

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

In the Matter of the Applications of)	
)	
U.S. Broadcasting Limited Partnership)	File Nos. BALH-20020603AAC
(Assignor))	BALH-20020603AAD
)	BALH-20020603AAE
and)	BALH-20020603AAF
)	BALH-20020603AAG
Cumulus Licensing Corp.)	BALH-20020603AAH
(Assignee))	BALH-20020603AAI
)	BALH-20020603AAJ
For Consent to Assignment of)	
Licenses of)	
WDEN-FM, WDEN (AM), WMAC(AM),)	
WDDO(AM), WMKS(FM), and WAYS(FM),)	
Macon, GA; WPEZ(FM), Jeffersonville, GA;)	
WMGB(FM), Montezuma, GA)	

**COMMENTS OF THE NATIONAL ASSOCIATION
OF BLACK OWNED BROADCASTERS, INC.**

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SUMMARY

The National Association of Black Owned Broadcasters, Inc. (“NABOB”), submits Comments in this proceeding to bring to the Commission’s attention the potential impact the transaction at issue in this proceeding may have on minority ownership, and because the issues raised in this proceeding are extremely relevant to the Commission’s pending review of its local radio ownership rules. In the transaction at issue in this proceeding, Cumulus Licensing Corp. (“Cumulus”) proposes to obtain an assignment of the licenses for eight radio stations in Macon, Georgia from U.S. Broadcasting Limited Partnership (“USB”).

At the time that Cumulus approached USB to purchase these stations, USB was in active negotiations with Access.1 Communications Corp. (“Access.1”), an African American owned broadcast company. USB and Access.1 had drafted and negotiated an asset purchase agreement and had concluded virtually all terms for their transaction, including price, and were on the verge of signing the agreement. Cumulus came in at the last minute and offered more money than the purchase price agreed to between USB and Access.1. Even though Access.1 offered to match Cumulus’s offer, USB accepted Cumulus’s offer.

This last minute maneuver by Cumulus thwarted a transaction which would have increased national African American station ownership by over 3% and highlights graphically the marketplace damage being caused by radio industry consolidation. This transaction demonstrates clearly that Cumulus, and other companies which have gained national market power through consolidation, are using this national market power to squeeze smaller companies out of the industry.

This transaction demonstrates that, when the Commission examines the potential impact on competition of a transaction, the Commission should consider the amount of national market power

an entity can bring to bear in a local market. The Commission's current method of conducting a local market competitive analysis, which treats all applicants the same – regardless of national market power – is flawed. The Commission is allowing companies with national market power to obtain control of stations and disrupt the competitive balance in markets without any consideration by the Commission of the national market power of such companies. The Commission must change its method of analyzing the potential anti-competitive harm from consolidation, or the radio industry will suffer the fate of other sectors of the telecommunications industry – evidenced by the collapse of WorldCom, Global Crossing, Qwest and Adelphia.

A review of the national market power of Cumulus and the manner in which that market power has been, and may be, abused in Macon is required before the transaction involved in this proceeding can be approved. Therefore, designation for hearing is appropriate in this proceeding.

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**COMMENTS OF THE NATIONAL ASSOCIATION
OF BLACK OWNED BROADCASTERS, INC.**

The National Association of Black Owned Broadcasters, Inc. (“NABOB”), hereby submits its Comments in the above-captioned proceeding. NABOB is submitting Comments concerning the above-captioned applications, because this transaction highlights many of the problems currently being addressed by the Commission in its Notice of Proposed Rule Making examining the Commission’s radio multiple ownership rules in local markets.¹

¹In The Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317, MM Docket No. 00-244, FCC 01-329, released Nov. 9, 2001 (the “Radio Ownership NPRM”).

I. INTRODUCTION

In this transaction, Cumulus Licensing Corp. (“Cumulus”) maneuvered to wrest the purchase of the above-captioned stations from an African American owned company, Access.1 Communications Corp. (“Access.1”), which was about to sign an asset purchase agreement for these stations with the proposed assignor, U.S. Broadcasting Limited Partnership (“USB”). This maneuver by Cumulus thwarted a substantial acquisition by a minority owned company at a time when the number of minority owners of broadcast stations is declining. Cumulus was able to accomplish this act because it has obtained excessive national market power as a leading participant in the consolidation of radio ownership, which is damaging the radio industry and depriving the American public of diversity and competition. NABOB therefore, submits that the Commission should designate this application for hearing to investigate whether Cumulus has abused its national market power in connection with obtaining this transaction, and whether it may abuse its local and national power in Macon if the pending assignment applications are granted.

II. STANDING

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, 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 the First Amendment rights of all Americans. These pending applications, if granted will preclude a significant opportunity to increase minority ownership and will, instead, continue the erosion of minority ownership and the erosion of diversity and competition in the radio industry. Thus, NABOB has a substantial interest in this proceeding.

III. THE TRANSACTION BEFORE THE COMMISSION DEMONSTRATES THE NEED FOR THE POLICY CHANGES PROPOSED BY NABOB

The principal reason the Commission must now contend with the problem of excessive concentration of ownership in the telecommunications industry is the Telecommunications Act of 1996 (“Telecom Act”). Over the strenuous objections of NABOB, Congress passed the Telecom Act for the misguided purpose of “fostering competition.” As predicted by NABOB, the Telecom Act has had the completely opposite effect and has thwarted competition. The Telecom Act simply allowed a handful of large companies to purchase their former competitors, thus decreasing competition, rather than fostering it. Buying one’s competitors is not competition, and the Commission should not allow companies to continue the current rampant consolidation in the radio industry under the false mantra of “fostering competition.”

The devastating results are now making headlines everyday – WorldCom, Global Crossing, Qwest, Adelphia. All of these now ruined companies grew wildly after the passage of the Telecom Act. Now, employees, shareholders, consumers, creditors and the American public must suffer from the excesses facilitated by the Telecom Act. Absent Commission intervention, the financial damage and loss of service to the public already triggered by the Telecom Act will continue unabated. The

radio industry is now on the brink of falling into the abyss already rampant in other sectors of the telecommunications industry. The Commission must stem the wave of consolidation in the radio industry to protect the American public from the continuing loss of diversity and competition.

NABOB filed Comments and Reply Comments in the Radio Ownership NPRM pointing out the negative impact which consolidation in the radio industry has had upon diversity and competition in the radio industry.² NABOB explained that the number of minority owners of radio broadcast facilities has decreased by 14% since the passage of the Telecom Act, which permitted major consolidation of ownership of radio broadcast stations into the hands of a few large corporations.³ NABOB noted that the Commission always has recognized that it has a statutory obligation to promote diversity of ownership of broadcast facilities.⁴ NABOB pointed out that minority ownership always has been recognized by the Commission as a component of diversity of ownership.⁵ Therefore, NABOB requested that the Commission take the following actions:

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.

²Comments of the National Association of Black Owned Broadcasters, Inc., March 27, 2002, MM Docket Nos. 00-244 and 01-317, March 27, 2002 (“NABOB Comments”); Reply Comments of the National Association of Black Owned Broadcasters, Inc., MM Docket Nos. 00-244 and 01-317, May 8, 2002 (“NABOB Reply Comments”).

³NABOB Comments at 3-4.

⁴NABOB Comments at 2-3.

⁵Id.

3. The Commission should eliminate its policy of granting 6, 12 ad 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 time assignment and transfer applications which exceed the limits are filed.
4. The Commission should make permanent, with the revisions proposed in NABOB's 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.
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.⁶

The instant transaction continues the pattern of damage to the public interest caused by recent consolidation of ownership in the radio industry and demonstrates the need for the policy changes proposed by NABOB in its Comments and Reply Comments submitted in the Radio Ownership NPRM. Accordingly, as shall be demonstrated below, the transaction before the Commission should be designated for hearing.

⁶NABOB Comments at 4-5.

IV. CUMULUS ABUSED ITS MARKET POWER WHEN IT WRESTED THE INSTANT TRANSACTION FROM ACCESS.1

The transaction before the Commission is one more example of how consolidation in the radio industry has placed too much market power in the hands of a few large companies, and demonstrates why a review of the Commission's local radio ownership rules is necessary at this time. The assignor in this proceeding, USB, had virtually concluded negotiations with Access.1 at the time Cumulus and USB began negotiation of the instant transaction. Access.1, and its predecessor entities, have owned radio stations for over twenty years, and Access.1 has an outstanding record as a Commission licensee.

Access.1 was negotiating with USB a transaction identical to the transaction now being proposed to the Commission by Cumulus and USB. The price offered by Access.1 had been agreed to by USB, and the parties had drafted and negotiated an asset purchase agreement and were concluding the final points in that agreement. However, unknown to Access.1, Cumulus came in at the "thirteenth hour" and offered USB more money. USB seized the Cumulus offer and terminated negotiations with Access.1, even though Access.1 offered to meet the Cumulus offer.

This transaction, if it had been obtained by Access.1, would have represented a large step forward for minority ownership in the radio industry. Indeed, the acquisition of 8 stations by Access.1 would have increased the number of African American owned radio stations from approximately 240 to 248, an increase of more than 3%. In comparison, Cumulus currently owns 250 stations⁷ -- in other words, Cumulus owns more stations than all African American radio station owners combined even without the proposed acquisition of the USB stations.

⁷Who Owns What, July 1, 2002, pp. 12-13, attached hereto as Exhibit 1.

Were it not for Cumulus's last minute maneuver to wrest the transaction away from Access.1, Access.1 would have obtained this transaction. Thus, Cumulus and USB have thwarted a significant opportunity to increase minority ownership. Whether the actions of Cumulus and USB were lawful, and whether Access.1 may have legal recourse against Cumulus and/or USB is not the subject of NABOB's Comments, and NABOB takes no position on those legal issues here. NABOB is commenting here to bring to the Commission's attention, the policy issues raised by this heavy-handed maneuvering by Cumulus.

V. GRANT OF THE ASSIGNMENT APPLICATIONS WOULD NOT SERVE THE PUBLIC INTEREST

A. Cumulus Would have Excessive Local Market Power in Macon

The maneuver by Cumulus to wrest the transaction from Access.1 raises for the Commission several important public interest questions: Is it in the public interest to allow a handful of companies to become so large and powerful that they can wrest away virtually all purchase opportunities from other prospective station purchasers? Is it in the public interest to allow a handful of radio companies to own and operate the largest, most profitable and most influential radio stations in virtually every market in the country? Is it in the public interest to allow Cumulus to own over 258 stations nationwide? Is it in the public interest to allow Cumulus to own seven stations in the Macon Arbitron metro? Some of the above questions, to the extent they relate to companies other than Cumulus, should be addressed in the Commission's Radio Ownership NPRM. However, the answers to these questions, as they relate to Cumulus in the Macon market, should be addressed in this proceeding.

As the Commission noted in the Public Notice issued at the time the Commission accepted Cumulus's application for assignment of these licenses, BIA data demonstrates that Cumulus will have a substantial share of the advertising in the market if the Commission approves the assignment of the licenses.⁸ Specifically, the BIA data shows that the eight stations Cumulus will control, if these assignment applications are approved, would account for \$7.125 million of the \$12.1 million of radio advertising revenue in the Macon Arbitron metro. This equals a 58.9% share of radio advertising.

In addition, through the instant transaction, Cumulus will own 8 stations in the Macon Arbitron metro -- a metro consisting of only 23 stations. In addition, Arbitron data demonstrates that, if allowed to acquire control of these 8 stations, Cumulus will control stations having an audience share of 41.5%. Thus, a grant of the instant application would allow Cumulus to dominate the Macon market in both audience share and advertising revenue. The Commission recently designated for hearing on excess concentration of control issues, three transactions in which Clear Channel Communications, Inc. ("Clear Channel") proposed to acquire stations.⁹ In none of those transactions did Clear Channel propose to obtain a market share of revenue as high as the 58.9% share proposed by Cumulus in this proceeding.¹⁰ This further supports the need for hearing designation in the present case.

⁸Public Notice, Report No. 25254, June 12, 2002.

⁹Youngstown Radio License, L.L.C., FCC 02-165, MB Docket No. 02-139 (July 10, 2002); Mountain Wireless, Inc., FCC 02-166, MB Docket No. 02-138 (July 10, 2002), and Sheldon Broadcasting, Ltd., FCC 02-167, MB Docket No. 02-137 (July 10, 2002).

¹⁰In the Youngstown case, Clear Channel proposed a revenue share of 40.8%; in the Mountain Wireless case, Clear Channel proposed a revenue share of 55.9%, and in the Sheldon case, Clear Channel proposed a revenue share of 52.7%

B. Cumulus's National Market Power Must be Considered as a Critical Factor in Examining the Local Market Diversity and Competition Impact of this Transaction

Cumulus, owns 250 stations nationwide.¹¹ In addition, in at least one market Cumulus has exceeded the Commission's statutory eight station local ownership limit. Because of the Commission's flawed method for calculating the number of stations an entity is allowed to own in a market, Cumulus owns or controls 10 stations in the Florence, South Carolina market.¹² NABOB highlighted the market distortion in Florence, and other markets, caused by the Commission's current flawed radio market definition rule, in its Reply Comments in the Radio Ownership proceeding.¹³ As NABOB pointed out in its Comments and Reply Comments in the Radio Ownership NPRM, audience share in Arbitron markets is the principal factor in determining the financial success of radio stations.¹⁴ It is Arbitron market shares – not the Commission's station contour maps – which advertisers examine to determine whether they will advertise on a station. Cumulus has been able to exploit this flaw in the Commission's rules to sell advertising time on 10 stations in the Florence market. Moreover, this review of local station ownership by Cumulus is limited only to those markets where Cumulus owns or controls more than 8 stations. This review did not determine whether Cumulus may own or control stations in excess of the statutory limit in markets where the statutory limit is less than 8 stations.

¹¹Who Owns What, July 1, 2002, pp. 12-13, Exhibit 1.

¹²Id.

¹³NABOB Reply Comments at 4.

¹⁴NABOB Comments at 8; NABOB Reply Comments at 4-5.

NABOB notes that, had Access.1 acquired these 8 stations, it would obtain the same market share that NABOB has stated Cumulus should be precluded from acquiring. However, NABOB would support Access.1's acquisition of these stations. This apparent dichotomy can be explained very simply. Access.1, unlike Cumulus, has no national market power. Access.1 owns radio stations in only three markets -- a standalone AM station in New York City, 7 stations in the Shreveport, Louisiana Arbitron market, and 2 stations in Marshall, Texas, a very small market not measured by Arbitron. The audience reach and advertising revenue controlled by Cumulus on a national basis gives Cumulus the market power to abuse its local market position in Macon. Access.1, having no national market power, would not have the ability to bring any national market power to bear in Macon.

This distinction should be critical to the Commission's analysis of the instant transaction, and highlights an ongoing flaw in the Commission's current method of analyzing transactions similar to the instant transaction. The Commission examines local radio market transactions without taking into account the national market power of the companies acquiring the stations. Pursuant to the Commission's interim policy for reviewing "flagged" transactions, the Commission will analyze: product market definition, market participants, market shares and market concentration, barriers to entry, potential adverse competitive effects and efficiencies, and other public interest benefits.¹⁵

The Commission's analysis, however, looks at these issues solely based upon local market data. The Commission has never considered the national market power that a large group owner can bring to bear in a local market when it has reviewed flagged transactions. The Commission should make national market power a consideration when analyzing all transactions – particularly flagged

¹⁵NABOB Comments at 10-12.

transactions. The Commission's one dimensional analysis, which looks only at specific local market data, fails to recognize that an entity which controls more than 250 radio stations nationwide will be able to bring national market power to a single market. For example, an entity which owns over 250 stations will be able to negotiate differently than an entity owning only eight stations with: advertisers, Arbitron, record companies, recording artists, concert promoters, concert venues and the various other participants in the radio marketplace.

This failure of the Commission to adequately consider the impacts on diversity and competition of national market power when reviewing local radio transactions is an important issue raised by NABOB in its Comments in the Commission's Radio Ownership NPRM.¹⁶ NABOB explained that the Commission has failed to recognize that a handful of large companies purchasing clusters of stations in small markets are able to use their national market power to overwhelm established broadcasters in small markets.¹⁷ NABOB urged the Commission to recognize that permitting such ownership consolidation will reduce diversity of ownership and reduce competition in small markets.

Indeed, the market distortions caused by radio consolidation have now been recognized within Congress, and members of Congress have spoken out on this problem.¹⁸ In fact, Senator Russ Feingold has recently introduced legislation to slow the continued consolidation of the radio

¹⁶Radio Ownership NPRM at para. 84-89.

¹⁷NABOB Comments at 10-12.

¹⁸See, Radio Business Report, July 8, 2002, p. 1, regarding Congressman Howard Berman (D-CA) and Senator Russ Feingold (D-WI).

industry.¹⁹ Senator Feingold’s legislation, entitled the “Competition in Radio and Concert Industries Act,” would significantly limit further ownership consolidation in the radio industry. At his press conference announcing the legislation, Senator Feingold pointed out that it has been alleged that companies with national market power are able to: coerce advertisers to buy several stations as a package, coerce Arbitron into redefining markets, coerce record promotion companies to pay to get music played on their stations, and coerce artists to advertise concerts on specific stations.

The proposed legislation, among other things: (1) requires the Commission to designate for revocation hearing any radio station license of any licensee which uses its ownership of radio stations and other businesses to discriminate against musicians, concert promoters, or other radio stations, (2) requires the Commission to designate for hearing any application for assignment of license or transfer of control of a radio station licensee, if grant of such application will lead to excessive concentration of control on a national level or a local level, (3) prohibits the Commission from revising upward the local radio ownership limits, and (4) requires the Commission to review the radio industry to determine whether industry participants manipulate the use of privately controlled audience measurement systems.

In his press release announcing the introduction of his bill, Senator Feingold stated that the bill, “[h]elps small and independent radio owners and promoters by curbing concentration to level the playing field in the marketplace.”²⁰ Also, in the press release, Senator Feingold stated, “I have been hearing from independent radio stations and concert promoters in Wisconsin who are being

¹⁹S.2691, Competition in Radio and Concert Industries Act of 2002, June 27, 2002, 107th Congress, 2d Session.

²⁰“Feingold Introduces Competition in Radio and Concert Industries Act,” Press Release June 26, 2002, U.S. Senator Russ Feingold.

pushed out by anti-competitive practices that are in turn a result of concentration.” Senator Feingold added, “The Telecommunications Act of 1996 opened the floodgates for concentration in the radio and concert industry, and that’s exactly why we are here today -- because we need to repair the damage that has been done through this anti-competitive behavior.”

VI. CUMULUS HAS BEEN ACCUSED PREVIOUSLY OF HARMING MINORITY OWNERSHIP

The Commission should take note in this proceeding that minority station owners recently have found it necessary to file petitions to deny against Cumulus in at least two other transactions. In Solar Broadcasting Company, Inc., 26 CR 271 (2002), Davis Broadcasting, Inc. (“Davis”), an African American owned company, alleged, *inter alia*, that Cumulus had attempted to monopolize advertising in the Columbus, Georgia Arbitron metro market and had engaged in predatory pricing. 26 CR at para. 9-11, 49. The Commission rejected Davis’s allegations without giving any consideration to the national market power Cumulus can bring to bear in the Columbus, Georgia market. *Id.* at para. 49-50. And, in Golden Triangle Radio, Inc. 26 CR 255 (2002), T&W Communications Corp. (“T&W”), another African American owned company, alleged that Cumulus’s proposed acquisition of 7 radio stations in the Columbus-Starkville, Mississippi Arbitron metro market would cause undue concentration of control of radio advertising in the local radio market. The Commission rejected T&W’s allegations also. In both the Solar and Golden Triangle cases, the Commission failed to give any consideration to the national market power wielded by Cumulus.

NABOB does not know whether Cumulus purposely seeks to cause competitive harm to minority owners. However, the Cumulus strategy of targeting acquisitions in small markets is having a disproportionately negative impact on minority owners. Minority owners usually are precluded by market entry barriers from acquiring stations in larger markets.²¹

Minority purchasers, because of market entry barriers, usually seek to acquire less costly stations in smaller markets. By targeting smaller markets with its national market power, Cumulus has been consolidating control of markets in which minorities are disproportionately owners or prospective owners. In the Solar and Golden Triangle cases, Cumulus has been accused of abusing its market power. The Commission must look at these cases collectively as it reviews the Macon transaction.

In the Solar and Golden Triangle cases, Commissioner Copps dissented to the Commission's decisions. Commissioner Copps issued a statement directed at five cases decided by the Commission on a single day. Commissioner Copps stated that of the five cases, he could support grant of only one case. As to the remaining four, including the Solar and Golden Triangle cases, Commissioner Copps stated that he would designate them all for hearing. Commissioner Copps added:

I am troubled by the trend toward greater and greater consolidation of the media as exemplified by these transactions. I am further troubled by the Commission's acceptance of these levels of concentration in radio, particularly in the smaller radio markets at issue here. The five transactions before us here would each result in levels

²¹The Commission received a wealth of information on the market entry barriers faced by minority entrepreneurs in the study conducted for the Commission, "Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present," prepared for the Office of General Counsel, Federal Communications Commission, by the Ivy Planning Group LLC, December 2000.

of concentration that are greater than that approved by the Commission in the past, and are potentially harmful to competition. Given the small markets at issue here, the effects of extreme concentration are that much more pernicious.

Commissioner Copps concluded:

When it comes to transfers of broadcast licenses, our analysis must go beyond competitive analysis, to the effects of the transfer on factors unique to broadcasting -- localism and diversity. This is consistent with Commission precedent, in which we have found that we have “an independent obligation to consider whether...radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest.” [citation omitted.]

The views of Commissioner Copps should be considered closely in connection with the transaction before the Commission.

VII. CONCLUSION

NABOB submits that, in addition to examining the local market power Cumulus will have in Macon in this proceeding, the Commission should also examine the national market power Cumulus already has brought to bear, and will bring to bear, in Macon. NABOB submits that such an examination requires designation of these applications for hearing to determine whether grant of the instant applications will serve the public interest.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2002, I caused copies of the foregoing **“Comments of the National Association of Black Owned Broadcasters”** to be served by U.S. mail, postage prepaid upon the following:

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/s/ Kathy Nickens

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July 12, 2002