Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
2010 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. 09-182
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294

To: The Commission, Office of the Secretary

COMMENTS OF THE MID-WEST FAMILY STATIONS

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SUMMARY

By these comments, Mid-West Family Stations ("Mid-West Family") raises two issues for the Commission's consideration as it reviews the broadcast ownership rules. First, Mid-West Family requests that the Commission clarify the question of grandfathering interests in existing station combinations where a transfer of control is occasioned by the death or other departure of an existing owner, and the transfer is to other existing owners pursuant to contract, rather than by will or intestacy. While the Commission's current ownership rules appear to grant such grandfathering protection, it is essential that this protection apply to transfers by contract, especially in the unique circumstances of closely-held entities where a transfer is caused by the death or other departure of a principal shareholder or shareholders. Second, Mid-West submits that the Commission should revise its Arbitron-based market definition to reflect marketplace realities and differences between the reach of stations in a market. Mid-West Family urges the Commission to carefully consider these issues as it considers the media ownership rules in this rule making proceeding.

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COMMENTS OF THE MID-WEST FAMILY STATIONS

The Mid-West Family Stations ("Mid-West Family") hereby submits comments in response to the Commission's Notice of Proposed Rule Making in the above-referenced proceeding (the "NPRM").[1] By its NPRM, the Commission has set forth its proposals regarding the media ownership and cross-ownership rules, and requested comments about its tentative conclusions. The NPRM also solicits suggestions regarding changes or revisions that may be advisable to the broadcast multiple ownership rules in order to further the Commission's goals of competition, localism, and diversity. Mid-West Family, by these comments, raises two issues for the Commission's consideration as it undertakes this quadrennial review.

First, in considering changes to the radio multiple ownership rules, Mid-West Family requests that the Commission clarify the question of grandfathering interests in existing station combinations where a transfer of control is occasioned by the death or other departure of an existing owner, and the transfer is to other existing owners pursuant to contract, rather than by will

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[1] *2010 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,* Notice of Proposed Rule Making, MB Docket 09-182, FCC 11-186 (Dec. 22, 2011) ("NPRM").

or intestacy. As set forth herein, this change is necessary to encourage local ownership of stations by those directly involved in their operation. In adopting its 2003 radio multiple ownership rules, the Commission granted some licensees grandfathering protection from divestitures required by changes to the multiple ownership rules, where such divestitures would be triggered by certain events.[2] The application of this grandfathering to transfers by contract in closely held corporations, as opposed to by will or through intestacy, however, was unclear. Accordingly, in 2003 Mid-West Family sought clarification of the Commission's decision in the unique circumstances of closely held entities where a transfer is caused by the death or other departure of a principal shareholder or shareholders, but where stock passes to other existing shareholders of the company by virtue of a contract rather than through will or intestacy.[3] The Commission never specifically addressed the issues raised in that reconsideration filing, and, although the public policy basis for such a result appears clear, Mid-West Family requests that the Commission bring certainty to this question by addressing the situation as it once again considers changes to the broadcast ownership rules.

Second, as detailed herein, the Commission should revise its Arbitron-based radio market definition to reflect marketplace realities and differences between the coverage of stations in a market. As discussed below, these issues hold the potential to significantly impact Mid-West Family and other similarly situated broadcast companies, especially in small and mid-sized

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[2] *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*, Report and Order, 18 FCC Rcd 13620 (Aug. 5, 2003) at footnote 1045 (hereinafter, "2003 R & O") (stating that the Commission does not intend to restrict the transfer of a grandfathered combination "to heirs or legatees by will or intestacy if no new violation would occur").

[3] *See* Mid-West Family Station's Petition for Reconsideration filed in response to the Commission's Report and Order *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*, 18 FCC Rcd 13620 (Aug. 5, 2003).

markets. Accordingly, Mid-West Family urges the Commission to carefully consider these issues as it reviews its media ownership rules.

BACKGROUND

Mid-West Family is a group of related companies that operate 36 radio stations, licensed to 20 Midwestern communities, operating in five regional clusters. Mid-West Family prides itself on having integrated its local management into station ownership, so that the responsiveness of the licensee to local concerns is highlighted. Thus, in each market, a different corporate entity holds the licenses.[4] The shareholders in each company are either station employees or others with some direct involvement in the management and operation of the stations. If a shareholder no longer has any involvement with the operation of the Mid-West Family stations, he or she is contractually obligated to sell their stock to the company or to other qualified shareholders. Senior management in each local station is given an opportunity, and encouraged, to make an investment in their own stations, thereby giving them a direct stake in making their stations truly responsive to their communities. By almost any objective measure, the Mid-West Family stations are characterized by their strong commitment to covering local events and being integral participants in their local communities.

[4] The Mid-West Family companies, and the geographical areas in which they operate, are as follows: Mid-West Management Inc. (Madison, Wisconsin), Family Radio, Inc. (LaCrosse Wisconsin), Long Nine, Inc. (Springfield, Illinois), MW Springmo, Inc. (Springfield, Missouri), and WSJM, Inc. (Southwestern Michigan).

DISCUSSION

I. THE COMMISSION SHOULD CLARIFY THAT THE CONTINUED GRANDFATHERING OF EXISTING COMBINATIONS OF STATIONS APPLIES EQUALLY TO INTERESTS THAT PASS BY CONTRACT IN CLOSELY HELD COMPANIES AS IT DOES TO INTERESTS THAT PASS PURSUANT TO WILL OR INTESTACY.

Among the issues raised by the NPRM in connection with the local radio ownership rules is the question of whether the Commission should adopt a specific waiver standard for the local radio rules, or else continue to consider such waivers on a case-by-case basis under the Commission's general waiver standard.[5] Mid-West believes that in crafting its waiver standard for the local radio ownership rules, one existing waiver or exemption from the local radio ownership rules that the Commission must be clarified or expanded by the Commission to ensure that the ownership rules do not have an unintended negative impact on existing radio groups and the furtherance of the paramount goal of localism. Clarifying this existing exemption in the manner discussed below will ensure that the Commission's rules treat similarly situated applicants consistently and to the benefit of the public interest.

In its *2003 Report & Order*, the Commission recognized that the public interest does not favor breaking up existing combinations of stations upon the death of a majority shareholder, especially in closely held corporations or other business entities. Thus, the Commission's rules make specific allowance for the continued grandfathering of existing radio station combinations when control of the stations is passed pursuant to a will or intestacy. However, the Commission's *2003 Report & Order* did not address a similar circumstance common in certain closely held businesses, where partners or shareholders have the right and the obligation, by contract, to buy out the interests of other owners upon their death, or upon their departure from the company for

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[5] NPRM at ¶ 81.

other reasons. These provisions insure that the businesses continue to be run by those already involved in their operations, so that the business does not have to deal with absentee or uninvolved owners who may otherwise have inherited the interest through will or intestacy, or may have gone on to other activities competitive with the company or totally divorced from it.

Throughout its history, Mid-West Family has fostered a strong connection between its stations and their communities by selling company stock to the local station managers, and requiring that all company stock be held by someone with a day-to-day connection to the stations, whether at a local or corporate level. Mid-West Family has built clusters of stations on the expectations of its owner-employees that this mechanism will ensure continuity of ownership by individuals invested in the operation and success of the stations. Through the death or departure of employees and the Commission's grandfathering rules, however, some of the investment expectations of these closely held companies may be upset, thus upsetting the local service provided by these stations.

All of the Mid-West Family companies have agreements in place intended to preserve the ownership of the companies in the hands of those actively involved in the business in some form or another. These agreements provide that, upon the death of a shareholder (or his or her becoming uninvolved with Mid-West Family properties), the stock that he or she owns in the company will be purchased by the company pursuant to an agreed-upon price established yearly by the company. In certain instances, the death of a long-term shareholder, or the death or departure of more than one such shareholder, and the subsequent repurchase of that stock by the company, could result in a long-form transfer of control of the company, even though the company continued to be controlled by its employees and others active in the business. This

would be true even though there was no real "sale" of the company and no real change in its operations and management.[6]

Mid-West Family has prided itself on giving opportunities to its long-term employees to buy into the ownership of the company for which they work, or into other companies within the group. It believes that this policy nurtures a spirit of "localism" at its facilities. Moreover, it encourages the development of new, younger employees who grow with the company and become owners as the veteran employees retire or pass on. Employee ownership creates an important bond between the employee and the company, and more importantly, promotes a better radio product as long-term employee-owners are concerned with developing radio properties that serve the communities in which they live. As owners, these employees have a personal stake in the service that their stations provide to local communities. When someone in a community complains about a radio station's operation, the employee cannot blame that problem on some absentee owner if they are in fact an owner of the company. This ownership policy has resulted in companies with a real commitment to local service in their communities, and in employees with a long-term commitment to their stations and the communities that the stations serve. Providing employees with the ability to grow and be involved in the company has been instrumental to the company and has truly served the goals of localism.

Throughout their careers, employees can accumulate stock in the companies for which they work. Some life-long employees may end up with significant blocks of stock in some of these

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[6] This is not a hypothetical issue. William Walker, one of the founding shareholders of the Mid-West Family, passed away in July 2003, shortly after the previous changes to the ownership rules were adopted. As a shareholder for over 40 years, Mr. Walker had accumulated large blocks of stock in several of the Mid-West companies, at least one of which would not be complaint with the new multiple ownership rules. While his death did not cause a transfer event with respect to that company, the death or departure of another shareholder of any significance in that company, in connection with the repurchase of Mr. Walker's stock, may result in such a transfer triggering the problems discussed herein.

companies. Upon their death or departure from the company, that stock is repurchased by the company so that it may then be reissued to younger employees who are rising through the ranks, and who will one day hold a majority of the company's stock. In this way, the companies ensure their stability and continuity as the younger employees gain experience and seniority, and gradually assume ownership.

These employees, with an ownership stake in the stations for which they work, tend to become loyal, long-term employees, invested in the success of their stations, and with deep ties to the communities that the stations serve. They are no longer just an "employee" who may upon a whim or an offer of a few dollars more, pick up stakes and move to a new station in a new city. Instead, the employees stay at "their" stations and grow with the station and the community. However, as shareholders grow older and have accumulated more stock, and as new younger shareholders acquire new interests, a transfer event may occur. In some cases, the death or departure of a shareholder with significant holdings, and the subsequent repurchase of that stock by the company, may be the cause of that transfer event. If the Commission does not extend the existing grandfathering protections to stock interests that pass pursuant to contract in closely held corporations and other business entities, as opposed to through wills or estates, the younger shareholders of these companies, whose interests grow as older shareholder die or retire, will be severely impacted by forcing unplanned divestitures of existing radio properties held by the group. Mid-West Family submits that this forced divestiture is not in the public interest, and would potentially injure the localism that these employee ownership plans engender. This simply was not the type of sale that the Commission intended to cover by its rules requiring divestiture. Thus, Mid-West Family submits that the Commission should clarify this issue as it reviews its local radio ownership rules.

In its *2003 Report & Order*, the Commission stated that it was adopting its grandfathering rules because forced divestiture would "unfairly penalize parties who in good faith bought stations in accordance with the Commission rules."[7] The Commission went on to say that parties should be given the opportunity to retain the value of the investments made in good faith reliance on the rules that were in existence at the time of those investments. In prohibiting the transfer of non-compliant groups, the Commission found that, in the normal case, this would not work an undue hardship. In reaching this conclusion, it looked at the ability of prospective buyers, who are now aware of the provisions of the new rules, to be able to plan their business strategies to comply with these new rules. Thus, new buyers would not be harmed if stations must be divested to bring the prospective buyer into compliance with the new rules.

In contrast, the situation of a closely held business, where the owners have shareholders agreements or similar contracts allowing, and in fact often compelling, the repurchase of their business associate's interest in the broadcast company upon death or departure, is not like that of a prospective new owner, purchasing a group of stations fully aware of the provisions of the new rules and able to structure their business deal accordingly. Instead, the owners already in the business, who will experience an increase in their percentage of ownership because of the repurchase of their departing associate's interests, have already made their investment decision – they have bought their existing interest in the company and made the investment decision to spend their time and money developing a particular cluster of stations. Because of the actions of another – often the involuntary actions of their associates (*e.g.* upon their death) – the remaining investors have not had the opportunity to plan their future ownership based on the new rules. Instead, they are thrust into a situation where, contractually, they or their companies must repurchase the

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[7] *2003 Report & Order* at ¶ 484.

interest of the departing associate. Such repurchase may be at a fixed price determined based on the value of the existing cluster, a value which may well adversely change if a forced divestiture is required. It would be unfair to these remaining owners to force them to suffer the financial strains of a repurchase of a departing shareholder's interest and an unplanned divestiture of an existing property at the same time. Similarly, it might be unfair to the estate of a shareholder who passes away, as a forced divestiture could adversely impact the value of the existing combination of stations. This will upset both existing business relationships and investment expectations.[8]

In allowing parties who acquire interests through a will or by intestacy to retain those interests even if they are non-complaint with the new rules, the Commission has recognized the unfairness of forced divestitures in these circumstances. The same logic that applies to those situations should apply to the contractual passing of stock or other ownership interests to other existing owners in closely held corporations and other business entities. In both cases, the transfer, with respect to the remaining shareholders, is not caused by a voluntary act by the shareholders.[9] Forced divestitures in this context would not serve the public interest, and would be inconsistent with the objective of industry stability that the Commission has tried to achieve through the grandfathering provisions of the new rules.

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[8] This is not an exception that would be limited to the unique ownership structure of a group like Mid-West. In many partnerships or closely held corporations, co-owners have contractual rights to acquire the interests of their partners if, for any reason, those partners decide to leave the business. Where there remains a continuity of ownership in such a closely held company, there should not be a forced divestiture of stations in existing combinations merely because of the death or retirement of one owner in such a company. That could have a dramatic detrimental effect on his or her partners in the closely held business.

[9] Commission precedent supports this conclusion. *See, e.g.*, Rose Broadcasting Co., 68 FCC 2d 1242 (1978), where the Commission found that the distribution of stock to an estate, and its subsequent sale by the estate to an existing owner of the applicant company, was the equivalent of the stock passing from the estate directly to its beneficiaries. In that case, the transfer out of the estate was treated as "involuntary" for purposes of permitting an application to retain its cut-off status after the death of a principal shareholder.

Therefore, the Commission should expand the existing exceptions to the required divestiture of non-compliant interests and permit closely-held companies to retain ownership of existing interests, even though there has been a long-form transfer of control, if control is retained by existing owners pursuant to a contractual buy-out provision triggered by the death or other severing of the departing owner's ties to the broadcast licensee company.

II. THE COMMISSION'S USE OF ARBITRON RADIO MARKETS IN ITS LOCAL RADIO OWNERSHIP RULE FAILS TO FULLY CONSIDER MARKETPLACE REALITIES.

The NPRM tentatively concludes that the current market definition of a radio market should be retained, along with the existing market size tiers and numerical limits.[10] Mid-West Family submits that the Commission should revise its current market definition to better reflect marketplace realities, particularly the coverage differences among stations. Such an approach would more accurately "reflect the actual options available to listeners and will reflect market conditions facing the particular stations in question,"[11] a goal previously espoused by the Commission in connection with its ownership rules. In defining "markets" for multiple ownership purposes based on Arbitron-defined radio markets, the Commission's approach overlooks distinctions in the size, revenue, and audience share of radio stations. Moreover, it is inconsistent with the guidance provided by the United States Court of Appeals for the Third Circuit in *Prometheus Radio Project, et al. v. Federal Communications Commission* [12] that the Commission must consider marketplace realities in setting ownership rules -- it cannot blindly assume that all stations are equal.

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[10] NPRM at ¶¶ 67-74.

[11] *Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992) at ¶ 10.

[12] *Prometheus Radio Project, et al. v. Federal Communications Commission*, 373 F.3d 372 (3rd Cir. 2004).

The Commission's current market definition fails to consider these real-world differences that exist among the various classes of radio stations. For example, under the Commission's market definitions, a small Class A FM station licensed to an outlying community counts exactly the same as a large Class C FM station located in the heart of the market, though clearly such signals are not equal in terms of their signal strength or their impact on marketplace diversity. Undoubtedly, the Commission is fully aware that Class A and Class C stations have very different coverage characteristics. Simply stated, Class A stations reach fewer listeners. Accordingly, the Commission's market definition and any numerical limitations on the combination of stations in a market should take these fundamental differences into account.

The Third Circuit emphasized Commission's oversight in this regard, as it repeatedly faulted the Commission in the *Prometheus* case for failing to utilize "actual-use data" or "actual market share" to inform its drawing of lines as to permissible and impermissible media combinations.[13] Among the issues that gave rise to the court's remand of the Commission's radio ownership rules in 2004 was the failure to take actual market share into account. In the context of the local radio ownership caps, the court expressly noted that the Commission "does not explain why it could not take actual market share into account when deriving the numerical limits," and that "the Commission's reliance on the fiction of equal-sized competitors, as opposed to measuring their actual competitive power, is even more suspect in the context of the local radio rule."[14] As a result, the court remanded the local radio numerical limits "for the Commission to develop numerical limits that are supported by rational analysis."[15] Despite the Court's admonition, this review has never been done. Thus, as part of its current review and reformulation

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[13] *Prometheus*, 373 F.3d 408-09, 419-420, and 434.

[14] *Id*. at 434-444.

of its radio ownership rules, it is incumbent upon the Commission to take the court's instructions into account and to create a market approach that reflects the realities of the particular market.

Unlike in the television context, where cable and satellite carriage may offset a weak over-the-air signal to some degree, in radio, the signal alone determines whether or not a station can be heard. In many geographically large markets, it may take multiple low-power radio facilities to cover a market that could easily be covered by a single high-power station. Yet the Commission's Arbitron methodology considers each station to be identical, regardless of its coverage area or market share. The Commission's previous contour-overlap methodology allowed for these differences by focusing on the actual signal coverage of the stations at issue. Two Class A stations, which did not overlap, would not be twice counted against a licensee under the old contour-overlap methodology, as they are under the new method. The threat to competition is made far worse by not taking audience reach into account under the Arbitron market definition. For example, a single media conglomerate could own all four Class C stations in a given market, while a smaller competitor could not own five Class A stations, despite the fact that the Class A stations might not cover the area of a single Class C station. Punishing smaller broadcasters, who cannot necessarily afford to purchase the limited number of large Class C stations in a market, but who still wish to provide diversity and competition in the market via smaller stations, is contrary to the public interest and the Commission's goals of competition, localism, and diversity.

One possible approach to account for the disparity in the geographic reach of stations would be to assign a value for a station based on its geographic coverage or class of station. For instance, a large Class C station would count as one full station for purposes of determining

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Footnote continued from previous page

[15] *Id*.

compliance with the applicable cap, whereas two small Class A stations, each covering approximately half of the geographic area of the market, would each count as half a station or together as one full station. In this way, the Commission's counting of stations for purposes of the radio multiple ownership rules would consider the reality of a station's reach.

CONCLUSION

For the reasons set forth above, Mid-West Family respectfully requests that the Commission include these changes or clarifications in its radio ownership rules.

Respectfully Submitted,

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