

**.Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Chillicothe, Dublin, Hillsboro and)
Marion, Ohio))

MB Docket No. 02-266 Federal Communications Commission
RM-10557 Office of the Secretary

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SEP - 5 2003

To: Assistant Chief, Audio Division
Media Bureau

Federal Communication Commission
Bureau / Office

SUPPLEMENT OF CITICASTERS

Citicasters Licenses, Inc., licensee of WMRN-FM, Marion, Ohio and Citicasters Company, licensee of WSRW-FM, Hillsboro, Ohio (collectively, "Citicasters"), by their counsel, hereby submits this Supplement in the above-captioned proceeding, as follows:

1. On July 22, 2003, the Committee for Competitive Columbus Radio ("Committee") filed a supplement in this proceeding arguing that recent changes in the Commission's local radio station ownership rules preclude the Commission from deleting Channel 295B at Marion, Ohio, allotting Channel 294B1 at Dublin, Ohio, and modifying the license of WMRN-FM to specify operation on Channel 294B1 at Dublin, as Citicasters has requested. In particular, the Committee notes that Clear Channel Communications, Citicasters' parent company, already owns seven stations in the market (as that market is defined under the new ownership rules) and that it cannot own an additional station consistent with the rules. However, these rules have been stayed by the Order in Prometheus Radio Project v. FCC (No. 03-3388, released September 3, 2003). See Exhibit 1. Thus, these rules have no current effect on this proceeding.

2. Should these new ownership rules take effect in the future while the rule making proposal is still pending, the Commission should not consider ownership issues in an allotment proceeding, but rather, in connection with the licensing action that follows the successful conclusion of an allotment proceeding. Second, even if the Commission were to consider ownership issues in this proceeding, it should apply the ownership rules that were in effect when the proceeding was commenced, and not apply the new rules retroactively. Under the former and currently effective rules, Clear Channel can own WMRN-FM after its reallocation to Dublin.

3. In raising the multiple ownership rules in this proceeding, the Committee is merely dressing up in new clothing the old competitive concerns it has already set forth in its comments. The Committee now alleges, for a variety of reasons, that Citicasters cannot own a station in Dublin, Ohio. They now allege an additional reason. However, as Citicasters has already pointed out in its comments, such concerns are not appropriate for consideration in this proceeding. In an allotment proceeding, the Commission is charged with ensuring that the mandate of Section 307(b) of the Communications Act is met, namely, to provide a fair, efficient and equitable distribution of radio service to the various communities. Thus, the Commission determines whether the proposed changes would result in a preferential arrangement of allotments pursuant to its FM allotment priorities, not whether a particular entity is qualified to hold the station license if the requested change is granted. *See Modification of FM and Television Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

4. Recently, the Commission affirmed this approach, stating: “a rulemaking proceeding involves a technical and demographic analysis of competing proposals in the context of Section 307(b) of the Act. In order to achieve an efficient and orderly transaction of both the

rulemaking process and the subsequent application process, any issue with respect to compliance with Section 73.3555 of the Rules will be considered in connection with the application to implement this reallocation.” *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055, 25059-60 (2002). This has long been the Commission’s policy, surviving through previous revisions of the multiple ownership rules. *See, e.g., Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664 (1997) (duopoly rule presented no obstacle to grant of petition but would be considered at application stage); *Copeland, Kansas*, 11 FCC Rcd 497 (1996) (compliance with audience share rule would be considered at application stage). The Commission should not abandon that approach now.

5. Here, the arrangement of allotments Citicasters has proposed is strongly favored under the Commission’s allotment priorities. Dublin, an incorporated city with a population of 31,392, currently has no local aural transmission service, and the petition would bring a first local service to Dublin without depriving any community of its sole transmission service. This enormous public service benefit – uncontradicted in the record of the proceeding – should be the Commission’s focus in deciding upon the proposed arrangement of allotments. Once the Table of Allotments has been amended, any questions regarding station ownership may appropriately be considered when an application is filed to implement the rule making. The application, unlike the pleadings currently before the Commission in this proceeding, will contain sufficient information upon which an ownership determination can be made. At that time, Clear Channel has the option of pledging to divest itself of one or more radio stations, if necessary, in order to comply with the applicable ownership rules.

6. Even if the Commission were to consider multiple ownership issues in connection with this allotment proceeding should the new multiple ownership rules ever take effect, the

Commission should not do so because it would impermissibly give the new rules retroactive effect. The Commission's power to make new rules permits it only to make rules with future effect. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213-215 (1988). The proscription on retroactive rule making derives from the Administrative Procedure Act ("APA"). 488 U.S. at 216-225 (Scalia, J., concurring). The Commission's new multiple ownership rules were adopted in a notice and comment rule making proceeding governed by the provisions of the APA. See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rule Making*, 16 FCC Rcd 19861 (2001); *Definition of Radio Markets, Notice of Proposed Rule Making*, 15 FCC Rcd 25077 (2000). Accordingly, the rules cannot be applied retroactively.

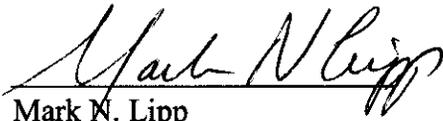
7. The proscription on retroactive rule making prohibits the Commission from making any rule that would "alter the past legal consequences of past actions." *Bowen*, 488 U.S. at 219; *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001). Citicasters filed the petition for rule making that began this proceeding well before the adoption of the multiple ownership rules. Therefore, the filing of the petition is a past action. At the time Citicasters filed its petition, under the ownership rules rule then in effect, Citicasters *could* have owned a station in Dublin, Ohio. Denying the petition on the basis of the *new* multiple ownership rules (in addition to being erroneous as a matter of FCC procedure as described above) would be to alter the past legal consequences of a past action, which is precisely the behavior that is forbidden under *Bowen*. See also *Celtronix, supra*, 272 F.3d at 588 ("retroactivity occur[s] where a statute would impair rights a party possessed when he acted") (citation and internal quotation marks omitted).

8. In addition, the Commission has a longstanding policy in rule making proceedings to apply the law in effect at the time of the filing of the rule making proposal. *See, e.g., Lancaster, Wisconsin, et al.*, 6 FCC Rcd 6113 (1991) (proposal filed after effective date of rule changes was considered under new rules). Even if multiple ownership concerns were at issue here, which they are not, there would be no reason to depart from that policy in this case.

ACCORDINGLY, for the reasons stated, the Commission should not give any consideration to the Supplement filed by The Committee for Competitive Columbus Radio in this proceeding.

Respectfully submitted,

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September 5, 2003

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3388

#E-59

PROMETHEUS RADIO PROJECT,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

*Fox Entertainment Group, Inc., Fox Television Stations, Inc.,
National Broadcasting Company, Inc., Telemundo Communications Group, Inc.
and Viacom, Inc.,
Intervenors

*(Pursuant to Clerk's Order dated 8/22/03)

(FCC No. 03-127)

Present: SCIRICA, *Chief Judge*, AMBRO and FUENTES, *Circuit Judges*

ORDER

Per Curiam.

Before the Court is Petitioner's motion to stay the effective date of Respondent Federal Communication Commission's new ownership rules, 2002 Biennial Regulatory Review, 68 Fed. Reg. 46,286 (Aug. 5, 2003), pending judicial review.¹ Extensive oral

¹Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation has designated this Court to hear this and related petitions for review.

argument was heard on September 3, 2003.²

We consider four factors in determining whether to grant the motion to stay: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the request is denied; (3) whether third parties will be harmed by the stay; and (4) whether granting the stay will serve the public interest. *E.g., Susquenita Sch. Dist. v. Raelee*, 96 F.3d 78, 80 (3d Cir. 1996); *In re Penn Cent. Transp. Co.*, 457 F.2d 381, 384-85 (3d Cir. 1972).

At issue in this litigation are changes adopted by the FCC that would significantly alter the agency's ownership rules for multiple media properties, including national television networks, local broadcast affiliates, radio stations, and newspapers. Petitioner has alleged harms from industry consolidation contending they would be widespread and irreversible if they occurred. The harm to petitioners absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part. In contrast to this irreparable harm, there is little indication that a stay pending appeal will result in substantial harm to the Commission or to other interested parties. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Granting the stay pending judicial review would maintain the status quo in

²Ordinarily, we would require strict adherence to Federal Rule of Appellate Procedure 18 that petitioner "move first before the agency for a stay of its decision or order." Fed. R. App. P. 18(a)(1). Nonetheless, under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.

order to permit appellate review after briefing on the merits. While it is difficult to predict the likelihood of success on the merits at this stage of the proceedings,³ these harms could outweigh the effect of a stay on Respondent and relevant third parties. Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review.

For the foregoing reasons, 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.

Subject to the Court's decision on the motion to transfer venue, the Clerk shall issue a briefing schedule.

DATED: SEP - 3 2003

cc: counsel of record

³ An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Holiday Tours, 559 F.2d at 844.

CERTIFICATE OF SERVICE

I, Lisa Balzer, a secretary in the law firm of Vinson & Elkins, LLP, hereby certify that on this 5th day of September, 2003, copies of the foregoing “**Supplement of Citicasters**” were sent via first class U.S. mail, postage prepaid, or via hand delivery, to the following:

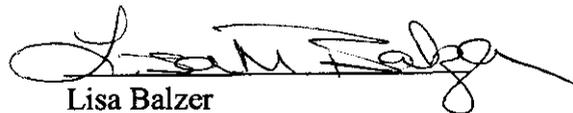
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