DOCKET FILE COPY ORIGINAL

ORIGINAL

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

RECEIVED

FEB 26 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

To: The Commission

COMMENTS OF CUMULUS MEDIA INC.

Cumulus Media Inc. ("Cumulus"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, respectfully submits these Comments in response to the Commission's *Notice of Proposed Rule Making* in this proceeding ("*NPRM*"), FCC 00-427, adopted on December 6, 2000, and released on December 13, 2000, 65 Fed. Reg. 82305 (published on December 28, 2000).[1]

INTRODUCTION

The *NPRM* seeks comment on whether and how the Commission should modify the way in which it determines the dimensions of radio "markets" and counts the number of stations within such markets, for purposes of applying the Commission's multiple-ownership rules and the ownership limits specified in Section 202(b)(1) of the Telecommunications Act of 1996 (the "1996 Act"). The Commission also seeks comment on whether and how it should amend the method by which the Commission determines the number of radio stations owned by a single party in a radio market for purposes of applying the multiple-ownership rules and the statutory ownership limits.

[1] The deadline for filing comments in this proceeding was extended to February 26, 2001, by *Order*, DA 01- 71, adopted and released on January 10, 2001.

No. of Copies rec'd 0+4
List A B C D E

Cumulus, through subsidiaries, owns or provides programming and marketing services to approximately 227 commercial AM and FM radio broadcasting stations. By number of stations, Cumulus is the second largest radio station owner in the United States. As a large, national radio broadcasting company, Cumulus has a high level of interest in the *NPRM's* reexamination of the current definition of a radio market under the Commission's local radio ownership rules.

In these Comments, Cumulus demonstrates that any significant change in the established methods of defining a radio market and of determining the number of stations in a given market or owned by a single entity within such market, such as are proposed in the *NPRM*, would violate Section 202(b)(1) of the 1996 Act. The Commission may not use the rulemaking process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended.

Cumulus also believes there is no reasonable basis for adopting any of the various options or approaches proposed in the *NPRM*. None of the specific proposals – ranging from changes in the counting methodology, to use of different signal contour overlap standards, to abandoning the use of overlapping signal contours altogether in favor of an Arbitron-based definition – are needed to meet any of the Commission's stated objectives. It also is not clear that any such proposals would necessarily eliminate the potential for arbitrary or anomalous results.

Finally, if the Commission were to adopt any of the rule changes proposed in the *NPRM*, the Commission would need to ensure that any such changes were applied "prospectively and fairly, with cognizance of the reasonable market expectations of parties who hold combinations lawfully assembled under [the Commission's] existing rules," as Commissioner Ness has cautioned. [2] To meet this standard, the Commission not only must "grandfather"

---

[2] *Definition of Radio Markets,* MM Docket No. 00-244, Separate Statement of Commission Susan Ness (Dec. 6, 2000), FCC 00-427 at 20.

existing ownership combinations and assignment applications, but also should permit combinations lawfully assembled in compliance with Section 202(b)(1) and the Commission's existing rules to be freely transferable for a reasonable period of time.

I. CHANGING THE DEFINITION OF RADIO MARKETS TO EFFECTUATE A DIFFERENT RESULT THAN CONGRESS INTENDED WOULD VIOLATE SECTION 202(b)(1) OF THE 1996 ACT.

Section 202(b)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), delineates with precision the number of radio stations a single party may own, operate, or control in a local market of a given size. It directs the Commission to permit common ownership of multiple radio stations in local markets of varying sizes at or under specified numerical station limits, without providing the Commission with any discretion to adopt a stricter station limit (or to consider other measures of market concentration such as audience or advertising revenue shares). The statute thus embodies Congress's judgment as to the proper balancing of the need for appropriate consolidation of ownership of media properties and the interests in avoiding undue concentration of control and maintaining a sufficient diversity of voices, which the Commission is not free to override.

The language Congress employed – that the Commission "shall revise" its regulations "to provide" this permitted level of ownership[3] – is clearly mandatory, not merely hortatory. Pursuant to this Congressional direction, the Commission implemented the Section 202(b)(1) radio ownership limits in its regulations, finding that they were "mandated" by the "specific terms set forth in the legislation." *See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368, 12370-71 (1996) (adopting revisions to 47 C.F.R. § 73.3555(a)(1)). Since Congress has clearly expressed its desire to regulate local radio ownership diversity through its set of tiered-market numerical station limits,

---

[3] Pub. L. No. 104-104, § 202(b)(1), 110 Stat. 56 (1996) (emphasis added).

the Commission obviously is not free to disregard that direction and promulgate a different set of ownership limits.

This significant limitation upon the Commission's discretion applies equally to the *NPRM's* proposals to amend the long-standing definition of a "radio market" embodied in Section 73.3555(a)(1) of the Commission's Rules. While Section 202 (b)(1) does not expressly define the term "radio market," as the *NPRM* indicates, the Commission's existing methodology for defining markets and counting stations has been consistently used since 1992. When Congress adopted the very specific numerical limits of Section 202(b)(1) to relax radio station ownership restrictions in local markets, Congress was aware of the Commission's existing definition and specifically did not alter it. As Chairman Powell has stated, "proper statutory interpretation would lead one to conclude that Congress set its numerical limits against the market definition that prevailed in regulation at the time, and not a definition that had not been used for this purpose previously."[4] Moreover, in implementing Section 202(b)(1) and revising Section 73.3555(a)(1) as directed by the statute, the Commission in 1996 specifically noted that the market-definition aspects of the local radio ownership rule "as set forth in previous Commission decisions, are unaffected by the Telecom Act and will remain in effect." *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 (1996).

"[I]t is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the

---

[4] *Definition of Radio Markets*, MM Docket No. 00-244, Concurring Statement of Commissioner Michael K. Powell (Dec. 6, 2000), FCC 00-427 at 24. Indeed, what little legislative history there is suggests that Congress did not envision the Commission's making further changes in its rules that would impede the objectives of Section 202(b)(1). *See, e.g.*, H. Rpt. No. 104-204, at p. 119 (discussing the broadcast ownership provisions of H.R. 1555, the House version of the bill that became the 1996 Act).

one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)); *see also Haig v. Agee,* 453 U.S. 280, 297-98 (1981); Separate Statement of Commissioner Harold W. Furchtgott-Roth, FCC 00-427, at 23. Accordingly, the Commission should not alter its accepted administrative definition of the term "radio market" or its methodology for counting stations within a given market, which have been consistently employed since 1992, so as to effectuate a result different from that intended by Congress in setting radio station ownership limits in the 1996 Act.

II. ADOPTION OF THE VARIOUS PROPOSALS IN THE *NPRM* IS UNWARRANTED.

The *NPRM* suggests several different, and in some ways conflicting, options or approaches as "possible means of addressing the definitional issues" discussed in the *NPRM. NPRM*, ¶9. Cumulus respectfully submits that none of these approaches is warranted at this time, and each (to varying degrees) would inappropriately frustrate the relaxation of ownership limits provided by Congress in the 1996 Act. Moreover, there would be no assurance that any of the new approaches would produce more rational results than the existing rules.

The proposal to eliminate the use of overlapping signal contours in favor of an Arbitron-defined radio market is the most sweeping, and least justifiable, approach presented. As the Commission recognized in its 1992 decision, [5] Arbitron markets change regularly, the number of rated stations continually fluctuates, and the "home market" designation and audience ratings of stations can change depending upon a number of factors, some of which are within the control of the individual licensee. Particularly in smaller and mid-sized markets, the Arbitron-defined Metro does not necessarily include all stations that may be geographically located so as to provide service to the same listeners or to sell advertising to the same advertisers. Indeed, as

[5] *Memorandum Opinion and Order and Further Notice of Proposed Rule Making, Revision of Radio Rules and Policies,* MM Docket No. 91-140, 7 FCC Rcd 6387, 6394-95 (1992).

the *NPRM* notes, many radio stations and many counties in the United States are not even located within an Arbitron-defined Metro. *NPRM*, ¶10. Thus, an Arbitron-based definition would provide an inherently uncertain yardstick for measuring the number of stations in a given market. Acquirors and would-be acquirors need certainty when deciding how many stations can be acquired in a particular radio market. The current market-definition methodology, based as it is on objective criteria relating to predicted signal contours, provides such certainty.

Nor is there any basis for concluding that a different contour overlap standard would provide a more accurate count of the number of stations in a market. As the *NPRM* observes, a standard that counted only those stations whose principal community contours overlap or intersect the overlap area of the principal city contours of the stations whose ownership is to be merged "might be too restrictive and thus inappropriately thwart the relaxation of the ownership rules that the 1996 Act contemplated." *NPRM*, ¶12. Other alternatives – such as counting only those stations that overlap a certain percentage of the contour of one or more of the mutually overlapping stations, or counting only those stations that are "actually heard" in a market (*id.*) – cannot be shown to produce more accurate results, and would be fraught with uncertainty.

Finally, with respect to the so-called "numerator-denominator" issue, Cumulus does not believe that either alternative suggested in the *NPRM* would "better reflect the statute's structure" or "lend consistency and predictability to the commercial marketplace." *NPRM*, ¶9. As noted above, the current methodology for counting stations in the market and counting the number of stations that a single entity is deemed to own in a market has been used since 1992, and is part of the regulatory backdrop against which Congress enacted Section 202(b)(1). Moreover, based on Cumulus's experience and the instances cited in the *NPRM*, the problems in this area appear to have arisen quite infrequently in the five years since enactment of the statute. Cumulus believes the Commission should be cautious in making any changes in station counting methods that are tested and familiar to applicants and their engineering consultants, and should require that any remedial measures be shown to further the Commission's "core concerns of

competition and diversity," 7 FCC Rcd at 6395, as well as to be consistent with the intent of Congress in relaxing radio ownership restrictions in the 1996 Act.[6]

III. ANY CHANGES THAT MAY BE ADOPTED BY THE COMMISSION MUST BE APPLIED PROSPECTIVELY AND FAIRLY.

The *NPRM* does not propose that any rules and policies adopted in this proceeding should be applied retroactively to existing ownership combinations. *NPRM,* ¶13. As the Commission recognizes, "[t]hose ownership arrangements were granted as being in the public interest and in accordance with applicable Commission rules and policies. There is no reason to disturb these ownership combinations." *Id.*

Cumulus agrees that the Commission should not attempt to promulgate any retroactive rules. In avoiding unfair retroactivity, however, Cumulus believes the Commission must be mindful of what Justice Scalia has termed "secondary retroactivity" – *i.e.*, a rule with "exclusively future effect" that "*affect*[s] past transactions," *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 219 (Scalia, J., concurring) (emphasis in original) – as well as what Commissioner Ness has referred to as the "law of unintended consequences." *Definition of Radio Markets,* MM Docket No. 00-244 (Separate Statement of Commissioner Ness), FCC 00-427 at 20. As Justice Scalia has explained, "a rule that has unreasonable secondary retroactivity – for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule – may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. §706, and thus invalid." 488 U.S. at 220. This concern is

---

[6] If the Commission were to determine that any change in methodology were needed to address the "counting consistency issue exemplified by the *Pine Bluff* case" (*NPRM,* ¶9), Cumulus believes that the second alternative suggested in paragraph 9 of the NPRM – *i.e.*, to "exclude from the count of the number of stations in a market, any stations owned by the applicant, except the commonly owned stations that form the market" (*id.*) – would be the preferable approach, as it represents a less drastic departure from the methodology that has been consistently used since 1992.

heightened when a new regulation "replace[s] a prior agency interpretation." *Smiley v. Citibank, S.A.*, 517 U.S. 741, 745 n. 3 (1996). To avoid this defect, any rule changes that the Commission decides to adopt in this area "must be applied prospectively and fairly, with cognizance of the reasonable market expectations of the parties who hold combinations lawfully assembled under [the Commission's] existing rules." (Separate Statement of Commissioner Ness, FCC 00-427 at 20).

In enacting new radio station ownership limits in Section 202(b)(1) of the 1996 Act, Congress attempted to balance the urgent economic and competitive realities that demanded multiple-station ownership with the avoidance of undue concentration of control. To achieve this balance, the new ownership limits were designed to help owners create viable "clusters" of multiple radio stations that were critical to achieving operating economies of scale, while at the same time making radio more competitive with other media by delivering more and better services to listeners and advertisers. Cumulus and other firms responded to this Congressional plan by investing many millions of dollars in the acquisition and development of radio stations previously held by struggling independent operators. As a result, the 1996 Act has had exactly the positive impact intended by Congress, particularly in the mid-size and smaller markets where the economic problems of radio typically were more severe.

Any changes in the Commission's local radio ownership rules which would restrict either the continued existence or free transferability of lawfully assembled, intact station clusters threatens to undermine the reasonable market expectations of parties by reducing the value of their past investments incurred in reliance upon the prior rules. The Commission should give careful consideration to these retroactivity and fairness concerns.[7] One means to avoid the

---

[7] *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (retroactive effect of a rule is permissible where "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles" is greater than "the ill effects of the retroactive application of a new standard").

ill effects of such "secondary retroactivity" would be to permit existing ownership combinations to be transferable to a new owner, at least for a reasonable period of years, similar to what the Commission has allowed in the case of grandfathered television LMAs. This would also avoid producing a result that is contrary to the statutory design and incentives of the 1996 Act.

Respectfully submitted,

CUMULUS MEDIA INC.

By: _____

Bruce D. Ryan
David D. Burns
Daniel Ball
PAUL, HASTINGS, JANOFSKY & WALKER, LLP
1299 Pennsylvania Avenue, N.W., Tenth Floor
Washington, DC 20004-2400
Telephone: (202) 508-9500
Facsimile: (202) 508-9700

Its Attorneys

February 26, 2001