

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of)	
)	
Shareholders of CBS Corporation,)	
(Transferor))	File Nos. BTCCT-19991116ABA, <i>et al.</i>
)	
and)	
)	
Viacom, Inc.,)	
(Transferee))	
)	
For Transfer of Control of CBS)	
Corporation and Certain Subsidiaries, Licensees)	
Of KCBS-TV, Los Angeles, CA, <i>et al.</i>)	

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 2000

Released: May 3, 2000

Before the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part and issuing a separate statement; Commissioner Tristani approving in part, dissenting in part and issuing a separate statement.

1. The Commission has before it for consideration the applications to transfer control of the CBS Corporation ("CBS") and its various licensee subsidiaries to Viacom, Inc. ("Viacom").¹ Petitions to deny the applications were filed by the American Cable Association ("ACA"), the National Black Media Coalition ("NBMC"), the WEYS Television Corporation ("WEYS"), and a group of petitioners objecting to certain broadcasts made by Howard Stern ("the Stern Petitioners").² In addition, the A.H. Belo Corporation ("Belo") filed a letter opposing the applications after the petition to deny period had expired.³ We will exercise our discretion pursuant to §1.41 and treat the letter as an informal objection. For the reasons stated below, we deny the petitions and informal objection and grant the applications subject to

¹ A complete list of the applications filed and the licenses to be transferred is attached as Exhibit A.

² CBS and Viacom argued that the various petitioners do not have standing. However, we have reviewed the petitions and will address the arguments raised in them. In addition to the petitioners to deny, a number of individuals filed letters commenting on the proceeding. Those letters have been reviewed and considered in reaching our decision here.

³ CBS and Viacom served their oppositions on the petitioners by facsimile, relying on §1.4(h) of our rules. We wish to clarify that §1.47, not §1.4(h), governs service requirements in Commission proceedings. *See* 47 C.F.R. § 1.47. The reference in §1.4 as to how to treat service by facsimile or electronic mail only relates to timing issues that arise when such service is specifically authorized by our rules. It is not a blanket authorization of service by such means. In this proceeding, no party objected or claimed any prejudice due to the method of service, so we do not need to rule on the propriety of the service in this particular case.

conditions to ensure compliance with our multiple ownership and cross-ownership rules.⁴

I. INTRODUCTION

2. On November 16, 1999, CBS and Viacom filed applications seeking Commission consent to the transfer of control of CBS and its subsidiary companies which are the licensees or permittees of numerous broadcast stations. CBS and its subsidiaries hold the licenses or construction permits of 20 television stations and 162 radio stations, in addition to various broadcast translator and auxiliary licenses. Viacom is the direct and indirect licensee or permittee of 18 television stations and several translator stations.⁵ Viacom is a publicly traded corporation that is currently controlled by National Amusements, Inc. ("NAI"), a single majority shareholder. Sumner Redstone controls NAI through the Sumner M. Redstone Trust.⁶

3. The applicants have made showings to support their contention that the proposed merger will fully comply with our radio and television duopoly rules. They have also made showings regarding those markets where the combined entity would own radio and television stations in excess of the permissible limits set out by our cross-ownership rule. In those markets, the applicants have requested time to come into compliance with that rule. Because the merger would result in violations of our Dual Network Rule and the national television ownership limit, the applicants have also requested time to bring the combined entity into compliance with those rules. Finally, the applicants have sought continued satellite waivers for certain television stations. The petitioners to deny oppose allowing the applicants time to come into compliance with our Dual Network Rule and the national ownership cap. NBMC makes additional allegations regarding EEO and news distortion violations by CBS. The Stern Petitioners allege that certain broadcasts of the Howard Stern program violated the laws governing indecent or obscene broadcasts.

II. The Transaction

4. Viacom currently has two classes of publicly traded common stock, Class A (voting) and Class B (non-voting). The merger agreement calls for CBS shareholders to receive 1.085 shares of Viacom Class B stock for each share of CBS common stock. There will be no change in the ownership of Viacom Class A stock and ultimate control of Viacom will remain with Mr. Redstone.

5. Currently, Viacom has a ten-member board of directors. Eight new directors, drawn from CBS' current board, will be added to the Viacom board after closing. For a period of three years, there can be no change in the size of the Viacom board or any removal of a CBS director without a supermajority vote of the board members. During that same period, directors from the CBS group will appoint replacements of the CBS directors. Likewise, directors from the Viacom group will appoint replacements for the Viacom directors. At the end of the three years, all directors will be elected by plurality vote of the Class A shareholders, whose votes are under Mr. Redstone's control.

6. Following the merger, Mr. Redstone will remain chairman and chief executive officer of

⁴ On April 28, 2000, Viacom filed an amendment pursuant to Section 1.103 of our Rules requesting that the effective date of this order be the date of adoption. We will grant the request.

⁵ Between them, the applicants also have interests in various program production companies, cable networks, publishing houses and record companies. This order only addresses the transfer of the various licensees and permittees regulated by the Commission.

⁶ At the time of the application, NAI intended to create a new, wholly owned subsidiary, NAIRI, Inc. which would be the single majority shareholder of Viacom. In any event, Sumner Redstone would continue to control NAI and remain in control of Viacom.

Viacom. Mel Karmazin, the current president and chief executive officer of CBS, will become president and chief operating officer of Viacom.

III. The Dual Network Rule

7. CBS is the owner of the CBS television network, one of the nation's four largest broadcast networks. Viacom owns UPN, the United Paramount Network, a relatively new national broadcast network.⁷ Section 73.658(g)(1) of our rules prohibits any entity from owning two or more television "networks." That rule defines a network as an entity "...which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states...."⁸ CBS, with its nationwide coverage, provides programming well in excess of 15 hours per week to over 25 affiliates and, therefore, is covered by this definition. While UPN does not fit within this network definition, the Dual Network Rule prohibits the common ownership of a network defined under (g)(1) with:

"...an English-language program distribution service that, on February 8, 1996, provided four or more hours of programming per week on a national basis pursuant to network affiliation arrangements with the local television broadcast stations in markets reaching more than 75 percent of television homes..."⁹

Viacom argues that UPN did not have the requisite audience reach on February 8, 1996 to be covered by (g)(2). In its petition, WEYS challenges the contention that UPN would not be covered by the Dual Network Rule. Viacom also argues that, should the Commission find that UPN is covered by (g)(2) and that the combined entity violates the Dual Network Rule, it should be allowed twenty-four months to come into compliance because of the unique circumstances of this transaction.¹⁰ ACA, WEYS, NBMC and Belo argue that the requested twenty-four months is without precedent, against the public interest, potentially anti-competitive and should be denied.

8. Viacom concedes that UPN provided four or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local broadcast stations. However, Viacom claims that UPN's national audience reach on February 8, 1996 was only 72.4% of television homes, based on a count of stations with which UPN held a primary affiliation agreement.¹¹ In making this claim, Viacom excludes from its count any stations with which UPN held a secondary affiliation agreement. The stations that had a secondary affiliation agreement with UPN reached an additional 18.6% of television households, giving a total of 91% of television households that UPN reached either through primary or secondary affiliates.

⁷ At the time the application was filed, Chris-Craft Industries, Inc. owned 50% of UPN. Pursuant to a buy/sell option, Viacom has acquired all of Chris-Craft's interest in UPN and is now the sole shareholder. Viacom amended the applications to reflect this transaction on March 27, 2000.

⁸ 47 C.F.R. § 73.658(g). This provision implements § 202(e) of the Telecommunications Act of 1996.

⁹ 47 C.F.R. § 73.658(g)(2)

¹⁰ NBMC claims that we should deny the applications just because the applicants have requested a reasonable time following any grant of the applications to come into compliance with our rules. It has long been Commission practice, however, in multi-station transactions to allow a reasonable time for parties to come into compliance with our rules. See, e.g., *Multimedia, Inc.*, 11 FCC Rcd 4883 (1995).

¹¹ See Viacom Exhibit F.

9. Viacom argues that secondary affiliation agreements are “license agreements” which are, in effect, syndication agreements. These license agreements permit programs to be aired “out of pattern” at times negotiated by the station. For example, rather than run a UPN program during its regularly scheduled network time, a secondary affiliate might run that program on the weekend or in late night. Also, Viacom states that secondary affiliates are not required to identify and promote their connection with UPN, denying the network the benefit of “branding” with those stations. Finally, secondary affiliates receive a separate feed from the primary affiliates, which does not include network promotions or programs containing the UPN logo at the bottom of the screen. Viacom also argues that the plain language of neither § 73.658(g) nor the underlying statute specifically states that the Dual Network Rule is to apply to UPN.

10. Though Viacom may call its “arrangements” with its secondary affiliates “license agreements,” it still considers those stations as UPN affiliates and not merely as stations to which a Viacom subsidiary sells programming. Both the statute and the rule refer to network affiliation “arrangements” and do not make any distinction between primary and secondary affiliates. There is no evidence that Congress intended for such a distinction to be made. Indeed, if Viacom’s argument is accepted, then § 202(e) of the Telecommunications Act of 1996 does not apply to anyone and Congress has enacted a law with no meaning or purpose. It is a basic rule of statutory construction that a statute is presumed to have some meaning and application.¹² Furthermore, Viacom’s argument that the Dual Network Rule does not refer to UPN by name and should not automatically be considered to include UPN directly contradicts the legislative history of the provision, which refers by name to the two “emerging networks, (WBTV, UPN)” in describing the networks to which the prohibition applies.¹³ Therefore, it appears clear that Congress intended the Dual Network Rule to apply to UPN. Recognizing that Congress intended the Dual Network Rule to apply to UPN and crafted it to so apply, we are persuaded that all network affiliation agreements, primary and secondary, should be counted towards determining a network’s national audience reach. We conclude that § 73.658(g)(2) includes UPN within its prohibition on dual network ownership.

11. In support of their alternative request for twenty-four months to come into compliance with the Dual Network Rule, the applicants argue that requiring the merged entity to sell a national broadcast network, with the concomitant effects on the financial standing of the network, its affiliates and its program suppliers, is without precedent. The applicants state that (1) UPN, its affiliate stations and its program suppliers are all financially inter-dependent; (2) UPN is not financially self-supporting; (3) an independent purchaser is unlikely to assume the financial burden that Viacom has been carrying due to the high cost of maintaining UPN; (4) the challenges presented by any divestiture are without precedent; and (5) it would serve the public interest to allow the parties a reasonable opportunity to come into compliance in such a way as to preserve UPN’s unique services. The applicants also point out that UPN relies extensively on UHF stations and in some cases LPTV stations to reach its audience. As noted above, in some cases UPN does not have a primary network affiliation agreement with these stations. The applicants claim that carriage under these circumstances is undesirable and will hurt any efforts to sell UPN. The applicants further assert that no party has come forward to express any serious interest in buying UPN. Finally, the applicants argue that, should no buyer be found and they be forced to shut down

¹² Sutherland on Statutory Construction, 2A, § 46.06, at 63 (4th ed. C. Sands, 1973)(“It is a recognized principle that a statute should be construed so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.”); *see also, Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 84 FCC 2d 445, 508 (1981).

¹³ 142 Cong. Rec. H1078-03, *H1121.

UPN, this would reduce program diversity. They argue that this loss would be even more serious in light of UPN's history of presenting programming targeted to minorities and of creating opportunities for minorities to participate in the creation, production, writing and on-air presentation of programming. Therefore, the parties ask for a twenty-four month period to come into compliance with the Dual Network Rule in order to avoid creating a situation where it would be necessary to simply shut down the network.

12. ACA, WEYS, NBMC and Belo all oppose a twenty-four month period to come into compliance as excessive and assert that it would provide no public interest benefit. ACA in particular asserts that the ownership of two networks will lead to abuses in the granting of retransmission consent, abuses to which small cable operators are especially vulnerable. ACA also asserts that CBS/Viacom will use the Dual Network Rule to subsidize UPN, again by possibly manipulating the terms of retransmission consent agreements. Belo points out that there will be markets where CBS or UPN owned and operated affiliates will be competing against independent affiliates of the one of the networks owned by CBS/Viacom, which could lead to unfair treatment of the independent affiliates.¹⁴

13. On March 27, 2000, the applicants filed an amendment ("Amendment") to reflect Viacom's acquisition of the remaining interest in UPN and to make certain representations regarding the operations of UPN during any period prior to coming into compliance with the Dual Network Rule. In the Amendment, the parties pledged:

Subject to Viacom's right to terminate UPN, Viacom will preserve UPN as a viable, independent voice distinct from that of the CBS Television Network during the period of time granted by the Commission for Viacom to come into compliance with the dual network rule.

To this end, the executives in charge of programming at UPN will be responsible solely for advancing the interests of that network. As they do today, the two networks will continue to strive for diverse audiences consistent with their separate programming strategies. Although the UPN television programming executives may participate in incentive compensation plans related to the performance of Viacom as a whole, such executives' compensation will not be otherwise directly related to the performance of the CBS Television Network.

14. We will deny the requested twenty-four month period, but will grant the parties twelve months for the combined CBS/Viacom to come into compliance with the Dual Network Rule. Before entering into this transaction, the applicants were aware that it could violate the Dual Network Rule. They cannot claim any surprise that compliance with the law is required. We recognize that there are inter-dependent relationships between program suppliers, affiliates and UPN, but we do not believe those relationships are an impediment to bringing the merged entity into compliance with the rule. Indeed, those very relationships are part of the value of UPN. Viacom initially argued that sale of UPN would be especially complex given that the network was, in part, owned by Chris-Craft. Viacom, however, exercised a buy/sell option with its former co-owner Chris-Craft. The exercise of this option gave Chris-Craft the opportunity to buy out Viacom's interest in UPN for \$5 million. Chris Craft declined to make this purchase. Viacom states that Chris-Craft "reportedly attempted but failed to line up additional partners

¹⁴Belo, ACA and WEYS also allege that the proposed transaction will result in the program supply market becoming too concentrated and that the merged CBS/Viacom will exert undue market influence in that market. The Department of Justice examined this specific issue in connection with its review of the broader merger and determined not to intervene in the transaction. In our discretion, we conclude that no further action with respect to these matters is warranted based on the record here.

interested in investing" in UPN. Viacom also states that "notwithstanding wide public knowledge of the potential divestiture of UPN, Viacom received no *bona fide* proposals to purchase its 50 percent interest in the network."

15. Although Congress clearly intended the Dual Network Rule to apply to UPN, there is no evidence that Congress intended for UPN or any other network to be sold at a "fire sale." The Commission has long granted parties a reasonable time to come into compliance with our rules.¹⁵ In the cases of station divestitures we have generally allowed a period of six to twelve months to come into compliance, and, consistent with those decisions, we find that a period of twelve months would be appropriate here.

16. Although we recognize the concerns of the petitioners regarding the potential for abuse of market power by the applicants during the period prior to coming into compliance, there is no evidence that such conduct will actually occur, or that such potential abuses should be addressed by the Commission as opposed to anti-trust authorities. Furthermore, we believe the pledges made by the applicants regarding the separate operations of the two networks and the relatively limited period allowed for coming into compliance minimize our concerns in this area. If the combined CBS/Viacom entity does violate our rules, we can take appropriate action against such misconduct at that time.

IV. The National Ownership Cap

17. In their application, the parties state that the merged CBS/Viacom would control 38 television stations (including one construction permit), provide programming to two additional stations pursuant to local marketing agreements and have an ownership attributable interest in one additional television station.¹⁶ These stations are licensed to 32 DMA's¹⁷ and reach slightly more than 41 percent of all national television households.¹⁸

18. The Telecommunications Act of 1996 and the Commission's rules prohibit the grant, transfer or assignment of any television license to any entity if it would result in that entity having a cognizable interest in television stations with an aggregate national audience reach exceeding 35 percent.¹⁹ Because the aggregate national reach of the stations owned by the combined CBS/Viacom would be over 6% in excess of the permitted level, the parties have asked for 24 months to come into compliance with the statute and rule. ACA, WEYS, NBMC and Belo oppose granting the requested 24 months because there is no precedent so to do and because it would not be in the public interest.

¹⁵ See, e.g., *Multimedia, Inc.*, 11 FCC Rcd 4883 (1995).

¹⁶ CBS/Viacom will program stations pursuant to out-of-market LMAs in the Fort Pierce-West Palm Beach, Florida, and Providence, Rhode Island - New Bedford, Massachusetts DMAs. In the Marquette, Wisconsin DMA, CBS/Viacom will own a satellite whose parent station is located in the Green Bay-Appleton, Wisconsin DMA. Pursuant to *Broadcast Television National Ownership Rules*, FCC 99-208, MM Docket No. 96-222, ¶¶ 20 and 29 (rel. August 6, 1999) ("*Television National Ownership Rules*"), all three DMAs are counted in determining CBS/Viacom's national audience reach.

¹⁷ Every television station is assigned to a "designated market area" ("DMA") by the Nielsen ratings service. A station's DMA indicates the primary market for that station's service. The Commission uses these DMA's as the basis for several of the multiple ownership rules. See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, 14 FCC Rcd 12903 (1999).

¹⁸ Telecommunications Act of 1996, § 202(c)(1); 47 C.F.R. § 73.3555(e).

¹⁹ *Id.*

19. The parties have intertwined their arguments in support of a 24-month period to come into compliance with the national ownership cap with their arguments for the same amount of time to come into compliance with the Dual Network Rule. They repeatedly state that the interests of UPN, of the various stations they refer to as owned and operated and of the independently owned UPN affiliates are complex and interdependent. The parties claim their situation is different from other Commission proceedings requiring divestiture because as many as 16 television stations may have to be sold to come into compliance with the national ownership cap. They also cite to Commission proceedings involving divestiture requirements under the newspaper/television cross-ownership rule and the cable/television cross ownership rule where the Commission has allowed up to 24 months to come into compliance.²⁰ The parties do not cite to any case that only involved the divestiture of television stations where the Commission has permitted more than 6 months to come into compliance with the multiple ownership rules.

20. First, there is no evidence that the applicants have to sell 16 stations to come into compliance with the national ownership cap. As Belo points out, they could sell fewer stations in larger markets to come into compliance with the rule. We will not dictate which stations the applicants must sell to come into compliance with the national ownership cap, but we note that the combined entity could sell a single television station, rather than 16 spread around the country, and come into compliance.²¹

21. Second, all of the cases that the applicants cite in support of a divestiture period longer than 12 months dealt with proceedings where parties needed to comply with either the newspaper/television cross-ownership rule or the cable/television cross-ownership rule. In those cases, the Commission permitted the longer divestiture period because the relevant market factors associated with the sale of newspapers or cable systems, such as the possible lack of demand for a newspaper or the limited number of potential buyers, were different from those affecting broadcast stations. This is especially true over the last several years where the number of sales of broadcast stations have increased significantly. In other words, the Commission specifically distinguished those proceedings from broadcast station proceedings. There are no cases involving only broadcast properties in which the Commission has permitted more than 12 months for the requisite divestitures to come into compliance with our rules.

22. The Commission has historically held, in multiple station transactions, that the overall benefits of allowing time for an orderly divestiture of broadcast properties outweighs the impact on diversity and competition from common ownership during a reasonable period following the grant of the application. However, the Commission has never found that a period greater than 12 months was appropriate to accomplish the needed divestitures in a transaction where only television stations were involved. No arguments or evidence have been presented in this proceeding to convince us that we should give the parties twice the longest amount of time we have granted in the same type of transactions. Therefore, we deny the request for 24 months to come into compliance with the national ownership cap and instead give the applicants twelve months to comply.

²⁰ Citing, e.g., *Metromedia Radio and Television, Inc.*, 102 FCC 2d 1334 (1985), *aff'd Health Medicine and Policy Research Group v. FCC*, 807 F.2d 1038 (D.C. Cir. 1986); *Storer Communications, Inc.*, 59 R.R.2d 611 (1985).

²¹ See *Viacom/CBS Application*, Exhibit F.

V. MULTIPLE OWNERSHIP ISSUES**A. Local Television Ownership Rule**

23. *Background and Standard.* The merger of Viacom with CBS will result in the common ownership of two television stations in the same Nielsen DMA in the following six markets: Philadelphia, Boston, Dallas-Fort Worth, Detroit, Miami, and Pittsburgh. With regard to the television duopoly rule, in the *Television Ownership Order*,²² we modified our rules to allow common ownership of two stations in the same DMA, if eight independently owned and operating commercial and noncommercial television stations will remain in the DMA post-merger, and at least one of the stations is not among the top four-ranked stations in the market. As detailed below, Viacom has submitted a showing representing that each of these newly created television duopolies will comply with our modified television duopoly rule.²³

24. *Showing of Compliance.* First, in Philadelphia, the fourth ranked DMA, Viacom controls the license of WPSG(TV), Channel 57 and CBS controls the license of KYW-TV, Channel 3. Station WPSG(TV) has the sixth largest audience share and KYW-TV has the third largest audience share in the market. At least seventeen independently owned and operating television stations will remain in the Philadelphia DMA post-merger. In Boston, the sixth ranked DMA, Viacom controls the license of WSBK-TV, Channel 38 and CBS controls WBZ-TV, Channel 4. Station WSBK-TV has the sixth largest audience share and WBZ-TV has the third largest audience share in the market. At least 15 independently owned and operating television stations will remain in the Boston DMA post-merger. Next, in the seventh ranked Dallas-Fort Worth DMA, Viacom controls KTXA(TV), Channel 21, and CBS controls KTVT(TV), Channel 11. Station KTXA(TV) has the fifth largest audience share and KTVT(TV) has the fourth largest audience share in the market. At least 14 independently owned and operating television stations will remain in the Dallas-Fort Worth DMA. Detroit, the eighth ranked DMA, is host to Viacom's WKBD(TV), Channel 50, which has the fifth largest audience share in the market and CBS's WWJ-TV, Channel 62, which has the fourth largest audience share. The Detroit market will have at least eight independently owned and operating television stations remaining in the DMA post merger. In Miami, the 16th ranked DMA, Viacom controls WBFS-TV, Channel 33, and CBS controls WFOR-TV, Channel 4. With regard to audience share, the stations are ranked fourth and fifth, respectively. After the proposed merger, at least 13 independently owned and operating television stations will remain in the Miami DMA. Finally, Pittsburgh, the 20th ranked DMA, is host to Viacom's WNPA(TV), Channel 19, and CBS's KDKA-TV, Channel 2. Station WNPA(TV) has the seventh largest audience share and KDKA-TV is ranked number one, with the largest audience share in the market. Following the proposed merger, at least 8 independently owned and operating television stations will remain in the Pittsburgh DMA.

25. *Discussion.* Having reviewed the showing submitted by the parties, we find that the television duopolies created by the Viacom-CBS merger in the Philadelphia, Boston, Dallas-Fort Worth, Detroit, Miami, and Pittsburgh DMAs, will be in compliance with the Commission's modified television duopoly rule. Each of the affected markets is served by a minimum of eight independently owned and operating television stations. Additionally, in each market at least one of the two commonly owned television stations is not among the top four-ranked stations. Accordingly, the proposed station combinations meet the new standards of our television duopoly rule, and we believe our core concerns regarding competition and diversity will continue to be protected upon consummation of the proposed merger.

²²14 FCC Rcd at 12903.

²³ All of the audience share statistics are based on the July 1999 Nielsen Ratings, the most current statistics available at the time the parties filed the transfer of control applications.

B. Radio-Television Cross-Ownership Rule

26. *Background and Standard.* Currently, CBS controls radio and television station combinations in twelve markets: Boston, Minneapolis, Chicago, Detroit, New York, Pittsburgh, Baltimore, Los Angeles, Philadelphia, San Francisco, Austin and Dallas/Fort Worth.²⁴ The proposed Viacom-CBS merger will result in radio and television station combinations in an additional eight markets: Atlanta, Houston, Seattle, Tampa, Sacramento, Columbus, West Palm Beach and Washington, D.C. Thus, in total, Viacom will control radio-television combinations in 20 U.S. television markets. In the *Television Ownership Order*, we relaxed the radio-television cross-ownership rule "to permit same market joint ownership of radio and television facilities up to a level that permits broadcasters and the public to realize the benefits of common ownership while not undermining our competition and diversity concerns."²⁵ There are three elements to the revised rule. First, a party may own up to two television stations (provided this is permitted under our revised duopoly rule or television LMA grandfathering policy) and up to six radio stations in any market where at least 20 independently owned media voices remain in the market.²⁶ In those markets where the voice count component of our revised duopoly rule and radio-television cross-ownership rule would allow a two television/six radio station combination, it may be in the form of one television station and seven radio stations.²⁷ Second, we will permit common ownership of up to two television stations (provided this is permitted under our revised duopoly rule or television LMA grandfathering policy) and up to four radio stations in any market where at least ten independently owned media voices remain in the market. Third, we will permit common ownership of up to two television stations (provided this is permissible under our revised duopoly rule or television LMA grandfathering policy) and one radio station regardless of the number of independent voices in the market.²⁸ We note that, in accordance with the *Television Ownership Order*, where a merger involves stations in different radio metro markets, the voice count requirement must be satisfied in each of those radio metropolitan markets ("radio metro markets") to qualify under our voice count criteria. As detailed below, Viacom has submitted an exhibit, which purports to show that Viacom's television-radio station combinations will be in compliance in 15 of the 20 markets. In the remaining five markets, Viacom requests a period of six months to divest the requisite number of its radio stations in order to comply with the revised radio-television cross-ownership rule. According to Viacom's showing, the merged entity will comply with the numerical ownership/voice dependent limitations of the radio-television cross-ownership rule in the markets of Tampa-St Petersburg, Fort Pierce-West Palm Beach, Atlanta, Boston, Detroit, Columbus, Philadelphia, Pittsburgh, Houston, San Francisco, Seattle-Tacoma, Minneapolis, New York, Washington, D.C., and Austin.

²⁴ A Viacom television station will be also be added to the CBS radio/television combinations in each of the Boston, Detroit, Pittsburgh, Philadelphia and Dallas/Fort Worth markets.

²⁵ 14 FCC Rcd at 12947.

²⁶ *Id.*

²⁷ *Id.*, at 12950

²⁸ *Id.*, at 12947

1. Tampa-St. Petersburg, New York, Philadelphia, Detroit, Boston, Seattle-Tacoma

27. *Discussion.* Based on the number of stations in the radio and television station combinations to be held by Viacom in Tampa-St. Petersburg, New York, Philadelphia, Detroit, Boston, and Seattle-Tacoma, at least 20 independently owned media voices must remain in these markets post-merger.²⁹ Viacom's showing represents that, in compliance with our revised radio-television cross-ownership rule, at least 20 voices will remain within each of these markets after the proposed merger. The station combinations for each of the DMAs will be as follows: one television/six radio stations in Tampa-St. Petersburg; one television/six radio stations in New York; two television/five radio stations in Philadelphia; two television/six radio stations in Detroit; two television/five radio stations in Boston; and one television/five radio stations in Seattle-Tacoma. We believe Viacom has sufficiently shown that there will be at least 20 independent media voices for each station in each of these markets post merger, as consistent with the numerical ownership limitations of such combinations in the first prong of our revised radio-television cross-ownership rule, and that common ownership of two television stations in the Philadelphia, Detroit, and Boston DMAs will not violate our revised duopoly rule or television LMA grandfathering policy.

2. Fort Pierce-West Palm Beach, Atlanta, Columbus, Pittsburgh, Houston, Minneapolis, Austin

28. *Discussion.* In order to comply with our revised radio-television cross-ownership rule, the number of stations in the radio and television station combinations to be held by Viacom in the markets of Fort Pierce-West Palm Beach, Atlanta, Columbus, Pittsburgh, Houston, Minneapolis, Washington, D.C., and Austin, require at least 10 independently owned media voices to remain in the market post-merger.³⁰

²⁹ The merged entity will control the following television and radio station combinations: **Tampa-St. Petersburg** (CBS's WQYK(AM) Seffner, FL; WQYK-FM, St. Petersburg, FL; WYUU(FM), Safety Harbor, FL; WLLD(FM), Holmes Beach, FL WRBQ-FM, Tampa, FL; WSJT(FM), Lakeland, FL and Viacom's WTOG(TV), Channel 44, St. Petersburg, FL); **New York** (CBS's WCBS-TV, Channel 2; WINS(AM), WNEW(FM), WCBS-FM, WCBS(AM), WFAN(FM), WXRK(FM) all licensed to New York, NY); **Philadelphia** (CBS's KYW-TV, Channel 3; KYW(AM), WPHT(AM), WOGL-FM, WIP(AM), WYSP(FM) and Viacom's WPSG(TV), Channel 57 all licensed to Philadelphia, PA); **Detroit** (CBS's WWJ-TV, Channel 62; WVMV(FM), WWJ(AM), WKRK-FM, WOMC(FM), WYCD(FM), WXYT(AM) and Viacom's WKBD-TV, Channel 50 all licensed to Detroit, MI); **San Francisco** (CBS's KPIX-TV, Channel 5; KYCY(AM), KYCY-FM, KITS(FM), KCBS(AM), KLLC(FM), KFRC(AM), KFRC-FM all licensed to San Francisco, CA); **Boston** (CBS's WBZ-TV, Channel 4 WBMX(FM), WBZ(AM), WODS(FM), WBCN(FM), WZLX(FM) and Viacom's WSBK-TV, Channel 38, all licensed to Boston, MA); and **Seattle-Tacoma** (CBS's KMPS(AM), KMPS-FM, KYCW(FM), KZOK-FM, all licensed to Seattle, WA, KBKS(FM) and Viacom's KSTW(TV), Channel 11, both licensed to Tacoma, WA).

³⁰ **Fort Pierce-West Palm Beach** (CBS's WIRK(FM), WEAT-FM licensed to West Palm Beach, FL and Viacom's WTVX(TV), Channel 34, Fort Pierce, FL); **Atlanta** (CBS's WZGC(FM), WAOK(AM), WVEE(FM) and Viacom's WUPA(TV), Channel 69, all licensed to Atlanta, GA); **Columbus** (CBS's WAZU(FM), Circleville, OH; WHOK(FM), Lancaster, OH and Viacom's WWHO, Channel 53, Chillicothe, OH); **Pittsburgh** (CBS's KDKA-TV, Channel 2, WDSY(FM), WBZZ(FM), KDKA(AM) all licensed to Pittsburgh, PA; WZPT(FM) New Kensington, PA and Viacom's WNPA(TV), Channel 19, Jeannette, PA); **Houston** (CBS's KIKK(AM), Pasadena, TX, KIKK-FM, KILT(AM), KILT-FM and Viacom's KTXH(TV), Channel 20, all licensed to Houston, TX); **Minneapolis** (CBS's WCCO-TV, Channel 4, WCCO(AM), WLTE(FM) all licensed to Minneapolis, MN, KSGS(AM), WXPT(FM) both licensed to St. Louis Park, MN); **Austin** (CBS's KEYE-TV, Channel 42, KKMJ-FM, both licensed to Austin, TX; KJCE(AM), Rollingwood, TX, KQBT(FM), Taylor, TX and KAMX(FM), Luling, TX).

As to the station combinations, there will be a one television/two radio station combination in West Palm Beach, a one television/three radio station combination in Atlanta, a one television/two radio station combination in Columbus, a two television/four radio station combination in Pittsburgh, a one television/four radio station combination in Houston, a one television/four radio station combination in Minneapolis, and a one television/four radio station combination in Austin. We have reviewed Viacom's showing of compliance and find that the proposed station combinations will comply with the numerical ownership/voice count limitations of our radio-television cross-ownership rule after consummation of the proposed merger. As required by the second prong of our radio-television cross-ownership rule, we find that at least 10 independently owned media voices will remain in the market for each of the stations licensed to these DMAs post-merger, and that common ownership of two television stations in the Pittsburgh DMA will not violate our revised duopoly rule or television LMA grandfathering policy.

3. Baltimore, Washington, D.C., Sacramento, San Francisco

29. In the Baltimore DMA and radio metro market, CBS controls one television station and eight radio stations. CBS also controls the licenses of six radio stations licensed to communities in the Washington, D.C. radio metro market, which is in the Washington, D.C. DMA. The communities of license are encompassed by the CBS Baltimore television station's Grade A contour, although they are in a separate DMA and a separate radio market from the television station.³¹ Because Viacom currently controls a television station in the Washington, D.C. DMA, the merged entity would have a one television/six radio station combination in the Washington, D.C. market

30. A similar situation exists in the Sacramento market. There CBS currently controls seven radio stations licensed to the Sacramento radio metro market and Viacom controls one television station in the Sacramento DMA. CBS also controls one television station and seven radio stations in the San Francisco DMA and radio metro market. The 2mV/m contour of one of CBS's radio stations licensed to the San Francisco DMA and radio metro market encompasses Sacramento. The parties argue that prior Commission precedent and market place realities dictate that the relevant market for the three Washington, D.C. and one San Francisco radio stations, should be the DMA in which the stations are located.

31. CBS commonly owns its radio and television station combinations in the Baltimore and Washington markets, pursuant to conditional waivers of the Commission's former radio-television cross-ownership rule.³² When evaluating these waiver requests, the Commission focused its review on the market where the stations were located. In granting these waivers, the Commission treated the Washington stations and the Baltimore stations as being located in separate markets. We have continued to follow this policy with similarly-situated radio-television cross-ownership combinations. For example, we found New York to be the relevant market for New York radio stations that fell within the Grade A contour of a commonly-owned television station located in the Hartford-New Haven DMA, for purposes of our radio-television cross-ownership rule.³³ In the circumstances of this case, therefore, as consistent with precedent, we find that when applying the revised radio-television cross-ownership rule in the Baltimore and

³¹ The radio-television cross-ownership rule is triggered when the Grade A contour of a television station encompasses the community of license of a radio station, or when the 1 mV/m contour of an FM station or the 2 mV/m contour of an AM station encompasses the community of license of a television station.

³² See *Stockholders of Infinity Broadcasting Corp.*, 12 FCC Rcd 5012 (1996). See also *Shareholders of American Radio Systems Corporation*, 13 FCC Rcd 12430 (1998); *WHFS, Inc.*, 12 FCC Rcd 3965 (1997).

³³ See, e.g. *A T & T Corporation*, 13 FCC Rcd at 4633, 4644 (1998).

Washington markets, the relevant market for a station is the market in which that station is located. Further, when determining compliance under the three prongs of our revised rule in the Baltimore and Washington markets, if a radio station in a combination is located in a separate radio metro market and DMA from a commonly-owned television station, that radio station will not count toward the number of stations that an entity may control. Accordingly, in analyzing the Baltimore DMA, we will not count the three CBS radio stations located in the Washington, D.C. DMA as part of the Baltimore market, even though those stations are within the Grade A contour of CBS' Baltimore television station. In addition to being consistent with precedent, we believe our decision here reflects the Commission's rationale for modification of our radio-television cross-ownership rule, "to balance our traditional diversity and competition concerns with our desire to permit broadcasters and the public to realize the benefits of radio and television common ownership."

32. With respect to the Sacramento combination, CBS's San Francisco radio station KFRC(AM) triggers the radio-television cross-ownership rule because its 2mV/m contour completely encompasses Sacramento. Viacom claims that the relevant market for KFRC(AM) should be San Francisco, the DMA in which the station is located. Encompassment by the relevant signal contour (in this case, 2mV/m), and not the DMA, determines whether we will count radio station towards the number of stations an entity may control in one market.³⁴ Consequently, Viacom will control a one television/eight radio station combination in the Sacramento market, which they acknowledge will violate our radio-television cross-ownership rule. We will provide Viacom six months to file the application necessary to bring it into compliance with the radio-television cross-ownership rule in the Sacramento market.

33. We shall now evaluate Viacom's showing in the markets of Washington, D.C., Baltimore, and San Francisco based on our decisions in the two paragraphs above. In the Washington, D.C. DMA, Viacom will control a one television/six radio station combination. Since 20 media voices will remain in the relevant market post-merger, this combination comports with our radio-television cross-ownership rule. However, in the Baltimore DMA, Viacom will control a one television/eight radio station combination. Since Viacom does not meet the voice count component of the revised duopoly rule, this combination will violate the radio-television cross-ownership rule. Viacom, therefore, has pledged to divest two Baltimore radio stations, which will result in the DMA containing a one television/six radio station combination in a market where 20 media voices will remain post-merger. We find, therefore, that the proposed station combinations in the market of Washington, D.C. will comply with the numerical ownership/voice count limitations of our radio-television cross-ownership rule post-merger, and that the proposed combination in the Baltimore market will comply with the numerical ownership/voice count limitations of our radio-television cross-ownership rule following divestiture of two radio stations. As detailed below, Viacom has requested a six-month waiver in order to come into compliance in the Baltimore market. Finally, in the San Francisco market, Viacom will control a one television/seven radio station combination. At least 20 media voices will remain in the San Francisco market post-merger, at least eight of which are independently owned and operating television stations in the San Francisco DMA. We find, therefore, that the proposed combination in the San Francisco market will comply with the numerical ownership/voice count limitations set forth in the first prong of our radio-television cross-ownership rule.

³⁴ *Media Communications Partners, L.P.*, 10 FCC Fcd 8116 (1995).

4. Los Angeles, Chicago, and Dallas-Fort Worth

34. *Waiver Request.* In addition to the Baltimore and Sacramento markets, the merger of Viacom and CBS would not comply with the radio-television cross-ownership rule in Los Angeles, Chicago, and Dallas-Fort Worth.³⁵ With regard to the Los Angeles and Chicago DMAs, Viacom will control a one television station/eight radio station combination post merger in each of these markets. Viacom has pledged to divest one Los Angeles radio station and one Chicago radio station, which will result in each DMA containing a one television/seven radio station combination. In markets where the voice count component of our revised duopoly rule and radio-television cross-ownership rule would permit a party to own two television and six radio stations, for a total of eight outlets, we also permit that party to own the same number of outlets in the form of one television and seven radio stations.³⁶ Consequently, a one television/seven radio station combination will be permissible in these markets if they meet the voice count restrictions for both our revised duopoly rule and radio-television cross-ownership rule. Each relevant market, therefore, must contain at least 20 independently owned media voices post-merger, and each DMA must contain eight independently owned and operating commercial and noncommercial television stations. A one television/seven radio station combination will meet the numerical ownership/voice count limitations of our new radio-television cross-ownership rule in both the Los Angeles and Chicago markets. As for the Dallas-Fort Worth DMA, Viacom will control a two television/eight radio station combination post merger. Here, Viacom has pledged to divest two radio stations in order to come into compliance with our revised radio-television cross-ownership rule. This two television/six radio station combination also requires at least 20 independently owned media voices remaining in the Dallas-Fort Worth market, and must meet our revised duopoly rule and television LMA grandfathering policy.

35. Viacom asks the Commission for a six-month period of time from consummation to file applications to divest the radio stations in the Baltimore, Los Angeles, Chicago, and Dallas-Ft. Worth markets. According to Viacom, the Commission has long held that allowing those entities proposing mergers or transfers of multiple stations a reasonable period of time to come into compliance with our rules is supported by the benefits derived from such transactions. Citing *Stockholders of CBS, Inc.*, Viacom further contends that we allow such relief where the conflicts are incidental to the much larger merger, will promote commerce, encourage investment in the broadcast industry, and allow for the free transferability of broadcast licenses. In addition, Viacom contends the Commission has stated that a forced, immediate sale could impose severe economic hardship on applicants without offsetting public interest benefits, restrict the value of the assets and artificially limit the range of potential purchasers.³⁷ Viacom also argues that this six-month period of time would have no appreciable impact on diversity or competition. All of the markets requiring divestiture are among the 25 largest media markets in the country. The Commission has previously allowed common ownership by CBS in Los Angeles, Chicago and Baltimore of one television/eight radio station combinations, at least on a temporary basis due, in "substantial part" to the level of diversity and competition in these markets. Finally, Viacom points out that under the modified ownership rules, these television/radio combinations would have been grandfathered, and CBS afforded the opportunity to demonstrate that permanent retention of these stations

³⁵ In each of these markets, Viacom has decided to maintain control of the television stations in the combination.

³⁶ *Television Ownership Report*, 14 FCC Rcd at 12950.

³⁷ See, e.g., *Multimedia, Inc.* 11 FCC Rcd 4883, 4889 (1995); *Stockholders of CBS, Inc.*, 11 FCC Rcd at 3755 (1995).

would serve the public interest.³⁸

36. *Discussion.* As Viacom has noted, several of our past decisions did find temporary waiver of our multiple ownership rules appropriate to facilitate multi-station transactions, especially when such waiver was incidental to the larger transaction.³⁹ Since that time, we have released our *Television Ownership Order*, which substantially relaxes our radio-television cross-ownership rule, and allows broadcasters the opportunity to take advantage of common ownership of a greater number of television and radio stations in a given market. We continue, however, to weigh our decisions against our underlying goals of diversity and competition in the broadcast market place. After reviewing the record, we do not believe that the public interest will be disserved by allowing Viacom six months to divest the necessary number of radio stations to come into compliance with our rules. The stations to be divested make up a small portion of an extremely large merger involving two networks and multiple broadcast stations. Additionally, the markets involved are among the largest in the country, each served by a plethora of independent media voices. Our review of the applicant's showing finds that the Baltimore market will have at least 27 independently owned media voices post merger. The Chicago, Los Angeles and Dallas-Fort Worth markets will each host at a minimum 32 independently owned media voices post merger. We also believe it is important to note that under our relaxed ownership rules, these radio/television combinations in Baltimore, Los Angeles, Chicago and Dallas-Fort Worth would be grandfathered until at least 2004 had CBS and Viacom not entered into this proposed merger.⁴⁰ Should the proposed transfer of control not take place, it is possible that these radio/television combinations would exist for at least four more years. Thus, this brief six-month period to divest the stations, we believe, would not harm diversity or hinder competition in a manner conflicting with the public interest. We will, however, prohibit Viacom from divesting the stations to any party whose acquisition would require waiver of our multiple ownership rules.

C. Satellite Waivers

37. We next consider the proposal of Viacom to continue operating stations KCCO-TV, Alexandria, Minnesota, and KCCW-TV, Walker, Minnesota, as satellites of WCCO-TV, Minneapolis, Minnesota and station WJMN-TV, Escanaba, Michigan as a satellite of WFRV-TV, Green Bay, Wisconsin. Viacom requests a continuing satellite exemption of the local television multiple ownership rule, 47 CFR § 73.3555(b), with respect to WCCO-TV, KCCO-TV, and KCCW-TV, which are all located in the Minneapolis-St. Paul, Minnesota DMA. A satellite exemption is no longer required to permit common ownership of WJMN-TV and WFRV-TV pursuant to the local television multiple ownership rule, 47 CFR § 73.3555(b), as they are licensed to separate DMAs. Viacom requests, instead, a waiver of the main studio rule, 47 CFR § 73.1125, to permit continued operation of WJMN-TV without a local main studio.⁴¹

³⁸ *Television Ownership Order* at 12957.

³⁹ See, e.g., *The Providence Journal Company*, 12 FCC Rcd 2883 (1997); *Argyle Television, Inc.*, 12 FCC Rcd 10737 (1997).

⁴⁰ We require applicants for transfer of control to demonstrate compliance with the radio-television cross-ownership rule. However, for parties who were previously granted waivers conditioned on the outcome of the report and order, we have extended those conditional waivers for parties that do not comply with the modified radio-television cross-ownership rule until the conclusion of our biennial review in 2004.

⁴¹ Section 73.1125(a) of the Commission's rules requires that a local main studio be maintained either within the station's community of license; within the principal community contour of any AM, FM or TV broadcast station licensed to the station's community of license; or within twenty-five miles from the reference coordinates of the (continued....)

38. Viacom bases its requests for satellite exemptions on the standards adopted in *Television Satellite Stations*, 6 FCC Rcd 4212, 4215 (1991). Under that standard, applicants acquiring satellite stations must show that the stations meet our satellite policy at the time of the assignment. However, an applicant will be entitled to a presumption that satellite operation is in the public interest if it meets three criteria: (1) no City Grade contour overlap exists between the parent and the satellite; (2) the satellite would provide service to an underserved area; and (3) no alternative operator is ready and able either to construct or to purchase and operate the satellite as a full-service station.⁴² If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis to determine whether other compelling circumstances warrant grant of a waiver.⁴³

39. The satellites meet the first criterion because the City Grade contour of WCCO-TV does not overlap the City Grade contour of either KCCO-TV or KCCW-TV. With respect to the second criterion, Viacom has demonstrated, by using our “transmission” test, that the respective areas are underserved. That test deems an area underserved if there are two or fewer full-service stations licensed to a proposed satellite’s community of license. No other full-service television station is licensed to Walker, Minnesota, KCCW-TV’s community of license and only one other full-power television station is licensed to Alexandria, Minnesota, KCCO-TV’s community of license.

40. As to the third criterion, we note that the Commission has approved continuing satellite status for these stations on two recent occasions.⁴⁴ In these determinations, the Commission relied on submissions demonstrating that it would not be feasible to find a purchaser willing to operate any of the stations on a stand-alone basis due to the small size of the respective markets, the expense of upgrading each station to a stand-alone facility, and other demographic considerations. Viacom has submitted further evidence demonstrating the unfeasibility of finding a purchaser willing to operate the respective stations on a stand-alone basis, and we agree that the facts show that operation of the satellites as full-service stations is unlikely to be profitable. While we find that this showing fails to meet the “presumptive” satellite waiver standard, we do believe that it is strong enough to support continued satellite operation under our *ad hoc* analysis. Therefore, we will grant Viacom authority to continue to operate these stations as satellites. As to the main studio rule, the applicants have demonstrated that the Escanaba market is extremely limited in size, that no other television station is licensed to that community and that maintenance of a main studio in Escanaba is not economically viable. Based on this showing, we will grant a waiver of the main studio rule, pursuant to 47 CFR § 73.1125, with regard to WJMN-TV.

(Continued from previous page) _____
center of its community of license. 47 CFR §73.1125(a). A station may be maintained beyond the limits set forth in Section 73.1125(a) where good cause exists, or “when doing so would be consistent with the operation of the station in the public interest.” 47 CFR §73.1125(b)(2).

⁴² *Television Satellite Stations*, 6 FCC Rcd at 4212.

⁴³ *Id.* at 4214

⁴⁴ See *Midwest Communications, Inc.*, 7 FCC Rcd 159 (1991); *Stockholders of CBS Inc.*, 11 FCC Rcd 3733 (1995).

VI. The Petitions to Deny

A. NBMC

41. In its petition to deny and intervene,⁴⁵ NBMC alleges that the proposed merger violates numerous Commission rules and the public interest. Among the rules alleged to be violated are our EEO rules and the news distortion policy.⁴⁶ We deny NBMC's petition.

42. NBMC has claimed that there are 12 EEO proceedings pending against the applicant. Even if evidence regarding these proceedings had been provided, the applicants only would have been required to provide information regarding adverse findings or adverse final actions falling within the specified categories of misconduct.

43. Finally, on the issue of news distortion, NBMC seems to allege that certain CBS affiliates in Mississippi have either distorted or suppressed news related to civil rights issues. There are no specific allegations of fact to support this claim.⁴⁷ In addition, none of the stations that are the subject of the applications are located in Mississippi. There is no legal basis to hold that CBS is liable for the local programming decisions of independently owned affiliates or that such programming decisions are in any way relevant to the merger. NBMC has failed to present any legal basis or to proffer any evidence that would support denying the CBS/Viacom application. Therefore, we deny its petition.

B. The Stern Petitioners

44. In their petition to deny, Al Westcott, Tom Blackwell, and Glenn and Kathleen Benfield (collectively the "Stern Petitioners"), allege that CBS has been violating 18 U.S.C. § 1464, which governs the broadcast of indecent or obscene material.⁴⁸ These violations are alleged to have taken place during the broadcast of Howard Stern's radio program. They also allege that CBS has permitted its radio stations to broadcast "threatening remarks" against individuals who might file a complaint with the Commission, law enforcement agencies or sponsors regarding the Howard Stern show. Finally, the Stern Petitioners contend that CBS should be held liable for the actions of an alleged serial rapist in New York who apparently was a listener of the Howard Stern show. In its opposition, CBS argues, among other things, that a September 1, 1995 Settlement Agreement between Infinity and the Commission specifically precluded use of material aired prior to the agreement as a basis for a petition. CBS also argues that any material aired prior to June 4, 1998 is irrelevant as the Commission has already considered, and passed upon, the qualifications of CBS within the context of a separate transfer of control application.

45. Section 310(d) of the Communications Act, by incorporating Section 308(b), requires us to consider a proposed transferee's character qualifications before granting a transfer of control application. This consideration entails examination of the transferee's compliance with the Communications Act and

⁴⁵ NBMC filed an amended petition to deny and intervene on January 4, 2000. The substantive allegations in the amended and original petitions are the same.

⁴⁶ NBMC also makes a blanket accusation that the applications are "fraught with anti-trust Justice Department, Federal Trade Commission, Security [sic] and Exchange Commission and indeed certain Internal Revenue Service violations." NBMC does not, however, make any specific factual statements to support these vague, generalized allegations. Given this lack of particularity and substantiation, we conclude that no action on our part with respect to NBMC's assertions is warranted.

⁴⁷ *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985); *Hunger in America*, 20 FCC 2d 143, 150 (1969).

⁴⁸ 18 U.S.C. § 1464 is reflected in our rules at 47 C.F.R. § 73.3999.

with our rules, including our indecency restrictions.⁴⁹ On December 26, 1996, the Commission approved the transfer of control of Infinity radio stations to Westinghouse Electric Corporation.⁵⁰ At that time, the Commission dismissed two letters alleging that Infinity committed “past and pending” violations of federal indecency law by broadcasting the “Howard Stern Show,” because the letters failed to raise a substantial or material question of fact concerning indecent programming.⁵¹ The Commission also noted that certain broadcasts of the “Howard Stern Show,” even if they were indecent, did not disqualify Infinity as a Commission licensee.⁵² On December 1, 1997, Westinghouse Electric Corporation, having merged with CBS prior to purchasing Infinity, changed its name to CBS Corporation, and, on June 4, 1998, purchased the stock of American Radio Systems pursuant to Commission consent granted on May 27, 1998.⁵³ The Stern Petitioners base their instant petition to deny on transcripts of broadcasts aired prior to the May 27, 1998 order. Not only has the Commission considered substantially the same issues within the context of our approval of the Westinghouse/Infinity merger, but has reviewed, and passed upon, CBS’s basic qualifications when approving the transfer of control of American Radio Systems stations. These issues have been decided by the Commission and will not be revisited.

46. With respect to the allegation that CBS permitted their radio stations to broadcast “threatening remarks” from Howard Stern, the Commission has already determined that the allegedly threatening remarks made by Mr. Stern were “‘off-the-cuff’ comments complaining about those listeners who allegedly [] paraphrased his material incorrectly,” and were not “calculated to threaten or intimidate” those complaining about his broadcasts.⁵⁴ We see no reason to alter this conclusion in the context of this application.

47. Finally, we reject the argument that CBS should be held liable for the actions of an alleged rapist in New York who happened to be a listener to the program. Absent some tangible, causal link, such as direct incitement, we will not hold a broadcast station liable for the actions of any or all of its listeners. Consequently, for the reasons set forth above, we deny the petition filed by Al Westcott, Glenn and Kathleen Benfield, and Tom Blackwell.

VII. Administrative Matters

48. We have reviewed the proposed merger and the related pleadings and find that the applicants are fully qualified and that grant of the transfer of control of the CBS broadcast stations to Viacom will serve the public interest, convenience, and necessity.

49. ACCORDINGLY, IT IS ORDERED, That the petitions to deny filed by the American Cable Association, the National Black Media Coalition, the WEYS Television Corporation, and the Stern Petitioners ARE DENIED, and the letter filed by A.H. Belo Corporation in opposition to the applications IS DENIED.

50. IT IS FURTHER ORDERED, That the request for 24 months to come into compliance with

⁴⁹ 47 U.S.C. § 310(d); *see also*, *Stockholders of CBS Inc.*, 11 FCC Rcd 3733, 3739 (1995).

⁵⁰ *See Stockholders of Infinity Broadcasting Corporation*, 12 FCC Rcd 5012 (1996).

⁵¹ *Id.*, at 5016, Footnote 1.

⁵² *Id.*; *See also KLUV(FM)*, 10 FCC Rcd 4517, 4519 (1995); *KRTH(FM)*, 9 FCC Rcd 7112 (1994).

⁵³ *See Shareholders of American Radio Systems Corporation*, 13 FCC Rcd 12430 (1998).

⁵⁴ *Eagle Radio, Inc.*, 13 FCC Rcd 13869, 13871 (1998).

the Dual Network Rule, Section 73.658(g), IS DENIED, however, we GRANT a temporary 12-month period from the date of the consummation of the transaction in order to allow Viacom/CBS to come into compliance with the Dual Network Rule.

51. IT IS FURTHER ORDERED, That the request for 24 months to come into compliance with the national television ownership cap, Section 73.3555(e), IS DENIED, however, we GRANT a temporary 12-month period from the date of the consummation of the transaction in order to allow Viacom/CBS to come into compliance with our national television ownership cap.

52. IT IS FURTHER ORDERED, That the requests for 6 months to come into compliance with the radio-television cross-ownership rule, Section 73.3555(c), in the Los Angeles, Chicago, Dallas/Ft. Worth, Sacramento and Baltimore markets ARE GRANTED, but within 6 months of consummation of the transaction, Viacom/CBS is directed to file the applications necessary to bring it into compliance in all five markets.

53. IT IS FURTHER ORDERED, That continued television satellite authorization, pursuant to Note 5 of Section 73.3555, for KCCO-TV, Alexandria, Minnesota and KCCW-TV, Walker, Minnesota, satellite stations of WCCO-TV, Minneapolis, Minnesota IS GRANTED, and a waiver of the main studio rule, Section 73.1125(a), to permit operation of WJMN-TV, Escanaba, Michigan without a local main studio IS GRANTED.

54. IT IS FURTHER ORDERED, That, pursuant to the request of Viacom and Section 1.103, this order is effective upon adoption.

55. Accordingly, IT IS ORDERED, That the applications for consent to the transfer of control of the CBS broadcast stations, applications BTCCT, BTCH, BTC, BTCTT, BTCTTL, BTCFTB, BTCFT 19991116ABA-AIN, as listed in Exhibit A, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

EXHIBIT A

CBS Corporation seeks consent to transfer control of the following stations (TV, TV Translator, AM, FM, FM Booster, and FM Translator) from the shareholders of CBS Corporation to Viacom Inc.:

Station	Service	Community of License	File Number	Facility ID Number
KCBS-TV	TV	Los Angeles, CA	BTCCT-19991116ABC	9628
KDKA-TV	TV	Pittsburgh, PA	BTCCT-19991116AAX	25454
KEYE-TV	TV	Austin, TX	BTCCT-19991116AAY	33691
KYW-TV	TV	Philadelphia, PA	BTCCT-19991116AAZ	25453
WBZ-TV	TV	Boston, MA	BTCCT-19991116ABA	25456
WJZ-TV	TV	Baltimore, MD	BTCCT-19991116ABB	25455
KCCO-TV	TV	Alexandria, MN	BTCCT-19991116ABD	9632
KCCW-TV	TV	Walker, MN	BTCCT-19991116ABE	9640
KPIX-TV	TV	San Francisco, CA	BTCCT-19991116ABF	25452
WBBM-TV	TV	Chicago, IL	BTCCT-19991116ABG	9617
WCBS-TV	TV	New York, NY	BTCCT-19991116ABH	9610
WCCO-TV	TV	Minneapolis, MN	BTCCT-19991116ABI	9629
WFRV-TV	TV	Green Bay, WI	BTCCT-19991116ABJ	9635
WJMN-TV	TV	Escanaba, MI	BTCCT-19991116ABK	9630
WWJ-TV	TV	Detroit, MI	BTCCT-19991116ABL	72123
KTVT	TV	Dallas-Fort Worth, TX	BTCCT-19991116ABM	23422
KCNC-TV	TV	Denver, CO	BTCCT-19991116ABN	47903
WFOR-TV	TV	Miami, FL	BTCCT-19991116ABO	47902
KUSG	TV	St. George, UT	BTCCT-19991116ABP	35822
KUTV	TV	Salt Lake City, UT	BTCCT-19991116ABQ	35823
K64AA	TV Translator	Spring Glen, UT	BTCTT-19991116ABR	35838
K67AA	TV Translator	Aurora, UT	BTCTT-19991116ABS	35839
K53CF	LPTV	Aurora, UT	BTCTTL-19991116ABT	35837
K64BO	LPTV	Delta, UT	BTCTTL-19991116ABU	35840
K43AE	LPTV	Myton, UT	BTCTTL-19991116ABV	35836
KCBS	AM	Los Angeles, CA	BTC-19991116ABW	9637
KFWB	AM	Los Angeles, CA	BTC-19991116ABX	25457
KIKK	AM	Pasadena, TX	BTC-19991116ABY	25450
KILT	AM	Houston, TX	BTC-19991116ABZ	25440
KMOX	AM	St. Louis, MO	BTC-19991116ACA	9638
KNX	AM	Los Angeles, CA	BTC-19991116ACB	9616
KRLD	AM	Dallas, TX	BTC-19991116ACC	59820
KYCY	AM	San Francisco, CA	BTC-19991116ACD	25458
WBBM	AM	Chicago, IL	BTC-19991116ACE	9631
WBZ	AM	Boston, MA	BTC-19991116ACF	25444
WCBS	AM	New York, NY	BTC-19991116ACG	9636
WCCO	AM	Minneapolis, MN	BTC-19991116ACH	9642
WINS	AM	New York, NY	BTC-19991116ACI	25451
WMAQ	AM	Chicago, IL	BTC-19991116ACJ	25445
WWJ	AM	Detroit, MI	BTC-19991116ACK	9621

Federal Communications Commission

KCBS-FM	FM	Los Angeles, CA	BTCH-19991116ACL	9612
KIKK-FM	FM	Houston, TX	BTCH-19991116ACM	25449
KILT-FM	FM	Houston, TX	BTCH-19991116ACN	25439
KITS	FM	San Francisco, CA	BTCH-19991116ACO	18510
KITS-FM1	FM Booster	Pleasant Hill, CA	BTCTFB-19991116ACP	18524
KITS-FM2	FM Booster	Pleasanton, CA	BTCTFB-19991116ACQ	18521
KITS-FM3	FM Booster	San Francisco, CA	BTCTFB-19991116ACR	18519
KITS-FM4	FM Booster	Antioch, CA	BTCTFB-19991116ACS	18526
KLLC	FM	San Francisco, CA	BTCH-19991116ACT	9624
KRQR-FM1	FM Booster	San Ramon/Dublin, CA	BTCTFB-19991116ACU	9633
KLSX	FM	Los Angeles, CA	BTCH-19991116ACV	25075
KTWV	FM	Los Angeles, CA	BTCH-19991116ACW	25437
WARW	FM	Bethesda, MD	BTCH-19991116ACX	9619
WBBM-FM	FM	Chicago, IL	BTCH-19991116ACY	9613
WCBS-FM	FM	New York, NY	BTCH-19991116ACZ	9611
WHFS	FM	Annapolis, MD	BTCH-19991116ADA	72177
WKRK-FM	FM	Detroit, MI	BTCH-19991116ADB	9618
WLTE	FM	Minneapolis, MN	BTCH-19991116ADC	9641
WNEW	FM	New York, NY	BTCH-19991116ADD	25442
WODS	FM	Boston, MA	BTCH-19991116ADE	9639
WVMV	FM	Detroit, MI	BTCH-19991116ADF	25448
WXRT	FM	Chicago, IL	BTCH-19991116ADG	16853
WZGC	FM	Atlanta, GA	BTCH-19991116ADH	13805
WZLX	FM	Boston, MA	BTCH-19991116ADI	13806
KRTH	FM	Los Angeles, CA	BTCH-19991116ADJ	28631
WUSN	FM	Chicago, IL	BTCH-19991116ADK	28620
KLUV	AM	Dallas, TX	BTC-19991116ADL	25375
KLUV-FM	FM	Dallas, TX	BTCH-19991116ADM	67195
KYNG	FM	Dallas, TX	BTCH-19991116ADN	1087
WXYT	AM	Detroit, MI	BTC-19991116ADO	28627
WQYK-FM	FM	St. Petersburg, FL	BTCH-19991116ADP	28619
KHVN	AM	Fort Worth, TX	BTC-19991116ADQ	63780
KRBV	FM	Fort Worth, TX	BTCH-19991116ADR	63779
WSCR	AM	Chicago, IL	BTC-19991116ADS	28630
WJMK	FM	Chicago, IL	BTCH-19991116ADT	28621
KFRC	AM	San Francisco, CA	BTC-19991116ADU	1082
KROQ-FM	FM	Pasadena, CA	BTCH-19991116ADV	28622
WPGC-FM	FM	Morningside, MD	BTCH-19991116ADW	28632
WOMC	FM	Detroit, MI	BTCH-19991116ADX	28623
WYCD	FM	Detroit, MI	BTCH-19991116ADY	1089
WFAN	AM	New York, NY	BTC-19991116ADZ	28617
KDKA	AM	Pittsburgh, PA	BTC-19991116AEA	25443
KYW	AM	Philadelphia, PA	BTC-19991116AEB	25441
WPHT	AM	Philadelphia, PA	BTC-19991116AEC	9634
WOGL-FM	FM	Philadelphia, PA	BTCH-19991116AED	9622
WYSP	FM	Philadelphia, PA	BTCH-19991116AEE	28628
WIP	AM	Philadelphia, PA	BTC-19991116AEF	28626

Federal Communications Commission

KYCY-FM	FM	San Francisco, CA	BTCH-19991116AEG	1092
KYCY-FM1	FM Booster	Pleasanton, CA	BTCTB-19991116AEH	1083
WQYK	AM	Seffner, FL	BTC-19991116AEI	28629
KVIL-FM	FM	Highland Park, TX	BTCH-19991116AEJ	28624
WJFK-FM	FM	Manassas, VA	BTCH-19991116AEK	28625
WCKG	FM	Elmwood Park, IL	BTCH-19991116AEL	71283
KFRC-FM	FM	San Francisco, CA	BTCH-19991116AEM	1084
KFRC-FM3	FM Booster	Walnut Creek, CA	BTCTB-19991116AEN	1090
KOAI	FM	Fort Worth, TX	BTCH-19991116AEO	23440
WLIF-FM	FM	Baltimore, MD	BTCH-19991116AEP	28637
WJFK	AM	Baltimore, MD	BTC-19991116AEQ	28636
KRLA	AM	Pasadena, CA	BTC-19991116AER	25076
WPGC	AM	Morningside, MD	BTC-19991116AES	28638
WXYV	FM	Baltimore, MD	BTCH-19991116AET	63778
WAOK	AM	Atlanta, GA	BTC-19991116AEU	63775
WVEE	FM	Atlanta, GA	BTCH-19991116AEV	63776
WBCN	FM	Boston, MA	BTCH-19991116AEW	26897
KSGS	AM	St. Louis Park, MN	BTC-19991116AEX	57833
WXPT	FM	St. Louis Park, MN	BTCH-19991116AEY	54425
WXRK	FM	New York, NY	BTCH-19991116AEZ	58579
WBGR	AM	Baltimore, MD	BTC-19991116AFA	43864
WBMD	AM	Baltimore, MD	BTC-19991116AFB	1913
KEZR	FM	San Jose, CA	BTCH-19991116AFC	1176
KLUE	FM	Soledad, CA	BTCH-19991116AFD	54968
KMJ	AM	Fresno, CA	BTC-19991116AFE	26923
KOOR	AM	Clovis, CA	BTC-19991116AFF	29429
KRAK	AM	Sacramento, CA	BTC-19991116AFG	65482
KSFN	AM	North Las Vegas, NV	BTC-19991116AFH	47745
KUPL	AM	Portland, OR	BTC-19991116AFI	26926
KXNT	AM	North Las Vegas, NV	BTC-19991116AFJ	33068
WECK	AM	Cheektowaga, NY	BTC-19991116AFK	1914
WTIC	AM	Hartford, CT	BTC-19991116AFL	66464
KBAY	FM	Gilroy, CA	BTCH-19991116AFM	35401
KBBT-FM	FM	Banks, OR	BTCH-19991116AFN	12551
KFRG	FM	San Bernardino, CA	BTCH-19991116AFO	1241
KINK-FM	FM	Portland, OR	BTCH-19991116AFP	53068
KLUC-FM	FM	Las Vegas, NV	BTCH-19991116AFQ	47744
KMGV	FM	Fresno, CA	BTCH-19991116AFR	18409
KMXB	FM	Henderson, NV	BTCH-19991116AFS	51676
KMXV	FM	Kansas City, MO	BTCH-19991116AFT	2446
KMZQ-FM	FM	Henderson, NV	BTCH-19991116AFU	12560
KOQO-FM	FM	Fresno, CA	BTCH-19991116AFV	29296
KQBT	FM	Taylor, TX	BTCH-19991116AFW	63201
KRNC	FM	Fresno, CA	BTCH-19991116AFX	26933
KSKS	FM	Fresno, CA	BTCH-19991116AFY	29924
KSRC	FM	Kansas City, MO	BTCH-19991116AFZ	11279
KUFO	FM	Portland, OR	BTCH-19991116AGA	26932

Federal Communications Commission

KVSR	FM	Fresno, CA	BTCH-19991116AGB	18406
KXFG	FM	Sun City, CA	BTCH-19991116AGC	63912
KXTE	FM	Pahrump, NV	BTCH-19991116AGD	2100
KYMX	FM	Sacramento, CA	BTCH-19991116AGE	72116
KZZO	FM	Sacramento, CA	BTCH-19991116AGF	65481
K232CO	FM Translator	Boulder City, NV	BTCT-19991116AGG	51674
K272DD	FM Translator	Pahrump, NV	BTCT-19991116AGH	51673
WAZU	FM	Circleville, OH	BTCH-19991116AGI	64717
WBMX	FM	Boston, MA	BTCH-19991116AGJ	1901
WBUF	FM	Buffalo, NY	BTCH-19991116AGK	53699
WCMF-FM	FM	Rochester, NY	BTCH-19991116AGL	1905
WEAT-FM	FM	West Palm Beach, FL	BTCH-19991116AGM	29567
WGRR	FM	Hamilton, OH	BTCH-19991116AGN	72126
WIRK-FM	FM	West Palm Beach, FL	BTCH-19991116AGO	1918
WJYE	FM	Buffalo, NY	BTCH-19991116AGP	1915
WKRQ	FM	Cincinnati, OH	BTCH-19991116AGQ	11276
WLLD	FM	Holmes Beach, FL	BTCH-19991116AGR	18527
WLVQ	FM	Columbus, OH	BTCH-19991116AGS	11277
WPXY-FM	FM	Rochester, NY	BTCH-19991116AGT	53966
WQSR	FM	Catonsville, MD	BTCH-19991116AGU	1916
WRBQ-FM	FM	Tampa, FL	BTCH-19991116AGV	11943
WRCH	FM	New Britain, CT	BTCH-19991116AGW	1910
WRMM-FM	FM	Rochester, NY	BTCH-19991116AGX	1907
WSJT	FM	Lakeland, FL	BTCH-19991116AGY	51987
WTIC-FM	FM	Hartford, CT	BTCH-19991116AGZ	66465
WWMX	FM	Baltimore, MD	BTCH-19991116AHA	74196
WYLY	FM	Lebanon, OH	BTCH-19991116AHB	40915
WYRK	FM	Buffalo, NY	BTCH-19991116AHC	1908
WYUU	FM	Safety Harbor, FL	BTCH-19991116AHD	18512
WZMX	FM	Hartford, CT	BTCH-19991116AHE	1900
WZNE	FM	Brighton, NY	BTCH-19991116AHF	6859
WNKS	FM	Charlotte, NC	BTCH-19991116AHG	53975
WSOC-FM	FM	Charlotte, NC	BTCH-19991116AHH	20339
WSSS	FM	Charlotte, NC	BTCH-19991116AHI	20338
KBEQ-FM	FM	Kansas City, MO	BTCH-19991116AHJ	48961
KFKF-FM	FM	Kansas City, MO	BTCH-19991116AHK	34431
KMPS	AM	Seattle, WA	BTC-19991116AHL	6387
KBKS	FM	Tacoma, WA	BTCH-19991116AHM	27020
WFNZ	AM	Charlotte, NC	BTC-19991116AHN	53974
WGIV	AM	Charlotte, NC	BTC-19991116AHO	6585
WBAV-FM	FM	Gastonia, NC	BTCH-19991116AHP	6587
WDSY-FM	FM	Pittsburgh, PA	BTCH-19991116AHQ	18525
WPEG	FM	Concord, NC	BTCH-19991116AHR	6586
W298AE	FM Translator	New Brighton, PA	BTCT-19991116AHS	18514
WBZZ	FM	Pittsburgh, PA	BTCH-19991116AHT	20350
WZPT	FM	New Kensington, PA	BTCH-19991116AHU	20351
KHTK	AM	Sacramento, CA	BTC-19991116AHV	20352

Federal Communications Commission

KNCI	FM	Sacramento, CA	BTCH-19991116AHW	20353
KXOA	FM	Roseville, CA	BTCH-19991116AHX	11273
KMPS-FM	FM	Seattle, WA	BTCH-19991116AHY	20356
KYCW	FM	Seattle, WA	BTCH-19991116AHZ	1091
KZOK-FM	FM	Seattle, WA	BTCH-19991116AIA	20357
KEZK-FM	FM	St. Louis, MO	BTCH-19991116AIB	13507
KEZN	FM	Palm Desert, CA	BTCH-19991116AIC	11747
KYKY	FM	St. Louis, MO	BTCH-19991116AID	20358
WHOK-FM	FM	Lancaster, OH	BTCH-19991116AIE	72311
W272AT	FM Translator	Columbus, OH	BTCH-19991116AIF	72310
KJCE	AM	Rollingwood, TX	BTC-19991116AIG	1243
KAMX	FM	Luling, TX	BTCH-19991116AIH	48651
KKMJ-FM	FM	Austin, TX	BTCH-19991116AII	66489
WNCX	FM	Cleveland, OH	BTCH-19991116AIJ	41390
KKJZ	FM	Lake Oswego, OR	BTCH-19991116AIK	4115
KUPL-FM	FM	Portland, OR	BTCH-19991116AIL	4114
K251AD	FM Translator	Beaverton, OR	BTCH-19991116AIM	4116
KSFM	FM	Woodland, CA	BTCH-19991116AIN	59598

56. In the Matter of the Applications of Shareholders of CBS Corporation (Transferor) and Viacom, Inc. (Transferee) For Transfer of Control of CBS Corporation and Certain Subsidiaries, Licensees of KCBS-TV, Los Angeles, CA *et al.*

**Statement of Commissioner Harold W. Furchtgott-Roth,
I. CONCURRING IN PART AND DISSENTING IN PART**

I concur in the fundamental decision to grant CBS's application to transfer radio licenses to Viacom, Inc. I also concur in the Order's disposition of matters relating to the dual network rule, national ownership cap, local television ownership rules, satellite waivers, and petitions to deny this transfer. Although I strongly support timely deregulatory action on our ownership rules in the context of the broadcast biennial review, I must at the same time acknowledge their current legal force and effect and therefore agree with their application to the instant license transfer request.

I must dissent, however, from application of the radio-television cross ownership rule to CBS/Viacom because that rule shrinks the combined entity's statutory right to local radio ownership. To my mind, such a result is in derogation of statutory right and thus untenable under the Administrative Procedure Act. *See* 5 U.S.C. section 706 (providing that a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . short of statutory right").

As I stated in last year's review of local broadcast ownership rules:

I believe that limitations on radio ownership under the one-to-a-market rule that constrict the statutory radio ownership caps in section 202(b) of the Telecommunications Act of 1996 are legally unsound. As [here], there are instances where ownership of a television station in addition to radio stations will trigger application of the one-to-a-market rule, which may impose lower caps on radio ownership than does section 202(b).

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting and in the Matter of Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd. 12,903 (rel. Aug. 6, 1999) ("*Local Ownership Report*").

For example, under section 202(b), a broadcaster is affirmatively and specifically authorized to own as many as 8 stations in certain local markets. *See* 47 U.S.C. section 202(b) ("[I]n a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service."). But under the Commission's one-to-a-market rule, which was promulgated pursuant to the generalized public interest standard, a party may *not*, contrary to the express language of section 202(b), own 8 radio stations if it happens to also own a television station in that market. In such a situation, the party can own only 1 television and 7 radio stations or 2 television and 6 radio stations. *See Local Ownership Report* at para. 9 & n.19.

This contraction of statutory ownership rights is exactly what happened to CBS/Viacom in the Sacramento, Baltimore, Los Angeles, Chicago, and Dallas-Fort Worth markets. *See Memorandum Opinion & Order* at paras. 29-36. Under section 202(b), as long as there are 45 radio stations in the market (an issue the Order does not even address), CBS/Viacom is by federal statute *affirmatively entitled* to own 8 radio stations. Yet by dint of the radio-television cross-ownership rule, the Commission forces the company to divest itself of property in order to fall within a wholly regulatory, more restrictive limit.

Again, as I have previously explained:

Nothing in section 202(b). . . indicates that radio ownership rights are contingent on non-ownership of a television station. Section 202(b) is not phrased in the conditional; it does not say that ownership of other kinds of communications properties should adversely affect the rights established by that section. Nor are the ownership rights created there limited to "radio-only" combinations, as the Commission [calls them]; rather, the provision simply speaks of radio ownership, without reference to broadcast combinations.

The one-to-a-market rule is, of course, based on the generalized "public interest" standard, whereas the caps established in 202(b) are very specific. Regulations promulgated under the general public interest grant of authority should not trump such particularized decisions by Congress. In short, the Commission cannot by rulemaking shrink statutorily granted ownership rights.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *Local Ownership Report*.

While I have my policy and even constitutional concerns with the other ownership limits applied today and hope to see them soon repealed or modified, none of them is clearly in derogation of a positive statutory right to ownership at defined levels. Because this is true of the radio-television cross-ownership rule, its operation in this Order appears to violate the Administrative Procedure Act. I cannot vote for such action, especially where, as here, the limit in question is not statutorily required.

Finally, I note my hope and expectation that other license transfer applicants will be subject to the same straightforward approach to section 309 taken in this Order – namely, application of *existing* statutory provisions and Commission rules to the proposed transfer, without a separate (and usually more restrictive) analysis taken pursuant to the public interest standard. I also hope and expect that other license transfer applicants will receive the same reasonable treatment when it comes to objections grounded in antitrust theory – that is, deferral to the Department of Justice. *See Memorandum Opinion and Order* at para. 16 (suggesting that concerns regarding potential abuse of market power should be addressed not by the Commission but by antitrust authorities); *id.* at n. 13 (noting that DOJ has examined the specific issue of concentration in program supply markets and thus declining to address the matter).

For the foregoing reasons, I concur in part but dissent from the relevant radio-television part of this decision.

II.

III. MAY 3, 2000

A. STATEMENT OF COMMISSIONER GLORIA TRISTANI,

B. DISSENTING IN PART

Re: CBS-Viacom Merger

The Commission's Order approving the merger between CBS and Viacom is most notable for what it fails to address. As mystery readers know, sometimes it is the dog that does not bark that explains a situation's underlying reality.

Diversity

First, the Order completely ignores the effect of the CBS-Viacom merger on one of the fundamental purposes of the Communications Act – maintaining a diversity of media voices.⁵⁵ The potential concentration of viewpoints on television is especially important. Television is still the means by which most Americans get their news and information, and is still the medium that children spend far more time with than any other.⁵⁶

One would never know from the Commission's Order that this merger involves the combination of two of the behemoths of the media industry. CBS owns, among other interests, the CBS network (with over 200 affiliates), 20 television stations, 162 radio stations, cable networks TNN and Country Music Television, King World and Eyemark Entertainment. Viacom owns, among other interests, the UPN network, 17 television stations, Paramount Pictures, Paramount Television, Spelling Entertainment Group, Blockbuster Video, Simon and Schuster, and cable networks MTV, Nickelodeon, Nick at Nite, VH-1, Showtime, TV Land and the Movie Channel.

⁵⁵ See, e.g., Communications Act, Section 257 (noting that one of the "policies and purposes" of the Communications Act favors a "diversity of media voices"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission"); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[I]t has long been a basic tenet of national communications policy" that "the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"), quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁵⁶ *Kaiser Family Foundation Report* (1999) (finding that, on average, children watch 2 hours and 46 minutes of television a day, compared to 48 minutes spent listening to CDs or tapes, the second most popular media activity).

Will the combination of these assets give one entity too much control over the marketplace of ideas? The Commission provides no analysis, and, most disturbing, does not even ask the question. The Commission's failure to examine this issue constitutes an abdication of its responsibility to ensure that the merger will serve the public interest and effectuate the purposes of the Communications Act.⁵⁷ Ultimately, the American public will pay the price if they do not have meaningful access to the diverse and antagonistic viewpoints that democratic deliberation requires.

I express no opinion on the results of such a diversity analysis in this case. But the Commission's failure to even raise the issue is an ominous development for those who are looking to the Commission to examine these mega-mergers in their broader context, rather than simply as a mechanical exercise to verify compliance with specific rules.

Radio Market Definition

Second, the Commission fails to acknowledge that it shifts the definition of "radio market" to suit its purposes. In particular, the Commission ignores the conflict between the definition of radio "market" it applies to the one-to-a-market rule and the definition of radio "market" that applies to the local radio ownership cap rules. Put simply, under the market definition adopted for the one-to-a-market rule, a radio station is present only in the Arbitron market to which it is assigned (unless its contour completely encompasses the city of license of a television station in another market, as CBS's San Francisco radio station KFRC(AM) does in Sacramento). By contrast, under the local ownership cap rules, a radio "market" is defined as all stations with signal contours that overlap the commonly-owned stations, regardless of the Arbitron market to which those stations are assigned. The Order's failure to address the conflicting market definitions is all the more glaring because the one-to-a-market and local ownership cap rules are contained in the very same section of the Commission's rules (Section 73.3555).

I understand the desire to pretend that the local ownership cap rules do not exist. As I have

⁵⁷ See Communications Act of 1934, Secs. 310(d) and 309(e); *Application of Telecommunications, Inc. and AT&T Corp.*, 14 FCC Rcd 3160, 3168-69 (1999).

written on several occasions, those rules are irrational and there is no defending them.⁵⁸ One of the problems is that a radio market definition based on overlapping signal contours often results in markets that bear little relation to reality.⁵⁹ The Order implicitly agrees, rejecting the notion that radio markets should be defined by overlapping signal contours. Instead, the Order looks to the markets established by a commercial ratings service as a more appropriate reflection of which stations actually serve particular listeners. Logically, the Commission's shifting definitional approach makes no sense. Either radio stations with overlapping signal contours should count as being in the same "market" or they should not. They cannot count as being "in the market" for one part of Section 73.3555 and then "out of the market" for another.

Beyond the illogic, these conflicting market definitions have a clear real-world effect: they permit more consolidation than if the Commission applied a consistent market definition. For the local ownership caps, the more stations that count as being "in the market" the greater the consolidation, because the rules provide for increasing levels of ownership as the number of stations in a market increases. A radio market definition based on signal contour overlaps can dramatically increase the number of stations in the "market" as distant stations whose signals overlap with the outermost reaches of stations in the market are swept into the count. In the recent situation in Wichita, Kansas, for example, the Commission's signal contour approach more than doubled the number of stations that Arbitron assigned to the Wichita market -- from 24 to 52 stations. That increase meant that an entity could own up to eight stations in Wichita, rather than only six that would be possible under Arbitron's station count. Similarly, CBS owns 5 FM stations in the 38-station Sacramento Arbitron market. But in a 38-station market, CBS would be limited to no more than 4 FM stations. In order to be able to own a fifth FM station, CBS must rely on out-of-market stations with overlapping signal contours as being "in the market."

For the one-to-a-market rule, the consequences of using a signal contour method are reversed -- bringing additional stations into the market generally would *restrict* consolidation. Here, for instance, CBS-Viacom will own one television and 7 radio stations in both the San Francisco and Sacramento markets. That could not happen under a signal contour approach, because the San Francisco stations would put CBS-Viacom over the one-to-a-market rule limit in Sacramento, and vice versa.

⁵⁸ See, e.g., Press Statement of Commissioner Gloria Tristani re: Mass Media Bureau Approval of Radio License Transfers in Youngstown-Warren, Ohio and Lafayette, Louisiana (March 20, 2000); Press Statement of Commissioner Gloria Tristani re: Applications for Radio License Transfers in Augusta-Waterville, Maine (rel. Feb. 28, 2000); Press Statement of Commissioner Gloria Tristani re: Mass Media Bureau's granting of applications to transfer radio licenses from Fuller-Jeffrey Broadcasting to Citadel Broadcasting in Portland, Maine (rel. Aug. 19, 1999); Dissenting Statement of Commissioners Susan Ness and Gloria Tristani, In re Applications of Pine Bluff Radio, Inc. and Seark Radio, Inc. File Nos. BAL-970103EA, BALH-970103EB, BALH-970103EC (rel. April 12, 1999); Joint Statement of Commissioners Susan Ness and Gloria Tristani, In re Station KBYB(FM), El Dorado, Arkansas, 13 FCC Rcd 15685 (1998).

⁵⁹ See, e.g., Press Statement of Commissioner Gloria Tristani re: Mass Media Bureau Approval of Radio License Transfer in Wichita, Kansas, (March 24, 2000) (although Arbitron assigned only 24 radio stations to the Wichita, Kansas market, the Mass Media Bureau counted 52 radio stations in the market under the contour overlap approach, including several Oklahoma stations whose signals did not even reach Kansas).

In other words, the Commission treats the San Francisco and Sacramento stations as being in the same market to permit a level of consolidation that otherwise would not be possible, but then it treats them as being in separate markets when counting them together would limit consolidation under other rules. It's tempting to say that the Commission simply adopts whatever definition of radio market will maximize consolidation, regardless of logic or consistency. One might be able to dismiss such a charge as cynical, but not as inaccurate.

Conclusion

Those who are counting on the Commission to use its public interest authority to scrutinize the impact of huge media mergers should be disheartened by this decision. The Commission shows little sensitivity to the broader context in which these mergers are taking place, and little stomach for limiting consolidation based on diversity concerns. The sound of a dog not barking is a clue; the sound of a watchdog not barking is a problem.