

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

In the Matter of
Shareholders of Hispanic Broadcasting Corporation (Transferor)
and
Univision Communications, Inc. (Transferee)
For Transfer of Control of Hispanic Broadcasting Corporation, and Certain Subsidiaries, Licensees of KGBT(AM), Harlingen, TX et al.
File Nos. BTC, BTCH, BTCFTB-20020723ABL-ADS, and BTCH-20021125ABD-ABH
MB Docket No. 02-235

MEMORANDUM OPINION AND ORDER

Adopted: September 8, 2003

Released: September 22, 2003

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a joint statement.

I. INTRODUCTION

1. The Commission has under consideration applications for consent to transfer control of licensee subsidiaries holding 62 full-service radio station licenses (16 AM and 41 FM) and 3 FM translator licenses from the current shareholders of Hispanic Broadcasting Corporation (HBC) to Univision Communications, Inc. (Univision).<sup>1</sup> Univision and its subsidiaries own or control 32 full-

1 A list of the stations to be transferred is attached as an appendix. After filing the instant applications, a wholly owned subsidiary acquired the following additional broadcast radio stations: KIOT(FM), Los Lunas, NM; KVVV(FM), Rio Rancho, NM; KJFA(FM), Albuquerque, NM; and KAJZ(FM) and KKSS(FM), Santa Fe, NM. On November 25, 2002, applications to transfer control of these stations to Univision Communications, Inc. were filed. See File Nos. BTCH-20021125ABD-ABH. These applications are included in the appendix and addressed in the instant order.

On February 24, March 7, and March 24, 2003, alternative sets of applications were filed seeking consent to assign and/or transfer control of the following 6 full service radio stations to either HBC as controlled by its current shareholders or to HBC as controlled by Univision: WKAQ(AM) and WKAQ-FM, San Juan, PR; WUKQ(AM), Ponce, PR; WUKQ-FM, Mayaguez, PR; KNGT(FM), Jackson, CA; and KINV(FM), Georgetown, TX. Alternative sets of applications were also filed for 3 booster stations. On May 30, 2003, the staff granted the applications naming HBC as currently controlled, and dismissed those applications naming HBC as controlled by Univision. See File Nos. BALH-20030324ADI, BALH-20030307ADZ, BTC-20030224ACH, BTCH-20030224ACI, BTC-20030223ACJ, and BTCH-20030224ACK. The applications were on public notice for more than 30 days.

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service television licenses and a number of low-power television and translator licenses, but no radio station licenses.<sup>2</sup> Univision also has an interest in Entravision Communications Corporation (Entravision), which owns and controls 18 full-service television and 52 full-service radio licenses.<sup>3</sup> The National Hispanic Policy Institute (NHPI) has filed a Petition to Deny the applications, challenging the existing ownership structure of HBC and the proposed ownership structure of the post-merger Univision. Elgin FM Limited Partnership (Elgin) has filed an informal objection contending, among other things, that the transaction will result in a Spanish-language media monopoly.<sup>4</sup> Several amendments to the applications, as well as various oppositions, responsive pleadings and *ex parte* letters and comments have been filed.<sup>5</sup> By this *Memorandum Opinion and Order*, we deny the Petition to Deny and informal objection to the extent set forth herein and grant the applications for transfer of control, subject to the conditions set forth below.<sup>6</sup>

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The applicants have subsequently filed an amendment requesting that these 6 full-service and 3 booster stations be added to the stations under review in the instant proceeding. Because the public has had 30 days to review the qualifications of both Univision and HBC within the context of the dismissed applications, during which time no petitions or pleadings have been filed challenging Univision's qualifications, we will include these full-service and booster stations in the instant Memorandum Opinion and Order as authorizations to be transferred. The amendment is being treated as a minor amendment since it does not propose additional changes to the ownership structure of HBC, other than the changes already proposed in the July 23, 2002 filing. See 45 C.F.R. § 73.3578(b); Shareholders of American Radio Systems Corporation, 13 FCC Rcd 12,430, n. 1 and 3 (1998). For reference purposes only in the Commission's Broadcast Radio and Television System database (CDBS), we have assigned file numbers to these authorizations, included these authorizations in the appendix, and have addressed them in the instant order.

<sup>2</sup> Since filing the applications, Univision has acquired the license for KPXF(TV), Porterville, CA, and KTFQ(TV), Albuquerque, NM, and applications to acquire the licenses for KXGR(TV), Green Valley, AZ, and KFTL(TV), Stockton, CA remain pending. See File Nos. BAPCT-20020730ABO, BALCT-20030313BCD, BAPCT-20020109AAR, and BALCT-20030429AAK. Univision has also filed an application for a new television station on Channel 52 at Blanco, TX, which is also pending.

<sup>3</sup> Including low-power television stations, Class A television stations, and television translators, Entravision owns or controls approximately 49 television authorizations.

<sup>4</sup> HBC challenges NHPI's standing, arguing that it does not exist as a legal entity. NHPI, however, filed a petition to deny in *Shareholders of AMFM, Inc.*, in which the Commission concluded that NHPI did have legal standing. See *Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062, 16077 (2000). NHPI has also attached the affidavit of New York State Senator Efrain Gonzales, President of NHPI, who states that he resides within the service area of one of HBC's stations, to which he listens regularly. This showing is sufficient to demonstrate standing. *Office of Communications for the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999). Elgin's letter, though styled as a "Petition to Deny," does not meet the pleading requirements of Section 309(d)(1) of the Communications Act and, therefore, will be considered an informal objection pursuant to Section 73.3587 of the Commission's rules. 47 U.S.C. § 309(d)(1); 47 C.F.R. § 73.3587.

<sup>5</sup> Spanish Broadcasting System, Inc. (SBS) has made numerous oral presentations to Commission staff and, in connection with the presentation, has filed numerous written exhibits that have been made part of the record. We have considered all written and oral *ex parte* presentations in reaching this decision.

<sup>6</sup> By Public Notices dated August 16, 2002 and August 26, 2002, respectively, the Media Bureau docketed the proceeding under MB Docket No. 02-235 and announced permit-but-disclose *ex parte* status. *Media Bureau Announces Assignment of Docket No. to Proceeding Involving Hispanic Broadcasting Corporation and Univision Communications, Inc.*, DA 02-2026 (MB 2002); *Media Bureau Announces Permit-But-Disclose Ex Parte Status to Proceeding Involving Hispanic Broadcasting Corporation and Univision Communications, Inc.*, DA 02-2082 (MB

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## II. BACKGROUND

2. The applicants propose a merger whereby Univision will create an acquisition subsidiary, Univision Acquisition Corporation, solely for the purpose of merging with HBC. Once the merger is complete, Univision Acquisition Corporation will cease to exist, and HBC will remain as the wholly owned subsidiary of Univision. As a result of the merger, each share of HBC Class A voting stock and each share of Class B nonvoting stock will be exchanged for .85 shares of Univision Class A voting stock.<sup>7</sup> Total consideration for the merger is approximately \$3.5 billion.

3. HBC's Class A voting stock is publicly traded. The Tichenor Family, as a result of the Tichenor Family Voting Agreement, retains the largest voting interest with 15.8% of HBC voting stock. McHenry Tichenor is HBC's President and Chairman of the Board of Directors, and holds an approximately 3.8% voting interest in HBC. Clear Channel Communications (Clear Channel), which owns or controls approximately 1200 full-service broadcast radio stations and 38 full-service broadcast television stations, currently holds all of HBC's Class B nonvoting stock, constituting 26% of its total equity. This nonvoting stock interest can be converted into a voting stock interest only upon the prior consent of the Commission. As discussed in further detail below, by this merger Clear Channel will convert its nonvoting stock interest in HBC into a 3.66% voting stock interest in Univision.

4. Univision is a publicly-traded company. A. Jerrold Perenchio is the single-majority voting shareholder by virtue of the fact that his Class P common stock is entitled to 10 votes per share so long as he continues to own at least 30% of the shares he held on October 2, 1996.<sup>8</sup> Univision certifies that Perenchio will have a 57% voting interest in the merged entity.<sup>9</sup>

5. At the time the applications were filed, Univision held a 9.86% voting stock interest in Entravision. Univision also owns all of Entravision's Class C nonvoting stock, which carries with it the right to designate two members to the Entravision Board of Directors. In the instant transfer of control application, Univision states that "[p]rior to consummation of the transaction proposed herein ... the

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2002). The Commission subsequently released an Order to govern procedures for the consideration of potential confidential information. *Order Adopting Protective Order in Proceeding Involving Hispanic Broadcasting Corporation and Univision Communications, Inc.*, DA 02-3227 (rel. Nov. 22, 2002). The parties have also filed with the U.S. Department of Justice a letter waiving the confidentiality provisions of the Hart-Scott-Rodino Antitrust Improvements Act, the Antitrust Civil Process Act, and any other applicable confidentiality provisions, to allow the Department of Justice to discuss the parties' confidential information with Commission personnel and to allow Commission personnel to review the parties' confidential documents. Letter from Scott Flick and Roy Russo to John Filippini, Esq., U.S. Department of Justice (Nov. 22, 2002).

<sup>7</sup> HBC and Univision stock par values are \$.001 and \$.01, respectively. The agreement provides for an alternate mechanism under certain circumstances, whereby each share of HBC Class B nonvoting stock will be converted into Univision Class B nonvoting stock. See Applications for Transfer of Control, Exhibit 5, n.2. Under this alternate mechanism, Univision Acquisition Corporation will remain as a subsidiary and HBC will cease to exist.

<sup>8</sup> Equity and voting interests held by foreign entities in Univision comply with the alien ownership restrictions set forth in Section 310(b)(4) of the Communications Act, as determined previously by the Commission. *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6673-6674 (1992).

<sup>9</sup> Applications for Transfer of Control, Exhibit 16, at 1.

[Univision] interest will be converted to a non-voting, non-attributable stock interest.”<sup>10</sup>

6. On March 26, 2003, the U.S. Department of Justice (DOJ) filed a Complaint for Injunctive Relief and proposed Consent Decree with the U.S. District Court for the District of Columbia.<sup>11</sup> As set forth in the proposed Consent Decree, the DOJ stated that it would not oppose the merger of Univision and HBC, if (a) Univision’s interest in Entravision is converted to a new class of Entravision nonvoting stock with no rights to designate members or otherwise influence the Entravision Board of Directors; (b) Univision’s total equity interest in Entravision is reduced to 15% of total equity (both voting and nonvoting) in 3 years, and 10% of total equity (both voting and nonvoting) in 6 years; and (c) certain proposed nonvoting shareholder approval rights associated with the new class of nonvoting stock are removed. The DOJ has also set forth specific provisions meant to further ensure that Univision is insulated from participating in Entravision’s radio business.

### III. DISCUSSION

#### A Radio/Television Cross-Ownership Rule

7. As a result of common control of Univision’s and HBC’s licenses, new radio/television combinations will be created in Phoenix, AZ (1 tv and 2 radio); Hanford, CA (1 tv and 1 radio); Los Angeles, CA (2 tv and 5 radio); Miami, FL (2 tv and 4 radio); Chicago, IL (2 tv and 3 radio); New York, NY (2 tv and 2 radio); Austin, TX (1 tv and 1 radio), Dallas-Ft. Worth, TX (2 tv and 5 radio), Houston-Galveston, TX (2 tv and 5 radio); San Antonio, TX (1 tv and 6 radio); and Waco-Temple-Bryan, TX (1 tv and 1 radio).<sup>12</sup> The San Francisco-San Jose, CA market will contain 3 separate radio/television combinations implicating the radio/television cross-ownership rule, 2 in the San Francisco radio metro market (2 tv and 1 radio, and 1 tv and 2 radio) and 1 in the San Jose radio metro market (1 tv and 1 radio).<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *United States of America v. Univision Communications, Inc. and Hispanic Broadcasting Corporation*, Civil Action No. 03-0758 (Mar. 26, 2003). We refer to the related Complaint for Injunctive Relief, Consent Decree, and Final Judgment as “Consent Decree” herein. Most of the substantive provisions of the Consent Decree for purposes of the instant order are contained in the Final Judgment, and all cites contained in this order refer to this document.

<sup>12</sup> The combinations listed in Univision’s showing assume that Univision will not have an attributable interest in Entravision after consummation of the merger. We discuss the relationship between Univision and Entravision below.

<sup>13</sup> Where a resulting combination contains stations in more than one Arbitron radio metro market, the voice count prong of the radio/television cross-ownership rule must be satisfied in each market. *Review of the Commission’s Regulations Governing Television Broadcasting (“Television Ownership Order”)*, 14 FCC Rcd 12903, 12952 n.173 (1999). Included as “voices” are those radio stations located outside a radio metro market, but with a “reportable share” in the market. *Id.* at 12951. “We generally do not count radio stations located in one Arbitron radio market towards the limits on the number of radio stations a party may own in another Arbitron radio market, even when the radio stations in the different markets fall within the Grade A contour of a commonly owned TV station.” *Review of the Commission’s Regulations Governing Television Broadcasting, Memorandum Opinion and Second Order on Reconsideration (“Television Ownership Reconsideration”)*, 16 FCC Rcd 1067, 1081 (2000). However, the Commission will count radio stations in different Arbitron markets towards the limit that an entity may own if the radio station’s relevant contour triggers the rule. *Id.*

8. The current radio/television cross-ownership rule is implicated when the Grade A contour of a television station encompasses the entire community of license of a commonly owned AM or FM radio station, or when the 2 mV/m contour of an AM radio station, or the 1 mV/m contour of an FM radio station, encompasses the entire community of license of a commonly owned television station.<sup>14</sup> Under the numerical ownership/voice count restrictions of the radio/television cross-ownership rule, a party may own 1 television station and up to 6 radio stations in any market where at least 20 independently owned media voices remain in the market after the proposed transaction.<sup>15</sup> If, under the Commission's local television ownership rule, a single entity could own 2 television stations in the market, it may hold either 2 television and up to 6 radio stations or 1 television and 7 radio stations in that market.<sup>16</sup> Second, a party may own 1 television station and up to 4 radio stations in any market where at least 10 independently owned media voices remain in the market after the proposed transaction.<sup>17</sup> Third, a party may own 1 television station and 1 radio station regardless of the number of independent voices remaining in the market.<sup>18</sup>

9. Univision claims that in each of the local markets at issue the proposed combinations will comply with the voice count/numerical ownership restrictions of the radio/television cross-ownership rule. This claim, however, assumes that neither Univision's interest in Entravision's radio stations nor Clear Channel's interest in HBC is cognizable under our rules. Attribution of Univision's interest in Entravision's radio stations or Clear Channel's interest in Univision would result in new radio/television combinations violating the voice count/numerical ownership restrictions of the radio/television cross-ownership rule in multiple markets as well as possibly implicate the local broadcast radio multiple ownership rule.<sup>19</sup> As discussed below, we conclude that Univision's interest in Entravision's radio stations after the merger will be nonattributable, subject to the representations made by Univision in its applications and related amendments, and that Clear Channel's interest in Univision after the merger will also be nonattributable. Accordingly, based on Univision's representation regarding its proposed interest in Entravision, the applications will comply with the radio/television cross-ownership rule.<sup>20</sup>

## **B Radio Multiple Ownership Rule**

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<sup>14</sup> 47 C.F.R. § 73.3555(c)(i) and (ii).

<sup>15</sup> Id. § 73.3555(c)(2)(i)(A).

<sup>16</sup> Id. § 73.3555(c)(2)(i)(B).

<sup>17</sup> Id. § 73.3555(c)(2)(ii). A party may also own 2 television and 4 radio stations where permitted by the local television ownership rule.

<sup>18</sup> Id. § 73.3555(c)(2). A party may also own 2 television and 1 radio stations where permitted by the local television ownership rule.

<sup>19</sup> As a result of the attributable relationship between Univision and Entravision's television stations, new tv/radio combinations will be created in Las Vegas, NV (1 tv and 3 radio); El Paso, TX (2 tv and 3 radio); Albuquerque, NM (2 tv and 5 radio); Harlingen-Westlaco-McAllen-Brownsville, TX (1 tv and 3 radio); and Monterey-Salinas (1 tv and 1 radio). All of these combinations meet the voice count/numerical restrictions of the radio/television cross-ownership rule. Attribution of Univision's interest in only Entravision's television stations will not violate the local broadcast television multiple ownership rule.

<sup>20</sup> Assuming both Univision's interest in Entravision's radio stations and Clear Channel's interest in Univision will be nonattributable, the merger will result in no new radio station combinations.

10. On July 2, 2003, the Commission released the *2002 Biennial Review Order*, completing a comprehensive review of the previous broadcast multiple and cross-ownership rules.<sup>21</sup> In the *2002 Biennial Review Order*, the Commission stated that it would retain the numerical ownership tiers of the previous radio multiple ownership rule,<sup>22</sup> but that the “current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local markets,” and that “the current rule improperly ignores competition from noncommercial radio stations in local markets.”<sup>23</sup> The Commission replaced the previous signal contour method for defining a local radio market with a new method based on the Arbitron radio metro market, and decided to count noncommercial radio stations in the market.<sup>24</sup> For purposes of determining compliance with the numerical ownership tiers of the broadcast radio multiple ownership rule, the Commission stated that it “will count as being in an Arbitron Metro above-the-line radio stations (i.e., stations that are listed as ‘home’ to that Metro), as determined by BIA,” and “will also include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro’s geographic boundary.”<sup>25</sup> The Commission further stated that it would grandfather existing radio station combinations, but would require applicants to show compliance with the radio multiple ownership rule upon transfer of the combination, unless the buyer of the combination is a small business as defined by the *2002 Biennial Review Order*.<sup>26</sup>

11. The effective date of the rule changes contained in the *2002 Biennial Review Order* was subsequently stayed by order of the 3<sup>rd</sup> Circuit Court of Appeals on September 3, 2003. In the order, the Court stated that the “the prior ownership rules [will] remain in effect pending resolution of these proceedings.”<sup>27</sup> While the new rules are not yet effective, it appears upon a review of the BIA Media Access Pro database that the applications would not be grantable once the new rules do take effect. We find, in particular, that in the Houston-Galveston, TX, radio metro market, which contains more than 45 radio stations, Univision will control a 6 FM/1 AM combination. Univision, therefore, would own 1 more FM than would be permissible under our new rules. Likewise, in the Albuquerque, NM, radio metro market, which contains only 43 radio stations, Univision will control a 5 FM combination, also 1 in excess of the amount that would be permissible. Having found the previous methodology for defining radio markets not to be in the public interest, we believe it would not be in the public interest to grant an application that would not comply with the radio multiple ownership rule once the new methodology is

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<sup>21</sup> *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 03-127 (released July 2, 2003) (*2002 Biennial Review Order*).

<sup>22</sup> *Id.* at ¶ 288. Under the numerical ownership tiers, a company may own (a) 8 radio stations, only 5 of which are in the same class, in markets with 45 or more radio stations; (b) 7 stations, only 4 of which may be in the same class, in markets with 30-44 radio stations; (c) 6 radio stations, only 4 of which are in the same class, in markets with 15-29 radio stations; and (d) 5 radio stations, only 3 of which are in the same class, in markets with 14 or fewer radio stations. *See Id.* at ¶ 236.

<sup>23</sup> *Id.* at ¶ 239.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶ 280.

<sup>26</sup> *Id.* at ¶ 487, 488.

<sup>27</sup> *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam).

applied. Absent the ability to condition upon compliance with our new rules, we would exercise our discretion not to act on the applications until the new rules become effective. Accordingly, we approve the acquisition on the condition that the merged firm divest the radio stations in Albuquerque and Houston, or otherwise show that waiver of the rule is appropriate, within six months in the event that the stay pending appeal in *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam) is lifted or the local radio ownership rules adopted in the 2002 *Biennial Review Order* otherwise go into effect.

### **C NHPI Petition to Deny**

12. NHPI requests that the Commission designate the applications for hearing in order to explore the relationships between Clear Channel, HBC, Univision, and Entravision.<sup>28</sup> According to NHPI, the merger is not limited to Univision and HBC, but includes both Clear Channel and Entravision.<sup>29</sup> NHPI argues that the proposed ownership structure is a sham, intended to comply, on paper, with the multiple ownership rules,<sup>30</sup> but that the post-merger ownership structure does not reflect how Univision will actually be operated. NHPI maintains that Clear Channel will have influence in the post-merger Univision exceeding its financial interest, and that Univision will continue to significantly influence Entravision after the merger. NHPI therefore requests that the Commission consider all Clear Channel and Entravision stations in determining compliance with the multiple and cross ownership rules. For the reasons set forth below, we deny this request in part, concluding that Clear Channel does not have an attributable interest in HBC, and will not have an attributable interest in Univision after the merger; and that NHPI has failed to raise a substantial and material question of fact concerning whether Clear Channel has, or will, exercise *de facto* control over either HBC or Univision. We further conclude that Univision will not have an attributable interest in Entravision's radio stations after consummation of the proposed transaction, but that Univision's relationship with Entravision's television stations after the merger will be attributable.

#### **1 Clear Channel**

##### **(a) Attribution**

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<sup>28</sup> NHPI also requests that *all* of Clear Channel's authorizations be designated for hearing in order to determine whether Clear Channel has "undisclosed ownership interests in various radio stations and has concealed this information from the Commission." NHPI Reply at 16. For the reasons set forth herein, we conclude that the record does not justify designating Clear Channel's authorizations for hearing.

<sup>29</sup> SBS made an identical argument in a September 30, 2002, presentation to Commission staff.

<sup>30</sup> NHPI contends that "[w]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business, the Commission has consistently discredited these types of sham applications." NHPI Petition to Deny at 20. The cases cited by NHPI in support of this proposition, however, involved issues particular to comparative proceedings and do not, therefore, govern our consideration of the ownership structure here. *See, e.g., Kist Corp.*, 102 F.C.C.2d 288, 290 (1985) (financial investment is not "necessarily an ownership interest creditable for integration purposes" in determining comparative merits of applicant). More importantly, the cited cases predate the *Attribution Order*, which adopted new, bright-line attribution standards. *Review of the Commission's Regulations Governing Attribution of Broadcast Interests (Attribution Order)*, 14 FCC Rcd 12559 (1999), *recon. granted in part (Attribution Reconsideration)*, 16 FCC Rcd 1097 (2001).

13. HBC was formed by the merger of Heftel Broadcasting Corporation (Heftel) and Tichenor Media Systems (Tichenor) on February 14, 1997.<sup>31</sup> As noted above, Clear Channel currently has a 26% nonvoting equity interest in HBC, which is convertible to a voting interest only upon prior consent of the Commission.<sup>32</sup> Clear Channel also has the right to approve certain extraordinary corporate actions.<sup>33</sup> Most recently, in *Shareholders of AMFM, Inc.*, the Commission held that Clear Channel's interest in HBC was nonattributable and that, despite NHPI's claims to the contrary, Clear Channel's right to approve these fundamental corporate actions were "permissible investor protections that neither restrict a corporation's discretion or rise to the level of attributable influence."<sup>34</sup> Clear Channel has not entered into any new financial or contractual relationship with HBC that would warrant revisiting the holding of *Shareholders of AMFM, Inc.*

14. With respect to Clear Channel's proposed future interest in Univision, Univision and HBC intend to convert Clear Channel's nonvoting interest in HBC into a voting interest in the post-merger Univision. In an August 30, 2002, amendment, Univision certified that Clear Channel will have a 3.66% voting stock interest in Univision following the merger. This voting interest falls below the 5% threshold set forth in the Commission's rules and is, therefore, a nonattributable voting interest.<sup>35</sup> The combination of total debt and equity held by Clear Channel will also comply with the 33% threshold set forth in the Equity/Debt Plus (EDP) attribution standard. Under EDP, when an investor either (1) supplies over 15% of a station's total weekly broadcast programming hours, or (2) is a same-market media entity subject to the broadcast multiple ownership rules, its interest in the licensee or other media entity in that market will be attributable if that interest, aggregating both debt and equity, exceeds 33% of the total asset value of the licensee or media entity.<sup>36</sup> Clear Channel certifies that the combined debt and equity it would hold in Univision would not exceed 33% of Univision's total asset value, and NHPI has provided no information calling this certification into question.

15. Rather than applying the EDP attribution standard in this case, NHPI appears to argue that EDP is inadequate as both a measure of Clear Channel's current influence over HBC and its potential influence over Univision. We disagree. The Commission created the EDP attribution standard to address the kind of influence alleged here, namely, multiple contractual arrangements and relationships that confer a cognizable level of influence for purposes of our multiple and cross-ownership rules.<sup>37</sup> To the extent that NHPI argues that we should disregard or alter our EDP Rule in this case, we decline to do so.

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<sup>31</sup> Prior to merger with Tichenor, Clear Channel held both *de jure* and *de facto* control over Heftel. Following the merger, however, Clear Channel converted its voting stock interest in Heftel into a nonvoting stock interest in the newly formed HBC. The conversion of Clear Channel's interest was approved in a January 1997 Letter from Stuart B. Bedell, Assistant Chief, Audio Services Division, to Roy Russo, Esq. (Jan. 13, 1997).

<sup>32</sup> See *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

<sup>33</sup> Clear Channel's prior approval is necessary before: (1) sale or transfer of all or substantially all of HBC's assets or a merger with another entity; (2) issuance of shares of preferred stock; (3) amendment of the certificate of incorporation under certain circumstances; (4) declaration or payment of non-cash dividends or distributions; or (5) amendment to those provisions in the articles of incorporation concerning the corporation's capital stock.

<sup>34</sup> *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

<sup>35</sup> 47 C.F.R. § 73.3555, Note 2(a).

<sup>36</sup> *Id.* § 73.3555, Note 2(i).

<sup>37</sup> *Attribution Order*, 12 FCC Rcd at 12580.



It has long been Commission practice to make decisions that “alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications.”<sup>38</sup> NHPI has further failed to raise a substantial and material question of fact concerning any other relationship that would be relevant in determining whether Clear Channel has a cognizable level of influence over HBC.

16. NHPI, in particular, argues that Clear Channel’s attributable influence over HBC is demonstrated by the allegations raised in an Amended Complaint filed by Spanish Broadcasting Systems, Inc. (SBS), in a lawsuit before the U.S. District Court for the Southern District of Florida, which NHPI has attached to the petition. Though the Amended Complaint relates mostly to Clear Channel’s alleged anticompetitive conduct and *de facto* control of HBC, it also alleges that Clear Channel holds an attributable interest in HBC because the HBC Board of Directors retains two members that were originally appointed by Clear Channel. The Commission, in the past, has determined that an investor’s relationship to an entity’s Board of Directors could result in an attributable level of influence under certain circumstances.<sup>39</sup>

17. In response to this allegation, HBC has provided a declaration from McHenry Tichenor, Jr., stating that the “nonvoting stock which Clear Channel holds in HBC affords Clear Channel no right or ability to vote with respect to who shall serve on HBC’s Board of Directors,” and that he, not Clear Channel, designated the original members of HBC’s Board of Directors, including the two former Clear Channel designees cited in the Amended Complaint. Tichenor further states that he “decided to ask two persons who had served on the board of the pre-merger Heftel entity to serve on the HBC Board after satisfying [himself] as to their qualifications, independence and loyalty to HBC.”<sup>40</sup> Tichenor also states that since designation of the original HBC Board of Directors, “each of these five Directors has been re-elected to HBC’s Board on six separate occasions, at the annual meetings of HBC stockholders, by the voting stockholders of HBC,” and that Clear Channel is not a voting shareholder of HBC.<sup>41</sup>

18. Although the two directors cited by SBS in the Amended Complaint do appear to be former Clear Channel designees to the Heftel Board of Directors, they are neither Clear Channel employees nor executives. Rather, they work for financial institutions that provided banking services for Clear Channel. These directors, moreover, have been elected independently to the HBC board subsequent to their appointment by Clear Channel to the Heftel Board. We find that these directors can reasonably be expected to act independently. NHPI has failed to provide any evidence supporting its allegation that Clear Channel has been able to influence the HBC Board of Directors through these directors. We, therefore, conclude that the presence of two former Clear Channel designees on the HBC board does not justify attribution of Clear Channel’s interest. Based on the information before us, we conclude that Clear Channel’s current interest in HBC and its proposed interest in Univision are both nonattributable.

### (b) De Facto Control

<sup>38</sup> See *Sunburst Media, L.P.*, 17 FCC Rcd 1366, 1368 (2002).

<sup>39</sup> See, e.g., *Telemundo Communications Group, Inc.*, 17 FCC Rcd 6958, 6972 (2002) (NBC’s right to nominate members to the Paxson Communication’s Corporation Board of Directors; presence of NBC employees on Paxson Board; and conduct of NBC-nominated directors when taken together indicated that NBC’s interest should be attributable).

<sup>40</sup> Declaration of McHenry T. Tichenor, Jr. at 1.

<sup>41</sup> *Id.* at 2.

19. In addition to claiming that Clear Channel has an attributable interest in HBC, NHPI argues that Clear Channel exercises *de facto* control over HBC, and that Clear Channel will exercise this level of control over Univision if the merger is approved. NHPI acknowledges that the Commission concluded in *Shareholders of AMFM, Inc.* that Clear Channel's interest in HBC was neither attributable nor rose to the level of *de facto* control.<sup>42</sup> NHPI argues, however, that this holding was implicitly conditioned upon the Commission's finding that Clear Channel did not "possess any participatory rights in HBC or its broadcast holdings."<sup>43</sup> NHPI argues that Clear Channel has "actively participated in the affairs of HBC" and, thus, Clear Channel should be found to have exercised *de facto* control over HBC.<sup>44</sup>

20. We clarify that *Shareholders of AMFM, Inc.* did not *per se* prohibit all forms of informal Clear Channel participation in HBC, regardless of its nature. The Commission's statement was rather an observation that Clear Channel did not possess any "participatory rights" deriving from its status as an investor, other than the right to participate in certain fundamental corporate actions.<sup>45</sup> The statement reflected the Commission's concern that Clear Channel could have excessive influence over the operations of HBC if Clear Channel had "participatory rights" in addition to those governing fundamental corporate actions. NHPI appears to acknowledge that Clear Channel has no veto or voting rights over HBC corporate actions other than those approved in *Shareholders of AMFM, Inc.*, and no evidence has been presented indicating that such additional rights exist. The Commission, of course, considers informal participation even when not taken through a formal investment-based "participatory right," but evaluates such informal participation within the framework of our attribution rules and policies, and our policies and precedent governing determinations of *de facto* control.

21. NHPI argues that new facts have come to light indicating that Clear Channel's informal participation in HBC rises to the level of *de facto* control. The Commission analyzes *de facto* control issues on a case-by-case basis.<sup>46</sup> In determining whether an entity has *de facto* control of an applicant or a licensee,<sup>47</sup> we have traditionally looked beyond legal title and financial interests to determine who controls the basic operating policies of the station.<sup>48</sup> The Commission, in particular, examines the policies governing station programming, personnel, and finances. The Commission has long held that a licensee may delegate day-to-day operations without surrendering *de facto* control, so long as the licensee continues to set the policies governing these areas.<sup>49</sup>

22. In determining whether NHPI's Petition to Deny justifies designating these applications for hearing on the issue of *de facto* control, Section 309(d) of the Communications Act provides for a

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<sup>42</sup> *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

<sup>43</sup> *Id.*

<sup>44</sup> NHPI Petition to Deny at 10.

<sup>45</sup> See, e.g., *Quincy D. Jones*, 11 FCC Rcd 2481, 2487 (1995).

<sup>46</sup> See *Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

<sup>47</sup> Such a finding would result in a violation of Section 310(d) of the Communications Act. 47 U.S.C. § 310(d).

<sup>48</sup> See *WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

<sup>49</sup> *WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995); *Choctaw Broadcasting Corp.*, 12 FCC Rcd 8534, 8539 (1997); *Southwest Texas Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981).

two-step test.<sup>50</sup> First, the petition to deny must set forth “specific allegations of fact sufficient to show that... a grant of the application would be *prima facie* inconsistent with [the public interest].”<sup>51</sup> Second, the Commission will formally designate an application for hearing in accordance with Section 309(e) of the Communications Act when,<sup>52</sup> based upon the totality of the evidence, there is a “substantial and material question of fact” concerning whether grant of the application would serve the public interest.<sup>53</sup>

23. To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute “specific evidentiary facts, not ultimate conclusionary facts or mere general allegations.”<sup>54</sup> The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge’s consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”<sup>55</sup>

24. If the Commission concludes that a petitioner has satisfied the first prong, it must then proceed to the second phase of the inquiry and determine whether, “on the basis of the application, the pleadings filed or other matters which [the Commission] may officially notice,” there is a “substantial and material question of fact.”<sup>56</sup> If, based on “the totality of the evidence” presented in the pleadings, the Commission concludes that this question of fact gives rise to sufficient doubt as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing.<sup>57</sup> The Commission is not required to rigidly follow this two-step process, and can focus first on the second step in evaluating a petition to deny.<sup>58</sup>

25. NHPI has failed to raise a substantial and material question of fact regarding Clear Channel’s potential *de facto* control over Univision after the merger. As noted above, Clear Channel will have a diluted ownership interest in Univision as a result of this transaction and HBC, as previously constructed, will cease to exist. Not only will Clear Channel have a small 3.66% voting interest in the post-merger Univision, but Univision will continue to have a single-majority shareholder after the transaction. Nothing NHPI has filed would explain how Clear Channel could overcome A. Jerrold Perenchio’s *de jure* voting control to exercise *de facto* control. In light of these facts, NHPI’s contention

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<sup>50</sup> 47 U.S.C. § 309(d).

<sup>51</sup> *Id.* § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (*Gencom*); and *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988) (*Astroline*).

<sup>52</sup> 47 U.S.C. § 309(e).

<sup>53</sup> 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; and *Astroline*, 857 F.2d at 1562.

<sup>54</sup> *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (*en banc*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Cir. 1974)).

<sup>55</sup> *Gencom*, 832 F.2d at 181.

<sup>56</sup> 47 U.S.C. § 309(d)(2); *see also Gencom*, 832 F.2d at 181.

<sup>57</sup> *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

<sup>58</sup> *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996).

that Clear Channel will control Univision after the merger is speculative at best.<sup>59</sup> We further conclude that, based on our review of the record evidence, NHPI has failed to raise a substantial and material question of fact justifying designation of these applications for hearing on the issue of Clear Channel's alleged current *de facto* control over HBC. Below we discuss the evidence contained in the pleadings.

26. **Amended Complaint.** NHPI has attached to its petition an Amended Complaint filed by SBS in a Federal District Court opposing the merger of Univision and HBC and, in particular, alleging Clear Channel participation in the affairs of HBC. SBS states that Clear Channel and HBC have attempted to depress SBS's stock price; have prevented an initial public offering of SBS stock; have undermined key SBS employment and business relationships; have induced large investors to sell SBS holdings; and have attempted to prevent SBS from acquiring a number of radio stations that could compete with Clear Channel and HBC radio stations.<sup>60</sup> With respect to whether Clear Channel has exercised *de facto* control over HBC, the complaint alleges that Clear Channel personnel met with SBS personnel to discourage SBS's competing offer for HBC. The Amended Complaint also alleges that Clear Channel exercised control over specific HBC decisions not related to the Univision/HBC merger, including decisions to purchase particular stations and decisions over contracts with national advertising representation firms.<sup>61</sup> The U.S. District Court dismissed the lawsuit on January 31, 2003, finding that SBS had failed to demonstrate injury to competition in the relevant market necessary to make out a claim under either Section 1 or 2 of the Sherman Act.<sup>62</sup> The Court further declined to exercise its supplemental jurisdiction over the myriad state law claims raised by SBS.

27. HBC asserts that SBS's allegations involve anticompetitive conduct and that the Commission considers such conduct only when and if there is a final adjudication. HBC argues that the other causes of action, which involve mostly torts or breaches of contract, involve private rights that raise no regulatory concern for the Commission. With respect to the issue of *de facto* control, HBC maintains that the Complaint contains unsupported allegations insufficient to support a petition to deny. According to HBC, most of the allegations are based on events that occurred prior to Commission approval of the Heftel-Tichenor merger that resulted in the formation of HBC.

28. The Commission considers the effect a merger will have on competition in its public interest analysis, but does not generally consider the kind of specific acts of anticompetitive conduct alleged in the Amended Complaint, especially those involving causes of action under state law, unless and until there is a final adjudication.<sup>63</sup> NHPI, in any case, has provided only very limited, indirect

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<sup>59</sup> See, e.g., *Univision Holdings, Inc.*, 7 FCC Rcd at 6675. (“[P]etitioners are essentially asserting that in the future the Buyer will be operated in a manner inconsistent with our requirements or with the representations made by the Buyer in the applications and in affidavits. In the absence of properly supported specific allegations of fact to support a contrary conclusion, we do not assume that an applicant will not faithfully carry out its representations or that [an applicant] will be operated in a manner that differs from the [transaction] under question.”).

<sup>60</sup> SBS in its *ex parte* presentations and associated attachments also alleges anticompetitive conduct on the part of Clear Channel. SBS has filed the Amended Complaint as part of its *ex parte* presentation.

<sup>61</sup> SBS also raises these allegations in its September 30, 2002, presentation to Commission staff.

<sup>62</sup> *Spanish Broadcasting System v. Clear Channel Communications, Inc.*, Order Granting Defendant's Motion to Dismiss, Case No. 02-21755 (rel. Jan. 31, 2003); Sherman Act, 15 U.S.C. §§ 1 and 2.

<sup>63</sup> *Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy)*, 102 F.C.C.2d 1179, 1205 (1985).

evidence which it claims supports the allegations raised by the Amended Complaint, and the court dismissed it. Under these circumstances, we conclude that further consideration of the anticompetitive conduct alleged in the Amended Complaint is not warranted.

29. NHPI also fails to support the allegations of Clear Channel *de facto* control over HBC with record evidence, affidavit or sworn testimony. The allegations, therefore, fail to meet the pleading requirements of Section 309(d)(1) of the Communications Act.<sup>64</sup> Much of the Amended Complaint contains conclusory statements regarding the market power of Clear Channel and its effect on HBC, and several of the specific allegations relate to events occurring prior to the merger of Heftel and Tichenor. Clear Channel legitimately exercised voting control over Heftel prior to the merger with Tichenor, but deliberately divested itself of this interest. As discussed above, the Commission approved the Clear Channel/HBC relationship in *Shareholders of AMFM, Inc.* The record evidence indicates that Clear Channel's role in the negotiations leading up to the Univision/HBC merger appears to be consistent with the nonvoting shareholder rights the Commission approved. For example, SBS, as part of its *ex parte* presentation, submitted an April 18, 2002 letter from L. Lowry Mays, Chairman and Chief Executive Officer of Clear Channel, to Raul Alarcon, Chairman and Chief Executive of SBS, acknowledging receipt of SBS's proposal to acquire HBC. In the letter, Mays states that he was certain the HBC board "will seriously consider the proposal," but that "Clear Channel is a passive investor and can have no voice in [approving the proposal] unless and until it is brought to a vote."<sup>65</sup> We conclude that absent credible substantiating evidence the Amended Complaint does not establish a *prima facie* case or raise a substantial and material question of fact regarding Clear Channel's alleged *de facto* control over HBC.

30. **Annual Employment Reports.** In support of its claim of *de facto* control, NHPI maintains that Clear Channel personnel work, or have worked, at HBC stations. NHPI has attached, as exhibits to the Petition to Deny, 12 FCC Form 395B Annual Employment Reports (collectively referred to as "EEO Reports") filed on or about November 15, 2000, pursuant to the then-existing rules implementing the Commission's broadcast equal employment opportunity program.<sup>66</sup> NHPI's allegation that Clear Channel personnel work, or have worked, at HBC stations is based on inferences drawn from the information contained in those reports.<sup>67</sup>

31. An FCC Form 395B Annual Employment Report was typically filed on behalf of an "employment unit" - a group of commonly owned stations located within a specific geographic area that shared at least one employee. The licensee filing the report could have been the entity owning any one of the stations in the employment unit. The Annual Employment Report was intended to elicit consolidated employment figures for all full and part-time employees working in an employment unit. Section I of the report asked for the legal name of the filing licensee, while Section IIB requested that the filing licensee

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<sup>64</sup> 47 U.S.C. § 309(d)(1).

<sup>65</sup> We conclude that a 600-page filing submitted jointly by SBS and NHPI on April 7, 2003, approximately 7 months after the pleading cycle closed in this case, is untimely and will be dismissed. We have, moreover, reviewed the filing and conclude that it does not alter any of the conclusions reached in this decision.

<sup>66</sup> See *Suspension of the Broadcast and Cable Equal Employment Outreach Program Requirements*, 16 FCC Red 2872 (2001) (suspending portions of the broadcast and MVPD EEO rules governing EEO outreach program and reporting requirements).

<sup>67</sup> Clear Channel completed its purchase of approximately 400 stations owned by AMFM, Inc. approximately 2 ½ months before the EEO Reports were filed.

“[I]st call sign and location of all stations whose employees are on this report,” including “commonly owned stations [within a specified geographic area] which share one or more employees.”<sup>68</sup> Section V of the report requested data on full and part-time employees working at an employment unit, categorized on the basis of sex and race.

32. The first four attached EEO Reports list HBC or its subsidiaries as the signatory licensee, but list stations owned by Clear Channel subsidiaries in Section IIB as belonging to a common employment unit. NHPI argues, therefore, that Clear Channel must have its employees at HBC stations. The remaining 8 attached EEO Reports list Clear Channel subsidiaries as signatory licensees, but also list stations owned by HBC subsidiaries in Section IIB as belonging to a common employment unit. In addition to commingling Clear Channel and HBC stations in Section IIB, NHPI points out that Clear Channel’s corporate headquarters is listed on Section I of the attached EEO Reports under the name of the signatory licensee. Though none of the attached EEO Reports are signed, NHPI states that Rick Wolf’s name, acting as Vice-President and Corporate Counsel of Clear Channel, is typed below the certification contained in Section IV of the 12 reports.

33. Clear Channel and HBC maintain that all 12 attached EEO Reports contain mistaken information. With respect to the 8 reports signed by Clear Channel or one of its subsidiaries, HBC maintains that its stations were listed by mistake. HBC provides a declaration from Neal A. Murphy, Corporate Counsel for Clear Channel, who states that, in preparing Clear Channel’s EEO Reports, Clear Channel personnel used an internal electronic database listing all stations in which it had an interest by geographic market. Murphy states that the electronic database listed stations in which Clear Channel had any interest, regardless of whether that interest was attributable under Commission rules, primarily “for the purpose of disclosure in Clear Channel’s FCC filings.”<sup>69</sup> Murphy, however, affirmatively certifies that the employee numbers contained in the attached EEO Reports were derived from a separate payroll database that listed only Clear Channel employees.<sup>70</sup> HBC further certifies that the EEO Reports “reflected only the [Clear Channel] employees who work for Clear Channel’s stations,” and “did not include any employees who work for HBC’s stations.”<sup>71</sup> Clear Channel personnel, according to Murphy, compiled the individual reports by lifting one of the entities listed in the electronic database from the relevant geographic market and transposing it onto Section 1 of the EEO Report.<sup>72</sup> The other stations listed in Section IIB of the report were likewise transposed from Clear Channel’s internal electronic database.

34. With respect to the 4 EEO Reports where HBC was the signatory licensee, HBC and Murphy certify that the same process was followed, and that the employees listed in these reports were also Clear Channel employees working at Clear Channel stations. Neil Murphy further states that the forms attached to the petition were filed electronically, and that HBC itself filed paper reports that reflected its employees. As support for this assertion, HBC has attached its own Annual Employment Reports for the same 12 markets. All of the reports are signed by McHenry Tichenor, Jr., a principal of

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<sup>68</sup> FCC Form 395B Broadcast Station Annual Employment Report, IIB.

<sup>69</sup> Declaration of Neil A. Murphy at 1.

<sup>70</sup> *Id.*

<sup>71</sup> Opposition of HBC at 7.

<sup>72</sup> Declaration of Neil Murphy at 2.

HBC, on or about September 28, 2000. The employment data contained in the HBC reports differs from the data contained in those Clear Channel reports naming HBC subsidiaries as the reporting licensee.

35. NHPI argues in its Reply that the EEO Reports conclusively demonstrate that Clear Channel did have employees at HBC stations. NHPI asserts, moreover, that HBC has failed to explain why Clear Channel was filling out reports for stations it did not own.<sup>73</sup>

36. We conclude that the EEO Reports do not raise a substantial and material question of fact on the issue of Clear Channel's alleged *de facto* control over HBC. The fact that HBC filed its own EEO Reports suggests that Clear Channel mistakenly included HBC licensees in its reports. The discrepancy, however, between the figures contained in the reports filed by HBC and Clear Channel, respectively, appears to lend support to Clear Channel's argument that the mistaken reports included only Clear Channel employees working at Clear Channel stations. Based on our review of the record, it appears that all of the Clear Channel reports, including those filed for HBC licensees, were completed using employment figures for Clear Channel stations only. Besides the fact that Clear Channel filed mistaken EEO Reports, NHPI has failed to provide any specific evidence that Clear Channel employees work or have worked at HBC stations.<sup>74</sup>

## 2 Entravision

37. Univision currently holds an attributable interest in Entravision through ownership of

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<sup>73</sup> NHPI also argues that a declaration by Neil Murphy in a previous case made no mention of Clear Channel having filed FCC Form 395B Annual Employment Reports listing stations owned by HBC or listing stations in which Clear Channel had no employees. The facts at issue in the previous case cited by NHPI are different than those presented here. We do not believe, therefore, that this previous declaration is inconsistent with the one filed in this case.

<sup>74</sup> NHPI argues that "Clear Channel's active participation in the affairs of HBC demonstrates a pattern of conduct in which Clear Channel conceals, through numerous material misrepresentations to the FCC, the actual ownership and control of established radio station groups, including HBC." NHPI Petition to Deny at 15. NHPI cites as evidence a petition to deny filed on November 8, 2001, by David Ringer against the license assignment of WFCB(FM), Chillicothe, Ohio from Secret Communications II, Inc. to Clear Channel. See File No. BALH-20010918AAP. Ringer alleged that Clear Channel used front companies to control stations it could not otherwise own under the multiple ownership rules, providing EEO Reports as support for this contention. The Commission has determined that the facts alleged in the Ringer petition do not raise a substantial and material question of fact that Clear Channel engaged in an unauthorized transfer of control of WFCB(FM). See *Secret Communications II, LLC*, 18 FCC Rcd 9139, 9147 (2003). Our decision here is consistent with that determination. We further find that the EEO Reports cited in the Chillicothe case are not directly relevant here because Clear Channel had a Local Marketing Agreement (LMA) with the licensee of WFCB(FM). The Commission has long permitted brokers to place employees at brokered stations, as long as the licensee complies with its obligation to retain ultimate control of station operations and maintains the minimum staffing requirements set forth in the Main Studio Rule. *Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828, 10842 (2002); *WGPR, Inc.*, 10 FCC Rcd at 8143; *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1998), *recon. denied in part and granted in part*, 7 FCC Rcd 6800 (1992). The Ringer petition, therefore, does not support the "pattern of conduct" alleged by NHPI. NHPI further states that websites registered to Clear Channel are operated by stations in which Clear Channel ostensibly has a nonattributable interest, and that this demonstrates that the companies owning these stations are "fronts." Domain registration is not necessarily probative of ultimate control over programming, personnel and finances, and such an alleged connection in this case is speculative and unsupported. See *Secret Communications II, LLC*, 18 FCC Rcd at 9148.

9.86% of Entravision's voting stock,<sup>75</sup> as well as through its right to designate two members to the Entravision Board of Directors. As noted above, Univision states in the instant transfer of control application that it intends to convert its current interest into "a non-voting, non-attributable stock interest."<sup>76</sup> Following an informal staff request, Univision amended its showing to state that "[d]irectors previously elected to the Entravision Board by Univision have resigned."<sup>77</sup>

38. NHPI, in its Reply to the Univision's Opposition, argues that Univision fails to state whether it will modify the rights of its Class C shares so as not to be able to designate members to, or otherwise influence, the Entravision board in the future. NHPI also questions whether Univision's post-merger interest in Entravision would comply with the Commission's EDP attribution standard. NHPI, in particular, contends that any EDP analysis should include accounts payable owed to Univision from Entravision.

39. On November 29, 2002, the staff released a letter ("Letter of Inquiry") requesting information to assist in determining whether the proposed future interest in Entravision would be nonattributable. The Letter of Inquiry requested information regarding the "class or classes of Entravision shares Univision will hold after consummation (including those shares that are not currently voting) and their rights with respect to the Entravision Board of Directors."<sup>78</sup> The Letter of Inquiry requested information regarding any accounts payable owed to Univision from Entravision, and a showing demonstrating compliance with the EDP standard.

40. In response, Univision further amended its showing to state that "Univision currently has no representation on Entravision's board of directors, and, prior to consummation of the HBC merger, all of Univision's stock holdings in Entravision will be converted into a new preferred, nonvoting stock that has no right of board representation or other board rights."<sup>79</sup> Univision, however, represented that the new class of stock will have approval rights over certain corporate actions consistent with those previously approved by the Commission. As mentioned above, the DOJ entered into a Consent Decree with Univision on March 25, 2003, requiring Univision to remove and/or modify certain of these rights.<sup>80</sup> As approved by the DOJ, Univision has proposed to hold approval rights only over (1) merger, sale, liquidation, and dissolution of Entravision; (2) amendment, alteration or repeal of the Certificate of Incorporation so as to adversely affect the rights of Univision's stock; (3) issuance or sale of the proposed class of stock; and (4) any sale of a station affiliated with a Univision-owned network.

41. NHPI challenges several of the originally proposed approval rights, arguing that they "far exceed the level of influence required for the Commission to find that Univision's interest in Entravision is attributable," and that "the Commission could find that Univision's proposed rights will give it *de facto* control over Entravision's operating policies."<sup>81</sup> Univision has, however, with the

<sup>75</sup> 47 C.F.R. § 73.3555, Note 2(a).

<sup>76</sup> Applications for Transfer of Control, Exhibit 16, n.1.

<sup>77</sup> August 29, 2002 Amendment at n.1.

<sup>78</sup> November 29, 2002 Letter of Inquiry.

<sup>79</sup> December 9, 2002, Response to Letter of Inquiry at 1.

<sup>80</sup> *Infra* ¶ 6.

<sup>81</sup> December 16, 2002, Reply of NHPI at 3.



exception of the proposed rights retained following discussions with the DOJ, removed any proposed approval rights over corporate actions from the new class of nonvoting stock to be created following the merger. NHPI's argument, therefore, that the constellation of originally proposed approval rights would result in attributable influence on the part of Univision is moot.

42. With respect to the approval rights that remain, the Commission has consistently held that a nonvoting shareholder's approval rights over fundamental corporate matters are "permissible investor protections that neither restrict a corporation's discretion or rise to the level of attributable influence."<sup>82</sup> Such "fundamental" or "extraordinary" corporate actions are, as the terms imply, those that fundamentally alter the character of the nonvoting shareholder's investment. Determining what rights involve fundamental corporate matters in any particular case is fact-based. In the past, however, the Commission has allowed nonvoting shareholders to hold several different protection rights without forfeiting their nonattributable status due to the Commission's desire not to disrupt the flow of capital to station owners, and its determination that such rights protect the investor as opposed to provide an opportunity for the investor to influence the overarching policymaking activities, programming decisions or day-to-day operations of a station.<sup>83</sup> Specifically, the Commission has permitted approval rights regarding the merger, sale, liquidation or winding up of an entity; the sale of all or substantially all of the entity's assets; the amendment of the Certificate of Incorporation; and the issuance or sale of stock.<sup>84</sup> These decisions are implicitly premised on the fact that such changes by necessity alter the fundamental character of the nonvoting shareholder's investment, and that some provisions to protect nonvoting shareholders against such changes are reasonably necessary to promote investment. We therefore conclude here that Univision's similar proposed rights in Entravision do not undermine the nonattributable nature of Univision's relationship with Entravision.

43. On March 10, 2003, the staff released a letter requesting further information regarding the proposed approval right over the sale of any Entravision station affiliated with a Univision-owned network. In response, Univision argues that this proposed approval right is also consistent with protections the Commission has previously permitted. Univision cites, in particular, the nonvoting shareholder rights and other interests NBC currently holds in Paxson Communications Corporation, which the Commission approved in *Telemundo Communications, Inc.*<sup>85</sup> Univision states that, among several other rights set forth in a 1999 Investment Agreement, NBC has the right to approve the sale of any Paxson station in a top-20 TV market, and a right of first refusal regarding the sale of any Paxson station. According to Univision, these nonvoting shareholder rights are coupled with (1) a 32% nonvoting equity interest in Paxson convertible to a voting interest upon prior Commission consent; (2) a warrant and call option for ten years permitting NBC to acquire a "super-majority" voting bloc; (3) Joint Sales Agreements and Time Brokerage Agreements involving individual stations, and a National Sales Agreement for all Paxson stations; and (4) the right to nominate 3 members to the Paxson Board of Directors who are not NBC employees. Univision argues that the rights proposed here are more limited than those the Commission permitted NBC to hold, especially in light of the fact that the proposed

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<sup>82</sup> *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078; see also *BBC License Subsidiary L.P.*, 10 FCC Rcd 7926, 7933 (1995); *Quincy D. Jones*, 11 FCC Rcd at 2487; *Roy M. Speer*, 11 FCC Rcd 14147, 14155-58 (1996).

<sup>83</sup> See *Roy M. Speer*, 11 FCC Rcd at 14157-58.

<sup>84</sup> See *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

<sup>85</sup> *Telemundo Communications, Inc.*, 17 FCC Rcd at 6971.

nonvoting stock will have no board representation rights. Univision further argues that, “in *National Broadcasting Company, Inc.*, the Commission held that a network’s combination of a 49% equity interest along with its provision of programming did not create an attributable interest in the licensee of an affiliated station, even where the network also retained a veto power over various business transactions, including the sale of the station or dissolution of the licensee.”<sup>86</sup>

44. Because Entravision owns 18 full-service television stations, almost all of which are affiliated with a Univision-owned network, Univision’s approval right restricts the sale of almost every Entravision television station. The sale of any single one of these television stations cannot be considered a “fundamental” or “extraordinary” corporate action. By contrast, in *National Broadcasting Co.*, the licensee owned only one television station and thus a sale of that one station was, indeed, a “fundamental” corporate matter, analogous to a sale of all or substantially all of the licensee’s assets. Similarly, in *Quincy D. Jones*, the Commission’s finding that a nonvoting interest in the licensee was nonattributable was explicitly based upon its interpretation of an approval right nominally over the sale or other disposition of any material portion of the licensee’s assets “other than in the ordinary course of business,” as meaning only the right to approve where all or substantially all of the licensee’s assets were to be sold.<sup>87</sup> Moreover, even in permitting nonattributable shareholders the right to participate in extraordinary corporate actions, the Commission has stated that those rights must be “narrowly circumscribed” for the interest to remain nonattributable.<sup>88</sup> Here, permitting the proposed veto right would enable Univision not only to be an exclusive network program supplier to virtually all Entravision television stations, but to control the sale of virtually any Entravision television station as well. Contrary to Univision’s argument, the level of influence over the core operations of Entravision’s television stations that would result would exceed that permitted in *Telemundo Communications, Inc.*, where NBC’s approval right over station sales was limited to the top-20 TV markets.<sup>89</sup> In any event, insofar as the Commission’s order in *Telemundo Communications, Inc.*, can be construed to be inconsistent with this or prior opinions, we decline to follow it. Accordingly, we conclude that Univision’s proposed right to veto the sale of any Entravision television station affiliated with a Univision network would render its interest in Entravision’s television stations attributable.

45. In a June 25, 2003, filing, Univision argues that, even should we attribute Univision’s interest in Entravision’s television stations, the approval right over affiliate sales does not extend to Entravision’s radio stations and that, therefore, its interest in Entravision’s radio stations should not be attributable. Univision also argues that the Department of Justice’s Consent Decree prevents it from exercising any influence over Entravision’s radio business.<sup>90</sup> In the circumstances present here, we agree that attribution of Univision’s interest in Entravision’s television stations does not extend to Entravision’s radio stations. As Univision notes, its sale approval right does not extend to Entravision’s radio stations. Moreover, the Consent Decree prohibits Univision from “using or attempting to use any rights or duties

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<sup>86</sup> March 12, 2003, Response to Letter of Inquiry at 2. See, also, *National Broadcasting Company, Inc.*, 6 FCC Rcd 4882 (1991).

<sup>87</sup> *Quincy D. Jones*, 11 FCC Rcd at 2847 n.15.

<sup>88</sup> *Id.* at 2847.

<sup>89</sup> We note that in *Telemundo Communications, Inc.*, no party specifically challenged the veto right over the sale of a top-20 station, and that right was not even mentioned in the Commission’s decision, much less discussed.

<sup>90</sup> June 25, 2003, Letter of Univision Communications, Inc., at 11-12.

under any television affiliation agreement or relationship between Univision and Entravision (including any duties Univision may have as a national sales representative for Entravision), to influence Entravision in the conduct of Entravision's radio business," as well as prohibits Univision, subject to certain exceptions, from "communicating to or receiving from any officer, director, manager, employee or agent of Entravision any nonpublic information regarding any aspect of [Univision's] or Entravision's radio business, including any plans or proposals with respect thereto."<sup>91</sup> The Consent Decree also contemplates an antitrust compliance program, along with designation of an Antitrust Compliance Officer, whose responsibility will be to, "on a continuing basis, supervise the review of current and proposed activities to ensure compliance with the [Consent Decree]."<sup>92</sup> We conclude that the absence of the contractual approval right over the sale of Entravision's radio stations and the Consent Decree's provisions reasonably prevent Univision from exercising a cognizable level of influence over the core operating functions of Entravision's radio stations while those provisions remain in effect. We conclude, moreover, that attribution of Univision's interest in Entravision's television stations alone will not result in violation of the Commission's radio/television cross-ownership rule.<sup>93</sup>

46. We recognize that the Consent Decree, according to its terms, expires within 10 years after entry of the proposed Final Judgment by the Court. Because we rely on the insulation effects of the Consent Decree in reaching our attribution determination in this case, we will require Univision to notify the Commission if the Consent Decree expires, terminates, or the relevant provisions change. Upon such notification, we will reevaluate whether, and to what extent, Entravision should be attributed to Univision and what further requirements, if any, we should impose as a result of that reevaluation.

47. With respect to whether the proposed future interest in Entravision would comply with the EDP Rule, the other issue raised in the November 29, 2002, Letter of Inquiry, the Commission, in the *Attribution Reconsideration*, stated that an applicant may determine its total assets by using the station's "book value as defined under standard financial accounting practices, or some other value, including the fair market value, provided the valuation is reasonable."<sup>94</sup> In response to the November 29, 2002, Letter of Inquiry, Univision provided an audited financial statement for the year ending on December 31, 2001, as well as unaudited financial statements for the period covering January 1, 2002, to October 31, 2002. These cover roughly the same period as the balance sheets provided to the SEC as part of its Form 10-Q filing for the quarterly period ending September 30, 2002. The balance sheet provided to the SEC in the Form 10-Q filing was unaudited. According to the calculation provided, which includes accounts payable owed to Univision from Entravision, Univision's post-merger interest in Entravision would fall below the 33% threshold of total assets set forth in the EDP attribution standard. Having reviewed the showing, we conclude that Univision's proposed interest in Entravision would comply with the EDP standard.

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<sup>91</sup> Consent Decree, at 7.

<sup>92</sup> *Id.* at 11-12.

<sup>93</sup> Even though the effective date of the new rules has been stayed, we note, as an aside, that attribution of Univision's interest in Entravision's television stations alone will not implicate the Cross-Media Limits set forth in the *2002 Biennial Review Order*.

<sup>94</sup> *Attribution Reconsideration*, 16 FCC Rcd at 1110. "[I]f the issue arises in connection with a transfer or assignment application or an ownership report filed after consummation of an assignment or transfer, the applicant must use the sales price of the transfer or assignment as the total asset value." *Id.* No Entravision station is being transferred as a result of this merger and, therefore, Univision may use any reasonable valuation method.

48. We conclude that, based on the representations contained in the responses to the Letters of Inquiry and related record evidence, Univision has adequately demonstrated that its interest in Entravision's radio stations following consummation will not be attributable under our attribution criteria. Our conclusion rests upon Univision's representation that its voting stock interest in Entravision following consummation will be less than 5%, which includes stock held by officers and directors of Univision; that the total debt and equity held by Univision following consummation will not exceed 33% of the total asset value of Entravision, which includes debt and equity held by officers and directors of Univision; and that Univision, prior to consummation, will divest itself of any class of stock permitting it to designate members to, or otherwise influence the Entravision Board of Directors. Though we find that Univision's right to approve any sale of any Entravision television station affiliated with a Univision-owned network will render Univision's interest in Entravision's television stations attributable, we do not extend this finding of attribution to Entravision's radio stations.

49. NHPI nevertheless argues that, despite the pledges made in the application, amendments and in responses to the Letters of Inquiry, Univision will continue to have significant influence over the business of Entravision such that its interest should be attributable. NHPI cites as support a network affiliation agreement between Univision and Entravision that gives Entravision stations the exclusive right to broadcast Univision programming 24 hours a day. NHPI also states that Univision acts as Entravision's exclusive national advertising representative firm. NHPI contends that Entravision has acknowledged the importance of its relationship with Univision in various SEC filings and further questions whether Univision can reasonably be expected to alter this relationship after the merger. Univision argues that its status as a program supplier to Entravision does not, in itself, warrant attribution. Univision states that, instead, the Commission applies the EDP standard to such relationships in order to determine attribution.<sup>95</sup>

50. In the *Attribution Order*, the Commission specifically declined to treat program supply relationships, such as network affiliation agreements, as *per se* attributable, rather subjecting such relationships to the EDP standard.<sup>96</sup> To the extent it may be appropriate to address concerns regarding a particular affiliation agreement, the Commission does so within the context of the EDP analysis,<sup>97</sup> or our policies and precedent involving attribution of specific interests. The Commission has also consistently held that advertising representation does not constitute an attributable interest, having removed such interests from consideration under the former cross-interest policy before the Commission released the *Attribution Order*.<sup>98</sup>

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<sup>95</sup> 47 C.F.R. § 73.3555, Note 2(i).

<sup>96</sup> *Attribution Order*, 14 FCC Rcd at 12599-600.

<sup>97</sup> *Id.* at 12579. See also *Sunburst Media, L.P.*, 17 FCC Rcd at 1368.

<sup>98</sup> See *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16076. Under the *Golden West* policy, the Commission held that representation of a station by a sales representative owned wholly or partially by the licensee of a competing station in the same community or service area would result in attribution. See *Golden West Broadcasters*, 16 FCC 2d 918 (1969). However, the Commission abolished this policy with respect to attribution, holding that market forces and the remedies available under antitrust statutes were sufficient to deter the anti-competitive practices the policy was meant to address. See *Representation of Stations by Representatives Owned by Competing Stations in the Same Area*, 87 F.C.C.2d 668 (1981). The Commission has also granted Univision a permanent waiver of the Network Representation Rule, which prohibits stations, other than those owned and operated by their network, from

(continued....)

51. A “major program supplier,” as that term is defined by the *Attribution Order*, will have an attributable interest if its combined debt and equity exceeds 33% of the total asset value of the licensee. As noted above, based on the record evidence, including the responses to the Letters of Inquiry, Univision will not hold more than 33% of the total asset value of Entravision.<sup>99</sup> As we stated before, any challenge to the adequacy of the EDP standard is more appropriately raised within the context of a rulemaking proceeding.

#### D Elgin Informal Objection

52. Elgin FM Limited Partnership owns three FM broadcast radio stations in Texas and competes against stations owned by HBC. Elgin argues that the combination of Univision and HBC will essentially create a Spanish language media monopoly and will therefore be anticompetitive, negatively affecting existing and future Spanish language media operators.<sup>100</sup> Elgin also argues that Univision’s relationship with other companies in the Spanish language music entertainment industry means that Univision will be able to control all aspects of Spanish language entertainment.<sup>101</sup> Elgin further states that because Clear Channel (which will own a small percentage of Univision stock if the transaction is approved) controls many large entertainment venues, it is questionable whether broadcasters unaffiliated with either Univision, Entravision, or Clear Channel will have a reasonable opportunity to be involved with one of those venues if the transaction is approved.<sup>102</sup> Finally, Elgin states that it will be difficult for independent Spanish language media operators to generate the synergies necessary to compete with “media giants” Univision and Clear Channel.<sup>103</sup>

53. With respect to the claim that the transaction is contrary to the public interest because it is anticompetitive, parties who file petitions to deny an application have the burden of pleading sufficient facts to establish a *prima facie* case that grant of the application is contrary to the public interest.<sup>104</sup> General or conclusory allegations or those based simply on belief are not sufficient to pass this test.<sup>105</sup> Elgin provides no support for its implicit yet essential contention that HBC’s radio stations and Univision’s television stations compete in the same product market. We have generally assumed, in our competition analyses of radio transactions, that radio and television stations do not compete in the same

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(...continued from previous page)

being represented by their network in the non-network (spot) advertising sales market. *Amendment of § 73.658(i) of the Commission’s Rules*, 5 FCC Rcd 7280, 7282 (1990).

<sup>99</sup> To the extent NHPI is alleging that Univision has *de facto* control over Entravision, we conclude that NHPI has failed to raise a substantial and material question of fact that Univision controls Entravision’s programming, personnel or finances.

<sup>100</sup> Elgin Petition at 1-2.

<sup>101</sup> *Id.* at 2.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See 47 U.S.C. § 309(d)(2); *Gencom v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

<sup>105</sup> See *Telemundo Communications Group, Inc.*, 17 FCC Rcd at 6962; *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (*en banc*).

product market, and the Department of Justice has followed a similar assumption.<sup>106</sup> Elgin has provided no basis to rebut that assumption in this case. Indeed, Elgin has failed to show that Univision and HBC compete against each other to any extent for listeners or advertisers. Moreover, Elgin has not shown that there are not other competitors that would compete against Univision/HBC in this alleged market, or what Univision/HBC's share of this market would be. In short, Elgin has not shown how this merger potentially would cause anticompetitive harms.

54. With regard to Elgin's claims that Univision will be able to control Spanish language entertainment as a whole, Elgin has not stated how in particular it will be harmed.<sup>107</sup> For example, while it notes that Univision owns record companies, it has not stated that it will no longer be able to play recordings from those companies. While Elgin also argues that Clear Channel controls many entertainment venues, that control exists today. If anything, the transaction – which will result in Clear Channel having a lower percentage of ownership in the HBC radio stations than it has today – makes it less likely that Clear Channel would improperly favor HBC stations over those owned by Elgin and other HBC competitors. The same is true with regard to Elgin's comments about the Katz Media Group, an advertising marketing representative owned by Clear Channel. The transaction would appear to ameliorate, not exacerbate, any competition concerns that arise from the relationship.

55. Finally, Elgin complains that it will be difficult for independent operators, such as itself, to generate the synergies necessary to compete with Univision. In general, though, the increased competitive effectiveness that may result from a transaction is not a reason to disapprove it.<sup>108</sup> Elgin has not explained or provided evidence as to why such increased effectiveness would be anticompetitive.

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<sup>106</sup> See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rulemaking*, 16 FCC Rcd 19861, 19895 (2001). See *Infra* ¶ 59.

<sup>107</sup> Media Access Project (MAP) alleges that Univision makes it “very difficult for competitors to hire Univision's TV personalities or ‘obtain marquee programming.’” July 25, 2003, Letter of Media Access Project. On August 21, 2003, Telemundo Communications Group, Inc., filed an *ex parte* letter making similar allegations, as well as alleging that Univision has precluded it from promoting its programming on Entravision's radio stations. August 21, 2003, Letter from Telemundo Communications Group, Inc. Telemundo has suggested a series of conditions which it claims will ensure that Univision will not engage in further alleged anticompetitive practices. We are not convinced that the practices alleged by Telemundo and MAP, even if true, will translate into competitive harms in this case, since Spanish-language programming sources are abundant and growing. Telemundo, for instance, has recently announced that it has gone from acquiring all of its content from outside sources to producing 70% of its own programming. July 28, 2003, *Communications Daily*, at 11. According to CEO James McNamara, Telemundo's relationship with NBC has “transformed Telemundo from an acquirer of programming to a producer of content” that is specifically geared to U.S. Hispanics. *Id.* With respect to promotion of its programming, Univision intends to divest a significant portion of its interest in Entravision as a result of the Consent Decree with the DOJ, and Univision will further be prohibited from influencing Entravision's radio business. *Infra* at ¶ 45. Entravision has approximately 52 full-service radio stations on which Telemundo can promote its programming in the future. Any argument that Univision would use its relationship with its HBC radio stations to prevent Telemundo from promoting its programming is speculative and ultimately irrelevant, especially since we find below that there exists no separate Spanish-language media competition or diversity market. Consequently, we do not believe Telemundo's proposed conditions are necessary to protect the public interest.

<sup>108</sup> See *MCI Telecommunications Corp. and EchoStar 110 Corp., Order and Authorization*, 16 FCC Rcd. 21608, 21625 (1999) (“The public interest, however, is in ensuring robust competition and not in protecting the financial interest of particular firms.”).

## E Ex Parte Submissions of SBS

56. We have received several filings from SBS relating to the effects of the merger on Spanish-language programming and, in particular, arguing that the merger, if approved, would diminish the diversity of sources available to Spanish-language speakers.<sup>109</sup> Citing a Pew/Kaiser Survey, SBS states that 11% of Hispanics speak no English and 29% speak English “just a little.” SBS contends that, “for approximately 40% of Hispanics, English-language broadcast media are of little or no relevance.”<sup>110</sup> SBS also has provided a number of declarations from advertisers and marketing firms, which it claims support the conclusion that the advertising industry views the Spanish-language market as separate. Although the arguments are not framed precisely, it appears that SBS is alleging potential harms from the proposed transaction both to competition and diversity within a putative “Spanish-language submarket.”

57. We are not convinced. SBS has not established that there is, for competition analysis, an identifiable Spanish-language media market that would be adversely affected by the proposed transaction. In fact, SBS apparently made the opposite point in its March 31, 2003, SEC Form 10-K when it stated that “[e]ach of [its] radio stations compete with both Spanish-language and English-language radio stations in the market...”<sup>111</sup> Further, with respect to the diversity of viewpoints available to viewers and listeners who speak primarily or only Spanish, we find no lack of available alternatives. Indeed, Spanish speakers likely have more media options available to them today than ever in this country’s history. We therefore decline to limit or condition our approval of this transaction on the basis of its purported impact on Spanish-speaking audiences.

58. First, with respect to alleged competitive harms, SBS has failed to demonstrate that we should abandon our longstanding reluctance to define product markets based on programming format or language.<sup>112</sup> In particular, for purposes of applying the broadcast multiple ownership rules, the Commission previously has held that Spanish-language programming does not constitute a separate market,<sup>113</sup> and that format choice should not be dictated by government regulation but left to market forces.<sup>114</sup> The record in this proceeding offers no basis to disturb those conclusions.

59. As stated above, we have generally assumed, in our competition analyses of radio transactions, that radio and television stations do not compete in the same product market, an approach

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<sup>109</sup> The Commission received *ex parte* filings from SBS on June 11, 16, 20, 23, and 26, 2003; July 3, 14, 16, 21, and 30, 2003; and August 5 and 6, 2003. The Commission has also received numerous *pro se* comments from public interest organizations and individuals.

<sup>110</sup> June 20, 2003, Letter from SBS, at 2.

<sup>111</sup> July 23, 2003 Letter from Univision, at 4.

<sup>112</sup> See, e.g., *Entertainment Formats*, 60 F.C.C.2d 858 (1969), recon. denied, 66 F.C.C.2d 78 (1977); *FCC v. WNCN Listeners Guild*, 540 U.S. 582 (1981) (upholding Commission policy that the public interest is best served by promoting program diversity through market forces, and not by considering station formats in ruling on applications for license renewal or transfer).

<sup>113</sup> *Spanish Radio Network*, 10 FCC Rcd 9954, 9956 (1995).

<sup>114</sup> *Entertainment Formats*, 60 FCC Rcd at 860-861.

the DOJ has generally followed.<sup>115</sup> The record in this proceeding offers no basis to disturb this conclusion. We also note that our conclusions are consistent with the actions of the Department of Justice, Antitrust Division in this case, which, after performing its own investigation, did not pursue possible market power allegations with regard to a purported Spanish-language television-radio market.<sup>116</sup> In response to our longstanding precedent and the actions of the DOJ, SBS has provided only anecdotal evidence that Spanish-language radio and television should be regarded as part of the same product market for competition purposes. The declarations of advertisers and marketing agencies are similarly unconvincing. Demographic statistics raised in sales presentations do not demonstrate the existence of a common Spanish-language radio and television product market for purposes of competition analysis, as illustrated by the fact that Univision has also submitted marketing materials comparing its ratings in local markets to English-formatted competitors.<sup>117</sup> Given the DOJ's decision, we see no reason, within the context of this case, to question our general presumption that television and radio stations compete in separate product markets. To the extent SBS is suggesting that separate Spanish-language radio market exists that would be harmed by the proposed merger, we are unpersuaded. This transaction will have no effect on radio concentration because Univision owns no radio stations.<sup>118</sup>

60. In any event, even if we were to conclude that Spanish-language programming could be regarded as a separate product market, competitive analysis considers current market participants as well as ease of entry into the relevant market. With respect to existing market participants, we note that Telemundo is a direct and substantial competitor to Univision. And, while Telemundo has sought to impose conditions on the current merger based on asserted competitive concerns, we do not believe there is any real risk that Telemundo will be unable to effectively compete even without those conditions.<sup>119</sup> Telemundo is a subsidiary of GE/NBC, an organization with access to broad financial resources and nearly unequaled access to the talent and program production expertise necessary to a successful network. Moreover, the number of programming services targeting the Spanish speaking population of the United States is substantial and growing. The Hispanic audience, even those who are "Spanish-dominant," are not limited to broadcast radio and television programming, but may also access Spanish-language programming via satellite and cable. The May 2003 "Rivera Study," cited by SBS in its June 20, 2003, filing notes that new technologies "offer access to Spanish-language programs that were simply unavailable until the recent past."<sup>120</sup> Univision, in a May 14, 2003, filing, also points out that Hispanics have multiple Spanish-language options available, including at least 26 Spanish-language networks

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<sup>115</sup> *Infra* ¶ 53.

<sup>116</sup> See *United States of America v. Univision Communications, Inc. and Hispanic Broadcasting Corporation*, Competitive Impact Statement, Civil Action No. 1:03CV00758, at 5.

<sup>117</sup> See July 23, 2003, Letter from Univision, Exhibit 1. We are, for similar reasons, unmoved by the opinions contained in the Lehman Brothers Report submitted by SBS on June 23, 2003. Marketing and/or investment materials may include terms of art, e.g., "market" or "market dominance," but use them in a more pedestrian, non-legal sense. A "market" that an investor may care about may be quite different than an economic market for purposes of competition analysis.

<sup>118</sup> As discussed in further detail above, we have already concluded that Univision will not have an attributable interest in Entravision's radio stations. *Infra* ¶ 45.

<sup>119</sup> See n.107, *supra*.

<sup>120</sup> "Latino Viewing Choices: Bilingual Television Viewers and the Language Choices They Make," by Louis De Sipio, Ph.D., The Tomas Rivera Policy Institute ("Rivera Study") at 5.



available on broadcast television, cable, or satellite.<sup>121</sup> Consistent with the general market trend, we expect new cable channels geared to a Hispanic audience to be introduced in the future.<sup>122</sup>

61. Further, with respect to barriers to entry into the alleged Spanish-language market, the record suggests that competitors may enter and exit the market with relative ease. Using Arbitron figures, Univision alleges that 99 new Spanish-language radio stations were introduced between 2001 and 2002.<sup>123</sup> A separate review of the BIA Publications Media Access Pro database by Commission staff reveals that, during the last four years, approximately 163 full-service Spanish-language radio stations switched from an exclusive English-language format and approximately 77 full-service English-language radio stations switched from an exclusive Spanish-language format.<sup>124</sup> Although it is unclear how many of these format changes were the result of ownership changes, the record evidence, as well as the staff's own investigation of the issue, support the conclusion that barriers to changing a station's format do not preclude entry of new Spanish-language radio stations. Thus, even if there were a Spanish-language market, we would have no basis to conclude that this proposed transaction would translate into competitive harms.

62. With respect to the proposition that the proposed transaction will unreasonably undermine diversity of programming available to the Spanish-language community, SBS similarly has failed to make its case. Although the effective date of the new rules set forth in the *2002 Biennial Review Order* has been stayed by the 3<sup>rd</sup> Circuit Court of Appeals, the reasoning in that order remains pertinent. In that order, we clarified that our primary "diversity" concern relates to viewpoint diversity, *i.e.*, do one or a few owners have the ability to filter out certain messages or viewpoints.<sup>125</sup> Accordingly, our focus in reviewing the allegation that the transaction should be prohibited or conditioned on diversity grounds cannot be limited to its purported impact on viewpoint diversity provided by broadcast outlets, but must encompass all of the media outlets available to purveyors of viewpoints presumably targeted to Hispanics.

63. The record evidence does not demonstrate that the Hispanic audience lacks a diverse mix of local or national programming alternatives. The Rivera Study notes that "Latinos have a wider palette of television programming options than does the population as a whole."<sup>126</sup> Interestingly, the Rivera Study included respondents who claimed to be Spanish-dominant with weak English-speaking skills (as demonstrated by the fact that 80% of the respondents responded to the survey in Spanish).<sup>127</sup> "Fully

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<sup>121</sup> May 14, 2003, Letter of Univision Communications, Inc., at 4. Univision's assertion is based on a Hispanic Television Directory available at [www.tvweek.com/hispanictv/](http://www.tvweek.com/hispanictv/).

<sup>122</sup> See, e.g., "Lifestyle Programming: Scripps Plans Spanish-Language Cable Net On Its 'How-To' Model," *Broadcasting and Cable* (Sept. 23, 2002).

<sup>123</sup> May 14, 2003, Letter of Univision Communications, Inc., at 4.

<sup>124</sup> SBS's July 21, 2003, filing also shows that 35 existing stations have converted to a Spanish-language format in the top ten "Hispanic" markets over the last 3 years, which also indicates a significant potential for new entry. July 21, 2003, Letter of SBS, at 4.

<sup>125</sup> *2002 Biennial Review Order*, ¶¶ 19-35.

<sup>126</sup> Rivera Study at 1. One of the purposes behind the study was to explain the overwhelming bilingual viewing pattern in the Latino community.

<sup>127</sup> *Id.* at 3.

three-quarters of Latinos routinely watch television in English and Spanish,” and “approximately two-thirds of respondents reported that children in the household preferred English-language programming while just 4 percent preferred Spanish-language programming.”<sup>128</sup> Using Nielson and Arbitron data as support, Univision points out that “over 99% of all Hispanic television households in the United States watch one or more English-language broadcast networks;” that “[i]n the markets in which HBC’s stations are located, an average of nearly two-thirds of all Hispanics listen to English-language radio stations;” and that “Hispanics spend the *majority* (53.4%) of their radio listening time listening to English-language formats.”<sup>129</sup> For the majority of Spanish-speaking citizens, therefore, the range of available outlets includes both English and Spanish-language alternatives and is, in fact, broader than that available to the larger population.

64. Even if we were to narrow our focus to include only outlets that provide programming in Spanish, we would not be able to conclude that this proposed transaction would result in a single gatekeeper for diversity purposes. On the local level, there appears to be no dearth of new Spanish-language radio stations entering local markets,<sup>130</sup> and, as discussed above, more new radio stations have switched to the Spanish-language format over the last four years than have switched away from it.<sup>131</sup> Moreover, in communities with large Hispanic populations, it is not uncommon to find one or more local newspapers published in Spanish.<sup>132</sup> In addition, English-language programs can be broadcast in Spanish by use of the Secondary Audio Program (SAP).<sup>133</sup> According to Nielsen figures, SAP penetration, as defined by the percentage of households owning a SAP-capable device, has increased from 68.4% in June 2002 to 76.1% in June 2003.<sup>134</sup> As of August 2000, between one-third and one-half of the broadcast

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<sup>128</sup> Id. at 1, 6. A 1998 study by the Tomas Rivera Policy Institute concluded that “[o]nly 26 percent of respondents watched the news exclusively in Spanish,” and that “[a] roughly equal number watched the news primarily and exclusively in English.” “Talking Back to Television: Latinos Discuss How Television Portrays Them and the Quality of Programming Options,” by Louis DeSipio, Ph.D., Tomas Rivera Policy Institute (1998 Rivera Study), at 4. This contrasted sharply with entertainment programming, where just 20% of respondents watched in both English and Spanish. Id. at 5.

<sup>129</sup> May 14, 2003, Letter of Univision Communications, Inc., at 4 (emphasis in original). The authors of the Rivera Study suggest that “[t]he fact that bilingual Latino viewers are overwhelmingly made up of immigrants and, to a lesser extent, the children of immigrants indicates that, if current trends continue, U.S.-born Latinos will move away from bilingual viewing and Spanish-language television.” Rivera Study at 11.

<sup>130</sup> According to the Nielsen figures cited by Univision, the number of Spanish-language radio stations has increased from 600 in 2001 to 699 in 2002. Arbitron, *Radio Today 2002 Edition and 2003 Edition*, 38, 48.

<sup>131</sup> See *Infra* ¶ 61.

<sup>132</sup> Spanish-speaking residents of New York and Miami, for instance, are served by general circulation newspapers *Hoy* and *El Nuevo Herald*, respectively. As noted recently in the *Washington Post*, Spanish-language newspapers will also be debuting in Dallas, Orlando, and Chicago. “Spanish-Language Media Expand,” *Washington Post*, Page A1 (August 11, 2003). Many smaller cities, such as Lawrence, Massachusetts, are also served by Spanish-language newspapers.

<sup>133</sup> Telemundo has also recently announced that it will provide English-language closed captioning for its Spanish-language programming by September 2003. July 28, 2003, *Communications Daily*, at 12.

<sup>134</sup> The “relatively low levels of the use of SAP among respondents who had access to such technology indicates that these respondents do not perceive that they are short of Spanish-language programming options.” Rivera Study at 10.

stations in the top 25 DMAs were already broadcasting on the SAP channel.<sup>135</sup> As a result, English-language networks and their local affiliates can reach a large proportion of Spanish speakers through either English-language programming or through the SAP channel. Nationally, the number of cable and satellite delivered programming services targeted at Spanish speaking viewers is large and growing.

65. There is, in sum, no shortage of media outlets available to Spanish speaking audiences in the United States. Given the wide variety of programming alternatives described above,<sup>136</sup> as well as Hispanic viewing habits and the ease of entry into the Spanish-language format, we simply cannot conclude that the Hispanic or Spanish-speaking audience constitutes a separate, insular “diversity” or competition market.

#### IV. CONCLUSION

66. Section 310(d) of the Communications Act provides that no station license shall be transferred or assigned until the Commission, upon application, determines that the public interest, convenience, and necessity will be served thereby.<sup>137</sup> In acting on such applications, we generally consider whether the proposed transaction will be consistent with the Communications Act and our rules and, in addition to complying with those rules, whether the transaction would otherwise serve the public interest.

67. We have reviewed the proposed merger and related pleadings and conclude that grant of the applications as conditioned herein will comply with the Commission’s rules. As discussed in further detail above, we also conclude that the merger will not be anticompetitive or result in a lack of diversity and, therefore, will be consistent with the public interest. We conclude that the applicants are fully qualified and that grant of the transfer of control of HBC broadcast radio stations to Univision, subject to the conditions set forth in this order, will serve the public interest, convenience, and necessity.

68. Accordingly, IT IS ORDERED, That the Petition to Deny of the National Hispanic Policy Institute is GRANTED IN PART as set forth above, and is DENIED IN ALL OTHER RESPECTS; and That the informal objection of Elgin FM Limited Partnership is DENIED.

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<sup>135</sup> See *Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15238-15239 (2000) (noting availability of Spanish-language audio on the SAP channel for several programs carried by each of the four major networks).

<sup>136</sup> See *Infra* ¶ 60.

<sup>137</sup> 47 U.S.C. § 310(d).

69. IT IS ORDERED, That the applications for consent to the transfer of control of licensee subsidiaries of Hispanic Broadcasting Corporation, applications BTC, BTCH, BTCFTB-20020723ABL-ADS and the additional authorizations listed in Note 1, the Appendix, or otherwise, and as docketed under MB 02-235, ARE GRANTED, conditioned upon the representations made by Univision in the applications and related amendments regarding its interest in Entravision; upon divestiture of radio stations in Albuquerque and Houston, as may be necessary to come into compliance with the rules adopted by the Commission in its *2002 Biennial Order*, or a showing that waiver of those rules is appropriate, within six months in the event that the stay pending appeal in *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam) is lifted or the local radio ownership rules adopted in the *2002 Biennial Review Order* otherwise go into effect; upon notification of the Commission should the Consent Decree between Univision and the U.S. Department of Justice expire, terminate, or otherwise be amended; and upon further requirements relating to ownership compliance that the Commission may impose as a result of the changed circumstances reported in such notification.

**FEDERAL COMMUNICATIONS COMMISSION**

Marlene Dortch  
Secretary

## Appendix

## Licenses to be Transferred from the Shareholders of Hispanic Broadcasting Corporation to Univision Communications, Inc.

Station	Community of License	File Number	Facility ID Number
KGBT(AM)	Harlingen, TX	BTC-20020723ABL	67067
KIWW(FM)	Harlingen, TX	BTCH-20020723ABM	67072
KGBT-FM	McAllen, TX	BTCH-20020723ABN	6662
KCOR(AM)	San Antonio, TX	BTC-20020723ABO	67069
KROM(FM)	San Antonio, TX	BTCH-20020723ABP	67071
KXTN(AM)	San Antonio, TX	BTC-20020723ABQ	67070
KXTN-FM	San Antonio, TX	BTCH-20020723ABR	67064
KLAT(AM)	Houston, TX	BTC-20020723ABS	67063
KLAT-FM	Winnie, TX	BTCH-20020723ABT	57801
KQBU-FM	Port Arthur, TX	BTCH-20020723ABU	25583
KRTX(AM)	Rosenburg-Richmond, TX	BTC-20020723ABV	57804
KPTY(FM)	Rosenburg, TX	BTCH-20020723ABW	57806
KLTO(FM)	Galveston, TX	BTCH-20020723ABX	479
KAJZ(AM)	El Paso, TX	BTC-20020723ABY	67065
KBNA-FM	El Paso, TX	BTCH-20020723ABZ	67066
KAMA(AM)	El Paso, TX	BTC-20020723ACA	36948
WIND(AM)	Chicago, IL	BTC-20020723ACB	67068
WOJO(FM)	Evanston, IL	BTCH-20020723ACC	67073
KCOR-FM	Comfort, TX	BTCH-20020723ACD	25469
KBBT(FM)	Schertz, TX	BTCH-20020723ACE	3075
KOVE-FM	Galveston, TX	BTCH-20020723ACF	19091
KSOL(FM)	Santa Clara, CA	BTCH-20020723ACG	19532
KSCA(FM)	Glendale, CA	BTCH-20020723ACH	24548
KRCD(FM)	Inglewood, CA	BTCH-20020723ACI	1025
KRCV(FM)	West Covina, CA	BTCH-20020723ACJ	19088
KLNO(FM)	Fort Worth, TX	BTCH-20020723ACK	41380
KISF(FM)	Las Vegas, NV	BTCH-20020723ACL	28893
KQMR(FM)	Indian Springs, NV	BTCH-20020723ACM	11614
KLNV(FM)	San Diego, CA	BTCH-20020723ACN	51515
KLQV(FM)	San Diego, CA	BTCH-20020723ACO	51164

KHOT-FM	Paradise Valley, AZ	BTCH-20020723ACP	59422
KKMR(FM)	Arizona City, AZ	BTCH-20020723ACQ	2740
KMRR(FM)	Globe, AZ	BTCH-20020723ACR	22977
KOMR(FM)	Sun City, AZ	BTCH-20020723ACS	55913
KHOV-FM	Wickenburg, AZ	BTCH-20020723ACT	29021
KHOV-FM1	Constellation, AZ	BTCFTB-20020723ACU	77422
KZOL(FM)	North Fork, CA	BTCH-20020723ACV	31716
KLTN(FM)	Houston, TX	BTCH-20020723ACW	65310
WLXX(AM)	Chicago, IL	BTC-20020723ACX	11196
KEMR(FM)	San Francisco, CA	BTCH-20020723ACY	70032
KZMR(FM)	Santa Cruz, CA	BTCH-20020723ACZ	70033
KEMR-FM2	Sausalito, etc., CA	BTCFTB-20020723ADA	70028
KEMR-FM3	Pleasanton, CA	BTCFTB-20020723ADB	14485
WADO(AM)	New York, NY	BTC-20020723ADC	70684
WCAA(FM)	Newark, NJ	BTCH-20020723ADD	46978
KTNQ(AM)	Los Angeles, CA	BTC-20020723ADE	35673
KLVE(FM)	Los Angeles, CA	BTCH-20020723ADF	35086
WQBA(AM)	Miami, FL	BTC-20020723ADG	73912
WAMR-FM	Miami, FL	BTCH-20020723ADH	61658
WAQI(AM)	Miami, FL	BTC-20020723ADI	37254
WRTO(FM)	Goulds, FL	BTCH-20020723ADJ	37253
KDXX(FM)	Lewisville, TX	BTCH-20020723ADK	57376
KHCK(AM)	Dallas, TX	BTC-20020723ADL	57375
KESS(AM)	Fort Worth, TX	BTC-20020723ADM	34298
KDOS(FM)	Robinson, TX	BTCH-20020723ADN	57377
KHCK-FM	Denton, TX	BTCH-20020723ADO	7040
KDXT(FM)	Granbury, TX	BTCH-20020723ADP	21599
KLSQ(AM)	Laughlin, NV	BTC-20020723ADQ	36694
KBAE(FM)	Llano, TX	BTCH-20020723ADR	87996
KVCQ(FM)	McQueeney, TX	BTCH-20020723ADS	25588
KIOT(FM)	Los Lunas, NM	BTCH-20021125ABD	73117
KVVF(FM)	Rio Rancho, NM	BTCH-20021125ABE	65256
KJFA(FM)	Albuquerque, NM	BTCH-20021125ABF	16750
KAJZ(FM)	Santa Fe, NM	BTCH-20021125ABG	7051
KKSS(FM)	Santa Fe, NM	BTCH-20021125ABH	63928
KINV(FM)	Georgetown, TX	BALH-20030307AEH*	55475
KNGT(FM)	Jackson, CA	BALH-20030307AEY*	24464
WKAQ(AM)	San Juan, PR	BTC-20030224ADP*	19099
WKAQ-FM	San Juan, PR	BTCH-20030224ADQ*	19098
WUKQ(AM)	Ponce, PR	BTC-20030224ADR*	9352
WUKQ-FM	Mayaguez, PR	BTCH-20030224ADS*	54818

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WKAQ-FM1	Juana Diaz, PR	BTCFTB-20030224ADT*	19100
WKAQ-FM2	Fajardo, PR	BTCFTB-20030224ADU*	92748
WUKQ-FM1	Ponce, PR	BTCFTB-20030224ADV*	127832

See *infra* Note 1. On May 30, 2003, the staff dismissed applications with the following file numbers: BALH-20030324ADI, BALH-200307ADZ, BTC-20030224ACH, BTCH-20030224ACI, BTC-20030224ACJ, BTCH-20030224ACK, BTCFTB-20030224ACL, BTCFTB-20030224ACM, BTCFTB-20030224ACN. The public will be able to reference the history of the authorizations by using the file numbers listed above.

**JOINT STATEMENT OF  
COMMISSIONERS JONATHAN S. ADELSTEIN AND MICHAEL J. COPPS, DISSENTING**

*Re: Applications for Transfer of Control of Certain Subsidiaries of Hispanic Broadcasting Corporation to Univision Communications, Inc.*

The majority's cursory opinion can be condensed to a blistering rebuke of the rights of Spanish speakers in our country. "Let them eat English" is today's decree. "Déjelos comer Inglés." Today's outcome-driven result shows that the public interest in protection against excessive media concentration is really only about the mainstream English-speaking population. It's no bother to the majority that the proposed merger threatens significant harm for millions of Americans who rely on Spanish-language broadcasting as the primary means of accessing news, information and programming relevant to civic and cultural participation in our society. In a measure of utter indifference to the public interest, the majority decrees that English-language broadcasting offers adequate choice for our multicultural society.

The company is aptly named Univision – "one vision" – because that describes what is likely from Spanish-language media from now on. The degree of concentration in Spanish-language broadcasting resulting from this transaction threatens to endanger competition, diversity and localism for millions of Americans who speak only or principally Spanish. Whether they watch broadcast or cable TV, listen to the radio, buy CDs, or surf the Internet, they will face the monolithic Univision – a reach no other media company is anywhere close to attaining with its respective audience. The proposed transaction creates an opportunity for a single media company to serve as a media gatekeeper for millions of Americans.

The Commission repeatedly has expressed its commitment to diversity, competition and localism in broadcasting generally. When these goals are severely at risk for a segment of the United States population, the Commission cavalierly decides English-language broadcasting should satisfy everyone.

Spanish speakers are no less deserving of protection from excessive concentration of media assets in the hands of one entity than those who speak English. Latinos are now the largest minority group in the United States – 38.8 million Hispanics live here, comprising 13% of the total U.S. population. The Hispanic population of the United States is more than the entire population of Canada. Studies show that more than 45 percent of U.S. Latinos exclusively or predominantly speak Spanish. For this population, access to news and information broadcast in the English language simply is not a substitute for Spanish-language broadcasting.

Common sense, empirical evidence, the Department of Justice's conclusions in this case, the Commission's own statements as recently as last year, and Univision's assertions to advertisers and investors suggest that Spanish-language broadcasting serves a distinct audience. It is pure fiction to assert that advertisers seeking to reach Latinos are just as likely to use English media as Spanish media, or that Telemundo, were it to be cut off from advertising its shows on HBC's radio stations, could be equally effective advertising on English-language radio stations.



Even though the bulk of the evidence suggests a separate market, the majority has not compiled the necessary data, done the requisite outreach or performed the strenuous analysis that is required to reach a definitive conclusion. This case was an opportunity for us to reach out and tap the expertise and experience of those who do business with, and consumers who receive the services of, this segment of our media. Once again, we failed to hold hearings, talk to experts, or gather any data on our own, which shows the lack of analytical depth in this item. After all of the adverse reaction to the Commission's recent weakening of its media ownership rules, we should have treated this merger as we have other major media mergers, with public hearings and an in-depth analysis of the practical and realistic effects on Spanish speakers of this proposed combination. Instead, the Commission once again fails to evaluate the public interest adequately and marches forward allowing further media concentration.

Even if, after conducting the careful analysis required and not the cursory approach taken by the majority, the Commission were to conclude that Spanish-language broadcasting should not be treated as a separate market, the unique considerations here compel special consideration under our statutory obligation to find affirmatively that the transaction serves the public interest. Every proposed merger coming before the Commission deserves to be examined on its own merits and within its own particular factual and contextual situation, free from predetermined conclusions of how some idealized marketplace should look. Our statutory mandate requires that the Commission must find the transfer of licenses in the public interest – we must consider the potential benefits and harms of a transaction on the listening and viewing public, accounting for the unique circumstances of each particular transaction.

For millions of Spanish speakers who rely exclusively or predominantly on Spanish-language media, this merger threatens a dramatic loss of diversity, competition and localism. Spanish speakers are just as worthy as English speakers of a diversity of information sources on their public airwaves. Once again, instead of encouraging the widespread dissemination of ideas by a diversity of sources on our nation's airwaves, the Commission approves a merger that will remove a significant independent media voice serving the Hispanic community. Once again, the FCC ignored the pleas of thousands of people across the country urging us to put a halt to more media consolidation. Thousands of people contacted us in opposition to the proposed merger, warning that the merger will damage Latino cultures, limit editorial voices, restrict the information flowing to Hispanics, and harm competition in broadcasting and advertising. These pleas of the public, many this time conveyed in Spanish, should not be so cavalierly ignored.

Opposition to the merger rang out from the National Association of Hispanic Publications; the largest Latino national fraternity, Lambda Theta Phi; the Hispanic Americans for Fairness in Media; the Latin American Workers Union; the National Hispanic Caucus of State Legislators; the Hispanic Organization of Latin Actors; the United Latino Fund; the Latinos and Media Project; Hispanic Religious Leaders of South Florida representing 3,000 Hispanic churches; the Community Association of Progressive Dominicans; the United Latin American Foundation; LatinoHOME; the Media Access Project; the Consumer Federation of America; Consumers Union; numerous individual churches and church leaders; several prominent Hispanic academics; and a number of advertisers and advertising firms. In addition, many members of Congress and state representatives expressed concern about the combination's impact on competition, diversity and the ability of broadcasters to address the local needs, tastes and interests of the diverse Hispanic community across the nation.

The Applicants claim that this merger will give them the scale and scope to compete more effectively with English-language media conglomerates for advertising dollars. As the 5<sup>th</sup>-largest

television network, Univision already is a major media giant – well ahead of UPN, WB and other networks. Univision’s market capitalization is \$7.8 billion, with 2002 net revenues of more than \$1 billion. Univision’s local stations are often the leading station in their television market, including the top station overall in top television markets like Los Angeles and Miami.<sup>138</sup> Its advertising rates are commensurate with its 5<sup>th</sup>-place ranking, and any gap in advertising revenues is narrowing rapidly.<sup>139</sup> Hispanic television ad revenues grew by more than 20% in 2002, more than twice the 7.4% growth of all broadcast television.<sup>140</sup> Univision simply does not need extra bulk to play in the media giant arena.

Curiously, while denying the existence of a separate market, the majority allows Univision to continue to sell advertising for its affiliates under a special waiver of FCC rules it obtained in 1978 on the basis of the nascent Spanish-language media market. The Commission today allows a \$7.8 billion company to continue to receive special regulatory treatment for a fledgling entity based on the nascency of the Spanish-language media market. One wonders how the majority can argue so strongly that there is nothing distinct about Spanish-language broadcasting and then continue a special waiver for the dominant player premised upon the existence of a separate market.

Given the clear loss of diversity and competition to consumers who rely on Spanish-language broadcasting, this merger should not go forward without more careful, sensitive analysis. On the record before us we cannot conclude that Univision has met its burden to prove that the license transfer serves the public interest, convenience, and necessity. As traffic cop over media concentration, the Commission should have either stopped this merger entirely, designated it for a hearing, or at the very least allowed it to proceed only with cautionary conditions.

### **I. The Proposed Transaction Presents a Unique Combination of Assets that Far Surpasses the Influence of Any Other Media Company**

Attempts to typecast this merger as one between a pure television company and a pure radio company are tortured and narrow. No other media company has anywhere near the combined influence of Univision’s leading television, cable, music, Internet and radio properties over its respective audience. Univision has far more extensive relationships in program supply and distribution than other media

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<sup>1</sup> See Univision 2002 Annual Report at 6 (stating that three of its stations – Fresno, Los Angeles, and Miami – rank as the top station in “total day” in their respective markets, English- or Spanish-language, among adults 18 to 49 years of age).

<sup>2</sup> See Univision 2002 Annual Report at 9 (stating that “Spanish-language television, in general, and [Univision], in particular, have benefited and will continue to benefit from a number of factors, including projected Hispanic population growth, high Spanish-language retention among Hispanics, increasing Hispanic buying power and greater advertising spending on Spanish-language media.”); Andrew Hobson, Executive Vice President of Univision Communications, Univision Earnings Conference Call, Nov. 7, 2002 (Univision Nov. 2002 Earnings Call) (explaining that Univision’s revenue growth “continues to be fueled by advertisers growing recognition of the importance of the Hispanic community,” shown by strong upfront growth of 20%). See also Eduardo Porter, “Buying Power of Hispanics is Set to Soar,” *Wall Street Journal*, Apr. 18, 2003 (noting that Telemundo increased by half its number of national advertisers since 2000).

<sup>3</sup> Louis Chunovic, “Spanish-language TV Hits Stride at Upfront Market,” *Television Week*, May 26, 2003, at 16 (noting that at the 2003 upfront Univision for the first time ever broke along with the big English-language broadcast networks).

companies, and Univision benefits from practices which are not tolerated for other media companies. Nor does Univision have any close competitor to keep it in check.

Already, Univision's multifaceted holdings make it a major media conglomerate.<sup>141</sup> Reaching 97% of U.S. Hispanic households, the Univision Network is the leading Spanish-language television network, with more than 70% audience share and twice as many full-power affiliates than its nearest Spanish-language competitor. It has a higher rating among Hispanic households than its next four competitors combined. The Univision Network consistently airs all twenty of the top 20 programs on Spanish-language television virtually every week. Univision also owns the 3<sup>rd</sup>-largest Spanish television network, Telefutera, the fastest growing television network in the country. Univision owns 50 TV stations (32 full-power and 18 low-power) which reach more than 40% of the country. It operates the leading Spanish-language cable network, Galavision, reaching 90% of Hispanic households. In addition to its television production business, it owns the country's leading Latin music recording and publishing company, averaging five of the top ten best selling albums on the weekly Latin charts. In addition, Univision owns the nation's leading Spanish-language Internet site, with an 80% market share.

Univision enjoys exclusive programming rights in this country to the shows of the largest producer of Spanish-language programming, Televisa. These exclusive contracts through 2017 with the dominant Mexican media conglomerate prevent other outlets from obtaining even the programming that Univision does not air, a warehousing practice that Commission rules prohibit for U.S. cable operators. Univision has a similar relationship with Venevision, Venezuela's leading Spanish-language programmer. Televisa owns 15% of Univision and Venevision has an 18% interest.

Univision also has, and will continue to have after the merger, a significant ownership interest in and contractual relations with Entravision. Entravision owns the largest group of Univision television affiliates and is second, only to HBC, in ownership of Spanish-language radio stations. Through a special waiver of Commission rules, Univision also serves as the exclusive sales representative for the sale of all national advertising aired on Entravision's Univision-affiliated television stations through December 2021 – a right that is denied other large networks due to the inherent conflicts of interest. In addition, Univision has an ownership interest in Entravision, and for six years can maintain an interest higher than what the Justice Department has deemed ultimately acceptable on antitrust grounds. Univision's contractual relationships with Entravision, as both a program supplier and a national advertising representative; its ownership interest in Entravision; its shareholder approval rights with respect to Entravision; and its historic ties must be considered in their totality in any public interest calculation of the proposed transaction.

HBC is the largest Spanish-language radio operator in the U.S. with 67 radio stations. It has one of the largest Spanish-language radio broadcast networks, and maintains a network of community-focused bilingual websites. In 2002, it controlled 51% of Spanish-language radio revenue in the top ten markets, according to BIA. Its annual revenues are nearly twice that of its nearest Spanish-language radio competitor. HBC ranks as the top radio station overall in several major markets.<sup>142</sup> In its own words,

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<sup>4</sup> See Univision 2002 Annual Report.

<sup>5</sup> Letter from Philip L. Verveer, Counsel to Spanish Broadcasting System, to Marlene H. Dortch, Secretary, FCC (June 16, 2003) (SBS June 16 Letter), Att. 4, *HBC Radio Presentation*, at 24 (noting top rankings in the general market in Los Angeles, San Diego, Houston, and El Paso).

HBC boasts: “In the Hispanic arena HBC is larger than Clear Channel, Infinity or ABC in the general market.”<sup>143</sup>

Post-merger, Univision will be among the nation’s most vertically integrated media conglomerates. It will control two-thirds of the advertising dollars targeting the Hispanic population. This transaction is not about equality of scale – approval of this merger only makes it more likely that Univision reaches a position of insurmountable dominance over Spanish-language broadcasting in this country.

## II. The Commission Must Give Special Consideration to the Merger’s Effect on Spanish Speakers

Language serves as a communications link, or a communications barrier, to cultural and civic participation in our multicultural society. Leading scholars universally agree that language is central to the creation and conveyance of culture. The ability to take in and comprehend information is a prerequisite to participation in our society. In the realm of broadcasting, language serves an equally essential function – it is not a mere broadcasting format, but a threshold factor for whether a message is even understood.

Before granting a merger drastically reducing diversity of viewpoints to 18 million Americans, we would have liked to have seen a rulemaking initiated to determine whether Spanish-language broadcasting constitutes a separate market segment within a generalized media market for purposes of our media protections. Ideally, this would have been considered as part of our broader media ownership proceeding. Instead, this decision merely points up another failure of that proceeding to confront crucial media ownership issues. The threshold existence of a separate Spanish market is a question worthy of the open deliberative process and judicial review afforded by a rulemaking proceeding.

Without such an open, generalized agency examination of the important growth in Spanish-language media and the distinctiveness of viewers and listeners who rely exclusively or predominantly on Spanish-language broadcasting, we should have designated this threshold consideration for a full hearing in accordance with our statutory directive. Absent that, we are left to resolve this fundamental question on the basis of the record submitted by parties attuned to this proceeding. As detailed below, not only common sense, but also expert testimony, empirical support, the Department of Justice’s findings, longstanding Commission precedent, and Univision’s own materials suggest that Spanish-language broadcasting serves a distinct audience. While not conclusive, the weight of the evidence in the record suggests that Spanish-language broadcasting, if not a separate market segment, at a minimum deserves special consideration beyond the dismissive treatment in this decision.

This transaction presents unique public interest concerns for diversity, competition and localism in Spanish-language broadcasting that are not accounted for under our media ownership rules. Ironically, under both the old and the new media ownership rules, Spanish speakers are not afforded the full weight of protections of English speakers. Spanish newspapers, formerly excluded from application of the rules, are counted for cross-ownership purposes under the new rules only if the newspaper is in the dominant language of the community. That the media ownership rules fail to account fully for language concerns shows why the majority’s preference for bright-line media ownership rules may not sufficiently protect

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<sup>6</sup> SBS June 16 Letter, Att. 3, *HBC Si Presentation* at 10.

the public interest. Case-by-case determinations and full consideration of special circumstances presented by transactions like the one before us offer more reliable means of protecting distinct segments of the public against undue concentration on the public airwaves.

If the Commission were to give special consideration to Spanish-language broadcasting, this does not banish Spanish speakers to a regulatory second-class status tantamount to segregation, as some wrongly – and perhaps mischievously – claim. Instead, it secures them the same consumer protections against excessive consolidation that should be afforded to all the public. The Spanish-speaking population deserves to have localism, competition and diversity in their news, information and entertainment. The Commission is required to safeguard the rights of these Americans just like the English-speaking population.

In any event, where the record shows substantial questions as to the public interest outcome of applying the rules to the particular facts in issue, we are statutorily required to conduct further analysis of the transaction's public interest implications. The Communications Act requires that we make an affirmative finding, for each application before us, whether the public interest, convenience, and necessity will be served by granting the application.<sup>144</sup> Regardless of rote application of our media ownership rules, if special circumstances are presented to us, our ultimate statutory obligation is to consider the potential benefits and harms of a transaction on the listening and viewing public.<sup>145</sup>

Given the unique public interest considerations here, we cannot conclude that the Applicants have shown that the transaction serves the public interest. For millions of Spanish speakers who rely exclusively or predominantly on Spanish-language media, this merger threatens a unique loss of diversity, competition and localism, which is not offset by demonstrated countervailing benefits.

#### **A. A Significant Number of Viewers and Advertisers Rely on Spanish-Language Media**

Extensive evidence in this proceeding shows a distinct set of viewers and listeners who rely exclusively or predominantly on Spanish-language media. As the numerous advertising agencies and advertisers on the record assert, a sizable portion of the Latino/Hispanic community relies on Spanish-language media as the primary source of its news and information.

According to major surveys, more than 45 percent of U.S. Hispanics are linguistically Spanish-dominant, meaning they exclusively or predominantly speak Spanish.<sup>146</sup> A study by the Pew Hispanic

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<sup>7</sup> 47 U.S.C. §§ 310(d), 309(a). *See also* 47 U.S.C. § 309(e) (stating that if the Commission “for any reason” is unable to make the affirmative finding, “it shall formally designate the application for a hearing.”).

<sup>8</sup> *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943) (“In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of the license would serve the ‘public interest, convenience, or necessity.’ If time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.”). *See also Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee)*, 15 FCC Rcd 16062 (2000); *Tele-Communications, Inc. and Liberty Media Corp.*, 9 FCC Rcd 4783 (CSB 1994) (conducting further public-interest analyses).

<sup>9</sup> *See also* Letter from Philip L. Verveer, Counsel to Spanish Broadcasting System, to Marlene H. Dortch, Secretary, FCC (July 14, 2003) (SBS July 14 Letter), Decl. of Alan Sokol at 2 (stating that Spanish-dominant Hispanics “constitute approximately fifty percent of all US Hispanics”).

Center reports that 47% of U.S. Hispanics – 18.2 million people – are Spanish-dominant, with 40% – 15.5 million – speaking and understanding “just a little” (29%) or “no” (11%) English.<sup>147</sup> Univision itself highlights Nielsen Media Research findings that 45.9% of U.S. Hispanic adults – 17.8 million people – are Spanish-dominant, with 17% speaking only and 28.9% speaking mostly Spanish.<sup>148</sup> Data compiled by Nielsen Media Research indicates that in the top ten Hispanic markets, from 43.7% (Sacramento) to 67.7% (Miami) of Hispanics are Spanish-dominant.<sup>149</sup> Univision also cites census figures that between 64.5 to 84.9 percent of U.S. Hispanics in various age groups speak Spanish at home.<sup>150</sup> For approximately 18 million Americans, Spanish is more than a language preference – it is the only language in which news and information broadcast over the airwaves are best comprehended.

This primary language use understandably correlates with media use. Spanish-dominant Latinos, as well as bilingual Latinos, rely heavily upon Spanish-language broadcasting, especially for news and information.<sup>151</sup> The Pew/Kaiser study concludes that “Spanish language media are an important source of broadcast news for a *majority* of Latinos.”<sup>152</sup> Specifically, 38% of Latinos report that they usually listen to and predominantly watch Spanish-language news programs, including one in four who *only* tune into Spanish-language broadcasts,” with an additional 26% watching news in Spanish and English equally.<sup>153</sup> A study by the Tomás Rivera Policy Institute found that 57% of bilingual Spanish speakers watch only Spanish-language news, with 16% watching only English news.<sup>154</sup> For all programming categories, 24% of bilingual viewers watched exclusively or primarily Spanish television.<sup>155</sup> In fact, 33% reported viewing Spanish-language networks all the time, with an additional 24% viewing them most of the time.<sup>156</sup> According to Nielsen, “a substantial share of viewing” in Hispanic homes is Spanish-language television.<sup>157</sup> Arbitron reports that Hispanics spend 68% of their time listening to Spanish radio.<sup>158</sup>

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<sup>10</sup> Letter from Philip L. Verveer, Counsel to Spanish Broadcasting System, to Marlene H. Dortch, Secretary, FCC (June 20, 2003) (SBS June 20 Letter), citing “2002 National Survey of Latinos,” Pew Hispanic Center/Kaiser Family Foundation (Dec. 2002) (*Pew/Kaiser Study*), Summary of Findings; Sec. 1 at 16; Sec. 3 at 44.

<sup>11</sup> Univision, “*The U.S. Hispanic Market in Brief 2003*.”

<sup>12</sup> See SBS June 20 Letter, citing Nielsen Media Research, “Nielsen Media Research’s Hispanic Local Markets.”

<sup>13</sup> Univision, “*The U.S. Hispanic Market in Brief 2003*.”

<sup>14</sup> As Alan Sokol, former Chief Operating Officer of Telemundo, explains, “[i]ssues of language proficiency and preference make Spanish language broadcasting especially important for the consumption of news and information programming where comprehension of detail and nuance is most important.” SBS July 14 Letter, Sokol Decl. at ¶ 3.

<sup>15</sup> SBS June 20 Letter, citing *Pew/Kaiser Study* Sec. 3 at 45.

<sup>16</sup> *Id.*

<sup>17</sup> Louis DeSipio, The Tomás Rivera Policy Institute, “Latino Viewing Choices: Bilingual Television Viewers and the Language Choices They Make” (2003) (*Tomás Rivera Study*), at 7.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> *Id.* at 8

<sup>20</sup> Nielsen Media Research, “Nielsen Media Research’s Hispanic Local Markets.”

<sup>22</sup> Arbitron, Hispanic Listening Preference, Dec. 2002.

The reliance of a sizable number of Latinos on Spanish-language media is likely to continue. The number of Hispanic American television households has grown 19% from 1996 to 2001, while the number of Spanish-dominant Hispanic Americans has grown at a greater pace, 29%, over the same time period.<sup>159</sup> Indeed, Nielsen Media Research has begun to monitor and report the viewing habits of the Hispanic community separately on a national level and within 16 local television markets. In radio, Arbitron has initiated an effort to introduce language weighting to better account for language factors.<sup>160</sup>

Advertisers and others who want to reach the growing Hispanic community rely uniquely on Spanish-language broadcasting. Reflected by a 34% increase in spending in Spanish-language media in 2002, advertisers and advertising agencies have made strategic decisions to specialize in targeting the fast-growing Hispanic audience.<sup>161</sup> Advertisers have set aside separate budgets for Spanish-language media, for, as Evan Shouten of Charles River Associates explains, advertisers “cannot effectively substitute Anglo for Spanish language media.”<sup>162</sup> With almost \$1.6 billion in billed revenues in 2001, and \$2.46 billion in 2002, a large and vibrant community of advertising agencies now serves the Spanish-language media market.<sup>163</sup> Hispanic buying power, totaling \$580.5 billion in 2002, is expected to grow to \$926.1 billion in 2007 and \$2.5 trillion by 2020.<sup>164</sup> Univision admits that it is attracting major consumer product company advertisers, including companies buying advertising across all of its media platforms, reflecting that “major advertisers have discovered Spanish-language television advertising is a more cost-effective means to target the growing Hispanic audience than English-language broadcast media.”<sup>165</sup>

Spanish-language broadcasting also serves a unique role in reaching Hispanic Americans in the political process. In the last presidential campaign, more than \$1.3 million was spent on Spanish-language media by the candidates, while an additional \$2 million was spent by the parties’ national

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<sup>23</sup> See Nielsen Media Research, [www.nielsenmedia.com/ethnicmeasure/Hispanic-american/hisp\\_pop\\_growth.html](http://www.nielsenmedia.com/ethnicmeasure/Hispanic-american/hisp_pop_growth.html). See also Univision, “*The U.S. Hispanic Market in Brief 2003*,” stating that “Spanish will still be spoken at home into the 21<sup>st</sup> Century.”

<sup>24</sup> See SBS June 16 Letter at 2 (citing Arbitron Radio Advisory Council Minutes from March 26-27, 2003).

<sup>25</sup> See, e.g., “The Hispanic Market – A Nation within a Nation,” TNS Media Intelligence/CMR. See also “Hispanics Finally Break the TV Barrier,” *USA Today*, (Sept. 10, 2003), at A1 (quoting ABC Entertainment President Susan Lyne, “there’s not an advertiser out there that hasn’t taken notice of the demographic shift.”).

<sup>26</sup> Letter of Arthur Belendiuk & Bruce Eisen, on behalf of National Hispanic Policy Institute and SBS, to Marlene H. Dortch, Secretary, FCC (Apr. 7, 2003), at Ex. 1, Evan Sue Shouten, Charles River Associates, “*Spanish Language Media: Distinct from Anglo Media*,” April 3, 2003, at ¶ 4. See also Letter from Jeffrey H. Smulyan, Chairman and CEO of Emmis Communications Corporation, to Secretary, FCC, (July 11, 2003), at 2; Letter from Philip L. Verveer, Counsel to Spanish Broadcasting System, Inc., to Marlene H. Dortch, Secretary, FCC, (June 2, 2003) (SBS June 2 Letter), Att. of Castor A. Fernandez (opining that English language media and Spanish language media are not substitutable).

<sup>27</sup> See Letter from Philip L. Verveer, Counsel to Spanish Broadcasting System, Inc., to Marlene H. Dortch, Secretary, FCC (June 3, 2003) (SBS June 3 Letter).

<sup>28</sup> See Jeffrey M. Humphreys, “The Multicultural Economy 2002: Minority Buying Power in the New Century,” *Georgia Business & Economics*, the Selig Center for Economic Growth, 2Q 2002, at 6.

<sup>29</sup> Univision 2002 Annual Report at 9, 10.

committees.<sup>166</sup> Both sides commissioned Hispanic media consultants to produce unique ads that would be aired only on Spanish-language television stations. More than \$16 million was spent on Spanish-language television advertising in the 2002 election by gubernatorial, Senate, and House candidates. The political process reinforces that Spanish-language broadcasting reaches Latino/Hispanic Americans in a unique and fundamental way.

Evidence also suggests that English-language broadcasters do not react to changes in advertising rates or practices of Spanish-speaking broadcasters. As Jeffrey H. Smulyan, Chairman and CEO of Emmis Communications Corporation explained on the record, “English language and Spanish language radio stations do not generally compete with each other. . . . we do not consider the Spanish stations’ rate cards in establishing our sales prices. The prices they charge simply do not have any influence on the advertising markets in which we operate.”<sup>167</sup> These viewing habits and commercial advertising practices lend considerable support to the notion that a distinct set of viewers and advertisers rely on Spanish-language broadcasting.

### **B. The Department of Justice Found a Separate Spanish-Language Radio Market**

The majority’s conclusion that there is no separate market for Spanish-language media contravenes in important ways the Department of Justice’s more specific findings. The Justice Department found an identifiable Spanish-language radio market segment which is already highly concentrated. Were the Commission to adhere to the Justice Department’s findings, at a minimum, this transaction would result in harmful concentration under the Commission’s longstanding approach to broadcast diversity that regards radio and television as within the same market for diversity purposes. The Commission’s public interest examination of a transaction’s effect on viewers is different from a pure antitrust analysis, but can be premised upon similar market segment findings.

In its antitrust review focused primarily on radio, the Department of Justice found that the Spanish-language radio market was separate from the general radio market.<sup>168</sup> After consulting numerous advertisers and advertising companies, the nation’s antitrust authority found that local and national advertisers considered “Spanish-language radio to be particularly effective or necessary to reach their desired customers, particularly Spanish-speaking consumers who listen predominantly or exclusively to Spanish-language radio.”<sup>169</sup> The Department found that these advertisers did not consider English-language radio to be a reasonable substitute, and would not turn to English-language radio if faced with a small but significant increase in advertising on Spanish-language radio.<sup>170</sup> Thus, the provision of

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<sup>30</sup> See SBS June 20 Letter, *citing* Adam J. Segal, “The Hispanic Priority: The Spanish-Language Television Battle for the Hispanic Vote in the 2000 U.S. Presidential Election,” Hispanic Voter Project, Johns Hopkins University (Jan. 2003) and Adam J. Segal, “Records Broken: Spanish-Language Television Advertising in the 2002 Election,” Hispanic Voter Project, Johns Hopkins University (Nov. 2002).

<sup>31</sup> Letter from Jeffrey H. Smulyan, Chairman and CEO of Emmis Communications Corporation, to Secretary, FCC, (July 11, 2003), at 1-2.

<sup>32</sup> *United States of America v. Univision Communications Inc.*, Civil Action No. 1:03CV00758, Complaint for Injunctive Relief, filed March 26, 2003, at ¶¶ 12-15 (DOJ Complaint).

<sup>33</sup> *Id.* at ¶ 14.

<sup>34</sup> *Id.*



advertising time on Spanish-language radio stations was deemed the relevant product market for antitrust purposes.

The majority offers little explanation for its failure to adhere to this finding, for either competition or diversity purposes. Curiously, while the majority gleefully accepts the Department of Justice's competition-based analysis that radio and television are separate markets, the same majority rejects out-of-hand the Department's conclusion on the existence of a separate Spanish-language radio market.

### **C. Commission Precedent Consistently Has Acknowledged that Spanish Stations Serve a Distinct Audience**

The majority's cursory analysis also runs counter to prior Commission recognition of the distinct audience served by broadcasters who broadcast in a language other than English. Just last year, the Commission found that Spanish-language stations "do not compete directly" with English-language media.<sup>171</sup> In that case, the Commission granted NBC a 12-month waiver of the TV duopoly rule to permit common ownership of three television stations in the Los Angeles market. In doing so, the Commission reasoned that diversity would not be adversely affected in part because the two Telemundo stations were among other media "that are programmed towards the Hispanic audience in the Los Angeles market," whereas the NBC station in that market "broadcasts to a wider audience exclusively in English."<sup>172</sup> The Commission further stated that "we are not as concerned in this case that the competition for advertising dollars will be diminished because the Spanish-language format of the Telemundo stations means that *they do not compete directly with NBC's station.*"<sup>173</sup>

The Commission has distinguished foreign-language stations generally in a number of areas to account for distinct characteristics of such stations or their audiences. For example, in the cable carriage context, the Commission has stated that programs in foreign languages (*e.g.*, MacNeil/Lehrer in Spanish) are not duplicative of the same programs broadcast in English, "because they target different audiences."<sup>174</sup> The Commission takes into account the relatively more limited audience of a foreign-language broadcast station in determining a station's historical viewing for the purpose of modifying its cable carriage rights.<sup>175</sup> As mentioned above, the Commission excludes foreign-language newspapers from media ownership protections unless the newspaper is in the dominant language of the community.<sup>176</sup>

As far back as 1972, the Commission adopted rules for cable carriage of broadcast television signals that allowed cable systems to carry distant foreign-language stations without counting such

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<sup>35</sup> *Telemundo Communications, Inc. (Transferor) and TN Acquisition Corp. (Transferee)*, 17 FCC Rcd 6958 (2002).

<sup>36</sup> *Id.* at 6977.

<sup>37</sup> *Id.* at 6978-79 (emphasis added).

<sup>38</sup> *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Report and Order, 16 FCC Rcd 1918, 1979 n. 167 (2000), citing *Must Carry Order*, 8 FCC Rcd at 2971.

<sup>39</sup> *See, e.g., Tele-Media Co.*, 10 FCC Rcd 8615, ¶ 14 (CSB 1995).

<sup>40</sup> *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 FCC 2d 1046, ¶ 101 (1975).

stations against their quota of distant non-network stations.<sup>177</sup> In affirming the exemption for foreign-language stations, the Commission explained that to do otherwise “we must hold that the average television viewer would find a film, news program, or sporting event of equal interest regardless of whether it is presented in English or Spanish. Suffice it to say we cannot so decide: *a program broadcast in a foreign language is of little interest to any but those fluent in the language.*”<sup>178</sup> Applying this principle in 1993, the Commission stated: “Unlike the switch from religious to commercial programming, *a language change makes programming suddenly understandable to a far greater audience, who were previously precluded from utilizing the station’s services.*”<sup>179</sup>

The Commission had a similar recognition of the importance of language, particularly Spanish, in the closed captioning context. Originally, the Commission exempted all non-English language programming from its requirements. On reconsideration, having been persuaded that Spanish was different due to the size and the growth rate of the country’s Spanish speakers, the Commission concluded that Spanish-language programming should be closed captioned.<sup>180</sup> Specifically, the Commission stated, “[u]nlike most other non-English language programming, there already exists a substantial market for Spanish-language programming in the United States.”<sup>181</sup> The majority today fails to account for its abandonment of this longstanding pragmatic understanding of the primary importance of a broadcast language.

#### **D. The Applicants’ Corporate and Marketing Materials Show a Distinct Spanish-Language Market Segment**

In numerous sales presentations and corporate filings, Univision itself extols the distinctness of the Hispanic viewer and Spanish-language media. In its Annual Report, Univision remarks, “major advertisers have discovered that Spanish-language television advertising is a more cost-effective means to target the growing Hispanic audience than English-language broadcast media.”<sup>182</sup> It further notes that “the strong Spanish-language retention among Hispanics indicates that the Spanish-language media has been and will continue to be an important source of news, sports and entertainment for Hispanics.”<sup>183</sup>

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<sup>41</sup> 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 02-277 *et al.* (June 2, 2003); *Amendment of Part 74, Subpart K of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, Cable Television Report and Order, 36 FCC 2d 143, ¶ 96 (1972).

<sup>42</sup> *Amendment of Part 76, Subparts A and D of the Commission’s Rules and Regulations Relative to Adding a New Definition for “Specialty Station” and “Specialty Format Programming” and Amending the Appropriate Signal Carriage Rules*, First Report and Order, 58 FCC 2d 442, ¶ 24 (1976) (emphasis added).

<sup>43</sup> *Fox Television Stations, Inc.*, Memorandum Opinion & Order, 8 FCC Rcd 3213 (1993), at ¶ 7.

<sup>44</sup> *See Closed Captioning and Video Description of Video Programming*, Order on Reconsideration, 13 FCC Rcd 19,973 (1998), at ¶ 95.

<sup>45</sup> *Id.*

<sup>46</sup> Univision 2002 Annual Report at 10.

<sup>47</sup> *Id.* at 9.

In terms of demographics and viewing habits, Univision emphasizes the large Spanish-dominant population that does not turn to English-language media. In promoting its “significant exclusive audience,” Univision notes that 68.3% of its adult San Francisco audience did not watch any English-language stations, like 67.7% of Dallas, 65.9% of Los Angeles and 52.2% of New York audiences.<sup>184</sup> In South Florida, according to Univision, 67% of the 1.6 million Hispanics in South Florida are Spanish-dominant, meaning that “if you do not target Hispanics over 1,055,000 Hispanics or 27% of the total Miami/Fort Lauderdale population will not be effectively reached by your general market television advertising efforts.”<sup>185</sup> Univision boasts that its station “delivers a significant exclusive audience. . . 51.9% of WLTV-TV’s audience does not watch any English television at all during the week!”<sup>186</sup> According to Univision, the majority of Hispanics prefer to get information in Spanish and they want to be marketed to as Hispanics.<sup>187</sup>

Univision also highlights its unmatched platforms and success in attracting the Spanish-speaking audience. Univision touts that the top 78 shows among Hispanics aged 18-49 are on Univision.<sup>188</sup> Univision explains that its programming “is more culturally relevant to Hispanic audiences.”<sup>189</sup> Univision also points out that for Hispanics commercials in Spanish are five times more persuasive than commercials in English, including increased awareness and message comprehension. As Univision Television Networks’ president of entertainment Mario Rodriguez explains, “Hispanics choose Spanish-language television over general-market TV every hour of every day of the year, and that happens because of the cultural connection and the cultural relevance available only here.”<sup>190</sup>

HBC makes similar claims with respect to the Spanish-speaking radio audience: “You can’t reach HBC listeners on general market stations”;<sup>191</sup> “On average, Spanish radio stations duplicate less than 10% with English language stations”;<sup>192</sup> and “Radio has a much stronger story to tell in the Hispanic market than it does in the general market.”<sup>193</sup> Noting that over 70% of U.S. Hispanics prefer to speak Spanish at home, HBC even states that “a large segment of the audience is driven by dependence and not just preference.”<sup>194</sup> It notes that “Hispanics are not reached effectively on general market media and you cannot reach the U.S. Hispanic effectively with Spanish TV alone.”<sup>195</sup> The direct statements of the

<sup>48</sup> SBS June 16 Letter, Att. 1, at 21 “Reaching the Lucrative U.S. Hispanic Market” Presentation. (“*Univision National Sales Presentation*”).

<sup>49</sup> SBS June 16 Letter, Att. 1, at 21 “Univision Reaching the Lucrative South Florida Market” Presentation. (“*Univision South Florida Presentation*”).

<sup>50</sup> *Id.*, Att. 1, *Univision South Florida Presentation* at 31

<sup>51</sup> *Id.*, Att. 2, *Univision National Sales Presentation*, at 16.

<sup>52</sup> *Id.*, Att. 2, *Univision National Sales Presentation*, at 25.

<sup>53</sup> *Id.*, Att. 2, *Univision National Sales Presentation*, at 23.

<sup>54</sup> “Spanish-Language TV Hits Stride at Upfront Market,” *Television Week*, May 26, 2003 at 16.

<sup>55</sup> SBS June 16 Letter, Att. 4, HBC Hispanic Radio Presentation at 25.

<sup>56</sup> *Id.*, Att. 3 *HBC Si Presentation* at 4.

<sup>57</sup> *Id.*, Att. 4, *HBC Hispanic Radio Presentation* at 14.

<sup>58</sup> *Id.*, Att. 4, *HBC Hispanic Radio Presentation*, at 15; Att. 3, *HBC Si Presentation* at 7.

<sup>59</sup> *Id.*, Att. 4, *HBC Hispanic Radio Presentation*, at 38.

Applicants strongly suggest that a distinct Spanish-language market exists to serve viewers and advertisers who are not effectively served by English-language media.

#### **E. The Majority Wrongly Presumes that Spanish and English are Interchangeable for All Viewers**

The majority's analysis overlooks those in the Hispanic community that rely on Spanish-language media as more than a linguistic preference. The Order barely addresses the broadcasting needs or desires of people who speak only or mostly Spanish, and the effect of the proposed transaction on this portion of our nation's population. The Order dismisses this population and boldly asserts that the majority of Spanish speakers watch English-language media and thereby have *more* media options than the general population. Inherent in this conclusion is the recognition that English speakers do not consume Spanish-language media, proving the very point that proficiency in a language is a threshold consideration for consumption of broadcasting. Even if Spanish speakers have more choice of local news and information sources today than in the past, that is hardly sufficient analysis to reduce the number of independent voices currently available to them without further examination of the effect of the transaction on competition, localism, and diversity for those viewers.

According to the majority, the transaction's threat to competition and diversity is mitigated because many Hispanics are bilingual and listen to English-language media. While this is undoubtedly true for some, it is not true for all and should not end our analysis of this transaction. There is simply no denying that for a significant portion of the population, Spanish and English media are not interchangeable. More than 45% of Spanish speakers living in the United States speak only or principally Spanish. For them, and the advertisers that want to reach them, English media is not an adequate alternative. Even for bilingual viewers, only 41.6% report having Secondary Audio Program (SAP) language translation capability on their television sets and only 17% report using SAP often.<sup>196</sup> This relatively low use of SAP use is not surprising, given the inconsistent availability of SAP programming, particularly for news and public affairs programming. Despite early optimism, a number of broadcasters that tried to use SAP a few years ago have now stopped. ABC, for example, dropped SAP audio track for *World News Tonight* after one year because of its costs and lack of discernable effect on viewership in Hispanic households.<sup>197</sup>

The majority then falls back on the fallacy that language is just another format, meaning that any broadcast station is potentially substitutable for another. This ignores the threshold factor of whether the language in which the broadcaster transmits its message is comprehensible to the listener. Preserving independent Spanish-language sources of news and information is critical because language itself is critical to the comprehension of the broadcast message. Programming in Spanish is not simply another entertainment format, such as smooth jazz or rock, classical or country, to people who do not speak English. HBC agrees, stating in sales materials that "Hispanic Radio is not a format – individual stations are programmed with a wide range of music and information formats designed to appeal to the local

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<sup>60</sup> SBS June 20 Letter, citing Tomás Rivera Study at 4.

<sup>61</sup> John M. Higgins, "Spanish on SAP Just Hasn't Caught On," *Broadcasting & Cable*, Mar. 24, 2003 (noting that CBS translates only one entertainment show). Stations that have discontinued SAP service include KTVU in the Bay Area, KENS in San Antonio, KGNS in Laredo, and WRAL in Raleigh.

market.”<sup>198</sup> Spanish programming is comprised of numerous formats, including regional Mexican, Spanish news/talk, and Tejano. The majority’s reference to Commission policy on licensee changes in entertainment format is simply immaterial to the question of whether this proposed transaction serves the public interest. The language in which a station broadcasts translates into whether its content or message is heard and understood – whether that relates to cultural issues in subtle ways, or to important public policy issues in a direct and explicit way.

The majority’s determination that language is simply a format precludes a more sophisticated examination of other possible approaches to broadcast language. For example, some have suggested that Spanish-language broadcasting could form a submarket within a larger general media marketplace. In examining the present options available to Spanish-only viewers and advertisers wanting to reach this audience, the weight of the evidence is that Spanish media outlets are not substitutable with English outlets and instead comprise a distinct market, or submarket, segment.<sup>199</sup> As the Department of Justice found, a price increase by an entity with market power in Spanish-language media is not likely to be offset immediately by new entry into that market by English-language broadcasters. Yet, Spanish outlets could be encompassed within a larger media market for overall media ownership purposes to the extent that over the long term, all media outlets could potentially convert to a different broadcast language. This recognizes that, over the long term and for bilingual viewers, Spanish and English broadcasters may be potential competitors and may compare ratings and monitor the other’s performance. Nevertheless, the majority fails even to consider this approach and whether it offers a more realistic assessment of the nature of competition in today’s broadcasting environment than the majority’s “one size fits all” approach.

Unfortunately, the majority has not conducted its market analysis with any rigor and therefore has not done the analysis necessary to determine whether Spanish-language media warrants separate media ownership review as a separate market or submarket. The Commission failed to hold hearings, talk to experts, and gather any data on its own, which is revealed by the dismissive approach to Spanish-only speakers.

### **III. The Merger Threatens a Unique Loss of Diversity and Competition for Spanish Speakers**

Today’s decision delivers an unfortunate setback in the Commission’s application of its public interest standard and reaches an outcome-driven decision that badly disservices the U.S. Hispanic community. The acquisition of the leading Spanish-language radio owner by the dominant Spanish-language media conglomerate will sharply reduce media competition and the diversity of viewpoints available to Spanish-speaking Americans. The merger threatens to increase exponentially the already high barriers to entry into Spanish-language media and to exacerbate a history of activity by Univision designed to thwart competition and further entrench its leading position. Given the increased

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<sup>62</sup> See SBS June 16 Letter, Att. 3, *HBC Si Presentation*, at 7.

<sup>63</sup> The concept of a submarket is used in other contexts. For example, the Commission treats noncommercial stations differently from commercial stations, even though both are now fully counted within a general media market for media ownership purposes. This commercial/noncommercial distinction is far more content-based than a distinction based on language.

concentration in Spanish-language broadcasting, whether considered as a matter of diversity or competition, we cannot conclude that the application before us serves the public interest.

After the merger, the combined entity will have an unmatched array of media platforms commanding two-thirds of the rapidly rising broadcast advertising dollars targeting the Hispanic population. Univision will become the gatekeeper to Spanish-language consumers in numerous key markets, with as much as 80% of the Spanish television and radio audience in many top Hispanic markets. In seven of the top ten markets, the merged firm's market share will exceed 60%, and in two markets it will exceed 70%.<sup>200</sup> This essentially means that there is little room for new, independent broadcasting companies, tailored to Hispanics, to emerge and compete.

The merger will result in fewer places for Spanish-only viewers to find a diversity of viewpoints or Univision's competitors to promote their offerings. Spanish-language media already is concentrated, and this transaction places diversity even more at risk. The top ten Hispanic markets currently average 3.3 television stations, 5.7 AM stations and 6 FM stations.<sup>201</sup> Spanish-language newspapers and cable networks do not offset this loss of broadcast competition and diversity. More Hispanics watch television and listen to radio than the general population, and there is no daily Spanish-language newspaper in 14 of the top 20 Spanish-language markets.<sup>202</sup> Univision itself notes that fewer Hispanic households subscribe to cable than the general U.S. population.<sup>203</sup> That Hispanics turn to television and radio more frequently than the general population means that our media ownership rules cannot be presumed to reflect consequences of cross-media concentration accurately. It also means that competitive effects inside the handful of Spanish broadcasting networks take on greater importance.

This transaction will result in enhanced market power for Univision to thwart competition in radio, television, and other Spanish-language media. Telemundo points out that the merged entity could use its dominance in Spanish-language media and cross-media advertising to lock up Spanish-language advertising revenue. Telemundo also asserts that because Univision serves as Entravision's sales representative, the combined entity could also be in a position to receive information concerning advertising rates and promotional strategies that could have adverse effects on Univision's rivals. Moreover, Univision's exclusive programming contracts with Televisa and Venevision prevent any Univision competitor from obtaining access even to the programming that never airs on Univision's networks. This warehousing of programming, which the FCC prohibits for cable operators, deprives

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<sup>64</sup> See Letter from Philip L. Verveer, Counsel to SBS, to Marlene H. Dortch, Secretary, FCC (June 11, 2003); Letter from William LeBeau, Telemundo Communications Group, Inc., to Marlene Dortch, Secretary, FCC (June 27, 2003) (Telemundo June 27 Letter).

<sup>65</sup> See Letter from Philip L. Verveer, Counsel to SBS, to Marlene H. Dortch, Secretary, FCC (July 3, 2003) (SBS July 3 Letter), at Att. A.

<sup>66</sup> Telemundo June 27 Letter, Att. at 4. See also Leila Cobo, "Regional Mexican Radio Tops Among U.S. Hispanics," *Billboard*, June 21, 2003 (confirming that Hispanics are avid radio listeners, far more than the general population).

<sup>67</sup> See Univision Reply Comments in MB Docket No. 02-277 *et al.*, at 6 (52% of Hispanic television households in the top 30 markets subscribe to cable television, compared with 67.8% of overall U.S. households that subscribe to cable). See also Tomás Rivera Study at 4 ("Satellite television is somewhat rarer among Latino bilingual viewers.").

viewers any ability to see certain programming produced by the world's leading producer of Spanish-language programming.

Telemundo further argues that it could be shut out of the radio advertising market, a key promotional avenue for its television programs. The rejection of television advertising by radio stations owned by or aligned with Univision not only stifles competition but also runs counter to typical corporate behavior in a fully functional marketplace. Telemundo relies heavily on radio to attract new viewers to its television programs, spending 74% of its total corporate advertising budget in 2002 on radio.<sup>204</sup> Of that amount, 47% was spent on HBC stations. After the merger, this advertising channel could potentially be foreclosed from Telemundo, as Univision's affiliated entities have done in the past. Entravision radio stations in key markets including El Paso and Denver have previously rejected all Telemundo advertising. As Univision's largest affiliate group, and with significant ownership interests held by Univision, Entravision's interest in furthering Univision's dominance clearly outweighed its interest in receiving proceeds from a major industry advertiser. This signals the near monopolistic market power that Univision already wields in Spanish-language broadcasting.

The record also contains largely un rebutted allegations that Univision precludes its talent, both music and television personalities, from appearing on rival networks, even for a mere interview or news program appearance.<sup>205</sup> Affidavits on the record state that this practice extended both to unscheduled or impromptu interviews as well as scheduled sessions. Even appearances at industry awards shows aired on rival networks were passed over by Univision or Univision-affiliated talent. This is not merely a loss to Telemundo or Univision's other television rivals – it results in a loss of diversity to the public. These restrictive practices are not tolerated on English-language media and run counter to a network's interest in widely promoting the talent that appears on shows run by the network. This again signals Univision's current market power, which will only increase through outright ownership of a radio distribution channel.

These practices demonstrate specific public interest harms that could be exacerbated by the addition of HBC's radio assets to Univision's many holdings. Adding radio furthers Univision's ability to restrict the appearance of radio personalities on rival television networks or to shut out artists at competing record labels from promotional opportunities on Univision's radio and television outlets. For Univision's television rivals, the potential to be shut out of radio advertising not only on Entravision, but now on HBC as well, leaves them without significant promotional outlets, and removes an independent radio group to counter Entravision's exclusionary tactics, and likewise with Univision's radio rivals. Post-merger, Univision and Entravision will control 55 percent of the Spanish-language radio stations in Telemundo's major markets, with nearly 90 percent in Phoenix and Dallas.<sup>206</sup>

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<sup>68</sup> Letter from William LeBeau, Telemundo Communications Group, Inc., to Marlene Dortch, Secretary, FCC (Aug. 21, 2003) (Telemundo Aug. 21 Letter).

<sup>69</sup> See SBS July 14 Letter, Sokol Decl. at ¶ 16-17 (noting that after Ricky Martin appeared on Telemundo, Univision no longer gave him any exposure and that Univision has already put pressure on HBC to cease interviewing other network's personalities); Letter from Andrew Schwartzman, Media Access Project, to FCC Chairman Michael Powell (July 25, 2003); Telemundo Aug. 21 Letter, Atts. 3, 4.

<sup>70</sup> Telemundo Aug. 21 Letter, Att. 6.

Instead of thoroughly analyzing and investigating these practices and the likely effect of the proposed merger, the majority curtly dismisses them, implying that Telemundo can fend for itself. Allegations of past, and ongoing, conduct by a merger applicant detrimental to competition and the public interest are worthy considerations for the Commission which, if found true, at a minimum call for cautionary conditions. These allegations should have been more thoroughly investigated and analyzed, with respect to all of Univision's television and radio rivals.

But of even more concern than the merger's effects on competition is its impact on diversity. Approximately eighteen million people speak only or mostly Spanish in this country, and diversity in media voices in that language will be greatly reduced after Univision acquires HBC. By clearing the way for only "one vision," the FCC harms the expression of diverse opinions held by Latinos across the country and others seeking to reach this audience.

The Commission has long recognized that radio and television compete in the same local markets for diversity purposes, which is why a finding otherwise by the Department of Justice is not conclusive. The proposed merger threatens substantial losses in diversity in local markets with the largest Hispanic American populations. Five of the ten largest Hispanic markets have fewer than four Spanish-language TV stations. Postmerger, Univision will combine its many duopolies and its other stations with multiple radio stations in the same local market, often pairing the leading Spanish TV station with the leading radio station. Neither the Applicants nor the majority adequately analyze how the proposed combination affects the ability of Spanish speakers to receive information from a number of independent, diverse sources.

That more than 20 Spanish-language satellite and cable networks serve the Hispanic community in addition to the few Spanish-language broadcast television networks is not an adequate answer. Univision Executive Ray Rodriguez apparently agrees, stating that "Hispanics in the United States still don't have enough choices."<sup>207</sup> More importantly, just a few months ago, the Commission excluded satellite and cable networks from its cross-ownership analysis in order to focus on sources of local programming, which the Commission found paramount in its diversity analysis. Against that finding, the majority offers no explanation for why the availability of national Spanish-language satellite or cable networks should be presumed to fulfill the right of Spanish speakers to receive diverse local news and public affairs programming over the public airwaves.

There is no basis to believe that new entry will ameliorate the harms to competition and diversity threatened by the proposed merger. The Department of Justice found that entry of new Spanish-language radio stations "would not be timely, likely, or sufficient," as station licenses are scarce and expensive, and reformatting of stations was unlikely to offset the competitive harm.<sup>208</sup> Rejecting the Department of Justice's conclusions out-of-hand, the majority fails to analyze other possible approaches adequately. Not only does the majority ignore the financial risk, time, expense and specialized knowledge involved in switching a broadcast station to a different broadcast language, it also assumes without further analysis that switching the broadcast language of a television station is just as easy as the examples it cites of switching a radio broadcast language. In fact, most of the radio conversions from English to Spanish over

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<sup>71</sup> Univision Nov. 2002 Earnings Conference Call.

<sup>72</sup> DOJ Complaint at ¶ 27.



the past three years were accomplished by Spanish-language broadcast incumbents, not new entrants.<sup>209</sup> SBS points out that the limited availability of stations and the expense of buying an existing station in the nation's top markets, the difficulty in identifying and recruiting talent, and the required knowledge and contacts in the Spanish-language advertising community already discourage entry.<sup>210</sup> While reformatting to a different broadcast language is possible, and might be more likely over the long term with price increases or other actions Univision could take, there is no denying that barriers for a new entrant are significantly raised by today's action allowing the combined resources of Univision and HBC.

#### **IV. Univision Cannot Simultaneously be Both a Nascent Player and a Media Giant under the Commission's Inconsistent Regulatory Approaches**

As the majority clears the way for the nation's 5th-largest network to acquire the leading Spanish-language radio outlet, Univision continues to benefit from special Commission policies it obtained as a fledgling entity serving a distinct audience. Univision sells advertising for its affiliates under a special waiver of Commission rules it obtained on the basis of the nascency of Spanish-language broadcasting. English-language media companies, including networks that have less reach than the 5th-ranked Univision, are prohibited from such conduct and must fully comply with the prohibition.

The Commission's network representation rule bars TV station affiliates from being represented by their affiliated network in the spot sales market for non-network advertising time.<sup>211</sup> The rule addresses two areas of competitive concern: 1) competition among national rep firms for station clients (where a station might choose the network's rep to improve its chances of getting or retaining a network affiliation); and 2) competition between networks and national spot advertising (to avoid a basic conflict of interest). A national rep firm often advises its client stations as to the appropriate level of their national spot rates. Without the rule, a network could act in the network's interest by assuring reasonably high spot rates to reduce competition with network advertising rates. Network-associated rep firms also can influence station programming decisions in favor of the network's program rather than a national spot program.

In 1978, Univision, then SIN (Spanish International Network), received a temporary waiver to serve as "national rep" for 9 stations in the sale of non-network time on a national or regional basis.<sup>212</sup> At that time, there were only 12 Spanish-language TV stations in the country, with total national and regional revenues of less than \$10 million. Denying the waiver, the Commission reasoned, would have left the stations with no choice of a representative. The Commission noted that the Spanish stations were "fledgling" entities just getting started.

In fact, the Commission at that time stated:

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<sup>73</sup> SBS July 14 Letter at 2.

<sup>74</sup> *Id.* at 7, Sokol Decl. at ¶¶ 11-12.

<sup>75</sup> 47 C.F.R. § 73.658(i).

<sup>76</sup> *Network Representation of TV Stations in National Spot Sales; Request of Spanish National Network*, FCC 78-682, 43 F.R. 45895 (1978).

There is one other aspect of the matter to be considered: *to the extent that the Spanish-speaking population forms a distinct audience or “market”,* it is apparent that there is a high degree of control of the TV stations serving it, with SIN’s principals involved in six of the 12 or 14 stations, 10 of them presenting SIN programs, and SIN serving as national rep for 9 of them. *It may be that we should not consider any change in the rule, or waiver, which would tend to increase or even to continue this degree of concentration of control.*<sup>213</sup>

In 1990, the Commission made permanent the temporary waivers it had granted Spanish station operators.<sup>214</sup> It did so on the basis of the public interest benefits of “encouraging the growth and development of new networks; fostering foreign-language programming; increasing programming diversity; strengthening competition among stations; and fostering a competitive UHF service.”<sup>215</sup>

As the 5th-largest network, the Univision Network can no longer be considered a “fledgling” or “emerging” network justifying continued waiver of this rule. The Univision Network has led all other networks (Spanish or English, cable or broadcast) in sustained viewer growth since 1992.<sup>216</sup> Univision has a market capitalization of \$7.8 billion, with 2002 net revenues of more than \$1 billion and net income of \$86 million. Hispanic buying power has increased dramatically since 1990, with the Hispanic population representing total consumer expenditures of \$569 billion in 2003 and expected to account for \$1 trillion of U.S. consumer spending by 2010.<sup>217</sup> According to Hispanic Business magazine, \$2.46 billion of total advertising expenditures were directed towards Spanish-language media in 2002, 61.8% of which went to television. Univision notes that national spot advertising “is the means by which most new national and regional advertisers begin marketing to Hispanics.”<sup>218</sup>

The majority, which argues so strongly there is nothing distinct about Spanish-language broadcasting, apparently has no problems continuing a special waiver for the dominant Spanish-language media player premised completely upon the existence of a separate market.

## V. The Majority’s Attribution Games are Harmful Precedent

In a further display of results-driven analysis, the majority contorts Commission precedent with respect to nonvoting shareholder approval rights to make certain that Univision’s interest in Entravision’s radio stations is not cognizable under our rules. In an unusual and potentially troubling step, the majority parses the assets within a company for attribution purposes, claiming that the shareholder approval rights with respect to television are attributable, but not to Entravision’s radio side.

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<sup>77</sup> *Id.* at 45898 (emphasis added).

<sup>78</sup> *Amendment of § 73.658(i) of the Commission’s Rules Concerning Network Representation of TV Stations in National Spot Sales*, FCC 90-364, 5 FCC Rcd 7280 (1990).

<sup>79</sup> *Id.* at ¶ 11.

<sup>80</sup> “Our Story,” available at [www.univision.net/jsp/en/univision.jsp](http://www.univision.net/jsp/en/univision.jsp)

<sup>81</sup> Univision 2002 Annual Report at 10.

<sup>82</sup> *Id.* at 13.

Univision's shareholder approval rights include the right to reject any sale of a television station affiliated with a Univision-owned network. While the Commission has held that a nonvoting shareholder's approval rights over fundamental corporate matters are permissible investor protections that neither restrict a corporation's discretion or rise to the level of attributable influence, the Commission traditionally applies this analysis on an entity-wide basis, not to only some assets of a corporation.

Here, the majority is willing to create another fiction that Entravision's corporate discretion can be parsed into various business lines and not considered as a whole. When the Commission begins separately examining attribution by business line or assets, we are a step closer to clever accounting gimmicks.

The majority's piecemeal examination of *de facto* control factors fails to appreciate the totality of the multiple contractual arrangements and other relationships between Univision and Entravision, as well as the merged entity and Clear Channel. In determining whether an interest is attributable, the Commission has articulated a need to assess the cumulative effect of all relevant factors, interlocking interests and multiple relationships, so as to determine whether an investor holds control or influence over the core operations of the licensee.<sup>219</sup>

The relationships between Univision and Entravision are extensive and include: Entravision's network affiliation agreement with Univision that expires in 2021, Univision's contract to serve as Entravision's exclusive advertising representative for national and regional spot sales through 2021, Univision's approval rights over certain corporate actions of Entravision, Entravision's accounts payable to Univision, and Univision's nonvoting stock holdings that will be diluted over an unusually lengthy Department of Justice divestiture period. Commenters state that Entravision is heavily dependent on Univision and will continue to be after the merger. Whether these relationships, considered collectively, afford the opportunity for Univision to influence the overarching policy determinations, programming decisions, or day-to-day operations of Entravision requires more careful analysis than the singular approach conducted by the majority.

Collectively, it appears that Univision will be in a position to exert tremendous control over Entravision as a whole for some time to come. Accordingly, the Commission should not have contorted the attribution rules to exclude Entravision's radio assets. When those assets are taken into account, this transaction results in dangerous consolidation in several local markets.

## **VI. The Commission Should Promote Minority Broadcasting**

Today's decision takes media consolidation to new and threatening heights for those who receive their news and entertainment in Spanish. One company will be the gatekeeper to the news and entertainment that this population will receive over their airwaves. Having conferred additional size and power upon Univision, we will likely see advertising rates go up, small advertisers and entrepreneurs frozen out, and any pretense of diversity fall away for Spanish speakers.

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<sup>83</sup> See *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12581 (1999).

Rather than allowing further media concentration by Univision, we should have focused instead on ways to promote minority participation in our media. Having failed to do so here, we should fully examine the state of minority broadcasting and the distinctiveness of Spanish-language broadcasting and take steps to promote more widespread minority broadcasting, before the next wave of consolidation makes a mockery of that objective. Although they make up 13 percent of our population, Latinos own only 1.8 percent of all radio stations and 0.1 percent of all television stations. Hispanics are under-represented not only in boardrooms, but in newsrooms as well. And those numbers continue to trend down.

Three months ago, this Commission walked away from most of its media concentration protections. Today we turn a deaf ear to the millions of people in this country who receive their news, information, and entertainment from Spanish-language media. We tell those who speak Spanish that they can listen to the English media if they want diverse media sources. We should quickly begin righting this fundamental wrong.