

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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 Not)	MB Docket 03-130
Located in an Arbitron Survey Area)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Viacom Inc. (“Viacom”), by its attorneys and pursuant to Section 1.429(f) of the Commission’s Rules, 47 C.F.R. § 1.429(f), hereby submits this Opposition to certain Petitions for Reconsideration filed in response to the Commission’s *Report and Order and Notice of Proposed Rulemaking* in the above-captioned proceeding, which was adopted on June 2, 2003.¹

This Opposition is limited to correcting several factual errors made by the four petitioners who

¹ Public Notice of the petitions for reconsideration was published in the Federal Register on September 19, 2003. See Notice of Petitions for Reconsideration and Clarification of Action, 68 Fed. Reg. No. 182 at 54903 (Sept. 19, 2003). Oppositions to the petitions for reconsideration are due within 15 days of public notice of the petitions in the Federal Register. See Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding, Rep. No. 2630, rel. Sept. 15, 2003. Accordingly, this Opposition is timely filed.

objected to the inclusion of noncommercial stations when determining the total number of radio stations in a local market.

I. The FCC Provided Adequate Notice and Opportunity To Comment on Whether Noncommercial Stations Should Count in Determining the Size of Local Radio Market.

Some petitioners erroneously suggest that the Commission gave no notice of its intention to include noncommercial stations when determining the total number of stations in a radio market.² Yet even well prior to commencement of the biennial review of all the broadcast ownership rules, the Commission in 2001 issued a far ranging notice of proposed rulemaking and initiated a “comprehensive examination of [its] rules and policies concerning local radio ownership.”³ In the *Local Radio NPRM*, the Commission noted its previous finding that the current media marketplace appears “robust in terms of the aggregate number of media outlets” and, in support of this finding, the Commission specifically cited the total number of radio stations licensed throughout the country – a total which included both commercial and noncommercial stations.⁴ In addition, the appendices to the *Local Radio NPRM* included information about the radio markets for three separate communities (Syracuse, NY; Rockford, IL; Florence, SC) with noncommercial stations specifically included in the list of stations in these markets.⁵

² See Petition for Reconsideration of the Future of Music Coalition (“FMC”), filed Sept. 4, 2003, at 11; Petition for Reconsideration of Office of Communication of the United Church of Christ, et al. (“UCC”), filed Sept. 4, 2003, at 28, n.97.

³ See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket NO. 01-317, Notice of Proposed Rulemaking, FCC 01-329, 16 FCC Rcd 19861, 19870, para. 19 (2001) (“*Local Radio NPRM*”).

⁴ *Id.*, at 19875-76, para. 35.

⁵ See *id.*, at 19900, Appendix A (including, for example, noncommercial station WNIJ(FM), Rockford Illinois in the Rockford Arbitron Metro).

As part of the third Biennial Regulatory Review of Broadcast Ownership Rules, the Commission issued an omnibus notice that incorporated by reference the comprehensive and ongoing local radio proceeding.⁶ In the *2002 Biennial Review NPRM*, the Commission broadly described the aspects of the local radio rule that were under consideration, noting that “the proceeding examines the effects of market consolidation, the proper definition of a radio market, and changes to the local radio ownership rules to reflect the current radio marketplace.”⁷ In addition, the Commission sought public comment on a series of empirical studies examining the current state of the media marketplace.⁸ At least one of these working group studies made specific reference to evidence of the “substitutability of *public* and commercial radio broadcasting news, classical music, and jazz.”⁹ By making this and other working group studies public – and, specifically soliciting public comment on these studies – the Commission gave adequate notice that it was considering the inclusion of noncommercial stations when counting the total number of radio stations in a market.¹⁰

As evidence of the adequacy of the Commission’s notice, several participants in this proceeding, including Viacom, specifically commented on the appropriateness of counting

⁶ See *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, Notice of Proposed Rulemaking, FCC 02-249, 17 FCC Rcd 18503, 18506, para. 7 (2002) (“*2002 Biennial Review NPRM*”).

⁷ *Id.*

⁸ See News, “FCC Releases Twelve Studies on the Current Media Marketplace: Research Represents Critical First Step in FCC’s Fact Finding Mission,” released Oct. 1, 2002.

⁹ Joel Waldfoegel, *Consumer Substitution Among Media*, at 9 (Sept. 2002) (emphasis added) (noting results “suggesting that listeners view public and classical radio stations as substitutes”).

¹⁰ See, e.g., *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996) (Court concluding that agency had provided adequate notice that alternative index was being considered when staff proposal, which differed from index proposed by agency, had been made available for public comment).

noncommercial stations in determining the size of the radio market.¹¹ For example, Viacom, citing prior Commission precedent, argued that noncommercial radio stations should be included in the analysis for purposes of measuring diversity because they represent additional independent voices.¹² Contrary to FMC's contention,¹³ Viacom advocated the inclusion of noncommercial radio stations as early as March 2002 – well in advance of the Commission's vote on the rulemaking. Other parties also made similar arguments.¹⁴

Moreover, given that the Commission's then-existing television local ownership rule included noncommercial stations for purposes of determining the number of independently owned and operating stations in a particular television market, interested parties reasonably should have anticipated the inclusion of noncommercial radio stations in determining the size of a radio market. Accordingly, the decision not to exclude noncommercial stations from the count of radio stations in a market was, at minimum, a logical outgrowth of the radio ownership rules

¹¹ See *Career College Ass'n v. Riley*, 74 F.3d 1265, 1276 (D.C. Cir. 1996) (holding that comments received may be reflective of notice and thus serve as evidence that adequate notice was given).

¹² See Viacom Comments in MM Docket No. 01-317, filed Mar. 27, 2002, at 14, 23; see also Viacom Ex Parte "Data In Support of Modified Methodology for Counting the Number of Stations in a Market," submitted May 1, 2003, at 3-4 (urging the Commission to include noncommercial stations because they offer unique, divergent viewpoints to the listening public); Letter dated May 7, 2003, from Anne C. Lucey, Vice President, Regulatory Affairs, Viacom Inc., to Paul Gallant, Special Advisor, Media Bureau, at 1-2 (recommending that all radio stations, including noncommercial stations, that are available to listeners in the Metro should be considered potential sources of competition).

¹³ See FMC Petition at 11.

¹⁴ See Bear Stearns Ex Parte Presentation, *A Defining Moment in Radio?* by Victor Miller (May 12, 2003), at 3, 15-16 ("Bear Stearns Ex Parte Presentation") (recommending that the Commission count all commercial and noncommercial stations in each Metro to reflect the "real radio diversity in the market"); Comments of West Virginia Radio Corporation in MM Docket No. 01-317, filed Mar. 26, 2002, Appendix 1 at 4 (including noncommercial educational stations in the count of stations in the Morgantown-Clarksburg-Fairmont, WV market because "they are separate media 'voices' that do compete for listeners").

proposed in the *Local Radio NPRM* and incorporated by reference in the *2002 Biennial Review NPRM*.¹⁵

II. Noncommercial Stations Serve the Same “Radio Listening Market” As Commercial Radio Stations.

A. Petitioners Ignore that the Commission Focused on the “Radio Listening Markets,” Not the “Radio Advertising Market.”

Three petitioners allege that commercial stations do not compete with noncommercial stations for advertisers and thus noncommercial stations are irrelevant to any competition analysis.¹⁶ These petitioners, however, mistakenly overlook that the Commission identified three relevant product markets in which radio stations compete: radio advertising, radio listening, and program production.¹⁷ Of these three relevant product markets, the Commission focused its analysis primarily on the radio listening market on the theory that “[p]reserving competition for listeners is of paramount concern in our public interest analysis.”¹⁸ Assuming that the Commission’s conclusions regarding the relevant product markets and the need for continued local radio ownership regulations are correct, it makes eminent sense to include noncommercial radio stations in determining the size of the relevant local radio listening market.

¹⁵ See, e.g., *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (concluding that changes from proposals do not require additional round of public comment where final rules represent a “logical outgrowth” of the proposals); *Public Serv. Comm’n of District of Columbia v. FCC*, 906 F.2d 713 (D.C. Cir. 1990) (finding that rule was a “logical outgrowth” of the rulemaking proposal where FCC’s notice announced both simplification and conformity as objectives of the rulemaking).

¹⁶ See Petition for Reconsideration of Main Street Broadcasting Company, Inc. (“Main Street”) at 10; Petition for Reconsideration of the National Association of Black Owned Broadcasters Inc. and Rainbow/Push Coalition, Inc. (“NABOB”) 12; FMC Petition at 11.

¹⁷ See *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, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, para. 242 (rel. July 2, 2002) (“*2002 Biennial Review Order*”).

¹⁸ *2002 Biennial Review Order*, para. 246.

B. Arbitron Collects and Publishes Audience Share Data for Commercial and Noncommercial Stations Alike.

Three petitioners assert noncommercial radio stations should not be included because Arbitron does not produce data on the ratings and listenership of noncommercial stations.¹⁹ This is incorrect. Arbitron in fact collects listener data for public radio stations (noncommercial and educational) in the same manner in which it does for commercial stations and currently publishes this data in the MaximiSer® and the MediaProfessionalsm databases.²⁰ Specifically, the MaximiSer® database includes persons, ratings and share data for noncommercial stations.²¹

C. Arbitron Audience Share Data Demonstrate that Noncommercial Radio Stations Compete with Commercial Radio Stations for Listeners.

Many noncommercial stations garner significant audience shares and therefore compete with commercial radio stations for the ears of the listening consumers. For example, in the Washington, D.C. Metro noncommercial stations WETA-FM (classical format) and WAMU(FM) (news talk information) are frequently among the top-rated radio stations in terms of audience share. As reported in the Spring 2003 MaximiSer® database, WAMU was ranked 10th in the Washington, D.C. Metro with an average-quarter-hour (“AQH”) share of 3.7, and WETA-FM was ranked 17th with an AQH share of 2.8. Both of these stations garnered higher

¹⁹ See FMC Petition at 11-12; UCC Petition at 29; NABOB Petition at 12.

²⁰ See <<http://www.arbitron.com/adagencies/medprofessional.htm>> (noting that the features of the MediaProfessional database include access to noncommercial and public station information).

²¹ It is correct that the Arbitron “Book” does not include data on noncommercial stations, as UCC notes. See UCC Petition at 29. But the “Book” is just one of Arbitron’s publications. UCC also apparently does not comprehend that the Commission did not use the Arbitron “Book” as the basis for defining the relevant radio geographic market. See UCC Petition at 29. Rather, the Commission adopted the Arbitron Metro boundaries, which are based on Metropolitan Areas established by the Office of Management and Budget, as a reasonable geographic delineation within which radio stations compete for listeners, as well as for advertising dollars and programming. Radio stations that are either designated as “home” to the Metro or are licensed to communities located within the Metro’s geographic boundary are counted as stations in a particular radio market. Given that the geographic boundaries of Arbitron Metros and the communities of license of radio stations are publicly available information, the inclusion of noncommercial stations in the relevant geographic market does not defeat the administrative convenience of an Arbitron Metro-based geographic radio market, as UCC argues.

rankings and shares than several commercial stations in the Metro, including for example, WTEM(AM), which has an all-news format, and WHFS-FM, which has a modern rock format. Indeed, even Main Street, which argued that commercial and noncommercial stations do not compete in the same advertising market, concedes that noncommercial stations “may contribute to the diversity of viewpoints available.”²²

Even FMC agrees that Commission should amend its counting methodology to include noncommercial stations if Arbitron measures listenership for noncommercial stations in a similar manner as for commercial stations.²³ Listenership shares are readily available through Arbitron’s MaximiSer® and the MediaProfessionalsm databases.

III. Even with the Inclusion of Noncommercial Stations, the Arbitron Metro-Based Radio Market Definition Results in the Permissible Common Ownership of *Fewer* Stations in Many Markets.

The broad claim that inclusion of noncommercial stations will lead to increased consolidation is simply not accurate.²⁴ As Viacom demonstrated in this proceeding, the total number of radio stations deemed to be in a radio market, as defined by the Arbitron Metro geographic market (including noncommercial stations) rather than the prior contour-based methodology, actually decreases in 17 out of 24 selected markets where Viacom’s subsidiary Infinity Broadcasting Corporation (“Infinity”) owns and operates radio stations.²⁵

²² Main Street Petition at 10.

²³ See FMC Petition at 12.

²⁴ See NABOB Petition at 12; UCC Petition at 28 & Exhibit 1. In addition, UCC makes factual statements that are blatantly wrong. Contrary to UCC’s claim (see UCC Petition at 27), Viacom’s subsidiary Infinity Broadcasting Corporation (“Infinity”) does not own any radio stations in the state of Arkansas, much less control 63.7% of the local commercial audience share in the Little Rock, AK Metro in conjunction with Clear Channel.

²⁵ See Viacom Ex Parte, submitted May 1, 2003, at 7-8.

Similarly, the ex parte presentation submitted by Victor Miller on behalf of Bear Stearns demonstrated that, following the transition to a Arbitron Metro-based market definition that includes noncommercial stations, the Commission “will essentially be using a ‘base’ (denominator) of stations which will in some cases be *significantly* lower than the ‘base’ of stations used under the contour test.”²⁶ When independently analyzing the effect of an Arbitron Metro-based geographic market, Bear Stearns likewise concluded that the general trend would be a decrease in the number of stations in a market, even with the inclusion of noncommercial stations. Specifically, Bear Stearns’ data indicate that the total number of radio stations would decrease in 24 of 33 selected Viacom/Infinity radio markets.²⁷

If it were not the case that the revised market definition would result in a decrease in the total number of stations in the market – and consequently a decrease in the total number of stations an entity may permissibly own or control – then the Commission would not have needed to adopt grandfathering provisions.²⁸ The Bear Stearns Ex Parte demonstrated that, even including noncommercial stations, the revised market definition would render a significant number of existing radio clusters non-compliant under the local ownership caps.²⁹

²⁶ Bear Stearns Ex Parte Presentation at 23 & Exhibit 8 (emphasis added).

²⁷ *See id.*

²⁸ *See 2002 Biennial Review Order*, paras. 483–486 (Commission specifically noting that the need to grandfather existing combinations will affect predominantly radio group owners because of the adoption of a geographic based, rather than signal contour based, definition of the local radio market).

²⁹ Specifically, Bear Stearns anticipated that approximately 107 stations in the top 200 radio markets would be “noncompliant.” *See* Bear Stearns Ex Parte Presentation at 26.

Conclusion

The petitions for reconsideration should be denied.

Respectfully submitted,

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By: _____ /s/

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CERTIFICATE OF SERVICE

I, Cristina Laudo, hereby certify that on this 6th day of October, 2003, a copy of the foregoing Opposition To Petitions For Reconsideration was served via first class mail, postage prepaid, on the following:

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