

Appendix I

Letter to Marlene H. Dortch, Secretary
(March 3, 2005)
("Albuquerque Request")

SCOTT R. FLICK
202.663.8167
scott.flick@shawpittman.com

March 3, 2005

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, DC 20554

RECEIVED

MAR - 3 2005

Federal Communications Commission
Office of Secretary

Dear Ms. Dortch:

This letter is in reference to the Commission's Memorandum Opinion and Order (the "*Order*") released September 22, 2003 in MB Docket No. 02-235.¹ The *Order* authorized the transfer of control of various radio stations licensed to Hispanic Broadcasting Corporation and its subsidiaries ("HBC") to Univision Communications Inc. ("Univision").

While the transfer application complied with all of the Commission's broadcast ownership rules at the time it was filed in 2002, the Commission adopted new broadcast ownership rules on June 2, 2003, while the application was pending, in its *Biennial Review Order*.² Although the Commission often assesses a transaction's compliance with its rules based upon its compliance at the time the application is filed,³ the *Order* approving the transfer here acknowledged that the transfer application complied with the "old" rules,⁴ but noted that it did not comply with the new rules in two markets – the

¹ *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).

² *In the Matter of the 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 (2003) ("*Biennial Review Order*"); see 47 C.F.R. §73.3555(a)(1)(ii).

³ See, e.g., 47 C.F.R. §73.3555(b)(2)(i).

⁴ Because Univision at the time owned no radio stations, the application involved only the transfer to a new entity of an existing group of radio stations. Therefore, the Commission had already ruled on prior occasions that the ownership by a single entity of the combination of radio stations at issue was permissible.

Marlene H. Dortch, Secretary
March 3, 2005
Page 2

Houston-Galveston metro market and the Albuquerque metro market. This was not because Univision would have owned more than the permitted number of radio "voices" in those two markets (in both markets, Univision would have owned one or even two less radio stations than the maximum permitted by the new radio ownership rule), but because the transfer would have perpetuated HBC's current ownership of one more FM station than permitted by the Commission's revised FM subcap rule in each of those two markets. In approving the transfer, the Commission provided Univision with a six month period following the actual implementation of the new radio ownership rules to either divest an FM station in Houston-Galveston and in Albuquerque or to request a waiver of the new rules with regard to those two stations.⁵

Because the U.S. Court of Appeals for the Third Circuit stayed implementation of the new rules, implementation of the new rules has in fact still not occurred. However, in September 2004, the Court of Appeals partially lifted the stay with regard to certain aspects of the rules affecting radio ownership, although not all. In an abundance of caution, Univision hereby seeks through this letter either (a) confirmation that the six month divestiture/waiver period has not yet commenced; (b) confirmation that no waiver is now necessary given intervening factual changes; or (c) a ruling that waiver of the new rules with regard to Univision's radio interests in these markets is in the public interest.

With regard to the first of these three matters, the Commission's new radio ownership rules have not yet become effective in a number of respects, due to the Third Circuit's partial stay of the *Biennial Review Order*, as well as its decision remanding for further consideration the rules adopted in the *Biennial Review Order*. Among the changes in the local ownership rules affecting radio station ownership that have not been permitted to go into effect are the Commission's actions with regard to the radio/television cross-ownership rule,⁶ the local radio numerical caps, and the local radio "same service" subcaps.⁷ Significant aspects of the rules adopted by the Commission in

⁵ *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) at ¶ 11.

⁶ See *Prometheus Radio Project v. FCC*, Nos. 03-3388 *et al.* (3rd Cir., filed Oct. 21, 2004) (order denying partial lifting of stay) (declining to lift stay on radio/television cross-ownership rule).

⁷ The Third Circuit's September 3, 2004 order granting in part the Commission's Motion for Panel Rehearing expressly stated that it was lifting the stay only with respect to "certain changes" and that the Commission's motion was denied with respect to "all other aspects . . . including matters pertaining to numerical limits on local radio ownership and the AM 'subcap' . . .

Marlene H. Dortch, Secretary
March 3, 2005
Page 3

the *Biennial Review Order* therefore have not yet become effective, and the six month divestiture/waiver period does not appear to have commenced.

Whether or not the new local radio ownership rules are deemed to have become effective, however, Univision notes that a waiver may be unnecessary with regard to both the Houston-Galveston and Albuquerque metro markets. In the Houston-Galveston metro market, Univision filed an application to divest station KKHT-FM, Winnie, Texas on November 5, 2004 as part of a complex multi-station transaction involving four other stations.⁸ The last required FCC action necessary to complete this transaction, approval of an application to assign KVVZ(FM), San Rafael, California,⁹ occurred on March 1, 2005. As a result, Univision anticipates completing divestiture of KKHT-FM in the near future, eliminating the need for any continuing waiver of the Commission's broadcast ownership rules in the Houston-Galveston market.

With respect to the Albuquerque market, the Commission's *Order* approving the transfer noted that the Albuquerque metro market contains 43 radio stations,¹⁰ permitting a single entity to own seven radio stations, no more than four of which are in the same service. While HBC (and now Univision) only owns five radio stations in the Albuquerque market, two less than permitted by the new rules, all five are FM stations, placing Univision one above the subcap on stations in the same service. However, the Third Circuit, in its decision remanding the new rules to the Commission, ruled that "[t]he Commission did not support its decision to retain the existing numerical limits with reasoned analysis"¹¹ and also held that [t]he Commission did not support its decision to

Footnote continued from previous page

..” See *Prometheus Radio Project v. FCC*, Nos. 03-3388 *et al.* (3d Cir., filed Sept. 3, 2004) (order granting partial lifting of stay). See also Public Notice, DA 04-3204 (MB Oct. 8, 2004) (lifting the temporary freeze on the filing of commercial radio station Forms 301, 314, and 315 due to “Third Circuit granting *in part* the Commission’s request to *partially* lift the Court’s stay to permit *certain* of the new ownership rules to go into effect.” (Emphases added)).

⁸ See FCC File No. BALH-20041105ANF.

⁹ See FCC File No. BALH-20041105AMU.

¹⁰ *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) at ¶ 11.

¹¹ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 433 (3d Cir. 2004).

Marlene H. Dortch, Secretary
March 3, 2005
Page 4

retain the AM/FM subcaps¹² and therefore remanded the matter of radio ownership caps and subcaps to the Commission to either justify, "or modify its approach, on remand."¹³

More importantly, since the Commission's *Order*, two radio stations (KVLK(FM) and KQLV(FM)) have constructed new facilities in the Albuquerque market,¹⁴ bringing the total number of stations up from 43 to 45. Having 45 radio stations in the market increases the Albuquerque ownership cap to eight stations, five of which can be in the same service, and eliminates entirely the need for any waiver or divestiture. Univision does wish to note, however, that during this same time period, the BIA database reclassified the home market of one of the FCC's 43 Albuquerque market stations, KBAC(FM), from Albuquerque to Santa Fe. If this were deemed to reduce the current number of radio stations in the market to 44, a waiver would indeed be necessary to bring Univision's Albuquerque radio interests into compliance with the new rules. However, the Commission indicated in its *Biennial Review Order* that, unless based on a physical change in a station (such as a transmitter site move or a new station coming on air), the Commission would not consider BIA market reclassifications in its ownership analysis until they had been in effect for at least two years following the reclassification.¹⁵ It would therefore appear that KBAC(FM) continues to be part of the Albuquerque market for multiple ownership purposes until the two year period has elapsed. This is only logical, since KBAC(FM) has not physically moved, and continues to cover the exact same audience in the Albuquerque market as it has for the past 15 years.

It therefore appears that no waiver is necessary to retain Univision's current radio interests in Albuquerque. However, should the Commission disagree with this conclusion, waiver of the new rules in Albuquerque is fully justified under these circumstances, where, in addition to there actually being 45 radio stations present, it is also true that: (1) divestiture would be required not by a local radio ownership cap, but by an FM subcap, *both* of which have been found to be unjustified by the Third Circuit Court of Appeals; (2) the divestiture would be required solely because a single station moved out of the Albuquerque market, leaving the market with an ample 44 stations

¹² *Id.* at 434-35.

¹³ *Id.*

¹⁴ KVLK(FM), Belen, New Mexico is a newly built station in the Albuquerque market, and KQLV(FM), Bosque Farms, New Mexico changed its city of license and moved its transmitter site from Grants, New Mexico to Bosque Farms, New Mexico, which is in the Albuquerque market.

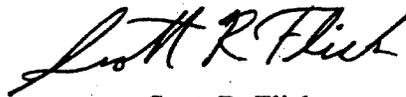
¹⁵ *Biennial Regulatory Order*, 18 FCC Rcd 13620 (2003) at ¶ 278.

Marlene H. Dortch, Secretary
March 3, 2005
Page 5

rather than the 45 stations desired by the Commission in setting its ownership caps (that have been found unjustified by the Third Circuit); (3) waiver would leave Univision with only five out of 44 radio stations in the market, *two less* than the total cap of seven radio stations otherwise permitted by the new rules; and (4) the Commission, as a result of the Third Circuit remand, will ultimately be revising its broadcast ownership rules in numerous ways with which Univision's current radio station interests in Albuquerque might well comply.¹⁶

Requiring the disruption of a station divestiture in this environment is not in the public interest, and Univision therefore respectfully requests confirmation that either (a) the six month divestiture/waiver period has not yet commenced; (b) the changed facts eliminate the need for a waiver; or (c) waiver of the new rules to permit Univision to continue to operate its current facilities in the Albuquerque market (and to the extent necessary in the short-term, the Houston-Galveston market) is in the public interest.

Sincerely,



Scott R. Flick

¹⁶ In this regard, the Commission has frequently granted broadcast ownership rule waivers where a pending Commission proceeding is considering whether the rule in question should be eliminated or modified in a way that could permit ownership of the station combinations at issue. See, e.g., *Shareholders of Jacor Communications, Inc.*, 14 FCC Rcd 6867 (MM Bur. 1999) (granting conditional waiver of one-to-a-market rule subject to outcome of pending rule making); *Shareholders of American Radio Systems Corp.*, 13 FCC Rcd 12,430 (MM Bur. 1998) (same); *WHFS, Inc.*, 12 FCC Rcd 3965 (1997) (same); *Maximum Media, Inc.*, 12 FCC Rcd 3391 (1997) (same); *Stockholders of Infinity Broadcasting Corp.*, 12 FCC Rcd 5012 (1996) (same); *Infinity Holdings Corp. of Orlando*, 11 FCC Rcd 17,813 (1996) (same); *S.E. Licensee G.P.*, 11 FCC Rcd 16,728 (1996) (same); *REP WWBB G.P.*, 11 FCC Rcd 19,689 (1996) (same); *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19,135 (1996) (same); *ITT-Dow Jones Television*, 13 FCC Rcd 4678 (MM Bur. 1998) (granting conditional waiver of duopoly rule subject to outcome of pending rule making); *Stockholders of Renaissance Communications Corp.*, 12 FCC Rcd 11,866 (1997) (same); *Gannett Co.*, 12 FCC Rcd 11,582 (MM Bur. 1997) (same); *Gray Communications Systems, Inc.*, 12 FCC Rcd 10,345 (MM Bur. 1997) (same); *NWCG Holdings Corp.*, 11 FCC Rcd 16,318 (MM Bur. 1996) (same); *WHOA-TV, Inc.*, 11 FCC Rcd 20,041 (1996) (same).