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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 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

Bonneville International Corporation ("Bonneville"), by its attorneys and pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby opposes the petition for reconsideration filed by Mt. Wilson FM Broadcasters, Inc. ("Petitioner" or "Mt. Wilson") in the above-captioned proceedings.[1] Petitioner asserts that the Commission should apply the local radio ownership rule to noncommercial station ownership and expand the definition of joint sales agreement ("JSA") to include underwriting agreements involving non-commercial radio

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[1] *Petition for Reconsideration of Mt Wilson FM Broadcasters*, MB Docket No. 02-277 *et al*, (filed Sept. 4, 2003) ("*Petition*").

stations.[2] Petitioner posits that the new rule's failure to adopt these policies "was simply inadvertent."[3] Petitioner is mistaken. Consideration of Mt. Wilson's requests would violate Administrative Procedure Act ("APA") notice requirements, and the proposed policies raise the specter of unintended consequences. The petition must be dismissed.

DISCUSSION

It is indisputable that Petitioner's request to extend the local radio ownership restrictions to cognizable interests in non-commercial stations is outside the scope of this proceeding. The APA requires that "[g]eneral notice of proposed rulemaking shall . . . include either the terms or substance of the proposed rule or a description of the subjects and issues involved."[4] As the D.C. Circuit Court of Appeals has stated, the notice requirement "improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review."[5] In this case, the *2002 Biennial Review Notice of Proposed Rulemaking* did not identify any proposals or remotely suggest consideration of any rules or policies to regulate cognizable interests in non-commercial stations.[6] Further, section 202 of the Telecommunications Act of

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[2] *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 Nos. 02-277, 03-130 and MM Docket Nos. 01-235, 01-317, 00-244, *Report and Order and Notice of Proposed Rulemaking,* 18 FCC Rcd 13620 at Appendix H, 47 C.F.R. § 73.3555(a)(1) and Note 2(k) to § 73.3555 (2003) *(2002 Biennial Review Report and Order), appeal pending sub nom. Prometheus Radio v FCC,* No. 03-338 (3d Cir. Sept. 3, 2003).

[3] *Petition* at 7.

[4] 5 U.S.C. § 553(b)(3).

[5] *Sprint Corp v FCC,* 315 F.3d 369, 373 (D.C. Cir. 2003) (quotations omitted).

[6] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and*
(continued on next page)

1996, which sets forth the statutory framework for this proceeding and amended the numerical limits on local radio ownership, only addressed regulation of commercial station ownership.[7]

The *2002 Biennial Review Order,* moreover, confirmed that the proceeding did not contemplate restrictions on cognizable interests in non-commercial stations. Following the decision's extensive discussion of the new rules, the Commission dismissed several requests for action "regarding ownership or attribution issues that were not raised in the *Notice* and that are therefore outside the scope of the proceeding."[8] In response to a request related to the Low Power FM station rules, the Commission stated:

> These are non-commercial stations *and therefore* a consideration of ownership limits for these stations is outside the scope of this proceeding.[9]

Similarly, the Commission rejected another request to consider new ownership restrictions on non-commercial educational stations, stating that "such limits are outside the scope of this proceeding."[10]

Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, 00-244, *Notice of Proposed Rulemaking,* 17 FCC Rcd 18503 (2002) ("*2002 Biennial Review Notice of Proposed Rulemaking*"). In addition, the 2001 local radio ownership notice of proposed rulemaking, which was incorporated into the *2002 Biennial Review* proceeding, did not contemplate regulation of non-commercial station ownership. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* MM Docket No. 01-317, *Notice of Proposed Rulemaking,* 16 FCC Rcd 19861 (2001) ("*Local Radio Ownership Notice of Proposed Rulemaking*").

[7] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 110 (1996).

[8] *2002 Biennial Review Report and Order,* 18 FCC Rcd at 13860, ¶ 627.

[9] *Id* at 13861, ¶ 630 (emphasis added).

[10] *Id* No "logical outgrowth" argument can overcome the deficiency of notice in this case. As the D.C. Circuit Court of Appeals has stated, "A final rule is not a logical outgrowth of a proposed rule when the changes are so major that the original notice did not adequately frame the subjects for discussion." *Omnipoint Corp. v FCC,* 78 F.3d 620, 631 (D.C. Cir. 1996) (quotation omitted). As noted above, neither
(continued on next page)

The Commission cannot consider proposals on reconsideration if proper notice and opportunity for comment are wanting. The D.C. Circuit Court of Appeals recently vacated a Commission rule adopted on reconsideration because the agency had failed to provide proper notice prior to promulgating the new rule.[11] As the court reaffirmed, "new rules that work substantive changes in prior regulations are subject to the APA's procedures."[12] In this case, the Commission did not contemplate regulation of non-commercial station ownership and thus did not provide any notice to justify consideration of Petitioner's requests. Indeed, the non-commercial community did not even participate in the *2002 Biennial Review* proceeding. Given the Commission's clear statement that proposals to regulate non-commercial station ownership are outside the scope of the proceeding, the Commission must dismiss Mt. Wilson's petition.

As a policy matter, moreover, Petitioner's requests demand a clear opportunity for public comment and significant Commission consideration. The press articles attached to the petition demonstrate that interested parties have diverse views on whether the underlying issue, underwriting agreements between commercial and non-commercial stations, serves the public interest.[13] Bonneville does not express any position on the merits but points out that the petition contains several unsubstantiated assertions. Petitioner presumes, for example, that an underwriting agreement is equivalent to a JSA and that an underwriting agreement necessarily is

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the *2002 Biennial Review Notice of Proposed Rulemaking* nor the *Local Radio Ownership Notice of Proposed Rulemaking* contemplated the regulation of ownership of or cognizable interests in non-commercial stations

[11] *Sprint Corp v FCC*, 315 F.3d 369 (2002).

[12] *Id* at 374.

[13] *See Petition* at Attachment A.

a cognizable interest that must be attributable under the Commission's rules and subject to the local radio ownership rule.[14]

Petitioner's proposed solution, moreover, is a blunt instrument that likely raises unintended consequences. If adopted, it would – for the first time – regulate ownership of or cognizable interests in non-commercial stations. If extended to the local television ownership rule, the proposal could force statewide non-commercial television systems to divest stations in larger DMAs. These proposals have far-reaching and unforeseen consequences. Even if the Commission believes that commercial station involvement in non-commercial underwriting poses concerns, there are less intrusive and more direct means to address the issue. In any event, Commission review of such matters can only occur in a rulemaking proceeding with proper notice and opportunity for comment.

CONCLUSION

For the reasons discussed above, any consideration of the petition would constitute flawed administrative procedure and an exercise in unsound policy. The Commission should

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[14] *See Petition* at 4-5.

dismiss the Mt. Wilson petition for reconsideration forthwith.

Respectfully submitted,

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Dated: October 6, 2003

CERTIFICATE OF SERVICE

I, Paula Lewis, do hereby certify that on this 6th day of October 2003, a copy of the foregoing Opposition To Petition For Reconsideration was served by U.S. Mail, first-class postage prepaid, on the following:

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Paula Lewis

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