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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE 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 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
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)	MB Docket No. 03-130

To: The Secretary, Office of the Secretary

COMMENTS

On behalf of various clients and pursuant to Section 1.429 of the Commission's Rules, we hereby submit Comments on the Petition for Reconsideration and Clarification filed on September 4, 2003 by Entercom Communications Corp. and the Petition for Reconsideration filed on September 4, 2003 by Great Scott Broadcasting, Inc. in the above-captioned proceedings.

1. Entercom and Great Scott raise, with variations, a scenario in which the changes in the multiple ownership rule, Section 73.3555 of the Commission's Rules, unfairly disadvantage a licensee. We agree with Entercom and Great Scott that the situation is unfair and should be addressed in a revision to the notes to Section 73.3555. However, we wish to expand upon the solution proposed by Entercom and Great Scott, because it addresses only a limited

subset of the problems that can occur. Below, we describe the unfair disadvantage in general terms, and propose a more general solution.

2. Entercom and Great Scott describe specific versions of the following generic scenario: a radio station licensee files a petition for rule making to change its station's community of license. The petition is on file before the Commission's multiple ownership rules are changed in the above-captioned proceedings. Under the rules in effect at the time of filing, the licensee could own the radio station when it is finally licensed to its new community. However, during the pendency of either the rule making proceeding itself or the application filed to implement the change in community of license, the new multiple ownership rules take effect. Under the new rules, the licensee cannot file an application for the station without exceeding its ownership limits in the market. Accordingly, the licensee is prohibited from owning the station unless it divests another station in the market.

3. Entercom and Great Scott propose to address this situation by exempting from the class of applications prohibited under Section 73.3555 (i) an application to change community of license from one community to another within the same Arbitron Metro, or (ii) an application which does not create new or increased contour overlap with commonly owned stations located outside any Arbitron Metro. Petition of Entercom at 3; Petition of Great Scott at 4-5. However, this solution does not bear a sufficient relationship to the problem. As it happens, the particular variations of the general scenario set forth above which affect Entercom and Great Scott involve only changes in community of license within a single Arbitron Metro. However, if the Commission were to adopt the limited solution proposed by Entercom and Great Scott, the result would actually be to create *more* unfairness. It would grandfather only certain long-pending

community of license changes while failing to address others that are no different in any pertinent respect.

4. To properly address the problem, the Commission should not apply the new ownership rules to any licensee that obtains a change in community of license as a result of the grant of a petition or counterproposal in a proceeding to amend the FM Table of Allotments, or the grant of an application for a change in community of license of an AM station, so long as the petition, counterproposal, or application was filed before the adoption of the rules in the above-captioned proceedings.[1]

5. The solution proposed herein would accommodate the concerns of Entercom and Great Scott, since the unfairness they complain of arose because they filed in reliance on the previous rules. However, this solution is more appropriately tailored to the problem, and is in keeping with past practice. 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., South Congaree and Batesburg, South Carolina,* 5 FCC Rcd 7480 (1990) (petition filed prior to adoption of Class A rule changes were granted under former rules although decision came more than a year later); *Lancaster, Wisconsin, et al.,* 6 FCC Rcd 6113 (1991) (counterproposal filed after adoption of rule changes was considered under new rules although petition was considered under prior rules), *recon granted,* 9 FCC Rcd 1937 (1994). This policy would be continued under the approach described herein, because the multiple ownership rules in

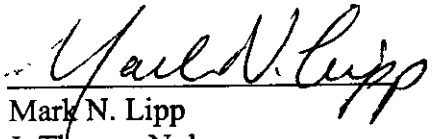
[1] Great Scott proposes a similar treatment of applications filed before the Commission "gave clear notice" of the proposed change Petition of Great Scott at 6. However, there is no need to limit this treatment to applications within the same Arbitron Metro as Great Scott proposes. That would unnecessarily limit the applicability of the relief sought herein. There is also no need to reach back to the date of the notice of proposed rule making in this proceeding to avoid "gaming," as Great Scott suggests. The ownership rule ultimately adopted could not have been predicted from the notice of proposed rule making in this proceeding. *See* 17 FCC Rcd 18503 (2002). Concerns regarding gaming are adequately addressed by the solution proposed herein

effect at the time the rule making proposal or application was filed would determine whether the licensee could own the station following a change in community of license.

6. Moreover, this solution would avoid retroactivity problems. 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 above-captioned proceedings are notice and comment rule making proceeding governed by the provisions of the APA. Accordingly, the multiple ownership rules adopted in these proceedings cannot be applied retroactively. Thus, when a petition for rule making or application complied with the ownership rules in effect on its filing date, it should not be denied because the rules were subsequently changed thereafter.

WHEREFORE, for the foregoing reasons, we respectfully urge the Commission to apply the multiple ownership rules adopted in these proceedings only prospectively to rule making proposals and applications filed after their adoption. It should apply the former rules to rule making proposals and applications filed before the new rules were adopted, and exempt from the new rules subsequent applications to implement rule making proposals that were filed prior to the new rules' adoption.

Respectfully submitted,



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October 6, 2003

CERTIFICATE OF SERVICE

I, Barbara Guzzy, a secretary in the law firm of Vinson & Elkins, LLP., do hereby certify that I have on this 6th day of October, 2003, caused to be mailed by first class mail, postage prepaid, a copy of the foregoing "**Comments**" to the following:

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