

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

In the Matter of)	
)	
2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 02-277
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MM Docket No. 01-235
)	
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

**PETITION FOR RECONSIDERATION
OF
THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.
AND
THE RAINBOW/PUSH COALITION, INC.**

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EXECUTIVE SUMMARY

The National Association of Black Owned Broadcasters, Inc. (“NABOB”) and Rainbow/PUSH Coalition (“Rainbow/PUSH”), submit this Petition for Reconsideration to request reconsideration of the following aspects of the Commission’s Order:

1. The Commission should adopt policies to promote minority ownership in this proceeding, not in a separate proceeding to be instituted at some unspecified date.

2. The Commission should require divestiture of radio ownership clusters that exceed the local radio ownership rules and should not grandfather these clusters.

4. If the Commission does not eliminate its grandfathering policy, the Commission should allow minority owned companies to own stations equal to the number of stations owned by the largest group owner in the market.

5. If the Commission does not eliminate its grandfathering policy, it should allow station clusters to be sold to minority owned companies, regardless of the size of the minority owned company.

6. The Commission should retain its policy of “flagging” transactions which exceed the 50/70 threshold for market concentration.

7. The Commission should not count noncommercial stations in determining the number of stations in a local radio market.

8. The Commission should not relax its ownership rules to allow greater combinations of radio, television, and newspaper ownership.

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The National Association of Black Owned Broadcasters, Inc. (“NABOB”) and Rainbow/PUSH Coalition, Inc. (“Rainbow/PUSH”), by their attorneys, hereby submit their Petition for Reconsideration in the above-captioned proceeding.¹

¹2002 Biennial Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket Nos.

I. INTRODUCTION

NABOB and Rainbow/PUSH submit this Petition for Reconsideration to request reconsideration of the following aspects of the Commission's Order:

1. The Commission should adopt policies to promote minority ownership in this proceeding, not in a separate proceeding to be instituted at some unspecified date.

2. The Commission should require divestiture of radio ownership clusters that exceed the local radio ownership rules and should not grandfather these clusters.

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8. The Commission should not relax its ownership rules to allow greater combinations of radio, television, and newspaper ownership.

02-277, 01-235, 01-317, 02-249 and 00-244 Report and Order, released July 2, 2003, published in the Federal Register, August 5, 2003, 68 FR 46286 ("Order").

II. THE COMMISSION SHOULD ADOPT POLICIES IN THIS PROCEEDING TO PROMOTE MINORITY OWNERSHIP

The Commission stated in the Order, “Encouraging minority and female ownership historically has been an important Commission objective, and we affirm that goal here.”² However, rather than taking any action in this proceeding to consider the rule and policy changes proposed by NABOB and Rainbow/PUSH to promote minority ownership, the Commission instead announced that it will, at some unspecified date in the future, issue a Notice of Proposed Rulemaking to address these issues. The Commission added that it will refer the issues raised in the comments of NABOB and Rainbow/PUSH to the newly announced Advisory Committee on Diversity.³ Although not specifically stated, it appears that the promised Notice of Proposed Rulemaking will not be instituted until the Advisory Committee, which has not yet been officially formed, completes its work. It could be a year before the Advisory Committee completes its work and the Commission issues an NPRM, and two or three years before an order results from such an NPRM.

NABOB and Rainbow/PUSH submit that this is a wholly inadequate manner of responding to the many issues raised by NABOB and Rainbow/PUSH regarding the potential impact on minority owners and prospective owners which will result from the rule changes adopted in this Order. The Commission’s decision to move forward with the radical rule changes adopted in this Order will clearly lead to massive additional concentration of ownership of media. Deferring proposals for promoting minority ownership until some unspecified later date suggests that the Commission, at best, is seriously misguided about the negative

²Order at par. 46.

³Order at par. 52.

impact its Order will have on minority ownership, or, at worst, suggests that the Commission has cynically deferred consideration of NABOB and Rainbow/PUSH's concerns until such time as further media consolidation will have eliminated any new minority ownership possibilities. As Commissioner Copps noted in his dissent:

An Advisory committee is a good step, but we should not be deflected from tackling the ownership diversity questions that are central to the media concentration item before us now. I am reminded of that old bureaucratic sleight-of-hand of foisting controversial issues onto a new government commission or task force to get them out of the way.⁴

Commissioner Copps added:

In any event, solutions to this problem will be harder to come by if media conglomerates proceed now to lock up control of the scarce licenses to use the public's airwaves. That is why these problems need solutions now, not somewhere far down future's road.⁵

Commissioner Copps provides the correct note of scepticism regarding the Commission's intent. NABOB and Rainbow/PUSH demonstrated in our Comments that the Commission should adopt policies to promote minority ownership of broadcast facilities now, not later.

Moreover, it should be noted that the U.S. Supreme Court's recent decision in *Grutter v. Bollinger* eliminates any impediment to adopting rules to promote minority ownership.⁶ Although there was never any precedent prohibiting the Commission from taking steps to promote minority ownership, the Commission had shied away from such policies after the Supreme Court's *Adarand* decision.⁷ The

⁴Statement of Commissioner Michael J. Copps Dissenting ("Copps Dissent") at 21.

⁵*Id.*

⁶*Grutter v. Bollinger*, 123 S. Ct. 2325, 71 USLW 4498 (2003).

⁷*Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

Supreme Court's decision in *Grutter v. Bollinger* clearly permits the Commission to consider such policies now.

In our Comments, NABOB and Rainbow/PUSH stated that the Commission should adopt promotion of minority ownership of broadcast facilities as a primary policy objective in this proceeding. We stated that, among the steps which the Commission should take to promote diversity of ownership and minority ownership, are the following:

1. As a part of its public interest review, the Commission should assess the impact on minority ownership of all assignment of license and transfer of control applications.
2. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the broadcast ownership rules, which waivers are ostensibly to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed simultaneously with the underlying assignment and transfer applications. The Commission's approach to granting waivers has been so exploited by the large group owners as to make the current ownership rules "window dressing."
3. The Commission should make permanent, with the revisions proposed in our Comments, the Commission's Interim Policy for processing assignment and transfer applications. In particular, the Commission should consider a 40/60 market share screen for "flagging" potential excessive consolidation in a market, instead of the current 50/70 screen.
4. The Commission should change its radio market definition to correlate with the Arbitron market, because the current rule has allowed a single entity to own between 9 and 12 radio

stations in, at least, 11 Arbitron metro markets.

5. The Commission should treat all Local Marketing Agreements as attributable interests.
6. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.⁸

In our Comments, NABOB and Rainbow/PUSH cited several studies demonstrating that, since the enactment of the Telecommunications Act of 1996, the number of minority owners in the radio industry has decreased by 14%.⁹ We showed that the Radio Local Market Study demonstrates that the 50/70 screen for “flagging” market over-consolidation is too loose. The Radio Local Market Study data would support a 40/60 screen, instead of the current 50/70 screen.¹⁰

We cited studies demonstrating that diversity of viewpoint is best promoted by diversity of ownership, and that minority ownership best promotes viewpoint diversity.¹¹ The Commission’s Diversity of Programming Study concluded that there is “empirical evidence of a link between race or ethnicity of broadcast station owners and contribution to diversity of news and public affairs

⁸NABOB and Rainbow/PUSH Comments, filed January 2, 2003 (“Comments”), at 3-4.

⁹“Radio Local Market Consolidation & Minority Ownership” (“Radio Local Market Study”), prepared by Kofi A. Ofori.

¹⁰Comments at 6-10.

¹¹Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?, Christine Bachen, *et al.*, December, 1999 at 37. (Incorporated herein by reference.)

programming across the broadcast spectrum.¹²

NABOB and Rainbow/PUSH demonstrated that only ownership diversity can provide the type of meaningful diversity that will promote the First Amendment policies of the Commission. We showed that a single entity owning stations broadcasting in a variety of entertainment formats does not provide the type of diversity that the Commission's ownership rules are designed to promote. The ownership rules are primarily intended to promote opinion diversity, and only secondarily entertainment diversity. We showed that the Commission should adopt policies which will diversify ownership of broadcast stations.¹³

With the exception of the Commission's adoption of the Arbitron market definition to define radio markets, the Commission rejected all of NABOB's proposals, and instead deferred consideration of all of them until such time as the Commission adopts an NPRM to consider proposals to promote minority ownership. As Commissioner Copps noted in his dissenting statement, "Minority ownership is vitally germane to this proceeding. I fail to see how we can perpetuate diversity of viewpoint, for example, without addressing minority ownership. Ownership matters to diversity. The issue of its impact on women and minorities should not be relegated to a Further Notice at some indeterminate time."¹⁴

¹²Diversity of Programming Study at i, cited at Comments at 10-13..

¹³Comments at 13-17.

¹⁴Copps Dissent at p.16.

III. THE COMMISSION SHOULD RECONSIDER AND REVERSE SPECIFIC RULE CHANGES WHICH WILL NEGATIVELY IMPACT MINORITY OWNERSHIP

A. The Commission Should Continue to “Flag” Transactions Which Exceed the 50/70 Processing Guideline

The Commission should retain its policy of “flagging” transactions which raise questions regarding excessive concentration of media ownership in a local radio market. The Commission’s interim policy for processing radio transactions that would result in one owner controlling more than 50% of local radio market revenues, or two owners controlling more than 70% of local radio market revenues, worked very well in informing the public about potential excessive concentration and allowing the public to comment. The Commission identified numerous transactions which triggered the flagging process. The mere number of transactions which triggered the process was clear evidence of the need for the policy. In fact, NABOB and Rainbow/PUSH presented evidence demonstrating that the Commission would be justified in flagging all transactions which failed to meet a 40/60 flagging standard.

Yet, the Commission has concluded that the flagging policy is no longer necessary. However, the Commission provided no adequate explanation for eliminating the policy. The Commission merely stated that application of the Arbitron market definition to the local radio ownership rule would eliminate the need for the flagging procedure. The record clearly demonstrates otherwise. As Commissioner Adelstein points out in his dissenting statement, the revenue share of the top owner in a local market now averages 47 percent, and the two largest firms average 74 percent.¹⁵

Given these average figure, it is clear that there are many markets in which the largest owner often

¹⁵Statement of Commissioner Jonathan S. Adelstein Dissenting (“Adelstein Dissent”) at p.10, citing Media Ownership Working Group (“MOWG”) Study No. 11.

exceeds the 50% threshold, and in most markets the two largest owners regularly exceed the 70% threshold. When the Commission adopted the flagging procedure in 1998, it did so to identify overly concentrated radio markets. The Commission has failed to explain what has changed in the radio marketplace in this brief period of time such that the 50/70 flagging procedure is no longer necessary. Indeed, given the extensive record evidence of even greater consolidation in the radio market, the record demonstrates that the 50/70 flagging procedure is needed now more than it was when it was adopted by the Commission in 1998. As noted above, the record actually supports a 40/60 flagging policy.

The Commission's local ownership rule is no substitute for the flagging procedure. The local ownership rule is a means for preventing over concentration in general. The flagging procedure identifies specific instances of over concentration and invites public comment. The two procedures are not mutually exclusive, but rather are complementary. The Commission should not eliminate the flagging procedure merely because the Commission has changed its method for defining radio markets.

B. The Commission Should Reverse its Decision to Grandfather Radio Combinations that Exceed the Local Ownership Rule Limits and Should Require that Such Combinations be Divested

The Commission correctly adopted NABOB and Rainbow/PUSH's proposal to use Arbitron markets to define radio markets under the Commission's local radio ownership rule. The prior contour overlap method produced too many anomalous results which significantly damaged competition in local markets by allowing excessive ownership of radio stations in many Arbitron markets. However, the Commission's decision to grandfather existing combinations that exceed the local radio ownership limits will have the effect of making permanent the damaging effects of the prior definition.

The grandfathering policy adopted by the Commission essentially guarantees an unassailable position to the current market dominators. The grandfathering policy makes the competitive condition worse in any market in which a grandfathered cluster exists. Under the Commission's grandfathering policy, a competing owner is barred from obtaining a number of stations equal to the number owned by the largest owner in the market. Therefore, competing owners in the market are now permanently barred from ever competing with the market dominator at a comparable ownership level. This result is clearly contrary to the record evidence. The record demonstrates that minority owners need opportunities to compete with the largest owners on equal terms. NABOB and Rainbow/PUSH, therefore, submit that the Commission should reverse its grandfathering policy and require that ownership combinations which do not comply with the Commission's local radio ownership rule must be divested.

C. The Commission Should Allow Minority Owners to Own Stations Equal to the Number Owned by the Largest Station Owner in the Market

As stated above, NABOB and Rainbow/PUSH request that the Commission require divestiture of radio clusters that do not comply with the revised local ownership rule. Alternatively, if the Commission does not reverse the grandfathering policy and require divestitures, the Commission should allow a minority owner to own stations equal to the number of stations owned by the largest owner in a market. As demonstrated in this proceeding, minority ownership is declining due to consolidation in the industry. Allowing a minority owner to own a number of stations equal to the largest owner in a market would be a small step toward reversing the continuing decline of minority ownership. Indeed, given the difficulty minority owners have in attracting capital, it is doubtful that there will be many minority entrepreneurs who

will be able to take advantage of such an exception to the local radio ownership rule. However, having such a rule in place may provide some benefit in reversing the decline of minority ownership that the rules adopted in the Order will clearly perpetuate.

D. The Commission Should Allow Sales of Grandfathered Clusters to Minority Owned Companies

As stated above, NABOB and Rainbow/PUSH strongly oppose the Commission's grandfathering policy. NABOB and Rainbow/PUSH submit that, if the Commission does not reverse and eliminate the grandfathering policy, the Commission should allow the sale of intact clusters to any minority owned company.

The Commission's Order would allow an exception to the prohibition on the sale of an intact cluster, if the sale is to a small business, as defined by the Small Business Administration.¹⁶ NABOB and Rainbow/PUSH submit that this restriction fails to recognize broadcast marketplace realities. Small businesses as defined by the SBA are rapidly being forced out of the broadcast industry by virtue of the Commission's previous radio deregulation policies, which unleashed the forces of market consolidation and ownership concentration. Such small businesses have great difficulty in raising capital. In addition, minority owned businesses of every size have problems raising capital. As pointed out by Commissioner Adelstein in his dissent, it is unlikely that any group owner will sell a cluster to a small business.¹⁷ But, if such a sale offer were made, it is unlikely that most minority owned businesses would be able to take advantage of such

¹⁶Order at par. 489.

¹⁷Adelstein Dissent at p. 23.

an offer. Therefore, as to minority owned businesses, the Commission should allow the sale of an intact cluster, regardless of the size of the minority owned business.

E. The Commission Should Not Include Noncommercial Radio Stations in Counting the Number of Stations in a Radio Market

As noted above, the Commission agreed with NABOB and Rainbow/PUSH and adopted Arbitron markets as the method for defining local radio markets. While NABOB and Rainbow/PUSH are pleased that the Commission adopted the Arbitron market definition, the Commission modified the Arbitron market definition by adding noncommercial stations to the count of stations in the Arbitron market. NABOB and Rainbow/PUSH request that the Commission reconsider this decision and exclude noncommercial stations from the station count.

In adopting the Arbitron market definition, the Commission stated it was adopting that definition because radio stations compete in Arbitron markets. However, commercial radio stations compete with other commercial radio stations, not noncommercial stations. For this reason, Arbitron does not ordinarily report noncommercial listening in its ratings reports. Inclusion of noncommercial stations creates a market distortion by allowing increased ownership consolidation based upon stations which do not influence the competitive status of the market. The result will be a major loophole allowing consolidation beyond that which is appropriate based upon the actual number of competitors in the Arbitron market. The Commission should reconsider this decision and exclude noncommercial radio stations when it compute the number of stations in a market under its local radio ownership rule.

IV. THE COMMISSION SHOULD RETAIN ITS MULTIPLE OWNERSHIP RULES

NABOB and Rainbow/PUSH have demonstrated that it is the market power of the large media owners which has caused the drop in minority ownership since 1996. NABOB and Rainbow/PUSH showed that changes in any of the Commission's ownership rules, to allow further concentration of media ownership, will cause further erosion in minority ownership. NABOB and Rainbow/PUSH have, therefore, opposed any relaxation of the Commission's ownership rules. The repeal and relaxation of the Commission's rules adopted in this proceeding will have precisely the negative effect NABOB and Rainbow/PUSH have described.

NABOB and Rainbow/PUSH demonstrated in our Comments that the loss of minority ownership since the previous relaxation of the Commission's ownership rules requires retention of the Commission's remaining ownership rules. Instead, the Commission's Order has relaxed or repealed most of the Commission's cross-media ownership rules. In particular, by eliminating the radio-television and newspaper-broadcast cross-ownership rules, the Commission has further eliminated the limited opportunities for increased ownership of radio and television stations by minorities. The consolidated market power of the television-radio-newspaper combinations that will be formed will severely overwhelm new entrants seeking to purchase stations and existing owners trying to operate stations in markets where such combinations are formed. The net effect upon minority ownership will be to worsen a situation which has already reached the crisis stage.

V. CONCLUSION

NABOB and Rainbow/PUSH demonstrated in our Comments that broadcast industry consolidation has had a negative impact on the number of minority owners in the broadcast industry. The Radio Local Market Study, the UCC Studies and the Democratic Discourse Study clearly and convincingly demonstrate this. Moreover, the studies show that absent government intervention, this decline can be expected to continue. In addition, the Commission's Diversity of Programming Study and the Democratic Discourse Study demonstrate that minority ownership promotes diversity of viewpoint in the broadcasting industry.

The Order fails to address the issues raised by NABOB and Rainbow/PUSH. The Commission should therefore, reconsider the Order and address the negative impacts of consolidation of ownership on minorities in this proceeding, not in a later proceeding to be instituted at some unspecified time in the future. The negative effects of consolidation have already damaged minority ownership. The record in this proceeding demonstrates that the rule relaxations which the Commission adopted in this proceeding will exacerbate the already negative effects on minority ownership caused by previous rule relaxations. The offer of a future Notice of Proposed Rulemaking to address minority ownership issues is a woefully inadequate response to the problems documented in this proceeding. The proposed future Rulemaking, amounts to a proposal to "close the barn door after the horse has left." It cannot be accepted as a meaningful response to the damage to minority ownership caused by the rule changes adopted in this proceeding. Therefore, NABOB and Rainbow/PUSH submit that the Commission should reconsider its Order and address the proposed rule changes to promote minority ownership NABOB and Rainbow/PUSH proposed in this proceeding.

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