

**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 No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

**SECOND PETITION FOR RECONSIDERATION  
OF  
THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.  
AND  
THE RAINBOW/PUSH COALITION, INC.**

The National Association of Black Owned Broadcasters, Inc. ("NABOB") and Rainbow/PUSH Coalition, Inc. ("Rainbow/PUSH"), by their attorneys, hereby submit their Second Petition for Reconsideration in the above-captioned proceeding to seek reconsideration of the Public Notice issued by the Media Bureau on September 10, 2003.<sup>1</sup> This Second Petition for Reconsideration is submitted to

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<sup>1</sup>Public Notice, DA 03-2867, *Media Bureau To Terminate Temporary Broadcast Station Application Freeze; Revised Processing Guidelines Announced*, released September 10, 2003 ("Public Notice"), attached hereto as Exhibit 1.

prevent what appears to be an ongoing violation of the Stay Order issued by the Third Circuit Court of Appeals in the appeal of the Commission's Ownership Order.<sup>2</sup> The violation referred to is the apparent intent of the Media Bureau to cease enforcing the Commission's policy of "flagging" certain radio transactions, a change in policy adopted in the Ownership Order.<sup>3</sup>

## **1. INTRODUCTION**

NABOB and Rainbow/PUSH submit this Second Petition for Reconsideration requesting reconsideration of the Public Notice to address matters not referred to in the Public Notice, but which the Media Bureau apparently considers to be covered by the Public Notice. Specifically, in press reports and in public statements by the Chief of the Media Bureau, it appears that the Media Bureau has determined that the stay of the Commission's Ownership Order in this proceeding applies only to certain unspecified portions of the Commission's Ownership Order and not to the entire Ownership Order.<sup>4</sup> NABOB and Rainbow/PUSH submit that there is nothing in the court's Stay Order to support this interpretation. A plain reading of the court's Stay Order demonstrates that the Commission's entire Ownership Order has been stayed.

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<sup>2</sup>*Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam) (order granting motion to stay effective date of the FCC's new ownership rules) ("Stay Order").

<sup>3</sup>*2002 Biennial Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket Nos. 02-277, 01-235, 01-317, 02-249 and 00-244 Report and Order, released July 2, 2003, summary published in the Federal Register, August 5, 2003, 68 Fed Reg 48,265 ("Ownership Order").

<sup>4</sup>Radio Business Report, online, "Red Flags Won't Return," September 15, 2003, a copy is attached hereto as Exhibit 2.

Specifically, NABOB and Rainbow/PUSH submit that the Stay Order does not permit the Commission to implement that portion of the Ownership Order which terminated the Commission's interim policy for "flagging" radio transactions. The Stay Order stayed the termination of the "flagging" policy, and therefore, the Commission must continue to "flag" those transactions that meet the "flagging" guidelines until the court lifts the Stay Order.

## **II. BACKGROUND**

On September 3, 2003, the United States Court of Appeals for the Third Circuit issued the Stay Order. In issuing the Stay Order, the court identified the subject matter of the stay request as "Respondent Federal Communications Commission's new ownership rules, 2002 Biennial Regulatory Review, 68 Fed. Reg. 46,286 (Aug. 5, 2003)."<sup>5</sup> In explaining its reasons for granting the stay, the court stated:

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 widespread an 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.<sup>6</sup>

The court went on to explain:

Granting the stay pending judicial review would maintain the status quo in 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,[footnote omitted] 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

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<sup>5</sup>Stay Order at par. 1.

<sup>6</sup>Stay Order at par. 3.

is warranted pending thorough and efficient judicial review.<sup>7</sup>

In the Ownership Order, the Commission announced that it would terminate its interim policy of flagging radio transactions.<sup>8</sup> Pursuant to the flagging policy, the Commission would “flag” for further review any radio transaction if a grant of the transaction would allow one entity to control 50% of the revenues in an Arbitron radio market, or if it would allow two entities to control more than 70% of the advertising revenues in the Arbitron radio market.<sup>9</sup> NABOB filed a Petition for Reconsideration of the Ownership Order and requested reconsideration of the elimination of the flagging policy.<sup>10</sup>

### **III. TERMINATION OF THE COMMISSION’S FLAGGING POLICY VIOLATES THE STAY ORDER**

It has been reported in the trade press that, in spite of the Stay Order, the Media Bureau has discontinued the flagging policy.<sup>11</sup> The Bureau did not state this in the Public Notice, and in fact did not address the flagging policy at all in the Public Notice. Therefore, NABOB and Rainbow/PUSH are unable to cite specific Bureau language confirming this termination. However, according to RBR, the Bureau’s rationale is as follows:

As [RBR] understand[s] it, because red-flagging was an interim measure and never part

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<sup>7</sup>*Id.*

<sup>8</sup>Ownership Order at par.496-497.

<sup>9</sup>*Id.* at par.496.

<sup>10</sup>NABOB and Rainbow/PUSH Petition for Reconsideration, filed September 4, 2003 at 8-9.

<sup>11</sup>Radio Business Report, (“RBR”) online, “Red Flags Won’t Return,”September 15, 2003, a copy is attached hereto as Exhibit 2.

of the FCC's rules, it is not affected by the federal court's temporary restraining order against the new rules. Red-flagging was killed by the Commissioners on 6/2, so only a vote by the Commissioners could bring it back.. That's a can of worms that few people at the FCC want to re-open. In fact, no one at the Commission even wants to make a formal comment on the matter.<sup>12</sup>

Thus, NABOB and Rainbow/PUSH are left to provide only a copy of the RBR press report as an indication of the Bureau's intent and rationale.<sup>13</sup> If the press report accurately reflects the Bureau's intent, the Bureau is engaged in a violation of the court's Stay Order, and the Commission must reconsider the stated policy and issue a Public Notice clarifying that the Commission will take no action to implement any portion of the stayed Ownership Order until the court lifts the stay.

The Court's Stay Order does not limit its affect to only portions of the Commission's Order. The court stated that it would stay the effectiveness of the Commission's "rule" changes, but it did not distinguish between any portions of the Ownership Order in making this statement. To the contrary, when the court referred to the Commission's "rules" it cited the Ownership Order, not some unspecified set of rules within the Ownership Order. The only reasonable interpretation of the court's Stay Order is that the court intended to stay the Ownership Order, not some unspecified portions of the Ownership Order. Therefore, the reported Bureau rationale, that the flagging policy was not stayed by the court, is contradicted by the plain language of the Stay Order.

That the Stay Order applied to the entire Ownership Order is further supported by the rationale

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<sup>12</sup>*Id.*

<sup>13</sup>On September 26, 2003, the Chief of the Media Bureau appeared on a panel entitled "Washington Update" at the NABOB 27th Annual Fall Broadcast Management Conference. In response to questioning during the panel discussion, the Bureau Chief confirmed that the Bureau will no longer enforce the flagging policy.

given by the court in granting the stay. The court noted that the rules at issue covered “national television networks, local broadcast affiliates, radio stations, and newspapers.”<sup>14</sup> The court did not limit the coverage of its concern to the specific concerns raised by the petitioner or to any specific rule change challenged by the petitioner. Moreover, the court specifically stated that the purpose of the stay was to “maintain the status quo<sup>15</sup>” -- a state that cannot be maintained if the Commission implements unannounced some portion of the Ownership Order.

Indeed, if the Commission implements unannounced some portions of the Ownership Order, while not implementing others, it will create an industry structure that will neither be the status quo before the stay, nor the industry structure contemplated by the proposed new rules. Instead, piecemeal implementation would create an industry structure that the Commission never contemplated and which the Commission has never determined to be in the public interest. The Commission created the instant proceeding because the Commission found that piecemeal changes in its rules had historically resulted in inconsistent policies and results. The piecemeal approach contemplated by the Bureau will result in precisely the result the Commission sought to avoid in this proceeding.

#### **IV. CONCLUSION**

NABOB and Rainbow/PUSH submit that the Commission should assess the conduct of the Media Bureau with respect to compliance with the Stay Order. To the extent the Bureau has taken it upon itself to terminate its enforcement of the flagging policy, the Commission must reverse the Bureau’s action and

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<sup>14</sup>Stay Order at par. 3.

<sup>15</sup>Stay Order at par. 3.

resume flagging all transactions which meet the criteria of the flagging policy.

Failure to reconsider and reverse the Public Notice will result in an ongoing violation of the court's Stay Order.

Respectfully submitted,

**THE NATIONAL ASSOCIATION OF BLACK  
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October 9, 2003

## CERTIFICATE OF SERVICE

I, Kathy Nickens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, L.L.P., do hereby certify that the foregoing "Second Petition for Reconsideration" of the National Association of Black Owned Broadcasters, Inc. and Rainbow/PUSH Coalition, Inc. was mailed this 9th day of October, 2003 to the following:

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October 9, 2003