

December 8, 2000

CONCURRING STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: In the Matter of Definition of Radio Markets, Notice of Proposed Rulemaking

I concur in the decision today to conduct a Notice of Proposed Rulemaking (NPRM) for the limited purpose of harmonizing the counting methods we use to determine both the size, and the number of stations in a radio market that count toward the ownership cap set forth in Section 202(b)(1). To the extent that this NPRM addresses what may be an arbitrary distinction between counting methods, I support its issuance. I do, however, caution the Commission to avoid using the rulemaking process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended.

The NPRM asks whether the Commission should adopt a *different* (and more restrictive) method for determining the relevant market because our current definition “may undermine the structure of the statute” and produce results “that are not in the public interest.” My single greatest problem with this proposal is one of statutory interpretation. The effect of eliminating the Commission’s current methodology and replacing it with a commercially defined market (such as Arbitron) would be to shrink markets, and thereby substantially limit the number of stations one could own. When Congress adopted its radio ownership caps, Commission regulations defined these markets in a particular way. That way was the law of the land. The Arbitron market definitions were in existence, but they were not used for regulatory purposes, and Congress did not specifically incorporate them. I believe proper statutory interpretation would lead one to conclude that Congress set its numerical limits against the market definition that prevailed in regulation at the time, and not a definition that had not been used for this purpose previously.¹

For this reason, I concur in today’s decision for the sole purpose of correcting what may be an arbitrary counting methodology for determining the size and number of stations one may own in a local radio market.

¹ “It is a commonplace of statutory construction that the specific governs the general,” *Morales v. Trans World Airlines*, 504 U.S. 374, 384-385 (1992) (citing, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).