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

In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

COMMENTS OF MBC GRAND BROADCASTING, INC.

MBC Grand Broadcasting, Inc. ("MBC Grand"), through counsel, hereby responds to the FCC's *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making* in the above-captioned proceedings, FCC 01-239, released November 9, 2001 (the "*NPRM*"). MBC Grand is the licensee of radio broadcast stations KNZZ(AM), KTMM (AM), KJOL(AM), KJYE(FM), KMOZ-FM, and KMGJ(FM), all licensed to Grand Junction, Colorado. The six stations owned by MBC Grand represent the maximum number of stations any single entity may own in the Grand Junction market under the local ownership rule mandated by Congress in the Telecommunications Act of 1996, P.L. 104-104, § 202(b), 110 Stat. 110. In the *NPRM*, the FCC proposes to adopt rules and procedures that would create new restrictions on local radio ownership groups in addition to the limited rule that Congress directed the FCC to adopt. These new rules and procedures would create uncertainty about MBC Grand's continued operation of the stations it currently owns and threaten MBC Grand's ability to dispose of its assets in an orderly manner in the event of a future sale of the stations. MBC Grand, therefore, has a strong interest in the outcome of this proceeding.

I. The *NPRM* Proposals Are An Extension Of Existing FCC Procedures That Conflict With The 1996 Telecommunications Act And Impose Unreasonable Burdens On Applicants

Notwithstanding Congress's direction in the 1996 Act to adopt a specific rule governing local radio station ownership including specific numerical limits, and clear evidence from the legislative history that Congress intended to prevent the agency from engaging in a case-by-case review of transactions which otherwise complied with Congress's mandated local ownership rule, the FCC has continued to assert an independent basis for authority to review individual transactions for potential effects on competition and/or diversity deemed inconsistent with the public interest. Since 1998, the FCC has "flagged" applications which, if granted, would result in either a single entity controlling 50 percent or more of radio advertising revenues in the market or two entities controlling 70 percent or more of such revenues. "Flagged" applications have been subjected to extended FCC scrutiny.

These policies and procedures are not only in conflict with Congress's intention expressed in the 1996 Act but were adopted without the benefit of any notice-and-comment rule making. In a significant understatement, the *NPRM* acknowledges (¶ 19) that "[o]ur framework for analyzing proposed radio combinations . . . has led to unfortunate delays that do not serve well the interests of the agency, the parties or the public." However, while conceding some of the deficiencies in the FCC's current policies and procedures, the *NPRM* proposes to cast these policies and procedures, in some manner, in the form of regulations, seeking comment on a variety of options, including continuation of current policies, adoption of "bright-line rules, reliance on individual analysis of each case, or some combination of the "bright-line" and case-by-case approaches.

The one option on which the *NPRM* does not seek comments – and the only course the FCC should adopt – is the abandonment of the current extra-legal review of applications which are consistent with the limited rule Congress directed the FCC to adopt. Although the *NPRM* implies that the consequences of the FCC's current policies and procedures have been largely benign (while acknowledging delays, the *NPRM* claims (¶ 19) that "[m]ost . . . flagged applications . . . were granted on delegated authority"), it ignores the extraordinary legal fees imposed on both sellers and buyers; the numerous transactions that have not been consummated, or have been consummated only under renegotiated terms, because the staff failed to approve applications within reasonable time periods provided in the sales agreements; and the representations extorted by the staff as a condition of recommending approval of applications that clearly fell within the four corners of the limited, Congressionally-mandated rule.[1]

II. The FCC Lacks Statutory Authority To Amend The Rule In Any Way That Imposes Additional Limitations On Local Radio Ownership

[1] To obtain the staff's agreement to recommend approval of the acquisition of its sixth station, KJOL(AM), MBC Grand felt compelled to promise that it would (1) dismiss a pending application for a construction permit for a new AM station (even though the 1996 Act permits the FCC to exceed the numerical limits if doing so will increase the number of operating radio stations, 110 Stat.110-111); (2) refrain from filing an application in the future for a construction permit on a new FM allotment; (3) in the event of a future sale of the MBC Grand stations, not sell all six stations to a single purchaser.

The record in this proceeding is already replete with demonstrations that the FCC lacks the authority to amend the local ownership rule in any way that imposes greater restrictions than those embodied in the limited rule adopted at Congress's direction. In the initial *Notice of Proposed Rule Making* in MM Docket No. 00-244, the FCC sought comments on proposals intended to correct so-called "anomalies" in the application of the local ownership rule; of the twenty parties who filed comments, fourteen expressly took the position that the FCC lacked statutory authority to make any changes in the rule that would have the effect of imposing greater restrictions on local radio ownership. Except for consolidating that proceeding with its new proposals, this *NPRM*, however, ignores the record that has already been compiled.

The fact of the matter is this: the language of Section 202(b) is clear and unambiguous; when Congress has made its intent clear, "that is the end of the matter;" the FCC "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If, however, additional evidence of Congress's intent were required, the FCC need look no further than to prior versions of Section 202(b) that were considered by Congress but rejected.

Section 337 of the House version of the bill, H. R. 1555, included the following provision:

> (a) LIMITATIONS ON COMMISSION RULEMAKING AUTHORITY- Except as expressly permitted in this section, the Commission shall not prescribe or enforce any regulation--
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> > (1) prohibiting or limiting, either nationally or within any particular area, a person or entity from holding any form of ownership or other interest in two or more broadcasting stations or in a broadcasting station and any other medium of mass communication . . ..

The only circumstance under which H.R. 1555 would have permitted the FCC to impose any regulation on radio ownership was narrowly described in Section 337(c), where the FCC would have been allowed to deny an application for a station license if and only if that station was to be combined with *more than one* non-broadcast medium of mass communication *and* the FCC determined that the resulting combination would result in an undue concentration of control. Except in that circumstance, the FCC would have been barred from any case by case review. In the report accompanying H.R. 1555, the House Committee on Commerce, Science and Transportation emphatically stated its view that there was no longer any need for government restrictions on station ownership:

> The audio and video marketplace . . . has undergone significant changes over the past fifty years and the scarcity rationale for government regulation no longer applies. . . . To ensure the industry's ability to compete effectively in a multichannel media market, Congress and the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities. To accomplish this goal, the Committee chooses to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces. In a competitive environment, *arbitrary limitations on broadcast ownership and blanket prohibitions on mergers or joint ventures between distribution outlets are no longer necessary*.

H. Rep. 104-204, Pt. 1 (1995), at 118 (emphasis added).

Similarly, Section 206 of S. 652, as originally passed in the Senate eliminated all numerical limits on local radio station ownership:

> (2) RADIO OWNERSHIP- The Commission shall modify its rules set forth in 47 CFR 73.3555 by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity either nationally or in a particular market.

The Senate bill further provided that the FCC was to have the discretion to “refuse to approve the transfer or issuance of an AM or FM broadcast license to a particular entity if it finds that the entity would thereby obtain an undue concentration of control or would thereby harm competition.” But the Senate’s language, as well as the language of H.R. 1555, was abandoned by the Conference Committee in favor of the specific, unequivocal numerical limits set out in Section 202(b). The

House, which had voted to eliminate all ownership restrictions, without granting the FCC any discretion to consider restrictions on ownership on a case by-case basis, agreed to specific numerical limits in markets of different sizes; the Senate, which had voted to eliminate numerical limits while expressly leaving the FCC discretion to consider undue concentration and competition in individual cases, agreed to the numerical limits without any language permitting case-by-case review.

The only reasonable conclusion from the language of the statute and the legislative history, therefore, is that Congress intended that the FCC would have no discretion to adopt any ownership rule more restrictive than the rule mandated by Section 202(b), or any procedure which would subject applicants to a numerical limit less than Congress had deemed appropriate. Because Congress rejected the sort of procedures the *NPRM* proposes to adopt, the FCC is without authority to to either continue its current policy of flagging applications for extended review or adopt any of the options – "bright-line rules," case-by-case analysis, or some combination thereof – set out in the *NPRM*. *See*, e.g., *Iowa Utilities Board v. FCC*, 120 F.3d 753, 797 n. 17, 802 (8th Cir. 1997) (FCC lacked jurisdiction to issue local telecommunications pricing rules where legislative history showed that bill provisions expressly authorizing such rules were rejected by Congress in Conference Committee).[2]

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[2] It is sophistry to suggest, as in the *NPRM* at ¶ 26, that Congress intended to restrain the FCC's ability to adopt different numerical limits to promote diversity of ownership but left the FCC free to adopt other rules or procedures to advance the FCC's ideal of competition. The legislative history described above makes it clear that Congress was both cognizant of diversity and desirous of improving competition and resolved both concerns in the compromise language adopted

III. No Other Provision Of The 1996 Telecommunications Act Or The Communications Act Of 1934 Authorizes The FCC To Adopt The Proposals Set Out In The NPRM

The *NPRM* posits that, notwithstanding Congress's direction in 1996 to adopt a specific local ownership rule, it is free to revisit the issue because, in Section 202(h), Congress also mandated a biennial review of the FCC's ownership rules (*NPRM*, ¶ 23) or, alternatively, because Congress, in a rule of construction set forth in Section 601(c)(1) of the 1996 Act, implicitly preserved the FCC's power to impose restrictions on local ownership under the public interest standard incorporated in Sections 309(a) and 310(d) of the Communications Act (*NPRM*, ¶ 24). Neither hypothesis withstands examination.

Section 202(h) requires the FCC biennially to review the radio ownership rule, and the other ownership rules mandated by Congress in the 1996 Act, to determine whether the rules remain "*necessary* in the public interest as the result of competition." (Emphasis added.) The statute then directs the FCC, at the conclusion of its review, to "repeal or modify any regulation it determines to be no longer in the public interest." Although Congress's intention, clearly, was to lessen the impact of the local ownership rules, or eliminate the rules altogether, as broadcasters find themselves in competition with additional sources of information and entertainment, the *NPRM* suggests (¶ 23) that Section 202(h) permits revision or replacement of the Congressionally-mandated rule "with another framework to address . . . [the FCC's] public interest goals."

The purpose and import of Section 202(h) was recently considered by the U.S. Court of Appeals for the District of Columbia Circuit in *Fox Television Stations, Inc. v. FCC*, No. 00-1222, *slip opinion* (decided February 19, 2002). Reviewing the FCC's decision to retain its national television

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by the Conference Committee.

station ownership rule, and the cable television-broadcast cross-ownership rule, both of which were also subjects of the 1996 Act, the Court held that the mandated review of the ownership regulations to repeal or modify those no longer "necessary in the public interest" encompassed concerns about both competition and diversity of ownership. *Slip Op.*, p. 18. The question, therefore, is whether the FCC, in light of Section 202(h), may conclude that its ideal of diversity of ownership permits the FCC to impose limitations on local radio ownership in addition to those directed by Congress in Section 202(b)?

Although *Fox* addressed only the national television station ownership rule, and the cable-broadcast cross-ownership rule, the Court's interpretation of Section 202(h)'s direction to the FCC is highly instructive. In Section 202(c)(1)(B) of the 1996 Act, Congress directed the FCC to amend its national station ownership rule "by increasing the national audience reach limitation for television stations to 35 percent." The Court found that Congress's choice of a 35 percent cap "*determined only the starting point* from which the Commission was to assess the need for *further* change." *Slip Op.*, p. 20 (emphasis added). Applying the Court's method of analysis to the radio local ownership rule, it is apparent that, whatever concerns the FCC may have with respect to either competition or diversity, Section 202(h) makes the rule mandated by Section 202(b) a benchmark from which the FCC may act either to repeal the rule entirely, or further limit its application. The FCC cannot, however, retreat from the baseline Congress has established and adopt new rules or procedures which increase restrictions on local radio ownership.

Section 601(c)(1) of the 1996 Act, boilerplate language inserted by Congress to avoid repeal of any other law by implication, does not give the FCC carte blanche to ignore Congress's intent by purporting to find authority for a more restrictive rule in provisions of the Communications Act.

The Court in *Fox* made Congress's view of the public interest clear: the FCC may repeal the rule, or relax the rule, if in the FCC's opinion the public interest so requires. But it may not create restrictions in addition to those Congress directed the FCC to adopt. Any other conclusion would stand the public interest standard on its head. The FCC may only deny an application after a hearing, and may designate an application for hearing only after finding that there is a substantial and material question of fact whether a grant would serve the public interest. 47 U.S.C. § 309(e). Yet the radio local ownership rule, as adopted by the FCC, embodies what Congress – the sole source of the FCC's authority – has determined to be in the public interest. In other words, an FCC refusal, grounded on the public interest standard, to grant an application would necessarily entail a repudiation of that which Congress has found to be in the public interest.

IV. Enforcement Of Laws To Promote Competition Is Better Left To Other, More Expert Agencies

The U.S. Department of Justice, and the Federal Trade Commission – not the FCC – are the agencies charged by Congress with administering the nation's laws in respect of competition. The Justice Department, in fact, reviews radio acquisitions and acts, in appropriate cases, to prevent violations of the anti-trust laws. Extended FCC reviews of proposed radio station sales for possible adverse effects on competition are, therefore, redundant in many cases and pose the risk of conflicting outcomes. When Mustang Broadcasting sought to exit from the Grand Junction market in 1999, the Justice Department, in reviewing the proposed sale of the Mustang stations, actually solicited MBC Grand to purchase two of the stations (KTMM and KMGJ(FM)) for the purpose of assuring the existence of a second strong station group in the Grand Junction market. Notwithstanding that the government's lead enforcer of the anti-trust laws had both endorsed and, indeed, solicited MBC Grand's acquisition of the stations, the FCC staff conducted an extended review of the transaction for several months before finally approving the sale.

The FCC's procedures also are an invitation to abuse. The owner of several stations in the Springfield, Illinois, market filed a petition to deny a competitor's application to acquire a another station that was "flagged" by the staff for extended review. The petition alleged that the proposed acquisition would result in an undue concentration of control because two station groups would control more than seventy percent of the Springfield market radio revenues. Omitted from the petition was the fact that the petitioner already controlled approximately fifty percent of the revenue in the market. Any of the proposals made in the *NPRM* – whether for "bright-line" rules, case-by-case analysis, or rebuttable presumptions – would only lead to the filing of more self-serving objections.

The fact is that the FCC's review of potential effects on competition, while burdensome to the applicants and subject to abuse, adds nothing to the review provided by the Justice Department. In passing the 1996 Act, Congress recognized that there has been an "explosion of programming distribution sources" from which consumers may choose and with which radio broadcasters must compete. H. Rep. No. 104-204, *supra*, at 118. The FCC, however, focuses narrowly on radio revenue to define the relevant market. In the Grand Junction market, in addition to other radio stations in the market, MBC Grand must compete with four full-power television stations, a cable television system with more than 20,000 subscribers, and a newspaper that reaches 80 percent of the households in the market. During certain dayparts (particularly between 7:00 a.m. and the first evening newscasts), television station advertising rates are directly competitive with the most popular programs on MBC Grand's radio stations. The cable television system sells 60-second commercials for four, five or six dollars per spot, and offers advertisers packages of spots that include exposures in popular news, sports, weather and other cable programming services. The local newspaper captures the largest share of advertising revenue in the market. Out-of-market stations rebroadcast by translators do not compete for local advertising dollars but do capture listening in the market, which has the effect of restraining advertising rates. Even outdoor advertising is a competitive factor. The FCC's narrow focus, therefore, is both out-of-step with Congress and out-of-touch with current competitive conditions.

V If The FCC Adopts Any Rules Further Limiting Local Radio Station Ownership, Existing Station Groups Must Be Insulated Against Future Application Of The New Rules

If, despite the significant doubts about its authority to adopt any of the options put forward in the *NPRM*, the FCC goes forward with any scheme to impose limits on local ownership beyond those mandated by Congress, the FCC must, at a minimum, insulate existing station groups from application of the new standards. Failure to adopt a broad grandfathering scheme would jeopardize investments made in reliance on the existing standards. The FCC is not permitted to change its rules in the middle of the game. *See Chennareddy v. Bowsher*, 935 F.2d 315 (D.C. Cir., 1991), citing with approval *Black v. Romano*, 471 U.S. 606, 621-22 and n. 18 (1985). It may not frustrate legitimate reliance interests. *See New England Tel. & Tel. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) ("under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy"); *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (regulation is retroactive when it alters the consequences of past legal actions).

This means that the FCC must not only assure that licenses for existing groups will be renewed in their ordinary course but also that existing groups not currently in violation with the new standard will not be subjected to the new standard in the event of a future sale. If the FCC were to apply the new standard to currently conforming station groups in future transactions, it would be penalizing owners either for (1) success, for increasing revenue or audience share to the point where the new standards would come into play or (2) events largely beyond the licensee's control, as where a competing station group had increased its share of market revenue and/or audience to the point where the new standards became applicable. If licensees of existing station groups -- including both groups which conform to the new standard and those which exceed it -- seek to dispose of their assets, the FCC must permit them to realize the full value of their investments. To that end, the FCC must permit the sale of (1) existing stations as a group, (2) only part of the group, or (3) parts of the group to different buyers, even if the resulting station group(s) would exceed the applicable benchmark.   Any other result would be arbitrary and capricious, and also raise the question of just compensation under the Fifth Amendment.

CONCLUSION

The proposals in the *NPRM* are fatally flawed. The FCC has no statutory authority for either its existing policies or procedures or any of the options put forward in the *NPRM*.   It should terminate the rule making proceeding and discontinue the procedures now in effect that violate the Congressional purpose underlying the present local ownership rule, unreasonably burden applicants, and fail to serve the public interest.

Respectfully submitted,

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