National Network (SIN)*, 43 Fed. Reg. 45,895, 45,898 (¶ 18(b)) (Oct. 4, 1978). At that time, Univision utilized the name "Spanish International Network." *Network Representation FNPRM*, 3 FCC Rcd at 2754 n.4 (¶ 2 n.4).

[15] *Amendment of § 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales; Request of Spanish International Network (SIN) for Waiver of § 73.658(i); Request of Telemundo Group, Inc. for Waiver of § 73.658(i); Request of Latin International Network Corporation for Waiver of § 73.658(i)*, Report and Order, 5 FCC Rcd 7280, 7282 n.5 (¶ 2 n.5) (1990) ("*Network Representation Order*"). Another Spanish-language network, "Latin International Network Corporation" or "Latinet," similarly received a temporary waiver at that time. *Id.*

[16] *Id.* at 7281-82 (¶¶ 7-12).

[17] *Id.* at 7281 (¶ 12).

[18] *Id.* at 7281-82 (¶ 12) (footnotes omitted) (citing Network Inquiry Special Staff, *New Television Networks; Entry, Jurisdiction, Ownership and Regulation* (Vol. I, Oct. 1980); *See also*

In 2003, Azteca – then a new Spanish-language television programming network – also received a permanent waiver of the network representation rule.[20] In support of its grant of the waiver, the Mass Media Bureau relied on the same two factors that had motivated the Commission to grant permanent waivers to Univision and Telemundo. First, the reality that a fledgling Spanish-language network would likely be unable to succeed absent a waiver, and second, the positive benefits that the previously granted waivers had produced for the public.[21] In addition, the Bureau approvingly cited the assertions of Univision and Telemundo in the proceeding that led to the *Network Representation Order* that "traditional sales firms lack 'the specialized skill and experience required to market successfully Spanish-language television,'" and "Spanish-language stations 'cannot themselves effectively secure national spot advertising sales.'"[22] Azteca contended that "its station affiliates suffer[ed] from the same competitive handicaps that were found to justify waivers of the rule for Univision and Telemundo."[23] The Bureau accepted this contention, and concluded that "[f]or the same reasons the Commission granted waivers to Univision and Telemundo," there was "good cause to grant Azteca a

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Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 FCC Rcd 318, 333 (1970); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 n.46 (1981); *Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* Report and Order, Docket No. 83-1009, 49 Fed. Reg. 31877 (1984); *Deregulation of* Radio, Report and Order, BC Docket No. 79-219, FCC 81-17, 46 Fed. Reg. 33588 (1981); *Amendment of Section 73.3555*, Memorandum Opinion and Order, 100 FCC 2d 74, 92-94 (1985)).

[19] 5 FCC Rcd at 7282 (¶ 12).

[20] *Azteca International Corporation (Azteca International) Petition for Waiver of Section 73.658(i) of the Commission's Rules*, Order, 18 FCC Rcd 10662 (2003).

[21] *Id.* at 10663 (¶ 3).

[22] *Id.* (quoting *Network Representation Order*, 5 FCC Rcd at 7281 (¶¶ 8-9)).

[23] *Id.* at 10663 (¶ 4).

permanent waiver of the network representation prohibition in Section 73.658(i) of the Commission's rules."[24]

II. ARGUMENT

For "good cause," the Commission may waive "[a]ny provision of [its] rules."[25] As the D.C. Circuit has explained, "'[a] waiver is permissible 'where particular facts would make strict compliance inconsistent with the public interest.'"[26] Put another way, "a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest."[27]

As a result of the grants of waivers of the network representation rule to Univision, Telemundo, and Azteca, the most powerful Spanish-language television programming networks have been operating free from the constraints imposed by the rule for between thirty-one and six years, and because those waivers are permanent they will continue to so operate for the indefinite future. As demonstrated fully below, there is "good cause" to grant a permanent waiver of the rule to Estrella TV, a new network seeking to enter the Spanish-language network marketplace and provide much-needed competition and additional programming choices to Hispanic television viewers.

First, absent grant of the requested waiver, Estrella TV will be constrained in its ability to compete with Univision and Telemundo, as well as Azteca, in the Spanish-language network

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[24] *Id.* at 10663 (¶ 5).

[25] 47 C.F.R. § 1.3.

[26] *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006) (quoting *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

[27] *WAIT Radio*, 418 F.2d at 1157.

television programming market. Each of Estrella TV's competitors has received a waiver, and failure to allow Estrella TV to operate on a level playing field will clearly place it at a significant competitive disadvantage in the marketplace. The Commission has already concluded that strict application of the network representation rule enables new networks to grow competitively, and that, in fact, "had [the FCC] not waived the network representation rule" as to Univision and Telemundo, their "development of new foreign language programming services would have been hampered, if not stifled completely."[28] There is no rational basis for concluding that the situation is any different for Estrella TV and, indeed, given the current economic conditions in the television industry in particular and across all domestic industries in general, the situation is likely even *worse* today. And, of course, the Commission has rightly concluded that allowing a network to fail (because of the restrictions imposed by the network representation rule or otherwise) constitutes "an outcome clearly inconsistent with the public interest."[29]

Second, Estrella TV's affiliates must compete with the affiliates of the entrenched Spanish-language programming networks, all of which are free to obtain national spot sales advertising representation from their own networks pursuant to the waivers that they previously received. Estrella TV affiliates lack the special skills and resources to market themselves successfully in the national spot advertising market, and are not capable of overcoming the most powerful incumbent Spanish-language networks' national spot sales presence. And, unlike affiliates of English-language television programming networks, the affiliates of Spanish-language networks have few options for representation in national spot sales. It remains true

[28] *Network Representation Order*, 5 FCC Rcd at 7281 (¶ 12).

[29] *Id.*; *see Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114, 1129-30 (¶¶ 34-35) (2001) (eliminating the prohibition on a merger between one of the "big four" networks and UPN or The WB, in part due to the fact that the emerging networks were struggling financially and might well have failed which, in turn, would clearly have harmed diversity).

today that traditional sales firms focus primarily if not exclusively on selling spots during English-language programming and lack the specialized skill and expertise necessary to effectively market Spanish-language stations to advertisers. In addition, as noted above, Spanish-language stations in general face considerable challenges, because advertisers are not willing to pay as much for spots on such stations as they are on their English-language counterparts and they often face discriminatory obstacles. Allowing Liberman to represent its affiliates' in the national spot sales advertising market through its Spanish Media Rep Team will temper these inherent disadvantages that the Estrella TV affiliates face and will improve their competitive standing, thereby promoting the public interest by improving competition.

Third, grant of the requested waiver will provide the same additional benefits that the Commission previously concluded had flowed and would continue to flow from the waivers granted to other Spanish-language broadcast television networks. A waiver will enhance Estrella TV's potential for success, thereby allowing it to grow into a viable competitor to the existing, entrenched Spanish-language networks. The network's programming will consist entirely of Spanish-language programming, and it will offer new originally-produced programs which, prior to the network's launch, have been available only on Liberman's owned stations. Thus, grant of the waiver will "encourag[e] the growth and development of new networks; foster[] foreign language programming; increas[e] programming diversity; [and] strengthen[] competition among stations."[30]

[30] *Network Representation Order*, 5 FCC Rcd at 7281-82 (¶ 12) (footnotes omitted) (citing Network Inquiry Special Staff, *New Television Networks; Entry, Jurisdiction, Ownership and Regulation* (Vol. I, Oct. 1980); *Competition and Responsibility in Network Television Broadcasting*, 25 FCC Rcd 318, 333 (1970); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 n.46 (1981); *Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Report and Order, Docket No. 83-1009, 49 Fed. Reg. 31877 (1984); *Deregulation of* Radio, Report and Order, BC Docket No. 79-219, FCC No. 81-17, 46 Fed. Reg. 33588 (1981); *Amendment of Section 73.3555*, Memorandum Opinion and Order, 100 FCC 2d 74, 92-94 (1985)).

Finally, grant of the requested waiver will not create any countervailing public interest harms. The Estrella TV affiliates will independently control their national spot advertising rates, and they will, consistent with the FCC's rules, retain ultimate discretion regarding the programming that they air on their stations.

In light of all of these facts, there is clearly "good cause" for granting Liberman a permanent waiver of the network representation rule. Indeed, a failure to grant the requested waiver would be arbitrary and capricious. The D.C. Circuit has long recognized "the importance of treating parties alike,"[31] and that the Administrative Procedure Act require agencies to "provide an adequate explanation before [they] treat[] similarly situated parties differently."[32] There is simply no basis here for failing to reach the same conclusion as to Estrella TV that has been reached as to every other Spanish-language broadcast television programming network that has requested a permanent waiver of the network representation rule.

At the very least, should the Bureau believe that prompt action on the permanent waiver request is not appropriate, Liberman should be granted a temporary interim waiver of the network representation rule while its request for a permanent waiver is being considered. The Commission granted interim temporary waivers to Univision and Telemundo while it considered

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[31] *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987). *Independent Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) ("An agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases . . . The treatment . . . must be consistent. That is the very meaning of the arbitrary and capricious standard."), *aff'd*, 235 F.3d 588 (2001); *accord Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard."); *see also Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 28 (D.D.C. 1997) (holding that FDA's failure to "provide[ ] a legitimate reason for failing to regulate . . . similar products in the same way" was "arbitrary and capricious").

[32] *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997); *see also Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (FCC must "do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act").

their permanent waiver requests,[33] and the grant of a similar interim temporary waiver to Liberman is necessary in order to place Estrella TV on equal footing with its competitors as it prepares to launch its new Spanish-language broadcast television programming network.

III. CONCLUSION

For the foregoing reasons, Liberman respectfully requests that it be granted a permanent waiver of Section 73.658(i) of the Commission's Rules or, alternatively, a temporary waiver pending a final decision on its permanent waiver request.

Respectfully submitted,

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June 29, 2009

[33] *See supra* notes 14-15.