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September 4, 2003

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Re: Petition for Partial Reconsideration
FCC Docket Nos. 02-277, 01-235, 01-317, 00-244 and 03-130

Dear Ms. Dortch:

On behalf of Saga Communications, Inc., and pursuant to 47 C.F.R. §1.429, we are filing herewith the original and 11 copies of a "Petition for Partial Reconsideration" ("Petition"), in the above captioned dockets.

Additionally, we are electronically submitting a copy of this letter and the Petition through the FCC's ECFS System.

It is respectfully requested that the FCC review and grant the relief sought herein.

If any question arises in connection with this submission, please contact undersigned counsel.

Very truly yours,

Gary S. Smithwick
Counsel for Saga Communications, Inc.

GSS/sls
Enclosures

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SEP - 4 2003

Federal Communications Commission
Office of Secretary

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

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Saga Communications, Inc. ("Saga"), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, respectfully seeks partial reconsideration of the Commission's "Report and Order and Notice of Proposed Rulemaking" titled *Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Market, and Definition of Radio Markets ("Multiple Ownership Order"),* FCC 03-127, released July 2, 2003.[1]

[1] See also, Federal Register publication *Multiple Ownership Order,* 68 Fed. Reg. 46286,

Saga seeks reconsideration of the portions of *Multiple Ownership Order* that redefine a "radio market" as that term is used in section 73.3555 of the Commission's rules.

Background

Section 73.3555 sets forth the number of radio stations a party can own in a "radio market." Prior to its amendment, Section 73.3555(a)(1)(i) provided that "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)." (emphasis added). New Section 73.3555(a)(1)(i) provides that a single person or entity may own, "In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM)."[2] (emphasis added) Both the new Section 73.3555 and the old Section 73.3555 rely on the term "radio market" to give meaning to the rule. The number of stations a party can own in any given area depends on the definition of the term "radio market."

Old Section 73.3555(a)(2)(iii) specifically defined the term "radio market."

> The number of stations in a radio market is the number of commercial stations whose principal community contours[3] overlap, in whole or in part, with the principal community contours of the stations in question (i.e., the station for which an authorization is sought and any station in the same service that would be commonly owned whose

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published August 5, 2003. Since public notice runs from the date of publication in the Federal Register, this petition is timely filed by September 4, 2003. By *Order,* E-59, on September 3, 2003, the United States Court of Appeals for the Third Circuit, stayed the effective date of the rules.

[2] The changes made in the *Multiple Ownership Order* to Section 73.3555(a)(1)(ii),(iii) and (iv) track the changes made in Section 73.3555(a)(1)(i).

[3] Old Section 73.3555 defined principal community contours as the 5 mV/m groundwave contour for AM stations and the 3.16 mV/m contour for FM stations.

> principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

The *Multiple Ownership Order* revoked Section 73.3555(a)(2) of the rules, leaving the term "radio market" undefined in the rules.[4] In place of the "principal community contour overlap method," the FCC decided to delegate to two private companies the responsibility of determining what is a "radio market." To remedy what the Commission perceived as problems in determining the relevant radio market, the Commission decided to replace the principal community contour method, with Arbitron, Inc.'s ("Arbitron") definition of a radio market, the Arbitron Metro, as supplemented by BIA Financial Network, Inc. ("BIA").[5]

The *Multiple Ownership Order* does not define "radio market" other than to say that, "Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. . . . The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete."[6]

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[4] By *Erratum,* released July 30, 2003, the Chief, Media Bureau, noted that Section 73.3555(a)(2) of the Rules was deleted in its entirety. Thus, although the text of the *Multiple Ownership Order* addresses market definitions, unlike the rule now in effect, the stayed new rule itself does not provide any information on radio market definitions.

[5] *Multiple Ownership Order,* at paras. 279-280.

[6] *Id.* at paras 275-6.

The FCC not only chose the Arbitron Metro as its definition of a radio market, but it authorized Arbitron to make future changes to its Metro boundaries. As the FCC admits, Arbitron can change its Arbitron Metro boundaries for any number of reasons.[7] Whether the change in an Arbitron Metro's boundaries is small or dramatic, carefully considered or made arbitrarily, the power to change the Arbitron Metro boundaries and thus change the definition of a radio market, now rests with Arbitron and not the FCC.

Likewise, Arbitron has the ability to include or exclude certain stations from within a radio market.

> For each Arbitron Metro, Arbitron lists the commercial radio stations that obtain a minimum share in the Metro. Some of these stations are designated by Arbitron as "home" to the Metro. These "home" radio stations usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro. These radio stations are also known as "above-the-line" stations because, in ratings reports, Arbitron uses a dotted line to separate these stations from other radio stations – known as "below-the-line" stations – that have historically received a minimum listening share in a Metro.[8]

The decision of what stations should be included as being above-the-line belongs, not to the FCC, but to Arbitron. The other entity granted a say in which stations are to be counted as part of a radio market is BIA. According to the Commission, BIA's Media Access Pro database builds on Arbitron's data to provide greater detail about the "competitive realities" in the Arbitron Metro. One of the things that BIA can do is to "determine on its own whether a particular station licensed to a community outside of a

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[7] *Id.* n. 582.

[8] *Id.* at para. 279.

Metro should be listed as 'home' to the Metro."[9]

The Commission has adopted a new standard for defining a radio market; one based on data compiled by a private company, Arbitron, as modified by BIA. For the reasons set out herein, this is a delegation of authority that is constitutionally impermissible and results in arbitrary and capricious decision-making.

The Commission Impermissibly Delegated Its Authority When It Permitted a Non-Governmental Business to Determine the Makeup and Geographical Boundaries of a "Radio Market," as that Term is Used in Section 73.3555 of the Rules.

The FCC has delegated to Arbitron and BIA the power to decide the geographic boundaries and the radio station composition of a "radio market" as that term is used in Section 73.3555 of the Commission's rules. Without any input or oversight from the Commission, Arbitron can change the boundaries of a radio market. It can add counties to a market, it can subtract counties from a market or it can split an existing Arbitron Metro into two or more markets. Arbitron and BIA, in their sole discretion can add or subtract radio stations that are "home" to a given Arbitron Metro. The net result is that two private companies have been given unprecedented authority to decide the geographic boundaries of a radio market and how many stations are assigned to each radio market.[10]

The Commission's reliance on Arbitron and BIA to determine the size and composition of markets impermissibly delegates to private citizens the legislative power granted to the Commission. The Supreme Court has held this sort of delegation

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[9] *Id.* at n. 587.

[10] The new rules provide interested parties no opportunity to show that the Arbitron/BIA radio market definition is inappropriate in a particular case, and that a different market definition should be applied. Each Arbitron/BIA radio market definition is an established fact, chiseled in stone, and not subject to modification.

unconstitutional. See, *Washington ex rel. Seattle Title Trust Co. v Roberge*, 278 U.S. 116 (1928). In that case, a landowner applied for a permit to construct a home, but was unable to obtain consent from the neighboring landowners, as required by a city ordinance. The landowner claimed that the ordinance violated due process and was an improper delegation of authority because it gave neighboring landowners the absolute discretion to determine whether a permit was issued. The Supreme Court agreed, and reasoned that the ordinance violated the Due Process Clause of the U. S. Constitution because it attempted to delegate to adjoining landowners the authority over issuance of a permit. The Court further reasoned that the adjoining landowners were not bound by any official duty and that there was no means for an appeal under the ordinance.

The same principle applies here. Neither Arbitron nor BIA is bound by any official duty, nor is there any appeal from their decision to change the basic structure of any radio market. Such changes to the basic structure of a radio market will have a significant impact on the rights of broadcasters within that market. It is a fundamental tenant that the government's power to deprive any person of liberty or property may not be exercised except at the behest of an official decisionmaker.

> [In] the very nature of things, one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.[11]

More recently, the Supreme Court has applied these principles in procedural due process contexts. For example, in *Fuentes v. Shevin*, 407 U.S. 67, 93 (1978) the Supreme Court had this to say in invalidating a statute that enabled private parties to exercise the State's

[11] *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

power:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.

Arbitron and BIA are not in the business of looking out for the public interest; that is the sole responsibility of the FCC. Arbitron and BIA are in the business of serving the needs of broadcasters. Arbitron sells broadcasters surveys, which provide broadcasters with basic data on the numbers of persons that listen to radio in an Arbitron Metro, the stations they listen to and the times of day they listen. Radio stations utilize this information to sell commercial advertising. BIA is a communications and information technology, investment banking, consulting, and research firm. BIA information is used by broadcasters considering the purchase or sale of a radio station as a going business. Both Arbitron and BIA are in the business of selling goods and services to media companies. The decisions they make are driven by their financial self-interest, rather any concern about the public interest. Stated another way both Arbitron and BIA are private companies whose mission is to make a profit for their owners and investors.[12] They are not legally or morally responsible for looking out for

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[12] In addition to being subject to pressure to change radio markets, Arbitron and BIA will be able to capitalize on the sale of data. The FCC will not approve any multiple radio station assignment or transfer unless Arbitron and BIA data is provided in the application. This gives Arbitron and BIA the ability to price their data at monopoly rates. A small or minority owned business will have to pay a large fee to BIA before the FCC will even consider its application to acquire an additional radio station or radio stations. Thus the Commission has placed Arbitron and BIA at the gateway of commerce and empowered

the public interest, which is the responsibility of the FCC.

In the *Multiple Ownership Order*, at para. 278, the FCC recognized that parties might attempt to manipulate Arbitron market definitions for the purpose of circumventing the local radio ownership rule. The FCC set out a policy that prevents a party from taking advantage of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. Also the FCC will not allow a party to rely on a station that is "home" to an Arbitron or BIA market unless it has been "home" to that market for at least two years. These procedures will not prevent manipulation and abuse of the definition of a radio market; they will only delay it. A party seeking to manipulate the Commission's definition of a radio market needs to convince Arbitron or BIA to make the desired change and then it simply needs to wait two years. For example, if a broadcaster has a radio station "cluster"[13] that does not comply with the new multiple ownership rules, it can have stations added to the radio market or it can have the market split, as appropriate to its needs. The broadcaster may not have any current plans to sell its cluster, but, after two years, should it desire to do so it can reap the full economic benefit of being able to sell a fully intact radio cluster.

Conclusion

It is the Commission's responsibility to define a radio market. Such a key definition, critical to the application of the Commission's new multiple ownership rules

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them to take a toll from all who pass. See e.g. *Munn v. Illinois*, 94 U.S. 113 (1877). Based on information and belief, BIA is currently charging $350.00 to provide a single report for a single radio market at one specific point in time so that applicants may provide a response to the questions in FCC Forms 301, 314 and 315 (and the related Instructions and Worksheets) with respect to compliance with the local radio station ownership limits.

[13] A group of commonly-owned stations in a radio market.

cannot be delegated to non-governmental third parties. Accordingly, the FCC should strike that portion of Multiple Ownership Order which delegates to Arbitron and BIA the responsibility to determine the size and makeup of each radio market. This third party method should be replaced with a specific rule, like the interim contour overlap method.[14] To do otherwise, results in the Commission improperly delegating its rulemaking and regulatory authorities to private commercial interests who have do duty to act in the public interest.

Respectfully submitted,

SAGA COMMUNICATIONS, INC.

By: _____

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September 4, 2003

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[14] See *Multiple Ownership Order,* at Paras. 282-286 which will be applied on a temporary basis in analyzing station combinations in areas not located in an Arbitron metro. This method makes "certain adjustments to minimize the more problematic aspects of [the former] system. There is no reason this method cannot be applied across the board to all proposed station transactions, regardless of market size.