Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 1997	)	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
	)	
Ways to Further Section 257 Mandate to Build on Earlier Studies	)	MB Docket No. 04-228
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360

To: The Commission

JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

Beasley Broadcast Group, Inc., Citadel Broadcasting Company, Entercom Communications Corp., Galaxy Communications, L.P., Great Scott Broadcasting and Greater

Media, Inc. (collectively the "Joint Parties"),[1] by their attorneys and pursuant to Section 1.429(f) of the Commission's rules, hereby oppose the arguments relating to the FCC's local radio multiple ownership rule[2] made by the Institute for Public Representation ("*IPR*")[3] in the March 24, 2008 Petition for Reconsideration (the "*Petition*") of the Commission's Report and Order and Order on Reconsideration in the above captioned proceeding, released February 4, 2008 (the "*2008 Order*"). For the reasons set forth herein, the Joint Parties believe that IPR's requests that the FCC tighten the numerical limits in the current local radio ownership rule and eliminate grandfathering of current station ownership clusters are not supported by evidence in the underlying record, and that IPR's claim that the Commission's determinations in this regard are arbitrary and capricious is without support and should be denied.

In the *2008 Order*, the Commission concluded that the current local radio ownership rule "remains 'necessary in the public interest' to protect competition in local radio markets."[4] In *Prometheus Radio Project v. FCC,* 373 F.3d 372 (3rd Cir. 2004) ("*Prometheus*"), the court reviewed, *inter alia*, the Commission's determination in the *2002 Biennial Regulatory Review Order*[5] to retain the specific numerical limits within size-tiered markets contained in the local

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[1] The joint parties and their subsidiaries and affiliates are the licensees of 412 radio stations located throughout the United States.

[2] 47 C.F.R.§ 73.3555(a).

[3] IPR's Petition was filed on behalf of Common Cause, the Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, James J. Elekes and National Hispanic Media Coalition.

[4] *2008 Order* at ¶ 110 (quoting Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-112) ("The Commission shall review its rules adopted pursuant to this section … biennially … and shall determine whether any of such rules are necessary in the public interest as the result of competition.").

[5] 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, *Report and Order*, 18 FCC Rcd. 13620 (2003) ("*2002 Order*").

radio ownership rule but to modify the method for determining local markets to use geographic-based Arbitron markets rather than the contour overlap method that had been employed previously. As Petitioners acknowledge, the *Prometheus* court upheld the Commission's reliance on a system based upon numerical local radio ownership limits,[6] finding that the establishment of a numerical limit was rational, in the public interest, and supported by substantial evidence.[7] However, the court concluded that the Commission had not shown that the specific numerical limits enacted by Congress in 1996 and retained by the Commission in its *2002 Order* were justified under a reasoned analysis. In particular, the court concluded that the Commission's reliance on game theory principles to produce markets with five equal-sized competitors did not rationally support the particular numerical benchmarks retained, and failed to demonstrate that application of the specified limitations had or would achieve the desired results.[8] The Commission was therefore charged on remand to develop numerical limitations supported by a reasoned analysis.[9]

In the *2008 Order*, the Commission, consistent with both the court's direction and the Commission's statutory mandate, carefully reviewed the entire record in the proceeding and determined that it was appropriate to maintain the existing local radio ownership limitations.[10] The Commission specifically explained:

> In so concluding, we depart from the Commission's rationale in the *2002 Biennial Review Order* that the existing limits are appropriate because they allow for roughly five equal-sized firms in each market. Instead, we

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[6] *Pet.* at 14.

[7] *Prometheus*, 373 F.3d at 431-432.

[8] *Id.* at 433-434.

[9] *Id.* at 434.

[10] Although the record may have supported further FCC relaxation of its multiple ownership rules, the only issue presented here is whether the agency's decision not to tighten the rules is sustainable.

> rest our decision on our conclusion that relaxing the rule to permit greater consolidation would be inconsistent with the Commission's public interest objectives of ensuring that the benefits of competition and diversity are realized in local radio markets. Making the numerical limits more restrictive would be inconsistent with Congress' decision to relax the local radio ownership limits in the 1996 Telecommunications Act and would disserve the public interest by unduly disrupting the radio broadcasting industry.[11]

The Commission further explained that "[t]he evidence in the record indicates that retaining the numerical limits at the current level is necessary to protect against excessive market concentration."[12]

IPR claims that "a rational analysis of the record in light of the local radio rule's purpose requires the FCC to lower the local radio ownership limits."[13] Moreover, IPR claims that "[t]o satisfy *Prometheus's* mandate, the FCC must at least consider whether lowering the local radio limits would better serve the public interest by creating competitive local radio markets."[14]

In fact, the Commission did consider this question. The Third Circuit's decision was issued in June 2004. The *2008 Order* was adopted three and a half years later in December 2007. The Commission engaged in a comprehensive, deliberative process and reviewed the voluminous record underlying its *2002 Order,* not merely the limited comments and studies cited by IPR. A few commenters urged the FCC to tighten the local radio ownership limits.[15] Other parties submitted expansive comments and comprehensive studies to demonstrate that the public

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[11] *2008 Order* at ¶ 117.

[12] *Id.* at ¶ 118.

[13] *Pet.* at 15.

[14] *Id.*

[15] *See 2008 Order* at ¶ 119 (citing Joint Comments of Office of Communication of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, and Benton Foundation; and Comments of Future of Music Coalition and American Federation).

interest supports *relaxation* of the numerical limits contained in the radio ownership rules. For, example, the National Association of Broadcasters ("NAB") explained:

> [T]he overwhelming weight of the record evidence now shows that the local ownership regulations are simply not necessary to promote the Commission's traditional goals of competition, diversity, and localism. Modern-day competition has fragmented audiences and eroded the advertising revenue that is critical to free, over-the-air broadcasting. Because current ownership limits inhibit broadcasters' ability to respond to changing market forces by creating more efficient ownership structures, many stations (especially those in smaller markets) are today facing grave economic difficulties.
>
> The evidence also establishes that concerns of "undue consolidation" are unfounded; the "information" industry is by all objective standards unconcentrated, relative to other American businesses, and the broadcast sector of that industry is actually the *least* concentrated of the sectors. Permitting more flexible ownership arrangements would enable struggling broadcasters to offer competitive advertising packages and to take advantage of cost-saving efficiencies and economies of scale to better position themselves in the modern marketplace, thereby supporting increasingly costly high quality local news and public affairs programming and, ultimately, the public interest.[16]

The Commission concluded that further relaxation of the numerical limits was unwarranted and that "additional consolidation would not serve the Commission's competitive goals."[17] And, "based on examination of the current record," the Commission also found "that making the numerical limits more restrictive is not justified."[18] Further tightening of the limits, the Commission determined, would be a "significant shock to the market,"[19] and would not serve the public interest because doing so "would undermine the benefits that consolidation has

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[16] *Reply Comments of the National Association of Broadcasters* (Jan. 16, 2007) at 3-4. *See also Reply Comments of CBS Corporation* (Jan. 16, 2007) at 11-12 (supporting proposal to permit an entity in a local market with 60 to 74 stations to own up to 10 radio stations, and an entity in a market with 75 or more stations to own up to 12 radio stations) ("*CBS Reply Comments*").

[17] *2008 Order* at ¶ 118.

[18] *Id.* at ¶ 119.

[19] *Id.* at ¶ 120.

brought to the financial stability of the radio industry."[20] The Commission explained that "[w]hile it is not our mandate to assure the profits of a given media sector, we are concerned with financial stability insofar as it assures the continued service that the public has come to expect."[21]

IPR also challenges the Commission's determination to retain the current local radio ownership limits on the grounds that the FCC did not adequately consider whether lowering the ownership limits would promote diversity and advance opportunities for minorities and women to own broadcast stations, and that the FCC's localism analysis was flawed.[22] IPR's claims are simply not supported by either the record or the mandate of the *Prometheus* Court, and fail to recognize the deference courts accord administrative agencies in such instances.[23] The Third Circuit directed only that the Commission provide a reasoned analysis to support the specific numerical limits, not the precise factors that had to be considered as part of this analysis or the weight given to any factors evaluated.

The Commission thoroughly evaluated the record, which is replete with examples of how efficiencies that flow from operating multiple stations in a market have promoted localism and diversity.[24] As the NAB emphasized:

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[20] *Id.* at ¶ 119.

[21] *Id.* at n.384.

[22] *Pet.* at 16-19. IPR's assertion that "[t]he Third Circuit also *directed* the FCC 'to consider [ ] proposals for enhancing ownership opportunities for women and minorities,'" *Pet.* at 17 (emphasis supplied), is an overstatement of the Court's suggestion. *See Prometheus*, 373 F.3d at n.82. In any event, the Commission has issued a Report and Order with respect to these proposals. *See* In the Matter of Promoting Diversification of Ownership in the Broadcasting Services, *Report and Order and Third Further Notice of Proposed Rulemaking*, MB Docket No. 07-294 (*rel.* Mar. 5, 2008).

[23] *See SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

[24] *See Comments of National Association of Broadcasters* (Oct. 22, 2007) at 19-27 (citing empirical findings in studies conducted by the FCC that common ownership of radio stations

> [S]tudies have found that the Commission's media ownership rules may be *ineffective* in producing diversity and may be counterproductive in ensuring that many points of view are heard. Whereas there is no evidence that the outmoded broadcast ownership rules have enhanced diversity as opponents claim, numerous studies repeatedly have concluded that *common ownership* has *increased* the diversity of programming and content.[25]

Commenters also emphasized that economically viable broadcasters are better able to focus their efforts on developing high quality local news and public affairs programming but that existing competitive pressures under which broadcasters operate are eroding advertising revenues and placing stress on the ability of radio broadcasters to continue to provide the same amount of high-cost local programming they currently provide.[26] Based on such evidence, the Commission reasonably concluded that tightening the numerical limits could undermine the efficiency gains that bolster the stations' financial stability and enhance their ability to "provide their local communities with quality programming."[27]

When reviewing statutory mandates established by Congress, the Commission must accord deference to the language of the statute and the applicable underlying principles.[28] In support of the 1996 relaxation of the radio ownership limits, several members of Congress observed that ownership restrictions previously placed on radio broadcasters had been adopted

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promotes programming diversity and does not harm competition); *see also CBS Reply Comments* at 11-12 ("Stations that are not operating close to the margin can afford to be less risk-averse and are therefore more likely to experiment with new types of programming and formats.").

[25] *NAB Reply Comments* at 37-38 (internal quotations and citations omitted).

[26] *See, e.g.*, *id.* at 36 and 46.

[27] *2008 Order* at ¶ 120.

[28] *See Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) (cautioning against agency constructions that "frustrate the policy that Congress sought to implement").

prior to the explosion in other sources of entertainment that was well underway in 1996.[29] Over ten years later, the increase in sources of audio, mobile, and wireless entertainment available to consumers continues unabated. The Commission correctly gave substantive weight to the intent of Congress and proceeded cautiously in its review of the radio ownership limitations. IPR, using circuitous reasoning, contends that the Commission's deference to the specific limits established by Congress somehow "contradicts" Congress's intent in Section 202(h) that the Commission periodically review the continuing validity of the ownership limits.[30] In the *2008 Order,* the Commission has in fact conducted the review required by Congress, reconsidered certain aspects of its rules, and concluded that "retaining the current numerical limits strikes the appropriate balance between protecting competition in local radio markets and enabling radio owners to achieve efficiencies through consolidation of facilities."[31]

Finally, IPR has confused the Commission's fully supported justification in the *2008 Order* for grandfathering ownership groups which had been lawfully acquired under the "contour overlap" method of defining a local radio market and the purely hypothetical grandfathering decision the FCC would have needed to make if the FCC had concluded that it should now tighten the numerical ownership limitations.[32] In connection with the *2002 Order*, this issue arose not in the context of a change in numerical ownership limitations, but rather in the revision of the methodology employed to define the relevant radio market; in the matrix of factors considered in that context, the Commission concluded that the proper balance of the many

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[29] *See* Statement of Sen. Lott at 141 Cong. Rec. S7906 (daily ed. Jun. 7, 1995) (urging reformation of ownership restrictions imposed "during a bygone era"); *see also* Statement of Sen. Pressler at 141 Cong. Rec. S8076 (daily ed. Jun. 9, 1995) ("The financial health and competitive viability of the Nation's radio industry is in our hands.")

[30] *Pet.* at 20.

[31] *2008 Order* at ¶ 122.

[32] *Pet.* at 22.

countervailing concerns was best served by adoption of a "transfer restriction." In other words, existing combinations newly defined as non-compliant clusters were grandfathered -- i.e., not required to be divested -- but they could not be transferred thereafter intact to a single entity or owner other than certain "eligible entities."[33] This determination was upheld by the Third Circuit over objections that it was arbitrary and capricious and violated the Constitution.[34] The Court specifically found that the transfer restriction was "in the public interest" under the mandate of §202(h) and represented reasoned decision making.[35]

Now, under a different matrix of factors that would be relevant only if the Commission had tightened the radio limitations, the Commission has again recognized that there are "negative policy consequences" to grandfathering that would need to be considered if the ownership limitations were to be changed.[36] But any decision regarding grandfathering concerns at this time demands a separate calculus, and, in the absence of a current analysis, has no proper retrospective application to the resolution of the distinctive factors which were considered by the Commission in 2003, as upheld by the Third Circuit. In fact, the balance of factors that led the Commission to adopt grandfathering with the transfer restriction in 2003, including the massive disruption that would occur if grandfathering were eliminated, remains very much in place today. IPR's assertions to the contrary are unsustainable.

For the reasons set forth above, the Joint Parties have demonstrated that the Commission's determination in the *2008 Order* to retain the current local radio ownership limits is proper and supportable by the record. In contrast, IPR's claims that the Commission's

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[33] *2002 Order*, 18 FCC Rcd. at 13809.

[34] *See Prometheus*, 373 F.3d at 427.

[35] *Id.*

[36] These concerns are not dissimilar to the reservations expressed by the Commission in the *2002 Order*. *Compare 2002 Order*, 18 FCC Rcd. at 13808-09 to *2008 Order* at ¶ 121.

determination in this regard fails to satisfy the obligation for reasoned analysis is not supported by the entire record. Accordingly, IPR's request for reconsideration of the Commission's holdings with respect to the local radio ownership rule should be denied.

Respectfully submitted,

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May 6, 2008

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CERTIFICATE OF SERVICE

I, Genevieve Edmonds, hereby certify that a copy of the foregoing "Joint Opposition to Petition for Reconsideration" was sent by first-class, postage prepaid mail, this 6th day of May, 2008, to the following:

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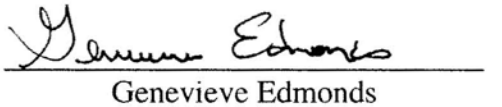

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