

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

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

TO THE COMMISSION

**EMERGENCY MOTION OF THE DIVERSITY
AND COMPETITION SUPPORTERS ET AL.
FOR A BRIEF POSTPONEMENT OF THE
VOTE, DUE LARGELY TO THE COLLAPSE OF
THE COMMISSION'S PUBLIC COMMENT SYSTEM**

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May 31, 2003

In this Emergency Motion, the Diversity and Competition Supporters et al.^{1/} respectfully move for a brief postponement of the vote, which is presently scheduled for June 2, 2003. The Commission's system for reception and review of public comments has collapsed, albeit through no fault of the agency. The Commission cannot lawfully vote until it corrects these technical problems and allows the record to catch up with its system of recording and publishing public comments.

Over the past two weeks, the Commission's docket databases have been crushed under the weight of a blizzard of comments. We do not and cannot know who has commented on which issues, which commission officials have received ex parte communications, and who has made these ex parte communications in the most critical

^{1/} The Diversity and Competition Supporters are:

American Hispanic Owned Radio Association
Civil Rights Forum on Communications Policy
League of United Latin American Citizens
Minority Business Enterprise Legal Defense & Education Fund
Minority Media and Telecommunications Council
National Asian American Telecommunications Association
National Association of Latino Independent Producers
National Coalition of Hispanic Organizations
National Council of Churches
National Council of La Raza
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Urban League
Native American Public Telecommunications, Inc.
PRLDEF-Institute for Puerto Rican Policy
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

The Office of Communication of the United Church of Christ, Inc. and Black Citizens for a Fair Media also join in this Motion. The views expressed in these Reply Comments are the institutional views of the Diversity and Competition Supporters et al., and do not necessarily reflect the individual views of each of their respective officers, directors, advisors or members.

two final weeks of the proceeding. Nor does the public know what we have filed in the past two weeks -- thereby depriving us of the opportunity to participate in the debate to the full extent contemplated by law. Furthermore, in the two-day Sunshine period this weekend, the Commission itself is unlikely to be able to review the comments filed this past week -- comments that haven't even been made available yet by ECFS.

This is probably the most important decision the Commission has ever had to make. Each commissioner has emphasized the vital importance of public participation in this docket. The Chairman has often pointed with pride to the fact that thousands of written comments are on file. Each of these comments is equally important because each commenter is equally important. No American should be denied the full opportunity to participate owed to her by law.

What did the missing comments say? While might be repetitive, nobody knows for sure. Perhaps buried within them were critical gems of wisdom that could have changed history. Nobody knows! The Commission cannot lawfully vote until it considers these comments and until the public has an opportunity to read and respond to them.

Agencies are forbidden from disregarding their own rules under any circumstances. The clear commands of the APA and the Commission's Rules cannot be waived because too many Americans thought this proceeding was important.^{2/}

^{2/} 5 U.S.C. §553(c) provides that an agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments [continued on p. 3]

Four years ago, to counterbalance the tendency for parties with economic interests to dominate its rulemakings with in-person lobbying, the Commission established its ECFS system to receive comments from ordinary citizens. ECFS is outstanding. It is well designed and a joy to use. It is the reason the FCC's website has consistently and deservedly ranked #1 in the federal government.

Most rulemaking proceedings are a breeze for ECFS, since only a handful of parties file comments in even very critical rulemakings such as DBS and spectrum auctions. Yet over the past two weeks, ECFS was so busy with this docket that it was often impossible to read filings or to post them. Numerous filings, although posted, never appeared on the site.^{3/} Similarly, the long-suffering OMD staff, which administers ex parte filings and posts notices of them in the Daily Digest, was overwhelmed. As of today, here is the abysmal state of the record in this docket:

^{2/} [continued from p. 2] with or without opportunity for oral presentation." See also 47 C.F.R. §1.415(a) (to the same effect). The Section also provides that the Commission shall issue its rules "[a]fter consideration of the relevant matter presented." 5 U.S.C. §553(c); see also 47 C.F.R. §1.425. Although parties were told they could file comments through May 30, there obviously was no "consideration of the relevant matter presented" by all parties. No agency can tell the public "you may file comments, but don't expect us to make them publicly available so others may answer them, or to actually consider whether they are relevant before we render our decision."

^{3/} To get its filings in on time, MMTC sometimes had to walk them over to the Massachusetts Avenue N.E. site on floppy disks. MMTC was always able to get faxes and e-mails to go through to the commissioners and their staffs, and FCC building security was always gracious in helping us hand-serve the commissioners and staff when no other means of distribution would work. Nonetheless, MMTC has no idea whether its filings were available to the appropriate staff people. Most critically, the public was not able to read MMTC's filings and either support or oppose them.

- The last filing MMTC made that showed up on the FCC's website was submitted May 22. Among the filings by MMTC which have not yet shown up on the site were made April 32 (one page letter, addressing the effective date), April 28 (25 page letter covering eight issues); May 26 (five pages of testimony concerning several issues); May 27 (four page letter, concerning the issue discussed on pp. 5-6 infra), May 29 (three page letter on another critical issue that was publicly reported as having arisen for the first time in two years only three days earlier); May 30 (four page letter, concerning the issue discussed on pp. 5-6 infra).
- The Daily Digest, which includes summaries of oral communications under 47 C.F.R. §1.1200 et seq., is at least twelve days behind. The most recent ex parte letters by any parties showing up on the Daily Digests published between May 23-30 were received March 3 through May 19. Most of these were not catalogued in a meaningful form. See, e.g., P.N., May 27, 2003, p. 4 ("(41,627 Documents Rec'd" by "Secretary" received May 16 and May 19, 2003). In that same Public Notice, out of a total of 44,486 documents (other than postcards) received, only four were identified by the name of the party presenting them, and three of those four were from large broadcast companies. Thus, the public could eventually find out what the broadcasters wanted, but not what everybody else wanted.
- Several public hearings were held throughout the country, with the transcripts entered in the docket to inform the record. Only one of those hearings dealt specifically with a particular issue of great importance, on which the Commission had sought public comment. This hearing was held in Detroit, at Wayne State University School of Law from 11 AM to 3 PM on May 19, 2003. This extraordinary hearing, the first public hearing on this particular subject since 1984, was attended personally by one commissioner; the Chairman and two other commissioners graciously provided video presentations. Sponsoring this hearing were Michigan's two senators, its governor and the Mayor of Detroit -- as well as three members of Congress, one of whom chaired the hearing. A court reporter transcribed the hearing and the transcript was filed with the Commission May 29. However the transcript is not yet available on the Commission's website. Thus, no one who was not present would know what was said in this vital public forum, and no one would be able to comment on the fruits of this meticulously planned and executed public event on a subject of the greatest public importance. Nor, apparently, have the commissioners seen the transcript.

The undersigned apparently was among dozens of representatives of the parties walking the 8th floor this past week. Yet the public could have no idea what any of us was doing there. Indeed, since the ex parte notice reporting system on the Daily Digest is still twelve days behind, we were not even aware of what each other was doing or saying there.

Here is an example of the injury caused by the collapse of the Commission's ECFS and Daily Digest facilities. Over the past month, MMTC had extensive discussions with staff members of the Media Bureau, Office of General Counsel and all five commissioners and their staffs regarding a number of its key proposals. MMTC was asked many probing substantive questions. In ex parte letters dated May 21 (two pages), May 27 (four pages), May 27 (four pages) and May 29 (three pages) and May 30 (four pages), MMTC provided the information and analysis requested of us. One of its key proposals figured in its May 27 letter.

One of the parties, an influential and respected national organization, had previously stated on the record in two dockets, twice in four years, that it did not oppose this particular proposal. Unfortunately, this past Thursday, May 29, this organization suddenly filed an ex parte letter opposing MMTC's proposal and presenting three objections that no one had never seen before. The next day, MMTC responded with its own ex parte letter. However, the undersigned later was advised that representatives of this organization visited the Commission that same day -- May 30, 2003 -- the final day before Sunshine -- to lobby in person for the organization's just-announced new

position. MMTC does not know, and could not have responded to, any additional points the organization might have made in these last minute oral presentations.

MMTC's May 27 and May 30 letters are among those that are not yet available on ECFS. Thus, although perhaps hundreds of thousands of other parties participated in the proceeding, none of them would have known of this controversy playing out between MMTC and the other organization. Consequently, those supporting either side's position would not have been unaware of this battle, and would not have been able to offer arguments, evidence and analysis that neither side presented in its respective oral and written presentations.

In addition, we call the Commission's attention to procedural relief requested in the MMTC/NABOB "Motion for Extension of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record," filed October 9, 2002 ("MMTC/NABOB 10/9/02 Motion"). The Bureau twice promised to address these matters in a subsequent order,^{4/} a matter MMTC repeatedly pointed out to the staff. As of the close of the record yesterday, May 30, 2003, no such order had been issued. Such an order could have generated additional public comment on matters of great significance. That lost opportunity cannot be recovered unless the Commission stops the clock and acts on the motion.

^{4/} See Order, DA 02-2989 (MB, released November 5, 2002) at 2 n. 6; Order, DA 02-3575 (MB, released December 23, 2002) at 3 n. 12. That is the last word on this subject, the precise nature of which we must omit herein since we are in the Sunshine period.

We underscore the limited basis of what is alleged and sought here. We do not suggest that the proceeding was conducted unethically, that any dealmaking took place, or that any public official was unduly influenced by opportunities to travel and give speeches. Indeed there has been no hint of impropriety. Nor do we claim that we have been denied access to the commissioners and staff. They were more than gracious and their doors were always open. However, more than rough justice is required by the APA and the Commission's rules. The applicable provisions admit of no exceptions, even when technology fails.

We do not seek a lengthy postponement. Indeed, we were not among those who earlier sought postponements of the vote for substantive reasons.^{5/} Instead, we seek a postponement whose length is precisely tailored to the harm that must be remedied if the vote is to take place lawfully. The postponement need last only long enough to ensure the legal regularity of the proceedings. Thus, we seek the establishment of a new Sunshine date which would fall two weeks after later of the dates on which (1) the Commission acts on the MMTC/NABOB 10/9/02 Motion, and (2) the date on which the Daily Digest and ECFS systems are caught up through the filings of May 30 and the ex parte notices of meetings occurring through May 30. Thereafter, a one-week Sunshine period

^{5/} MMTC suggested, instead, that the Commission vote whenever it chooses, while establishing the effective date as the conclusion of the reconsideration period, after the parties have had a chance to comment on the rules themselves. See MMTC ex parte letter, April 21, 2003. The Commission has not ruled on this request.

should be established to allow the Commission to absorb all of these filings and notices and respond to them. Recognizing that at some point someone has to have the last word, it would be reasonable for the Commission to limit new filings and new oral presentations to responses to filings made through May 30 and to ex parte notices for meetings held through May 30.

Although some members of Congress prefer that the Commission act by June 2, these legislators could hardly object to a postponement whose limited purpose is to ensure that the Commission has not violated its own rules or Congress' own statutory commands. Nor should the Court be unsolicitous if the Commission postpones the vote briefly in order to obey the law.

Even if the result might not change after if all comments were considered, voting Monday would not constitute harmless error. The Commission cannot know today how it would vote in a few days once ECFS and the Daily Digest catch up with the comments and ex parte filings and once the record reflects the fruits of a ruling on the MMTC/NABOB 10/9/02 Motion. Further, the credibility and public acceptance of any Commission decision, especially a potentially controversial one, depends on the avoidance of even the appearance of any procedural shortcuts.

The public interest would not be harmed by this brief postponement. The structural rules have been on the books for many years, and no party has stated that it will face ruin unless the Commission repeals them right now. The republic and the industry will not collapse if these rules stay on the books for a fortnight or so.

WHEREFORE, the Commission should postpone its vote for just long enough to allow the public, and itself, to catch up on the paperwork backlog, thereby ensuring that the Commission's decision will not violate the Administrative Procedure Act and the Commission's own regulations.

Waivers of any rules and policies that must be waived in order to allow Commission consideration of this Emergency Motion before 10:00 AM June 2, 2003 are respectfully requested.

Respectfully submitted,

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