

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

In re Application of)
)
Telemundo Communications Group, Inc., et al.)
(Transferors))
)
and)
)
TN Acquisition Corporation)
(Transferee))
)
For consent to transfer of control of)
Station KSTS-TV, San Jose, California, et al.)
)

File Nos. BTCCT-20011 101ABK, et seq.

TO THE CHIEF, MASS MEDIA BUREAU

CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION TO DENY

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NOSOTROS
Mexican American Grocers Association
National Puerto Rican Coalition
National Association of Hispanic Publications

January 9, 2002

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The Puerto Rican Legal Defense and Education Fund, Inc., the National Council of La Raza, League of Latin American Citizens, National Hispanic Media Coalition, NOSOTROS, Mexican American Grocers Association, National Puerto Rican Coalition, and the National Association of Hispanic Publications ("PRLDEF, et al."), through counsel and pursuant to Sections 73.3584 and 1.45 of the Commission's rules, hereby submits its reply to the Oppositions to Petitions to Deny ("Opposition(s)"), respectively filed by Council Tree Hispanic Broadcasters II, L.L.C. ("Council Tree"), the National Broadcasting Corporation, Inc. ("NBC"), and Telemundo Communications Group, Inc. ("Telemundo") on December 19, 2001. The Oppositions were filed in response to PRLDEF et al.'s Petition to Deny ("Petition") filed on December 3, 2001 with respect to the above-referenced application. As demonstrated in our initial pleading, and reiterated below, the Commission should deny grant of this application unless and until it is given sufficient information to fulfill public interest standards.

I. BACKGROUND AND SUMMARY

In the above-referenced Oppositions, applicants NBC and Telemundo claim that they have already made a showing supporting their contention that the proposed merger fully complies with public interest standards.

Unfortunately, applicants have interpreted the license transfer process to mean that their responsibility to provide sufficient information ceases upon minimal compliance with the numerical limits in the Commission's ownership rules. Embedded in these responses is the notion that the FCC is foreclosed from exercising its responsibility to provide full-fledged, vital public interest consideration in license transactions.

The fact that applicants are prepared to compete as broadcasters was never an issue.

The question has always been whether this transaction is in the public interest.

II. NBC'S WAIVER REQUEST DOES NOT INCLUDE AN ADEQUATE PUBLIC INTEREST SHOWING

In proposing that it has met the waiver requirements for the Commission's rules, NBC

states:

"The temporary waiver requested by NBC will not impede the stated objectives of the FCC's television ownership rules: (1) to prevent concentration of power and 2) to promote diversity in programming sources and viewpoints." NBC Opposition at 11.

NBC goes on to cite the diversity of the Los Angeles market and claims that the period requested is reasonable in light of current market conditions. The waiver analysis, however, cannot stop with consideration of these factors.

What remains missing from NBC's presentation is the demonstrable public interest benefits called for by the Commission:

"Waiver of the rule is in the public interest to permit common ownership of two television stations in the same market where one station is a "failed station," as supported by a showing that the station either has been off the air for at least four months immediately preceding the application for waiver, or is currently involved in involuntary bankruptcy or

insolvency proceedings, Second, we will presume a waiver of the rule is in the public interest where one of the merging stations is a "failing" station, as supported by a showing that the station has had a low audience share and has been financially struggling during the previous several years, and that the merger will result in demonstrable public interest benefits."¹

Again, as in the application itself, NBC's articulation of the rules signal a preference that the Commission overlook public interest components and lean in the direction of noncompliance.²

Encouragingly, for the first time NBC contends that the need for minority ownership, particularly in light of the economic recession, justifies the longer waiver period. NBC Opposition at 4 and 17. This goes a long way toward stating a justification that is valid. As our Petition pointed out, their agreement with and adoption of the need for waivers that would foster minority ownership is commendable and welcome.³ While, unfortunately, we are not aware of any efforts NBC is undertaking to encourage minorities to submit bids for the stations, they deserve credit for taking this first step. The Commission should give positive consideration to this justification for a waiver and reject their other proffered justifications.⁴

¹ In the Matter of Review of the Commission's Regulations Governing TV Broadcasting, 14 FCC Rcd 12903, 12908 (1999).

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³ Petition at 11-12. Also see *Stockholders of CBS, Inc.*, 11 FCC 3733(1995) in which Westinghouse's commitment to seek minority buyers and augment children's programming was recognized by the Commission as a public interest benefit.

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⁴ In arguing for a 12 month waiver, NBC makes the point that Telemundo is a weak competitor, with two UHF's. Opposition at 15. But earlier, the network contends that Los Angeles has an abundance of strong Spanish language facilities -- including, of course, Telemundo's and other (technically inferior) UHF's. Opposition at Pages 12-13. These arguments are inconsistent -- NBC can't have it both ways. In addition, Council Tree only cites *Shareholders of CBS Corp.*, 15 FCC Rcd 8230 (2000), which resulted in a 6-month waiver. Thus, they don't seriously attempt to grapple with the question of whether a twelve-month waiver is justified.

III. NBC'S PROGRAM SEPARATION PLEDGE RUNS AFOUL OF THE FCC'S NON-DISCRIMINATION RULES, WHICH ARE STILL ENFORCEABLE

In its Opposition, NBC says our EEO argument is "constitutionally suspect" but cites no authority for that proposition. Opposition at 3. And they are flatly wrong. What we point out is that two specific errors and omissions in the application may tend to promote discrimination in violation of Section 73.2080(a). The rule is modeled after Title VII, the constitutionality of which is well established. Also, Council Tree's argument that the employment issues are moot after MD/DC/DE Broadcasters reflects a misunderstanding of the points raised. Council Tree Opposition at 8. The EEO rules currently under restructuring primarily deal with recruiting responsibilities. Here, we raise important considerations about NBC's sketchy offerings regarding the future of current Telemundo employees in two respects: Career opportunities and disproportionate adverse impact.

A. Employee Separation Could Lead to Deprived Career Opportunities for Telemundo Employees

First, during the waiver period, when the operations of the Los Angeles stations are kept separate, the Telemundo employees will not have the opportunity to cross-train with their KNBC counterparts, learn the "NBC Culture" and thus enhance their long term prospects for continued NBC employment after the waiver period -- and cross-fertilize the program decision making pool, which is a central purpose of the nondiscrimination rule.⁵

NBC dismisses our argument in a footnote by saying that they will maintain (basically segregated) stations only during the waiver period. NBC Opposition at 14, n.37. Nevertheless, they are asking for a year of segregated operations. Indeed, a day is too long. To ensure equal opportunity, they should operate the stations jointly both during and after the waiver period. That "one year" is an especially critical year, because it will be devoted to figuring out how to make the

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⁵ See *In Re Applications of Independence Broadcasting Co., Inc., Station WHAT, et al.*, 53 FCC 2d 1161, (1975), (a duopoly situation that resulted in all of the broadcasters' minority employees being restricted to employment at only one of the stations).

NBC/Telemundo merger "work" -- how to make the disparate corporate cultures fit together; who to keep, and who to let go. In a year's time, the careers of many minority media professionals can be derailed. In this era of acquisition-mania, the volatile merger environment is already sufficiently stressful enough. By holding Telemundo employees at arms length during that time, NBC deprives them of the contacts, the mentoring, and the participation in the merger process that are going to be very critical to surviving as part of (and being included as part of) the merged entity in the Los Angeles market and elsewhere.

While NBC may not be characterizing it as such, what this separate operations plan really amounts to is the lifelong issue over separate and unequal segregation.⁶ Employees at a separately maintained "minority" facility lack the ability to move seamlessly into jobs at the "majority" one or to influence program content there -- two justifications for the nondiscrimination rule.

Telemundo states that "after the merger with NBC, Telemundo will be able to send its reporters abroad with NBC production crews "at a relatively low marginal cost." Opposition at 10. Telemundo also states that its reporters "may end up covering news events for both Telemundo and NBC (or MSNBC or CNBC) Telemundo Opposition at 10-11. However, the wonderful hypotheticals posed by Telemundo's counsel have not been pledged to by NBC. These consequences would be very attractive, but they are not in the application -- and the FCC must rely on the four corners of the application, not on the non-binding theories and speculation of counsel. Indeed, in the application under challenge here, strict program separation will be imposed -- preventing the kind of cross-fertilization desired by Petitioners and asserted in Telemundo's Opposition.

B. Employee Cutbacks Could Disproportionately Impact Telemundo Employees

Second, after the stations are combined (post-waiver period), NBC must make sure that

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minority employees taken in from the Telemundo stations will be treated as equally as their NBC colleagues when (as usually happens in merger situations) there are job cuts. Years ago, NBC did not do a good job recruiting and hiring minorities, leaving many of them to develop their careers in the equal employment oasis of Spanish language television. Now, will a 16-year Telemundo veteran have his or her length of service considered superior to a 12 year KNBC-TV employee in the same job, if there is a combining of functions? Or will the less experienced KNBC employee win the game of musical chairs because the Telemundo employee's Telemundo job tenure is wiped out with the merger? If NBC (and others) had hired minorities in the past, perhaps this would not be a critical issue at this juncture. However, that is not the case. Unless the Telemundo employees are treated as equal to KNBC employees in job tenure (i.e., their Telemundo experience "vests" at NBC), the effect of NBC's former EEO inadequacies will manifest itself when (as seems likely) pink slips are handed out mostly to Telemundo employees.

IV. APPLICANTS HAVE NO ENTITLEMENT TO A PRESUMPTION THAT THE PROPOSED MERGER MEETS PUBLIC INTEREST STANDARDS

As a basis for its contention that the application meets public interest standards, NBC offers this statement by Chairman Powell (ending quoted in pertinent part):
"A transaction that complies with structural rules to advance the public interest (when they exist) should not be subject to further ad hoc review; otherwise the exalted benefits of such rules would be eviscerated."⁷

Council Tree similarly relies on the partial quote of Chairman Powell's statements and claims that "A transfer of control application demonstrating that the proposed transaction will comply with Commission rules is presumptively deemed to be in the public interest." Council Tree adds that: "Neither the rules nor the pertinent application form requires applicants to make a public interest showing independent of this well-established standard." See Council Tree Opposition at 7.

Both parties misconstrue administrative law and the statutory obligations of the FCC. NBC

claims that Commission rules in and of themselves satisfy the Act's mandatory public interest standard. NBC incorrectly collapses the Commission's rulemaking power and process with its adjudicatory power and process. Agencies may use the rulemaking process to meet their obligations under their enabling statutes, but they cannot wholly ignore or circumcise a Congressionally- mandated requirement out of their agency duties. Thus, the Commission is obligated to perform a public interest analysis. NBC is just plain wrong on the law when it argues that the Commission has, through its rulemaking process, articulated the parameters of the public interest analysis. Only recently, in the very case cited by NBC, a Commission member noted the separate and important public interest analysis that is necessary in the licensing process, and focused upon the Commission's public interest inquiry by setting out as part of its Four Part Test, an inquiry as to "Whether the transaction promises to yield affirmative public interest benefits." ⁸

The applicants' comments call for the Commission to completely disregard its obligation to safeguard the public's right to receive diversity of views and information. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994). The Commission has clearly noted that "our concern with diversity is most acute with respect to local ownership issues," and has restated its belief to proceed with "reasonable caution" to consider the impact on industry structure made possible by the 1996 legislation and by other forces that are "changing, often in unpredictable ways, the marketplace for video programming. . ." *In the Matter of Review of the Commission's Regulations Governing TV Broadcasting*, 14 FCC Rcd 12903, (1999).

The applicants' attempt to devolve the public interest requirement into a mere paper

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The other public interest inquiry components; 1) whether the transaction would result in a violation of the Communications Act; 2) whether the transaction would result in a violation of the Commission's rules; and 3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act. Quoted from *Applications for Consent to the Transfer of Control of License and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order, FCC 01-12* (released January 22, 2001).

formality, easily satisfied with unsubstantiated statements, is unsupported by the language of the Act and misinterprets the legal complexity of a public interest standard. A public interest determination is governed by numerous factors. What is in "the public interest" must be flexible in order to provide for the various considerations and factors which evolve over time. This is especially applicable to the television industry since it changes quickly and is always responding to ever changing preferences and demographics.

Television is still the means by which most Americans get their news and information, and therefore the potential concentration of viewpoints through that medium endangers our most cherished democratic values. We request that the Commission review this merger in the manner consistent with strengthening the potential of broadcasters to serve the public interest, and not merely as a mechanical review of compliance with technical rules.

V. IN ABSENCE OF A SHOWING, APPLICANTS' POSITION THAT ENDOWED RESOURCES EQUATE TO PROGRAM DIVERSITY MUST BE REJECTED

Telemundo wraps a public interest argument around the fact that it is smaller and less powerful than Univision. Opposition at 2. If that were all that's required, then sufficient public interest merit could be found in almost every merger. Despite the applicants' claims to the contrary, the merger may do a tremendous disservice to the Spanish-language viewing audience. For example, by allowing NBC and Telemundo to merge, the creation of a third independent Spanish network may be impossible. This is not an unfounded concern. In 1985, if instead of promoting the creation of the Fox network, the FCC had allowed (then third-running and weak) ABC to merge with NBC, Fox (and WB, and UPN) would probably never have emerged, at least under independent ownership. The Spanish speaking community deserves the same diversity promoting policies that the English- language community enjoyed.

Telemundo also offers that the merger will result in improved service to the Spanish speaking Latino community, and therefore serve the public interest. Telemundo Opposition at 5. Telemundo **mischaracterizes** the interests and habits of the United States Latino community. It is

not static, but rather an evolving community consisting of several different national origin subgroups, both Spanish and Portuguese speaking. It is also a community that is younger than other groups in the United States, and thus quickly adapts to the ways of the United States, including in its acquisition of English and its enjoyment of things that are typically "American," such as television and radio programming.

Yet, Telemundo proposes that the Latino audience can be defined by language alone. Latinos are not solely defined by the fact that many speak Spanish. Latinos are an ethnic and national origin group with distinct cultures. Thus, there is cross-over that occurs from the Latino and Spanish-language programming to English-language programming, and that would increase if stations like NBC confined their understanding of Latinos to language distinctions solely. In addition, despite Telemundo's contention that it serves a Spanish-speaking audience and therefore it (and NBC) are not "required to demonstrate the public interest benefit to the English-speaking audience...", it attempts to do just that in its Opposition. In its claim that the merger will benefit the NBC English-speaking audience (Telemundo Opposition at 11), Telemundo advises us that have started discussions with NBC on how "Telemundo might create and produce programming for NBC." Telemundo Opposition at 12. However, merely stating this, and serving as the exclusive broadcaster for an awards show, hardly suffices as discernable public interest qualifications.

In a similar vein, NBC accurately quotes our comments regarding the competitive effects of combining its resources with Telemundo's,⁹ but omits the most significant concern immediately following. NBC at 8, fn.16. Clarification was sought on the nexus between NBC's infusion of resources and the resultant diversity of viewpoint benefit claimed by applicants. We are indeed aware of a licensee's right to programming discretion. Our questions, however, are in response to NBC's and Telemundo's own representations as to how this merger will result in "improved service," and thus accrue to the public's advantage. All that is proposed in the application is the

NBC/GE powerhouse voice transmitting through the smaller Telemundo entity. There remains a disconnect between NBC's acquisition of Telemundo and the melding of community voices with the Latino audience as a result of that acquisition. The parties' theories of public interest benefits might be worthy of FCC endorsement -- if only they were documented with evidence or took the form of acceptable and unsupported promises in the application. Instead, the Commission is presented with the mere hypothesizing of counsel.¹⁰

We stand by our concerns that the applicants, despite the vigor by which they come to these sweeping notions, have not demonstrated at least one public interest benefit to be exacted from this merger.

VI. OPPOSITIONS POSE BUSINESS CONSIDERATIONS IRRELEVANT TO PROPOSED MERGER'S PUBLIC INTEREST IMPLICATIONS

Council Tree states: "Efforts to promote minority investment will suffer a serious setback, and the reasonable expectations of tens of thousands of Native American investors will be frustrated, if the petitioners are permitted to delay grant of the captioned applications and consummation of NBC's proposed acquisition of Telemundo." Opposition at 4.

We do not believe that it is inappropriate for us to request that the application meet the statutory requirements set forth in the Act, and that it sufficiently show the public interest benefits of the merger. We also do not believe that such requests do an injustice to minority communities. Rather, our Petition is drafted and presented in the spirit of seeking diversity and progress for racial and ethnic communities in the United States. Thus, we object to the efforts of Council Tree to cast our efforts as detrimental to minority progress in the television industry.¹¹

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⁵ *statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), in which the Commission demanded seriousness regarding promises of programming in no uncertain terms: "Do not puff; there will be no further preferences given on these overblown proposals. We want serious, solid proposals which will not be in issue at the hearing, but as to which there must be effectuation." *Id.* at 398.

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⁹ In a related note, we are quite taken aback by NBC's attack (Opposition at 2, note 4) on

Finally, Telemundo's claim that its programming will suffer if there is continued delay on the merger is unsupported by the reality of the up-front advertising process and Telemundo's own words. Opposition at 12-14. Telemundo claims that while approval of the merger is uncertain, it cannot proceed with programming and thus is in jeopardy of losing advertising for the 2002-2003 season which opens in May 2002. However, nothing prohibits Telemundo from proceeding with its programming plans. The advertising market is driven by the market it is reaching, in this case, the Latino audience, not who owns the network. Therefore, the merger is irrelevant to the 2002-2003 up-front advertisers. In any event, the license ownership is not made any riskier by the merger with NBC. Indeed, Telemundo and NBC both argue that Telemundo will be a stronger competitor and a "better" network as a result of the merger. If that is true, then advertising would be easier and more profitable. If what Telemundo is arguing is that programming cannot be finalized pre-merger because NBC might intend to change programming, this is pure speculation, especially since Telemundo claims it is an award-winning network. Opposition, pp. 9, 11-12. Telemundo cannot claim to be a "great catch" that will be even better post-merger, and also claim it fears change.

VII. CONCLUSION

Reduced to its bare essentials, without the florid language projecting increased diversity and improved service, NBC and Telemundo fall short of demonstrating public benefits associated with this merger. What they would like for us to believe is that the merger will automatically provide diversity of programming based upon NBC's infusion of resources.

If the issues we raised fell outside the scope of public interest analysis, then the Commission's rules would not serve in protection of the public interest, but in the interests of

Esteban Torres, which involves baseless speculation that the petition may be "commercially" motivated because he's a Director of La Raza and also a Director of Entravision. He has recused himself from votes on the Entravision Board concerning this matter. He was not a party to the filing, and National Council of La Raza's decision to sign on to the Petition was an executive decision, not a board one. In addition, neither Entravision nor Univision (with which Entravision affiliates its stations) opposed the Petition. Consequently, there is no "commercial" hook at all.

broadcasters operating mainly as media giants - not as trustees of the public airwaves.

We respectfully request that the Commission withhold grant of the applications unless and until applicants provide an adequate showing that the public interest will indeed be served.
Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jenny Rivera, Esq., counsel for PRLDEF, et al., do hereby certify that, on this 9th day of January, 2002, I had copies of the foregoing Consolidated Reply to Oppositions to Petition to Deny filed by PRLDEF, et al., sent via U.S. Mail, postage prepaid, to the following:

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