

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

In re:

Application of UNIVISION)
COMMUNICATIONS INC.) File Nos.
For Consent to Transfer of Control)
of Univision Communications Inc.) BTCCT 20060718AIK
Licensee of Stations KUVN-TV) BTCH 20060718AJQ
and KDXX(FM) , Dallas, TX;) BTCCT 20060718AJF
and KTFQ-TV and KQBT(FM),) BTCH 20060718AET
Albuquerque, NM to BROADCASTING)
MEDIA PARTNERS INC.)

To the Chief, Media Bureau

NUNC PRO TUNC
PETITION TO DENY

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SUMMARY

Rincon & Associates, a Texas-based company that conducts research on multicultural markets in the United States and headed by Dr. Edward Rincon, professor of Hispanic marketing and research psychologist, and Mr. Conrad E. Gomez, (“Rincon Associates, et al” or “Petitioners”) are located in the markets of the above-referenced stations. Employees of Rincon & Associates include audience members of the radio and television stations in the Dallas-Fort Worth, Texas and the Albuquerque, New Mexico DMA’s respectively. Petitioners bring this challenge to these applications to transfer control of licenses in television and radio stations directly or indirectly controlled by Univision through various subsidiaries to Broadcasting Media Partners Inc. (“BMPI” or the “Transferee”) because the transfer contravenes the public interest. Petitioners ask the Commission to designate these applications for hearing under section 309(e) of the Communications Act.

First, Univision is not eligible for a grant of transfer because it is currently not in compliance with the Commission’s multiple ownership and cross-ownership rule. Further, a grant of these applications will firmly place Univision further out of compliance and perpetuate Univision’s already dominant and anticompetitive advantages in the Spanish-language television market. In its applications, Univision admits that a grant of the transfer will place it over the rules and asks the Commission for a limited six-month waiver following consummation of the proposed transfer “to address compliance by its attributable parties” and permit “the orderly adjustment of the overlapping interests” of Transferee’s with Univision stations. Actually, Univision is not deserving of a waiver for at least two reasons. First, Univision has failed to divest stations to comply with the Commission’s broadcast ownership and cross-ownership limits. For example, it has been noncompliant with the limits in the Albuquerque market since it merged with Hispanic Broadcasting Corporation (“HBC”) in 2003 notwithstanding a Commission order requiring that it divest at least one station in the Albuquerque market or seek a waiver within six months of the effective date of the Commission’s new ownership rules. Univision unilaterally ignored this requirement. It did not divest the station, nor apply for a waiver. Instead, upon the expiration of the six-month waiver request deadline on March 3, 2005, Univision asked the Commission to toll the 6-month time period until the stay of the new television/radio cross-ownership rules is lifted. All the while, Univision has been and continues to be in violation of the local radio ownership

subcap rule, which was not changed by the Commission and remains in effect. Further, in the appendices to these transfer applications, Univision addresses the specific markets where the transfer will place Univision over the ownership limits. In these exhibits, Univision argues that its further penetration of the Spanish-language market in each market area “would not have any adverse effect on the multiplicity of media voices.” However, while Spanish-language competition in certain markets (like Los Angeles) reflects diversity of voices, in most markets (including those covered by this Petition) Univision’s market dominance cannot be surpassed, in terms of advertising and market reach. Moreover, the Commission, in recent decisions, has acknowledged that for media that target Spanish-language audiences, the existence of lower quality and/or pay options in a particular market are not true alternatives to free over-the-air broadcasts. Univision’s continued unresponsiveness and breach of the current ownership limits reflects a pattern of disregard for the rules. These actions show that Univision does not intend to abide by the Commission’s divestiture requirements, notwithstanding the need for strict compliance with these requirements in light of Univision’s market dominance.

Second, the Commission should order a hearing to consider Univision’s failure to tailor its programming to the local markets it serves in the United States. Univision relies on foreign programming and syndicated content that do not meet the needs of the local markets. Univision’s programming fails to address the needs of local American Hispanic audiences and is often offensive to them. The programming content is not germane to the lives of Hispanics in the various markets this Petition challenges or American Latinos in general.

Third, the Commission should order a hearing to consider whether Univision should have to adhere to a higher standard of performance given its dominant position in the Spanish-language national and local television markets and national and local mass media markets. As a threshold issue, we note that the Commission has acknowledged the unique characteristics of the Spanish-language market. Recently, the Commission issued an order acknowledging the need for emergency alerts broadcasts to the public pursuant to the FCC’s EAS rules to be in Spanish and English. Likewise, the Katrina Advisory Committee has adopted a resolution recommending the same. Indeed, in recent history, the Commission has approved waivers in order to encourage the addition of a Spanish-language alternative in certain markets where there is no Spanish language voice other than Univisions, has acknowledged Univision’s market dominance over its nearest competitors, and has adjusted several policies to accommodate non-English speakers.

Fourth, notwithstanding Univision's inadequacy in meeting the needs of Latinos in the various communities of licenses, the Transferee, BMPI, lacks the experience and expertise necessary to cure Univision's extraordinarily poor record of stewardship. BMPI has no background in providing broadcast non-entertainment programming, and in particular, Spanish-language programming of any type. Given the lack of experience of BMPI, it is very likely that the Transferee will follow Univision's history of providing programming that fails to serve the needs of the largest minority group in the nation. Lacking both the expertise needed to cure Univision's many deficiencies or even an apparent awareness of those deficiencies, it is likely that a grant of these applications will result in an even further degradation of service to Hispanic Americans, including Petitioners.

Accordingly, the Commission should hold a hearing on the applications and deny them. Even if the administrative law judge finds that the transferor and transferee are qualified and that the transaction serves the public interest, the Commission should under no circumstances allow the transfer to go forward until it is sure that the transaction meets the Commission's standard of service to the communities of license and is in keeping with the Commission's policy towards encouraging program diversity for Spanish-language audiences.

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Albuquerque, NM to Broadcasting)
Media Partners Inc.)

To the Chief, Media Bureau

PETITION TO DENY

Rincon Associates, a Texas-based company that conducts research on multicultural markets, its principal Dr. Edward Ricon and longtime Albuquerque, New Mexico resident Conrad E. Gomez (“Rincon & Associates, et al.” or Petitioners”) by their attorneys, hereby submit their petition to deny the above-referenced applications for transfer of control of the above-referenced licensees of television and radio stations from Univision Communications Inc., and its various subsidiaries, including Univision Television Group, Inc., Telefutera Television Group, Inc., Univision Puerto Rico Station Acquisition Company, and Univision Radio, Inc., (collectively “Univision”) to Broadcasting Media Partners Inc. (“BMPI” or “Transferee”).¹ Petitioners, pursuant to 47 U.S.C. §§307 and 309, and 47 CFR §73.3584, respectfully request that these Applications be set for evidentiary hearing before the full Commission, and, based on the

¹ This Petition is timely filed. Inasmuch as the Commission’s Consolidated Database System (“CDBS”) was inoperable at certain times in July and August 2006, the Commission has granted a ten day extension for broadcast applicants, permittees and licensees needing to file pleadings [CITE] It has agreed to waive filing deadlines “in appropriate circumstances” to those who “may have experienced difficulties in timely filing amendments, settlements, and contracts”. *Id.* Petitioners have had at least 10 days less time than the time contemplated in 47 C.F.R. §73.3584 to prepare this Petition due to lack of access to critical filings only accessible in CDBS. Because the Commission affords viewers and listeners the same procedural rights as licensees, this Petition, utilizing a 10-day extension period, is timely filed. As explained here, Petitioners do not believe a waiver is necessary, but if one is necessary it is respectfully requested.

evidence to be adduced at the hearing, to deny the Applications. In support thereof, Petitioners state as follows:

I. STANDING

Petitioners have standing to file this petition to deny under 47 C.F.R. §309(d) of the Communications Act of 1934, as amended. Unless persons like Petitioners can be heard by the Commission, there may be no adequate way to bring to the Commission's attention matters impacting on the qualifications of a licensee to renew its license for broadcast facilities.² The Commission will accord party-in-interest status to a petitioner who demonstrates residence in the station's service area and regular and non-transient viewership of the station.³ As longstanding residents of the respective markets, Petitioners have experienced poor service and have not received community specific information geared to the Spanish –speaking audiences in their respective communities and in the United States generally.⁴

Moreover, Petitioners as viewers and listeners of the stations owned by Univision, meet the higher Article III standing requirement for judicial review, should that be necessary. Petitioners are concerned that the transfer would lead to violations of various provisions of the FCC's media ownership rules resulting in the further dilution of diverse voices.⁵ This diminution in diversity of viewpoints affects the quality and variety of programming options available to them. *Id.* Petitioners rely on Univision stations to provide them with news and information critical to their involvement in public policy and matters that directly impact their lives. However, Petitioners continually lose opportunities to be educated about information critical to them, including notification about candidates for local political elections. Univision is applying to transfer the stations to an entity that will do an even less sufficient job of meeting Petitioners' respective local needs.⁶

² *Office of Communications for the United Church Of Christ v FCC*, 359 F.2d 994 (D.C. Cir. 1966).

³ *Chef-5 Broadcastings L.P.*, 14 FCC Rcd 13041 (1999). See Exhibit 1 and II

⁴ See Exhibits I and II.

⁵ *Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988).

⁶ *Rainbow/PUSH Coalition v. FCC* 364 F.3d 499 (.D.C. Cir. 2004). (“[T]he Commission does not, as we understand it, quarrel with the proposition that listeners are indeed able to invoke and press the duopoly rule. The ultimate point of the duopoly rule is, after all, to assure (or at least enhance) diversification of viewpoints within the broadcast industry. That is, the FCC serves (at Congress' behest) as the public's proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely related hands. Listeners are, by definition, "injured" when licenses are issued in contravention of the policies undergirding the duopoly rule.”)

In addition, viewers and listeners, like Petitioners, are protected by the First Amendment and have a right to have access to a diversity of programming that address their political, entertainment and informational needs. Rincon & Associates is in the business of capturing marketing statistics on multi-ethnic communities, including Latino and Spanish-language media audiences. Attached to this filing is a declaration under penalty of perjury from Dr. Edward Rincon, an authorized member of Rincon & Associates, identifying how he would be harmed by a grant of the Application. Thus Rincon has administrative standing. Consequently, on these bases, Petitioners, have standing to file the instant petition to deny.

II. ARGUMENT

Petitioner asks the Commission to designate the above-referenced applications for a hearing because there is a substantial and material question of fact as to whether Univision is (a) in compliance with the Commission's ownership rules, (b) has operated its licenses in the public interest of the local communities of license, (c) has managed its licenses up to the higher standard that should be applied to a market dominant entity, and (d) should be transferring its licenses to an entity whose experience in broadcasting or in Spanish-language programming makes that entity unqualified to cure Univision's deficiencies.

Univision is currently out of compliance with certain of the Commission's ownership rules, and in its transfer applications acknowledges that a grant of this transfer will render the new licensee over the ownership limits. While acknowledging in its application the importance of Spanish-language alternatives in the various markets, it asks the Commission to waive its requirement to comply with the ownership rules altogether or for time to "address" being over the limit after the transfer is consummated. However, the Commission should not abide by either request because Univision has continuously disregarded its obligation as a licensee by (1) failing to abide by the Commission's multiple ownership rules, particularly its local radio station ownership rule, 47 CFR 73.3555(a), in the Albuquerque, New Mexico market; (2) repeatedly relying on foreign programming and syndicated content and providing little if no programming that meet the needs of the local community of license; (3) providing programming that offends Congress' prohibition on color discrimination in American broadcasting (see 47 U.S.C. §151 (1996)), and (4)

categorically failing to meet a higher standard befitting a company with such a dominant foothold in the Spanish-language programming market. Here, it proposes to transfer its licenses to an entity with no relevant experience that will enable it to cure Univision's failures as a licensee.

The Communications Act includes a public interest standard that confers on holders of broadcast licenses the duty to be trustees, and requires them to broadcast with the interests of local community of license in mind. The failure of Univision to provide adequate programming relevant to the Latino markets in the United States and, specifically, in Albuquerque and Dallas-Fort Worth, denies its viewers, including Petitioners, the right to receive to access to social, political, esthetic, moral and other ideas and experiences that they are entitled under the Communications Act.⁷

A. Univision is in clear violation of the FCC's local ownership rule, and its past abuse of Commission waiver requirements indicates that it will not honor any pledge or requirement to divest any station.

Univision is already out of compliance with the Commission's local radio ownership rule.⁸ Nonetheless, it now asks the Commission to permit it to transfer its licenses to another entity while acknowledging that such a transfer will further implicate the Commission's ownership rules.⁹ Such an action would solidify the firm foothold in the Spanish-language media market

⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁸ In its application to renew its license, Univision admits that it is over the local radio station ownership cap by one FM radio station. See Exhibit 18-A, to Transferee's FCC Form 315, Section IV, Question 8(b) ("Ownership Appendices"). Under 47 CFR 73.3555(a), an entity may own, operate, or control (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a radio market with 45 or more radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market. 47 C.F.R. § 73.3555(a).

⁹ See Exhibit 18-A and 18-B to various of Univision's FCC Form 315, Section IV, Question 8(b), filed July 2006, at 3 (*citing* 47 C.F.R. § 73.3555(a)). Specifically, *see id.* at §73.3555(a)(1)(i) ("In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM)"). 47 C.F.R. § 73.3555(c). *See also id.* at §73.3555(c)(2) ("An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1) of this section. An entity may not exceed these numbers, except as follows: (i) if at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to (A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or (B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six

that Univision already enjoys and permit it to pass its dominance onto a new owner that isn't qualified to hold Univision licenses.

Univision says that it acknowledges the importance of Spanish-language alternatives in the markets it operates and the Commission's concern for viable diversity of ownership in that market. In the appendices to the concurrently filed applications, Univision addresses the market conditions in each market where it would fall outside the various ownership limits. In each application, Univision points out specifically, where applicable, the existence of Spanish-language competitors and how the presence of alternatives "catering to the particularized needs, interests and concerns of communities within the DMA" meets the Commission's interest in "strong competition and the diversity of voices."¹⁰ Univision asks the Commission to recognize these alternatives and use them as a basis for granting its waiver requests. However, the Commission ought to adhere to its recent practice of acknowledging the market dominance of Univision in the Spanish-language market and deny waiver requests that would permit Univision to maintain its market dominance of over 98% of Hispanic households in America.¹¹

The Commission has made some critical acknowledgments about the market dominance of Univision, most notably in a 2005 decision in which it removed the noncommercial reservation from a station in Phoenix in order to give the "nearly one million Hispanics in the Phoenix area, as well as advertisers, a choice between two Spanish-language television stations."¹² In this

commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule). (ii) If at least 10 independently owned media voices would remain in the same market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule)." Further, *see* 47 C.F.R. §73.3555(d) ("No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with §73.183 or §73.186 [of the Commission's rules], encompassing the entire community in which such newspaper is published; or (2) The predicted 1 mV/m contour for an FM station, computed in accordance with §73.313 [of the Commission's rules], encompassing the entire community in which such newspaper is published; or (3) the Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.").

¹⁰ *See* Appendices A thru I, Exhibit 18-B of FCC Form 315 to various transfer applications.

¹¹ *See* Univision investor page at <http://www.univision.com> (visited Aug 1, 2006)

¹² *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel *39, 620-626 MHz, Phoenix, Arizona and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, 20 FCC Rcd 16854 (rel. October 13, 2005); *See also* Concurring Statement of Commissioner Michael J. Copps, noting that "[o]ver the past few years, we have seen consolidation in Spanish-language media taken to new and threatening heights. Today's decision should promote at least somewhat greater diversity and competition for those receive news and entertainment in Spanish in one of the largest Hispanic markets in the country."

decision, the Commission also pointed out that “the market disparity between Univision and Telemundo, the two major Spanish language networks, in terms of market share and viewers reached, both nationally and locally in Phoenix...[and that] in the eight major markets where Univision and Telemundo compete directly, Univision serves anywhere from two to three times more viewers than Telemundo.”¹³ The Commission went on to point out other instances in its past where it has made decisions in order to promote competition in markets that service foreign- and Spanish-language audiences with limited English-speaking abilities¹⁴ and pointed out that “nothing prevents [it] from taking into account the public interest benefits of an additional Spanish-language station for purposes of a waiver.” Finally, where (as in these transfer applications) Univision claimed abundant broadcast and non-broadcast options are available, the Commission disagreed, noting that

[w]hile there may be other sources of Spanish-language programming in the Phoenix market, many of those cited by Univision are not full-service stations or were pay services and we do not recognize the availability of pay services as an

¹³ *Id.* (citing BIA Publications Media Access Pro database).

¹⁴ *Id.* (citing *Network Representation of TV Stations in National Spot Sales*, 5 FCC Rcd 7280, 7281-7182 (1990) (Commission granted a network representation waiver based in part on its finding that such a waiver would “encourage the growth and development of new networks” and “foster foreign language programming.”), *KRCA License Corp.* 15 FCC Rcd 1794 (1999) (granting waivers of the minimum interference spacing rules based in part on “substantial service gains to Spanish- and Asian-language viewers.”), *San Francisco/SanMateo*, 68 FCC 2d 860 (1978) (approving a channel exchange in based in part on a commercial station's improved ability to serve “an important part of the total Spanish language population in a 10-county area by virtue of the new equipment it can use on a certain channel); *Petition for Issuance of Policy Statement of Notice of Inquiry on Part-Time Programming*, 82 FCC 2d 107, 108 (1980) (noting a 1980 Commission decision to base its change in policy concerning time brokerage agreements in part on its desire to increase foreign-language program diversity); *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996*, 13 FCC Rcd 3272 (1997) and *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 15 FCC Rcd 5140, 5154-5155 (2000) (recognizing the importance of serving the Spanish-language community when it adopted its rules concerning closed captioning and the telecommunications relay service). *See also* *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*, 18 FCC Rcd 13620, 13799-13800 (2003) (*reversed in part, in other respects, sub nom. Prometheus Radio Project v. FCC*, 372 F.3d 372 (3d Cir. 2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) (“*Prometheus Rehearing Order*”), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (stating that in connection with its recent revision of its multiple ownership rules, the Commission revised its definition of “daily newspaper” to include non-English dailies based on the conclusion that “those whose primary language is not English deserve the same protections of diversity and competition as do English speakers”); *Fostering Expanded Use of UHF Television Channels*, 41 FCC 1069 (1964) (pointing out that in 1964, when the Commission granted a second commercial television allotment to Phoenix it relied on an argument from the proponent that there was “a pressing need for a TV station to serve the large Spanish-language speaking population of Phoenix and its environs”); *Univision/HBC Merger Order*, 18 FCC Rcd at 18872-18873 (dissenting statements of Commissioners Adelstein and Copps) (noting that with respect to cable carriage, the Commission has distinguished foreign-language stations to account for distinct characteristics of such stations or their audiences).

adequate substitute for free, over-the-air broadcasting of the kind that we find would be fostered by approval of” the petition in that case.¹⁵

Likewise, here, notwithstanding the existence of alternatives and competitors in the markets that will be affected by this transfer, the market dominance of the applicants cannot compare in depth and scope even if all competitors were to combine, in some cases. As to free, over the air broadcast, Univision’s market dominance makes it a formidable force to be reckoned with in terms of advertising, at least.

Univision is also unworthy of waiver requests because it has abused them. Specifically, Univision has been over the limit since it merged with Hispanic Broadcasting Corporation (“HBC”) in 2003 notwithstanding a Commission order that it divest at least one station in the Albuquerque, New Mexico market.¹⁶

Though aware of the divestiture orders issued by the Commission and having promised to divest, Univision never came into compliance with the local ownership rule. Thus, Univision’s actions demonstrate its intent to manipulate procedural rules to retain all its stations in that market. The Third Circuit in *Prometheus* lifted the stay on the Commission’s ownership rules, triggering a six-month period to divest or seek a waiver. Univision did neither. Instead, on the date the waiver or divestiture was due, it submitted a letter requesting that the Commission “clarify” whether the new ownership rules were in effect, and if not in effect, whether the 6-month waiver would be tolled when they came into effect.¹⁷ In the request, Univision rationalized that divestiture would not be required if KBAC (FM), having recently moved to the Santa Fe market, could still be counted as part of the Albuquerque market.¹⁸ Under that scenario, the number of

¹⁵ *Id.* In this case, Univision claimed 84% of the Spanish-language television advertising revenues and 93% of the Hispanic viewers in the market.

¹⁶ *Shareholders of Hispanic Broadcasting Corporation (Transferor) and Univision Communications, Inc. (Transferee) for Transfer of Control of Hispanic Broadcasting Corporation, et al., Memorandum Opinion and Order*, 18 FCC Rcd 18834 (2003) (“Univision/HBC Merger Order”). (The Commission stated that “in the Albuquerque, NM, radio metro market, which contains only 43 radio stations, Univision will control a five FM combination, also one in excess of the amount that would be permissible.” *Id.* at ¶ 11. The Commission then stated its approval of the merger was granted 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.”) *Id.*

¹⁷ Transferee’s Exhibit 18-B, at 16. See 47 CFR §73.3555(a)(1)(ii).

¹⁸ At that time, the station had been reclassified by BIA out of the Albuquerque market, but the station had not yet moved its transmitter site to Santa Fe.

voices would have been 45 and Univision's ownership of five FM stations in the markets would be permissible. This tactic failed when KBAC formally completed the move from the Albuquerque market, establishing firmly the 44-station count in Albuquerque. Still, even then Univision did not make any move to divest any station or make a waiver request. Univision ignored the fact that since 2003 it had been in violation of the local broadcast ownership rule.

Univision has breached the Commission's ownership limit on prior occasions and has been slow to notify the Commission of such overages. While the Commission was reviewing the Univision/HBC merger, Univision acquired KTFQ-TV. It failed to notify the Commission of this acquisition as required.¹⁹ This inaction was the basis of a petition to deny filed by National Hispanic Policy Institute ("NHPI"). In its complaints, NHPI argued that Univision violated Section 1.65(a) of the Commission's rules, which requires each applicant to ensure "continuing accuracy and completeness of information furnished in the pending application [that] is no longer substantially accurate."²⁰ This instance is evidence of Univision's reluctance to abide by Commission ownership limitations and attempts to not invite inquiry of instances when they are over the limits.

Even the language of Univision's current transfer applications exposes Univision's reluctance to divest stations if necessary. Univision references a request for a six-month waiver to "address compliance" and to "permit the orderly adjustment" of the holdings of the applicants to the transfer,²¹ carefully avoiding the term "divest." These actions and its past stall tactics in the Albuquerque market indicate that Univision truly does not intend to divest itself of any of the stations. Such actions appear to suggest bad faith. Accordingly, the Commission should hold a hearing to further investigate Univision's actions, especially in light of its market dominance.

B. Univision continually utilizes foreign programming and syndicated content that do not meet the needs of its American communities of license.

¹⁹ Univision acquired KTFQ(TV) in 2003. *See* File Nos. BALCT-20030313BCD.

²⁰ Arguably, Univision was also in violation of Section 1.17(a), which directs that "no person . . . shall . . . in any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading" or "in any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading." [47 C.F.R. § 1.17\(a\)](#).

²¹ *See* Ownership Appendices to application.

One of the primary issues concerning a broadcast licensee's fitness to retain and be permitted to transfer its licenses is whether it has served the interests of the local community.²² A station must focus on events and issues that matter to its local audience.²³ Petitioners have been dissatisfied with the level of service they have received from Univision because Univision has not addressed the programming needs of Petitioners' households and other Spanish-language dominant households in the markets being challenged that must rely on Univision as their primary sources of information. Petitioners believes that Univision must be held accountable to them and to the above-referenced markets' local audiences, especially given that Spanish-language programming serves as a bridge between members of the Spanish-speaking immigrant communities and others in their non-Spanish speaking communities. In particular, Univision fails to adequately cover local issues such as health, education and politics that are germane to American Latinos. Upholding these localism principles should be fundamental to any broadcaster's obligation to serve its communities.

Univision has repeatedly failed to serve its local communities by broadcasting foreign programming content from Mexico, while neglecting to present programming that addresses the needs of the Hispanics/Latinos in America. Univision imports over 80% of its prime time Spanish-language programming from Mexican or South American programmers.²⁴ Since 1961, the majority of Univision's programming has been produced by Televisa, a Mexico based company that owns 25% of Univision²⁵.

"Outsourcing" programming diminishes opportunities and incentives for Hispanic Americans to develop television programming that address the distinct needs of U.S. Spanish-language audiences, thus clearly violating the broadcaster's obligation to serve the interests of its local viewers. A Pew/Kaiser Survey found that "Spanish-language media are an important source of broadcasting news for a substantial majority of Latinos, with 35% of Latinos indicating that they listen to and predominantly watch Spanish-language news programs, while 25% tune into only

²² Communications Act, Section 309(k)(1).

²³ See Carrion, E, "EcoLatino" Issue 4, (July 2006) at <http://www.athensecolatino.com/v4n4/editor.html>. (last visited Sept 4, 2006).

²⁴ See Becker, A. "Spanish-Language Expansion" *KeepMedia/ Broadcasting & Cable* (May 23, 2005).

²⁵ See generally www.Univision.com. Televisa is the largest producer of Spanish language television programming in the world. Univision and Televisa signed a sales agreement in 1992 which ends in 2017.

Spanish-language broadcasts.²⁶ The Pew/Kaiser Survey concluded that 64% of Hispanic Americans rely on Spanish-language broadcasting as a significant source of news and information²⁷ that directly affects their daily lives in *this* country, not in Mexico and points south of Mexico. For such a large population, access to news and information broadcast in the English language is simply not a substitute for Spanish-language broadcasting.

Moreover, Hispanics have very positive views about the significant role of the Spanish-language media in advancing their interests in the U.S. in comparison to English-language media.²⁸ Nearly 78% of Hispanics believe that the Spanish-language news media are very important to the economic and political growth and development of the Hispanic community.²⁹ On the other hand, they are very concerned that the English-language media tend to portray negative stereotypes and images of their communities. In fact, 44% of Hispanics believe that the English-language media are doing damage to their image.³⁰ Over half of Hispanics (51%) also gave the English-language media poor grades on news coverage germane to their communities, citing the fact that the English-language media outlets places emphasis on undocumented immigration and criminal activity while lacking coverage of the many accomplishments of Hispanic leaders.³¹ In addition, parties that submitted comments in the Univision/HBC merger proceeding have stated that “Hispanic [r]adio and TV more effectively address the cultural roots and backgrounds of the Hispanic consumer base.”³²

U.S. primetime programming has been criticized for its dearth of Hispanic characters. Approximately 3% of all characters on primetime television are of Hispanic heritage, whereas Hispanics makeup 13% of the total population.³³ Hispanics also appeared most frequently in comedies, had heavy accents, were mostly male, and portrayed as uneducated and having menial

²⁶ See Suro, R. “2002 National Survey of Latinos,” Pew Hispanic Center/Kaiser Family Foundation (Dec. 2002) (“Pew/Kaiser Survey”). Sec. 3 at 45.

²⁷ *Id.*

²⁸ *Id.* at 48.

²⁹ *Id.*

³⁰ *Id.*

³¹ Pew/Kaiser survey at 10.

³² See Claudia Lezcano of J. Walter Thompson U.S.A., short letter comment submitted to the FCC on June 23, 2003, in the matter of Univision Communications Inc./Hispanic Broadcasting Corporation merger.

³³ See Elasmr, M., Hasegawa, K. & Brain, M. “The Portrayal of Women in U.S. Primetime Television.” *Journal of Broadcasting & Electronic Media*, 43, pp. 20-24 (1999); see also Glascock, J. “Gender Roles on Prime-Time Network Television: Demographics and Behaviors” *Journal of Broadcasting & Electronic Media*, 45, pp. 656-669 (2001).

jobs.³⁴ As the only broadcaster with the ability to counteract these gross misrepresentations and devaluations of America's largest minority group, Univision is obliged to provide even more exposure to matters of particular relevance to Hispanic Americans who depend on and trust its programming. Thus its programming ought to be *primarily* local in content, and specifically tailored to serve the public interest of its communities of license, not homogenous content designed for a mass foreign audience.

Throughout Univision's licensing period, it has repeatedly failed to serve its local community. Instead it has broadcast foreign programming from Mexico, and provided programming content that is not germane to Hispanics in America, nor produced with the Hispanic American market in mind. Because its stations are not broadcasting programming that can help Spanish-language dominant households understand and navigate the issues that affect their lives in America, the stations are actually creating a disservice to the public.

This conclusion is supported by a recent study the 2004 presidential campaign which found that English language networks devoted more of their nightly news to campaigns and elections than Spanish-language networks³⁵. Hispanic Americans, particularly new immigrants trying to integrate into society, relying heavily on news and information from a Spanish-language network such as Univision, are in effect cheated of adequate local coverage that impacts their community.

Under Univision's corporate policy of centering its programming on foreign programming, the Hispanic communities in markets in the United States where it holds licenses has little access to the scant domestically produced television services available that could address their social and political needs.³⁶

³⁴ See Mastro, D.E. & Greenberg, B.S. "The Portrayal of Racial Minorities on Prime Time Television." *Journal of Broadcasting & Electronic Media*, 44, pp. 690-703 (2000).

³⁵ A typical half-hour of network news on ABC, CBS and NBC averaged eight minutes of election coverage. A typical Univision broadcast contained six-and-one-half minutes of election coverage. See Kaplan, M., Goldstein, K., Hale, M. "Spanish Language TV Coverage of the 2004 Campaigns" at <http://pewhispanic.org/files/reports/38.pdf>. See also DeSipio, L. The Tomas Rivera Policy Institute, "Latino Viewing Choices: Bilingual Television Viewers and the Language Choices They Make" (2003), noting in a survey of over 1,000 U.S. Hispanics, 57% of bilingual viewers indicated that they get most of their news from Spanish-language stations. *Id.* at 11.

³⁶ Programming issues may be raised if there is clear evidence of market failure. See *Deregulation of Television*, 98 FCC2d 1076 (1984). If Univision continues its overwhelming use of imported programming, the Spanish speaking audience will continue to be deprived of information and news that is vital to their needs. This is not a question of formats. Compare *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). It is instead a question of programming sources. It directly implicates the purpose of Section 310(b) of the Act, which was to ensure that American owned media dominate American airwaves. See Statement of Hon. Clarence D. Dill, Chairperson, Committee on Interstate Commerce, United States Senate, March 14, 1934 (in Max Paglin, *A Legislative History of the Communications Act*

Studies show that the processes of acculturation and assimilation are very distinct for Hispanic Americans in comparison to other immigrant groups; as such, Spanish-language media plays a central role for Hispanics in the integration into mainstream American society.³⁷ That process is hindered when the very medium upon which new Hispanic immigrants primarily rely imports the majority of its programming from the same environment which they just left. The foreign programming which Univision predominantly supplies to local Hispanic communities neglects to address the unique and local needs of its audiences, particularly on issues of immigration information, education, health, employment and ways to overcome English barriers that will assist first generation immigrants in becoming full participating members of society.

As the fastest growing and least assimilated group in the country, Hispanics face discrimination based on race, color, national origin, and language in employment, housing and education. These social and economic barriers make it even more difficult for them to enjoy from America's promise of equal opportunity for all. It therefore becomes especially important for Hispanic immigrants to be able to access ethnic-relevant news — meaning news items and other cultural information that are pertinent to Hispanics.³⁸ This programming requires more than coverage in the Spanish language. It requires in-depth cultural background that provides an American Hispanic, not a Mexican or Anglo-American point of view.

a. Color discrimination in Univision's programming violates the provisions of 47 U.S.C. §151 (1996)

Petitioner notes that Univision's most popular television program are Televisa *telenovelas*, serialized melodramas, or soap operas which last for two or three months. Usually, the telenovelas air on weeknights during primetime for five out of six hours of primetime broadcasting. This genre of programming has been the most popular format on Univision. Because they are shown during primetime, telenovelas are very appealing to a broader Spanish speaking audience, including males and viewers of all ages.³⁹

of 1934) at 245 (“there is a pretty strong demand that there shall not be any ownership of any kind outside of American ownership of our communications companies”). That concern is especially important in the case of programming aimed at communities of first and second generation immigrants.

³⁷ *Id.* at 1.

³⁸ See Luna, Peracchio & de Juan, “Cross-Cultural and Cognitive Aspects of Web Site Navigation,” 30 *Journal of the Academy of Marketing Science*, 397, 398 (2002).

³⁹ See Duran, E. “More than a mini-series, less than a soap.” *New York Times*, sec.2 p.40 (Sept. 19, 1999). See also McAnany, E.G. & La Pastina, A.C. ,Telenovela audiences: A review and methodological critique of Latin American research, *Communication Research*, 21, pp. 828-849 (1994).

Univision's telenovelas have been widely criticized for their stereotypical characterizations and for their lack of racial diversity.⁴⁰ Women are often depicted as mothers and housewives, or as poor young girls whose only goal in life is to marry the wealthy leading man (the typical "Cinderella-type story"), and homosexuals are often caricatured. While these attributes of Telenovelas are deplorable, one particular aspect of them crosses the line into actionable misconduct offensive to the Communications Act: the fact that skin color typically dictates one's social class, with dark skinned characters relegated to servile roles.⁴¹

Univision's telenovelas feature actors that are almost always blonde or pale-skinned. Lighter skinned characters on Univision's telenovelas are typically represented as the major characters, have higher job status, and have more emphasis placed on attractiveness as compared to darker skinned, indigenous characters.⁴² The findings in a recent study indicated that light skinned characters made up 31.3% of all characters, and dark skinned characters made up 13% of all characters.⁴³ Light skinned characters were more likely to be major characters (54%) than dark skinned characters (18%) who played primarily minor roles (82%). Darker skinned characters were shown working primarily in service positions (17%). Light skinned characters (32.6%) were more likely to have blonde hair than dark skinned characters (2.6%).⁴⁴ Finally, light skinned characters (23.6%) were also more likely than dark skinned characters (5.1%) to be perceived as upper class, while most dark skinned characters were found to be rated as lower class (56.4%).⁴⁵ A once popular afternoon telenovela had a comedian in blackface chasing madly after a light-skinned actress in skimpy attire.⁴⁶ Many advertisements feature Afro-Latinos in Afros, Black face, or with distorted features.⁴⁷

In this way, Univision's viewers are bombarded with negative images of darker-hued Latinos, thus perpetuating the stereotypical notion of inferiority, not along racial or social standing but

⁴⁰ See Navarro, M. "Complaint to Spanish TV: Not enough Americans," *New York Times*, p.B1 (August 21, 2000).

⁴¹ See generally, Glascock, J. & T. Ruggiero, "Representations of Class and Gender on Primetime Spanish-language Television in the United States," ("Representations of Class") *Communications Quarterly*, Vol. 52 (2004).

⁴² *Id.* at 7.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Hutchinson, Earl O., "Mexican Officials Must Come Clean on Racism," at www.imdiversity.com/villages/Hispanic/dialogue_opinion_letters, (August 2006) (last visited Sept 1, 2006).

⁴⁷ *Id.*

along color lines.⁴⁸ The impact of these negative images is very harmful to Latinos in America, whose ethnicity is often more Mestizo than European, and who often are struggling with their cultural identity in a predominantly Anglo culture⁴⁹. Thus, Latinos in America, who are trying to assimilate into a new society, are also faced with discrimination based on national origin and race.⁵⁰

The Spanish speaking audience is equally as deserving as English speakers in receiving diversity of information sources on the public airwaves that serve their specific local needs. While the center of Hispanic culture is the concept of family, also important is their connections to others outside the family, as such relationships have been found to define their social status.⁵¹ By not offering programs that reflect differences between U.S. Latinos and Latin Americans, or even what it is like to be Latino in the United States, Univision has failed to adequately address the acculturation needs of its audience. Hence the airing of these telenovelas by Univision only serves to hinder Hispanics in the assimilation process by conveying a message of color discrimination and promoting a racial caste system, which under 47 U.S.C. §151 (1996) cannot be permitted by the Commission.

Consider the consequences for democracy, and for the public interest in broadcasting, if today's English language media were permitted to portray minorities only in negative, stereotypical roles on primetime. There would be a national outrage and backlash. When this mistreatment is visited on Latinos, the Commission should be just as outraged; after all, Latinos are not second-class citizens and the Communications Act does not contemplate unequal treatment of any class of persons protected by Section 151. Therefore Univision should be precluded from engaging in any form of discrimination, especially in light of the fact that Univision maintains holdings that reach 98% of the Spanish market. This overwhelming dominance that Univision has over the

⁴⁸ See Villafae, Verunica, "What About the 'Other Media'?" Center for Integration and Improvement of Journalism, (Jan. 1, 2002). Under the law, color discrimination is every bit as offensive as race discrimination. See, e.g., *Walker v. Secretary of Treasury, IRS*, 713 F. Supp. 403, 407 (1989) stating that the purpose of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* and 42 U.S.C. §1981. are the "protection of citizens of the United States in their enjoyment of certain rights without discrimination on account of race, *color*, or previous condition of servitude"(emphasis supplied). The court held that color discrimination is distinct from race discrimination in a civil rights lawsuit. *Id.*

⁴⁹ See Representations of Class at 10.

⁵⁰ *Id.*

⁵¹ See Uhlmann, E., Dasgupta, N., Elgueta, A., Greenwald, A.G., & Swanson, J. Subgroup Prejudice based on skin color among Latinos in the United States and Latin America. *Social Cognition*, 20, pp. 198-225 (2002).

Spanish language market makes it even more egregious that its programming is discriminatory and ignores the greater needs of its local American Hispanic communities.

C. Univision should not be permitted to transfer its licensees because it fails to adhere to the higher standard that should be applied to an entity with such a dominant position in a market

As previously stated, Univision holds a monopoly in the Spanish-language broadcast market.⁵² Spanish language speakers form a distinguishable segment of the broadcast viewing and listening population. As noted above, the Commission has acknowledged the importance of encouraging diverse and new voices in the market that targets Spanish-speaking audiences and those broadcasters' need to address the unique interests of the market of people that speak and understand little English. It recently recognized that emergency alerts should be broadcast to the public pursuant to the FCC's EAS rules in both Spanish and English.⁵³ The Katrina Advisory Committee has adopted a resolution recommending the same.⁵⁴ Clearly, the Commission understands that the Spanish-language market is a distinct market with unique needs that broadcasters need to accommodate. It follows that if one entity has the sole ability to reach 98% of that market, it has a monopoly in that sector. Under its latest tradition of relying on the market to correct lapses in quality programming, public service and other accommodations, the Commission owes it to the Hispanic population that makes up a sizeable portion of television audiences, to study evidences of market failure. In a situation, as with Univision, where one

⁵² In its own investor relations materials, Univision Network touts that it is the most-watched Spanish-language broadcast television network in the U.S. reaching 98% of U.S. Hispanic Households.. See (<http://uvn.client.shareholder.com/releasedetail.cfm?ReleaseID=203117>) (visited Aug. 29, 2006) Its other media holdings solidify this formidable market dominance. Univision owns TeleFutura Network, a general-interest Spanish-language broadcast television network, which was launched in 2002 and now reaches 86% of U.S. Hispanic Households; Galavisión, the country's leading Spanish-language cable network; Univision Television Group, which owns and operates 62 television stations in major U.S. Hispanic markets and Puerto Rico; Univision Radio, the leading Spanish-language radio group which owns and/or operates 69 radio stations in 16 of the top 25 U.S. Hispanic markets and four stations in Puerto Rico; Univision Music Group, which includes Univision Records, Fonovisa Records, La Calle Records and a 50% interest in Mexico-based Disa Records labels as well as Fonomusic and America Musical Publishing companies; and Univision Online, the premier Spanish-language Internet destination in the U.S. located at www.univision.com. Univision Communications also has a 50% interest in TuTV, a joint venture formed to broadcast Televisa's pay television channels in the U.S., and a non-voting 14.9% interest in Entravision Communications Corporation, a public Spanish-language media company. Univision Issues Statement.

⁵³See generally In the Matter of Recommendation of Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks *Notice of Proposed Rulemaking*, 71 Fed. Reg. 38564, EB Docket No. 04-296 (rel. July 7, 2006).

⁵⁴See generally Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and Recommendations to the Federal Communications Commission, EB Doc. No. 06-119 (June 12, 2006).

player holds that much of a particular market, opportunities for market failure exist. Fortunately, the Commission now has an opportunity to review issue thoroughly as it applies to the Spanish-language market in the United States and to Univision's holdings throughout the United States.

D. The Transferee appears to be unwilling and unable to cure Univision's deficiencies, making an even further degradation of service likely.

Univision is a media giant, well ahead of UPN, WB and other networks. In 2005, Univision posted net revenues of more than \$1.953 billion.⁵⁵ In fact, Univision is now the 5th largest media conglomerate in the nation.⁵⁶ Yet despite this obvious monopoly over the Spanish-language market, Univision has and continues to benefit from a history of providing poor programming services which would otherwise not be tolerated from other media companies.

The core of most content in Univision's programming lacks educational and informational value. During primetime broadcasting, only 1 out of 6 hours is devoted to news broadcasting, while the remaining 5 hours are dedicated to telenovelas, which have little to no social, educational or political relevance to the local Hispanic communities. Hispanic households do not have as many televisions sets in different rooms as do other households, so they generally have to congregate around fewer television sets.⁵⁷ As such, the programming choices are less, particularly for children and teenagers who end up watching these same telenovelas as the adult members of the household.

The transferee, BMPI, is made up of a series of investors that comprises the Saban Capital Group ("Saban"). Saban lacks the experience and expertise necessary to cure an extraordinarily poor record of stewardship by the current licensee. Saban has no background in providing broadcast non-entertainment programming, and in particular, Spanish-language programming of any type. Saban's experience in broadcasting began in 1988 when Saban formed an international television, production, distribution, and merchandising company.⁵⁸ The company produced the X-Men and numerous other shows and products developed around Marvel Comics characters.

⁵⁵ See www.univision.com (last visited on Sept. 3, 2006).

⁵⁶ *Id.*

⁵⁷ Clemens, L., "A Question of Quality" August 21, 2006 at www.multichannel.com/article/CA6363953.html?display=Special+Report (last visited Sept 3, 2006).

⁵⁸ See www.saban.com (last visited Sept 3, 2006).

By 1997, the company partnered with the Fox Family Channel to produce more children's programming.⁵⁹

In the nearly twenty years that Saban has been in the broadcast field, at no time has Saban created, developed or produced non-entertainment programming, and certainly none targeted to the needs of the Hispanic community. In addition, the transferee's portion of the transfer of control application failed to provide any programming plans that would explain how Saban would improve Univision's low quality performance.

The Commission has not yet had the occasion to consider whether a transferee possesses the qualifications to repair a serious problem it proposes to inherit. It is not surprising that this question has not yet arisen. Most large publicly held broadcast companies operate under conditions of high transparency, and thus it is rare for one of them not to operate in the public interest. Consequently, when such a company is transferred, the issue of a transferee's ability to cure a serious deficiency would seldom arise. When a smaller company has operated poorly, the question of a buyer's remediation skills also seldom arises. A smaller company's deficiencies are inherently easier to cure because they seldom involve questions of scale, language, culture and a trans-national supply chain, such as those involved here.

The Commission could (and should, as noted at pp. 23 - 24) find that Univision's poor stewardship requires a hearing under Section 309(e) of the Act. In such a hearing, the qualifications of the transferee would be irrelevant.⁶⁰ However, if the Commission does not order a hearing, it must reach the question of whether Saban is qualified to operate these particular assets, with their unique and overwhelming importance to the nation generally.

It is well established that an applicant's broadcast experience and its past broadcast record are highly relevant to the applicant's ability to offer service in the public interest. The closest historical parallel is found in the Commission's (former) comparative hearing jurisprudence, when — as it must do now albeit for a different reason — it was compelled to evaluate the skill sets of applicants coming before it seeking the privilege of a broadcast license. When the Commission evaluated applicants comparatively, it held that a past broadcast record which is “either unusually good or unusually poor” would “give some indication of unusual performance

⁵⁹ *Id.*

⁶⁰ See *Jefferson Radio Corp. v. FCC*, 340 F.2d 781, 794 (D.C. Cir. 1964) (holding that the Commission may not allow an unqualified licensee to avoid accountability by selling its stations). *Id.*

in the future.”⁶¹ Saban has had no past broadcast record, but he has had “previous broadcasting experience” through his cable programming activities “which would not qualify as a part broadcast record, *i.e.*, where there was not ownership responsibility for a station’s performance.”⁶² Like past broadcast record, broadcast experience was examined comparatively “upon an offer of proof of particularly poor or good previous accomplishment.”⁶³

Univision’s historical indifference in providing programming that addresses the unique problems that face the Hispanic community should never have been tolerated, especially given that fact that the Spanish-language media has such a tremendous impact on the lives of millions of Hispanics, particularly new immigrants. The transferee’s inexperience and its unwillingness to demonstrate a serious level of commitment to improving the quality of the content of programs such that the Hispanic community will be better served, demonstrates that the transferee will likely continue to air the same type of programming as the transferor. The Commission now has an opportunity through this proceeding to evaluate the public interest adequately and to perform a much needed, in-depth analysis of the practical and realistic effects on the Hispanic audiences of this proposed transfer of control.

Given the lack of experience of Saban, it is very likely that Univision’s history of providing foreign produced programming will be followed by its new owners. This will only continue to perpetuate a history of ignoring the social needs of the Hispanic community further disenfranchising the largest minority group in the nation, in favor of providing popular programming. Clearly, the transferee, like its predecessor is only interested in increasing its bottom line while disregarding its public interest mandate. It is therefore likely that the programming services offered by the transferee will be inferior even to the low quality service now provided by Univision.

E. A hearing will provide the Commission a forum to consider the unique needs of the Latino Spanish-language market

Latinos are now the largest minority group in the United States.⁶⁴ There are increasingly more Hispanic households that are Spanish-dominant than Hispanic households where there is a

⁶¹ See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC2d 393, 398 (1965).

⁶² *Id.* at 396.

⁶³ *Id.*

⁶⁴ See *infra* note 70. The Nielsen data indicates that there are 38.8 million Hispanics in the United States, and they comprise 13% of the total U.S. population.

mixture of English and Spanish spoken.⁶⁵ Consequently, there is a timely need for the Commission to acknowledge the separate requirements of this subgroup as broadcast programming audiences. Indeed, recent Nielsen data estimates that there are 6.5 million U.S. Hispanics who speak only Spanish in the United States.⁶⁶

Understandably, for many in this category, there is a preference for news and information in their native language. 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.⁶⁷ For all programming categories, 24% of bilingual viewers watched exclusively or primarily Spanish television.⁶⁸ In fact, 33% reported viewing Spanish-language networks all the time, with an additional 24% viewing them most of the time.⁶⁹ According to Nielsen, “a substantial share of viewing” in Hispanic homes is Spanish-language television.⁷⁰ Arbitron reports that Hispanics spend 68% of their time listening to Spanish radio.⁷¹

Because, as previously stated, English-language programming is an insufficient substitute, Univision’s 98% foothold of the Hispanic market speaks volumes of its true dominance. As Commissioners Adelstein and Copps surmised in their dissenting statement to the Univision/HBC merger, 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 also dominates Spanish-language programming and distribution sources over other media companies, making it a behemoth media giant that is able to stifle competition.

⁶⁵ See Nielsen Media Research, www.nielsenmedia.com/ethnicmeasure/Hispanic-american/hisp_pop_growth.html.

⁶⁶ Univision itself has acknowledged Census figures stating that between 64.5 to 84.9 percent of U.S. Hispanics in various age groups speak Spanish at home. Studies show that more than 45 percent of U.S. Latinos exclusively or predominantly speak Spanish. For example, a study by the Pew Hispanic Center reported 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. “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. Likewise, Nielsen Media Research has found 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. Univision, “*The U.S. Hispanic Market in Brief 2003*.” 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. Nielsen Media Research, “Nielsen Media Research’s Hispanic Local Markets.” (“Nielsen Media Research”).

⁶⁷ See 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.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 8.

⁷⁰ See generally Nielsen Media Research.

⁷¹ See Arbitron, Hispanic Listening Preference, (Dec. 2002) at www.arbitron.com/Radio_Stations/presurvey_wi02.htm.

There is no like entity in the English-language market that compares with such dominance. Univision's multifaceted holdings make it a major media conglomerate. It has more than 70% audience share, twice as many full-power affiliates than its nearest Spanish-language competitor and a higher rating among Hispanic households than its next four competitors combined.

Univision itself recognizes its dominance of the Spanish-language market:

- The Univision Network is by far the nation's most watched Spanish-language broadcast television network and the fifth most-watched full-time network overall, competing head-to-head with the English-language television networks in primetime seven nights a week.
- Since Nielsen Media introduced its Hispanic Television Index (NHTI) in 1992, the Univision Network has led all other networks (Spanish or English-language, cable or broadcast) in sustained viewer growth.
- As the first and foremost Spanish-language broadcast television network in the U.S., the Univision Network attracts more Hispanics during each broadcast hour than any other network (English- or Spanish-language).
- More Hispanics watch the Univision Network in each daypart than ABC, CBS, NBC, FOX and Telemundo.
- Hispanic viewing share levels have increased from 59% in 1992 to 78% in 2003.
- Univision consistently airs on average all of the top 20 programs on Spanish-language television.⁷²

For advertising purposes, this dominance correlates to a market failure that the Commission should and must consider. When one company controls over half of the market, advertisers have no other option but to buy time with those stations, creating an atmosphere that is suffocating for competitors.⁷³ Those that monitor advertising are also taking notice. 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.⁷⁴ Advertisers and others who want to reach the growing Hispanic community rely uniquely on Spanish-language broadcasting. Those that commented in the Univision/HBC merger proceeding indicate that advertisers and advertising agencies have made strategic decisions to

⁷² (<http://www.univision.net/corp/en/univision.jsp>) (visited Aug. 29, 2006)

⁷³ See generally Comments to Univision/HBC Merger such as Information Policy Institute July 13, 2003 Letter to Commission on Univision/HBC merger, National Association of Hispanic Publisher July 16, 2003 Letter to the Commission on Univision/HBC merger, Letter by Auto Nation June 23, 2003.

⁷⁴ Arbitron Radio Advisory Council Minutes from March 26-27, 2003.

specialize in targeting the fast-growing Hispanic audience and have set aside separate budgets for Spanish-language media.⁷⁵ Hispanic buying power, totaling \$580.5 billion in 2002, is expected to grow to \$926.1 billion in 2007 and \$2.5 trillion by 2020.⁷⁶

The Department of Justice has recognized that advertising on Spanish-language radio stations was deemed the relevant product market for antitrust purposes. The Department of Justice in its review of the Univision/HBC merger discovered that the Spanish-language radio market is separate from the general radio market and is highly concentrated. In its antitrust review that focused primarily on radio, the Department of Justice found that the Spanish-language radio market was separate from the general radio market.⁷⁷ 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."⁷⁸ 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.⁷⁹

The Commission has not been willing to go as far as the Department of Justice and formally acknowledged the existence of a separate Spanish-language market for ownership purposes. However, it has recognized the marked disparity between Univision and its next competitor in market share and size, Telemundo. Commissioners Adelstein and Copps also pointed out in their

⁷⁵ 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."). 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). 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).

⁷⁶ 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.

⁷⁷ Adelstein/Copps dissent, citing *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).

⁷⁸ *Id.* at ¶ 14.

⁷⁹ *Id.*

dissent to the Univision/HBC merger,⁸⁰ that the Commission has recognized that Spanish-language stations “do not compete directly” with English-language media.⁸¹ 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.”⁸² 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.*”⁸³

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.”⁸⁴ 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.⁸⁵ As mentioned above, the Commission excludes foreign-language newspapers from media ownership protections unless the newspaper is in the dominant language of the community.⁸⁶

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 stations against their quota of distant non-network stations.⁸⁷ The Commission has stated:

⁸⁰ See generally Univision/HBC Merger.

⁸¹ *Telemundo Communications, Inc. (Transferor) and TN Acquisition Corp. (Transferee)*, 17 FCC Rcd 6958 (2002).

⁸² *Id.* at 6977.

⁸³ *Id.* at 6978-79 (emphasis added).

⁸⁴ 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.

⁸⁵ See, *e.g.*, *Tele-Media Co.*, 10 FCC Rcd 8615, ¶ 14 (CSB 1995).

⁸⁶ *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).

⁸⁷ *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*

“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.*”⁸⁸

Given the foregoing case for establishing a higher standard for Spanish-language market stations explained in the foregoing arguments of this petition as applied to the failure to meet that standard, this licensee is no longer qualified to continue to be a trustee of the broadcast licenses in question and of others it holds. At the least, it should not be permitted to transfer licenses to another entity not qualified to manage Univision’s current license holdings. Finally, Petitioners request a hearing before the Commission to present oral argument to address the importance of the issues involved here. The unique considerations underscored in this transaction compel special consideration under the Commission’s statutory obligation to find affirmatively that the transfer of control serves the public interest. Although through paper pleadings, parties can preserve salient points they wish to address during the hearing, only through the actual hearing can the Commission consider the potential benefits and harms of a transaction on the Hispanic community and thereby be able to fully take into account the exceptional circumstances of this transaction. The Commission has authority under Section 1.1 of its rules and should therefore designate this matter for hearing.⁸⁹

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September 5, 2006

Commission’s Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order, 36 FCC 2d 143, ¶ 96 (1972).

⁸⁸ *Fox Television Stations, Inc.*, Memorandum Opinion & Order, 8 FCC Rcd 3213 (1993), at ¶ 7.

⁸⁹ See *American Broadcasting Companies, Inc.*, 7 FCC2d 245, 9 RR2d (1966) (the ABC-ITT merger case, which like this case presented unique questions about the quality of a transferee’s potential stewardship and about the quality of broadcast service to which the public would be entitled.

CERTIFICATE OF SERVICE

I, Jeneba Ghatt, certify that, on this 11th day of September 2006, I caused to be served upon the parties listed below by first class mail, postage prepaid, copies of the foregoing *Petition to Deny* to the following:

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