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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BRIAN M. MADDEN
(202) 416-6770

E-MAIL
BMADDEN@LSL-LAW.COM

Via Hand Delivery

Ms. Marlene S. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Entercom Communications Corp.
Petition for Reconsideration and Clarification
MB Docket No. 02-277
MM Docket No. 01-235
MM Docket No. 01-317
MM Docket No. 00-244
MB Docket No. 03-130

Dear Ms. Dortch:

On behalf of Entercom Communications Corp., there is transmitted herewith an original and eleven (11) copies of its *Petition for Reconsideration and Clarification* submitted in connection with the above-referenced proceedings.

If any additional information is desired in connection with this matter, please contact the undersigned counsel.

Very truly yours,

Brian M. Madden

Brian M. Madden

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
	)	
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)	MB Docket No. 03-130

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Entercom Communications Corp. ("*Entercom*"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby submits this Petition for Reconsideration and Clarification respectfully requesting that the Commission reconsider and clarify its revision of Note 4 to Section 73.3555 of the Commission's Rules ("*Note 4*") contained in the Report and Order and Notice of Proposed Rulemaking in the above-captioned proceedings released on July 2, 2003. *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,*

Report and Order and Notice of Proposed Rulemaking, FCC 03-127, slip op. (rel. July 2, 2003) ("*Report and Order*"). [1]

Note 4 to the multiple ownership rules defines the circumstances under which the rules are to be applied to various types of applications. The overriding principle of Note 4 is that the rules are not to "be applied so as to require divestiture, by any licensee, of existing facilities...." However, two provisions added without substantive discussion in the *Report and Order* would result in the termination of grandfathered status where a single entity held a combination of stations lawful under the contour-based ownership rules but now over the permissible limit for Metro markets files an application for a "minor change" in technical facilities for one or more of its stations either to "implement an approved change in an FM radio station's community of license or [to] create new or increased concentration of ownership among commonly owned, operated or controlled media properties." As will be demonstrated herein, for stations that are included within a defined Metro market and do not have signal contour overlap with any commonly owned station outside of that Metro, applications of the types identified by the new language added to Note 4 are without regulatory significance for multiple ownership purposes. The grant of these types of facility change applications does not alter the number of stations in the Metro, and should not, therefore, affect the continuation of a licensee's grandfathered status. These same considerations are applicable to major change applications filed to change an AM station's community of license from one community within a Metro to another community within the same Metro, which applications should equally be free from the risk of the loss of grandfathered status under Note 4.

[1] Entercom participated in the underlying proceedings involving the radio ownership rules, especially with regard to the definition of radio markets for purposes of the rules. In those filings, Entercom explained its basis for opposing the replacement of the contour overlap methodology used for the past 10 years with reliance on Arbitron defined Metros. Although Entercom continues to believe that the change in the definition of radio markets is erroneous, those comments will not be repeated here.

Entercom respectfully submits that the changes to Note 4 added by the *Report and Order* should be reconsidered and clarified by the addition of the italicized language indicated below:

> **Note 4 to § 73.3555**: Paragraphs (a) through (c) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (c) will apply to all applications for new stations, to all other applications for assignment or transfer, ***and, with the exception of applications to change a community of license from one community within a radio Metro market to another community within the same Metro or for changes in facilities of existing radio stations which do not create new or increased contour overlap with commonly owned, operated or controlled radio stations located outside of a Metro,*** to all applications for major changes to existing stations and to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (c) of this section may not be assigned or transferred to a single person, group or entity, except as provided above in this Note or in the Report and Order in Docket No. 02-277, released July 2, 2003 (FCC 03-127).

I. The Commission's Revision of Note 4 and Associated Expansion of the Scope of Section 73.3555 of Its Rules Was Issued Without Explanation, Is Inconsistent With Commission Policy and Hinders Furtherance of the Commission's Allotment Priorities.

In issuing its new media ownership rules, the Commission recognized that some existing combinations of broadcast stations would exceed the new ownership limits. *Report and Order* at ¶¶ 482-95. So as not to penalize group owners who acquired or developed groups of stations in compliance with the then-existing rules, the Commission "grandfathered" these existing radio station groups. *Id.* at ¶ 484. This principle is explicitly set forth in the first sentence of Note 4 to the rule.

However, in its *Report and Order*, the Commission expanded the scope of Section 73.3555 of its rules through the addition of new provisions to Note 4 that makes the rules applicable to minor change applications filed to "implement an approved change in the FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties."[2] 47 C.F.R. § 73.3555, Note 4. Despite the Commission's decision to grandfather existing combinations, this status would be eliminated if one of the identified types of facility change applications were to be filed for any of the stations in the established group. The effect of this seemingly routine revision is so broad that it would terminate the grandfathered status of an ownership combination in circumstances even where the proposed change in community of license is to another community within the station's existing Metro market – a change that is without significance under the ownership rules because it would not alter the number of stations the group owner has in the market, the total number of stations in the Metro, or otherwise effect any cognizable change to the Metro's characteristics.

The *Report and Order* provides no explanation of how this change to Note 4 is in the public interest. In the circumstances described above, the change to Note 4 neither advances the Commission's ownership goals nor furthers the fulfillment of the Commission's established allotment priorities. The sole effect of this change in such a case is to rescind grandfathered treatment, which the Commission recognizes protects station group acquisitions made in good faith reliance with the then-existing local radio ownership rule, *Report and Order* at ¶ 484, upon implementation of a change in technical facilities that is without relevance to the application of the new ownership rules.

[2] Under the prior version of Note 4, the rules were not applicable at all to minor change applications filed for existing stations.

A. The Commission Failed to Offer Any Justification in Expanding the Scope of Section 73.3555 of its Rules Through the Revision of Note 4.

In the *Report and Order*, the Commission identified numerous instances in which its existing ownership rules were no longer in the public interest and offered detailed, comprehensive explanations of how the changes in the rules adopted advanced the public interest.[3] No explanation or justification for the change to Note 4 is offered.

The Telecommunications Act of 1996 requires the Commission to review its ownership rules on a biennial basis and "repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, § 202(h). The Commission interprets this language to "upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *Report and Order* at ¶ 11. But Congress's instruction that the Commission repeal or modify a regulation it determines to be no longer in the public interest in no way weakens the well established and "frequently reiterated [requirement] that [the agency] must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

It is well recognized that "an agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 (1983) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). By failing to provide any explanation for the modification of Note 4, and thereby curtailing the grandfathered status of combinations defined or developed in compliance with the contour-based ownership rules, the

[3] *See, e.g., Report and Order* at ¶ 133-34 (justifying modification of the local TV multiple ownership rule); *Report and Order* at ¶ 239 (justifying modification of the local radio ownership rule); *Report and Order* at ¶ 330 (justifying modification of the newspaper/broadcast cross-ownership rule).

Commission has failed to "provide[] a reasoned explanation for its action." *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

Throughout the *Report and Order*, the Commission expressly extended grandfathered status to licensees that had acquired or developed lawful radio station combinations under the former contour-overlap rules. However, in footnote 1033 to the *Report and Order*, the Commission noted its policy not to permit modification of a station's facilities in a grandfathered combination where the proposed modification would result in a *new* violation of the ownership rules. *Report and Order* at n.1033. At footnote 569, the only other instance in the entire 256 pages of the *Report and Order* where the Commission even alludes to the revision to Note 4, the Commission states that compliance with the new ownership rules would be required when a party files for authority to construct a new station, to buy or transfer an existing station, "or to make certain modifications, such as a change in the community of license of a radio station." *Id.* at n. 569. No reason is given for applying Section 73.3555 to such applications; the footnote is a single sentence nearly identical to the new language in the revision to Note 4.

The most likely explanation for this change to Note 4 is to prevent "gaming" of the new rules by "manipulat[ing] Arbitron market definitions for purposes of circumventing the local radio ownership rule," *Report and Order* at ¶ 278, which maneuvers the Commission has acted expressly to prohibit.[4] But this justification would not apply to group owners seeking to effect a change of community of license within the same Metro or to improve facilities of a station within a Metro where no new or increased overlap is proposed with a commonly owned station located outside of the Metro. As a result, the filing of these applications should not trigger the loss of grandfathered rights under the ownership rules.

[4] *See Report and Order* at ¶ 278.

B. Application of Note 4 to a Licensee Seeking to Implement Facility Changes Within the Same Market Impedes Rather Than Promotes Established Commission Goals.

By issuing its revised local radio ownership rules, the Commission sought to "preserve a healthy and robust competition among [local radio] broadcasters." *Report and Order* at ¶ 6. In fact, the Commission "primarily rel[ies] on competition to justify the [new local radio market] rule." *Report and Order* at ¶ 239. The Commission concluded that the former local radio ownership rules did not serve the public interest for two reasons: (i) the prior local radio market definition methodology did not protect against undue concentration; and (ii) the prior rules did not incorporate the competitive presence of noncommercial stations. *Report and Order* at ¶ 241.

The loss of grandfathered status for a group owner that seeks to change the community of license of one of its stations to a different community within the same Metro or to modify the facilities of a station within a Metro without creating a new or increased overlap with a commonly owned station located outside of the Metro does not address either of the two failings in the contour-overlap rules noted by the Commission. As long as the number of total stations and the number of commonly owned stations in the Metro does not change, a reallocation of the community of license of one of the stations to a different community within that Metro or an expansion of signal coverage within the Metro has no net impact on the concentration of radio ownership in that market. As a consequence, the grandfathered combination should be allowed to remain intact without requiring divestiture.

Rather than serve the public interest, the revisions to Note 4 will likely inhibit the fulfillment of the Commission's established allotment priorities, *see Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). A change in a station's designated community of license within the same Metro that would advance the allocation priorities would require the

divestiture of otherwise grandfathered stations under Note 4. To the extent that such a change could be seen as "gaming" the enforcement of the new rules, the proactive measures adopted by the Commission at ¶ 278 of the *Report and Order* are adequate to achieve the Commission's regulatory purposes; the revisions made to Note 4 in this respect are both overly broad and unnecessary.

Similarly, to the extent that the reference in Note 4 to "new or increased concentration of ownership" among commonly owned radio stations in a Metro is intended to encompass *any* improvement to a station's technical facilities which yields new or increased overlap with other commonly owned stations in the *same* Metro, the threat of the loss of grandfathered status to one or more stations in an existing commonly owned group would prevent an owner from providing enhanced service by its stations. Under the new ownership rules, the degree of overlap among commonly owned stations within a Metro is without regulatory significance – indeed, the ownership rules apply whether or not *any* overlap exists among any stations within the same Metro, and without regard to the class of stations involved.[5] The only relevant factor is the *number* of stations owned in common within the Metro – where the number of stations owned in a Metro does not change, despite the filing of an application to expand a station's coverage area, a licensee should not be threatened with the loss of grandfathered status.

II. The Real World Application of Revised Note 4 Demonstrates Its Flaws.

Entercom's concerns about the application of revised Note 4 are not hypothetical. In February 2003, well before the new ownership rules were adopted, Entercom, through a wholly-owned subsidiary, filed a Petition for Rule Making (RM-10697) to change the community of

[5] Only where a facility change application proposes new or increased overlap between a Metro station and a commonly owned non-Metro station would the degree of overlap be relevant; in that instance, a licensee would have to demonstrate compliance with the ownership rules both within the Metro and under the interim contour overlap rules outside of the Metro. *Report and Order* at ¶ 286.

license of two of its stations within the Wilkes Barre-Scranton, Pennsylvania Metro: the community of license of Station WKRZ(FM) would change from Wilkes Barre to Freeland, and the community of license of Station WAMT(FM) would change from Freeland to Avoca, representing first local transmission service to Avoca. All of these communities are located in the Wilkes Barre-Scranton Metro. The Commission issued a Notice of Proposed Rule Making in Docket No. 03-140 on June 23, 2003, proposing the changes requested. Entercom is the licensee of a total of nine AM and FM stations in the Wilkes Barre-Scranton Metro, including Stations WAMT and WKRZ. The common ownership of these nine stations was permissible under the former contour overlap rule since one of the stations does not overlap with any of the other eight, and there are more than 45 stations within the relevant radio markets created by contour overlap of other stations. All nine of the stations are located within the Metro and Entercom's ownership of the entire group is now grandfathered under the new rules. However, as Note 4 currently reads, once the rule making proceeding now under consideration by the Commission is completed, Entercom will be unable to file applications to implement the changes in the FM Table of Allotments found by the Commission to be in the public interest without divesting one of its stations in the Metro, even though the changes to be authorized by the rule making involve changes to communities which are all included within the Wilkes Barre-Scranton Metro. Absent a divestiture, the provision of first local transmission service to Avoca would therefore be precluded by the application of Note 4 to Entercom's holdings in the Metro without the realization of any countervailing public interest benefit.

III. CONCLUSION

For the foregoing reasons, Entercom respectfully urges the Commission to reconsider and clarify its changes to Note 4 to Section 73.3555 of the Commission's rules by the adoption of the suggested language set forth at page 3 of this Petition.

Respectfully submitted,

ENTERCOM COMMUNICATIONS CORP.

By: Brian M. Madden

Brian M. Madden
Jean W. Benz
John W. Bagwell
Leventhal Senter & Lerman PLLC
2000 K Street, N.W. Suite 600
Washington, DC 20006-1809
(202) 429-8970

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Its Attorneys