

past several months, despite the adverse market and regulatory conditions.¹² Only one of these parties has offered a firm response. Telemundo has attempted (and continues to attempt) further negotiations with that party, but the complex nature of the proposed transaction has, to this point, precluded agreement.

The Movants' efforts to come into compliance with the Rule have been complicated by significant changes in both regulatory and competitive conditions that were not foreseen in the *Telemundo Order*. One week prior to the issuance of the *Order*, the D.C. Circuit had remanded the Rule in its entirety to the Commission, holding that the Commission's prior efforts to justify the Rule were insufficient.¹³ The *Telemundo Order* did not discuss or otherwise mention the remand of the Rule. Five months later, in September 2002, the Commission issued the *Ownership Notice*, which asked whether the Rule should be revised in light of substantial recent changes in the media marketplace.¹⁴ The *Notice* stated that possible outcomes of the proceeding included the elimination or relaxation of the Rule; for example, the Commission has suggested that it might replace the Rule with a "local media ownership rule that

¹² Of these, a number saw the station as no more than a "stick", i.e., the existing programming or operations added no real value to the Station, and likely would not have preserved KWHY-TV's unique "Spanish-language character." None of these parties was willing to commit to an offer.

¹³ *Sinclair*, 284 F.3d at 162. See also Supplement to Request for Interim Relief of Emmis Communications Corporation (filed Sept. 4, 2002) (confirming that *Sinclair* remanded entire Rule).

¹⁴ See, e.g., *Ownership Notice*, 17 FCC Rcd at 18505-06, 18527-36. The Commission has repeatedly stated that it expects to conclude the Ownership Proceeding by late spring.

permit[s] one entity to own up to a certain percentage of such outlets in a local market."¹⁵

The issuance of the *Notice* coincided with a severe and notable downturn in the television station transaction market. In the *Telemundo Order*, the Commission concluded that a 12-month waiver would be appropriate because of the ongoing economic downturn, which had worsened following the terrorist attacks the preceding fall. Indeed, in 2001, only 111 television stations changed hands, which is roughly half the more than 200 stations that traded in each of several years during the late 1990s.¹⁶

Following issuance of *Sinclair* and the *Ownership Notice*, the station market has experienced a further and dramatic decline. According to BIA data, in the fourth quarter of 2002, parties announced "long form" transactions involving only 14 full-power television stations (with a total estimated value of \$391.7 million). In comparison, the fourth quarter of 2001 witnessed the announced long-form assignment or transfer of 40 stations with a total estimated value of \$2.996 billion.¹⁷ In all, television station sales in 2002 declined to levels not seen for a decade, when the United States was

¹⁵ *Id.* at 18505-06, 18539. Because the Commission's current ownership rules ignore market size differences, a party can own 22 percent of the television stations in a 9-station market, but cannot own more than 8 percent of the stations in a major market like Los Angeles.

¹⁶ Harry Jessel, "Brokers: Wait Till Next Year." *Broadcasting and Cable* at 30 (December 9, 2002) ("Jessel").

¹⁷ See Attachment 1.

recovering from its last recession prior to 2001.¹⁸ Many analysts have concluded that the "market is waiting" on Commission action this spring in the Ownership Proceeding "to decide who may own what where."¹⁹

The Los Angeles Spanish-language television market also has become more competitive. Since 2001, the number of local, fully programmed Spanish-language television broadcast stations in the Los Angeles market has doubled from three to six (including KAZA-TV, Avalon, California, KFTR(TV), Ontario, California, and KRCA(TV), Riverside, California.) As a result, KWHY-TV's ratings and advertising revenues marginally declined in 2002.

A recently announced radio transaction is likely to have further depressed the market for KWHY-TV. In July 2002, Univision, the nation's dominant Spanish-language television broadcaster, proposed to acquire the nation's largest Spanish-language radio station group, Hispanic Broadcasting Corp.²⁰ In the *Telemundo Order*, the Commission recognized that Univision has long been the "dominant" Spanish-language broadcaster in the Los Angeles market.²¹ If the transaction is approved as expected, Univision will add five radio stations to its two television stations in Los Angeles, which will extend its

¹⁸ Jessel at 30. Only 86 stations were involved in transactions announced in 2002.
Id.

¹⁹ *Id.*

²⁰ *Broadcast Applications*, Public Notice, 2002 FCC LEXIS 3794 (Aug. 2, 2002). Univision already owns a television duopoly in Los Angeles. Univision and HBC have recently announced that the Justice Department has approved the proposed transaction, subject to a phased-in reduction of Univision's holdings in one of its major station affiliate groups.

²¹ *Telemundo Order*, 17 FCC Rcd at 6977.

competitive edge in the Los Angeles market. The proposed merger, which was announced less than three months after the consummation of the Telemundo transaction, could not help but affect the potential market for a Los Angeles stand-alone Spanish-language television station.

The Proposed Extension Advances the Public Interest

The proposed extension poses no risk to the public interest. Of the three potential concerns addressed in the *Telemundo Order* – potential loss of diversity and competition, insufficient resources expended on Telemundo, and a need to uphold the existing Rule to preserve regulatory certainty – none justifies denial of this request.²²

First, an updated analysis reveals that the three-station combination has resulted in no material loss to competition or diversity in the Los Angeles television market. Indeed, both the Los Angeles Spanish-language broadcast television market and the Los Angeles broadcast television market as a whole have become even more competitive. Since 2001, the number of fully-programmed Spanish-language outlets has doubled from three to six. Similarly, since the *Telemundo Order* was issued, the number of independent television voices in the market has grown to include *twenty* separate entities.²³ Such recent evidence of increased competition and diversity

²² *Id.* at 6975-77.

²³ Compare Cable World, Special Report: Media Ownership Highlights in the Top 20 DMAs (January 20, 2003) (identifying 16 independent commercial owners) & *Broadcasting & Cable 2002-03* at B10 (identifying 4 independent noncommercial licensees) with *Telemundo Order*, 17 FCC Rcd at 6976 (noting Los Angeles has 19 independent television voices). According to Cable World, the market boasts dozens of other media outlets, including six cable operators, seven daily English- or Spanish-language newspapers, and more than fifty commercial radio stations.

despite common ownership of KNBC and the Telemundo Stations confirms that such common ownership poses no actual threat to the Los Angeles market. Accordingly, Telemundo's continued common ownership of KNBC and the Telemundo Stations for up to 12 months following the final outcome of the soon-to-be-concluded Ownership Proceeding will not pose any demonstrable risk to either diversity or competition in the Los Angeles market.

Second, the always speculative argument that GE would "starve" its Spanish-language stations has been answered by the Movants' clear commitment to Telemundo's Spanish-language viewers since the *Telemundo Order*. The Movants have gone to great expense to enhance Telemundo's programming and distribution, including the addition of local Spanish-language newscasts on Telemundo's stations in New York, Dallas and Puerto Rico, and the acquisition of several new stations with a collectively price of nearly \$100 million. As noted, the Movants also have improved the ability of the Telemundo Stations to serve their viewers.

Third, the D.C. Circuit, through *Sinclair*, and the Commission itself, through the Ownership Proceeding, have cast substantial doubt on the continued viability of the Rule. The Court concluded in *Sinclair* that the FCC had failed to justify the existing rule and remanded the Rule in its entirety for further consideration.²⁴ The commencement of the Ownership Proceeding, in which the Commission itself questioned whether the Rule remains necessary to the public interest, negates any public interest grounds for

²⁴ See, e.g., *Sinclair*, 284 F.3d at 162.

compelling abrupt compliance with the Rule prior to the outcome of that proceeding.²⁵

The Commission's own studies suggest that the Rule may well be unnecessary or overly burdensome.²⁶ Numerous comments to the Ownership Proceeding advocate repeal or relaxation of the Rule.²⁷ In the context of these substantial uncertainties, which are largely an unavoidable consequence of the pending rulemaking, the normal concerns about "preserving" regulatory certainty simply do not apply.

Indeed, denying this extension request – which would force divestiture on the eve of a potential change in the Rule and in the face of the substantial prevailing market uncertainty – would not further the public interest, but rather harm it. Such an outcome would in effect pre-judge the Commission's soon-to-be completed review of the Rule. It

²⁵ See, e.g., *Ownership Notice*, 17 FCC Rcd at 18505-06, 18527-36, 18539.

²⁶ See e.g., Scott Roberts, Jane Frenette, Dione Stearns, Media Bureau, FCC, "A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000"; Joel Waldfogel, The Wharton School, University of Pennsylvania, "Consumer Substitution Among Media"; Nielsen Media Research, "Consumer Survey on Media Usage"; and Jonathan Levy, Anne Levine, Marcelino Ford-Livene, Office of Plans and Policy, FCC, "Broadcast Television: Survivors in a Sea of Competition," *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, MB Docket 02-277 (MB, released Oct. 1, 2002).

²⁷ See, e.g., Joint Reply Comments of National Broadcasting Company, Inc., Telemundo Communications Group, Inc., et.al, to the *Ownership Notice*, at 41 (submitted Feb 3., 2003) ("NBC Reply Comments"); Initial Comments of National Broadcasting Company, Inc., Telemundo Communications Group, Inc., et. al, to the *Ownership Notice* at 49-53 (submitted Jan. 2, 2003) ("NBC Initial Comments"). See also Comments of Granite Broadcasting Corporation to the *Ownership Notice* at 3 (submitted Jan. 2, 2003) (urging repeal of local television ownership rule); Comments of Gray Television, Inc. to the *Ownership Notice* at 6-20 (submitted Jan. 2, 2003) (urging repeal of local television ownership rule); Comments of National Association of Broadcasters at 79-80 (submitted Jan. 2, 2003) (citing need for rule that permits triopolies); Reply Comments of Hearst-Argyle Television, Inc. at 13-19 (submitted Feb. 3, 2003) (proposing rule that would allow triopolies with certain audience share).

would surely be perverse result, and a substantial disservice to the viewers and current owner of KWHY-TV, if such a sale were followed within months by a rule-change that would have obviated the need for such a disruptive transaction. Of course, it is not possible to know in advance the Commission's ultimate decision about the Rule. But in light of the substantial uncertainties, preserving the status quo by granting the requested extension would be the most prudential course to follow.

In the context of the current economic climate and the uncertainties created by the rulemaking, any forced divestiture could well be the sort of "fire-sale" which the Commission has on numerous occasions sought to avoid by granting relief from immediate enforcement.²⁸ At the time the Commission decided the appropriate period for the Waiver, the Commission could not have reasonably foreseen the drop in station transactions even *below* the depressed levels resulting from the 2001-02 economic downturn or the proposed Univision-HBC transaction. Telemundo's own experience during the past several months underscores that the market for KWHY-TV is far weaker than might be expected. During the Waiver's term, NBC and Telemundo have worked together to attract meaningful offers for KWHY-TV, including adding a new executive to

²⁸ See, e.g., *UTV of San Francisco*, Memorandum Opinion & Order, 16 FCC Rcd 14975 (2001); *Shareholders of CBS Corporation*, Memorandum Opinion & Order, 15 FCC Rcd 8230 (2000); *Guy Gannett Communications*, Memorandum Opinion & Order, 14 FCC Rcd 6204 (MMB, 1999); *Insight Communications Company, L.P.*, 12 FCC Rcd 19623 (CSB, 1997) (noting that "the Commission grant[s] temporary relief in contemplated divestiture situations, based on the belief that reasonable accommodations may be made to avoid the risk of "fire sales."); *Westinghouse Electric Corporation*, 11 FCC Rcd 3733 (1995); *Capital Cities/ABC, Inc.*, Memorandum Opinion & Order, 11 FCC Rcd 5841 (1989).

assist with regard to potential transactions. Yet, the Movants' request for offers has resulted in only one firm response, and the uncertain regulatory conditions have even complicated those ongoing negotiations. A forced sale in these circumstances would not attract a large and diverse group of potential buyers, and would significantly diminish the prospects of preserving the current Spanish-language news and entertainment format.

**Commission Precedent Supports Extension of Temporary Waivers
Pending Imminent and Likely Changes to the Relevant Rule**

The proposed relief is consistent with Commission policy and precedent. The Commission has altered the terms of temporary waivers in light of changes in market or regulatory conditions.²⁹ For example, in a recent case involving Viacom's compliance with the national television ownership cap, the Commission has extended a waiver period following court remand of the relevant rule even prior to the Commission's commencement of a proceeding addressing that remand.³⁰ In the *Viacom Cap Order*,

²⁹ See *Tribune Company, Petition for Removal of Condition on Grant of Application for Transfer of Control of Television Station WBZL(TV), Miami, Florida, Order, DA 02-1928 (MB, rel. August 9, 2002)* (changing terms of temporary waiver of newspaper-broadcast cross-ownership rule following Commission extension of waiver pending outcome of biennial review of cross-ownership rule).

³⁰ See, e.g., *1998 Biennial Review, Memorandum Opinion & Order, 17 FCC Rcd 6280 (2002)* (the "*Viacom Cap Order*") (granting Viacom 12 months to come into compliance with national television ownership cap following conclusion of not yet issued rulemaking to address remanded cap). See also Letter to Joel Rosenbloom from Chief, Mass Media Bureau (MMB, dated October 24, 1996) (the "*Capital Cities Policy*") (holding that extension of temporary waiver is appropriate when relevant rule becomes subject to rulemaking proceeding). The Mass Media Bureau's subsequent clarification of the *Capital Cities Policy*, see *Stockholders of Renaissance Communications Corp.*, 13 FCC Rcd 4717 (MMB, 1998), does not preclude extensions of waivers in light of pending rulemaking where i) the D.C. Circuit has remanded the relevant rule

Viacom had a 12-month temporary waiver of the national television ownership cap. The waiver was to expire in May 2001, but it was stayed pending court review of the validity of the cap. In February 2002, the D.C. Circuit remanded the cap to the Commission for further review. In March 2002, nearly a year after Viacom's initial waiver period had expired, the Commission granted Viacom a further 12 months – a period equal to the entire initial waiver period -- *after* the final outcome, including any judicial review, of the proceeding begun in response to the remand of the cap.

The proposed relief presents even a stronger case than that in *Viacom*. Unlike in the *Viacom Cap Order*, the relevant rule had been remanded to the Commission for further justification in a separate proceeding that was issued contemporaneously with – rather than well after – the issuance of the waiver. Accordingly, the entire period of the 12-month waiver was under the shadow of the remand (and the resultant regulatory uncertainty). Also unlike *Viacom*, the Commission commenced a proceeding questioning the continued validity of the relevant rule *during* the initial term of the Waiver, and that proceeding was accompanied by an immediate adverse effect on the television station market that could not have been foreseen when the Waiver was issued.

immediately prior to the issuance of the relevant temporary waiver; and ii) the Commission subsequently issued a Notice of Proposed Rule Making and studies that cast significant doubt on the viability of the current Rule during the waiver period. See, e.g., Letter to Capital Cities/ABC, Inc., 2 FCC Rcd 2539 (1987) (extending temporary waiver of radio-television cross-ownership rule because "the Commission has raised a question as to whether the public interest is better served by permitting" the common ownership at issue).

Alternatively, the proposed request satisfies the Commission's traditional test for an extension of time of temporary authority. The Movants have acted diligently in complying with the Commission's requirements: the Movants have vigorously pursued the interest of several parties in KWHY-TV, have requested firm offers from several, and continue to attempt to negotiate a proposed sale. Also, events beyond the Movants' control – notably, the very depressed station transaction market and the soon-to-be-approved Univision-HBC merger – have delayed efforts to fulfill the Commission's requirements. Either basis is sufficient reason to grant the proposed relief.

The proposed relief likewise satisfies the stricter standard for interim relief:³¹ 1) the Movants would suffer irreparable harm if the proposed relief is not granted; 2) the Movants have made a strong showing as to the substance of their arguments; 3) the proposed relief will not substantially harm any other interested party; and 4) the proposed relief is consistent with the public interest.

First, the Movants will suffer irreparable harm if forced to divest KWHY-TV, a unique and irreplaceable asset.³² If the Rule changes, the Movants are unlikely to be able to re-acquire the station or any equivalent facility, given the uniqueness of

³¹ To the extent the Commission views this request as a stay or other form of interim relief, the four-part standard is appropriate. See, e.g., *CBS Communications Services, Inc.*, 13 FCC Rcd 4471, 4473 (¶ 7) (1998) (citing *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

³² See, e.g., *Tom Doherty Assoc. Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995); cf. *United Church of the Med. Ctr. v. Medical Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury.")

KWHY-TV's history, its established audience, its unique analog and digital parameters, and the Movants' familiarity with the station.

Second, the Movants, in this and the pending Ownership Proceeding, have made a strong showing that the Commission (or reviewing court) will ultimately relax the Rule to allow common ownership of three stations in one of the nation's most diverse and competitive television markets.³³ Although *Sinclair* did not need to reach the specific issue presented in this case, any form of the Rule that allows the ownership of two stations in a nine-station market but not the common ownership of a mere three stations in a market nearly three times that size must be deemed arbitrary without clear, compelling and precise justification.³⁴ The reasoning of *Sinclair* – that the Rule, pending such further justification, unnecessarily limits common station ownership – confirms that the record before the *Sinclair* panel does not justify a blanket denial of the common ownership of three stations in a 25-station market. Moreover, at least one judge on the *Sinclair* panel would have vacated the entire Rule outright in deference to a strict reading of Section 202(h) of the Communications Act, which underscores that the Commission faces a heavy burden to sustain the current Rule.³⁵

³³ See, e.g., NBC Reply Comments at 41 (submitted Feb 3., 2003); NBC Initial Comments at 49-53 (including citation to Petition for Rulemaking of National Broadcasting Company, Inc., *Amendment of Part 73 of the Commission's Rules to Modify Section 73.3555(b) of the Regulations Concerning Multiple Ownership of Broadcast Stations* (submitted August 26, 2002).)

³⁴ See, e.g., NBC Reply Comments at 41; Initial NBC Comments at 49.

³⁵ *Sinclair*, 284 F.3d at 171-172 (Sentelle, J., concurring and dissenting in part).

Third, the proposed relief will not substantially harm any other interested parties. The Movants have separately operated KWHY-TV for the last 11 months without demonstrable material harm to either viewers or competitors. Under Telemundo's stewardship, KWHY-TV has largely maintained its viewership and is in the process of improving its technical facilities. As the Commission expects to issue its order addressing revisions to the Rule within three months, the proposed relief will not be as lengthy as Viacom's ongoing waiver of the national ownership cap.³⁶

Fourth, as noted, the proposed relief will not adversely affect the public interest. It is necessary to fulfill the Commission's initial intent underlying the Waiver: to provide sufficient time in light of prevailing regulatory and market conditions for the Movants to come into compliance with the Rule. Since the *Telemundo Order*, the prevailing regulatory conditions are in substantial flux and market conditions have substantially deteriorated. Further, any forced divestiture while the Rule is under review will cause KWHY-TV (and its viewers) to face considerable uncertainty and instability as the new buyer decides whether to keep or sell the station following the end of the Ownership

³⁶ The Movants also note that, nearly one year ago, Emmis Communications Corporation requested a similar extension of time of a waiver of the Rule that was to expire on July 1, 2002 (pursuant to a prior extension). See Request for Interim Relief of Emmis Communications Corporation (filed May 6, 2002). Understandably, in light of the pending rulemaking, the Commission has not acted on that request, which effectively has extended the waiver for nearly nine months. Under the Commission's general obligation to treat similarly situated parties similarly, the public interest requires at least a similar extension here. *Cf.*, *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently."); *Ramon Rodriguez*, Memorandum Opinion & Order, 3 FCC Rcd 407, 408 (1988).

Proceeding. Accordingly, the Commission should extend the period of time allotted for an orderly divestiture of KWHY-TV.

Conclusion

Grant of the proposed relief will not open the floodgates for similar requests. The majority of the Waiver's period elapsed during the pendency of the Ownership Proceeding; no other waiver of the Rule had followed so closely the ruling in *Sinclair* or had been so affected by the *Ownership Notice* and other subsequent events. As important, the Waiver merely allows the Movants to continue to operate KWHY-TV in its current manner for no more than 12 months after the final outcome (including any judicial review) of the Ownership Proceeding with regard to the Rule.

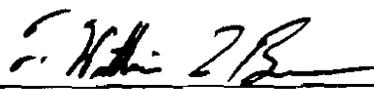
For all the foregoing reasons, the Movants request that the Commission grant the proposed relief. Please direct any communications regarding this submission to the undersigned.

Respectfully submitted,

TELEMUNDO OF LOS ANGELES LICENSE
CORPORATION

ESTRELLA LICENSE CORPORATION

NBC SUBSIDIARY (KNBC-TV), INC.

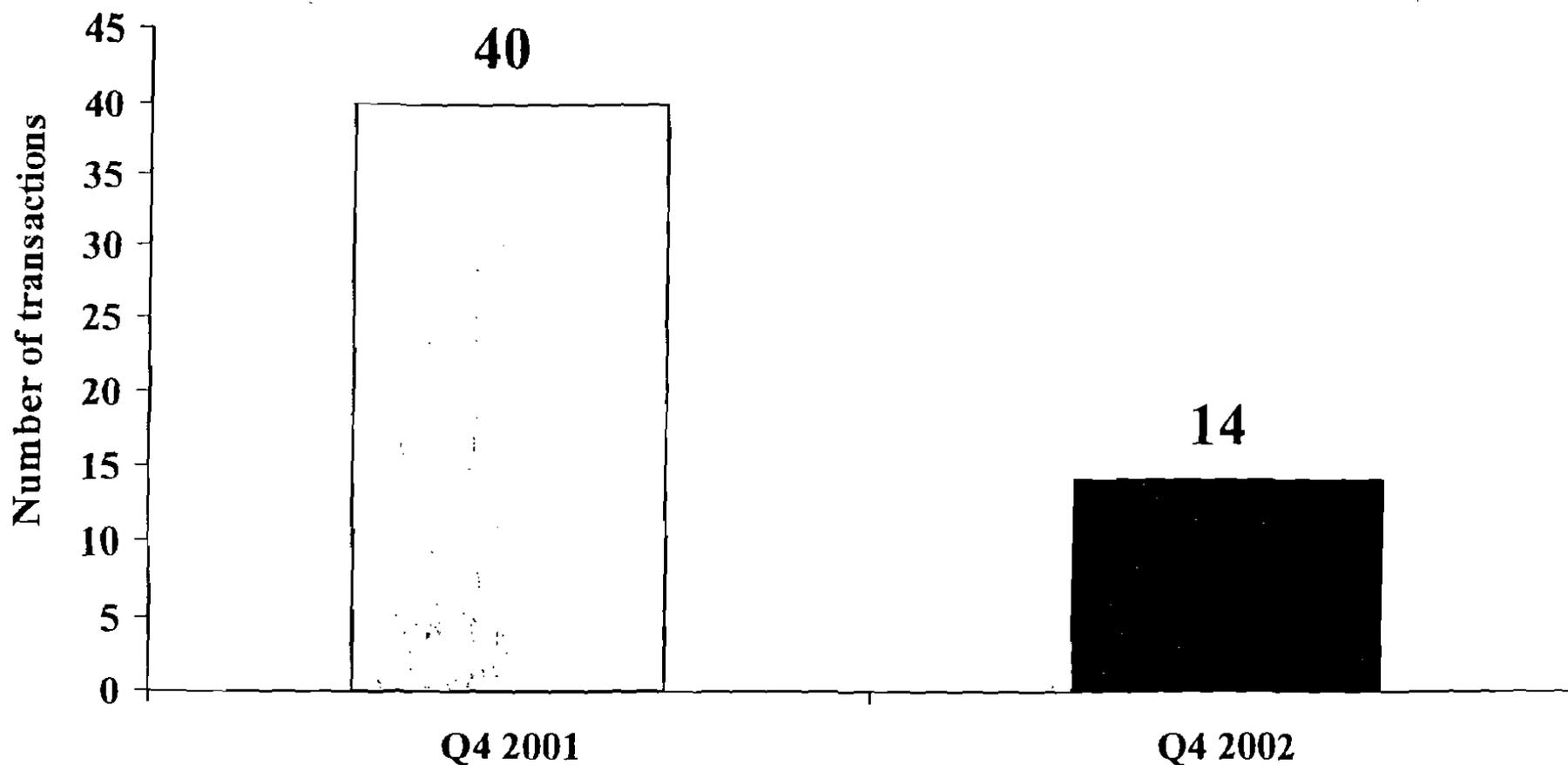
By: 
F. William LeBeau

Their Senior Regulatory Counsel and Assistant
Secretary

ATTACHMENT 1

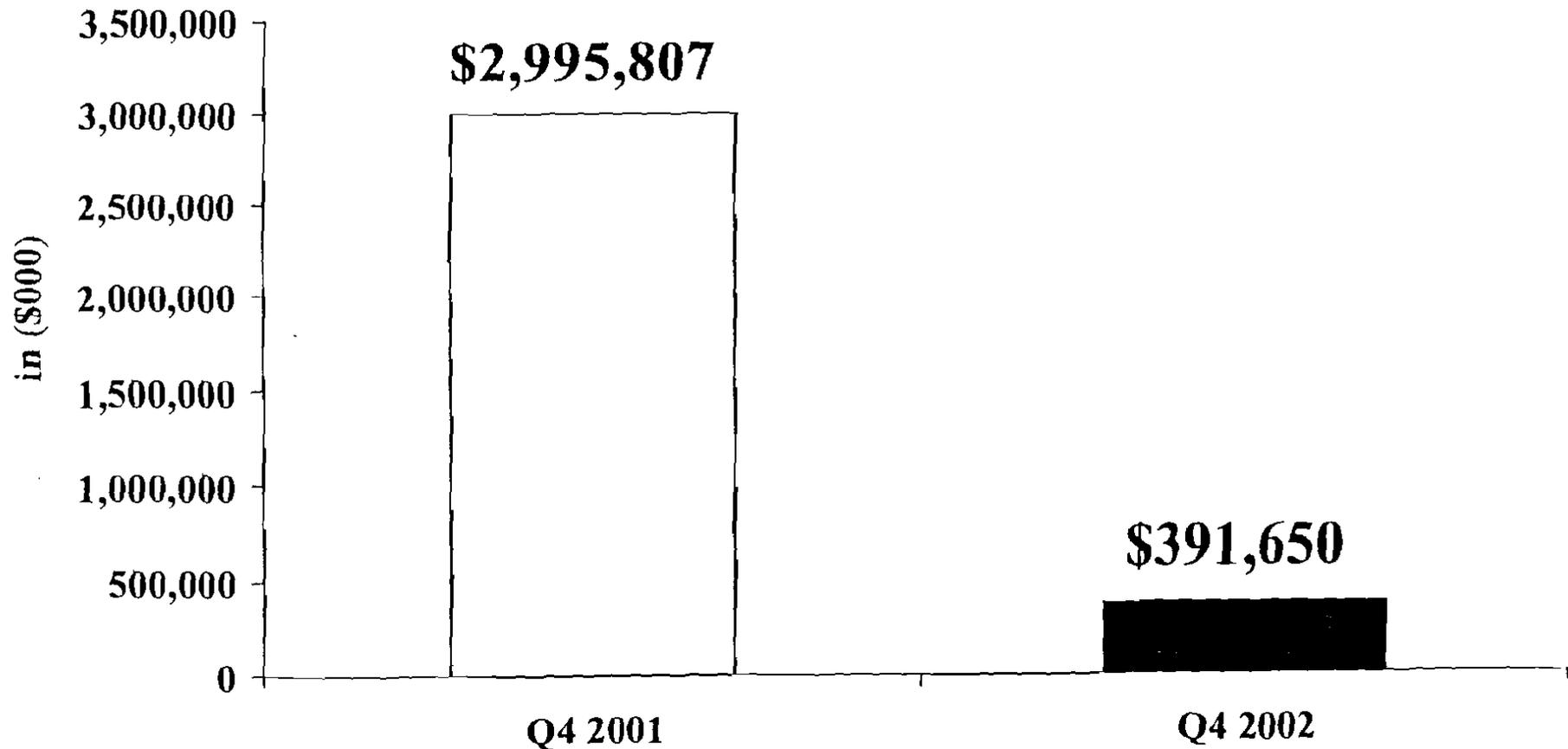
(BIA Analysis of Fourth Quarters of 2001 and 2002)

Number of Television Stations Sold in Q4 2001 vs. Q4 2002



Source: Media Access Pro™; Transaction totals include all that are announced as of the end of the month.

Television Transactions Value, Q4 2001 vs. Q4 2002



Source: Media Access Pro™; Transaction totals include all that are announced as of the end of the month.

DECLARATION

I, Bruce Campbell, Senior Vice President of National Broadcasting Company, Inc., under penalty of perjury, declare that the foregoing Joint Request for Extension of Temporary Waiver is true and accurate to the best of my personal knowledge and belief.



Bruce Campbell

Dated: March 11, 2003

CERTIFICATE OF SERVICE

I, Martha A. Shiles, hereby certify that on this 14th day of March, 2003, copies of the foregoing were served by hand delivery (indicated by *) or by U.S. mail, postage prepaid, upon the following:

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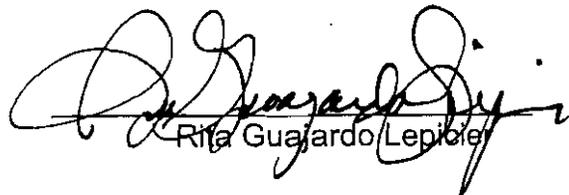
I, Rita Guajardo Lepicier, certify that I have sent this June 21, 2010, by first-class, postage prepaid, U.S. Mail, copies of the foregoing PETITION TO DENY FCC APPLICATIONS to the following:

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