RECEIVED

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
	)	
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

Lewis J. Paper
Jacob S. Farber
Gregory Kwan
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 828-2265
(202) 887-0689 (fax)
PaperL@dsmo.com
FarberJ@dsmo.com

September 4, 2003

Attorneys for Cumulus Media Inc.

TABLE OF CONTENTS

Summary

The Commission should reconsider the decision in its *Report and Order* to repeal Section 73.3555 (a)(2) of its rules (the "Prior Rule") and to substitute a new rule (the "New Rule") to define a radio market in reliance on Arbitron Metro Survey Areas (each a "Metro") where available. If the Commission does not rescind the New Rule, then, in that latter event, the Commission should (1) apply the Prior Rule to applications that were pending before the Commission on the date (the "Adoption Date") on which the New Rule was adopted (June 2, 2003) and (2) provide permanent grandfathered status to non-compliant clusters of commonly-owned radio stations that were in existence as of the Adoption Date (as augmented by the processing and consummation of applications pending on the Adoption Date).

Applicable law and authority requires the Commission to have a reasoned basis for any decision it makes in the repeal or promulgation of rules. The Commission is of course free to change its position as to what rules will best serve the public interest; however, the Commission must always provide a reasoned explanation for such change and account for any changes in fact or circumstance which warrant that new position.

The Commission's decision to repeal the Prior Rule and to adopt the New Rule cannot be squared with the foregoing principles. The Commission had rejected the use of Arbitron Metros as a vehicle for defining a radio market when the Commission adopted new rules in 1992 that would allow a party to own two stations in the same service in the same market. The Commission had instead selected the Prior Rule, which incorporates a contour overlap methodology, because of the agency's view that the contour overlap methodology would reflect the actual options available to listeners and would thus be responsive to the Commission's core concerns with competition and diversity.

The Commission's selection of the contour overlap methodology in the Prior Rule proved to be a reasonable one. In almost eleven years of experience with the Prior Rule, thousands of transactions – involving the expenditure of billions of dollars – have, as the Commission acknowledged in its *Report and Order*, restored the financial health to the radio industry. No regulation, however, is perfect, and there have been situations under the Prior Rule which appear to be at odds with the Commission's interest in diversity and competition. Principal among those anomalous results is the Commission's decision in *Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999) ("*Pine Bluff*"). That case involved a circumstance where a station owned by the buyer was included in the "denominator" (identifying all stations in the "market") but not included in the "numerator" (which identifies the stations the buyer would own in the "market"). The *Report and Order* identified three other anomalous situations where the number of radio stations in a market, as defined under the Prior Rule, appeared to exceed the actual number of radio stations competing in a particular geographic area.

The few anomalies identified in the record pale in significance and number with the thousands of transactions that have been consummated under the Prior Rule and that have been consistent with marketplace realities. The Commission should not adopt an industry-wide solution to a problem of such limited scope. That is particularly so because the record provides virtually no evidence that the Prior Rule has resulted in any anticompetitive behavior (in part because the Prior Rule left the Commission and the United States Department of Justice with the discretion to take corrective action before any such anticompetitive behavior could be initiated).

The Commission's repeal of the Prior Rule and the adoption of the New Rule is all the more arbitrary because of the inherent problems in relying on Arbitron Metros: the boundaries of and stations in a Metro largely reflect individual decisions made by radio station owners over the course of many years which may or may not reflect the realities of a marketplace; some

Metros (such as the Nassau/Suffolk, Long Island New York Metro) are unusually large and do not reflect the marketplace in which radio stations compete; and Arbitron includes in a Metro any station from another Metro which simulcasts a Metro station's programming (even though the two stations do not compete with each other for listeners or advertisers). The Commission's reliance on Arbitron Metros as the "real" economic marketplace is also inconsistent with the *Report and Order's* legal assumption that every station competes where its community of license is located.

To the extent the record demonstrates that the anomalous results are not isolated incidents, the Commission can amend the Prior Rule to (1) include in the numerator every station owned by the buyer which is also included in the denominator (and thus eliminate the *Pine Bluff* problem) and (2) if warranted, eliminate from the denominator those stations which do not compete for advertisers or listeners with the stations in the market.

If it nonetheless decides to retain the New Rule, the Commission should apply the Prior Rule to applications that were pending on the Adoption Date. Many of those applications have been pending for many months and in some cases more than one year. Applying the New Rule to pending applications would have an unlawful "secondary retroactivity" effect because the inequity and burden imposed on those private parties would far outweigh any public interest benefit that could be secured by applying the New Rule to pending applications.

If the new Rule is retained, the Commission should also provide permanent grandfathered status to pre-existing non-compliant clusters of commonly-owned radio stations. Parties have expended substantial time, money and effort in developing those clusters to create the kind of efficiencies that, as the *Report and Order* acknowledged, helped to restore the radio industry's financial health. If, as the *Report and Order* requires, the grandfathered status of pre-existing non-compliant clusters disappears upon the sale of the stations or the ownership interests of the group owner, those parties will be unfairly penalized (because "orphaned" stations excluded from the cluster will lose much of their value). The loss of grandfathered status will also have an adverse effect on competition because no new owner will be able to develop a station group in the market that will equal the size of a pre-existing non-compliant cluster that is not sold.

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

Cumulus Media Inc. ("Cumulus"), acting pursuant to Section 1.106(a) of the Commission's rules, hereby requests reconsideration of the *Report and Order* released in the above-referenced dockets with respect to those portions that (1) repealed Section 73.3555(a)(2) of the Commission's rules (the "Prior Rule") and substituted a new procedure for defining a radio market (the "New Rule"), (2) decided to apply that New Rule to assignment and transfer of control applications pending before the Commission prior to June 2, 2003 (the "Adoption Date"), and (3) decided that the grandfathered status of pre-existing non-compliant clusters of commonly-owned radio stations would disappear upon the subsequent sale of the stations or transfer of control of the stations' owner to a third party unless that third party qualified as a small business under standards established by the Small Business Administration (the "SBA"). *2002 Biennial Regulatory Review*, FCC 03-127 (July 2, 2003) ("*Report and Order*").

Upon reconsideration, the Commission should (1) restore the contour overlap methodology previously embodied in the Prior Rule but, if warranted, modify the Prior Rule to (a) include in the fraction's "numerator" (which identifies market stations to be owned by the buyer) any commonly-owned station which is also included in the "denominator" (which identifies all the stations in the market) and (b) exclude from the market (i.e., the denominator) any stations which do not compete for listeners or advertisers with the stations in the "market," (2) if the New Rule is retained, apply the Prior Rule to assignment and transfer of control applications pending prior to the Adoption Date, and (3) if the New Rule is retained, provide permanent grandfathered status to non-compliant clusters of commonly-owned radio stations if the cluster was in effect prior to the Adoption Date (as augmented by the consummation of any application pending prior to the Adoption Date).

Introduction

The Commission's New Rule for defining radio markets represents a fundamental and abrupt departure from a rule that had been in place for almost eleven years and had been the basis upon which thousands of transactions had been consummated to produce the very efficiencies and financial health that the Commission had sought for the radio industry when it first adopted the Prior Rule in 1992. To be sure, that success should not preclude the Commission from altering or repealing the Prior Rule if the public interest requires such change. The record in the above-referenced proceedings, however, woefully fails to provide that needed justification.

Although it complains that the Prior Rule is incurably "flawed as a means to preserve competition in local radio markets," the *Report and Order* offered scant evidence to support that

v1: ZKFX01!.DOC

conclusion. *Report and Order* ¶ 256. There have been literally thousands of transactions processed and approved under the Prior Rule, but the *Report and Order* cited only a handful of situations which allegedly reflect the "unrealistic and irrational results" which, in the Commission's view, required a fundamental change. *Report and Order* ¶ 248.

The defects in the *Report and Order* are exemplified by the anomaly on which the *Report and Order* focuses the most attention – the Commission decision in *Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999) ("*Pine Bluff*"). That case presented a situation (the exclusion from the "numerator" of a commonly-owned station of the buyer that was included in the "denominator") which, contrary to the *Report and Order*, could be easily remedied. The other few anomalies referenced in the *Report and Order* pale in number and significance with the countless number of transactions consummated under the Prior Rule which have, as the *Report and Order* acknowledged, contributed to the restoration of the radio industry's financial health. *See Report and Order* ¶ 236 (consolidation has placed the radio industry today "on a stronger financial footing than it was a decade ago").

The absence of sufficient evidence to support the adoption of the New Rule is compounded by the inherent problems in relying on Arbitron Metro Survey Areas (each a "Metro") and BIA as a substitute for the Prior Rule. The problems include (1) Arbitron and BIA's inclusion in a Metro of a station from *another* Metro that is commonly owned and simulcasts the same programming of a Metro station (even though the two stations do not compete with each other), (2) a legal assumption by the Commission that a station necessarily competes in the Metro where its community of license is located even if Arbitron and BIA have determined that the station does not in fact compete in that Metro, (3) a recognition that some Arbitron Metros are unusually large and reflect more than one competitive radio marketplace, and (4) the historical fact that the number of competitors in an Arbitron Metro on the Adoption

Date largely reflects individual decisions previously made by station owners which may or may not comport with the realities of the radio marketplace.

Many of the inherent problems with Arbitron were recognized by the Commission when it rejected the use of Arbitron in 1992 as the vehicle to define radio markets. *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6394-95 (1995) (subsequent history omitted). Although it acknowledges that rejection, the *Report and Order* provides virtually no explanation as to why a system deemed unreliable in 1992 now appears to be the most reasonable alternative. The failure to provide that reasoned explanation is all the more remarkable because the *Report and Order* acknowledges that use of Arbitron and BIA will produce anomalies and inconsistent results, *see Report and Order* ¶¶277-78; but nowhere does the *Report and Order* make any effort to identify the nature or scope of those anomalies or whether they would be less significant in number and impact than the anomalies created under the Prior Rule.

Even if the New Rule could be justified, the Commission has provided no reasoned basis to apply the rule to assignment and transfer of control applications that were pending on the Adoption Date. There were apparently hundreds of applications in that status, many of which had been pending for many months and in some cases more than one year. The decision to suspend the processing of those applications under the Prior Rule so that they could be disposed of under the New Rule will have an impermissible "secondary retroactivity" effect. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219 (1988) (Scalia, J. concurring). The harm to those private parties who negotiated contracts and submitted applications in reliance on the Prior Rule far outweighs any salutary benefit for the public interest. For that reason, assignment and transfer of control applications pending prior to the Adoption Date should be processed under the Prior Rule (if the New Rule is retained).[1]

[1] It is presumed that the Commission will change its position and apply the Prior Rule to applications pending on the Adoption Date in light of the decision by the United States Court of

The *Report and Order* is equally arbitrary in limiting the grandfathered status of pre-existing clusters of commonly-owned radio stations which would violate the strictures of the New Rule. Those clusters reflect substantial investments of time, effort and money by station owners who reasonably relied on the Prior Rule; to limit the grandfathered status of those clusters to the existing owners would not only strip those owners of the value of those clusters but also create a competitive advantage for other non-compliant clusters in the same markets which are not sold (because the new owner under the New Rule would not be able to own the same number of radio stations). Providing permanent grandfathered status, therefore, is not only compelled by the equities of private parties but also by the need to preserve the level playing field for all competitors that the New Rule is purportedly designed to achieve. Accordingly, if the Commission retains the New Rule, it should provide permanent grandfathered status to those non-compliant clusters that were created on the basis of the Prior Rule.

I. Background

In 1992, the Commission rejected its initial selection of Arbitron Metros as the vehicle to define radio markets for situations where, for the first time, a party would be entitled to own more than one radio station in the same service in the same market. *Revision of Radio Rules and Policies*, 7 FCC Rcd at 6395. The Commission decided to rely on the contour overlap methodology incorporated in the Prior Rule because of its belief that the overlap methodology would address the Commission's "core concerns of competition and diversity" and "reflect the

---

Appeals for the Third Circuit to stay the New Rule as well as the other ownership rules adopted by the *Report and Order*. *Promethius Radio Project v. FCC*, No. 03-3388 (3d Cir. September 3, 2003) ("we will grant Petitioner's motion to stay the effective date of the FCC's new ownership rules and order that the prior ownership rules remain in effect pending resolution of these proceedings").

actual options available to listeners" as well as the "market conditions facing the particular stations in question." 7 FCC Rcd at 6395.

The Commission's selection of the contour overlap methodology had a reasonable basis rooted in the unique characteristics of radio. As the National Association of Broadcasters pointed out in its comments in MM Dkt. No. 00-244, it is often difficult to pinpoint a precise geographic area in which radio stations compete because of their scattered locations and the varying strengths of their respective signals. *See* Comments of the National Association of Broadcasters (MM Dkt. No. 00-244 February 26, 2001) at 5-6. Use of a contour overlap methodology captures those unique characteristics because the definition of a market is tied to those areas where radio stations' signals are the strongest and thus the area where they are likely to compete.

Experience has confirmed that marketplace reality. Since the adoption of the Prior Rule in 1992, billions of dollars have been expended in thousands of transactions that resulted in the formation of numerous clusters of commonly-owned radio stations as owners and entrepreneurs sought to achieve the efficiencies that would make radio a profitable business again. The Commission has occasionally required divestures or designated assignment or transfer of control applications for hearing on the basis of concerns with undue concentration of radio advertising dollars.[2] But there is a paucity of decisions which reflect any anticompetitive behavior that has

---

[2] There have been situations where the United States Department of Justice ("DOJ") or the Commission has determined that a proposed common ownership of radio stations in a market could result in undue concentration of radio advertising dollars and, on that basis, has required that the proposed transaction be cancelled or subject to divesture of some commonly-owned radio stations. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 15 FCC Rcd 19861, 19869-70, 19879 (2001). Those actions underscore the ability of the DOJ and the Commission to take appropriate action under the Prior Rule if permissible combinations would nonetheless create potentially anticompetitive situations. *See Report and Order* ¶ 261.

arisen as a result of the Prior Rule.[3]

The absence of any real competitive harm should have given the Commission pause before deciding to repeal the Prior Rule. Instead, the *Report and Order* simply says that the Commission need not "demonstrate actual harm" to justify the repeal of the Prior Rule and the adoption of one that the Commission believed to be more "rational." According to the *Report and Order*, it is sufficient for the Commission to rely on the "potential harms of concentration." *Report and Order* ¶261.

Although there is virtually no evidence of anticompetitive behavior under the Prior Rule, its implementation did produce some results that appear to be inconsistent with marketplace realities. The *Notice of Proposed Rulemaking* in MM Dkt. No. 00-244 identified three (3) anomalous situations in Wichita, Kansas, Youngstown, Ohio, and Ithaca, New York. *Definition of Radio Markets* 15 FCC Rcd 25077, 25079 (2000). That same *Notice of Proposed Rulemaking* also highlighted what has been commonly referred to as the "*Pine Bluff*" problem: a situation where the denominator (representing the number of stations in the "market") includes a station owned by the buyer which is not also included in the numerator (which reflects the number of stations the buyer would own in the "market"). *Id.* at 25080. *See Report and Order* ¶¶ 253-54.

The *Pine Bluff* problem was identified by the Commission in its 1998 *Biennial Review Report*, 15 FCC Rcd 11058, 11091-94 (2000). The problem was also cited in the *Staff's Report for the Biennial Regulatory Review of 2000*, 15 FCC Rcd 21089, 21146 (2000). However, neither report identified any other particular instances in which the Prior Rule had created a *Pine*

---

[3] The *Report and Order* does allude to "some evidence of potential competitive harm." *Report and Order* ¶261 n.548. That "potential competitive harm" consists of a study which "*suggests* that consolidation has resulted in an increase in advertising prices" and allegations by "several small broadcasters" that consolidation has had adverse effects on their respective businesses. *Id. (emphasis added).* However, the *Report and Order* provides no assessment of that "potential competitive harm," and, for all the record shows, the level of such harm, to the extent it exists, appears to be *de minimus*.

Bluff problem or in which the Prior Rule generated a number of stations in a "market" that seemed inconsistent with marketplace realities.

The Commission nonetheless issued its *Notice of Proposed Rulemaking* in MM Dkt. No. 00-244 raising questions about the Prior Rule based upon the *Pine Bluff* problem and the three anomalous situations in Wichita, Kansas, Youngstown, Ohio, and Ithaca, New York. The Commission expressed its concern that the Prior Rule had the "potential to cause results at odds with economic reality" and, on that basis, identified remedial options that might be pursued, including the possible use of Arbitron. 15 FCC Rcd at 25080-82. Although the listening public and competing radio station owners would presumably have some interest in correcting or preventing those odd results, the Commission received sixteen comments, all but one of which advocated the retention of the Prior Rule.

The Commission eventually folded the proceedings in MM Dkt. No. 00-244 into its 2002 Biennial Regulatory Review, which ultimately resulted in the issuance of the *Report and Order*. The *Report and Order* repealed the Prior Rule for those markets where Arbitron has established a Metro. *Report and Order* ¶¶ 274-77. Under the New Rule for those markets, the number of stations in the market will include (1) all commercial and noncommercial stations whose community of license is located in the Metro and (2) all stations which BIA has determined to be "home" to the Metro (so that a station could be deemed to be in two markets – the market where it is "home" and the market where its community of license is located). To prevent manipulation of Metro boundaries and "home" status designation by radio station owners, the *Report and Order* stated that no reliance could be placed on changes to the Metro until two (2) years after the implementation of such change (unless the change reflects an FCC-approved change in a station's community of license).[4] *Report and Order* ¶¶ 275-81.

---

[4] The reference to the change in the station's community license is not referenced in the *Report and Order* but in the worksheets to the new Form 314 and 315 applications.

The *Report and Order* stated that parties with pending assignment and transfer of control applications would have the opportunity to amend their applications to demonstrate compliance with the New Rule or to request a waiver. Although the Commission retained the discretion to process pending applications under any standard it chose prior to the effective date of the New Rule, the implicit assumption (which subsequently proved to be correct) was that hundreds of pending applications would be held in abeyance until such amendments or waiver requests were received.

In the meantime, the *Report and Order* stated that existing non-compliant clusters of commonly-owned stations would be grandfathered. *Report and Order* ¶¶ 484-86. However, the grandfathered status would disappear upon the assignment of the station licenses or the transfer of control of the stations' owner unless the new owner qualified as a small business under SBA standards.[5]

In adopting the New Rule, the Commission acknowledged that it had rejected the use of Arbitron in 1992 when it first confronted the need to develop a methodology to define radio markets. *Report and Order* ¶ 262. The *Report and Order* said nothing about the basis for the Commission's change in view other than to state that, "[e]ven though the problems with the contour-overlap system were present at the beginning, the effect was less evident because of the far more restrictive ownership limits [adopted in 1992]. It was only after the ownership limits were substantially raised in the 1996 [Telecommunications] Act that the scope of the market-distorting effects of that system became manifest. In light of this experience, it would be irresponsible for us to leave uncorrected our market definition and counting methodology." *Id.*

---

[5] *Report and Order* ¶¶ 480-89. The SBA standard for a small business in radio is an entity with $6 million or less in annual revenue. *Report and Order* ¶ 489.

II. Facts and Law Require Changes

A. Repeal of Prior Rule Arbitrary and Capricious

1. Applicable Legal Standard

The Commission has broad discretion in developing regulations to govern broadcast ownership and other matters within its jurisdiction. *E.g. NBC v. United States*, 319 U.S. 190, 219 - 20 (1943). However, that administrative discretion is not unlimited. The Commission must provide "a reasoned explanation for its action that does not 'run [] counter to the evidence before [] it.'" *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Company*, 463 U.S. 2943 (1983). To satisfy that obligation for a reasonable explanation, the Commission's action must be supported by "substantial evidence." *NBC v. United States*, 319 U.S. at 224 (court's duty is at an end when it finds "that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress").

In elusive areas such as regulations to define a broadcast market, courts will give considerable deference to the Commission's expertise; but even in those situations there must be some reasonable record to justify the action. *See Sinclair Broadcast Group v. FCC*, 284 F.3d at 162 ("notwithstanding the substantial deference to be accorded to the Commission's line drawing, the Commission cannot escape the requirements that its action not 'run[] counter to the evidence before it' and that it provide a reasoned explanation for its action"). And, if the Commission action involves a change of position from an earlier order, the Commission must provide a "reasoned analysis" to support that change. *Motor Vehicle Manufacturer's Association v. State Farm Mutual Auto Insurance Company*, 463 U.S. at 57. *Accord Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 - 45 (D.C. Cir.), *reh. granted in part*, 293 F.3d 537 (D.C. Cir.

2002) ("*Fox*") ("Commission may, of course, change its mind but it must explain why it is reasonable to do so").

2. Repeal of Prior Rule Violates Legal Standard

The Prior Rule was premised on the intersecting contours of radio stations' city grade signals. In so doing, the Prior Rule touched on the heart of a radio station's ability to attract listeners – the opportunity to be heard. That ability, in turn, underlies every station's effort to attract advertisers or financial sponsors. In short, the Commission had a reasonable basis to conclude in 1992 that the contour overlap standard would be responsive to its "core concerns of competition and diversity" and thus "reflect the actual options available to listeners" as well as the "market conditions facing the particular stations in question." *Revision of Radio Rules and Policies*, 7 FCC Rcd at 6395.

The *Report and Order* relies on a handful of anomalies to repeal a regulation that is reasonable on its face and, as the Commission has acknowledged, been the foundation on which thousands of transactions have been consummated to restore the radio industry's financial health (and to thus insure continued program service for listeners). In adopting the New Rule, then, the Commission has crafted an industry-wide "solution" to a problem that is extremely limited in scope. That kind of imbalance exemplifies arbitrary action. As one court explained, an administrative agency "cannot enact 'an industry-wide solution for a problem that exists only in isolated pockets. In such a case, the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious.'" *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18, 37 (D.C. Cir. 2002). The Commission's reliance on a few anomalies to adopt the New Rule is particularly arbitrary in the absence of any evidence in the record that those anomalies have generated anticompetitive behavior in radio markets or otherwise caused harm to listeners. *See Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist'").

The *Report and Order* asserts that the *Pine Bluff* anomaly cannot be corrected under the Prior Rule because any correction would require the exclusion of a commonly-owned station from the denominator or the inclusion of a station in the numerator that does not share a contour overlap with all of the commonly-owned stations in the "market." In either case, according to the *Report and Order*, the result would "be both unprincipled and unprecedented in the history of competition analysis." *Report and Order* ¶255.

That conclusion cannot be squared with the very nature of the "problem" that the Commission claims is presented by *Pine Bluff*. That problem arises because a commonly-owned station in the denominator is not in the numerator and could, according to the *Report and Order*, mean that a single owner would own more stations in a market than would otherwise be reflected in the methodology incorporated in the Prior Rule. Stated another way, the exclusion of a station in the denominator from the number of commonly-owned stations in the numerator would, in the Commission's view, present a distorted picture of the number of stations which a party owns in the market. Given that perspective on the "problem," it is entirely reasonable to amend the Prior Rule to add that commonly-owned station in the denominator to the numerator. If that solution would cure the problem, it should not matter to the Commission that the resolution might appear to be "unprincipled and unprecedented" under theories of competition; radio has unique characteristics as a business, and the Commission should be focused on practical ways to solve the problem rather than the conformity of its solution with practices and decisions in dealing with other businesses.

The *Report and Order* identifies other alleged flaws of the Prior Rule, but none of them is supported by any substantial evidence in the record. Thus, the *Report and Order* states that the

Prior Rule "is not in line with coherent and accepted methods for delineating geographic markets for purposes of competition analysis" because it uses the outlets of one party to identify the boundaries of the market; but that delineation of the market is only based on the essence of radio broadcasting – the ability of listeners to receive a strong signal. Nowhere does the *Report and Order* cite any evidence to show that the market analysis generated by the overwhelming majority of transactions consummated under the Prior Rule does not comport with the realities of the marketplaces in which those stations compete.

The *Report and Order* nonetheless complains that the Prior Rule could have created distortions by including in the market radio stations that "may be too distant to serve effectively either the listeners or the advertisers in the geographic area in which concentration is occurring . . ." *Report and Order* ¶258. That flaw – to the extent it occurs with any frequency (a question not answered by the *Report and Order)* – could be easily cured excluding from the market those stations that do not compete with the stations in the market for listeners and advertisers.

The *Report and Order* contends that "[c]onsistency suffers as well" from use of the Prior Rule. More specifically, the *Report and Order* asserts that "there is no common metric that [the Commission] can use to compare the effect of two different combinations on competition." *Id.* Here too, however, there is no explanation as to why the Commission needs to make those comparisons – especially when it has utilized Arbitron and BIA data to assess the extent to which there is any undue concentration of radio advertising dollars in one or two competitors. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 15 FCC Rcd at 19870. The argument also fails to explain the particular harm that has befallen or would be imposed on listeners from that lack of "consistency." Indeed, the *Report and Order* disavows any need to identify any harm that has arisen or could arise from the Prior Rule in order to justify any change. *Report and Order* ¶261.

The repeal of the Prior Rule, then, is not based on a problem that has introduced anticompetitive behavior or compromised program service to the public. The repeal is instead based on a logic which is more theoretical than real – or reasonable.

The repeal of the prior Rule is particularly arbitrary in light of the anomalies inherent in the use of Arbitron and BIA data. These anomalies include the following:

- Some Arbitron markets are unusually large and do not reflect the actual state of competition. For example, the Nassau/Suffolk, Long Island, New York Arbitron Metro is approximately 90 miles long and includes stations on the eastern edge of New York City and stations that serve the eastern tip of Long Island in Montauk; all of those stations do not compete with each other.

- Both Arbitron and BIA will identify an outside station as being "home" to a Metro if that station is commonly-owned with a station in the Metro and simulcasts the same programming as that commonly-owned station – even though the two stations do not compete with each other for the same listeners and advertisers; the inclusion is made if the outside station has a single diary entry in the Metro.

- Arbitron and BIA would not consider a station to be competing in a particular Metro merely because the station's community of license is located in the Metro; Arbitron and BIA – unlike the Commission – recognize that a station will compete in one Metro even though its community of license is located in another Metro; by making a *legal* assumption that a station *necessarily* competes in the Metro where its community of license is located, the *Report and Order* has made an arbitrary assumption that may not and probably does not square with the realities of the economic marketplace.

- By prohibiting any reliance on changes in Arbitron Metros for a 2-year period, the *Report and Order* will necessarily distort the economic marketplace for that period of time in those situations where the change in station assignments reflects a reassessment of the economic realities of the marketplace.

- Arbitron's existing Metros reflect the culmination of individual decisions which may or may not reflect the realities of the economic marketplace – a factor which helps to explain why Arbitron's list of stations in markets differs in many respects with the lists of market participants identified by other rating services. *See* Comments of the National Association of Broadcasters, *supra*, Attachment B at 5-6 (identifying the differences between Arbitron and the M Street Directory).

The *Report and Order* makes no effort whatsoever to compare the anomalies that can and almost certainly will be generated by the use of Arbitron with the limited number of anomalies that have occurred under the Prior Rule after almost eleven years of experience. In the absence of that kind of analysis, the *Report and Order* has no reasoned basis to assume that use of Arbitron and BIA data will produce a more coherent approach than the Prior Rule in defining radio markets that will more closely reflect the realities of the economic marketplace. Stated another way, it is patently unreasonable for the Commission to abandon the system under the Prior Rule – which has produced only a relatively small number of anomalies – in exchange for an approach whose consistency and accuracy cannot be accurately be gauged.

The record in the instant proceedings therefore requires that the Commission retain the Prior Rule. To the extent the Commission believes that the *Pine Bluff* problem compromises the integrity of the Prior Rule on an industry-wide basis, a qualification could be added to require that all commonly-owned stations in the denominator also be included in the numerator. And, to the extent warranted, the Commission can exclude from the denominator those stations that do not really compete in the market. Continued use of the Prior Rule with those qualifications (if warranted) will allow future transactions to proceed largely on the same basis upon which much of the industry has already been consolidated.[6]

---

[6] Adoption of the New Rule is also inconsistent with Congress's establishment of the ownership limits in the Telecommunications Act of 1996. *See Report and Order* ¶266. Contrary to the *Report and Order*'s assertion, the instant situation is very different from the one in *Fox*. *See Report and Order* ¶267. In *Fox*, the Congress merely mandated that the national ownership limit for television be increased to 35% of the national audience but did not preclude the Commission from adopting a higher percentage. In contrast, the very essence of the ownership limits established by Congress depended on the definition of a radio market under Commission rules. In other words, the national television ownership cap mandated by Congress was not dependent on any other rule; in contrast, the fundamental and underlying premise of the ownership limitations for radio were premised on the definition of a "market." For that reason, the

B. If Retained, New Rule Should Not Apply to Pending Applications

Although the New Rule is purportedly designed to be applied prospectively, the Commission, in effect, arranged for the New Rule to be applied to virtually all of the hundreds of assignment and transfer of control applications that were pending on the Adoption Date. To implement that approach, the Commission suspended the processing of almost all of those pending applications so that they would be required to file an amendment to demonstrate compliance with the New Rule or to request a waiver from such compliance. As a result, contracts that were negotiated many months – and in some cases more than one year – before the Adoption Date in reasonable reliance on the Prior Rule were suddenly held hostage to a new rule which could in some circumstances preclude the transaction from being approved (because the New Rule would in many situations reduce the size of the market).

To be sure, there have been situations in the past when the Commission has properly applied new rules to pending applications. *E.g. United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (a pending application for a new authorization can be dismissed without hearing if the Commission properly changes regulations governing eligibility); *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1294 - 95 (D.C. Cir. 1989) ("filing of an application creates no vested right to a hearing" and thus entitles the Commission to dismiss an application which does not qualify under newly-promulgated eligibility criteria). At the same time, it is unusual if not unique for the Commission to withhold action on pending applications that are otherwise grantable under its existing rules *solely* for the purpose of waiting for a new rule to become effective so that it can be applied to those pending applications. Although such action does not rise to the level of "retroactive rulemaking," it does

---

Commission's reliance on *Fox* and other case authority is inapposite. *See Report and Order* ¶269 n. 559, *citing American Hospital Association v. NLRB*, 499 U.S. 606, 613 (1991) (Court would not curtail agency's authority to impose "industry-wide rule" which "is inconsistent with the natural meaning of the language read in the context of the statute as a whole").

constitute "secondary retroactivity" which violates the Commission's obligation to act reasonably. *See Bowen v. Georgetown University Hospital*, 488 U.S. at 219 (Scalia, J. concurring).

As the Commission has acknowledged, "secondary retroactivity" is assessed under five factors:

> "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden that a retroactive order imposes on a party and (5) the statutory interest in applying a new rule despite the reliance of a party on a old standard."

McElroy Electronics Corporation, 10 FCC Rcd 6762, 6768 (1995), *reversed on other grounds*, *McElroy Electronics Corporation v. FCC*, 86 F.3d 248 (D.C. Cir. 1996), quoting *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). Consideration of those five factors requires that applications pending on the Adoption Date be processed under the Prior Rule.

First, application of the New Rule to pending applications would certainly constitute a matter of first impression. The New Rule has never previously been applied to *any* application.

Second, the New Rule represents an abrupt departure from prior practice. Although the Commission raised the prospect of altering or repealing the Prior Rule in the *Notice of Proposed Rulemaking* issued in MM Docket No. 00-244 in December 2000, the Commission said nothing about applying any new rule to pending applications. Interested parties were thus allowed to reasonably conclude that the Prior Rule would remain in effect unless and until it was changed in an order that had become effective. It also bears emphasizing that the initial comments to that *Notice of Proposed Rulemaking* were decidedly negative, and it was not until a few months prior to the Adoption Date that the Commission provided informal notification to interested parties that serious consideration was being given to repealing the Prior Rule.

Third, interested parties reasonably relied on the continued effectiveness of the Prior Rule in negotiating contracts that underlie the hundreds of assignment and transfer of control applications that were pending on the Adoption Date. There was simply no way for interested parties to know that the Commission would repeal the Prior Rule and then hold those pending applications in abeyance so that the New Rule could be applied to pending applications. The Commission's silence on that point is especially arbitrary because the Commission certainly could have anticipated that continued reliance would be placed on the Prior Rule. It is well known in the industry and among the Commission that parties were continuing to negotiate contracts that would necessarily require the filing of an assignment or transfer of control application. The Commission gave no hint that parties should refrain from pursuing transactions because of the possibility that the Prior Rule would be repealed and that a new rule would be applied to any application pending on the Adoption Date.

Fourth, application of the New Rule to pending applications will impose substantial burdens on private parties. On the one hand, if the transaction complies with the New Rules, then the mere filing of an amendment to demonstrate such compliance is not unduly burdensome; on the other hand, for those transactions which do not qualify under the New Rule, parties will have lost not only the benefit of the contract that they executed but also the time, money, and effort that was invested in negotiating the contract. In some cases, the non-qualification of a particular transaction will also mean that a related local marketing agreement or joint sales agreement will have to be terminated within the 2-year period established by the *Report and Order* for the transition.

Finally, there is no public interest benefit that would outweigh the cost to private parties in applying the New Rule to pending applications. The Prior Rule has been in effect for almost eleven years and has been the foundation on which thousands of transactions have been approved by the Commission and consummated. There is no evidence or logical basis to conclude that the processing of pending applications will cause any demonstrable harm to the public or materially undermine the goals to be served by the New Rule.

In sum, consideration of the five factors underlying "secondary retroactivity" plainly shows that it would be unreasonable to apply the New Rule to assignment and transfer of control applications pending on the Adoption Date.

C. Non-Compliant Clusters Should be Grandfathered Permanently

The *Report and Order* gave no consideration whatsoever to the practical impact on existing station owners of its decision to eliminate the grandfathered status of existing non-compliant clusters of commonly-owned radio stations upon the sale to any party other than a small business as defined by the SBA. *See Report and Order* ¶¶482-87. As the *Report and Order* acknowledged, clusters of commonly-owned stations enabled radio station owners to enjoy certain efficiencies which in turn helped to put the radio industry on a sound financial footing. By limiting grandfather status to existing owners, the *Report and Order* will not only undermine those efficiencies when the stations are re-sold; of equal, if not greater importance, the limitation on grandfathered status deprives the existing owner of the financial benefits from a cluster that was assembled in reliance on the Prior Rule. By eliminating grandfather status, the existing owner will have to separate one or more "orphan" stations, and the practical reality is that an "orphan" station separated from its group – and the efficiencies which it produced – will lose much of its value. Nowhere does the *Report and Order* explain how the loss of those efficiencies or the imposition of those financial detriments to existing owners is outweighed by the interests to be served by the New Rule.

The *Report and Order's* failure to account for those private costs is compounded by the *Report and Order's* acknowledgment that the failure to provide permanent grandfathered status will unfairly benefit those non-compliant group owners who do not sell stations and will be blessed with a permanent competitive advantage over every other competitor in the market (who will not be allowed to assemble a station group of the same size). *Report and Order* ¶485. In conclusory language, the *Report and Order* states without explanation that that result is outweighed by the Commission's interest "in improving the precision of [its] radio market definition in these particular cases." *Report and Order* ¶486. Although the meaning of that statement is not entirely clear, it appears that the *Report and Order* is placing a higher premium on consistent implementation of the New Rule than the real world impact of the rule in the marketplace. There is no explanation as to how that precision will serve the listeners' interest in a more competitive marketplace if the balance among existing competitors is destroyed.

Consistency should give way to real public interest benefits. The New Rule was purportedly adopted to benefit competition. If that is the ultimate goal, then pre-existing non-compliant clusters should be grandfathered on a permanent basis. That result would not only better serve the public interest in robust competition but also eliminate the unfair costs on private parties who reasonably relied on the Prior Rule in buying stations and in making investments to improve program service to the public.

[Remainder of Page Intentionally Left Blank]

Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Commission reconsider its adoption of the New Rule to define radio markets and, upon such reconsideration, reinstate the Prior Rule with qualifications (if warranted on an industry-wide basis) to eliminate the *Pine Bluff* problem and to eliminate from the denominator those stations which do not compete with stations in the market for listeners or advertisers, or, if the New Rule is retained, (1) apply the Prior Rule to assignment and transfer of control applications that were pending as of the Adoption Date and (2) provide permanent grandfathered status to non-compliant clusters of commonly-owned stations that were in place prior to the Adoption Date (after any augmentation by the consummation of pending applications).

Respectfully submitted,

DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 828-2265
(202) 887-0689 (fax)
PaperL@dsmo.com
FarberJ@dsmo.com

Attorneys for Cumulus Media Inc.

By: ______________________
Lewis J. Paper
Jacob S. Farber
Gregory Kwan

v1; ZKFX01!.DOC