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Statement of Commissioner Susan Ness
Mass Media Bureau Approval of Various Radio License Transfer Applications

Today's approval by the Mass Media Bureau of dozens of long-pending radio license transfer applications underscores the breathtaking consolidation of the radio industry since the passage of the Telecommunications Act of 1996, and the critical need for an over-arching Commission policy for processing radio license transfer applications fairly and expeditiously. This action, however, should not be viewed as the beginning of *carte blanche* approvals, but rather as the end of undue government delay. It is unfair for the Commission to hold applications -- in some cases for over two years – while pondering how to address difficult cases. These Bureau decisions, therefore, should not be viewed as Commission validation of extraordinary levels of market ownership concentration being in the public interest. Indeed, while this Agency had to address the backlog of broadcast transactions as a matter of procedural fairness, it would have been far better for these decisions to be accompanied by a formal announcement of concrete steps toward a coherent and sustainable Commission radio merger policy.

Consolidation in the Radio Industry

Since passage of the Telecommunications Act of 1996, the commercial broadcast radio industry has undergone sweeping consolidation. For an industry that for decades was marked by local ownership, entrepreneurship and small, family owned businesses, the recent emergence of two or three dominant national radio companies represents a fundamental transformation of this media industry. Indeed, according to BIA, the number of unique station owners has plummeted by 18% over the past five years. "As the ownership picture crystallizes into consolidated entities, the so-called "Mom and Pop" type radio business, once the foundation of the radio economy and found in the smallest to the largest markets, has all but disappeared." [1]

Just five years ago, with a few exceptions, no single entity could own more than 20 stations in the same service nationally. Even in the largest markets, an entity could own no more than two stations in a single service and could not exceed a 25% audience share.[2] After Congress revised the ownership limits in 1996, eliminating the national cap

[1] *State of the Radio Industry 2000,* BIA Financial Network, Chantilly, VA. (2000), at 18.

[2] *Radio Ownership*, Report and Order, MM Doc. No91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part,* Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC Rcd 6387 (1992).

and relaxing local ownership rules,[3] a single station owner, Clear Channel Communications, now owns more than 1,200 stations nationwide. That is more than a 500% increase in national concentration. Many of the applications approved by the Bureau today represent local market concentrations of over 50%.

These outcomes are the direct result of the congressional directive to relax radio ownership rules. But, in my opinion, the Act did not remove the Commission's obligation to assess whether the transfer is in the public interest. The public interest standard was codified in the Communications Act of 1934 and survived the 1996 amendments to that Act.[4] While the Act established an absolute ceiling on the number of stations that could be owned, it did not expressly require the Commission automatically to approve a combination if the resultant ownership level were at or below the ceiling.

In my view, under the Commission's existing public interest authority, the most egregious local concentration levels should result in close examination by the Commission. A recently withdrawn application for our consent to license transfers, for example, would have resulted in a single licensee in Bismarck, North Dakota controlling 58.1% of the local advertising market, with the top two licensees controlling 91.8% of the market.[5] Many of the non-challenged applications approved by the Bureau today exceed that amount.[6] I am not satisfied to turn a blind eye to such developments and, once again, urge this Commission to establish a rational and judicially sustainable procedure for screening proposed transactions based on market concentration.

Bureau Action is Procedural Necessity, Not New Policy

Today's Mass Media Bureau action was prompted by procedural fairness. It would be inequitable for the Commission to hold pending applications for an extended period of time while devising a new merger review methodology, then apply that methodology retroactively to the pending applications. Among the transfer applications approved today, 19 have been pending for a year or more; 6 have been pending for over two years. That is simply too long. As I have said repeatedly over the past six years, applicants to this agency are entitled to an expeditious answer, even if it is an answer that they do not like. It is difficult to retain good employees and compete in the market when action is pending on a license transfer application over an extended period of time. The Bureau action today helps to address the delay that has plagued pending applications.

The public should not misconstrue today's action, however. It is not an open invitation to file any and all merger applications so that they may be rubber-stamped by a

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), sec. 202(b)(1).

[4] 47 U.S.C.310(d)

[5] Application for transfer of licenses on file with Mass Media Bureau, Federal Communications Commission.

[6] Non-challenged transactions approved today will result in a single entity controlling 68.1% (Casper, Wyoming) and two entities controlling 100% (Augusta-Waterville, Maine) of the local advertising market.

Commission willing to ignore local market concentration. Although the Bureau decisions arguably fit within existing precedent for challenged and non-challenged license transfer applications, they do not represent acquiescence by all members of this Commission to even greater leniency. Would-be applicants are forewarned that even transactions that go unchallenged will be scrutinized by members of this Commission if those combinations present unconscionable levels of concentration, as determined by a thorough and sound economic analysis.

Commission Should Quickly Complete Action on Radio Merger Policy

The Bureau action today should have been accompanied by Commission action to establish a more systematic means of reviewing radio license transfer applications. For example, it would have been useful to have announced a date certain by which the Commission would vote to adopt an item establishing a more rational radio market definition.[7] As I have noted previously,[8] the current contour-overlap method for measuring radio market ownership limits is flawed, creates anomalous outcomes that defy normal market assumptions, and is arbitrary, in that it allows some group owners to hold more licenses in a radio market than competing group owners. It is instructive that, had the Commission adopted an Arbitron radio market definition, as opposed to the contour-overlap method, as many as 17 out of 32 pending radio mergers would have violated the Commission's local ownership limits. This potentially significant impact on our radio merger review emphasizes the critical need for the Commission to act swiftly in adopting a rational radio market definition.

Moreover, the Commission should not hesitate to address whether and how to determine radio market concentration benchmarks, especially in light of the scrutiny recently applied by the United States Court of Appeals for the District of Columbia Circuit to the Commission's economic analysis with respect to a cable television regulation.[9] A well developed record and analysis is essential to provide guidance to parties and to survive court review.

Commission Merger Review Remains Relevant

I continue to support a robust role for the Commission in reviewing proposed license transfers. Again, nothing in the Telecommunications Act of 1996 forecloses our responsibility to ensure that *every* license transfer is in the public interest, convenience, and necessity.[10] It is not enough to defer entirely to the antitrust enforcement agencies. The antitrust statutes do not establish an affirmative obligation to find a transfer to be in the public interest. Unlike the Commission, the Department of Justice and Federal Trade

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[7] *See In Re: Definition of Radio Markets*, Notice of Proposed Rule Making, MM Doc. No. 00-244, FCC 00-427 (December 13, 2000) (comment cycle closes on March 13).

[8] *See id.*, Separate Statement of Commissioner Susan Ness; Joint Statement of Commissioners Susan Ness and Gloria Tristani, *KBYB(FM), El Dorado, Arkansas*, 13 FCC Rcd 15686 (1998).

[9] *See, e.g.*, Time Warner Entertainment v. FCC, No. 94-1035 (D.C. Cir., Mar. 2, 2001).

[10] 47 U.S.C. 310(d).

Commission have enforcement discretion to choose which proposed transactions they will scrutinize. In an age of big mergers and shrinking government budgets, such discretion often leaves enforcement agencies no choice but to focus their efforts on the largest transactions. This only heightens the importance of the Commission's role in reviewing transactions involving all firms, including those serving small and mid-sized markets. Consumers in Charleston are just as entitled to robust markets as those who live on the Charles. The Commission has a unique role in ensuring that every American community is well served by competitive markets so that a multiplicity of radio voices may be heard.

Conclusion

While the Bureau action approving a backlog of transactions today was necessitated by procedural fairness, I sound the alarm over the growing levels of local radio ownership concentration. Applicants have pushed the regulatory envelope beyond recognition. I urge us now expeditiously to adopt a new radio market definition and clear, reasonable, and sustainable radio merger review guidelines.