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

In re:	)	
Shareholders of UNIVISION	)	
COMMUNICATIONS INC.	)	File Nos.
Consent to Transfer of Control	)	BTCCT-20060718AIK
of Stations KUVN-TV, Garland, Texas;	)	BTCH 20060718AJQ
KDXX(FM), Benbrook, Texas;	)	BTCCT 20060718AJF
KTFQ-TV, Albuquerque, NM and	)	BTCH 20060718AET
KQBT(FM), Rio Rancho, NM to	)	
BROADCASTING MEDIA PARTNERS INC.[1]	)	

To the Chief, Media Bureau

REPLY TO OPPOSITIONS TO PETITION TO DENY

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September 29, 2006

[1] The caption of the initial Petition to Deny mistakenly included station KSTR-TV, File No. BTCCT-20060718AHS. The station was removed in the *nunc pro tunc* September 11, 2006 filing, even though not explicitly noted. This administrative oversight does not harm the parties nor affect the substance of the pleading.

SUMMARY

This Reply addresses the Oppositions filed by the Applicants, Univision Communications Inc. ("Univision") and Broadcast Media Properties Inc. ("BMPI") (together "Applicants") to the Petition to Deny the above-referenced transfer of licenses ("Opposition(s)"). This case is about whether the Commission will apply the same standards of review and care to America's Spanish language consumers that it applies to English language consumers. By its own admission, Univision claimed earning 84% of the Spanish-language television advertising revenues and capturing 93% of the US Hispanic television audiences.[2] Comparatively, if CBS controlled 84% of the ratings and revenue of the English-language broadcast market, the Commission would examine any proposed sale of that company with extraordinary care. Over 31 million US Residents speak Spanish as their primary language in the home, and 47 million Americans speak a language other than English in their home.[3] The Commission has recognized that in times of emergency, these Americans deserve the same protections as other Americans.[4] No less a standard of care is owed to Spanish speaking Americans throughout the broadcast year.

Given its overwhelming market domination, Univision must not be allowed to fly under the radar, despite its disregard of Commission rules, and get a pass to transfer valuable licenses. Applicants rely primarily on administrative nit-picks that distract from the deep importance of the fundamental issues of equal and nondiscriminatory treatment raised in the Petition. The

[2] *See 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") 18872-18873 (dissenting statements of Commissioners Adelstein and Copps) (pointing out Univision pleadings to that Merger request).
Univision Television Group owns and operates 62 television stations in major U.S. Hispanic markets and Puerto Rico and Univision Radio, the leading Spanish-language radio group, owns and/or operates 69 radio stations in 16 of the top 25 U.S. Hispanic markets and 4 stations in Puerto Rico. *See* www.univision.net

[3] US Census Bureau, 2005 American Community Survey; and Language Use and English Speaking Ability, Census 2000 Brief (Issued October 2003).

[4] *See In re* 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).

Oppositions concede most of the factual premises of the Petition, and do not seriously contest the merits of the Petitioners' allegations concerning the quality and discriminatory nature of Univision's programming and Univision's failure to address the local needs of Spanish-language media consumers. Neither do the Oppositions adequately address whether the proposed transferee has the requisite qualifications to cure Univision's profound inadequacies.

The most curious aspect of the Oppositions is BMPI's request to the Commission to dismiss Petition to Deny and not allow it to "disrupt the proceeding." Implicit in this request is a call for the Commission to quickly dispense of the *only public interest challenge* to a multi-billion dollar merger with enormous implications for the future of American broadcasting in a multicultural society.[5] Rather than dismissing the Petition, the Commission should welcome this kind of filing. As the Courts held in *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (DC Cir. 1966)[6], the broadcast regulatory process is not a private game between regulators and applicants for which members of the audience are mere inconvenient interlopers.

This Petition reflects the interests of broadcast consumers concerning the stewardship of a company that overwhelmingly dominates the ratings and revenues from Spanish language television. The last time an FCC regulatee had that level of dominance in its industry, it was broken up.[7]

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[5] A letter by Theodore M. White, a resident of Washington DC and principal of Urban Broadcasting Corporation, which had been the permittee of UHF Television Station WTMW-TV, Channel 14 at Arlington, Virginia informally objected to the application. Letter of Theodore M. White to Marlene H. Dortch (filed August 23, 2006). This objection generally discusses a private business dispute. Petitioners have no knowledge of the matter and are agnostic on its merits.

[6] *See also Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (DC Cir. 1969) ("UCC II") and *Stone v. FCC* , 466 F.2d 316 (DC Cir. 1972).

[7] *United States v. AT&T*, 552 F. Supp. 131, 187 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 798-802 (2d Cir. 1983), cert. denied, 404 U.S. 1073 (1984). AT&T and the U.S. Department of Justice agreed to implement divestiture of twenty-two local operating companies--about two-thirds of AT&T's assets--on 24 August 1982. This agreement modified the Consent Decree

Finally, the Applicants have not shown that Petitioners lack administrative standing. The Petition to Deny contains the showing required by Sections 309(d)(1) and 309(e) of the Act that a grant of the Applications raises a substantial and material question of fact requiring a hearing. Univision's market dominance, its abuse of the multiple ownership rules, its poor service and its discriminatory programming cry out for examination in a hearing. BMPI's failure even to acknowledge the nature and magnitude of the remedial task facing a successor licensee underscores BMPI's disinterest and inability to offer a cure. For all of these reasons, the Commission should designate the above-captioned applications for hearing and thereafter deny them.

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of 1956 (known also as the Final Judgment). This agreement, which became known as the Modified Final Judgment, set the boundaries and conditions of divestiture that were to take effect on 1 January 1984.

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To the Chief, Media Bureau

REPLY TO OPPOSITIONS TO PETITION TO DENY OF UNIVISION AND COMMENTS OF BROADCASTING MEDIA PARTNERS INC.

Rincon & Associates, Edward Rincon and Conrad Gomez ("Rincon *et al.*" or "Petitioners") respectfully reply to the September 20, 2006 Oppositions filed by Univision Communications Inc. ("Univision") and Broadcast Media Partners Inc. ("BMPI") (collectively, the "Applicants") in response to Rincon *et al.*'s petition to deny ("Petition").[8]

I. PETITIONERS HAVE SUBMITTED A *PRIMA FACIE* CASE THAT GRANT OF THE APPLICATIONS IS NOT IN THE PUBLIC INTEREST

A. APPLICANTS' CURRENT VIOLATIONS OF THE MULTIPLE OWNERSHIP RULES ARE HARMFUL TO THE PUBLIC INTEREST

The Oppositions claim that the Petition does not indicate how the transfer would disservice the public interest. However, Rincon *et al.*'s complaint is that Univision has failed as a licensee and is not qualified to have these and other similarly-filed transfer Applications granted. First, as a broadcaster, Univision has the unique responsibility to serve local communities but has failed to do so. As the declarations to the Petition state, Univision has not

[8] In a September 27, 2006 –dated letter, Rincon *et al.* sought a two-day extension to file this Reply. The applicants each manifested that they would interpose no objection.

adequately provided programming germane to their local needs.[9] Declarants and Petitioners to this case, as proud members of their respective communities, are interested in learning about happenings at their local schools, learning of local elections, happenings at places of worships, political activity and other community-based activities. Their interests as members of the local public indeed have been harmed.

Also, Rincon *et al.*'s reminder that Univision is currently over the local ownership limits in Albuquerque is relevant and adequately supports a prima facie case for sanctioning Univision. Not only is Univision currently out of compliance with the ownership rules, as the Petition notes, Univision shows no intent of coming into compliance, irrespective of the fact that is awaiting Commission decision on its pending waiver request. Inherent in Univision's request for a waiver in its March 3, 2005 letter to the Commission was the inference that it was or would be making efforts to divest one station. To date, it has made no such efforts. The fact that it has not divested the station since it first requested the waiver notwithstanding the expiration of the waiver period is evidence that Univision intended to not do so. [10]

It is against the public interest for a market-dominant entity to continue to expand its dominance in contravention of Commission rules. The Petition also fully addresses Rincon *et*

[9] *See* Petition to Deny at Appendices, Declarations of Dr. Edward Rincon and Conrad Gomez.

[10] *See RKO General v. FCC*, 670 F.2d 215 (DC Cir. 1981) Upholding the principle that if a party could have stated facts helpful to its cause, but didn't do so, it can be inferred that the facts don't exist and noting that Unlike a private party haled into court a licensee had an affirmative obligation to inform the Commission of the facts the Commission needed in order to license broadcasters in the public interest. Consequently, a party's failure to be forthcoming with information goes to its character as a licensee. A recent case decided by the Commission exemplifies how a party deserving of a waiver ought to demonstrate that it is deserving of Commission favor such as a grant of a waiver request. In *Assignment of License for KSMO-TV, Kansas City, MO* (File No. BALCT-200501017ACA), an applicant requesting a waiver of the television duopoly rule for a "failing station" demonstrated clearly declining audience share, decreasing revenues, the fact that it is the only buyer and will make investment to restore the station and other information the Commission needed to make its decision. Many Commission rules, such as those governing requests for Special Temporary Authority, are premised on the applicant making a showing, when they seek a waiver extension, that that they have taken good faith steps toward fulfilling the obligations they promise to fulfill in order to receive the benefit of a waiver grant. As the Petition argues, Univision's past bad acts should preclude it from being granted its transfer request as it has repeatedly abused Commission granted waivers, and shows no intent of divesting a station although it is over the ownership limit.

al.'s public interest concern over the existing effect Univision's Spanish language dominance has on advertisers, competitors and the consuming audience.

BMPI also argues that Rincon *et al.* have not offered any support for the belief that compliance with the media ownership rules can only be achieved through divestiture of stations and that a grant of a temporary waiver of radio stations would cause undue media concentration.[11] First, BMPI confuses the bases for Rincon *et al.*'s objections. Through its argument BMPI insinuates that the Commission should continue to sanction non-compliance of the transferor, an entity that has never convincingly demonstrated an intent to come into compliance.[12] Notwithstanding the existence of a pending request, the Commission fully considers periods of time when a licensee is fully out of compliance with its rules.[13]

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[11] BMPI Opposition at 4-5 (stating that BMPI "presented voluminous evidence of both the highly competitive nature of the affected markets and the *de minimis* impact of the requested six-month compliance period on competition and diversity in those markets.")

[12] Applicants point out the Petition's arguments about Univision's past request for a waiver and BMPI's request for a temporary waiver as "inappropriately conflate[ing] Univision the licensee, and BMPI, the proposed transferee." However, if the Commission were to step back and consider the Petition and the crux of the Applicants' request, it would agree that indeed, Univision is asking the Commission to waive its rules and policy of not granting favors to licensees that are currently out of compliance with its rules without a valid Commission-sanctioned waiver to excuse the rule violation. *See, for example, In re KSBN Radio, Inc* 19 FCC Rcd 20162 (2004) (denying a radio station's request for a waiver of failing to timely construct facilities within the required time and not adequately explaining its malfeasance.).

[13] *See Commonwealth Public Broadcasting Corp*, 19 FCC Rcd. 8026 (2004). (Rejecting a broadcaster's argument that its "corrective action" merits reduction of a Commission forfeiture where the broadcaster filed its modification application for facilities constructed almost four months *after* required and continually engaged in rule compliant behavior and noting that

> rather than discontinue its unauthorized operations, Commonwealth chose to file the necessary applications to "legitimize" its then-continuing violation of the rules. Further, without regard to whether the delay in filing applications (including STA for unauthorized facilities) constitutes expeditious corrective action, no mitigation of the forfeiture would be warranted on the basis that it ultimately corrected those violations. Corrective action taken to come into compliance with Commission rules or policies is expected, and does not nullify or mitigate any violations or forfeitures.)

Id. (quoting *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Radio Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973)).

Second, while it is true that divesture of one station alone may not cause undue media concentration, it is imperative that the Commission not ignore the wide-reaching implications of theses Applications and other similarly filed transfer requests for other licenses. A grant of these and other applications would further perpetuate the existing Spanish-market dominance to whoever is the ultimate licenses holder: Univision or BMPI if this and other associated transfers are granted. Consequently, Univision's contention that there are other "voices" in the effected market is irrelevant.[14] No other entity contains the level of market dominance in the Spanish-language market and therefore even one instance of non-compliance should not go without inspection and review.

Further, BMPI classifies the limit violation as a *de minimis* breach. However, the Commission should consider that at a certain level, if one considers the fact that there are thousands of outstanding broadcast licenses, in the overall scheme of broadcast regulation, a one station rule violation could be considered *de minimis.* However, what is not *de minimis* is the general deterrent impact that strict rule enforcement has on the industry as a whole. When the Commission comprehensively enforces its rules against all licensees and applicants, the policy message transmitted is clear. Licensees and applicants behave accordingly and thus strict rule enforcement actually facilitates deregulation in the long run. Finally, public confidence in the integrity of the broadcast regulatory system depends on strict rule enforcement.

[14] Univision Opposition at 16.

B. THE PETITION TO DENY PRESENTS DOCUMENTATION TO SHOW THAT UNIVISION'S PROGRAMMING FAILS TO MEET THE NEEDS OF THE LOCAL COMMUNITY

Univision states that the Petitioner's fail to provide reasonable basis for factual claims about its programming and that such attacks are "irrelevant in the context of Applications."[15] The Petition provides ample factual support to its assertion that Univision's programming does not meet the needs of the local communities in question.[16] The Petition clearly notes that the processes of acculturation and assimilation are very distinct for Hispanic Americans more than for other immigrant groups. It is undisputed that Univision's position as a dominant force in the media industry, reaching over 98% of the Hispanic market, plays a unique role for Hispanics in the integration into mainstream American society. As such, Univision bears an obligation to broadcast more than telenovelas, which lack educational and instructional value. The Commission still prefers that broadcasters meet the local programming needs of their respective communities of license. Indeed, recently the Commission has asked the public to comment on its intent to retain a localism standard in its recent Notice of Proposed Rulemaking in its 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules.[17]

Likewise, the Petition summarized sufficient sources that discuss Univision's programming and its unfortunate negative impact on the local and national needs of the largest

[15] Univision Opposition at 12.
[16] *See* Petition to Deny at 13-19.
[17] *In re 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* MB Docket No. 06-121 (rel. January 24, 2006) See *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, 13711-47 (2003) ("2002 Biennial Review Order"), aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C., 373 F.3d 372 (2004) ("Prometheus"), 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) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177).

and fastest growing minority group in the country. Rincon *et al.* do not contest the popularity of Univision's programming or its telenovelas, but rather question whether they meet the needs of the local community and best serve the public interest. As Univision itself proclaims on its own website, the telenovelas that it airs during primetime have out-delivered the Superbowl in reaching Hispanics adults.[18] Univision also boasts that the popularity of the telenovelas help it maintain a high audience share during primetime broadcasting surpassing other competing Spanish-language networks.[19] Popularity of programs does not always indicate their quality. Indeed, in the 1950s, Amos and Andy were well liked by whites and African Americans alike; however, the show was riddled with negative portrayals of African Americans playing subservient and even demeaning roles.[20] If a show such as Amos and Andy were aired on the public airwaves on one of the four largest networks, there would certainly be a great public outcry. Accordingly, the Commission should therefore hold Univision more accountable for meeting the needs of the estimated 32 million Spanish-language households it serves. This result is expected especially considering that Univision is the country's dominant Spanish-language broadcaster and the fifth largest most watched network overall,[21]

Further, Rincon *et al*. are not asking the Commission to deny the transfer because of what they *perceive* as deficiencies in programming nor is Rincon *et al.* asking Univision to adhere to

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[18] *See* www.Univision.com.
[19] *Id*.
[20] *See generally* THE ADVENTURES OF AMOS AND ANDY: A SOCIAL HISTORY OF AN AMERICAN PHENOMENON, Melvin Patrick Ely, University of Virginia Press; 2nd edition (December 2001); *See also* Popular Art and Racism: Embedding Racial Stereotypes in the American Mindset--Jim Crow and Popular Culture, Ronald L. F. Davis, Ph. D., *See* www.jimcrowhistory.org (Noting how radio captured the imaginations of millions of passive listeners who tuned in for broadcasts of the Amos and Andy shows--the most popular radio show in America in the 1930s and that the characters of the Kingfish, a dishonest and lazy confidence man who massacred the English language by mispronouncing words, and Sapphire, his loud, abrasive, bossy, and emasculating wife, became permanent fixtures in the minds of white Americans).
[21] As Univision notes on its own website, it competes head to head with the English-language networks on primetime seven nights a week. In addition, more Hispanics watch Univision in each daypart than ABC, NBC,CBS, Fox and Telemundo. *See* www.Univision.net

Petitioner's personal standards and tastes. While it is true, as Univision asserts, that licensees are given broad discretion to choose the types of programming they want to satisfy the community needs requirement, it should be noted that indecent programming is popular, but is not in the public interest.[22] The Commission has in the past acknowledged the need for a license to provide specific programming designed to meet the needs and interests of the audience in which the station serves.[23] Section 326 has never been held to bar a challenge based on injury from programming. In fact, the Commission has held that there are certain instances when the public interest outweighs the programming choices of the licensee, as is the case here where the programming is detrimental to children that watch Univision, and to the local communities as a whole.[24]

Also, the color discrimination exhibited by telenovelas has a tangible impact on the public, since it inhibits Univision's ability to effectively address the assimilation needs of the significant population of Spanish-speaking immigrants that consume them on Univision. In fact, the Petition noted, these telenovelas only serve to hinder Hispanics' assimilation process by conveying a message of color discrimination and perpetuating negative stereotypes. Therefore, Rincon *et al.*'s allegations are not simply conclusionary and generalized as Univision states, nor should they be so easily dismissed.[25]

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[22] *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (Noting that the FCC's public interest rulings, with reference to specific program content, "do not invariably constitute 'censorship' within the confines of 47 U.S.C. §326, and not every condition imposed by Commission on licensee constitutes interference with free speech."). *See also, Brandywine Main Line Radio, Inc., v. FCC* 473 F.2d 16, 75 (DC Cir. 1972)**;** *Banzhaf v. FCC*, 405 F.2d 1082 (DC Cir. 1968).

[23] *See Stone v. FCC*, 466 F2d 316 (1972).

[24] *See FCC v. Pacifica Foundation*, 438 U.S. at 750.

[25] Rincon *et al.* provide numerous statistics regarding the number of actors that are blonde or pale-skinned in Telenovelas, which Univision quickly dismisses as "meaningless." This lack of concern shows an utter disregard for the negative impact of these images that are harmful to Hispanics in America, whose ethnicity is more Mestizo than European, and who contend with issues of cultural identity, and discrimination based on race and national origin.

In its Opposition, Univision might have been expected to express indignation and opposition on the merits to any allegations of color discrimination and racial stereotyping. It did not do that because it could not do that. Instead, as an afterthought, it mentions in a footnote "the fact that television actors may not be representative of the general population is hardly limited to foreign-produced telenovelas."[26] Univision, by not directly refuting these allegations, is in effect admitting that its programming is not representative of local audience. Univision cannot point to the fact that others broadcast similar programming to justify its actions in failing to meet the local community needs and its role in perpetuating stereotypes. Telenovelas lack value and are offensive.

Former Chairman Powel, concurring in the 1998 EEO proceedings said that a licensee cannot include race or color-based discrimination in its programming.[27] Univision argues that Rincon *et al.*'s assertion that color discrimination in telenovelas violates Section 151 of the Communication's Act is frivolous. Nonetheless, it does not discount the Commission's concern about nondiscrimination in programming. At bottom, the Commission's interpretation of its own governing statute is entitled to considerable respect and consequently, it should investigate to what extent this rule is being violated by Univision.

Univision states that over 56% of its programming in 2006 was produced in the United States. This fact implies that 44% of its programming is thus foreign-produced. If any one of the major networks, ABC, NBC, CBS or Fox were to produce nearly half of their programming abroad, such act would seriously curtail much needed job opportunities for Americans in the

[26] Univision Opposition at 13, fn 39.
[27] Commissioner Powell declared "[i]f the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license is ultimately derived." *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 13 FCC Rcd. 23004, 23052 (1998) (separate statement of Commissioner Michael K. Powell).

media industry, and in particular, for minorities who are already greatly underrepresented both in front of and behind the cameras and in the board rooms. As such, when Univision, the largest Spanish-language broadcaster, admits that nearly half of its programming is foreign-produced, it is essentially conceding that it denies minorities employment opportunities in the broadcast industry.

C. BMPI HAS NOT SHOWN THAT IT HAS THE INTEREST OR ABILITY TO CURE UNIVISION'S GROSS DEFICIENCIES

BMPI fails to adequately rebut Rincon *et al.*'s concerns about BMPI's ability to be a licensee. BMPI state that the Petition relies on the Commission's former comparative criteria as a basis for opposing BMPI as a proposed licensee. It also points to Section 310(d) of the Communications Act as a defense. Certainly, Petitioners understands comparative proceedings are no longer used. [28] However, the 1965 *Policy Statement on Comparative Broadcast Hearings* and subsequent cases have held that past broadcast record and experience are good predictors of a broadcaster's ability to serve the public.[29] Indeed, the *Bechtel v. FCC*, 10 F.3d 875, 878 (DC Cir. 1993) case that BMPI cites held that the hiring of an experienced manager by a non-local applicant could serve the public as well or better than a local applicant. Moreover, if one were to apply the current Univision market dominance example to a hypothetical English-language market player, it would reveal an eye-opening illustration. Imagine if Viacom, for example, had control of 84% of the English-language television ratings and revenue but had not met the local needs of its communities of license, it is certain that the Commission would pause before turning over control of Viacom to an entity that has no previous interest in or experience with journalism, at least without some kind of affirmative showing of an ability to cure Viacom's poor

[28] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).
[29] *Id.* at 397-398.

performance. Accordingly, Spanish-language viewers and listeners are entitled to no less protection.

Further, Rincon et al. do not ask the Commission to consider the qualifications of another potential transferee or assignee than the one proposed on Form 315, in contravention of Section 310(d) of the Communications Act. Instead, Rincon *et al*. ask the Commission to consider the lapses of the transferor and whether they can be cured by the proposed transferee as against all potential purchasers pursuant to past proposal that suggest the Commission has this authority.[30]

Finally, BMPI, in its Opposition, made assertions that cause Rincon *et al.* to express additional concern over whether it to is interested in following Commission rules and worthy of the waiver request it seeks. BMPI questions whether "compliance with the media ownership rules can only be achieved through divestiture of stations",[31] evidencing that it too holds no intention to divest licenses that are currently over the local ownership rules, even if after these Applications and the associated transfer applications are granted, it is vested with such a significant market dominance.

II. REMEDIAL MEASURES ARE NECESSARY UNDER CONDITIONS OF MARKET FAILURE SINCE UNIVISION OVERWHELMINGLY DOMINATES THE SPANISH LANGUAGE MARKET

Univision notes that the Commission has rejected the notion of a separate Spanish-language market. However, since the decision where it fully addressed the concept, the Commission has recognized Spanish-language market in several instances, including in 2003,

[30] While the Commission does not consider a person other than the proposed assignee or transferee, it has determined that it can ascertain the process by which all Americans may be considered by the licensee as a potential purchaser. *See Public Notice of Intent to Sell Broadcast Station*, 43 RR2d 1, 3, n 3 (1978) ("We do not believe that such a violation [of Section 310(d) would occur since our enforcement would be limited to ensuring [under the terms of [Commissioner Hooks' "public notice of sale" proposal] that a seller published and filed proof of publication with its application.").

[31] BMPI Opposition at 4.

when it issued an Omnibus Report and Order on the Cross-Ownership of Broadcast Stations and Newspapers and treated English-language newspapers differently from (non-dominant) Spanish-language newspapers.[32] The Commission determined that it would exclude non-English language daily newspapers in areas where the dominant language of the market is not English from the newspaper/broadcast cross-ownership rules. By applying the cross-ownership rules to English-language newspapers, the Commission treated English-language media separate form Spanish-language media, thereby acknowledging market-based distinctions. Despite the FCC's reluctance to include language as a market definition-defining factor, it has vigorously protected Spanish-language broadcasters by granting them permanent waivers, and in effect acknowledging that Spanish-language media faces different marketplace challenges and conditions than English-language media.[33] Therefore, while it is true that in the 1995 ***Spanish Radio Network*** [34] proceeding the Commission refused to consider language as a factor in

[32] *In re Matter of 2002 Biennial Regulatory Review, Report & Order*, 18 FCC Rcd. 13620 (2003) After extensive review, the Commission determined that it would exclude non-English language daily newspapers in areas where the dominant language of the market is not English from the newspaper/broadcast cross-ownership rules. Currently, the multiple ownership rule defines a daily newspaper as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. This change in definition of daily newspapers to include non-English dailies printed in the primary language of the market and thereby applied the cross media limit to non-English daily papers in markets in which the language they are printed in is the dominant language of their market. The cross-ownership rules apply only to English-language newspapers unless it can be demonstrated that another language is dominant in that market.

[33] In 1978, the Commission granted the Spanish International Networks request for a waiver of the Network Representation Rule because at that time Spanish television stations were "fledgling" entities. *Network Representation of TV Stations in National Spot Sales; Request of Spanish National* Network, FCC 78-682, 43 Federal Register 45895 (1978); *See also* Amendment of §73.658(i) of the Commission's Rules Concerning Network Representation of TV Stations in National Spot Sales, 5 FCC Rcd 7280 (1990); *See Telemundo Commun. Group, Inc.* 17 FCC Rcd. 6958 (2002). In the NBC/Telemundo merger, the Commission granted NBC twice as much time to divest certain television stations as it had afforded ABC during its merger with Disney in the exact same market because Telemundo did not generate as much advertising dollars as the Disney stations and would be more difficult to sell.

[34] *Spanish Radio Network*, 10 FCC Rcd 9954 (1995) at paras. 8-10. Univision also contends that because the Petition challenges the transfer of four "Spanish-language broadcast stations to an entity that has none, it could not imagine conceivable harm to competition or diversity that such transfer could create." The harm comes from the cumulative effect of the several dozen broadcast stations owned by Univision that the transferee is poised to acquire. Indeed there are significant foreseeable harm to diversity and competition.

determining a separate Spanish market, more recent Commission decisions indicate it has been following a different path from the *Spanish Radio* precedent.

In any event, *Spanish Radio* should be overruled. It should be self-evident that because communications requires listeners and viewers to comprehend the messages transmitted to him or her, a company that transmits in a language that cannot be comprehended by some of those hearing it cannot include those persons in its market base. Thus, it should hold true that viewers who speak and understand only English are not, and should not, be considered part of the market for Spanish language television, and vice versa. It should be noted that persons who do not understand messages in their own language (i.e., persons under 12 years old) are not included in the market either under Arbitron and Nielsen protocols.

In this case, the Commission should heed to its own policy of stepping in when there are instances of market failure.[35] Indeed, in this case, where there is ample evidence that one entity controls such an overwhelming aspect of one particular market, demonstrate an example of market failure and a need for inquiry or investigation.

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[35] *See In the Matter of The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television* Stations, 10 FCC Rcd. 1076 (1984) When deciding to deregulate certain filing and recordkeeping requirements for television broadcast stations, the Commission determined:

> [w]e see no need to require documentation of non-entertainment programming other than issue-responsive programming. Thus, retaining the present logging obligations no longer serves any regulatory purpose. We have found that marketplace forces at work today will elicit adequate amounts of non-entertainment programming, without regulatory intervention. If at some time in the future, there is significant market failure with respect to such programming, we are certain this will be brought to our attention by such means as audience complaints. Having been alerted to any problem which arises, we can document its scope by any of several means, such as special studies, investigations and temporary logging requirements and take whatever regulatory action is needed.

See also Deregulation of Radio, 84 FCC 2d. 968, 976 (1981). In this proceeding that deregulated certain requirements of radio broadcasters, the Commission noted that though it selected to rely on the market to assure continued compliance with non-entertainment programming, it would intervene in cases when the market had failed.

III. PROCEDURAL MATTERS

Applicants' Oppositions to Rincon *et al.*'s petition are insufficient to warrant dismissing Rincon's petition. Applicants raise superficial arguments over issues that typically would not warrant denial or dismissal of a petition to deny. For example, the Applicants challenge the timeliness of the filing.[36] They assert that Rincon was not entitled to a 10-day extension[37] afforded to broadcasters and others who experienced problems with CDBS.[38] Applicants further suggest that Rincon *et al*. ought to have requested an "extension of time to file" or explain the slight delay in filing after the initial deadline. They were not required either of these things. Given that FCC procedural rules are inherently equally applicable to all parties irrespective of whom the movant is, citizens have equal footings as licensees with regard to procedural rules.[39] The FCC granted the filing extension to broadcasters without requiring each applicant that filed late to make a detailed showing of how and when it attempted and failed to access CDBS, or to explain why it filed after the initial deadline. Likewise, Rincon *et al.* were not required to do so.

[36] Univision Opposition at 6; BMPI Opposition at 2.

[37] The Applicants state the Petition was filed 13-days late, however, the 10-day extension did not include weekends or the Labor Day holiday as Univision notes. Univision Opposition at 7; BMPI Opposition at 2.

[38] Applicants state that Rincon *et al.*' did not demonstrate that they "tried and failed to Access the Applications", BMPI Opposition at 2, and show no cause for filing the document after the initial petition to deny deadline or to request a waiver. Univision Opposition at 7. On the contrary, Rincon *et al.* clearly stated the cause for the timing of its filing: that they "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.*" Petition to Deny, at fn 1. Implicit in this statement is an inference that Petitioners attempted to, but failed to access the necessary information. There is no requirement that Rincon *et al.* state any "magic language" that Applicants seem to believe is required. Univision goes as far as to assert that Rincon *et al.* could have accessed the applications from the public inspection file or from opposing counsel. However, neither solution is practical. Both options would have required Rincon *et al.* to make multiple inquiries to opposing counsel or visits to the file until the filing was actually made because Rincon *et al.* had no inclination when the applications would have eventually been filed. Further, the purpose of public access to CDBS is to avoid the inconvenience and impracticalities in the first place.

[39] The principles of *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (DC Cir. 1966) ("UCC I") establish this equity and in subsequent cases: *Communications of the United Church of Christ v. FCC*, 425 F.2d 543 (DC Cir. 1969) ("UCC II"); *Rainbow/PUSH Coalition v. FCC*, 396 F.3d 1235 (DC Cir. 2005); and *Stone v. FCC* , 466 F.2d 316 (DC Cir. 1972).

As the Commission and several media reports noted, the CDBS was not available to the public.[40] Petitioners, being members of the public, were in the class of parties that could not access the filings during the months the system was down and therefore should be afforded the same procedural rights as licensees.

A. THE APPLICANTS' FOCUS ON FORM OVER CONTENT IS NOT SUFFICIENT TO DEFEAT THE PETITION

Applicants accuse Rincon *et al.* of misstating material facts.[41] They themselves misstate significant facts by asserting that the pleading is unsupported by affidavit or declaration.[42] In fact, the pleadings include two compelling declarations sworn to under perjury of law by persons with personal knowledge of the facts contained in the Petition.[43] Implicit in the declarants' statements is a challenge to Univision for failing to respond to its local needs. Local communities need more than nationally-produced novellas, but rather they need to be able to rely on their local broadcasters to relay school closings during increment weather, the location of meetings and gatherings that can affect their political standing in the community, the opening of new places of worship, and the results of local races for city council, for example. The only issue Applicant raise on the matter is that the declarations do not follow a particular format Applicants

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[40] *See* Radio World, Aug. 10, 2006, (noting that "during the period while the CDBS was not working, "some applicants, permittees and licensees may have experienced difficulties in timely filing amendments, settlements, and contracts. The Bureau will waive these requirements in appropriate circumstances," the commission said in the public notice."); Ohio Media Watch, http://www.michiguide.com/archives/2006/08/, (noting that it could not verify that a station swap in Ann Arbor, Michigan was occurring because the FCC's CDBS database system is currently unavailable.; *See also* Americanbandscan.blogspot.com, Aug. 16, 2006 posting (noting that it is "trying to pull up the CDBS right now (Wednesday afternoon)" but that there is a "returning a page indicating a hardware failure has occurred.").

[41] Univision Opposition at 8-9; BMPI Opposition at 2.

[42] BMPI Opposition at 2, Univision Opposition at 2-4.

[43] BMPI and Univision point out that the declarations were not attached to the corrected pleading. The Commission should note that those were not attached because they were not changed in any respects. Univision and BMPI do not refute they received the declarations. In fact, they cite and challenge the declarations in their Oppositions.

believe is required.[44] It is not necessary that affidavits attached to petition to deny be couched in any particular words or phrased in any particular manner."[45] The effect and intent of the declaration are provided and sufficiently support the petition and are in a format similar to hundreds submitted to the Commission in years prior.

Applicants further challenge the extent to which Rincon *et al.*'s Petition is based on "personal knowledge". Nonetheless, there is no requirement that a viewer or listener has to know all statements/facts based on personal knowledge in a petition to deny.[46]

Section 309(d) of the Communications Act, 47 U.S.C. §309(d), provides that "allegations of fact" in a petition to deny:

> "shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials therefore shall similarly be supported by affidavit."[47]

Thus, it is sufficient for a listener or viewer to state his own personal knowledge of the facts necessary to establish his standing. The declarants are not expected to also be experts on the science and statistics of broadcasting. Those kinds of facts are established through citations to official records, to the studies themselves, or to the application. Under Univision's construction,

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[44] Univision accuses Rincon et al. of purposefully phrasing its declaration so as to avoid attesting to the facts in the petition simply because the petition states the foregoing "Declaration is true and correct". The allegation is absurd and lacking in substance for several reasons. First, the petitioners and declarants are the same and Univision does not explain what would be the benefit to declarants for putting their name and credibility on the line by filing the petition in the first place and then purposefully avoiding to swear and attest to its accuracy. It also ignores the fact that similarly drafted and worded petitions have passed muster and that the Commission has not dismissed declarations for something trivial as the arrangement of the wording of a declaration.

[45] *In re Columbia Broadcasting System, Inc.*, 46 FCC 2d 903 (1974).

[46] If the Commission had to rely on the "personal knowledge" of citizen groups and members of the listening and viewing public to act on licensee behavior it would never be able to root out licensee misconduct. *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (DC Cir. 1985) ([i]t is fundamentally unfair for [the]FCC to dismiss a challenge where the challenging party has seriously questioned the validity of a representation and the defending party is the party with access the relevant information."); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 509 (DC Cir. 1988)(holding that it is unfair to reject a petition to deny without further investigation where "the licensee had exclusive access to much of the information at issue…it would be difficult [for the petitioners to deny] to adduce more specific evidence than they already have.").

[47] 47 U.S.C. §309(d). *See also* 47 C.F.R. §73.3584(d) (to the same effect).

for which there is no case support, a local listener or viewer would need to have personal knowledge of every fact in an application (including the contents of FCC applications filed by the applicants) in order to challenge the application. Under that theory, the only party that would be eligible to challenge an application would be the party that filed the application. There has never been a requirement that a viewer or listener show anything other than his local residence, his status as a viewer or listener, and in a general way, why he would have been aggrieved if the petition is not granted.[48]

B. THE APPLICANTS HAVE NOT SHOWN THAT PETITIONERS LACK STANDING

As with Applicants' attack on the form of the declarations their challenge to Rincon *et al.*'s standing also lack merit.[49] Univision states that Petitioner doesn't identify any "transaction specific harm" that would result in the transfer. However, the Commission does not require petitioners to meet such a burden. As the Court in UCC I pointed out:

> It is the public in individual communities throughout the length and breadth of our country who must bear final responsibility for the quality and adequacy of television service -- whether it be originated by local stations or by national networks. Under our system, the interests of the public are dominant. The commercial needs of licensed broadcasters and advertisers must be integrated into those of the public. *Hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of the television service* which stations and networks provide and which, undoubtedly, has a *vast impact on their lives and the lives of their children*. Nor need the public feel that in taking a hand in broadcasting they are unduly interfering in the private business affairs of others. On the contrary, *their interest in television programming is direct* and their responsibilities important. *They are the owners* of the channels of television -- indeed, of all broadcasting. Indeed, the petition and supporting declarations reference several specific harms.[50]

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[48] *See, e.g., Kathryn R. Schmeltzer*, DA 04-570 (Chief, Media Bureau, Feb. 27 2004) at 3.

[49] Univision Opposition at 4-5; BMPI Opposition at 3-4.

[50] UCC I at 1003. One of the author's of BMPI's Opposition has begrudgingly acknowledged the current validity of UCC I, even while questioning, and in essence, urging Courts to discontinue upholding the principles of listener standing. *See What is Left of Listener Standing? The D.C. Circuit's Continuing Flirtation With a Dying Doctrine*, 14 CommLaw Conspectus 403, Barry H. Gottfried and Jarrett S. Taubman (2006).

Consequently, Rincon *et al.* have met the requirement of Section 309(d)(1) of the Communications Act by pointing out that over the past 20 years, Univision has failed to provide sufficient local programming to the detriment of its Spanish language audience that relies on such programming for critical local information. Such malfeasance has negatively affected local communities and individual residents of those communities, such as Rincon *et al.* Further, as asserted in the Petition, Rincon *et al.* does not believe the proposed inexperienced transferee will be able to correct Univision's deficiencies and thus a grant of the application would further exacerbate the current harm. If the Commission were to deny the Applications, Rincon *et al.* and similarly situated listeners and viewers in Albuquerque, Dallas and throughout the United States would be saved from a greater harm of the substandard programming provided by the current licenses holders. Rincon *et al.* contest that Univision is willing to satisfy the public interest by providing programming to satisfy the needs of the local community, even though it has the ability to do so. Notwithstanding, Petitioners believe that BMPI is even less willing and able to serve the public interest. If the Commission were to deny the application, Rincon *et al.* foresee that at least three options would become available to assuage or cure some of their injuries: (1) Univision may decide against transferring its licenses immediately and, in light of the decision, begin programming in the public interest in order to position the company for a potential future transfer; (2) Univision may re-file its application to transfer the licenses to BMPI or another owner that directly addresses public interest local programming needs and concerns and shows a desire and ability to provide a cure Univision's deficiencies; and (3) Univision may decide to transfer its licenses to another entity, unlike BMPI, which can and will serve the public interest.[51]

[51] Option 3 does not implicate 310(d) of the Act, which says that the Commission cannot consider a specific alternate buyer. Obviously, though, by exercising its power to deny an application under Section 309 when no

Thus, as shown in the Petition, Rincon *et al.* have satisfied the standing requirement. A party seeking Article III (judicial) standing is held to a higher standard than a party seeking administrative standing.[52] Univision suggests that because the FCC has cited court cases on Article III standing in discussing administrative standing, the FCC must have decided to conflate the two. However, that is not the case.

IV. CONCLUSION

The Petition to Deny presents sufficient evidence for the Commission to designate the above-captioned applications for hearing and thereafter deny the applications. However, if the Commission is not yet persuaded that a hearing is necessary, it should conduct a thorough investigation and afford Petitioners an opportunity to participate in the investigation.[53]

"competing" application is before it and a petitioner to deny does not identify, much less seek, sale to that party, the Commission is not offending 310(d).

[52] *See California Ass'n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (DC Cir. 1985); *See also American Legal Foundation v. FCC*, 808 F.2d 84 (DC Cir. 1987); UCCI; *See also Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application,* 82 FCC 2d 89 (1980)(citing *Warth v. Seldin*, 422 US 490, 511 (1975)).

[53] In *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) ("*Bilingual II"*), the Court held that when the evidence was insufficient to warrant a grant of an application and the licensee had exclusive access to all of the relevant evidence it would need to make a final determination, the Commission is expected to conduct an investigation and elicit from the applicant the information necessary to enable the agency to make an affirmative determination that a grant of the application would serve the public interest. *Bilingual II* at 628-630.

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September 29, 2006

CERTIFICATE OF SERVICE

I, Jeneba Ghatt, certify that, on this 29th day of September 2006, I caused to be served upon the parties listed below by electronic and first class mail, postage prepaid, copies of the foregoing *Reply to Oppositions to Petition to Deny*:

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