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

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

**COMMENTS OF NASSAU BROADCASTING II, L.L.C.**

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (the "Commission") Rules, Nassau Broadcasting II, L.L.C. ("Nassau") hereby submits its Comments in response to the above-referenced Notice of Proposed Rulemaking, released on November 9, 2001.[1]

## I. INTRODUCTION

Nassau is the licensee of radio broadcasting stations operating in New Jersey and Pennsylvania. Additionally, it programs several stations through time brokerage agreements. The Commission has recently granted applications for assignment of license for three additional radio broadcast licenses[2] from Multicultural Broadcasting, Inc. to Nassau.

[1] Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861 (2001)(NPRM); Order, DA-02-582 (Rel. Mar. 8, 2002) (extending the Comment deadline to Mar. 27, 2002 and the Reply Comment deadline to April 24, 2002)

[2] WJHR(AM), WSBG(FM), WVPO(AM)

Nassau has a substantial interest in this proceeding. Nassau has already had one set of applications subjected to review under the Interim Policy adopted in the NPRM[3]. It has an additional set of license assignment applications currently being reviewed under the Interim Policy[4]. Nassau's applications for assignment of the licenses for radio stations WCHR-AM and WNJO(FM), Trenton, New Jersey (the "Assignment Applications"), which were filed in September 1998, were among the first to be affected by the Commission's competition review when, without prior notice and comment, the FCC instituted its policy of "flagging" certain applications where it concluded that there might be an affect on competition. Although there were "standards" for flagging applications, there were none for review of them once flagged. Accordingly, action was held up on numerous applications; in some cases like the Nassau Assignment Applications, for several years.

On March 12, 2001, the Commission approved many applications for assignment and transfer of radio broadcast licenses that had been "flagged".[5] In his Statement accompanying the Public Notice announcing the grants, Chairman Powell acknowledged that in adopting Section 202(b) of the Telecommunications Act of 1996 (the "Telecom Act"), Congress had "relaxed the limits the Commission had placed on ownership of radio stations in a local market."[6] Further, he noted, that "Congress established quite plainly the number of stations that could be commonly owned in a local market--- and the proposed

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[3] See, In the Matter of Applications of Great Scott Broadcasting, Assignor and Nassau Broadcasting II, L.L.C., Assignee, (Memorandum Opinion and Order), File Nos. BAL-980910GI and BALH-980910GJ, (rel Mar. 19, 2002)("Great Scott Order").

[4] File Nos. BAL-20010618AAT, BALH-20010618AAU, BALH-20010618AAN.

[5] Public Notice, Broadcast Actions Report No. 44939, released March 12, 2001, pp. 11-24.

[6] Chairman Michael Powell (Separate Statement), released March 12, 2001, at p. 1.

transfers in all of the flagged cases comply with the numerical caps."[7] In his statement, then Commissioner Furchtgott-Roth went one step further, noting that "[n]o rules for flagging were ever written; no rules were proposed for public comment; no rules were reviewed by the Commission; no rules were approved by the Commission; no rules were available for parties to review and to understand whether their transaction complied or did not comply with those rules; and no rules were available to challenge in court."[8] However, the Assignment Applications were to remain pending for more than one year longer.

In the NPRM, the Commission adopted the Interim Policy, which would give priority to those applications that had been pending more than one year, such as the Nassau Assignment Applications. On March 19, 2002, the Commission granted the Nassau Assignment Applications.[9] These Assignment Applications were analyzed by the Commission under the Interim Policy. Although the Commission ultimately concluded that grant of the Assignment Applications was in the public interest, Nassau still believes that the Commission exceeded its statutory authority in conducting such an inquiry in the first place. Moreover, in applying those standards to review of the Assignment Applications three years after they were filed, as well as to review other applications filed prior to the release of the Interim Policy, constituted prohibited retroactive rulemaking. It is Nassau's position that so long as a proposed assignment or transfer meets the ownership limits specified by Congress, there is no further basis for review under the local ownership rules or any competition

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[7] Id.

[8] Statement of Commissioner Harold W. Furchtgott-Roth, "Mass Media Bureau Approval of Various Radio License Transfer Applications," released March 12, 2001.

[9] Great Scott Order ¶¶46-47.

review standards, as proposed in the NPRM. The Commission should decide not to adopt any additional competition rules for radio broadcasting.

## II. CONGRESS PROVIDED EXPLICIT, DEFINED STANDARDS FOR THE COMMISSION TO FOLLOW WHEN ENACTING SECTION 202(b) OF THE TELECOM ACT.

When Congress passed the Telecom Act, the public interest standards articulated in Sections 309(a) and 310(d) remained unchanged. Certainly Congress did not expand the ownership inquiry to be done by the Commission. Congress clearly intended Section 202(b) to work in conjunction with this public interest mandate. The limits on radio broadcast ownership set by Congress in the Telecom Act provide the standards for the Commission's public interest requirements, and any further review is unnecessary and beyond Congressional intent. As Chairman Powell recently noted in the context of approving certain broadcast license assignments, "[a] transaction that complies with structural rules designed to advance the public interest (when they exist), should not be subject to further ad hoc review; otherwise the exalted benefits of such rules would be eviscerated."[10] That such structural rules exist, as a result of the enactment of Section 202(b), is beyond peradventure.

The Commission is afforded multiple opportunities to consider a licensee's operation in the public interest, such as when considering a proposed licensee's character and fitness qualifications. Congress understood this framework. Upon enactment of Section 202(b), Congress specified detailed ownership caps that implicitly satisfied the public interest. If Congress intended to authorize the Commission to conduct further review on this issue, such language could have been included in the Act.[11]

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[10] Chris-Craft Communications, Inc., 16 FCC Rcd 14975, 14996 (2001).

[11] In fact, Congress chose to take out any language concerning a "market concentration" analysis by the Commission from the final bill.

Furthermore, in the NPRM, the Commission proposes an expansion of regulation of local broadcasting by imposing an additional "competition review" on radio license assignments and transfers of control. Such expansion of regulation appears to be at odds with the Telecom Act. As the D.C. Circuit has recently noted in voiding other local broadcasting regulations, "[i]n the Telecommunications Act of 1996 the Congress set in motion a process to *deregulate* the structure of the broadcast and cable television industries."[12]

Congress included Section 202(h) in the 1996 Telecom Act with the express direction to the Commission that it review all its local ownership rules and whether such rules are necessary in the public interest as a result of competition--hardly a signal of intention that the Commission should expand the scope of its regulations. "The Commission shall *repeal or modify* any regulation it determines to be no longer in the public interest."[13] In the Fox Television case, the Court effectively created a presumption against retaining such local broadcasting regulations. But instead of eliminating regulations, the Commission is now proposing to impose a new regulatory structure to review competition in the local radio markets. In light of the already existing mechanisms (at the Department of Justice ("DoJ") and the Federal Trade Commission ("FTC")) for regulating competition issues, as well as the clear intent of the Congress in the Telecom Act that there should be substantial deregulation of local radio broadcasting, any additional regulation would most likely be considered arbitrary and capricious by a reviewing court.

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[12] Fox Television Stations, Inc. v. F.C.C., ___ F.3d ____ (Slip. Op. No. 01-1222, Feb. 19, 2002, at p. __).

[13] Pub. L. 104-104, § 202(h), 110 Stat. 110 (emphasis supplied).

## III. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO CONDUCT AN ANTITRUST ANALYSIS.

Congress has entrusted the DoJ and the FTC with enforcement of the Nation's antitrust laws, not the Commission. Arguably, Congress specifically declined to grant such authority to the FCC. When Congress changed the ownership limits in the Telecom Act, it also specifically rejected market concentration analysis as proposed in the NPRM. In Section 202(b), Congress directed the FCC to change its rules to increase the number of stations that could be owned in any market, up to 50% of the stations in the smallest markets. Unlike the original bills passed by the House and Senate, the conference agreement that resulted in Section 202(b) specifically rejected any "market concentration" analysis by the Commission and even provided the Commission with a mechanism for exceeding the local market limits when a combination would result in an increase in the number of operating stations.[14]

In the NPRM, the Commission cites to the differences in the House and Senate bills and their inclusion of a discussion of undue concentration of control.[15] The Commission contends that the Congress "merely" directed that it modify its local ownership rules.[16] But significantly the bill as enacted into law did not provide for any of the kind of "concentration

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[14] See H. Rep. No. 230, 104th Cong., 2d. Sess. at 200 (Conference Report).

[15] Notice of Proposed Rulemaking at n. 41.

[16] Id., at ¶ 12.

analysis" that had been included in the earlier versions of the legislation, from which it can only be inferred that Congress decided to reject such antitrust analysis by the Commission.[17]

Nor could Congress be deemed to have redirected the jurisdiction over antitrust review from the DoJ and the FTC. Section 601(b)(1) of the Telecom Act, instructs that "nothing in this Act or the amendments made by the conference agreement shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws," which laws do not provide such jurisdiction to the Commission[18]. By creating its own competition review standards, the Commission has ignored established antitrust principles and the decision of the Congress in the Telecom Act.

For example, when the Commission requested additional in information in November 2001 regarding the Nassau Assignment Applications in Trenton, New Jersey, the Commission never cited diversity issue as a basis for the inquiry. Instead, the Commission focused entirely on competition matters, utilizing the Interim Guidelines, which are essentially a mirror of the DoJ's antitrust review guidelines. The Commission's analysis was completely redundant in light of the fact that the DoJ had already reviewed the transaction, under its almost identical analysis, and found the transaction acceptable. Such duplicative review is unnecessary and the Commission should not engage in this repetitive analysis.

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[17] See Cable Arizona Corporation v. Coxcom, Inc., 261 F.3d 871 (9th Cir. 2001), citing Russello v. United States, 464 U.S. 16 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

[18] See also Conference Report at 200.

## IV. THE COMMISSION SHOULD CONTINUE TO DETERMINE THE DEFINITION OF THE MARKET USING STATION CONTOURS.

The Commission is charged under the Act and the Telecom Act with ensuring that an application for assignment or transfer of control of station licenses complies with the limits on local radio broadcasting ownership. When Congress increased the number of radio stations that one owner could operate in a given local radio market, Congress was presumably aware of the use of "contour methodology" for determining the definition of the market. Congress did not include in the Telecom Act any changes in the methodology for determining radio markets. From this failure by Congress to make any such change in the market definitions, it should be inferred that Congress did not intend any changes in this method for determination of the relevant station market.[19] Thus, for purposes of determining compliance with the local ownership restrictions of Section 202(b) of the Telecom Act, the contour study is the critical element.

In the NPRM, the Commission proposes adopting Arbitron radio metropolitan areas as the relevant geographic market. However, Arbitron is a private company that created its radio market structure for certain commercial purposes to measure audiences, not with regulatory intentions in mind, and certainly not that they be used for antitrust analysis. In particular, use of Arbitron's radio markets could create unfair discrepancies when examining the number of stations within a market, which are at odds from the commercial of the market.

For example, in 1998, Arbitron included WKXW in the Trenton, New Jersey market. The most recent Arbitron report, however, places WKXW in the Middlesex-Somerset-

[19] C.F.T.C. v. Schor, 478 U.S. 833, 845 (1986).

Union, NJ metro, notwithstanding that the station continues to be licensed to Trenton. Regardless of WKXW's stated location, the station continues to receive 15% of its advertising revenues from within the Trenton market. Additionally, the Spring 2001 Arbitron report stated that WKXW received a 6.8 share of the listening audience within the Trenton metro area (12+, 6a-midnight). This is a substantial portion of the Trenton audience. Based on Arbitron's decision to move WKXW, the Commission proposed to exclude it from the Trenton market when analyzing the transfer of WCHR and WNJO to Nassau—notwithstanding that WKXW is licensed to Trenton and puts a city grade signal over the entire Trenton Arbitron market. Such an example proves that Arbitron markets would not provide the consistent market definition analysis necessary to comply with Section 202(b), and could create unworkable anomalies. Instead, the Commission should maintain its current market definition analysis to provide consistency and comply with the Telecom Act.

Reliance on Arbitron-defined markets for analysis of compliance with local ownership requirements is particularly harmful to operators like Nassau in small and medium-sized markets. For example, Arbitron lists only nine stations (not including WXKW, which as noted above is licensed to Trenton) in the market. However, when the market is determined by overlapping contours, as demonstrated by Nassau in its contour study, 49 stations put overlapping city-grade signals over Trenton.[20] Monmouth-Ocean, another market in which Nassau operates, has similar discrepancies between the reality of the overlapping contours and the Arbitron definition of the market. There is no need to abandon the contour methodology for determining compliance with the local ownership limits.

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[20] Great Scott Order, ¶ 17.

## V. CONCLUSION

Nassau urges the Commission to conclude that compliance with the local ownership rules provided by Congress is definitive with no need for any separate FCC competition review. Such a conclusion would avoid the frustration and delay that occurred with the Trenton Assignment Applications. The Commission should avoid conducting a duplicative antitrust analysis, for which it has no authority. Additionally, the Commission is urged to retain it current contour methodology analysis in determining the relevant market for purposes of the local ownership rules.

Respectfully submitted,

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