

March 2, 2017

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Written Ex Parte Communication, MB Docket Nos. 14-50, 09-182

Dear Ms. Dortch:

The Federal Communications Commission (FCC) recently filed a motion requesting that the Third Circuit Court of Appeals hold in abeyance the consolidated cases pending before it in light of a petition for reconsideration filed by the National Association of Broadcasters (NAB) in the above-captioned proceedings.¹ The Commission told the Third Circuit that it “intends to act” on NAB’s petition and further noted that:

NAB’s petition permits the FCC to reconsider the *Order* more broadly, including reexamining those portions of the *Order* that NAB has not expressly asked the agency to reconsider.²

The undersigned licensees of radio stations commend the Commission for its plan to act on NAB’s petition and urge the Commission to act not only on NAB’s requests, but also to review the entire record, including advocacy regarding the AM/FM subcaps. The Commission originally adopted the AM/FM subcaps in light of technological and marketplace differences between AM and FM stations that the FCC feared disadvantaged AM stations.³ The Commission’s most recent

¹ See FCC Motion to Hold in Abeyance, Prometheus Radio Project, *et al.*, v. FCC, Nos. 17-1107, *et al.* (3d Cir. Feb. 15, 2017) (Motion).

² *Id.* at 1, 4.

³ *Review of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2778 (1992) (adopting separate numerical limits for ownership of AM and FM stations “because stations in the FM service may in particular markets have an advantage over stations in the AM service, or vice versa This approach will tend to prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service. *We believe that this is particularly important with respect to the FM service, which in many markets enjoys significant competitive advantage.*” (emphasis added)).

broadcast ownership order⁴ ignores record evidence that any technical and marketplace dynamics that may once have differentiated AM and FM stations no longer exist. On reconsideration, the Commission should find that the subcaps do not protect competition in local radio markets in light of today's marketplace dynamics and eliminate the subcaps.

Agency action on a petition for reconsideration is “an outgrowth of the ongoing rulemaking” proceeding.⁵ The Commission's eventual order on the petition must provide a reasoned explanation for its decisions, but need not be limited to the particular requests of the petitioner.⁶ Rather, an agency is “free to modify its decision based on the evidence amassed throughout the entire rulemaking.”⁷ This is particularly the case where, as here, the petitioner's critique of the Commission decision is sweeping, rather than narrowly focused.⁸ So long as the resulting order on the petition modifies rules that are a “logical outgrowth” of the proceeding and includes “a reasoned explanation for [the] decision that is supported by the record,” the Commission will meet applicable Administrative Procedure Act standards.⁹

In the multiple notices that ultimately led to its most recent broadcast ownership decision, the Commission discussed, and asked several questions about, whether to retain the AM/FM subcaps.¹⁰ For example, in the Notice of Proposed Rulemaking associated with the 2010 Quadrennial Review, the Commission observed:

⁴ See *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864 (2016) (Report and Order).

⁵ See *Globalstar, Inc. v. FCC*, 564 F.3d 476, 479-80, 485-86 (D.C. Cir. 2009).

⁶ See *id.* at 485, 488.

⁷ *Globalstar, Inc.*, 564 F.3d at 486.

⁸ See *Globalstar*, 564 F.3d at 486 (such broad, “plain language” cannot be viewed as constraining a petition for reconsideration to the limited issues raised by the petitioner). NAB's petition seeks relief on the basis of wide-ranging errors in the statutory, legal and marketplace analyses in the Commission's Report and Order. See *Petition for Reconsideration of the National Association of Broadcasters*, MB Docket Nos. 14-50, *et al.*, at i (Dec. 1, 2016) (“these rules are divorced from current competitive realities, are based on faulty premises or misunderstandings of the law, lack evidentiary support, and prevent local broadcasters from competing and serving their local communities effectively”).

⁹ See *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997).

¹⁰ See, e.g., *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 29 FCC Rcd 4371, ¶¶ 98-107 (2014); *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the Broadcasting Services*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17516-18 ¶¶ 75-80 (2011); *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the*

Those advocating elimination of the subcaps argue that recent advances in technology, including online streaming, HD radio technology, and the use of FM translators to augment AM station broadcast signals, have improved the ability of AM radio to compete in the marketplace. In addition, they assert that many of the top stations in large and small markets are AM stations, which undercuts any argument that AM radio will flounder if the subcaps are removed. Some broadcasters also assert that lifting the subcaps will create new ownership opportunities of divested station [sic] for entities, which include minorities, women, and small businesses, because broadcasters will buy and sell certain in-market stations to strengthen existing station clusters. In addition, they state that the owners of these station clusters would then be in better financial positions to devote additional resources in local programming.¹¹

The Commission went on to seek comment on the impact of digital radio on the AM/FM subcaps, the “technical limitations” of AM with respect to FM, and the impact of changes to the FM translator rules on AM.¹²

Several commenters addressed the multiple rounds of Commission questions and proposals regarding the subcaps, including:

- A joint filing by 21 broadcast owners representing 668 AM and FM stations, highlighting the technological advances and regulatory changes, including the daytime contours of AM versus FM stations, HD technology, changes to the FM translator rules, Arbitron (now Nielsen) ratings, diverse ownership of AM stations and marketplace dynamics of radio.¹³
- Comments by Clear Channel Communications, Inc. discussing the increasing competition from other audio platforms, including satellite and mobile phones, the strong performance of AM radio as a competitor, the technical parity between AM and FM

Broadcasting Services, Notice of Inquiry, 25 FCC Rcd 6086, 6112 ¶ 86 (2010) (“Does it continue to make sense to have sub-caps for the two services? Have recent technological advances eliminated the need for this aspect of the rule?”).

¹¹ *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the Broadcasting Services*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17516 ¶ 76 (2011).

¹² *Id.* at ¶¶ 78-80.

¹³ See Reply Comments of Alpha Broadcasting, LLC, *et al.*, MB Docket No. 09-182 (July 26, 2010).

stations, and attaching a study by BIA/Kelsey dispensing the notion that AM stations are weak competitors.¹⁴

- Comments by Frandsen Media Company LLC, highlighting the changing marketplace dynamics “where audio service is simply audio service,” and where AM stations can be rebroadcast by FM translators, over the internet, digitally and on FM HD-2 channels.¹⁵
- Comments by Entercom Communications Corp. demonstrating the challenges posed by the AM/FM subcaps in “delivering full market service with a diversity of programming.”¹⁶
- Comments by the National Association of Broadcasters highlighting the competitive advancements of AM stations and the possibility for increased market entry by diverse owners through elimination of the subcaps.¹⁷

As CBS Corp. succinctly stated:

These subcaps were historically premised upon supposed technological and marketplace disparities between AM and FM stations which have been eradicated by the increasing competitiveness of AM stations and the advent and increasing utilization of digital radio technology. As the record compiled in response to the initial Notice of Inquiry in this proceeding conclusively demonstrated, the subcaps have long been unsustainable, are even more so now, and cannot lawfully be maintained as an aspect of any local radio ownership rule that might be left in place.¹⁸

As the Commission represented to the Third Circuit, in light of NAB’s petition for reconsideration, the Commission is permitted to undertake an examination of the entire record in these proceedings.¹⁹ We believe the Commission should use this opportunity to reach beyond the specific requests from NAB in order to reconsider its continued defense of the AM/FM subcaps. The Commission’s latest order fails to discuss any commenter other than NAB,²⁰ and thus

¹⁴ Comments of Clear Channel Comms., Inc., MB Docket No. 09-182, at 37-45 (July 12, 2010); Appendix D, Mark R. Fratrik, Ph.D., *The Importance of AM Stations in Local Radio Markets* (June 30, 2010).

¹⁵ Comments of M. Kent Frandsen, MB Docket Nos. 09-182, 07-294, at 5-7 (March 5, 2012).

¹⁶ Reply Comments of Entercom Comms. Corp., MB Docket No. 09-182, at 2 (July 26, 2010).

¹⁷ Comments of the National Association of Broadcasters, MB Docket Nos. 09-182, 07-294, at 38-39 (March 5, 2012); *see also* Comments of the National Association of Broadcasters, MB Docket No. 14-50 *et al.*, at 68-69 (Aug. 4, 2014).

¹⁸ CBS Corporation Submission of Documents, MB Docket Nos. 14-50, *et al.* (Aug. 6, 2014) at attachment, Comments of CBS Corporation, MB Docket Nos. 09-182, 07-294, at 19 (March 5, 2012).

¹⁹ Motion at 4.

²⁰ *See* Report and Order, 31 FCC Rcd at 9907-10 ¶¶ 113-20.

ignores the evidence cited above, including an empirical study, that demonstrates the absence of justification for retention of this rule. The Commission's decision thus fails to reflect competitive changes, is contrary to statute, and is arbitrary and capricious. The Commission should take this opportunity to correct its error and reconsider and eliminate the AM/FM subcaps.

Respectfully submitted,

/s/ Bob Proffitt

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