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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

The University of Southern California ("USC"), licensee of noncommercial station KUSC(FM), Los Angeles, California (USC and KUSC are collectively referred to as "KUSC"), by its attorney, hereby opposes the September 4, 2003 Petition for Reconsideration filed in the captioned proceedings by Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson").[1]

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[1] Mt. Wilson seeks partial reconsideration of the *Report and Order and Notice of Proposed Rulemaking*, FCC 03-127, released July 2, 2003 (hereinafter, the "*R&O*").

In support whereof, the following is shown.

KUSC and Clear Channel Broadcasting, Inc., d/b/a/ Clear Channel Traffic Los Angeles (collectively, "Clear Channel")[2], entered into a Representation Agreement (the "Rep Agreement") effective July 1, 2003. The material terms of the Rep Agreement, which was filed with the Commission on August 19, are detailed below.[3]

Relying exclusively on eight pages of hearsay newspaper articles containing incomplete and sometimes erroneous information,[4] Mt. Wilson protests against an agreement it has plainly neither seen nor read.[5] It urges, based on random press clippings, that the ownership rules be modified to make "underwriting" agreements "(and the like)" cognizable, along with LMAs and JSAs, Petition at 3.

Mt. Wilson's arguments are falsely premised and its Petition is meritless.[6] [7]

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[2] In the section on **The Rep Agreement**, *infra*, Clear Channel Traffic Los Angeles is referred to as "Clear Channel Traffic."

[3] The Rep Agreement, comprising 3-1/2 pages plus two pages of exhibits, was supplemented by the parties on August 1 with an additional paragraph. Both the Rep Agreement and supplement were submitted to the FCC, although the Commission does not require the filing of representation agreements; see § 73.3613(c)(2).

[4] For example, KUSC has not entered into a "partnership" with Clear Channel; Petition, Att. A, p. 1. See also Petition at 6, para. 8: "The press coverage reflects that the sale of all underwriting will be outsourced to Clear Channel". That statement is incorrect; see **The Rep Agreement**, *infra*. Mt. Wilson's reliance on questionable third-hand information vindicates the Commission's traditional refusal to credit arguments grounded on hearsay.

[5] The publicly available Rep Agreement was in KUSC's ownership file at the Commission for more than two weeks before the Petition was submitted.

[6] Lacking any real knowledge, the Petition repeatedly refers to the Rep Agreement as an "underwriting agreement." The gravamen of Mt. Wilson's argument is set out in the Petition at 4, para. 3: that for noncommercial stations JSAs "probably would be titled an underwriting agreement -- since noncommercial stations do not sell time." It then proceeds to insist that such "JSA/underwriting agreements" should be attributable. But, as will be shown, the Rep Agreement is nothing at all like a JSA.

[7] Apparently the Petition derives from a personal animus by Mr. Wilson's President against Clear Channel; he professes to be "mad as hell and not going to take it." Pet., Att. A, pp. 5-6.

As a noncommercial licensee, KUSC takes no position on the multiple ownership rules (KUSC agrees, however, that Note 2(k) to § 73.3555 should be revised, but not as proposed by Mt. Wilson; see discussion under **Note 2(k)**, *infra*).

Here are the facts. *There is no cognizable relationship between KUSC and Clear Channel*. The Rep Agreement is substantially identical to representation agreements between thousands of commercial stations -- doubtless including Mt. Wilson's stations -- and their national and/or regional sales representatives. The Commission does not require that such commonplace contracts be filed, n.3, *supra*; they need not be put in station public files, § 73.3526(e); and they do not have to be made available for FCC inspection, § 73.3613(e). Sales representation agreements are part of the everyday business of broadcasting.

The only material differences between commercial representation agreements and the Rep Agreement are that instead of soliciting commercial sponsors, the Rep Agreement contemplates soliciting noncommercial underwriters; *and* that KUSC retains significantly greater discretion and control over station underwriting -- including which announcements it will accept or reject -- than that typically accorded under commercial rep agreements.

Attributable Interests

The Commission's definition of "cognizable interests" is contained in new Note 1 to § 73.3555: "any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station." The Rep

Agreement does not allow Clear Channel "to own, operate or control" *any* aspect of KUSC's policy or operations, nor does Clear Channel have anything to do with the underwriting; it only solicits prospective underwriters for the station. See **The Rep Agreement**, *infra*.

The *R&O*, in the section on "Attribution of Joint Sales Agreements," ¶¶ 316-325, discourses at some length upon what types of interests are and are not to be attributed. Attributable interests "convey a degree of influence or control to their holder sufficient to warrant limitation under our ownership rules." *R&O*, ¶ 318 *(citations omitted)*. "Influence" is viewed as "an interest that is less than controlling, but through which the holder is likely to induce a licensee to take actions to protect the interests of the holder." The degree of influence subject to regulatory restriction is "based on [the Commission's] judgment regarding what interests in a licensee convey a realistic potential to control its programming and other core operational decisions." *Id. (citation omitted)*.

In deciding to attribute certain JSAs, the *R&O* finds that, generally, "the broker will sell advertising packages for the group of stations, offer substantial discounts and create incentives not available to other broadcasters in the market." *Id.*, ¶ 319. Such JSAs "raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally." Typically, "JSAs put pricing and output decisions [for a number of stations] in the hands of a single firm. Instead of stations competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market." *Id. (citations omitted)*. This "threat to competition

and the potential impact on the influence over the brokered station" necessitate the attribution of JSAs. *Id.*, ¶ 321 *(citations omitted)*.

None of these concerns are present in the KUSC/Clear Channel Rep Agreement.

The Rep Agreement

In the Rep Agreement, KUSC engages Clear Channel Traffic, a subsidiary of Clear Channel, as its radio stations' exclusive Southern California representative[8] for the solicitation of funding support accompanied by on-air underwriting identification announcements for potential new underwriters and for the collection of the associated funds, in return for which Clear Channel Traffic receives a specified commission. Notwithstanding Mt. Wilson's contrary assertion, n.4, *supra*, The Rep Agreement expressly excludes a number of existing KUSC underwriters from being solicited by Clear Channel Traffic.

There is no "joint selling" under the Rep Agreement. Clear Channel does not "sell" KUSC underwriting announcements in combination with any of its own stations, or anyone else's stations. Solicitations are made solely for KUSC by Clear Channel Traffic, an entity separate and distinct from the sales department that serves Clear Channel's Los Angeles area radio stations.

Clear Channel does not "lease" any of KUSC's underwriting time under the Rep Agreement; all of the air time remains KUSC's, to utilize as KUSC considers appropriate.

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[8] In addition to KUSC, USC is the licensee of California noncommercial stations KCPB(FM), Thousand Oaks; KFAC(FM), Santa Barbara; and KPSC(FM), Palm Springs. KCPB, KFAC and KPSC rebroadcast KUSC's programs to their respective communities.

Clear Channel Traffic, as KUSC's agent, proposes to bring potential new underwriters to the station, precisely as sales reps nationwide bring potential advertisers to commercial stations. All pricing decisions are made by KUSC. And the Rep Agreement expressly provides that all underwriting announcements are controlled by and subject to the prior approval of KUSC. Clear Channel Traffic staff submits underwriting Insertion Order Forms, similar to commercial sales insertion order forms, to KUSC's Marketing Department. The forms identify the potential underwriter, the number of underwriting announcements desired, the days and dayparts involved, the average cost per announcement and the total price. There is no mention of content in the forms and Clear Channel Traffic plays no role in creating the announcements, which are the responsibility of KUSC staff. KUSC Marketing Department personnel work directly with the underwriter on announcement content, which must comply not only with § 399B of the Communications Act and § 73.503(d) of the FCC's Rules, *but also with KUSC's own station policies and standards*.[9]

Clear Channel Traffic's representation services are expressly limited to solicitation and do not include the authority to accept any underwriting or otherwise bind KUSC. As is generally the case with commercial rep agreements, Clear Channel Traffic collects the funds and receives a commission based on an agreed-upon percentage of net collections. KUSC controls announcement availabilities and agrees to give Clear Channel Traffic 30 days' prior notice of any change in the availabilities. Control of all station functions is specifically vested in KUSC; Clear Channel Traffic serves as KUSC's underwriting agent.

[9] For example, the Rep Agreement states that KUSC does not accept political, tobacco, gambling or distilled spirits underwriting announcements.

The Rep Agreement expires June 30, 2004 and is terminable by either party before then upon 60 days' notice. Finally, the Rep Agreement provides that during its term, the parties will cooperate on at least one project that supports music education in schools.

In the past, KUSC's Marketing Department has been able to solicit underwriting sufficient to fund up to 25% of the station's operational budget. It is hoped that, via the Rep Agreement, this percentage (which has fallen off due to employee turnover) may again be attained. The preponderance of KUSC's operating budget -- at least 75% -- derives from other sources.

The Rep Agreement is intended to assist one of America's premiere public radio stations, without any abrogation of licensee influence or control. Indeed, such agreements could provide a worthwhile mechanism for assisting numerous financially strapped noncommercial broadcasters. Far from adversely affecting competition, agreements like this one should be applauded as an innovative means of increasing funding for struggling public broadcasting stations. The *R&O* repeatedly comments on noncoms' marketplace impact as competitive voices, *see, e.g.,* ¶¶ 287, 294. Creative means of helping noncommercial operators survive (such as taking a page from the commercial sales book and fashioning a rep agreement usable by and specifically tailored to noncoms) can only increase competition.

To sum up, but for the fact that underwriting announcements rather than commercials are solicited,[10] there is no material difference between the KUSC/Clear Channel Rep Agreement and a typical commercial sales representation agreement, *except that the Rep*

[10] Lest we forget, there is also the aforementioned music education project included in the Rep Agreement.

Agreement is more restrictive and KUSC retains greater control over content than commercial licensees typically enjoy. KUSC has the discretion to accept or not accept any order brought to it by Clear Channel Traffic; run-of-the-mill commercial rep agreements are less flexible. Otherwise, the agreements are virtually identical. If the Rep Agreement were deemed an attributable ownership interest, then every commercial rep agreement must also be cognizable. Such a result would be unthinkable.

Nothing in the Rep Agreement conveys "a degree of influence or control to" Clear Channel "sufficient to warrant limitation" under the ownership rules. *R&O*, *supra*, ¶ 318. Clear Channel cannot contractually induce KUSC to act to protect Clear Channel's interests. *Id.* The Rep Agreement does not involve joint selling, is not part of an "advertising package[ ] for the group of stations," there is no "offer[ing of] substantial discounts and creat[ion of] incentives not available to other broadcasters in the market," the underwriting time remains KUSC's and both rates and availabilities are determined by KUSC. *Id.*, ¶ 319. Thus the Rep Agreement does not "raise concerns regarding the ability of smaller broadcasters to compete," or "negatively affect the health of the local radio industry generally." *Id.*

Contrary to Mt. Wilson's baseless speculations, the Rep Agreement is not in any respect a noncommercial JSA and thus it should not be considered attributable.

Note 2(k)

KUSC does agree with Mt. Wilson that Note 2(k) to § 73.3555 should be revised, albeit for different reasons and with differing language. Mt. Wilson insists the Note is not sufficiently inclusive. In fact, Note 2(k) is overly broad and its scope should be narrowed.

The Note reads: "'Joint Sales Agreement'" is an agreement with a licensee of a 'brokered station' that authorizes a 'broker' to sell advertising time for the 'brokered station.'" By its terms, this definition could be read to include commercial and noncommercial representation agreements as well as other routine contracts. For the reasons already discussed, KUSC doubts the Commission intended the definition to be so all-embracing. KUSC therefore respectfully urges the Commission to narrow the definition of Joint Sales Agreement in Note 2(k) to more closely accord to the rationale expressed in ¶¶ 316-325 of the *R&O*.

Conclusion

WHEREFORE, for these reasons, the Petition for Reconsideration filed by Mt. Wilson FM Broadcasters, Inc. should be denied.

Respectfully submitted,

THE UNIVERSITY OF SOUTHERN CALIFORNIA

By: _____
Lawrence Bernstein

Its Attorney

LAW OFFICES OF
LAWRENCE BERNSTEIN
1818 N Street, NW
Suite 700
Washington, D.C. 20036
(202) 296-1800

October 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have, this 3rd day of October, 2003, served a copy of the foregoing "Opposition to Petition for Reconsideration" upon the following person via first class United States Mail, postage prepaid:

Robert B. Jacobi
Cohn and Marks
1920 N Street, NW
Suite 300
Washington, D.C. 20036

Counsel for Mt. Wilson FM
Broadcasters, Inc.

Lawrence Bernstein