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

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

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

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

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

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

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

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

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

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

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

The Applicants claim that this merger will give them the scale and scope to compete more effectively with English-language media conglomerates for advertising dollars. As the 5^{th}-largest television network, Univision already is a major media giant – well ahead of UPN, WB and other networks. Univision's market capitalization is \$7.8 billion, with 2002 net revenues of more than \$1 billion. Univision's local stations are often the leading station in their television market, including the top station overall in top television markets like Los Angeles and Miami.[1] Its advertising rates are

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

commensurate with its 5th-place ranking, and any gap in advertising revenues is narrowing rapidly.[2] Hispanic television ad revenues grew by more than 20% in 2002, more than twice the 7.4% growth of all broadcast television.[3] Univision simply does not need extra bulk to play in the media giant arena.

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

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

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

Attempts to typecast this merger as one between a pure television company and a pure radio company are tortured and narrow. No other media company has anywhere near the combined influence of Univision's leading television, cable, music, Internet and radio properties over its respective audience. Univision has far more extensive relationships in program supply and distribution than other media companies, and Univision benefits from practices which are not tolerated for other media companies. Nor does Univision have any close competitor to keep it in check.

Already, Univision's multifaceted holdings make it a major media conglomerate.[4] Reaching 97% of U.S. Hispanic households, the Univision Network is the leading Spanish-language television network, with more than 70% audience share and twice as many full-power affiliates than its nearest Spanish-language competitor. It has a higher rating among Hispanic households than its next four competitors

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

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

[4] *See* Univision 2002 Annual Report.

combined. The Univision Network consistently airs all twenty of the top 20 programs on Spanish-language television virtually every week. Univision also owns the 3rd-largest Spanish television network, Telefutura, the fastest growing television network in the country. Univision owns 50 TV stations (32 full-power and 18 low-power) which reach more than 40% of the country. It operates the leading Spanish-language cable network, Galavision, reaching 90% of Hispanic households. In addition to its television production business, it owns the country's leading Latin music recording and publishing company, averaging five of the top ten best selling albums on the weekly Latin charts. In addition, Univision owns the nation's leading Spanish-language Internet site, with an 80% market share.

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

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

HBC is the largest Spanish-language radio operator in the U.S. with 67 radio stations. It has one of the largest Spanish-language radio broadcast networks, and maintains a network of community-focused bilingual websites. In 2002, it controlled 51% of Spanish-language radio revenue in the top ten markets, according to BIA. Its annual revenues are nearly twice that of its nearest Spanish-language radio competitor. HBC ranks as the top radio station overall in several major markets.[5] In its own words, HBC boasts: "In the Hispanic arena HBC is larger than Clear Channel, Infinity or ABC in the general market."[6]

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

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

[6] SBS June 16 Letter, Att. 3, *HBC Si Presentation* at 10.

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

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

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

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

This transaction presents unique public interest concerns for diversity, competition and localism in Spanish-language broadcasting that are not accounted for under our media ownership rules. Ironically, under both the old and the new media ownership rules, Spanish speakers are not afforded the full weight of protections of English speakers. Spanish newspapers, formerly excluded from application of the rules, are counted for cross-ownership purposes under the new rules only if the newspaper is in the dominant language of the community. That the media ownership rules fail to account fully for language concerns shows why the majority's preference for bright-line media ownership rules may not sufficiently protect the public interest. Case-by-case determinations and full consideration of special circumstances presented by transactions like the one before us offer more reliable means of protecting distinct segments of the public against undue concentration on the public airwaves.

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

In any event, where the record shows substantial questions as to the public interest outcome of applying the rules to the particular facts in issue, we are statutorily required to conduct further analysis of the transaction's public interest implications. The Communications Act requires that we make an affirmative finding, for each application before us, whether the public interest, convenience, and necessity will be served by granting the application.[7] Regardless of rote application of our media ownership rules, if special circumstances are presented to us, our ultimate statutory obligation is to consider the potential benefits and harms of a transaction on the listening and viewing public.[8]

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

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

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

According to major surveys, more than 45 percent of U.S. Hispanics are linguistically Spanish-dominant, meaning they exclusively or predominantly speak Spanish.[9] A study by the Pew Hispanic Center reports that 47% of U.S. Hispanics – 18.2 million people – are Spanish-dominant, with 40% – 15.5 million – speaking and understanding "just a little" (29%) or "no" (11%) English.[10] Univision itself highlights Nielsen Media Research findings that 45.9% of U.S. Hispanic adults – 17.8 million people – are Spanish-dominant, with 17% speaking only and 28.9% speaking mostly Spanish.[11] Data compiled by Nielsen Media Research indicates that in the top ten Hispanic markets, from 43.7% (Sacramento) to

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

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

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

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

11 Univision, "*The U.S. Hispanic Market in Brief 2003*."

67.7% (Miami) of Hispanics are Spanish-dominant.[12] Univision also cites census figures that between 64.5 to 84.9 percent of U.S. Hispanics in various age groups speak Spanish at home.[13] For approximately 18 million Americans, Spanish is more than a language preference – it is the only language in which news and information broadcast over the airwaves are best comprehended.

This primary language use understandably correlates with media use. Spanish-dominant Latinos, as well as bilingual Latinos, rely heavily upon Spanish-language broadcasting, especially for news and information.[14] The Pew/Kaiser study concludes that "Spanish language media are an important source of broadcast news for a *majority* of Latinos."[15] Specifically, 38% of Latinos report that they usually listen to and predominantly watch Spanish-language news programs, including one in four who *only* tune into Spanish-language broadcasts," with an additional 26% watching news in Spanish and English equally.[16] 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.[17] For all programming categories, 24% of bilingual viewers watched exclusively or primarily Spanish television.[18] In fact, 33% reported viewing Spanish-language networks all the time, with an additional 24% viewing them most of the time.[19] According to Nielsen, "a substantial share of viewing" in Hispanic homes is Spanish-language television.[20] Arbitron reports that Hispanics spend 68% of their time listening to Spanish radio.[21]

The reliance of a sizable number of Latinos on Spanish-language media is likely to continue. The number of Hispanic American television households has grown 19% from 1996 to 2001, while the number of Spanish-dominant Hispanic Americans has grown at a greater pace, 29%, over the same time period.[22] 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.[23]

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12 *See* SBS June 20 Letter, citing Nielsen Media Research, "Nielsen Media Research's Hispanic Local Markets."

13 Univision, "*The U.S. Hispanic Market in Brief 2003*."

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

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

16 *Id*.

17 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.

18 *Id.* at 1.

19 *Id.* at 8

20 Nielsen Media Research, "Nielsen Media Research's Hispanic Local Markets."

22 Arbitron, Hispanic Listening Preference, Dec. 2002.

23 *See* Nielsen Media Research, www.nielsenmedia.com/ethnicmeasure/Hispanic-american/hisp_pop_growth.html. *See also* Univision, "*The U.S. Hispanic Market in Brief 2003*," stating that "Spanish will still be spoken at home into the 21st Century."

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

Advertisers and others who want to reach the growing Hispanic community rely uniquely on Spanish-language broadcasting. Reflected by a 34% increase in spending in Spanish-language media in 2002, advertisers and advertising agencies have made strategic decisions to specialize in targeting the fast-growing Hispanic audience.[24] Advertisers have set aside separate budgets for Spanish-language media, for, as Evan Shouten of Charles River Associates explains, advertisers "cannot effectively substitute Anglo for Spanish language media."[25] With almost $1.6 billion in billed revenues in 2001, and $2.46 billion in 2002, a large and vibrant community of advertising agencies now serves the Spanish-language media market.[26] 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.[27] Univision admits that it is attracting major consumer product company advertisers, including companies buying advertising across all of its media platforms, reflecting that "major advertisers have discovered Spanish-language television advertising is a more cost-effective means to target the growing Hispanic audience than English-language broadcast media."[28]

Spanish-language broadcasting also serves a unique role in reaching Hispanic Americans in the political process. In the last presidential campaign, more than $1.3 million was spent on Spanish-language media by the candidates, while an additional $2 million was spent by the parties' national committees.[29] Both sides commissioned Hispanic media consultants to produce unique ads that would be aired only on Spanish-language television stations. More than $16 million was spent on Spanish-language television advertising in the 2002 election by gubernatorial, Senate, and House candidates. The political process reinforces that Spanish-language broadcasting reaches Latino/Hispanic Americans in a unique and fundamental way.

Evidence also suggests that English-language broadcasters do not react to changes in advertising rates or practices of Spanish-speaking broadcasters. As Jeffrey H. Smulyan, Chairman and CEO of Emmis Communications Corporation explained on the record, "English language and Spanish language

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25 *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.").

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

27 *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).

28 *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.

29 Univision 2002 Annual Report at 9, 10.

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

radio stations do not generally compete with each other. . . . we do not consider the Spanish stations' rate cards in establishing our sales prices. The prices they charge simply do not have any influence on the advertising markets in which we operate."[30] These viewing habits and commercial advertising practices lend considerable support to the notion that a distinct set of viewers and advertisers rely on Spanish-language broadcasting.

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

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

In its antitrust review focused primarily on radio, the Department of Justice found that the Spanish-language radio market was separate from the general radio market.[31] 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."[32] 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.[33] Thus, the provision of advertising time on Spanish-language radio stations was deemed the relevant product market for antitrust purposes.

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

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

The majority's cursory analysis also runs counter to prior Commission recognition of the distinct audience served by broadcasters who broadcast in a language other than English. Just last year, the Commission found that Spanish-language stations "do not compete directly" with English-language

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

32 *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).

33 *Id.* at ¶ 14.

34 *Id*.

media.[34] 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."[35] 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*."[36]

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."[37] 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.[38] As mentioned above, the Commission excludes foreign-language newspapers from media ownership protections unless the newspaper is in the dominant language of the community.[39]

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.[40] In affirming the exemption for foreign-language stations, the Commission explained that to do otherwise "we must hold that the average television viewer would find a film, news program, or sporting event of equal interest regardless of whether it is presented in English or Spanish. Suffice it to say we cannot so decide: *a program broadcast in a foreign language is of little interest to any but those fluent in the language*."[41] Applying this principle in 1993, the Commission stated: "Unlike the switch from religious to commercial

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

36 *Id*. at 6977.

37 *Id.* at 6978-79 (emphasis added).

38 *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.

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

40 *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).

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

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

programming, *a language change makes programming suddenly understandable to a far greater audience*, who were previously precluded from utilizing the station's services."[42]

The Commission had a similar recognition of the importance of language, particularly Spanish, in the closed captioning context. Originally, the Commission exempted all non-English language programming from its requirements. On reconsideration, having been persuaded that Spanish was different due to the size and the growth rate of the country's Spanish speakers, the Commission concluded that Spanish-language programming should be closed captioned.[43] Specifically, the Commission stated, "[u]nlike most other non-English language programming, there already exists a substantial market for Spanish-language programming in the United States."[44] The majority today fails to account for its abandonment of this longstanding pragmatic understanding of the primary importance of a broadcast language.

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

In numerous sales presentations and corporate filings, Univision itself extols the distinctness of the Hispanic viewer and Spanish-language media. In its Annual Report, Univision remarks, "major advertisers have discovered that Spanish-language television advertising is a more cost-effective means to target the growing Hispanic audience than English-language broadcast media."[45] It further notes that "the strong Spanish-language retention among Hispanics indicates that the Spanish-language media has been and will continue to be an important source of news, sports and entertainment for Hispanics."[46]

In terms of demographics and viewing habits, Univision emphasizes the large Spanish-dominant population that does not turn to English-language media. In promoting its "significant exclusive audience," Univision notes that 68.3% of its adult San Francisco audience did not watch any English-language stations, like 67.7% of Dallas, 65.9% of Los Angeles and 52.2% of New York audiences.[47] In South Florida, according to Univision, 67% of the 1.6 million Hispanics in South Florida are Spanish-dominant, meaning that "if you do not target Hispanics over 1,055,000 Hispanics or 27% of the total Miami/Fort Lauderdale population will not be effectively reached by your general market television advertising efforts."[48] Univision boasts that its station "delivers a significant exclusive audience. . . 51.9% of WLTV-TV's audience does not watch any English television at all during the week!"[49]

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

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

45 *Id*.

46 Univision 2002 Annual Report at 10.

47 *Id.* at 9.

48 SBS June 16 Letter, Att. 1, at 21 "Reaching the Lucrative U.S. Hispanic Market" Presentation. ("*Univision National Sales Presentation*").

49 SBS June 16 Letter, Att. 1, at 21 "Univision Reaching the Lucrative South Florida Market" Presentation. ("*Univision South Florida Presentation*").

50 *Id.*, Att. 1, *Univision South Florida Presentation* at 31

According to Univision, the majority of Hispanics prefer to get information in Spanish and they want to be marketed to as Hispanics.[50]

Univision also highlights its unmatched platforms and success in attracting the Spanish-speaking audience. Univision touts that the top 78 shows among Hispanics aged 18-49 are on Univision.[51] Univision explains that its programming "is more culturally relevant to Hispanic audiences."[52] Univision also points out that for Hispanics commercials in Spanish are five times more persuasive than commercials in English, including increased awareness and message comprehension. As Univision Television Networks' president of entertainment Mario Rodriguez explains, "Hispanics choose Spanish-language television over general-market TV every hour of every day of the year, and that happens because of the cultural connection and the cultural relevance available only here."[53]

HBC makes similar claims with respect to the Spanish-speaking radio audience: "You can't reach HBC listeners on general market stations";[54] "On average, Spanish radio stations duplicate less than 10% with English language stations";[55] and "Radio has a much stronger story to tell in the Hispanic market than it does in the general market."[56] Noting that over 70% of U.S. Hispanics prefer to speak Spanish at home, HBC even states that "a large segment of the audience is driven by dependence and not just preference."[57] It notes that "Hispanics are not reached effectively on general market media and you cannot reach the U.S. Hispanic effectively with Spanish TV alone."[58] The direct statements of the Applicants strongly suggest that a distinct Spanish-language market exists to serve viewers and advertisers who are not effectively served by English-language media.

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

The majority's analysis overlooks those in the Hispanic community that rely on Spanish-language media as more than a linguistic preference. The Order barely addresses the broadcasting needs or desires of people who speak only or mostly Spanish, and the effect of the proposed transaction on this portion of our nation's population. The Order dismisses this population and boldly asserts that the majority of Spanish speakers watch English-language media and thereby have *more* media options than the general population. Inherent in this conclusion is the recognition that English speakers do not consume Spanish-language media, proving the very point that proficiency in a language is a threshold consideration for consumption of broadcasting. Even if Spanish speakers have more choice of local news and information sources today than in the past, that is hardly sufficient analysis to reduce the number of independent

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51 *Id.*, Att. 2, *Univision National Sales Presentation*, at 16.

52 *Id,.* Att. 2, *Univision National Sales Presentation*, at 25.

53 *Id.*, Att. 2, *Univision National Sales Presentation*, at 23.

54 "Spanish-Language TV Hits Stride at Upfront Market," Television Week, May 26, 2003 at 16.

55 SBS June 16 Letter, Att. 4, HBC Hispanic Radio Presentation at 25.

56 *Id.*, Att. *3 HBC Si Presentation* at 4.

57 *Id.*, Att. 4, *HBC Hispanic Radio Presentation* at 14.

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

59 *Id.*, Att. 4, *HBC Hispanic Radio Presentation,* at 38.

voices currently available to them without further examination of the effect of the transaction on competition, localism, and diversity for those viewers.

According to the majority, the transaction's threat to competition and diversity is mitigated because many Hispanics are bilingual and listen to English-language media. While this is undoubtedly true for some, it is not true for all and should not end our analysis of this transaction. There is simply no denying that for a significant portion of the population, Spanish and English media are not interchangeable. More than 45% of Spanish speakers living in the United States speak only or principally Spanish. For them, and the advertisers that want to reach them, English media is not an adequate alternative. Even for bilingual viewers, only 41.6% report having Secondary Audio Program (SAP) language translation capability on their television sets and only 17% report using SAP often.[59] This relatively low use of SAP use is not surprising, given the inconsistent availability of SAP programming, particularly for news and public affairs programming. Despite early optimism, a number of broadcasters that tried to use SAP a few years ago have now stopped. ABC, for example, dropped SAP audio track for *World News Tonight* after one year because of its costs and lack of discernable effect on viewership in Hispanic households.[60]

The majority then falls back on the fallacy that language is just another format, meaning that any broadcast station is potentially substitutable for another. This ignores the threshold factor of whether the language in which the broadcaster transmits its message is comprehendable to the listener. Preserving independent Spanish-language sources of news and information is critical because language itself is critical to the comprehension of the broadcast message. Programming in Spanish is not simply another entertainment format, such as smooth jazz or rock, classical or country, to people who do not speak English. HBC agrees, stating in sales materials that "Hispanic Radio is not a format – individual stations are programmed with a wide range of music and information formats designed to appeal to the local market."[61] Spanish programming is comprised of numerous formats, including regional Mexican, Spanish news/talk, and Tejano. The majority's reference to Commission policy on licensee changes in entertainment format is simply immaterial to the question of whether this proposed transaction serves the public interest. The language in which a station broadcasts translates into whether its content or message is heard and understood – whether that relates to cultural issues in subtle ways, or to important public policy issues in a direct and explicit way.

The majority's determination that language is simply a format precludes a more sophisticated examination of other possible approaches to broadcast language. For example, some have suggested that Spanish-language broadcasting could form a submarket within a larger general media marketplace. In examining the present options available to Spanish-only viewers and advertisers wanting to reach this audience, the weight of the evidence is that Spanish media outlets are not substitutable with English outlets and instead comprise a distinct market, or submarket, segment.[62] As the Department of Justice

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60 SBS June 20 Letter, citing Tomás Rivera Study at 4.

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

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

63 The concept of a submarket is used in other contexts. For example, the Commission treats noncommercial stations differently from commercial stations, even though both are now fully counted within a general media

found, a price increase by an entity with market power in Spanish-language media is not likely to be offset immediately by new entry into that market by English-language broadcasters. Yet, Spanish outlets could be encompassed within a larger media market for overall media ownership purposes to the extent that over the long term, all media outlets could potentially convert to a different broadcast language. This recognizes that, over the long term and for bilingual viewers, Spanish and English broadcasters may be potential competitors and may compare ratings and monitor the other's performance. Nevertheless, the majority fails even to consider this approach and whether it offers a more realistic assessment of the nature of competition in today's broadcasting environment than the majority's "one size fits all" approach.

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

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

Today's decision delivers an unfortunate setback in the Commission's application of its public interest standard and reaches an outcome-driven decision that badly disserves the U.S. Hispanic community. The acquisition of the leading Spanish-language radio owner by the dominant Spanish-language media conglomerate will sharply reduce media competition and the diversity of viewpoints available to Spanish-speaking Americans. The merger threatens to increase exponentially the already high barriers to entry into Spanish-language media and to exacerbate a history of activity by Univision designed to thwart competition and further entrench its leading position. Given the increased concentration in Spanish-language broadcasting, whether considered as a matter of diversity or competition, we cannot conclude that the application before us serves the public interest.

After the merger, the combined entity will have an unmatched array of media platforms commanding two-thirds of the rapidly rising broadcast advertising dollars targeting the Hispanic population. Univision will become the gatekeeper to Spanish-language consumers in numerous key markets, with as much as 80% of the Spanish television and radio audience in many top Hispanic markets. In seven of the top ten markets, the merged firm's market share will exceed 60%, and in two markets it will exceed 70%.[63] This essentially means that there is little room for new, independent broadcasting companies, tailored to Hispanics, to emerge and compete.

The merger will result in fewer places for Spanish-only viewers to find a diversity of viewpoints or Univision's competitors to promote their offerings. Spanish-language media already is concentrated, and this transaction places diversity even more at risk. The top ten Hispanic markets currently average

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market for media ownership purposes. This commercial/noncommercial distinction is far more content-based than a distinction based on language.

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

3.3 television stations, 5.7 AM stations and 6 FM stations.[64] Spanish-language newspapers and cable networks do not offset this loss of broadcast competition and diversity. More Hispanics watch television and listen to radio than the general population, and there is no daily Spanish-language newspaper in 14 of the top 20 Spanish-language markets.[65] Univision itself notes that fewer Hispanic households subscribe to cable than the general U.S. population.[66] That Hispanics turn to television and radio more frequently than the general population means that our media ownership rules cannot be presumed to reflect consequences of cross-media concentration accurately. It also means that competitive effects inside the handful of Spanish broadcasting networks take on greater importance.

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

Telemundo further argues that it could be shut out of the radio advertising market, a key promotional avenue for its television programs. The rejection of television advertising by radio stations owned by or aligned with Univision not only stifles competition but also runs counter to typical corporate behavior in a fully functional marketplace. Telemundo relies heavily on radio to attract new viewers to its television programs, spending 74% of its total corporate advertising budget in 2002 on radio.[67] Of that amount, 47% was spent on HBC stations. After the merger, this advertising channel could potentially be foreclosed from Telemundo, as Univision's affiliated entities have done in the past. Entravision radio stations in key markets including El Paso and Denver have previously rejected all Telemundo advertising. As Univision's largest affiliate group, and with significant ownership interests held by Univision, Entravision's interest in furthering Univision's dominance clearly outweighed its interest in receiving proceeds from a major industry advertiser. This signals the near monopolistic market power that Univision already wields in Spanish-language broadcasting.

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

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

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

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

The record also contains largely unrebutted allegations that Univision precludes its talent, both music and television personalities, from appearing on rival networks, even for a mere interview or news program appearance.[68] Affidavits on the record state that this practice extended both to unscheduled or impromptu interviews as well as scheduled sessions. Even appearances at industry awards shows aired on rival networks were passed over by Univision or Univision-affiliated talent. This is not merely a loss to Telemundo or Univision's other television rivals – it results in a loss of diversity to the public. These restrictive practices are not tolerated on English-language media and run counter to a network's interest in widely promoting the talent that appears on shows run by the network. This again signals Univision's current market power, which will only increase through outright ownership of a radio distribution channel.

These practices demonstrate specific public interest harms that could be exacerbated by the addition of HBC's radio assets to Univision's many holdings. Adding radio furthers Univision's ability to restrict the appearance of radio personalities on rival television networks or to shut out artists at competing record labels from promotional opportunities on Univision's radio and television outlets. For Univision's television rivals, the potential to be shut out of radio advertising not only on Entravision, but now on HBC as well, leaves them without significant promotional outlets, and removes an independent radio group to counter Entravision's exclusionary tactics, and likewise with Univision's radio rivals. Post-merger, Univision and Entravision will control 55 percent of the Spanish-language radio stations in Telemundo's major markets, with nearly 90 percent in Phoenix and Dallas.[69]

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

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

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

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

70 Telemundo Aug. 21 Letter, Att. 6.

affects the ability of Spanish speakers to receive information from a number of independent, diverse sources.

That more than 20 Spanish-language satellite and cable networks serve the Hispanic community in addition to the few Spanish-language broadcast television networks is not an adequate answer. Univision Executive Ray Rodriguez apparently agrees, stating that "Hispanics in the United States still don't have enough choices."[70] More importantly, just a few months ago, the Commission excluded satellite and cable networks from its cross-ownership analysis in order to focus on sources of local programming, which the Commission found paramount in its diversity analysis. Against that finding, the majority offers no explanation for why the availability of national Spanish-language satellite or cable networks should be presumed to fulfill the right of Spanish speakers to receive diverse local news and public affairs programming over the public airwaves.

There is no basis to believe that new entry will ameliorate the harms to competition and diversity threatened by the proposed merger. The Department of Justice found that entry of new Spanish-language radio stations "would not be timely, likely, or sufficient," as station licenses are scarce and expensive, and reformatting of stations was unlikely to offset the competitive harm.[71] Rejecting the Department of Justice's conclusions out-of-hand, the majority fails to analyze other possible approaches adequately. Not only does the majority ignore the financial risk, time, expense and specialized knowledge involved in switching a broadcast station to a different broadcast language, it also assumes without further analysis that switching the broadcast language of a television station is just as easy as the examples it cites of switching a radio broadcast language. In fact, most of the radio conversions from English to Spanish over the past three years were accomplished by Spanish-language broadcast incumbents, not new entrants.[72] SBS points out that the limited availability of stations and the expense of buying an existing station in the nation's top markets, the difficulty in identifying and recruiting talent, and the required knowledge and contacts in the Spanish-language advertising community already discourage entry.[73] While reformatting to a different broadcast language is possible, and might be more likely over the long term with price increases or other actions Univision could take, there is no denying that barriers for a new entrant are significantly raised by today's action allowing the combined resources of Univision and HBC.

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

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

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71 Univision Nov. 2002 Earnings Conference Call.

72 DOJ Complaint at ¶ 27.

73 SBS July 14 Letter at 2.

74 *Id.* at 7, Sokol Decl. at ¶¶ 11-12.

The Commission's network representation rule bars TV station affiliates from being represented by their affiliated network in the spot sales market for non-network advertising time.[74] The rule addresses two areas of competitive concern: 1) competition among national rep firms for station clients (where a station might choose the network's rep to improve its chances of getting or retaining a network affiliation); and 2) competition between networks and national spot advertising (to avoid a basic conflict of interest). A national rep firm often advises its client stations as to the appropriate level of their national spot rates. Without the rule, a network could act in the network's interest by assuring reasonably high spot rates to reduce competition with network advertising rates. Network-associated rep firms also can influence station programming decisions in favor of the network's program rather than a national spot program.

In 1978, Univision, then SIN (Spanish International Network), received a temporary waiver to serve as "national rep" for 9 stations in the sale of non-network time on a national or regional basis.[75] At that time, there were only 12 Spanish-language TV stations in the country, with total national and regional revenues of less than $10 million. Denying the waiver, the Commission reasoned, would have left the stations with no choice of a representative. The Commission noted that the Spanish stations were "fledgling" entities just getting started.

In fact, the Commission at that time stated:

> There is one other aspect of the matter to be considered: *to the extent that the Spanish-speaking population forms a distinct audience or "market"*, it is apparent that there is a high degree of control of the TV stations serving it, with SIN's principals involved in six of the 12 or 14 stations, 10 of them presenting SIN programs, and SIN serving as national rep for 9 of them. *It may be that we should not consider any change in the rule, or waiver, which would tend to increase or even to continue this degree of concentration of control.*[76]

In 1990, the Commission made permanent the temporary waivers it had granted Spanish station operators.[77] It did so on the basis of the public interest benefits of "encouraging the growth and development of new networks; fostering foreign-language programming; increasing programming diversity; strengthening competition among stations; and fostering a competitive UHF service."[78]

As the 5th-largest network, the Univision Network can no longer be considered a "fledgling" or "emerging" network justifying continued waiver of this rule. The Univision Network has led all other networks (Spanish or English, cable or broadcast) in sustained viewer growth since 1992.[79] Univision has

75 47 C.F.R. § 73.658(i).

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

77 *Id.* at 45898 (emphasis added).

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

79 *Id.* at ¶ 11.

80 "Our Story," available at www.univision.net/jsp/en/univision.jsp

a market capitalization of $7.8 billion, with 2002 net revenues of more than $1 billion and net income of $86 million. Hispanic buying power has increased dramatically since 1990, with the Hispanic population representing total consumer expenditures of $569 billion in 2003 and expected to account for $1 trillion of U.S. consumer spending by 2010.[80] According to Hispanic Business magazine, $2.46 billion of total advertising expenditures were directed towards Spanish-language media in 2002, 61.8% of which went to television. Univision notes that national spot advertising "is the means by which most new national and regional advertisers begin marketing to Hispanics."[81]

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

V. The Majority's Attribution Games are Harmful Precedent

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

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

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

The majority's piecemeal examination of *de facto* control factors fails to appreciate the totality of the multiple contractual arrangements and other relationships between Univision and Entravision, as well as the merged entity and Clear Channel. In determining whether an interest is attributable, the Commission has articulated a need to assess the cumulative effect of all relevant factors, interlocking interests and multiple relationships, so as to determine whether an investor holds control or influence over the core operations of the licensee.[82]

The relationships between Univision and Entravision are extensive and include: Entravision's network affiliation agreement with Univision that expires in 2021, Univision's contract to serve as Entravision's exclusive advertising representative for national and regional spot sales through 2021,

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81 Univision 2002 Annual Report at 10.

82 *Id.* at 13.

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

Univision's approval rights over certain corporate actions of Entravision, Entravision's accounts payable to Univision, and Univision's nonvoting stock holdings that will be diluted over an unusually lengthy Department of Justice divestiture period. Commenters state that Entravision is heavily dependent on Univision and will continue to be after the merger. Whether these relationships, considered collectively, afford the opportunity for Univision to influence the overarching policy determinations, programming decisions, or day-to-day operations of Entravision requires more careful analysis than the singular approach conducted by the majority.

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

VI. The Commission Should Promote Minority Broadcasting

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

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

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