

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Definition of Radio Markets) MM Docket No. 00-244
)
TO: Chief, Mass Media Bureau

**COMMENTS OF WEIGLE BROADCASTING CORPORATION AND
WILLIAM E. BENNS, III**

Weigle Broadcasting Corporation and William E. Bennis, III (the Commentators), by their attorney, hereby respectfully submit the following comments in this proceeding.

I. Commentators and Their Interests in this Proceeding:

1. William E. Bennis, III, is the chief executive officer and one-third owner of a number of companies in the Marietta, Ohio/Parkersburg, West Virginia market. In August of 1999, the Bennis companies filed applications to transfer the licenses of five stations in the Marietta/Parkersburg market to Jacor Licensee of Louisville, Inc., a company controlled by Clear Channel. The applications have never been acted upon by the Commission's staff, presumably, because of concerns relating to concentration of broadcast revenues.

2. Weigle Broadcasting Corporation is the licensee of FM Broadcast Station WRVZ, Pocatalico, West Virginia (a suburb of Charleston, West Virginia). In May of 2000,

Weigle applied to transfer the license of Station WRVZ to West Virginia Radio Corporation of Charleston. Again, as in the case of Bennis, the application has never been acted upon by the Commission=s staff. Once again, we presume that the reason for inaction is concern over concentration of broadcast revenues in the Charleston, West Virginia, market.²

3. In this rule making, the Commission proposes to change the definition of a radio market. No specific rules have been proposed. Thus, neither Weigle nor Bennis knows whether the changes would block the transactions which they propose. However, as will be demonstrated, the Commission should in no event adopt rules which are applied retroactively to require the denial of transfer applications which were pending long before new rules were proposed.

II. Changing the Definition of a Radio Market May Well Run Afoul of the Intent of Congress:

4. The current definition of a radio market is set forth in Section 73.3555(a)(3)(ii) of the Commission=s Rules and Regulations, and stems from proceedings in Docket No. 91-140. Initially, in a Report and Order, released April 10, 1992, the Commission adopted a definition based upon Arbitron Metro markets. Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992). Upon reconsideration, however, the Commission determined that the use of the Arbitron Metro definition was too restricted and was not practicable in part because Arbitron constantly

²Although, in the case of WRVZ, the Justice Department conducted a thorough investigation and determined that the transaction would have no anti-competitive effect. In the case of the Marietta/Parkersburg transactions, the Justice Department was given notice of those

redefines its markets. Therefore, upon reconsideration, the Commission adopted the definition which is currently set forth in 47 C.F.R. Section 73.3555(a)(3)(ii), and reads as follows:

The number of stations in a radio market is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e., the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service. @ Revision of Radio Rules and Policies, 7 FCC Rcd 6387 (1992).

5. Section 73.3555(a)(1) of the Commission's Rules and Regulations sets forth the number of stations which may be commonly owned in any market, as defined in Section 73.3555(a)(3)(ii). Section 73.3555(a) of the Commission's Rules and Regulations is unique because, unlike all of the other Commission Rules and Regulations which were adopted by the agency, Section 73.3555(a) was actually dictated to the Commission by Congress when the Congress enacted Section 202 of the Telecommunications Act of 1996, (P.L. 104-104, 110 Stat. 56), approved February 8, 1996. What Section 202 did was to specifically direct that, The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that

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(A) in a radio market with 45 or more commercial radio stations, a party may own, operate or control up to 8 commercial radio

transactions but evidently determined that they did not even merit any special investigation.

stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.@

This is the exact same language that the Commission dutifully incorporated in Section 73.3555(a)(1) as directed by Congress.

6. The Congress did not dictate the definition of a radio market set forth in Section 73.3555(a)(3)(ii); it did not need to do so, because the language defining a radio market was already on the books and had been unchanged since it was originally adopted in 1992. Congress was, however, aware of that language. Arguably, therefore, a change would require consultation with the Congress, which has not taken place. Therefore, if the Commission decides to change the definition, it may reasonably expect that appeals will be taken to the courts and that these appeals may, in fact, prove successful.

III. In Focusing on Radio, Alone, Without Considering Other Advertising Media the Commission Is Being Myopic:

7. The radio broadcasting business is founded upon advertising. Without advertising revenues, no commercial radio station could survive. Thus, the radio business is part

of the broader advertising business. Radio stations compete for revenues with such other diverse advertising media as newspapers, television and cable. Furthermore, because radio is a tertiary or quaternary advertising medium,³ the competition is dog eat dog. Very little radio advertising is ever sold over the transom. Only very rarely does anyone ever call or visit a radio station to buy radio advertising. Instead, the advertising must be sold by skilled sales people, who must compete for business with other sales people representing newspapers, television stations, and cable systems. Thus, even if a company could control 100% of the radio stations in a particular market, the company could scarcely fix the price of advertising.

8. The Marietta/Parkersburg market is a case in point. In Marietta/Parkersburg, the sales people for the Bennis stations must compete with sales people for four different daily newspapers (owned by three different companies), two cable systems, a television station, and at least five other radio stations owned by a company controlled by Nicholas Galli. A similar competitive situation exists in the Charleston market where Weigle Broadcasting Corporation has its station.

9. The Commentators respectfully submit that if the radio broadcasting industry is viewed as it should be, as simply a small part of the larger business of advertising, there is no danger that radio broadcasters operating under the current rules will in any way be able to fix the price of advertising in their respective markets. Hence, there is really no need to change the definition of a market or otherwise tinker with the rules adopted by Congress.

IV. The New Rules, If Any, Should Not Be Applied Retroactively to Bar a

³In most markets, newspaper is the primary medium, followed by television and/or cable. Thus, in times of poor business, a merchant is likely to cut back his radio advertising before trimming his newspaper or television budget.

Grant of Applications Already on File:

10. To the extent that the Commission seeks by this rule making to slow or reverse concentration of control of broadcast revenues, it is a matter of locking the barn after the horse has been stolen. With the enactment of the Telecommunications Act of 1996, and the changes in the Commission's multiple ownership rules brought about by that Act, a few large companies have already come to own the vast majority of radio stations in the U.S. The genie cannot be put back in the bottle.

11. Other, smaller companies, relying upon the regulatory milieu have sought to acquire groups of stations, knowing that stations in a group are worth more individually than stations which are not in a group. This is so because of the economies of scale and other efficiencies that arise from group operation. For example, as many as five stations can be operated from a single studio building using a common sales staff and common engineering and programming personnel.

12. Many individuals have purchased stations with borrowed money, paying top dollar for the properties, because they add value to all the stations in a pre-existing group. Any attempt to require such stations to be sold separately and not as a group would severely devalue the stations and, to the extent that the stations were acquired with borrowed money, would likely cause many owners to go bankrupt. It would, in short, be an economic disaster. For this reason, Commentators respectfully submit that any new rule which seeks to break up existing combinations, e.g., by requiring stations in a group to be sold only as individual stations, is economically dangerous and contrary to the public interest. Even if the Commission should make some change in the definition of a radio market, it should not apply that change in such a way as

to destroy groups that have already been created.

13. Certainly, it would be grossly unfair to apply any new rules to block a grant of applications, like those filed by Weigle and Bennis, which were in perfect conformity with the rules in existence at the time the applications were filed, but have been blocked by amorphous and ever changing concerns over revenue concentration. On information and belief, there are only about 30 transactions, involving less than 100 stations, which are in this category. One hundred stations out of the 11,000 licensed radio stations in this country are a drop in the bucket. Even if there could be some perceived public benefit from blocking those sales (and we respectfully submit that there is no benefit at all), the benefit is so minuscule as to be de minimis.

14. The people involved in these currently blocked and long delayed transactions have already suffered substantial damage. Owners who had retirement plans have had to put those plans on hold. Owners who expected to go on to other ventures have had to put their very lives on hold. The stations, themselves, have suffered, losing key employees because ownership was unable to sign long term employment contracts. Station staff members have suffered because they didn't know whether they would, or would not be retained by new ownership or whether new ownership would ever arrive.

15. Simple justice and equity require that these pre-existing applications be grandfathered and granted, without further delay.

February 13, 2001

Respectfully submitted,

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