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MEMBER, DISTRICT OF COLUMBIA BAR ONLY,
PRACTICE LIMITED TO FEDERAL COURTS AND AGENCIES

September 4, 2003

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SEP - 4 2003

Honorable Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: MB Docket No. 02-277
MM Docket No. 01-235
MM Docket No. 01-317
MM Docket No. 00-244
MM Docket No. 03-130

Dear Madame Secretary:

Please accept for filing on behalf of our client WJZD, Inc. an original and ~~four~~^{two} copies of a "Petition for Reconsideration" relative to the **Report and Order and Notice of Proposed Rulemaking** in the above-referenced consolidated dockets, FCC 03-127, published in the Federal Register on August 5, 2003.

Out of an abundance of caution this pleading is being filed both at the Secretary's filing location at 236 Massachusetts Avenue, N. E., Washington, DC prior to 7:00 p.m. today and the ECFS electronic filing system prior to 11:59 p.m. today.

Should additional information be desired in connection with the above matter, kindly communicate with this office.

Very truly yours,



Dennis J. Kelly

cc: See Attached Certificate of Service

BEFORE THE
Federal Communications Commission
WASHINGTON, D C 20554

RECEIVED

SEP - 4 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
2002 Biennial Regulatory Review -) MB Docket 02-277
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) MM Docket 01-235
And Newspapers)
)
Rules and Policies Concerning Multiple) MM Docket 01-317
Ownership of Radio Broadcast Stations)
in Local Markets)
)
Definition of Radio Markets) MM Docket 00-244
)
Definition of Radio Markets for Areas) MB Docket 03-130
Not Located in an Arbitron Survey Area)

TO: The Commission

PETITION FOR RECONSIDERATION

Dennis J. Kelly

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Counsel for:

September 4, 2003

WJZD, INC.

SUMMARY

The Commission's rules as adopted in the above-entitled matter: (1) abrogate the right of parties who filed Petitions to Deny under the rules as they existed prior to June 2, 2003, in violation of 5 U.S.C. §706(2)©; (2) in several respects are arbitrary and capricious in violation of 5 U.S.C. §706(2)(A), in the sense that Arbitron has a history of errors in market determinations, Arbitron's determination of "Arbitron Metro" radio markets is not uniform, impartial, rational and coherent, but rather is based upon Arbitron's need to sell its ratings data to subscribers and the various agendas of its subscribers; and (3) the Commission's failure to publish a list, state by state, market by market, of the geographic composition of each of the "Arbitron Metro" radio markets, violates 5 U.S.C. §553(d), because the incorporation by reference into FCC rules of Arbitron and BIA data constitutes a "rule" as defined by 5 U.S.C. §551(4), and the Commission had a statutory obligation to publish the "rule" in the Federal Register. Finally, the rules are flawed because there are instances where the new radio rules may actually aid and abet the largest radio group

owners in acquiring more stations than they have at present in a given area.

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Definition of Radio Markets for Areas) MB Docket 03-130
Not Located in an Arbitron Survey Area)

TO: The Commission

PETITION FOR RECONSIDERATION

WJZD, Inc. ("WJZD"), by its attorney, and pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405, and Section 1.106 of the Rules and Regulations of the Commission, 47 C.F.R. §1.106, hereby respectfully submits this Petition for Reconsideration of the **Report and Order and Notice of Proposed Rulemaking** in the above-entitled matter, FCC 03-127, 18 FCC Rcd --, 29 Communications Reg. (P&F) 564, 2003 WL 21511828 (2003) (the "**Order**"). As this

pleading is being filed on the 30th day subsequent to publication of the **Order** in the Federal Register, 68 FR 46286 (August 5, 2003), it is timely filed. In support whereof, the following is shown:

Preliminary Statement

1. WJZD is a minority-owned company and the licensee of FM Broadcast Station WJZD, Gulfport, Mississippi. WJZD(FM) is a "stand-alone" FM station which is in competition with the monolithic Clear Channel Communications, Inc. for radio listeners and revenues in the Gulfport-Biloxi-Pascagoula, Mississippi market, which according to the Arbitron organization comprises all three counties along Mississippi's Gulf Coast. Additionally, WJZD(FM) is in competition with two smaller group radio operators, Triad Broadcasting and the Dowdy organization.

2. Clear Channel (through a subsidiary, Capstar TX Limited Partnership) is currently seeking to acquire WQYZ(FM), Ocean Springs, Mississippi; its FCC Form 314 application, File No. BALH-20021224ACR, is pending before the Commission's Audio Division. On February 6, 2003, WJZD timely filed a "Petition to Deny" against this application on competition grounds. WJZD requested that the Commission not only look at Clear Channel's impact on the Gulfport-Biloxi-Pascagoula market, but that it investigate Clear Channel's

regional radio muscle, in that Clear Channel owns six radio stations in the neighboring Hattiesburg-Laurel, Mississippi market, including two high power FM stations which can be heard in Gulfport-Biloxi-Pascagoula, in addition to major radio holdings in the New Orleans market to the west and the Mobile market to the east.

3. Without any advance warning, the Commission at ¶498 of the **Order** ordered the staff to dismiss Petitions to Deny such as that filed by WJZD, without providing WJZD (and similarly situated parties in other competition cases) the opportunity to raise legitimate issues as to whether the public interest, convenience and necessity would be served by a grant of a particular assignment or transfer application. As shown below, this violates Section 309(a) of the Communications Act, 47 U.S.C. §309(a), as well as Section 706(2) of the Administrative Procedure Act, 5 U.S.C. §706(2). Thus, in order to protect its rights to administrative due process in the WQYZ matter, WJZD is seeking reconsideration of the arbitrary and capricious administrative fiat contained in ¶498 of the **Order**, and calls upon the Commission to ensure that petitioners such as WJZD are given a full and fair opportunity to be heard on their concerns as to the effects upon competition when behemoths such as Clear Channel seek to tighten a vise-like grip on the radio broadcasting industry.

4. Additionally, WJZD believes that the Commission's reliance upon Arbitron market determinations and/or the BIA database is arbitrary and capricious, and is rulemaking not based upon substantial evidence in the whole record. This is so because: (1) Arbitron makes determinations as to what counties are or are not in a market are often based upon negotiations between Arbitron and potential subscribers, and decisions made by Arbitron based on what it needs to do to sell its "ratings books"; (2) there is no consistent methodology or formula applied uniformly nationwide either by the Commission or Arbitron as to what counties (or radio stations) are either in or out of a given market, and certainly none that are subject to either public or judicial scrutiny; (3) the Commission has not conducted a proper notice and comment rulemaking to determine the geographical boundaries of radio markets throughout the nation; and (4) because Arbitron and BIA data are not publicly available and apparently will not be published either in the Federal Register or the Code of Federal Regulations, the public will not be able to effectively comment on any future radio acquisition without having to make a substantial payment to either Arbitron or BIA to obtain data which should be publicly available. Additionally, the result of the **Order** means that the Commission will view each individual radio

market in a vacuum, without any consideration to the assignee's concentration of media control in neighboring markets.

**¶498 of the Order Violates WJZD's
Right To Administrative Due Process**

5. WJZD believes that Clear Channel's acquisition of the license of WQYZ(FM), Ocean Springs, Mississippi is not in the public interest. To that end, WJZD followed the Commission's procedural rules and timely filed a Petition to Deny, as is its right under Section 309 of the Communications Act and the Commission's Rules. By a 3-2 vote, the Commission ordered the dismissal of WJZD's petition, without any review of the merits thereof, and without affording WJZD or other interested parties any procedure or right to be heard relative to Clear Channel's amendment to its portion of the Form 316 application. At the very least, the Commission had an obligation to determine whether Clear Channel's amendment is acceptable for filing, and then re-publish the WQYZ(FM) Form 314 application on a "Broadcast Applications" public notice, and then allow a period of time to provide maximum fairness, a 30 day period for formal protests and comments from the public.

6. As things now stand, the Commission has certainly violated WJZD's right to administrative due process. The

Commission is obligated to carry out the mandates stated in the Communications Act. One of those mandates is to entertain "Petitions to Deny" and to rule on such petitions on the whole record, providing a reasoned explanation for its decisions. In ¶498 of the **Order**, the Commission has rendered the statutorily-mandated Petition to Deny process nugatory. WJZD urges the Commission on reconsideration to remedy this error which is certainly reversible in the United States Court of Appeals pursuant to 5 U.S.C. §706(2)(C).

**The Commission's Use of Arbitron Radio Markets
Fails to Comport With the Administrative Procedure Act**

7. In ¶657 of the **Order**, the Commission summarized its decision as to the future determination of the definition of the largest radio markets:

In the Local Radio Section of this **Order**, we replaced our current contour-overlap methodology for defining radio markets with a geography-based market definition. For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule.

8. It is WJZD's position that the foregoing ruling violates the Administrative Procedure Act, 5 U.S.C. §551 et seq in a number of respects. The Commission relies on Arbitron data because Arbitron is an organization which gathers and sells radio station audience data to radio stations and advertisers. However, the Commission never discussed exactly how Arbitron gathers its data and makes

determinations as to (1) what geographic areas comprise a given "Arbitron Metro" market and (2) how Arbitron (and another commercial gatherer and seller of radio data, BIA) select the stations which are credited to an "Arbitron Metro" market. In particular, WJZD urges that the following Commission findings are not based on substantial evidence upon the whole record: (1) that Arbitron is qualified to make determinations of what counties or areas comprise an "Arbitron Metro" market; (2) that Arbitron's criteria for making such "Arbitron Metro" market determinations is "rational and coherent" (**Order** at ¶249); (3) that Arbitron's scheme of nationwide "Metro Markets" is "objectively determined" (**Order** at ¶273).

9. Furthermore, the inclusion or exclusion of counties or geographic areas from "Arbitron Metro" markets was never considered by the Commission in the context of this rulemaking. In order to "set in stone" in agency regulations the determinations of a non-governmental organization, the Commission was required to include as a part of its notice and comment rulemaking proceeding the identities and constituent counties or geographic areas, at least as an appendix. It should have invited comment on these determinations. It failed to do so. Furthermore, the Commission apparently has no plans to publish the identities

and constituent counties/areas of individual "Arbitron Metro" markets in either the Federal Register or the Code of Federal Regulations. Thus, for an interested citizen or entity to knowledgeably comment on a proposed station acquisition in the future, the interested party would have to pay Arbitron or BIA for the data. In a country where the applicable ruling law is supposed to be published and available to everyone, this seems totally outrageous and totally illegal.

10. Moreover, "Arbitron Metro" markets fail to take into consideration the combined market power of a large national radio station operator such as Clear Channel. In some instances, the incredible market power and corporate muscle of Clear Channel can actually combine several neighboring markets into one large media market for the purposes of selling regional and national advertising time--squeezing out stand-alone radio station operators (such as WJZD) in the process.

11. The failure of the Commission to consider these things is a violation of the Administrative Procedure Act.

12. Arbitron's Qualifications. WJZD does not concede the Arbitron organization's qualifications to make determinations as to the geographic composition of radio markets across the country. Arbitron is a for-profit entity which is out to make as much money as it can from the

gathering and selling of radio audience listening information. At least some of its decisions as to data gathering, market decisions and data sales are not based upon uniform nationwide objective criteria, but rather on what Arbitron needs to do to sell its "books" to subscribers. The undersigned is personally aware of a number of instances in which Arbitron's data and/or market determinations are either clearly erroneous and/or based on either the failure to sell a "book" to any subscribers in a given market or pressure by potential subscribers as to what counties to include or exclude in a given market.

13. The problems with Arbitron's data are not new. For example, in the study included as Appendix B to the 1972 **Reconsideration of the Cable Television Report and Order**, 36 FCC 2d 326, 25 RR 2d 1501 (1972), Arbitron remarkably found that New York City television station WNEW-TV (Channel 5) was "significantly viewed" off-the-air in Chemung County, New York, in which Elmira is the county seat¹. Elmira is located 173 miles northwest of New York City², and off-the-air viewing of WNEW-TV (now WNYW) in Chemung County was (and still is) a physical impossibility.

¹**Pike & Fischer Radio Regulation Current Service**, p. 85:993.

²**Air-Line Distances Between Cities in the United States** (U. S. Coast and Geodetic Survey, Special Publication No. 238, 1947) at p. 103.

14. In northwestern lower Michigan, Arbitron created a "market" called the "Northwest Michigan" market, and included in the "Arbitron Metro" seven counties (Antrim, Benzie, Charlevoix, Emmet, Grand Traverse, Kalkaska and Leelanau), despite the fact that no one radio station in this "Metro" covers the entire market, and in fact a number of station operators need to utilize two radio stations to deliver one program signal to the entire market. Furthermore, on information and belief, one of the radio station operators in this market pressured Arbitron to exclude from the "Northwest Michigan" market Wexford County, where Cadillac is the county seat, despite the fact that the area's television market is called "Traverse City-Cadillac". The radio operator in question owns stations in Cadillac. There clearly was no "rational and objective" criteria applied by Arbitron as to the county composition of this market. Also, the selection of counties by Arbitron in this instance appears to have nothing to do with U. S. Census determinations.

15. Another market determination by Arbitron which has no apparent connection with reality is the Rochester, Minnesota radio market. While the Rochester "Metropolitan Statistical Area" consists only of Olmsted County, Minnesota (where Rochester is county seat and largest community), Arbitron included in the "Metro" the rural Minnesota counties

of Dodge and Wabasha in addition to Olmsted. However, it is a total mystery why Arbitron (or BIA) did not include the neighboring county of Mower, in which Austin is the county seat and largest community. One of the radio stations which Arbitron and BIA include as "above the line" stations in the Rochester market is KNFX(AM), 970 kHz, Austin, Minnesota. Furthermore, another market station, KYBA(FM), a Class C2 facility licensed to Stewartville, Minnesota, operates from a transmitter site roughly halfway between Rochester and Austin. Mysteriously, Arbitron/BIA fail to mention Class C FM Station KAUS-FM, Austin, which provides primary service to both Austin and Rochester and aggressively sells time in Rochester. Most of the high power Rochester FM stations serve Austin as well as Rochester. The local television market is known as "Rochester-Austin-Mason City". Interestingly, Clear Channel is a player in both Rochester and in Mason City, Iowa. If Arbitron can combine neighboring counties to form one market, such as, for instance, South Bend-Elkhart, Indiana, why does the Rochester market not include neighboring Austin, Minnesota? We don't know. On the basis of this record, the Commission does not know either.

16. Therefore, it is arbitrary, capricious and irrational for the Commission to accept, without more, that

Arbitron is somehow qualified to make crucial determinations as to the composition of radio markets which provides the foundation of the new Section 73.3555 as it pertains to commercial broadcast radio. By adopting Arbitron's radio market determinations, the Commission has acted in an arbitrary and capricious manner, and thus has violated 5 U.S.C. §706(2)(A).

17. **Arbitron's Criteria Is Not "Rational and Coherent"**.

As demonstrated above, Arbitron's criteria as to the geographic composition of broadcast radio markets is not rational and coherent. In fact, on this record, the public has no idea what the criteria for market determinations might be. The Commission's statement that Arbitron's criteria are "rational and coherent" is utterly arbitrary and capricious, and is unsupported by substantial evidence on the whole record. Again, the Commission's action violates the Administrative Procedure Act, 5 U.S.C. §706(2)(A)-(E).

18. **Arbitron's Markets Are Not "Objectively Determined"**. As noted above, Arbitron's markets are not "objectively determined", as contended by the Commission. Arbitron has a long history of determining markets, both in television and in radio, based on whether it can sell its "books" in a given city. For example, several years ago, when Arbitron was still engaged in producing television

audience ratings data, the undersigned has personal knowledge that Arbitron combined Victoria, Texas with San Antonio, Texas as one market, despite the fact that these two cities are 100 miles apart, when the Victoria television stations would not buy ratings data from Arbitron (Nielsen has found Victoria to be a "DMA" separate from San Antonio). On the radio side, Arbitron cobbled together the seven county region of northwestern lower Michigan described in paragraph 14 above as one market, despite the fact that most of the stations in the Traverse City area cannot be heard in the Petoskey-Charlevoix area and vice versa, and also despite the fact that the television market is centered on the cities of Traverse City and Cadillac, and the Arbitron radio market arbitrarily excluded the county in which Cadillac is located. Arbitron did this in order to sell its ratings data. Furthermore, Arbitron has left the door open to change the composition of counties in the market if three of the four subscribers to its ratings data want such a change.

19. Again, the Commission has engaged in rulemaking which is arbitrary and capricious, because it has stated that Arbitron's radio market determinations are "objectively determined", when in fact they are not. Once again, the Commission has violated 5 U.S.C. §706(2)(A).

20. FCC Has a Statutory Obligation to Publish the Geographic Composition of the New Radio Markets. The

Administrative Procedure Act, at 5 U.S.C. §551(d), defines the term "rule" as follows:

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

When the Commission adopts a "rule", it has a statutory requirement to publish it in the Federal Register. 5 U.S.C. §553(d) provides as follows:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

21. The appellate court has found that the term "rule" as used in the Administrative Procedure Act includes "nearly every statement an agency may make". **Batterton v. Marshall**, 648 F.2d 694 (D. C. Cir. 1980). One of the things that the

Commission has done in the above-entitled proceeding is to virtually set in stone radio market determinations made by a private, for-profit entity, Arbitron, as a part of Commission regulations. However, unlike the Cable Television Report and Order, where the Commission published "Appendix B" and listed "significantly viewed stations" state by state and county by county, the Commission did not publish any appendix or other table or chart in connection with the above-entitled station listing state by state and market by market the geographic composition of radio markets. None of the exceptions to 5 U.S.C. §553 apply to this matter. Thus, an agency such as the Commission is required to publish the entire final rule in the Federal Register. **N.L.R.B. v. Wyman-Sanders Co.**, 394 U.S. 759, 764 (1969). When an agency violates the publication requirement, the agency rule is void and has no legal effect. **W.C. v. Bowen**, 807 F.2d 1592 (9th Cir. 1987).

22. Clearly, the Arbitron market determinations and the BIA reports upon which the Commission relies have been incorporated by reference into the FCC Rules. This is not good enough to comply with the statute. The Commission has a statutory obligation to publish a listing (perhaps in a format resembling the above-described "Appendix B") of the composition of the various "Arbitron Metro" radio markets around the country. Furthermore, it is unfair to require

members of the public to have to pay Arbitron or BIA for market data which the Commission has incorporated into its rules by reference. That market data must be published by the Commission in the Federal Register and either the Code of Federal Regulations or the FCC Record, and should be made available on the FCC's website for public consumption. That is the very reason for 5 U.S.C. §553—that the Commission publish its rules in the source for agency regulations which is provided for by Congress—the Federal Register and Code of Federal Regulations.

23. **FCC Rules Do Not Contemplate the Possibility of Regional Markets Dominated by One Operator.** A significant flaw in the Commission's abandonment of a case-by-case, city-grade contour driven market determination in favor of an "Arbitron Metro" market driven determination of radio markets, is that there may be situations where one radio operator, such as Clear Channel, may own a large number of radio stations in a region which may contain a number of "Arbitron Metro" radio markets which are separated by a mere county line. Under the new rules, Clear Channel could potentially own more stations than at present, where the city-grade contours of high-power radio stations may well encompass areas in more than one "Arbitron Metro" radio market. On information and belief, Clear Channel owns its

own national advertising spot sales organization, and Clear Channel thus has the capacity and ability to customize a package of stations in a region (i.e., more than one market), which could well convince an advertiser only to advertise with Clear Channel stations and eschew advertising with stand-alone stations. WJZD urges the Commission to retain the city-grade contour driven rules, on an either/or basis—that is, an operator cannot own more stations than it can under Section 73.3555 as it was in effect prior to June 2, 2003.

Conclusion

24. The Commission's rules as adopted in the above-entitled matter: (1) abrogate the right of parties who filed Petitions to Deny under the rules as they existed prior to June 2, 2003, in violation of 5 U.S.C. §706(2)(C); (2) in several respects are arbitrary and capricious in violation of 5 U.S.C. §706(2)(A), in the sense that Arbitron has a history of errors in market determinations, Arbitron's determination of "Arbitron Metro" radio markets is not uniform, impartial, rational and coherent, but rather is based upon Arbitron's need to sell its ratings data to subscribers and the various agendas of its subscribers; and (3) the Commission's failure to publish a list, state by state, market by market, of the geographic composition of each of the "Arbitron Metro" radio

markets, violates 5 U.S.C. §553(d), because the incorporation by reference into FCC rules of Arbitron and BIA data constitutes a "rule" as defined by 5 U.S.C. §551(4), and the Commission had a statutory obligation to publish the "rule" in the Federal Register. Finally, the rules are flawed because there are instances where the new radio rules may actually aid and abet the largest radio group owners in acquiring more stations than they have at present in a given area.

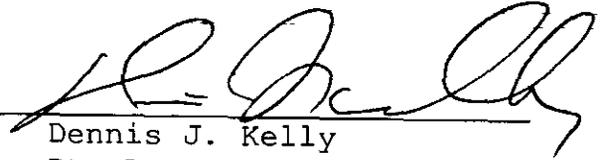
25. WJZD urges the Commission to vacate all portions of FCC 03-127 that relate to commercial broadcast radio stations. Further, WJZD urges the Commission to issue a new "Notice of Proposed Rulemaking", which lays out all Arbitron and BIA determinations of "Arbitron Metro" media markets and calls for public comment upon them before they become set in stone in communications law. Finally, WJZD urges the Commission to adopt and preserve rules which allow the Commission and its staff to scrutinize acquisitions by Clear Channel, Viacom/Infinity, Cumulus and the other major group radio station owners to determine their impact under anti-trust, economic impact and unfair trade practice paradigms.

WHEREFORE, WJZD urges that this Petition for Reconsideration **BE GRANTED.**

Respectfully submitted,

WJZD, INC.

By

A handwritten signature in black ink, appearing to read "Dennis J. Kelly", written over a horizontal line.

Dennis J. Kelly
Its Attorney

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September 4, 2003

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Petition for Reconsideration" were served by e-mail or by first-class United States mail, postage prepaid, on this 4th day of September, 2003 upon each of the following:

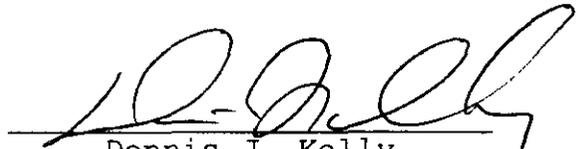
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