

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

In the Matter of)	
)	
2002 Biennial Regulatory Review – Review of)	MB Docket No. 02-277
the Commission’s Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section)	
202(b) of the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	
Ownership of Radio Broadcast Stations)	MM Docket No. 01-317
in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

To: The Commission

REPLY COMMENTS OF MBC GRAND BROADCASTING, INC.

MBC Grand Broadcasting, Inc. (“MBC Grand”), through counsel, hereby submits Reply Comments in the above-referenced proceedings, which arise from the FCC’s *Notice of Proposed Rule Making*, 17 FCC Rcd 18503 (2002) (the “*NPRM*”).¹

These Reply Comments do not address any specific comments by other parties but, rather, discuss several discrete developments since the January 2, 2003 comment deadline which should be taken into account in the FCC’s final resolution of the issues raised by the *NPRM* and in prior proceedings that have been consolidated with MB Docket No. 02-277.

¹ As noted in Comments filed on January 2, 2003, 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 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.

I The Fractionalization Of The Broadcast Radio Audience Continues

On January 14, 2003, XM Satellite Radio, Inc., announced that its subscription radio service would be available in 75 percent of General Motors Corp.'s 2004 models, up from less than 50 percent of GM's 2003 models.² *The Washington Post*, January 15, 2003, p. E5. At the end of 2002, XM Radio had 360,000 subscribers; its competitor, Sirius Satellite Radio, Inc., had 30,000, up from only 6,500 in August 2002. *USA Today*, January 30, 2003. Both satellite radio providers offer 100 or more channels. By the end of 2003, XM Radio forecasts 1,000,000 subscribers, Sirius 300,000. Sirius has arrangements similar to the XM Radio arrangement with GM for installation of its equipment in new Daimler Chrysler, Ford, Nissan, BMW and Volkswagen vehicles.

This is not to suggest that the growth of satellite-delivered programming threatens the imminent demise of radio broadcasting. It is, however, a clear reminder that the markets the FCC seeks to influence are not static, and the trend is clearly in the direction of further fractionalization of the radio broadcasting audience and, ultimately, the advertising base on which the radio broadcasting industry relies. Radio broadcasters compete for audience and revenues with print media, television, cable television, DBS and, increasingly, the Internet, and now multi-channel satellite distributors growing by hundreds of thousands of new subscribers every year. See MBC Grand's Comments in MM Docket No. 01-317, filed March 27, 2002, p. 10. New, more restrictive rules intended to limit the ability of radio broadcast licensees to maintain -- let alone increase -- their share of the audience and the advertising market will only injure the public interest. Group ownership of strong local stations is not a threat to diversity and localism. If the FCC ignores the fact that radio broadcasters operate in an ever more competitive environment, implementation of new in-band, on-channel digital broadcast

² GM is XM Radio's largest shareholder.

technology – intended to give broadcasters new tools and new opportunities to compete in the digital era – will be delayed and, ultimately, diversity and the ability of local stations to provide local service will suffer.

II Redefining Radio Markets Is Just Another Impermissible Way Of Ignoring Congress’s Explicit Direction In The 1996 Act

Since the deadline for filing initial comments, two members of the FCC have suggested that complaints about undue concentration of control in the radio broadcasting industry could be addressed by changing the manner in which the FCC defines radio “markets” for purposes of the local radio ownership rules. (“Opening Remarks” by Commissioner Kevin J. Martin, Forum on Media Ownership, Columbia Law School, January 16, 2003; “The Last DJ? Finding a Voice on Media on Media Ownership,” Commissioner Jonathan S. Adelstein, Future of Coalition Policy Summit 2003, Georgetown University, Washington, D.C., January 6, 2003.)

As shown in Part I of these Reply Comments, above, the notion that the FCC should change its definition of radio markets is an idea in search of a problem. Of at least equal significance, it is nothing more than another impermissible device to circumvent Congress’s clear command in the 1996 Act.

In its *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making* in MM Docket Nos. 317 and 00-244, 16 FCC Rcd 19861 (2001) (the “*Local Radio Ownership NPRM*”), the FCC solicited comments on several proposals intended to effectively rewrite the numerical limits Congress mandated in 1996, including (1) reliance on Section 309 of the Communications Act to set numerical limits lower than those chosen by Congress; (2) rebuttable presumptions based on audience or advertising share or other unspecified measurements; (3) case-by-case competitive analysis of all proposed radio combinations. *Local Radio Ownership NPRM*, ¶¶ 63-67. Much effort has been expended in response to that notice and the present

NPRM, to demonstrate conclusively that Congress intentionally denied the FCC any authority to impose any numerical limit more restrictive than that chosen by the legislature. MBC Grand Comments in MM Docket No. 1-317, etc., filed March 27, 2002, pp. 3-9; MBC Grand Comments in this proceeding, filed January 2, 2003, pp. 3-7.

Section 202(h) of the 1996 Act gives the FCC three options with respect to the current local radio ownership rules: it may (1) justify the rules, in their current form, (2) modify the rules, to make them *less* restrictive or (3) eliminate them. *Fox Television Stations, Inc. v. FCC*, No. 00-1222, U.S. Court of Appeals, District of Columbia Circuit (decided February 19, 2002), *slip opinion*, p. 20. Redefining the term “market” so that the rules become more restrictive is *not* one of the FCC’s options.

Congress expressed its mandate to the FCC this way:

(b) Local Radio Diversity.--

(1) Applicable caps.--The Commission *shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that--*

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

(2) Exception.--Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

Telecommunications Act of 1996, P.L. 104-104, § 202(b), 110 Stat. 110, 111 (emphasis added).

Congress could not have more clearly signified its intention to adopt the definition of radio markets used by the FCC since 1992. *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992). In fact, when the FCC amended Section 73.3555 in response to Congress's mandate, it did not suggest that a revised definition of radio markets was even open for discussion and did not even solicit comments from the public on how it should implement the mandate. *Order*, 11 FCC Rcd 12368, 12370 (1996) (definition of radio markets among provisions of the rules "unaffected by the Telecom Act").

Because Congress has legislated by reference to the FCC's rules, no other definition of "radio market" is lawfully possible. See, *CBS, Inc. v. Primetime 24 Joint Venture*, 9 F. Supp. 2d 1333, 1339 (S.D. Fl. 1998) (where Congress had adopted FCC definition of a Grade B signal, satellite carrier could not use a subjective test to determine if a household was "unserved"); *accord, ABC, Inc. v. Primetime 24 Joint Venture*, 17 F. Supp. 2d 467, 472 (M.D. N. Car. 1998). See also, *Capitol Mortgage Bankers, Inc. v. Andrew M Cuomo*, 77 F. Supp. 2d 690, 697 (D. Md. 1999) (where Congress defined with specificity procedure HUD was to follow in addressing default-claim rates, HUD's rulemaking authority was limited to adopting regulations to carry into effect will of Congress as expressed in the statute, citing *Board of Governors of the Federal Reserve v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986)); *Association of American*

Physicians and Surgeons, Inc. v. U.S. Food and Drug Administration 226 F. Supp. 2d 204, 219 (U.S. D.C. Dist. Col. 2002)(by enacting a “distinct regulatory scheme” to address a given issue, Congress demonstrated its intention to occupy the field and any attempt by the agency to intervene with an inconsistent regime was in excess of its authority, citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 230, 154-155 (2000)).

The notion that the FCC should, or even could, amend its definition of radio markets must, therefore, be discarded.

In any event, the FCC has not proposed any new definition of radio markets that would lead to predictable results or fail to produce anomalous or arbitrary outcomes. In MM Docket No. 00-244 (*Notice of Proposed Rule Making*, 15 FCC Rcd 25077 (2000)(the “*Market Definition NPRM*”) the FCC proposed, as alternatives to the present rule, (1) reliance on Arbitron radio “metro” market definitions (*Market Definition NPRM*, ¶¶ 10-11), or (2) adopting a more restrictive contour overlap standard in which it would count only stations whose principal city contours overlapped the “overlap area” of the stations proposed to be commonly owned (*Market Definition NPRM*, ¶ 12). Either proposal, if adopted, would lead to unpredictable, inconsistent and irrational results.

In 1992, in fact, the FCC rejected the use of Arbitron definitions to define markets for the purposes of the multiple ownership rules, agreeing with commenters that Arbitron markets change regularly, the number of radio stations fluctuates, and Arbitron tends to undercount stations in the market. *Memorandum Opinion and Order* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6394-95 (1992). These shortcomings have not changed and the list, in fact, understates the problems with this proposal. For example, according to Arbitron, the Grand Junction “metro” consists of only Mesa County. (See MBC Grand’s Comments in MM Docket No. 00-244, filed February 26, 2001, pp. 2-4.) There are only ten radio stations licensed to communities in

Mesa County, while, under the FCC's definition, the market consists of at least 18 stations. In reporting ratings for the Grand Junction "metro," Arbitron lists a total of ten stations, two of which are *not* licensed to communities in Mesa County, "above the line." "Below the line," Arbitron lists three more stations in nearby counties that have significant listening in Mesa County. Two stations licensed to Grand Junction are not listed at all. Clearly, the Arbitron definition of the Grand Junction "metro" is a poor reflection of the actual market and, equally clearly, reliance on such definitions for regulatory purposes would yield unpredictable and irrational results.

The proposed more restrictive contour-overlap definition is no improvement. By defining the market according to the overlap area between the stations proposed to be combined, every single transaction would result in a different market definition, with different ramifications for the local ownership rules and no rational relationship to the economic market in which the stations compete.

Assuming, for the sake of argument only, that the existing market definition has led to outcomes that the FCC believes are unintended anomalies, the FCC has not proposed an alternative that would not lead to more and greater arbitrariness. The bottom line, however, is that the FCC is without authority to change, modify, tweak or tinker with the rules it was ordered by Congress to adopt.

III Congress Mandated The Rule And, If The Rule Is To Be Made More Restrictive, Congress Should Be The Body To Do So

On January 30, 2003, Senator McCain introduced a bill (S. 267) entitled the "Telecommunications Ownership Diversification Act of 2003," which he described as a "market-based, voluntary method of facilitating entry and diversity of ownership." 149 *Cong. Record* S1829 (daily ed. Jan. 30, 2003). FCC Chairman Powell issued a statement praising Senator McCain's initiative, saying the legislation would "encourage and facilitate new entry, including

entry by women and minorities, into the telecommunications industry.” Statement of FCC Chairman Michael Powell, January 30, 2003.

Senator McCain’s bill, whatever its merits, squarely focuses attention on the respective roles of the FCC and Congress in deciding national policy on the issues of competition and diversification of ownership in the broadcasting industry. In the 1996 Act, Congress made a policy judgment about how many stations a single entity could own in a radio market consistent with the public interest. In a period of accelerating competition from a variety of sources, Congress directed the FCC to implement that policy and, periodically, deregulate further, or repeal the rules entirely where they were no longer necessary in the public interest. Congress alone has the authority to make the rules more restrictive. The FCC may only (1) justify the rules currently in effect or (2) move in the direction of further deregulation. Those are its only choices Congress may deal with questions of competition and diversity of ownership virtually any way it wants, through Senator McCain’s bill or otherwise. The FCC cannot; it can move only in the direction Congress has pointed.

Respectfully submitted,

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