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

In the Matter of	)	
	)	
2006 Quadrennial 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. 06-121
	)	
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
	)	

WRITTEN EX PARTE PRESENTATION OF CLEAR CHANNEL COMMUNICATIONS, INC. ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Clear Channel Communications, Inc. ("Clear Channel") hereby submits this filing in order to respond to certain comments and reply comments filed in response to the Second Further Notice of Proposed Rulemaking ("*2ndFNPRM*")[1] in the above-captioned proceeding. The *2ndFNPRM* seeks comment on various issues relating to ownership of broadcast stations by minorities, women, and small businesses. As noted previously, Clear Channel believes that the FCC should seek to increase such ownership, and supports certain proposals – both specific, narrowly-tailored and well-defined regulatory efforts and voluntary industry activities – designed to further the important

[1] Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121, *et al.*, FCC 07-136 (rel. Aug. 1, 2007).

policy of promoting ownership of radio stations by women, minorities, and small businesses.[2]

Certain commenters in this proceeding, while purporting also to support efforts to further that goal, advance arguments that are either inconsistent with the FCC's statutory obligation in this proceeding and ordinary administrative law principles, or would actually have precisely the opposite effect. As explained below, the Commission is barred from accepting their contentions, and must instead move forward to determine whether its media ownership rules, including the local radio ownership rule, remain necessary in the public interest as the result of competition, and if not, to repeal or modify them. While Clear Channel believes that the FCC's goal of furthering minority ownership is an important one, it must be promoted in a manner that is equally true to Congress' deregulatory mandate to update the media ownership rules to reflect current competitive conditions. Proposals designed to further minority ownership can – and, indeed, must – coexist beside deregulatory changes that are necessary to update the local radio ownership rule to reflect current competitive realities.

I. THE FCC MAY NOT HALT DEREGULATORY CHANGES THAT ARE MANDATED BY STATUTE BASED ON A DESIRE TO FURTHER OTHER GOALS.

Consumers Union ("CU") and the Office of Communication of the United Church of Christ ("UCC") argue that the most effective way for the Commission to promote ownership of broadcast

[2] Comments of Clear Channel Communications, Inc. on Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed Oct. 1, 2007) ("*Clear Channel Diversity Comments*"); Reply Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, *et al.*, at ii-iii, 55-58 (filed Jan. 16, 2007) ("*Clear Channel Media Ownership Reply Comments*"); *see also* Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, *et al.*, at 77-80 (filed Oct. 23, 2006) ("*Clear Channel Media Ownership Comments*"). Separately, Clear Channel filed comments in support of MMTC's request that the Commission modify its existing policy regarding the transfer of grandfathered clusters of radio stations to allow transfers of grandfathered clusters to any third parties, provided that the buyer commits to transfer any stations exceeding the cap to a small business within twelve months. *See* Comments of Clear Channel Communications, Inc., RM-11388 (filed Sept. 5, 2007). That support was reiterated in a joint reply filing by a number of parties. *See* Reply Comments of 48 Parties, RM-11388 (filed Oct. 5, 2007).

stations by women, minorities, and small businesses is to decline to implement the deregulatory changes that Congress mandated in Section 202(h) of the 1996 Act, and which the current state of competition in the media marketplace would require as a matter of administrative law anyway.[3] Other parties ask the FCC to interminably delay relaxation of the media ownership rules pending adoption and implementation of proposals designed to increase the participation of new entrants in the broadcast business.[4]

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[3] *See, e.g.*, Comments of Consumers Union, Consumer Federation of America, and Free Press, MB Docket Nos. 06-121, *et al.*, at 25-29 (filed Oct. 1, 2007) ("*CU Diversity Comments*"); Comments of United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and the Benton Foundation, MB Docket Nos. 06-121, *et al.*, at 5-6 (filed Oct. 1, 2007) ("*UCC Diversity Comments*"); Reply Comments of Consumers Union, Consumer Federation of America, and Free Press, MB Docket Nos. 06-121, *et al.*, at 2 (filed Oct. 16, 2007) ("*CU Diversity Reply Comments*"); *see also* S. Derek Turner, Mark N. Cooper, *The Lack of Racial and Gender Diversity in Broadcast Ownership & The Effects of FCC Policy: An Empirical Analysis*, at 56-60 (Appendix A to CU Diversity Comments) ("*CU Diversity Appendix A*") (purporting to show that minority and female owned radio stations are most common in large markets that tend to be the least concentrated, and that minorities and women are underrepresented in terms of radio station ownership, as compared to the percentage of the national population that these groups comprise); *Market Concentration and Female and Minority Radio Station Ownership: Econometric Study* (Appendix B to CU Diversity Comments) (same); *Reply Comments of the National Association of Black Owned Broadcasters, Inc. and the Rainbow/Push Coalition, Inc. on the Commission's Ownership Studies and the Second Further Notice of Proposed Rule Making*, MB Docket Nos. 06-121, *et al.*, at 5-7 (filed Nov. 1, 2007) ("*NABOB Diversity Reply Comments*"). In comments submitted in response to the ten studies on media ownership that will be incorporated into the above-captioned proceeding, UCC also contends that concentration has negative effects on minority and female ownership, and that FCC Study 2, Kiran Duwadi, Scott Roberts, and Andrew Wise, *Ownership Structure and Robustness of Media* (revised Sept. 5, 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf (released in MB Docket Nos. 06-121, *et al.* as Study 2), which finds a decline in the number of stations owned by women and minorities between 2002 and 2005, and FCC Study 10, George *Williams, Review of the Radio Industry, 2007* (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf (released in MB Docket Nos. 06-121, *et al.* as Study 10), which finds that radio consolidation increased between 1996 and 2006, support this conclusion. *See* Comments of the Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, Benton Foundation, MB Docket Nos. 06-121, *et al.*, at 43-44 (filed Oct. 22, 2007). The studies on which UCC relies to support its assertion, however, do not show any causal connection between increased common ownership levels and falling minority and female ownership levels. Furthermore, Clear Channel's own actions, detailed below and in previous filings, demonstrate the beneficial effects that can flow to women, minorities, and new entrants in the face of deregulation.

[4] *See, e.g.*, *NABOB Diversity Reply Comments*, at 5-7; *see also* November 1, 2007 Letter from

As explained fully in the earlier filings of Clear Channel and many others in this docket, however, the FCC has an affirmative statutory obligation to repeal or relax its media ownership rules as competition develops.[5] While the Commission can, and Clear Channel agrees should, seek to increase opportunities for women and minorities at the same time, it cannot – and there is no need to – elevate a desire to do so over the statutory directive that Congress has issued. Promoting minority ownership and complying with the deregulatory mandate are not mutually exclusive endeavors.

As Clear Channel has already shown, the biennial review requirement, as interpreted by the FCC in 2003 and affirmed by the Third Circuit, coupled with the dramatic increase in competition and diversity in the media marketplace, warrants repeal or, at the very least, substantial relaxation of the local radio ownership rule.[6] Specifically, at a minimum, the FCC should modify the local radio caps to allow, as Clear Channel has previously demonstrated is appropriate, up to ten stations in markets with between sixty and seventy-four stations, and ownership of at least twelve stations in markets with seventy-five or more stations.[7] And, as Clear Channel has also previously shown, the Commission should move forward to eliminate the subcaps on the number of AM and FM stations that a single party can own, due to the lack of any factual or legal basis for retaining the subcaps.[8]

(Continued . . .)
Rainbow PUSH, *et al.* to Kevin J. Martin; October 31, 2007 Letter from National Hispanic Media Coalition to Marlene H. Dortch.

[5] *See, e.g.*, *Clear Channel Media Ownership Comments*, at 2-6; *Clear Channel Media Ownership Reply Comments*, at 6-13.

[6] *See generally Clear Channel Media Ownership Comments*; *Clear Channel Media Ownership Reply Comments*.

[7] *See Clear Channel Media Ownership Comments*, at 50-59; *Clear Channel Media Ownership Reply Comments*, at 42-47.

[8] *See Clear Channel Media Ownership Comments*, at 66-73; *Clear Channel Media Ownership Reply Comments*, at 49-53.

Simply put, these changes are compelled as a matter of statutory obligation and administrative law, and must be implemented alongside of any proposals that are designed to increase ownership of broadcast stations by particular groups.

Past experience demonstrates, moreover, that deregulatory changes have the positive effect of spurring transactional activity that creates just the sort of ownership opportunities that CU and UCC say that they want to increase. As Clear Channel has explained before, the deregulatory changes mandated by the 1996 Act sparked a substantial volume of broadcast transactions.[9] A beneficial byproduct of this activity was that Clear Channel sold forty radio stations to minorities in connection with the AMFM merger, representing "the most significant one-time increase in minority ownership in history" and "boost[ing] the number of minority-owned stations 26%."[10]

Likewise, as Clear Channel explained in its earlier submissions, repeal of the AM/FM subcaps is likely to provide opportunities to expand ownership of broadcast stations by minorities, women, and small businesses.[11] A lifting of the subcaps will trigger significant acquisition activity, as broadcasters seek to realign their local market clusters by acquiring certain in-market stations while divesting others.[12] And the divested properties will in many cases provide opportunities for affordable purchases by modestly capitalized and entry-level owners, including minorities, women and small businesses.[13]

In sum, the Commission's statutory mandate precludes it from accepting the contentions of

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[9] *Clear Channel Diversity Comments*, at 4-5; *Clear Channel Media Ownership Comments*, at 75-76.

[10] *Clear Channel Media Ownership Comments*, at 75-76 (quoting *Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062, 16105 (2000) (statement of Chairman William E. Kennard); Bill McConnell, *The greening of the MMTC*, Broadcasting & Cable, Sept. 9, 2002, *available at* http://reedtelevision.com/article/CA242662.html?display=Washington.

[11] *See Clear Channel Media Ownership Comments*, at 72.

[12] *See id.*

[13] *See id.*

some that freezing ownership rules in place or further tightening them can be justified based on a desire to promote ownership diversity. Furthermore, both historical evidence and logic lead to the inevitable conclusion that deregulatory changes in the local radio ownership rule will enhance, rather than reduce, opportunities for increased ownership of broadcast stations by women and minorities.[14]

II. RETAINING MEDIA OWNERSHIP RULES CANNOT BE JUSTIFIED BASED ON A DESIRE TO AVOID CONSTITUTIONAL ISSUES, AND ANY SDB DEFINITION MUST BE FORMULATED TO ACTUALLY ACHIEVE THE FCC'S STATED GOALS.

CU and UCC also take the position that continuing to restrict media ownership is appropriate as a means of avoiding the difficult constitutional questions that would be raised if the FCC sought to adopt a race- or gender-specific definition of a "Socially and Economically Disadvantaged Business" (or "SDB").[15] However, as discussed in Section I above, the FCC's biennial review mandate *precludes* it from maintaining the current media ownership rules intact, and it must seek to further minority and female ownership at the same time as it deregulates in response to Congress's unambiguous direction.

While failing to suggest an SDB definition of their own, CU and UCC also launch a series

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[14] The "study" attached to the *CU Diversity Comments* also purports to demonstrate that minority owners are more likely to air formats that appeal to minority audiences and that minority and female owners are more likely to be locally-owned. *See CU Diversity Appendix A*, at 54-55, 42. Basing a decision in this proceeding based on judgments regarding the particular programming formats aired by minority-owned stations would be, at best, constitutionally suspect. *See, e.g.*, Reply Comments of Clear Channel Communications, Inc. on FCC Media Ownership Research Studies, MB Docket Nos. 06-121, *et al.*, at 7-8 n.28 (filed Nov. 1, 2007) (explaining why the FCC cannot make regulatory decisions based on the content or viewpoint expressed by broadcasters and citing cases); *Clear Channel Media Ownership Comments*, at 51 & n.210 (explaining why the FCC cannot base a decision to retain the AM/FM subcaps on the type of programming typically aired on AM stations and citing cases). And, Clear Channel and others have already demonstrated why the FCC cannot require "local" ownership of radio stations. *See, e.g.*, *Clear Channel Media Ownership Reply Comments*, at 27-28 & nn.109-110.

[15] *See CU Diversity Comments*, at 37; *UCC Diversity Comments*, at 5-6.

of attacks on the SDB definition that Clear Channel proposed in its comments.[16] As an initial matter, Clear Channel wishes to clarify that, contrary to the apparent suggestions of CU and UCC, it did not mean to suggest that its proposed definition was the only one that the FCC could consider, or that it necessarily set forth *all* requirements that would govern SDB transactions. Rather, Clear Channel meant to provide the FCC with a starting point for consideration of this important issue, which no other commenter in this proceeding has yet meaningfully addressed. The definition as proposed in Clear Channel's prior filings would include any entity that:

> (1) Does not hold an attributable interest in more than fifty radio stations nationally and does not hold an attributable interest in any radio station in the local market where the transaction would take place, and
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> (2) Does not hold an attributable interest in more than six television stations nationally and does not hold an attributable interest in any television station in the local market where the transaction would take place.[17]

As explained in Clear Channel's reply comments on the *FNPRM* in this proceeding, the FCC's current definition of an "eligible entity," which includes those with less than approximately $6.5 million in annual revenue, has created almost no opportunities for new entrants to purchase broadcast properties. This is because of market dynamics and the problems that companies with that level of revenue face in raising necessary capital.[18] Indeed, in the four years since the definition became operational, and despite substantial efforts, Clear Channel has transferred only *one* grandfathered radio cluster to an entity meeting its requirements, and we do not believe that any

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[16] *See CU Diversity Reply Comments*, at 3-4; Reply Comments of United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and the Benton Foundation, MB Docket Nos. 06-121, *et al.*, at 3-7 (filed Oct. 16, 2007) ("*UCC Diversity Comments*").

[17] *Clear Channel Diversity Comments*, at 2 (citing *Clear Channel Media Ownership Reply Comments*, at 55-56).

[18] *See Clear Channel Media Ownership Reply Comments*, at 55-56.

other such transfers have occurred.[19] While the FCC might conclude that including a revenue cap in an SDB definition is appropriate, the reality that only one transaction involving an "eligible entity" has occurred to date conclusively demonstrates that the current cap is far too low.[20] Indeed, even UCC recognizes that any cap must be "high enough to ensure that the business will be viable," because "a successful broadcast venture requires significant capital investment."[21]

In arguing that Clear Channel's proposed definition would allow an unreasonably large number of incumbent broadcasters (or other companies) to qualify,[22] CU and UCC also overlook the fact that the definition closely tracks the definition contained in previously-introduced and currently pending tax certificate legislation.[23] Two bills – one sponsored by Representative Bobby Rush (D-IL) and the other by Representative Charles Rangel (D-NY) – are currently pending in Congress, and to the extent that the FCC wishes to look to such bills as a definitional model, it could of course consider adopting definitions similar to those contained in the pending legislation.[24] Furthermore, and also contrary to UCC's apparent suggestion,[25] Clear Channel does not oppose the

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[19] *See* FCC File No. BALH - 20070122ALB.

[20] *See Clear Channel Media Ownership Comments*, at 77-80.

[21] *UCC Diversity Reply Comments*, at 4. In a footnote, UCC argues that the current $6.5 million revenue cap is too *high*. *Id.* at 3 n.4. It is impossible, however, to square this contention with its recognition that a cap must be high enough to ensure business viability, in light of the high prices at which broadcast properties sell, *see Clear Channel Media Ownership Comments*, at 77-79, and UCC's separate recognition that operating a broadcast business is costly, *UCC Diversity Reply Comments*, at 4.

[22] *See CU Diversity Reply Comments*, at 3-4; *UCC Diversity Reply Comments*, at 3, 4-5.

[23] *See* H.R. 600 (introduced by Rep. Bobby Rush, D-IL); *see* H.R. 1473 (similar bill introduced in the 109th Congress). Senator John McCain has previously introduced similar bills. *See, e.g.*, Telecommunications Ownership Diversification Act of 2002, S. 3112.

[24] *See* H.R. 600, § 1071(f)(2); H.R. 3003, § 1071(d)(1)(A).

[25] *See id.* at 6-7.

inclusion of provisions designed to guard against "unjust enrichment," such as the type of holding periods that the pending bills contain.

III. THE FCC SHOULD REJECT ATTEMPTS TO OPPOSE PROPOSALS THAT WOULD FURTHER MINORITY OWNERSHIP.

CU, surprisingly, also opposes several of the proposals that would further broadcast ownership opportunities for women and minorities. Most notably, CU "strongly opposes" the proposal to allow a company to acquire more than the otherwise-allowable number of stations in a market where the company establishes an "incubator" program that substantially promotes ownership by SDBs.[26] CU contends that the proposal will have "no actual measurable immediate improvement in the state of SDB broadcast ownership," but this is simply incorrect.[27] As Clear Channel explained in its opening comments, adoption of this proposal would provide incentives to existing broadcasters to share their talent, experience, and/or financial resources, while at the same time promoting new entry by giving individuals interested in becoming broadcast station owners real-world experience in the industry.[28] Clear Channel continues to support rule waivers for companies who establish incubator programs, and urges the FCC to consider adopting this proposal.

While not mounting outright opposition, UCC questions the utility of allowing holders of expiring construction permits to transfer them to SDBs and allotting new owner a full three years from the date of closing to complete construction, raising concerns about how many permits would be covered.[29] Although the Commission may well have more extensive data, Clear Channel's own search of the FCC's database revealed that between 2005 and the present, approximately eleven

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[26] *CU Diversity Comments*, at 34.

[27] *See id.*

[28] *Clear Channel Diversity Comments*, at 2-3.

[29] *See UCC Diversity Reply Comments*, at 7-8.

commercial permits appear to have expired.[30] This represents eleven permits that could have been transferred to new entrants over a period of less than two years.[31]

IV. CONCLUSION

In sum, Clear Channel supports efforts – both specific, narrowly-tailored and well-defined regulatory efforts and voluntary industry activities – designed to further the important policy of promoting ownership of radio stations by women, minorities, and small businesses. The Commission, however, must adopt such initiatives alongside of the deregulatory changes that Congress mandated in Section 202(h) of the 1996 Act, and must therefore reject contentions that maintaining or tightening media ownership restrictions is an appropriate means to further that goal.

Respectfully submitted,

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[30] This total includes both permits that expired and those that were cancelled before they expired, because the permittee turned them in due to inability to construct during the allotted time period.

[31] Clear Channel also continues to urge the Commission to waive the requirement that a licensee operating a radio station in the expanded AM band return one of its AM allotments for cancellation on the fifth anniversary of the date on which the Commission issued the expanded AM band license when the licensee assigns or transfers control of one of its AM stations to an SDB. *See Clear Channel Diversity Comments*, at 3-4. Clear Channel believes that adoption of this proposal would make an additional twenty to twenty-four permits available for purchase by new entrants.