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 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket 01-317
	)	
Definition of Radio Markets	)	MM Docket 00-244
	)	
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)	MB Docket 03-130

To: The Commission

PETITION FOR RECONSIDERATION
OF MONTEREY LICENSES, LLC

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SUMMARY

Monterey Licenses, LLC ("Monterey") seeks reconsideration of the Commission's decision in its recent *Report and Order* to attribute radio joint sales agreements (JSAs), to not permanently grandfather existing JSAs, and to utilize Arbitron's market definition for purposes of the radio multiple ownership rules. Nothing in the record of this proceeding supports attributing JSAs. As the decision to attribute JSAs is entirely inconsistent with the recently concluded attribution proceeding where the Commission found that JSAs deal exclusively with advertising and have nothing to do with the Commission's diversity and competition goals for its rules, the lack of any record precludes the Commission from overturning its previous findings.

Even if the Commission decides that it properly determined that JSAs are attributable, the decision to not permanently grandfather existing JSAs, which foster the competitive balance in radio markets, is arbitrary and capricious and manifestly unfair. The Commission has failed to offer a reasoned explanation for permanently grandfathering existing combinations of stations that exceed the local radio ownership rule's limits while at the same time requiring parties to unwind JSAs under the same circumstances. Like parties that acquired stations under the preexisting local ownership rules, parties that entered into JSAs prior to the Commission's adoption of the *Report and Order* should not be penalized for their compliance with the FCC's attribution and local ownership rules that were in effect at the time the agreements were signed. Moreover, requiring parties to unwind JSAs would place smaller station groups at a competitive disadvantage by hampering their ability to compete in local markets. Smaller station groups use JSAs to combine their sales forces, allowing them to negotiate for better sales packages to more effectively compete against dominant station groups in local markets. Should the Commission fail to permanently grandfather JSAs, as it has existing radio combinations, it will exacerbate the already anti-competitive situation in many local markets.

Finally, the Commission's decision to abandon the use of station contours for purposes of the local radio ownership rule is also arbitrary and capricious and ignores marketplace realities to the detriment of smaller broadcasters. The Commission itself has recognized that the new system is flawed and ripe for abuse as it allows stations to determine what market they are in simply by requesting that Arbitron include or exclude them from a particular market. Another flaw in the Arbitron methodology that prejudices smaller broadcasters is that it considers each station, regardless of its coverage area, to be identical. Furthermore, since Arbitron markets are considered distinct unto themselves, an entity can own a station "home" to one market, which puts a significant signal into an adjacent market, and may get significant "below-the-line" ratings in that market, but the Commission's Arbitron-based system considers it to have no diversity impact whatsoever. Under these circumstances, regional concentrations of ownership in the hands of a few companies will be greatly increased. While the prior rules may have resulted in a few anomalies, the new rules will actually allow companies to increase their holdings. These new rules will move the Commission further from reflecting the true competitive situations in broadcast markets. Based on this direct threat to competition and diversity, the Commission must abandon its proposed Arbitron market definition and return to the more sensible and realistic contour-overlap methodology.

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To: The Commission

PETITION FOR RECONSIDERATION

Monterey Licenses, LLC ("Monterey"), by and through its attorneys, and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's *Report and Order*, released in the above-captioned proceeding on July 2, 2003, FCC 03-127, 68 Fed. Reg. 46286, (August 5, 2003), 18 FCC Rcd 13620 ("*R&O*"). As demonstrated below, the Commission's decision to make Joint Sales Agreements ("JSAs") among radio stations attributable is an arbitrary and capricious departure from recent Commission precedent and is entirely unsupported by the record. Moreover, even if such decision were found to be justified, the decision to not permanently grandfather existing JSAs, which foster the competitive balance in a market, is unjustified. Finally, the Commission's decision to abandon the use of station contours for purposes of the local radio ownership rules is also arbitrary and capricious and ignores marketplace realities to the detriment of smaller broadcasters. In short, the decision is not supported by record evidence, contains prejudicial errors of fact and substantive law, is inconsistent with Commission precedent and the public interest, and therefore the decision cannot stand. Accordingly, Monterey respectfully requests reconsideration of the *R&O*.

I. THE COMMISSION'S DECISION TO MAKE JSAS ATTRIBUTABLE IS ARBITRARY AND CAPRICIOUS AS IT IS NOT SUPPORTED BY THE RECORD OR COMMISSION PRECEDENT.

In the *R&O*, the Commission summarily concludes that "JSAs currently in existence will be attributable."[1] However, other than the Commission's bare assertion, there is no support for this conclusion in the record or, for that matter, anywhere. Indeed, just two years prior to initiating the instant proceeding, the Commission sought and received extensive comment on its attribution rules.[2] In the resulting *Attribution Order*, the Commission explicitly stated: "Accordingly, after weighing competition, diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs."[3] Furthermore, the Commission declined to adopt general disclosure and reporting requirements for radio JSAs "in the absence of specific evidence of widespread abuse of JSAs by broadcasters."[4] Even the Commission's September 12, 2002 *NPRM* stated expressly: "We do not contemplate a change in the broadcast

1 *R&O* at ¶ 324.

2 *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Report and Order*, 14 FCC Rcd 12559 (1999) ("*Attribution Order*") at ¶ 122.

3 *Id.* at ¶ 123.

4 *Id.*

attribution rules, except to the extent that the single majority shareholder exemption is under consideration in the cable proceeding."[5] Despite the recent findings of the *Attribution Order* that were based on a comprehensive record and its disavowal of an intent to modify its attribution rules in the *NPRM*, the Commission now inexplicably reverses itself by concluding that: "JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution" and "we find that JSAs may convey sufficient influence or control over advertising to be considered attributable."[6] While the Commission has the discretion to change its mind, it must explain why it is reasonable to do so. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Despite this requirement, the *R&O* points to no "specific evidence of widespread abuse" and provides no explanation, save for the conclusory statements quoted above, to justify its new rule.

The U.S. Court of Appeals for the District of Columbia Circuit recently remanded to the Commission a decision where it failed to adequately explain its departure from a previously held position. *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027 (D.C. Cir. 2002). In *Fox*, the court held that the Commission's decision to retain the national television ownership cap in 1998 without explanation as to why it was ignoring a prior conclusion in 1984 to eliminate the cap was arbitrary and capricious. The court noted: "So long as the reasoning of the 1984 Report stands unrebutted, the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision." *Fox* at 1045. Here, the Commission has completely failed to

5 *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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, Notice of Proposed Rule Making, 17 FCC Rcd 18503 (2002) (*"NPRM"*) at n.13.

6 *R&O* at ¶ 322.

point to any evidence justifying attributing JSAs or adequately explain why it is now rejecting the reasoned conclusion it reached in the *Attribution Order*.

It, however, is not at all surprising that the Commission is unable to explain its about-face as the facts do not warrant such a drastic change in position. As an initial matter, a JSA only involves the sale of advertising and has nothing to do with the provision of programming. Therefore, the concerns over loss of diversity and competition that potentially exist when a licensee contracts with another party to program its station – an LMA or TBA, for example – are not present here. As JSAs only affect advertisers, the DOJ, not the Commission, is the appropriate forum for review of competition rules in this area. Indeed, the Commission's decision to attribute JSAs because of their potential impact on competition in advertising markets runs completely counter to its statement in the *R&O* that "our duty as an agency runs to consumers, not advertisers."[7] The Commission also stated in the *R&O* that it "is not charged with protecting competition in the advertising markets" and noted that the "Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market."[8] The Commission's contention that JSAs are harmful because "JSAs put pricing and output decisions in the hands of a single firm. Instead of competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market"[9] seems to be exactly the type of harm which the Commission, in this very *R&O*, decides is outside its purview.

In addition, the Commission itself expressly acknowledges the lack of evidence regarding its purported need to attribute JSAs: "Nothing in the record indicates that licensees abdicate

7 *Id.* at ¶ 68.

8 *Id.* at ¶ 339.

9 *Id.* at ¶ 319.

control over stations that are subject to JSAs."[10] Indeed, no commenter submitted evidence of any kind that so much as suggested that JSAs should be considered attributable. Of the five commenters the Commission cites to as being against JSAs in one way or another, three were represented by the same counsel and employ the *exact same language*, *see* Exhibit 1, and none of the comments provide a single iota of empirical evidence that supports attributing JSAs.[11] As Chairman Powell recently noted, he "take[s] pride in the fact that [FCC] decisions rest on an extraordinarily strong empirical record."[12] Clearly, the *R&O* falls short of this admirable standard as there is *no* empirical support in the record for determining that JSAs should be attributable, and for abandoning the contrary conclusion that the Commission has reached only four years ago.

Further illustrating the arbitrary nature of its decision to attribute JSAs is the Commission's own statement that "JSAs raise concerns regarding the ability of smaller broadcasters to compete."[13] This statement is entirely inconsistent with the Commission's conclusion in its attribution proceeding where the Commission expressly made the point that, JSAs "may actually help promote diversity by enabling smaller stations to stay on the air."[14] Indeed, it has been Monterey's experience that in markets where it has JSAs, the efficiencies generated by JSAs permit it to compete with much larger media conglomerates that own multiple stations in local markets while still retaining local control over programming.[15] The ability to

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10 *Id.* at ¶ 318.

11 *Id.* at nn.702-03 and Exhibit 1.

12 *Written Statement of Michael K. Powell Before the Committee on Commerce, Science, and Transportation, United States Senate*, June 4, 2003.

13 *R&O* at ¶ 319.

14 *Attribution Order* at ¶ 122.

15 *See* Section II, *infra*.

enter into JSAs is essential to ensuring that smaller broadcasters are able to compete in today's media marketplace. In light of the public outcry against homogenization of programming and the Commission's apparent concern with localism, JSAs should be celebrated for permitting smaller broadcasters to compete with the huge media conglomerates without sacrificing editorial control over programming, and for permitting smaller companies, without the ability to buy more stations in a market, to aggregate enough advertising availabilities to compete with the most consolidated company in a market.

Contrary to the suggestion of the *R&O*, the Commission's attribution precedent and policies in no way support finding JSAs attributable. As the Commission stated in the *Attribution Order*, "The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[16] Because the Commission has made no finding that JSAs result in influence or control over matters that involve programming or core operations, and has no record evidence on which to make such a finding, they are by definition not attributable interests. Furthermore, the "degree of influence" targeted by the attribution rules is not a degree of conjecture or a mere scintilla of possibility. Instead, "[t]he attribution rules are designed to attribute entities that wield *significant* influence on core operations of the licensee."[17] As the

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16 *Attribution Order* at ¶ 1 *citing Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984) *on recon.*, 58 RR 2d 604 (1985) *on further recon.*, 1 FCC Rcd 802 (1986) ("*1984 Attribution Order*"). *See Quincy D. Jones,* 11 FCC Rcd 2481 (1995) at ¶ 22 (describing the objective of the Commission's attribution rules as "to identify those interests in or relationships to an applicant which confer on its holders a degree of "influence" such that holders have 'a realistic potential to affect the programming decisions of licensees'" and quoting *1984 Attribution Order*).

17 *Attribution Order* at ¶ 46 (emphasis added). *Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the*

Commission's precedent demonstrates, control over programming decisions is the key factor in whether a particular interest in a station should be considered attributable. As JSAs confer no influence over programming decisions, let alone "significant influence," the Commission's decision to make JSAs attributable is arbitrary and capricious.

II. PRINCIPLES OF FAIRNESS, THE PUBLIC INTEREST AND ESTABLISHED COMMISSION PRECEDENT REQUIRE THE COMMISSION TO PERMANENTLY GRANDFATHER JSAS ENTERED INTO PRIOR TO THE ADOPTION OF THE *R&O*.

Even if the Commission were to conclude that it properly found JSAs to be attributable interests, the Commission's decision in the *R&O* to grandfather JSAs which are not compliant with the new multiple ownership rules only until September 4, 2005, is manifestly unfair and contrary to the public interest. The Commission has failed to offer a reasoned explanation for permanently grandfathering existing combinations of stations that exceed the local radio ownership rule's limits while at the same time requiring parties to unwind JSAs under the same circumstances. Like parties that acquired stations under the preexisting local ownership rules, parties that entered into JSAs prior to the Commission's adoption of the *R&O* should not be penalized for their compliance with the FCC's attribution and local ownership rules that were in effect at the time the agreements were signed. In short, to hold that a contract entered into by two parties in full compliance with all then-existing FCC regulations is now invalid, while at the

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Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy, Memorandum Opinion and Order, 16 FCC Rcd 1097 (2001) ("*Attribution Reconsideration Order*") at ¶ 13 ("attribution extends to relationships that permit *significant* influence over the core operations of a licensee.") (emphasis added). On reconsideration, the Commission in rejecting a petitioner's argument that the Commission should look to three factors—"(1) participation in programming selection; (2) influence in hiring personnel who make programming or core management decisions; and (3) substantial control over the licensee's budget"— noted that "our rules address many of [petitioner's] concerns." *Id.* at ¶ 16.

same time permanently grandfathering non-compliant ownership of stations – would be fundamentally unjust. Grandfathering of existing ownership interests *and* JSAs not only would be the most fair solution, it would also be consistent with established Commission precedent.

The Commission's decision in the *R&O* to grandfather existing ownership interests is but the most recent example of a longstanding and consistent policy grandfather such interests. For example, when the Commission originally adopted its newspaper/broadcast cross-ownership ban, the Commission required divestitures only in the most "egregious" of cases, namely where the commonly owned newspaper and television combination constituted a monopoly in a given market. *See Amendement of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to the Multiple Ownership* Standard, 50 FCC 2d 1046, 1078 (1975) *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).[18] At that time, the Commission also concluded that parties would not be required to divest existing radio/television combinations were in effect prior to the adoption of new rules. *Id.* at 1081-82. Fundamental to these decisions was the Commission's understanding that forced divestiture would result in adverse public interest consequences.

The Commission listed several similar reasons in the instant proceeding for permanently grandfathering existing station combinations. According to the Commission:

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18 *See also Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, Memorandum Opinion and Order, 25 FCC 2d 318 (1970) *aff'd sub nom. Mansfield TV,Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, *Memorandum Opinion and Order*, 3 RR 2d (P&F) 1554 (1964). When LMAs were deemed attributable in 1999, the Commission grandfathered existing LMAs until the conclusion of the 2004 Biennial Review. *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, *Report and* Order, 14 FCC Rcd 12903 (1999) at ¶ 133.

> As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules. Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry. On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.[19]

The very same rationale supports the grandfathering of existing JSAs. Parties to JSAs, like those that purchased stations, should not be penalized for their compliance with the rules that previously were in effect. Although the investments may not be equivalent to station ownership in terms of total dollars, these investments are nevertheless significant. Moreover, the investments were entered into based on the 1999 proclamation from the FCC that JSAs were not attributable interests. Such investments were made with the intent that they would be amortized over the full length of the JSA term – not some arbitrarily shorted two year grandfathering period.

The Commission has provided no explanation as to why parties to JSAs, like station group owners, should not be afforded "the opportunity to retain the value of their investments made in reliance on [the FCC's] rules."[20] As the Supreme Court has stated, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what they law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). In this case, the Commission has failed to provide any factual support for its sudden decision to make JSAs

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19 *R&O* at ¶ 484.

20 *Id.*

attributable or for its failure to permanently grandfather JSAs. This complete lack of factual support is alone fatal to its rule.

There is simply no reason for the Commission's decision to make JSAs attributable, while at the same time grandfathering existing group ownership. As noted above JSAs, unlike actual ownership, affect only the sale of advertising time, and have nothing to do with decisions related to programming and other core operations of stations. Thus, JSAs, are unlike station ownership, LMAs, and other similar arrangements, as they do not raise diversity concerns regarding programming decisions that are the principal focus of the Commission regulations in this area. Consequently, they should not be considered attributable interests for purposes of local radio ownership. If the Commission nonetheless fails to reverse its unjustified decision to make JSA attributable, JSA attribution and grandfathering should at a minimum parallel that of grandfathered group ownership.

Moreover, requiring parties to unwind JSAs would place smaller station groups at a competitive disadvantage by hampering their ability to compete in local markets. The economic circumstances surrounding the JSAs to which Monterey is a party underscore why the Commission must permanently grandfather JSAs. Monterey has entered into JSAs as a means of competing with larger radio groups in its markets. For example, in the Fargo-Moorhead, North Dakota-Minnesota market as defined by Arbitron, the dominant station group owner currently controls seven of the market's fifteen stations.[21] According to BIA's Media Access Pro, the 2002 revenue figures show that these seven stations, account for approximately 49% of the estimated total market revenue and this group has acquired a new station which has not yet been

21 Clear Channel, the largest station owner in the Fargo market, has attributable interests in KVOX(AM), Moorhead, Minnesota, KFGO(AM), Fargo, North Dakota, KFAB(FM), Kindred, North Dakota, KKBX(FM), Fargo, North Dakota, WDAY-FM, Fargo, North Dakota, KRVI(FM), Detroit Lakes, Minnesota and KDAM(FM), Hope, North Dakota.

considered in the market ratings or revenue.[22] This combination will apparently be grandfathered, even though it is not compliant with the new local ownership rules.

In order to effectively compete in Fargo, Monterey has entered into a JSA whereby Monterey will sell advertising time on another station. The combined sales forces have allowed the parties to negotiate for better sales packages to compete against this dominant group in the market. Because Monterey can sell this additional station to advertisers in combination with its other stations, it can better compete with this dominant station group for the limited advertising revenues available in the market. Similarly, in the Savannah market, Monterey owns 5 FM stations listed as "home" to the market by Arbitron, none of which are geographically located in the Arbitron metro counties. In addition, it has entered into a JSA with another outlying station with a signal that is not competitive in that market. Because of its weaker signals in Savannah, Triad is the third-ranked station group in Savannah – yet it would have to divest itself of this JSA under the proposed rules. Here again, requiring divestiture of a JSA which allows a weaker group to more effectively compete simply is not in the public interest.

The Commission itself has traditionally recognized the benefits of such arrangements for precisely these reasons, stating that JSAs "help promote diversity by enabling smaller stations to stay on the air."[23] Moreover, in the DTV context, the Commission said it "look[s] with favor upon joint business arrangements among broadcasters that would help facilitate the transition to digital technology. JSAs may be one such joint business arrangement."[24] Moreover, Congress has expressly noted the public interest benefits associated with JSAs and similar cooperative

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22 *See* Exhibit 2, Media Access Pro. The Hope station is not yet included in the BIA market figures.

23 *R&O* at 122-23.

24 *Attribution Order* at ¶ 122.

arrangements. Specifically, Congress commended the "positive contributions" of LMAs and also found "the efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity..."[25] The same logic applies equally to JSAs. Should the Commission refuse to reconsider grandfathering JSAs as it has existing radio combinations, it will exacerbate the already anti-competitive situation in Fargo, Savannah, and other markets.

The Commission's action also contravenes the rulemaking procedures of the Administrative Procedure Act, which prohibit an agency from applying rules retroactively. *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1525 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995). ("The FCC cannot abandon the legislative scheme because it thinks it has a better idea."); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987) ("both the express terms of the APA and the integrity of the rulemaking process demand that the corrected rule, like all other legislative rules, be prospective in effect only.") Moreover, as Justice Scalia has warned, agencies must be wary of "secondary retroactivity," namely, a rule having "exclusively future effect" that "affect[s] past transactions." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring). As Justice Scalia explained, "a rule that has unreasonable secondary retroactivity – for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule – may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. § 706, and thus invalid." *Id.* at 220. This concern is exacerbated when a new regulation "replace[s] a prior agency interpretation." *Smiley v. Citibank*, 517 U.S. 735, 745 n.3 (1996). Until recently, the Commission had no regulations governing, much less prohibiting, JSAs. And while the Commission is not prohibited from enacting rules prospectively to new JSAs, for the Commission to now apply its new regulations

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[25] S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 164 (1996) and H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 119 (1995).

ex post facto to JSAs which were in existence well before the adoption of the rules is impermissible. *Id.* The Commission cannot simply change its regulations and upset some existing business relationships, while leaving business relationships of competitors, that do not comply with exactly the same rules, in place.

In sum, parties that entered into JSAs relied completely on the lack of Commission regulation of such agreements and the Commission's decision in the *Attribution Order* declining to make them attributable. Therefore, making them attributable is unfair, unwise, and contrary to the public interest and established Commission precedent. There is no support in the record for the Commission to completely reverse course and needlessly interfere with established business relationships that relied on an existing regulatory scheme. This is particularly true given that JSAs have nothing to do with the Commission's diversity and competition goals for its rules. The Commission's actions also have an impermissible retroactive effect as parties are required to comply with the Commission's new rules – a result that requires retroactive application of the recent decision. As shown above, the Commission has provided no justification for treating JSAs differently with respect to its failure to grandfather existing JSAs while at the same time grandfathering existing station groups. This failure to permanently grandfather JSAs will prohibit smaller broadcasters from competing with larger station group owners to the detriment of competition and the public interest.

III. THE COMMISSION'S NEW DEFINITION OF A RADIO MARKET IGNORES MARKETPLACE REALITIES AND IS ARBITRARY AND CAPRICIOUS.

In 1992, the Commission held that using a contour-overlap method to determine compliance with the radio multiple ownership rules "will reflect the actual options available to listeners and will reflect market conditions facing the particular stations in question."[26] While not disputing that this was accurate at the time or finding that the contour-overlap system has caused any harm, the Commission now finds that the contour-overlap system is "irrational" and must be changed.[27] Far more irrational, however, is the Commission's decision to utilize the market definition of a commercial ratings firm which ignores many marketplace realities.

The contour overlap methodology possessed the benefits of objectivity and certainty, qualities not shared by the proposed Arbitron market definition. The fundamental flaw in the Arbitron market definition is that many stations can determine what market they are in simply by requesting that Arbitron include or exclude them from a particular market.[28] The Commission itself has recognized that the system is ripe for abuse.[29] The Commission's proposed two-year "waiting period" before a station can benefit from a change in markets, however, is ineffectual to curb these abuses. Simply put, two years is a ripple in time for large media conglomerates that purchase stations at large multiples of annual cash flow with the expectation of owning stations for long periods of time. In such an environment, the benefits of obtaining a more desirable market is certainly worth the costs of waiting two years. Furthermore, waiting two years before selling a station is also economically rational if the new market designation will produce a higher sales price. For the Commission to expressly recognize the inherent potential for abuse in its

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26 *Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992) at ¶ 10.

27 *R&O* at ¶ 261.

28 Under the Commission's system adopted in the *R&O*, stations not licensed to a community in a Metro County will be included in a market if Arbitron considers them "home" to the market. In the case of many fringe stations, that consideration is based upon whether or not a licensee has requested that Arbitron consider that station to be home to the market, not upon any objective ratings or coverage criteria.

29 *R&O* at ¶ 278.

market definition but yet nevertheless choose to adopt it, albeit with an inadequate "waiting period," is arbitrary and capricious and must be reversed on reconsideration.

Further demonstrating the flaws of its Arbitron-based market definition is the fact that the Commission does not truly adopt Arbiton's definition; instead, the *R&O* introduces a wholly new market definition by virtue of its "counting methodology." Specifically, the *R&O* instructs that "below-the-line" stations are not to be counted as being part of a particular market.[30] The Commission adopts this counting methodology despite expressly acknowledging the fact that approximately 30% of radio listening is attributable to "below-the-line" commercial stations.[31] It is unreasonable on its face for the Commission to determine that a system which ignores 30% of radio listening "will reflect more accurately the competitive reality."[32] The competitive reality is that listeners do not differentiate between stations based on whether the station is "above-the-line" or "below-the-line." Nor do listeners make listening choices based on where a station's community of license is located. The quality and availability of a signal, and the programming contained on that signal, not the city of license, or the licensee's determination to request that it be considered a "home" station in a market, determine listener choice. That is precisely why the signal contour-overlap method, which more accurately reflects a station's actual coverage, is the preferable methodology.

The Commission's new market definition also wholly ignores the differences that exist among stations in an Arbitron market, even among "above-the-line" stations. Specifically, the new market definition does not consider the real-world differences that exist among the various classes of radio stations. For example, the Commission's proposed market definition prejudices

30 *R&O* at ¶ 281.

31 *Id.*

32 *Id.* at ¶ 280.

small stations because Arbitron counts Class A FM stations licensed to outlying communities exactly the same as Class C FM stations located in the heart of the market though clearly such signals are not equal in terms of their impact on marketplace diversity. Undoubtedly, the Commission is fully aware that Class A and Class C stations have very different coverage characteristics. Simply stated, Class A stations reach fewer listeners.

Unlike in the television context, where cable carriage may practically offset a weak over-the-air signal, in radio, the signal determines whether or not a station can be heard. And in many geographically large markets, it may take multiple low-power radio facilities to cover a market easily covered by a single high-power station, yet the Arbitron methodology considers each station, regardless of its coverage area, to be identical. The contour-overlap methodology accounted for these differences by focusing on signal coverage. Two Class A stations, which did not overlap, would not be twice counted against a licensee under the old contour-overlap methodology – though they are under the new system. The threat to competition is made far worse by not taking audience reach into account under the new market definition. For example, a single media conglomerate could own all four Class C stations in a given market while a smaller competitor could not own five Class A stations. Punishing smaller broadcasters, who cannot necessarily afford to purchase the limited number of Class C stations in a market, but who still wish to provide diversity and competition in the market via smaller stations, is an affront to the public interest and threatens the continued viability of such stations.

Indeed, in what may be the most perverse manifestation of the new rules, the Arbitron methodology may well lead to *more* consolidation, not less. Under the contour-overlap methodology, stations in adjacent markets worked to limit the number of stations an entity could own in a market-thus preventing regional concentrations. Under the new methodology, by considering Arbitron markets to be distinct unto themselves, an entity can own a station "home" to one market, which puts a significant signal into an adjacent market, and may get significant "below- the-line" ratings in that market, but the Commission's new system will consider it to have no diversity impact whatsoever.

A few examples illustrate the absurd results that will occur if the Commission fails to reconsider its change in market definition. In the Biloxi-Gulfport-Pascagoula, Mississippi market, where Monterey has several stations, the market is adjacent to the New Orleans, Louisiana market to the southwest, the Mobile, Alabama market to the northeast, and the Laurel-Hattiesburg market to the north. Not surprisingly, Biloxi receives significant below-the-line listening from stations located in these markets. According to BIA, stations located outside of the Biloxi market account for 33.3% of radio listening within the market.[33] The contour-overlap methodology took this fact into account by limiting the number of stations a single entity could own in the area. The number of significant stations an entity could own in Biloxi was limited if that entity also owned powerful stations in New Orleans or Mobile that would have significant below-the-line listening in Biloxi. In contrast, the new Arbitron-based market definition ignores market realities by ignoring any consideration of the commonly-owned stations from separate Arbitron markets that actually compete for listeners in the Biloxi market. For example, Clear Channel owns at least ten stations which receive ratings in Biloxi, yet only four of these are actually counted towards Clear Channel's station total in the market.[34] Because many stations like Clear Channel's will no longer be included as part of the Biloxi market, larger station groups from adjacent markets can now purchase up to the maximum permissible number of stations in Biloxi, and the maximum permitted in each of the adjacent markets, which will undoubtedly lead

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33 BIAfn, *2003 Investing in Radio Market Report*.

34 *See* BIA Media Access Pro.

to increased consolidation in the market, and probably increased concentration overall. Clearly, this is not what the Commission intended by its new rules.

Similarly, Monterey has stations in Lincoln, Nebraska, which provides yet another example of what are certain to be numerous markets where switching to the Arbitron definition will have negative consequences. Under the contour-overlap methodology, the number of stations a party could own in Omaha was limited by the number of stations the party owned in nearby Lincoln. Given that Omaha and Lincoln are totally separate markets, a single owner can now acquire additional stations in both markets without violating the rules. This problem is not limited to markets where Monterey has stations, as the rule change will have similar negative consequences throughout the country wherever there are markets which are geographically proximate. One can imagine that in the compact Northeast corridor, this issue will come up repeatedly. Coverage will no longer be considered a limiting factor on ownership -- the ownership of a station that blankets a market with a signal will not be considered at all in that market if it is assigned to another Arbitron market. Monterey submits that these instances will be far more common, and, thus, more harmful to the public interest than the anomalous situation the Commission cited to in Pine Bluff, Arkansas under the contour-overlap system.[35] Based on this direct threat to competition and diversity, the Commission must abandon its proposed Arbitron market definition and return to the more sensible and realistic contour-overlap methodology.

[35] And the Pine Bluff situation can be remedied far easier – through minor changes such as those applied to non-rated markets in the interim policy adopted in the *R&O* – than through the completely new system adopted by the Commission.

CONCLUSION

For the reasons set forth above, the Commission should reconsider its decision to make JSAs attributable, its decision to abandon its contour-based local radio market definition, and its failure to permanently grandfather JSAs.

Respectfully submitted,

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EXHIBIT 1

In total, comments relied upon by the Commission to attribute JSAs consist of the following:

- "Indeed, and in light of the need for the Commission to take a more rigorous approach to ownership and other business relationships among stations, DBC [IWC}, [NABCo] recommends that the Commission adopt a similar regulatory approach to new and existing joint sales arrangements ("JSAs"). These arrangements to play a significant role in affecting the fairness and effectiveness of competition in a local market." Dick Broadcasting Comments in MM Docket No. 01-317 at 8.
- "Indeed, and in light of the need for the Commission to take a more rigorous approach to ownership and other business relationships among stations, IWC recommends that the Commission adopt a similar regulatory approach to new and existing joint sales arrangements ("JSAs"). These arrangements to play a significant role in affecting the fairness and effectiveness of competition in a local market." Idaho Wireless Comments in MM Docket No. 01-317 at 9.
- "Indeed, and in light of the need for the Commission to take a more rigorous approach to ownership and other business relationships among stations, NABCo recommends that the Commission adopt a similar regulatory approach to new and existing joint sales arrangements ("JSAs"). These arrangements to play a significant role in affecting the fairness and effectiveness of competition in a local market." North American Comments in MM Docket No. 01-317 at 17-18.
- "Local Marketing Agreements, Time Brokerage Agreements, and Joint Sales Agreements, are all just various form of a licensee apathetically trading away their community responsibilities in exchange for financial consideration, thus should be abolished entirely. These types of agreements, very popular in the early 1990's, have lost their appeal since larger broadcasters can easily purchase these facilities in a deregulated era instead of haggling with another party over station control issues, yet remain under what was then considered very conservative ownership limitations within a market." Hodson Comments in MM Docket No. 01-317 at 9.
- "The same is true for JSAs since they have same competitive impact as TBAs and LMAs in that they take the same revenue from the market." Eure Comments in MM Docket No. 01-317 at 2.

EXHIBIT 2

BIA Radio Owner Market Revenue Share Report

Home to Market Stations Only

Mkt Rank	Market	# AMs	# FMs	Owner	BIA's Estimated Revenue for 2002 Station (000)	Market (000)	% Share of Market
220	Fargo-Moorhead, ND-MN	2	5	Clear Channel Communications	5,875	11,900	49.3%
220	Fargo-Moorhead, ND-MN	0	1	Fargo Baptist Church		11,900	
220	Fargo-Moorhead, ND-MN	1	0	Forum Communications Company	750	11,900	6.3%
220	Fargo-Moorhead, ND-MN	0	1	Ingstad, Tom	500	11,900	4.2%
220	Fargo-Moorhead, ND-MN	0	2	Minnesota Public Radio		11,900	
220	Fargo-Moorhead, ND-MN	1	1	Northwestern College Radio Network		11,900	
220	Fargo-Moorhead, ND-MN	0	1	Prairie Public Broadcasting		11,900	
220	Fargo-Moorhead, ND-MN	1	4	Triad Broadcasting Company	4,850	11,900	40.7%
220	Fargo-Moorhead, ND-MN	0	1	Vision Media Inc	150	11,900	1.2%
	Fargo-Moorhead, ND-MN	**5**	**16**	**Market Total**	**12,125**	**11,900**	**101.8%**