

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

In the Matter of)	
)	
2002 Biennial Regulatory Review - Review of)	MB Docket No. 02-277
the Commission's Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast)	
Stations in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

To: The Commission

**COMMENTS OF THE NATIONAL ASSOCIATION
OF BLACK OWNED BROADCASTERS, INC. AND THE
RAINBOW/PUSH COALITION, INC.**

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EXECUTIVE SUMMARY

The National Association of Black Owned Broadcasters, Inc. (“NABOB”) and Rainbow/PUSH Coalition (“Rainbow/PUSH”) have a substantial interest in this proceeding. The number of minority owners of broadcast facilities has decreased by 14% since the passage of the Telecommunications Act of 1996, which permitted major consolidation of ownership of broadcast stations into the hands of a few large corporations. The Commission has recognized in the Notice of Proposed Rulemaking in this proceeding, that it has a statutory obligation to promote diversity of ownership of broadcast facilities. Minority ownership has always been recognized by the Commission as a component of diversity of ownership. Therefore, NABOB and Rainbow/PUSH request that the Commission adopt promotion of minority ownership of radio facilities as a primary policy objective in this proceeding. NABOB and Rainbow/PUSH request that the Commission take the following actions to promote diversity of ownership and minority ownership:

1. The Commission should place greater emphasis on the promotion of diversity of ownership, and with it the promotion of minority ownership, in the radio industry.
2. As a part of its public interest review, the Commission should assess the impact on minority ownership of assignment and transfer applications.
3. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the radio ownership rules to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed at the same time that assignment and transfer applications which exceed the ownership limits are filed.

4. The Commission should make permanent, with the revisions proposed in these Comments, the Commission's Interim Policy for processing assignment and transfer applications. In particular the Commission should consider a 40/60 market share screen for "flagging" potential excessive consolidation in a market, instead of the current 50/70 screen.
5. The Commission should change its radio market definition to correlate with the Arbitron market. The failure of the Commission's current definition is reflected in at least eleven Arbitron markets where a single entity owns or controls between 9 and 12 radio stations.
6. The Commission should treat all Local Marketing Agreements as attributable interests.
7. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.

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RAINBOW/PUSH COALITION, INC.**

The National Association of Black Owned Broadcasters, Inc. ("NABOB") and Rainbow/PUSH Coalition, Inc. ("Rainbow/PUSH"), by their attorneys, hereby submit their Comments in the above-captioned proceeding.¹ In this proceeding the Commission seeks to:

- (1) define more precisely the Commission's policy goals; (2) determine how to best promote these goals in today's media market consistent with [the Commission's] statutory mandate; (3) establish the best measure for diversity, competition, and localism; and (4) establish a balancing test to prioritize the goals if tension exists between them.

¹2002 Biennial Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket Nos. 02-277, 01-235, 01-317, 02-249 and 00-244 released September 23, 2002 ("NPRM").

NPRM at para. 29.

NABOB is the trade association representing the interests of the African American owners of radio and television stations and cable television systems across the United States. Founded in 1976 and incorporated in 1978, NABOB has been an active participant in Commission rulemaking proceedings for over 25 years. Throughout its existence, NABOB has helped the Commission to establish policies to promote minority ownership in the broadcast industry. The number of African American owners of broadcast stations has dropped significantly since the passage of the Telecommunications Act of 1996. This loss of African American owners robs the American public of the diversity of broadcast voices the Commission has consistently acknowledged to be necessary to preserve our First Amendment rights and protections. Therefore, NABOB has a substantial interest in this proceeding.

Rainbow/PUSH is an organization committed to furthering social, racial, and economic justice. Consistent with this mission, Rainbow/PUSH seeks to ensure that minority communities have access to a diverse range of broadcasting sources, and that minority individuals have opportunities to own and be employed in the broadcast industry. Rainbow/PUSH has an interest in preventing further consolidation in the broadcast industry, and therefore, Rainbow/PUSH has a substantial interest in this proceeding.

NABOB and Rainbow/PUSH submit that the Commission's review of its ownership rules should result in the adoption by the Commission of specific policies to promote minority ownership of broadcast facilities. In support of their position, NABOB and Rainbow/PUSH submit these Comments.

I. SUMMARY

A. The Principal Issues

In the NPRM, the Commission asked for a response to numerous questions regarding possible further deregulation of ownership in the broadcast industry. In particular, the Commission asked:

- (1) How has consolidation of ownership affected diversity? NPRM at para. 43.
- (2) Should the Commission consider promotion of minority ownership as part of its diversity of ownership goal in this proceeding? NPRM at para. 50.
- (3) If so, how should the Commission promote minority ownership in this proceeding?
Id.

In these Comments, NABOB and Rainbow/PUSH shall demonstrate that:

- (1) Consolidation has substantially reduced diversity by reducing the number of broadcast facilities owned by minorities.
- (2) Promotion of minority ownership continues to be a necessary method of promoting the diversity of viewpoint objectives of the First Amendment.
- (3) There are several measures the Commission can adopt in this proceeding to promote minority ownership.

NABOB and Rainbow/PUSH submit that the Commission should adopt promotion of minority ownership of broadcast facilities as a primary policy objective in this proceeding. Among the steps which the Commission should take to promote diversity of ownership and minority ownership are the following:

1. As a part of its public interest review, the Commission should assess the impact on minority ownership of all assignment of license and transfer of control applications.
2. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the radio ownership rules to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed simultaneously with the underlying assignment and transfer applications.
3. The Commission should make permanent, with the revisions proposed in these Comments, the Commission's Interim Policy for processing assignment and transfer applications. In particular, the Commission should consider a 40/60 market share screen for "flagging" potential excessive consolidation in a market instead of the current 50/70 screen.
4. The Commission should change its radio market definition to correlate with the Arbitron market, because the current rule has allowed a single entity to own between 9 and 12 radio stations in, at least, 11 Arbitron metro markets.
5. The Commission should treat all Local Marketing Agreements as attributable interests.
6. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.

B. How Many Mr. Smiths?

In the NPRM, the Commission asks whether it is possible for consolidation to increase viewpoint diversity. NPRM at para. 43. The studies summarized in these Comments demonstrate

clearly that viewpoint diversity cannot be increased by consolidation, and is, in fact, harmed by it. This fact was recently graphically demonstrated in a press report involving Sinclair Broadcasting Group's Chief Executive Officer, David Smith.² Mr. Smith told investors at a media conference held by UBS Warburg, that one of the reasons he is centralizing into one Baltimore facility a substantial amount of news production for the 63 television stations Sinclair owns or programs is because he is "sick of the news judgment of some local news directors."³ Mr. Smith stated, "Nothing upsets me more than when a local news director puts a headline story of a water-main break in Los Angeles as local news. That's the kind of foolishness you see when local news directors are left to their own devices."⁴

Mr. Smith added, "One of the nice things about having a centralized news operation is that we take all the politics out of the local news issues. We're able to focus on content that's ratings-driven as opposed to fluff, or dog-catcher stories, or whatever people tend to want to follow for whatever their politics is."⁵

This statement is a clear "smoking-gun." For all of the talk about "better serving the public" put forth by Sinclair and other proponents of further consolidation, the bare fact revealed by Mr. Smith's statements is that increased consolidation means increased control of news by a small group of people. Mr. Smith's statements highlight the fact that consolidation of ownership gives control of the nation's airwaves – and hence, control of the nation's political discourse -- to a handful of

²Broadcasting and Cable, December 16, 2002, p. 11 (attached hereto as Exhibit A).

³*Id.*

⁴*Id.*

⁵*Id.*

individuals. As Mr. Smith recognizes, control of the nation's news outlets is a political matter. And, as Mr. Smith made clear, because control of the news is a political matter, he wants the news under his control.

Thus, Mr. Smith has crystalized the central issue before the Commission in this proceeding -- Who will control the news received by the American public? NABOB and Rainbow/PUSH submit that turning the nation's airwaves over to a small group of Mr. Smiths is not in the public interest, and the Commission has a statutory obligation to prevent this from occurring.

II. CONSOLIDATION IN THE BROADCAST INDUSTRY HAS HAD A NEGATIVE IMPACT UPON VIEWPOINT DIVERSITY AND MINORITY OWNERSHIP

A. The Radio Local Market Study

Since the enactment of the Telecommunications Act of 1996, the number of minority owners in the radio industry has decreased. The study prepared by Mr. Kofi A. Ofori entitled "Radio Local Market Consolidation & Minority Ownership ("Radio Local Market Study"), submitted as an attachment to the Comments of the Minority Media Telecommunications Council⁶ in the Radio Ownership proceeding, demonstrates that the number of minority owners has decreased from 173 in 1995 to 149 in 2001. Radio Local Market Study at 1. (Incorporated herein by reference.) The study demonstrates that, without specific Commission action to promote minority ownership, the number of minority owners will continue to decline. Radio Local Market Study at 1-3, 25-26.

⁶Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket Nos. 01-317 and 00-244 (the "Radio Ownership Proceeding"), Comments of the Minority Media Telecommunications Council, filed March 27, 2002.

The Radio Local Market Study confirms that the negative effects of consolidation have occurred with the Commission's 50/70 screen to "flag" market over-consolidation in place. The Radio Local Market Study provides data which demonstrates that the 50/70 screen is too loose. The Radio Local Market Study data would support a 40/60 screen, instead of the current 50/70 screen. Specifically, the Radio Local Market Study demonstrates that:

1. During 1996 and 2000, a single owner controlled an average of 44% and 45%, respectively, of the advertising revenues in the markets measured by Arbitron.
2. For Arbitron markets 101 through 150, the single largest firm controlled an average of 47% and 48% of advertising revenues for the years 1996 and 2000, respectively.
3. The two largest firms in each of the Arbitron markets controlled an average of 70% of the revenue share in 1996 and 74% of the revenue share in 2000.
4. For markets 200 and above, the two largest firms controlled an average of 77% of the revenue share in 1996 and 87% of the revenue share in 2000. Radio Local Market Study at 5-7.

The Radio Local Market Study concludes that:

The data show that according to two measures — the 25% audience cap and the 50/70 screen — ownership consolidation has exceeded public interest safeguards. The data also show that the impact [of] consolidation is greater in the smaller markets where there are generally fewer stations and smaller populations.

Radio Local Market Study at 7.

B. The United Church of Christ Studies

In its Comments in the Radio Ownership proceeding, the United Church of Christ (“UCC”) provided the Commission with additional excellent information concerning concentration in radio markets. UCC Comments in the Radio Ownership Proceeding, filed March 27, 2002, at 14-20. UCC provided the “UCC Local Radio Ownership and Market Concentration Study” and the UCC “Herfindahl-Hirschman Index Chart for Radio.” The UCC studies demonstrated that the number of owners of radio stations decreased from 5100 in 1996, to 3800 in 2001, a decrease of 25%. UCC Radio Ownership Proceeding Comments at 14. In 33 local markets of varying sizes researched by UCC, the number of independent owners decreased in 28 of those 33 markets. Id. at 15. Moreover, this decrease in the number of owners occurred while the number of stations identified by Arbitron in each of these 33 markets grew. Id.

In two of the specific markets about which the Commission requested detailed information, Syracuse, New York and Rockford, Illinois, UCC showed that this national trend is reflected in these markets also. In 1993, the Syracuse Arbitron market had 27 commercial radio stations owned by 17 companies. By 2001, independent radio station ownership in the market had dropped to 9 companies, even though Arbitron reported 5 additional commercial radio stations competing in the market. Similarly, UCC showed that in Rockford independent ownership dropped from 7 owners to 5 owners. Id. at 16.

UCC went on to demonstrate that, contrary to the assertions of some parties, the alleged benefits of programming diversity have not been achieved by all of this consolidation of ownership. UCC shows that, of 17 markets studied by UCC, the number of stations added to the Arbitron markets increased by 5.7 stations. However, radio formats during this time period only increased

by 1.5 formats. Thus, the evidence refutes the assertion that increased consolidation provides public interest benefits in the form of more diverse programming.

UCC also demonstrated that the U.S. Department of Justice Herfindahl-Hirschman Index (“HHI”) shows that there is a high amount of concentration in the radio markets measured. UCC shows that in the 33 markets measured, 28 had an HHI above 1800, the level considered high by the Department of Justice. *Id.* at 18. Moreover, more than half of the markets had an HHI above 3000, a level considered far beyond that of a highly concentrated market – demonstrating that most of the measured markets lack effective competition. *Id.*

Thus, the UCC studies clearly demonstrate that, due to consolidation, there is very little competition remaining in most radio markets.

C. The Democratic Discourse Study

The recently published study Democratic Discourse in the Digital Information Age: Legal Principals and Economic Challenges at the Millenium, by Dr. Mark Cooper, commissioned by the Consumer Federation of America, Consumers Union, the Center for Digital Democracy and Media Access Project, December, 2002 (“Democratic Discourse Study”), provides additional evidence regarding excessive consolidation in the radio industry.

The Democratic Discourse Study demonstrates that, since enactment of 1996, the radio industry has become heavily consolidated.⁷ The study shows that, since 1996, the national radio market “has gone from being atomistically competitive to a loose oligopoly.”⁸ The study adds that

⁷Democratic Discourse Study at 190.

⁸*Id.*

“on a listener-weighted basis, the average format is a tight oligopoly.”⁹ The Democratic Discourse Study goes on to show that, at the local level since 1996, the largest local radio markets have gone from being tight oligopolies to being very, tight oligopolies.¹⁰ It shows that half of all radio markets have become effective monopolies.¹¹ The Democratic Discourse Study concludes that consolidation has reduced the amount of news broadcast by radio stations, which, in turn, has reduced diversity in civic discourse.¹² The study concludes that further deregulation of television station ownership will lead to a loss of diversity in the television industry similar to that which has occurred in the radio industry.

III. THERE IS SIGNIFICANT RESEARCH DEMONSTRATING THAT THE COMMISSION’S STATUTORY OBLIGATION TO PROMOTE DIVERSITY OF VIEWPOINTS IS BEST ACHIEVED BY PROMOTING MINORITY OWNERSHIP

A. The Commission’s Diversity of Programming Study

There is significant research demonstrating that diversity of viewpoint is best promoted by diversity of ownership, and that minority ownership best promotes viewpoint diversity. In fact, the Commission has commissioned a study which demonstrates that minority ownership enhances viewpoint diversity.¹³ The Commission’s Diversity of Programming Study concluded that there is

⁹*Id.* at 190-192.

¹⁰*Id.* at 192.

¹¹*Id.* at 192 - 195.

¹²*Id.*

¹³Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?, Christine Bachen, et al., December, 1999 at 37. (Incorporated herein by reference.)

“empirical evidence of a link between race or ethnicity of broadcast station owners and contribution to diversity of news and public affairs programming across the broadcast spectrum.¹⁴ The Diversity of Programming Study focused on news and public affairs programming, rather than entertainment programming, because it is news and public affairs programming which is most important to promotion of the Commission’s diversity goals.¹⁵ The Diversity of Programming Study provided empirical evidence that minority owned stations: (1) tailored their coverage of national news stories to address minority concerns, (2) covered major news stories their competitors did not cover, and (3) approached news stories differently from their competitors in order to reach a minority audience.¹⁶ In addition, minority owned stations pay special attention in public affairs programming to events or issues of greater concern to ethnic or racial minority audiences.¹⁷ Minority owned stations place greater effort into live coverage of government meetings, and into coverage of issues concerning women, particularly health issues, and to broadcasts in languages other than English.¹⁸ Minority owned stations staff their public affairs programming with minority employees, and use call-in formats, which enhance audience participation.¹⁹ Minority owned stations participate in minority-related events in their communities.²⁰ This diversity of news and public affairs

¹⁴Diversity of Programming Study at i.

¹⁵*Id.* at 3.

¹⁶*Id.* at 12-13.

¹⁷*Id.* at 20.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

programming provided by minority owned stations is precisely the public interest benefit the Commission's ownership rules are intended to promote.

Two additional studies conducted for the Commission have shown that the effects of current and past discrimination by financial institutions and advertisers continue to act as barriers to entry and growth for minority entrepreneurs and existing owners.²¹ While recent court decisions may have limited the Commission's discretion in devising programs to promote minority ownership, the Commission has continued to recognize the public interest benefit in promoting minority ownership. In its report to Congress on barriers to entry, the Commission recommended to Congress that it consider reinstatement of the tax certificate program.²² NABOB and Rainbow/PUSH submit that the Commission should continue to encourage reinstatement of the tax certificate program.

B. The Democratic Discourse Study

The Democratic Discourse Study provides much useful information and analysis demonstrating that promotion of diversity of viewpoint must be the principal consideration in this proceeding. The Democratic Discourse Study provides an extensive discussion of the legal underpinnings of the Commission's policies which have promoted diversity of ownership.²³

²¹“Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present,” by Ivy Planning Group LLC, December 2000 at 11; Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes, by William D. Bradford, Ph.D., December, 2000 at 27. (Incorporated herein by reference).

²²Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 15 FCC Rcd 15376, 15445, par. 84 (2000).

²³Democratic Discourse Study at 14-28.

Focusing on news and public affairs programming, the Democratic Discourse Study cites extensive research which explains why consolidated ownership in mass media markets fails to serve minority audiences.²⁴ The study also demonstrates that consolidated ownership of mass media outlets leads to a “tyranny of the majority” with respect to civic discourse and political discourse.²⁵ The Democratic Discourse Study also cites empirical evidence that African American broadcast station owners provide an otherwise unsupplied source of discourse.²⁶ The Democratic Discourse Study concludes that greater concentration of media ownership results in less viewpoint diversity, “while diversity of ownership across geographic, ethnic and gender lines is associated with diversity of programming.”²⁷

IV. THE COMMISSION SHOULD PROMOTE VIEWPOINT DIVERSITY BY MAKING PROMOTION OF MINORITY OWNERSHIP OF BROADCAST STATIONS A PRINCIPAL OBJECTIVE OF ITS OWNERSHIP RULES

A. Viewpoint Diversity Can Be Achieved Only Through Promotion of Ownership Diversity

In the NPRM in the Radio Ownership proceeding, the Commission recognized that “diversity is one of the guiding principles of the Commission’s local ownership rule.” Radio Ownership NPRM at para. 29. The diversity principle is intended to advance the purpose of the First Amendment, which, as the Supreme Court stated, “rests on the assumption that the widest possible

²⁴*Id.* at 37-39.

²⁵*Id.* at 39-50.

²⁶*Id.* at 40-41.

²⁷*Id.* at 51-54, citing numerous additional studies to support this conclusion.

dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Radio Ownership NPRM at para. 29, citing Associated Press v. United States, 326 U.S. 1, 20 (1995). The Commission noted in the NPRM that the Commission has historically evaluated four aspects of diversity: viewpoint diversity, outlet diversity, source diversity, and program diversity. Radio Ownership NPRM at para. 30. The Commission seeks comment on which of these four types of diversity should guide the Commission’s public interest considerations. Id.

NABOB and Rainbow/PUSH submit that the Commission should promote those aspects of diversity which will lead to ownership of broadcast facilities by a diverse set of owners, particularly minority owners. This requires that the Commission promote viewpoint diversity and source diversity. Specifically, the Commission should seek diversity among owners, because owners have the ultimate control over the programming that is broadcast over the airwaves.²⁸

It is only through ownership diversity that the Commission can work to ensure that there will be “less chance [that] a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.” NPRM at para. 29 (citing Amendment of Sections 73.35, 73.24, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 45 FCC 1476, 1477 (para. 3)).

Only ownership diversity can provide the type of meaningful diversity that will promote the First Amendment policies of the Commission. A single entity owning stations broadcasting in a

²⁸The Supreme Court of the United States has, in fact, determined that the preservation of media diversity is a government interest that is not only important, but of the highest order. See Turner Broadcasting System v. FCC, 512 U.S. 622, 663 (1997); see also Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 190 (1997).

variety of entertainment formats does not provide the type of diversity that the Commission's ownership rules are designed to promote. The ownership rules are primarily intended to promote opinion diversity, and only secondarily entertainment diversity. The local ownership rule is intended to ensure that one person or entity does not have an inordinate ability to control the free flow of ideas and to control public discourse on important issues. One owner controlling many entertainment formats is positioned to exercise exactly the inordinate control over public discourse the local ownership rule is designed to prevent. Thus, consolidation can never promote true diversity. This is true no matter how many stations are under common control in a market. Eight stations in eight different formats in one market, regardless of the specific formats, will never express opinions at odds with the views of the party controlling those eight stations. Mr. Smith's comments quoted in Exhibit A are clear proof of this fact. Such consolidation will always be contrary to the principle of viewpoint diversity.

Thus, the Commission should adopt policies which will diversify ownership of broadcast stations.

B. The Commission has the Statutory Authority and Obligation to Promote Viewpoint Diversity, Source Diversity and Minority Ownership in its Broadcast Ownership Rules

In the Radio Ownership NPRM the Commission asks several questions concerning the relationship between its statutory obligations under Section 309(a) and Section 310(d) of the Communications Act on the one hand, and Section 202(b) of the Communications Act, on the other. Pursuant to Sections 309(a) and Section 310(d), the Commission is obligated to regulate the granting of and transfer of radio licenses "consistent with the public interest, convenience, and necessity."

Section 202(b)(1), added to the Communications Act by the Telecommunications Act of 1996, requires the Commission to establish numerical guides, set forth in that section, specifying how many stations an entity may own in markets of various sizes.

The Commission sets forth in the Radio Ownership NPRM three possible analyses of how these sections of the Communications Act are intended to work together. The third analysis, which suggests that Section 202(b) established presumptively permissible levels of radio ownership and that, therefore, the Commission should rely on that section's numerical limits "absent a specific reason to conclude that the rule is ineffective in addressing diversity and competition issues with respect to a particular proposed combination." This interpretation of the statutory scheme is the most reasonable. Throughout the history of the Communications Act, Congress has provided the Commission the discretion to interpret the Communications Act in light of each specific case before it. It is reasonable to conclude that, in adopting Section 202(b), Congress intended to provide the Commission the discretion to balance the competing interests reflected in Sections 309(a), Section 310(d) and Section 202(b).

The Commission has stated that it has had two central public interest goals in meeting its obligation to promote the public interest under Sections 309(a) and Section 310(d): the promotion of diversity and competition. The Commission asks for comment on the contours of these public interest goals. Radio Ownership NPRM at para. 28. As noted above, NABOB and Rainbow/PUSH submit that the primary aspects of diversity the Commission should promote in its radio ownership rules are viewpoint diversity and source diversity. These two aspects of diversity require the Commission to promote the ownership of broadcast facilities by diverse owners, who have the potential to provide a diverse array of opinions on topics of importance to the American public. As

the Commission noted in the Radio Ownership NPRM, the Supreme Court has stated, and the Commission has consistently endorsed the principle that the “widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Radio Ownership NPRM at para.29.

As long as the Commission focuses on the fundamental principle that the radio ownership rules are designed primarily to ensure to the American public “diverse and antagonistic sources” of information, the answers to many of the Commission’s questions follow very clearly. One owner controlling many different entertainment formats is incapable of providing the American public “diverse and antagonistic sources of information.” No matter how broad a variety of entertainment programs a single owner may provide, a single owner can never be relied upon to provide programming antagonistic to the views or interests of that owner. Moreover, only the most foolhardy of employees would routinely engage in airing programming antagonistic to the views or interests of his or her employer. Certainly, national communications policy cannot be established based upon a hope that a group station owner will permit programming to air which is antagonistic to such owner’s views and interests.

V. THE COMMISSION SHOULD TAKE THE FOLLOWING SPECIFIC ACTIONS TO PROMOTE MINORITY OWNERSHIP OF BROADCAST STATIONS

A. The Commission Should Use Arbitron Markets to Define Radio Markets

The Commission has asked whether it should revise any of its current rules to promote diversity. Radio Ownership NPRM at para. 30. It is clear that revisions are definitely required. In

particular, the Commission's method for defining radio markets for purposes of applying its local radio ownership rule is in need of revision.

The Commission asks in the Radio Ownership NPRM whether the appropriate geographic area for measuring diversity should be coextensive with the relevant geographic market for competition purposes? Radio Ownership NPRM at para. 33. The answer to this question is yes. The principal barrier to increased diversity of ownership by minority owners is the inability of small minority owned companies to compete with large majority owned companies. Ofori Study at 2. Thus, in this regard, the competitive and diversity objectives call for a similar policy approach.

Moreover, the appropriate geographic area that should be used for diversity and competition purposes is the Arbitron market. Arbitron markets should be used to determine whether the acquisition of a radio facility will impede increased diversity and whether it will impede competition.

The Commission explains that it currently uses a contour overlap test to define radio markets when reviewing assignment and transfer applications. Radio Ownership NPRM at paras. 5, 7 & 44. The Commission notes that this method of defining radio markets has been criticized for producing irrational results. NABOB and Rainbow/PUSH fully agree with this criticism. Radio stations compete in Arbitron markets. Arbitron audience ratings are the principal factor used by advertisers in deciding on which stations to advertise, and it is advertising revenue that ultimately determines the survival and success of a radio station. Thus, defining radio markets through the current method of reviewing contour overlaps relies upon engineering measures that frequently bear no resemblance to the true Arbitron-based world in which stations operate.

In Golden Triangle Radio, Inc., et al, FCC 02-51, released March 19, 2002, v. ("Golden Triangle"), the irrationality of application of the current contour overlap rule was graphically

demonstrated. In Golden Triangle, the Commission denied a Petition to Deny filed by T&W Communications Corporation (“T&W”) against the purchase by Cumulus Licensing Corp. (“Cumulus”) of seven radio stations in the Columbus-Starkville-West Point Arbitron market in Mississippi (the “Columbus-Starkville” market).²⁹ The Commission acknowledged that Arbitron reported 14 stations in the Columbus-Starkville metro.

As a result of the Commission’s current radio market definition rule, the Commission’s analysis was flawed. Having determined that the parties are competing in the Columbus-Starkville Arbitron metro, the Commission should have analyzed the question of undue concentration based upon the actual advertising market in which the stations compete. Instead, the Commission analyzed the transaction based upon its current definition of radio markets. That definition divided the Arbitron market into three separate markets. The Commission then identified the stations which purportedly operated in each of these three markets and concluded that in Market 1, Cumulus would be allowed to own 5 stations, in Market 2 Cumulus would be allowed to own 5 stations, and in Market 3 Cumulus would be allowed to own 5 stations. Thus, although Cumulus would own 7 of the 14 stations in the Arbitron metro, the Commission’s radio market definition did not even consider these numbers in the computation of the number of stations Cumulus would be allowed to own. This is a clear example of a case where the application of the Commission’s current market definition creates an irrational result. More importantly, it is a clear case of a situation where the

²⁹The Golden Triangle proceeding is not yet final, and the discussion of this matter is not intended to request on behalf of T&W any relief in that proceeding. Rather, these comments are directed at seeking a change in the Commission’s policies for future proceedings. It should be noted that undersigned counsel for NABOB also represents T&W in that proceeding, and the principal owner of T&W, Mr. Bennie Turner, is the President of NABOB. Thus, NABOB has a substantial interest in the Golden Triangle case.

application of the Commission's rule is negatively impacting minority ownership. The Commission should amend the radio market definition rule so that the computation of the number of stations in a market reflects the competitive realities of the Arbitron market.

B. The Commission's Current Definition of Radio Market Is Allowing Many Group Owners to Exceed the Eight Station Local Market Ownership Limit

The need to use Arbitron markets as the definition for radio markets is graphically demonstrated by the recent issue of the publication Who Owns What. In the December 31, 2002 issue of Who Owns What (attached as Exhibit B), numerous group owners are listed as operating more than 8 radio stations in various Arbitron markets. For example, the following group owners are shown to operate the following number of stations in the indicated markets :

1. Clear Channel
 - a. Los Angeles – 11.
 - b. Louisville – 10.
 - c. Roanoke -- 9.
 - d. Huntington – 9.
2. Citadel
 - a. Wilkes Barre – 11.
 - b. Little Rock – 10.
3. Cumulus
 - a. Florence – 9.
4. Beasley

a. Augusta, GA – 9.

5. Next Media

a. Chicago – 11.

b. Greenville, NC – 10.

6. Curtis Media Group

a. Raleigh – 12.

These numbers, in 11 separate markets, clearly demonstrate that, in the actual markets in which these companies compete for advertising revenues, many group owners are currently able to exceed the statutory ownership limits. This is due to the Commission's failure to develop a definition of radio markets that reflects the realities of the advertising markets in which stations compete.

Indeed, in its Comments in the Radio Ownership proceeding, Cumulus boldly touts that it is the licensee of nine radio stations, and time brokers a tenth, in the Florence, South Carolina Arbitron metro. Cumulus Radio Ownership Comments, filed March 27, 2002 at 7. Rather than demonstrating the alleged public interest benefits of consolidation, Cumulus's description of its operations in Florence actually demonstrates the pressing need for a sensible definition of radio markets which will permit the Commission to enforce the eight station local market limit imposed by Section 202(b). With industry consolidation, an increasing number of group owners are able to sell advertising time on all of their stations in an Arbitron market as a package. Thus, situations such as those listed above, where group owners are able to sell 9, 10 or even 12 stations in a package, place small station owners at an unfair disadvantage. This situation clearly requires enforcement of the eight station limit of Section 202(b). It is equally important to note that, while very revealing,

the Who Owns What listing cannot answer the question of how many group owners are exceeding the ownership limits in markets where the maximum number of stations that can be owned is less than eight.

In addition, the numbers identified above for the companies exceeding the eight station limit may not include some time brokerage and local marketing agreements. These numbers demonstrate that, included in the enforcement of Section 202(b), must be a rule which requires that all time brokerage agreements and local marketing agreements between same market licensees be filed with the Commission and treated as attributable interests, even if they are for less than 15% of a station's broadcast time.

C. The Commission Should Give Greater Consideration to the Promotion of Viewpoint Diversity and Minority Ownership When it Reviews Assignment of License and Transfer of Control Applications

In Golden Triangle, supra, after concluding its calculation of the number of stations in the relevant Columbus-Starkville radio market, the Commission turned to the question of potential competitive harm due to Cumulus acquiring 7 stations in a 14 station market. The Commission concluded that there was no evidence of potential competitive harm. In so holding, the Commission stated:

33. T&W Communications asserts that Cumulus has a strategy of “overwhelming” small competitors and thereby making supracompetitive profits. It also asserts that Cumulus is selling advertising on its stations in combination packages and is offering free spots on the station that competes with T&W Communications’ station. T&W Communications asserts that Cumulus is attempting to “squeeze” other radio stations out of the market. Cumulus, on the other hand, describes its ability to offer packages of advertising as a public interest benefit and a benefit for advertisers. It states that with common operation of the stations, it is able to offer advertising packages of sufficient scope to be a desirable alternative to newspaper or television advertising,

at least for some advertisers, thus facilitating greater cross-media competition.

34. Absent additional evidence in the record, we decline to find that the mere fact of offering advertising in packages, or of offering advertisers discounts for buying spots on multiple stations, is anticompetitive. Indeed, such practices may be efficient and procompetitive. As for Cumulus's statements to its shareholders that it seeks to enter midsize markets in order to earn higher than market returns, Cumulus explains in the very sentences quoted by T&W Communications that this is because many small programmers lack the capital to produce high quality locally-originated programming and employ more sophisticated research and marketing techniques, which Cumulus will be able to do. In short, Cumulus is claiming to be able to operate radio stations better than its competitors. Cumulus's superior ability to earn revenues, if it indeed has that ability, is not an anticompetitive harm that would warrant our denying these applications.³⁰

Thus, the Commission disregarded T&W's evidence concerning free advertising spots and other activities engaged in by Cumulus to squeeze small competitors out of the market. In fact, the Commission held that such conduct may be "efficient and procompetitive." This is a very troubling statement. The facts described by T&W in the Golden Triangle case appear to be a clear example of predatory pricing designed to drive a small competitor out of a market.

Small radio markets receive very little study from major research firms such as Arbitron and BIA. In fact, until Cumulus contracted with Arbitron to measure the metropolitan area, there was no Columbus-Starkville Arbitron metro. Similarly, the BIA data examined by the Commission in Golden Triangle was a special study commissioned by Cumulus for purposes of that proceeding. It would appear from the Commission's analysis in Golden Triangle that the Commission would view these new expenditures by Cumulus as being "efficient and procompetitive." However, NABOB and Rainbow/PUSH submit that these expenditures, coupled with the evidence of predatory pricing presented by T&W, actually demonstrate that small markets across America are "ripe for the

³⁰Golden Triangle at par. 33-34, Footnotes omitted.

picking.” The Commission’s Golden Triangle decision gives a green light for large companies to purchase large clusters of stations in small markets and to use so-called “efficient and procompetitive” free and discount ad packages to drive small competitors out of these markets.

If the Commission continues with this view of competition in small markets, the Commission will do serious damage to diversity of ownership and viewpoint in small markets, and will, in the process, also do serious damage to minority ownership. The NABOB membership consists primarily of small stations and many of them are in small markets. See Local Radio Market Study at 11-14. The Commission should review and revise its current approach toward analyzing anticompetitive conduct so that the Commission’s analysis will foster diversity of ownership, not destroy it.

D. The Commission Should Adopt a Bright-line Test to Limit Additional Excessive Radio Ownership Consolidation

The Commission requests comment on the rules and procedures it should adopt to regulate radio ownership. NABOB and Rainbow/PUSH submit that the Commission should adopt rules which will promote viewpoint diversity, source diversity and minority ownership, and which will prevent further excessive ownership consolidation in the radio industry. Such rules and procedures should begin with a bright-line test.

1. Owners should not be allowed to exceed the numerical ownership limits set forth in Section 202(b).
2. Owners seeking to engage in transactions which will result in combinations in excess of the limits set forth in Section 202(b) should be required to file assignment or transfer applications which will eliminate the excessive combinations simultaneously

with the primary transaction. The Commission should terminate its practice of granting 6, 12 and 18 month waivers of the ownership rules to allegedly allow parties to seek out potential buyers. In the Clear Channel-AMFM merger, the largest radio merger to date, the parties were able to file assignment and transfer applications for over 100 radio stations, with numerous buyers, including several minority owned buyers, at the time the merger application was filed. If buyers could be lined up and transactions signed prior to the filing of the Clear Channel-AMFM merger, parties in all radio merger applications should be able to file assignment and transfer applications at the time the merger application is filed. This would eliminate the need for rule waivers. Moreover, this would subject the sale of such “spin-off” stations to scrutiny along with the applicable merger application. Such scrutiny would allow review of issues, such as: (1) the seller’s good faith efforts to find a buyer, (2) the possibility that the buyer chosen will increase consolidation in the market, (3) the impact of the sale on minority ownership, and (4) the potential for sales to companies which may be acting in concert with the seller (e.g., buyers who may act as “fronts” or who may “park” stations for the seller).

3. The Commission should replace its 50/70 screen with a 40/60 screen for all radio assignment and transfer applications.
4. The Commission should specifically examine the impact on minority ownership of all radio assignments and transfers.
5. The Commission should treat all local marketing agreements as attributable interests.

6. The Commission should make permanent, with the revisions proposed in these Comments, the Commission's Interim Policy for processing assignment and transfer applications.

VI. CONCLUSION

Broadcast industry consolidation has had a negative impact on the number of minority owners in the broadcast industry. The Radio Local Market Study, the UCC Studies and the Democratic Discourse Study clearly and convincingly demonstrate this. Moreover, the studies show that absent government intervention, this decline can be expected to continue. In addition, the Commission's Diversity of Programming Study and the Democratic Discourse Study demonstrate that minority ownership promotes diversity of viewpoint in the broadcasting industry. Therefore, NABOB and Rainbow/PUSH submit that the Commission should implement the above-described actions and policies to promote diversity of viewpoint and minority ownership and to curtail the continuing negative effects of industry consolidation.

Respectfully submitted,

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