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NOTE

From Diversity to Duplication: Mega-Mergers and the Failure of the Marketplace Model Under the Telecommunications Act of 1996

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I. INTRODUCTION

In the immediate aftermath of the September 11 terrorist attacks, radio station owners faced a difficult decision: Should the station limit its play list to reflect the nation's period of turmoil? In the weeks to follow, there undoubtedly would be a careful revision of many radio stations' musical choices—sometimes deliberately, sometimes unconsciously. Most of these efforts drew little attention.

One station owner's actions, however, drew sharp criticism from media watchdogs. In the week following the terrorist attacks, an e-mail rumor began that Clear Channel Communications had developed a list of approximately 150 potentially inappropriate songs, which was circulated among its staff in an attempt temporarily to "ban" the songs from its play lists.[1] Clear Channel's official statement is that no songs were ever "banned," and that the company simply suggested in an internal memo that its staff members be sensitive to their audience's mood during a time of national mourning.[2]

Even if the memo was simply a suggestion to tastefully limit play lists, there were several reasons for the outcry. Primarily, critics questioned whether some of the alleged songs on the list were truly "lyrically inappropriate," including John Lennon's "Imagine" and the Bangles' "Walk Like an Egyptian."[3] Underlying this criticism, however, was the fact that Clear Channel is a media conglomerate that owns approximately one out of every ten U.S. radio stations and has more than 110 million listeners.[4] Whether the list was misguided and the circumstances extreme, listeners ultimately became angry that Clear Channel had the ability to manipulate the entire nation's listening habits with a carefully worded fax.

1. Douglas Wolk, *And the Banned Play On*, VILLAGE VOICE, Sept. 26, 2001, at 60, *available at* http://www.villagevoice.com/issues/0139/wolk.php.

2. Steve Jones, *No. 1 Radio Chain Didn't Ban Songs*, USA TODAY, Sept. 19, 2001, at 4D, *available at* http://www.usatoday.com/life/music/2001-09-20-song-list.htm#more; *see also* Press Release, Clear Channel Communications, Clear Channel Says National "Banned Playlist" Does Not Exist (Sept. 18, 2001), *available at* http://www.clearchannel.com/documents/press_releases/NationalBannedPlaylist.pdf.

3. Eliza Truitt, *It's the End of the World as Clear Channel Knows It*, SLATE, Sept. 17, 2001, *at* http://slate.msn.com/?id=1008314.

4. Clear Channel Communications Web site, *at* http://www.clearchannel.com/radio/index.php (last visited Nov. 21, 2002).

"Mega-owners" such as Clear Channel became possible with the Telecommunications Act of 1996 (1996 Act),[5] which radically deregulated national and local radio station ownership limits that had been in existence for almost sixty years.[6] The 1996 Act reflected Congress's firm belief that a deregulated marketplace would best serve the public interest, as suggested by the Act's preface, which described its purpose as: "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[7]

This Note argues that the 1996 Act is an example of excessive adherence to the marketplace model, particularly for regulating the radio industry. From the time that the Federal Communication Commission ("FCC" or "Commission") was created until the early 1980s, the Commission regulated radio based on the trusteeship model, "whereby broadcast stations were entrusted by the government to operate in the public interest" based upon specific guidelines.[8] This changed in 1981, when the Commission began to deregulate the industry and implemented a marketplace model, under which the market would determine the public interest.[9] Although a less extreme marketplace model has guided the FCC's regulation of radio since the early 1980s, the current incarnation of the marketplace model is both contrary to the public interest and economically harmful for radio stations and industries affected by radio, such as advertising. Part II of this Note describes the theoretical bases and history of radio station ownership regulation, including the trusteeship model and the marketplace model of regulation. Part III of this Note describes the marketplace model's negative effect on diversity of ownership in the radio industry. Part IV gives an analysis of these effects, linking decreased diversity of station ownership with harm to the public interest.

5. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

6. Implementation of Sections 202(a) and 202(b)(1) of the Telecomms. Act of 1996 (Brdcst. Radio Ownership), *Order*, 11 F.C.C.R. 12368, paras. 2-3, 2 Comm. Reg. (P & F) 376 (1996).

7. 110 Stat. at 56.

8. Benjamin J. Bates & Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. MEDIA ECON. 19, 22 (1999).

9. *Id*. at 23.

II. HISTORY OF OWNERSHIP REGULATION OF RADIO STATIONS BEFORE AND AFTER THE 1996 TELECOMMUNICATIONS ACT

To understand the magnitude of the changes that the Telecommunications Act of 1996 has wrought on the radio industry, it is important to track the changes in radio regulation since it was first regulated in the early twentieth century. First, this Note will examine the policy justifications behind radio regulation; then, it will examine the regulations themselves, including limitations on local ownership, national ownership, and the concurrent ownership of radio stations and other media such as newspapers or television stations.

A. *Policy Justifications*

Radio is unique in that it is the first broadcast medium that the federal government controlled by regulations.[10] Radio regulation was first based on the proposition that airwaves were a public resource that was exploited for the "public interest" by those granted the "privilege" by the federal government.[11] However, over the past twenty years, the concept of the "public interest" has become malleable, changing from a trusteeship model in the 1930s to today's marketplace model.[12] The most recent radio regulatory legislation, the 1996 Act, is yet another extension of that marketplace model, but much more far-reaching. To understand the detrimental effects of the 1996 Act's deregulatory scheme, it is important to review the trusteeship model under which the courts and the FCC worked for the first fifty years of the Commission's existence.

1. The Early Years and the Trusteeship Model

The first radio regulations were promulgated in the early 1900s to prevent overlapping frequencies and signal confusion at a time when radio was used primarily as a safety device.[13] The Radio Act of 1912 gave the Secretary of Commerce the right to resolve such signal disputes by licensing; however, a decade later, the ineffectiveness of this Act was apparent.[14] The burden of overseeing radio licensing had become too much

10. Richard R. Zaragoza et al., *The Public Interest Concept Transformed*: *The Trusteeship Model Gives Way to a Marketplace Approach*, *in* PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING 27 (Jon T. Powell & Wally Gair eds., 1988).

11. *Id.* at 28.

12. *Id*. at 30.

13. Michael Ortner, *Current Public Law and Policy Issues: Serving a Different Master—The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 140-141 (2000).

14. *Id*. at 141.

for the Commerce Department, and many unlicensed commercial radio stations began to appear.[15] In addition, several court cases successfullychallenged the right of the Secretary to become involved in radio regulation.[16]

In 1927, Secretary of Commerce Herbert Hoover called several national conferences aimed at managing this situation; these conferences resulted in the Radio Act of 1927 (1927 Act)[17], and the creation of the National Radio Commission.[18] This Commission had the power "to regulate all public and private radio transmissions," including granting licenses and setting hours and frequencies.[19] For the first time, the 1927 Act maintained the public's rights over those of broadcasters by declaring that the broadcasters serve "public convenience, interest, or necessity."[20] Seven years later, the Communications Act of 1934 (1934 Act)[21] merged the Interstate Commerce Commission and the Federal Radio Commission to create the Federal Communications Commission.[22] The industry-supported 1934 Act was designed to "preserve the developing broadcasting industry and protect the interests of existing stations."[23] Congress passed the 1934 Act under the assumption that the radio spectrum would stay primarily commercial; in fact, the 1934 Act stipulated "that the broadcasting industry would not be a governmental operation."[24] The 1934 Act, however, did contain some limitations on the ownership and transfer of broadcast licenses.[25] The 1934 Act explained the need for regulation of a privately owned commercial resource by redefining the airwaves as a scarce public resource; as such, this public resource required oversight.[26] "A second, largely unstated basis for regulation was fear of the potential power of

15. *Id.*

16. *Id.* at 141 n.11. One of these decisions was *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926). Ortner writes that the *Zenith* court "ruled that the Secretary of Commerce did not have the statutory power to assign wavelengths and hours of operation to radio broadcast license-holders." *Id*.

17. Radio Act of 1927, ch. 169, 44 Stat. 1162.

18. Ortner, *supra* note 13, at 141, 142.

19. *Id.* at 142.

20. *Id.* (citing Radio Act of 1927, ch. 169, 44 Stat. 1162, 1166) ("The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitation of this Act, shall grant to any applicant therefor [sic] a station license provided for by this Act.").

21. Communications Act of 1934, ch. 652, 48 Stat. 1064.

22. Ortner, *supra* note 13, at 144.

23. Bates & Chambers, *supra* note 8, at 22.

24. *Id.*

25. Ortner, *supra* note 13, at 144.

26. Bates & Chambers, *supra* note 8, at 22.

broadcasters, both in terms of political power and economic power."[27] The FCC's regulation of a public resource (the airwaves) being used by private individuals was touted as the "trusteeship" model, whereby the government entrusted broadcasters with the airwaves to use in a manner consistent with the public interest.[28]

Originally, regulators had difficulty defining the "public interest" under the trusteeship model. In *National Broadcasting Co. v. United States*, the Supreme Court attempted to define the public interest in accordance with the 1934 Act as "the interest of the listening public in 'the larger and more effective use of radio.'"[29] However, in *FCC v. RCA Communications, Inc.*, the Court altered its previous opinion and accepted the FCC's power to define the "public interest" on a case-by-case basis.[30] Although the "public interest" was ill-defined by case law, the FCC developed a number of content and structural regulations to ensure that broadcasters acted according to the public interest standard.[31] Content regulations included requirements that stations devote a certain amount of broadcast time to nonentertainment programming, as well as "community ascertainment" rules that "required broadcasters to familiarize themselves with the needs and interests of their communities."[32] Structural regulations included limiting the number of stations a single entity could own, preferring to license those having fewer broadcast interests, and encouraging minority participation in broadcasting.[33] As discussed *infra*, first the content regulations then the structural regulations were eliminated under the marketplace model.

The Commission received support for its efforts to structurally regulate broadcasting in *FCC v. RCA Communications*, *Inc*.,[34] when the Court clearly stated that marketplace competition is not sufficient to maintain the public interest:

27. *Id*. (citation omitted).

28. *Id*.

29. NBC v. United States, 319 U.S. 190, 216 (1943) (citation omitted). *See also* Bates & Chambers, *supra* note 8, at 22.

30. Bates & Chambers, *supra* note 8, at 22; FCC v. RCA Comm., Inc., 346 U.S. 86, 90-91 (1953).

31. Review of the Comm'n's Regs. Governing TV Brdcst., *Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 3524, para. 57, 17 Comm. Reg. (P & F) 2005 (1995) [hereinafter *Television Broadcasting Review*].

32. *Id*. para. 58. These rules were constitutionally problematic in that they placed the FCC in the difficult position of "assess[ing] licensee responsiveness to community needs" without violating the First Amendment. Zaragoza et al., *supra* note 10, at 29.

33. *Television Broadcasting Review*, *supra* note 31, at para. 60.

34. 346 U.S. at 93-94.

> [A]s to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. . . . Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.[35]

Thus, the trusteeship model did not equate the "public interest" with economic competition. In this case, the FCC was to grant licenses only if there was a "reasonable expectation that competition may have some beneficial effect" such as "maintaining good service and improving it."[36] Economic efficiency could only factor into the equation as a supporting force, not a guiding principal.[37]

2. The Marketplace Model

The trusteeship model, which used both direct content regulations and indirect structural regulations to maintain radio's public interest mandate, was the primary framework for broadcast regulation until the early 1980s, when it was replaced with the marketplace model.[38]

Beginning in the late 1970s, the Commission started proposing a shift away from the trusteeship model for radio regulation,[39] and began using an economic/marketplace model for broadcast regulation in 1981.[40] The marketplace model did not replace the public interest standard; rather, it attempted to meet the public interest standard through market forces.[41] Under this model, licensees are "marketplace participants," rather than the holders of a public trust, and "market forces rather than [FCC] judgments

35. *Id*.

36. *Id.* at 97.

37. *Id*. at 93 n.4:

> We need not in this case attempt to suggest with any precision where the balance is struck. Certainly the presence of §§ 313 and 314 in the Act, prohibiting certain restrictions on competition, indicates the relevance of some competitive criteria, although it hardly directs the Commission to rely on "competition."

38. Zaragoza et al., *supra* note 10, at 30; Bates & Chambers, *supra* note 8, at 22-23.

39. Bates & Chambers, *supra* note 8, at 19-20.

40. *Id*. at 23. The FCC, however, did not state that it was relying purely on the economic/marketplace model at the time. Deregulation of Radio (Part 1 of 2), *Report and Order*, 84 F.C.C.2d 968, App. D, para. 1, 49 Rad. Reg.2d (P & F) 1 (1981) [hereinafter *Deregulation of Radio*].

41. *Deregulation of Radio*, *supra* note 40, para. 3.

on program service . . . determine where the public interest lies in broadcasting."[42] Furthermore, the marketplace model finds scarcity of spectrum space "irrelevant" to the First Amendment analysis of broadcasting.[43] This is because "[b]y definition, all resources are scarce;"[44] in essence, the radio spectrum is no different from the limited amount of newsprint that can be manufactured for the printing of newspapers.[45]

Under the marketplace model, radio stations still have a public interest mandate. The model, however, assumes that broadcasters will inherently act in the public interest by adjusting their content to satisfy their audience's preferences.[46] A broadcaster that does not satisfy consumer needs will lose profits.[47] Content regulation is not only useless under the marketplace model, it is actually harmful because any regulatory interference from the FCC based on content guidelines would "deny the American consumer maximum satisfaction from the medium."[48] Accordingly, the FCC dropped much of its direct regulation of programming content.[49]

During the shift from the trusteeship model to the marketplace model, traditional liberals and market-oriented conservatives vigorously offered arguments for and against the new paradigm.[50] Liberals argued that marketplace forces would not adequately protect the public interest, primarily because there was still ownership monopoly over the spectrum.[51] Conservatives and libertarians argued that there was an excess of spectrum, and that the primary concern should be to develop it; furthermore, new media options—such as videocassettes and cable—were offering consumers further entertainment and information options.[52] Thus, the

42. Zaragoza et al., *supra* note 10, at 30 (quoting Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209, 233 (1982)).

43. *Id*. "Admittedly, there are not unlimited broadcast outlets. But that kind of 'economic scarcity' does not justify content regulation." *Id*. at 45 n.43 (citing FCC Chairman Mark S. Fowler's Testimony before the Subcommittee on Communications, Senate Committee on Commerce, Science, and Transportation on March 18, 1987).

44. Bates & Chambers, *supra* note 8, at 24.

45. Amendment of Section 73.35555 [formerly Sections 73.35, 73.240, and 73.636] of the Comm'n's Rules Relating to Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Report and Order*, 100 F.C.C.2d 17, para. 7, 56 Rad. Reg.2d (P & F) 859 (1984).

46. Zaragoza et al., *supra* note 10, at 30.

47. *Id*.

48. *Id*.

49. Deregulation of Radio, *Report and Order*, 84 F.C.C.2d 968, para. 9, 49 Rad. Reg.2d (P & F) 1 (1981) (proceeding terminated); Zaragoza et al., *supra* note 10, at 31.

50. Patricia Aufderheide, *Shifting Policy Paradigms and the Public Interest in the U.S. Telecommunications Act of 1996*, 2 COMM. REV. 259, 263 (1997).

51. *Id*.

52. *Id*.

public interest in programming diversity was being adequately served by new technology.[53] However, the theory that more entertainment outlets would result in programming diversity was premised on the fact that station ownership within markets would remain regulated to prevent local monopolies.[54]

Marketplace forces eventually won the battle, and the trusteeship model's regulation of broadcast content unraveled under the new marketplace model. As Mark Fowler, FCC Chairman at the time, noted, "the language of the [F]irst [A]mendment protects the right of speech, not the right of access to ideas or even the right to listen. The direct concern of the [F]irst [A]mendment is with the active speaker, not the passive receiver."[55] One of the clearest indications of the government's shift to a marketplace model, at least before the passage of the 1996 Act, was the abolition of the "fairness doctrine." Under this doctrine, broadcasters had a duty to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[56]

The 1996 Act's most important provisions (as applied to radio) deal with the structural regulations still left from the trusteeship model, rather than content regulation, which had been effectively eliminated by the time of its passage. Although the elimination of structural regulations may seem to be the next logical step in moving fully to the marketplace model, it is unclear that the new legislation has proved itself to be in the public interest or effective in achieving the stated goal of the 1996 Act: cheaper, better-quality radio media for American "consumers."[57]

B. Regulation History

Before 1996, the FCC mandated three types of structural limits on radio station ownership: multiple station ownership in the same market; multiple station ownership nationally; and ownership of both a radio and television station in the same market, or the "one-to-a-market" rule.[58] The

53. *Id*. At the FCC's inception in 1934, the nation had 583 radio stations; by 1981, the number of stations had grown to almost 9000. *Deregulation of Radio*, *supra* note 40, para. 2.

54. Bates & Chambers, *supra* note 8, at 24.

55. Zaragoza et al., *supra* note 10, at 45 n.40 (citing Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 237-38 (1982)).

56. *Id*. at 33 (citing Pub. L. No. 66-274, Sec. 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1934)). The fairness doctrine was effectively abolished by Complaint of Syracuse Peace Council, *Memorandum Opinion and Order*, 2 F.C.C.R. 5043, 63 Rad. Reg.2d (P & F) 541 (1987).

57. *See supra* note 7 and accompanying text.

58. Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps*: *More*

1996 Act required significant deregulation in each area, resulting in more opportunities for the ownership of multiple radio stations by a single entity.

1. Multiple-Station Ownership in the Same Market

The FCC has regulated ownership of two or more radio stations in a single market, also known as a duopoly, for more than sixty years. In 1938, the Commission issued its first decision denying a license that would result in a duopoly.[59] In a strongly worded statement, the Commission declared:

> [T]o permit the entry into the field of [a duopoly] might well, from an economic standpoint, prevent the future entry into the field by an applicant who would offer a new, different, improved and competitive service. . . . [T]he Commission will grant duplicate facilities to substantially identical interests only in cases where it overwhelmingly appears that the facility, apart from any benefit to the business interests of the applicant, is for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled.[60]

This "diversification of service" rationale indicates that the Commission believed a greater number of owners in any one area would result in a greater diversification of programming.[61] In 1940, the FCC formally banned duopolies in FM radio; and in 1943, it did the same for AM radio.[62]

The duopoly rule has remained constant for many years, even during the mid-1980s when the Commission began to liberalize national ownership restrictions.[63] However, the Commission loosened the duopoly rule in 1992,[64] citing an explosion of radio stations in most markets, as well as economic woes that made it imperative for radio stations to share resources such as "facilities, managerial and clerical staffs, sales, bookkeeping, promotion, production, news and other aspects of station

Monopolies, *Less Localism*, *Decreased Diversity and Violations of Equal Protection*, 5 COMMLAW CONSPECTUS 269, 270 (1997).

59. *Television Broadcasting Review*, *supra* note 31, para. 4 (citing Genesee Radio Corp., *Order*, 5 F.C.C. 183 (1938)).

60. Genesee Radio Corp., *Order*, 5 F.C.C. 183, 186-87 (1938).

61. *Television Broadcasting Review*, *supra* note 31, para. 4.

62. *Id.*

63. Howard, *supra* note 58, at 273. However, while duopolies were generally banned between 1938 and 1992, the definition of a duopoly changed during this period. Between 1943 and 1964, there was no fixed technological definition of a duopoly; rather, each potential duopoly was evaluated on a case-by-case basis. *Id.* at 273 n.48. In 1964, the FCC changed its definition of a duopoly so that a single entity could not own two stations with overlapping 1 mV/m contours. *Id.* The FCC further modified the standard in 1989, when it barred a single entity from owning two AM stations or two FM stations with overlapping contours of 5 mV/m and 3.16 mV/m, respectively. *Id.*

64. *Television Broadcasting Review*, *supra* note 31, para. 4.

operation."[65] At that time, the FCC was looking for a solution to an increasingly fragmented radio market with revenue growth that had dropped to one-tenth the annual growth rate of the Gross National Product from 1985 to 1990.[66] Furthermore, there was evidence that stations in smaller markets were "highly leveraged in anticipation of increased profits;" in addition, stations were cutting their staffs, which challenged their ability to produce news programming.[67] The FCC concluded from this evidence that "radio stations could not meet their public interest mandate if they could not make a profit."[68] Approving a limited number of duopolies in certain markets would allow stations to combine operations to reduce staff and other similar costs, thereby keeping the stations open and actually promoting program diversity.[69]

The final result of the liberalized duopoly rule was a two-tiered approach: (1) in a market of fifteen or more stations, a single entity could own up to two FM and two AM stations if their combined audience share was less than 25%;[70] (2) in a market of fourteen or fewer stations, the new scheme allowed common ownership of up to three stations, only two of which could be in one service, AM or FM—in addition, no entity could own more than 50% of the stations within the market (also known as the "50% rule").[71]

The 1996 Act increased the two-tiered market system to a multitiered system. It also allowed an entity to own more stations in a single market, as well as more stations in a single service. Table 1 illustrates the results of the 1996 Act.[72] The 50% rule for markets of fourteen stations or less still applies under the 1996 Act.[73]

65. Revision of Radio Rules and Policies, *Report and Order*, 7 F.C.C.R. 2755, paras. 34-37, 70 Rad. Reg.2d (P & F) 903 (1992) [hereinafter *Revision of Radio Rules*].

66. *Id*. para. 7.

67. Wenmouth Williams, Jr., *The Impact of Ownership Rules and the Telecommunications Act of 1996 on a Small Radio Market*, 5 J. RADIO STUD. 8, 10 (1998).

68. *Id*.

69. *Id.*

70. Howard, *supra* note 58, at 273.

71. *Id*. at 274 n.52 (citing 47 C.F.R. § 73.3555(a)(1) (1995)).

72. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a)-(b)(1), 110 Stat. 56, 111 (1996).

73. *Id*. § 202(b)(1)(D), 110 Stat. at 110.

TABLE 1. LIMITS ON OWNERSHIP OF COMMERCIAL STATIONS

Market Size (Number of Stations)	*Maximum Number of Stations Owned by a Single Party*	*Maximum Number of Stations in a Single Service Owned by a Single Party*
45 or more	8	5
30-44	7	4
15-29	6	4
14 or less	5	3

2. Multiple-Station Ownership Nationally

The FCC originally began requiring national ownership limits at about the same time that it began imposing local ownership limits.[74] The national ownership provisions mandated that a current license holder could possess a second license only if "the applicant could demonstrate that the issuance of the license (1) would have a pro-competitive impact, and (2) would not result in the concentration of control of broadcasting facilities in a manner inconsistent with the public interest."[75]

In 1940, the FCC imposed an absolute limit of six FM stations under common control.[76] National ownership of AM stations, however, went unregulated until 1946, when the FCC denied CBS an application for an eighth AM station, thereby imposing a de facto limit of seven AM stations.[77] Significantly, the CBS decision came on the heels of the Supreme Court's decision in *Associated Press v. United States,* which stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[78]

Several years later, in 1953, the Commission made official the de facto seven-station AM limit and raised the FM station limit from six to

74. *Television Broadcasting Review*, *supra* note 31, para. 2.

75. *Id.*

76. *Id.* (citing Rules Governing Standard and High Frequency Brdcst. Stations, 5 Fed. Reg. 2382, 2384 (June 26, 1940)).

77. *Id.* (citing Sherwood B. Brunton, *Decision*, 11 F.C.C. 407, 3 Rad. Reg. (P & F) 291 (1946)).

> The FCC did not impose an absolute limit on AM station ownership as it held that, with respect to AM, concentration of control "is not a factor of the absolute number of stations alone but depends also upon the character of the facilities involved, e.g., the powers and the frequencies of the stations."

Howard, *supra* note 58, at 270 n.21 (citing Sherwood B. Brunton, *Decision*, 11 F.C.C. 407, 413, 3 Rad. Reg. (P & F) 291, 298 (1946)).

78. Howard, *supra* note 52, at 270 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).

seven.[79] These new limits were known as the Rule of Seven.[80] The rationale for the Rule of Seven was twofold—"to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[81]

It took the FCC more than three decades to make any significant changes in national radio station ownership caps, and initial proposals were drastic. In 1984, the Commission called for a complete elimination of national ownership caps by 1990.[82] The 1984 order stated that because the duopoly rule was in place, the local market would still be available to promote viewpoint diversity, and that a wide variety of sources, including newspapers and cable, were helping individual communities achieve this diversity.[83] The Commission, additionally, maintained that the "Rule of Seven" was no longer necessary to deal with radio's scarcity of outlets and "unique power" to influence and persuade because of the astronomical increases in the total number of radio stations.[84] Moreover, the Commission directly challenged the idea that group ownership resulted in a "monolithic editorial viewpoint" and less issue-oriented programming, citing a study in which the National Association of Broadcasters concluded that there were bigger news departments and more public service programming on group-owned stations.[85] Thus, the Commission actually equated group ownership with diversity of programming.

In 1985, after receiving eight petitions from the radio industry requesting that the FCC review the 1984 decision, the FCC decided that total deregulation was unnecessary and that it would limit ownership to a modest twelve AM or twelve FM stations nationally.[86] Six years later,

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79. *Further Television Broadcasting Review*, *supra* note 31, at para. 2.

80. Howard, *supra* note 58, at 271 (citing Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regs. Relating to Multiple Ownership of AM, FM and TV Brdcst. Stations, *Report and Order*, 18 F.C.C. 288, para. 17, 9 Rad. Reg. (P & F) 1563 (1953).

81. Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regs. Relating to Multiple Ownership of AM, FM and TV Brdcst. Stations, *Report and Order*, 18 F.C.C. 288, para. 10, 9 Rad. Reg. (P & F) 1563 (1953), *cited in* Howard, *supra* note 58, at 271.

82. Howard, *supra* note 58, at 271 (citing Amendment of Section 73.35555 (formerly Sections 73.35, 73.240, and 73.636) of the Comm'n's Rules Relating to Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Report and Order*, 100 F.C.C.2d 17, paras. 109-110, 56 Rad. Reg.2d (P & F) 859 (1984)).

83. Amendment of Section 73.35555 (formerly Sections 73.35, 73.240, and 73.636) of the Comm'n's Rules Relating to Multiple Ownership of AM, FM and TV Brdcst. Stations, *Report and Order*, 100 F.C.C.2d 17, para. 108, 56 Rad. Reg.2d (P & F) 859 (1984).

84. *Id.* paras. 7-8.

85. *Id.* paras. 9, 45-47.

86. Howard, *supra* note 58, at 271 (citing Amendment of Section 73.35555 (formerly Sections 73.35, 73.240, and 73.636) of the Comm'n's Rules Relating to Multiple Ownership

while it was considering loosening the duopoly rules in the face of dismal radio profits in the late 1980s, the FCC reconsidered national caps yet again. In 1994, this resulted in a limit of twenty AM and twenty FM stations.[87] With the relaxation of the duopoly and national ownership rules, as well as the end of the recession of the early 1990s, most of the radio industry had returned to profitability by the passage of the 1996 Act.[88]

The 1996 Act performed an about-face on the FCC's previous efforts to carefully balance diversity and economics. The Act completely eliminated any national limits on radio station ownership—a feat that was not achieved earlier due to industry protest in 1984.[89] As in 1984, Congress cited the public's access to alternate media outlets (this time including satellite radio) as well as the increase in the number of radio stations in operation (which was then at 11,000) to prove that radio ownership was not in need of national-level regulation.[90]

3. The One-to-a-Market Rule

The FCC's duopoly rule did not prevent an entity from owning both a television and radio station in the same market. In 1970, however, the Commission, citing concerns for diversity and competition, adopted the "one-to-a-market" rule that prevented such ownership arrangements.[91] An increase in broadcasting outlets over twenty years and the realization that common ownership does not equal common viewpoints led the Commission to allow waivers of the one-to-a-market rule under certain conditions.[92] The 1996 Act instructed the FCC to extend favored status to mergers in the top fifty markets, where previously favored status was only granted to the top twenty-five markets.[93] Later, the FCC further relaxed its one-to-a-market rule to permit a single owner to possess up to two

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of AM, FM, and TV Brdcst. Stations, *Memorandum Opinion and Order*, 100 F.C.C.2d 74, para. 53, 57 Rad. Reg.2d 966 (1985)).

87. *Id*. at 271-72 (citing Revision of Radio Rules and Policies, *Second Memorandum Opinion and Order*, 9 F.C.C.R. 7183, para. 5, 76 Rad. Reg.2d (P & F) 698 (1994)). This final decision was not without controversy. The FCC initially decided that the limit would be thirty AM or thirty FM stations; months later, however, the limits were dropped to eighteen stations for each service, which then increased to twenty by 1994. *Id.* at 271-72 n.34 (citing *Revision of Radio Rules*, *supra* note 59, para. 23; Revision of Radio Rules and Policies, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 F.C.C.R. 6387, paras. 10, 70, 71 Rad. Reg.2d (P & F) 227 (1992)).

88. Bruce E. Drushel, *The Telecommunications Act of 1996 and Radio Market Structure*, 11 J. MEDIA ECON. 3, 5 (1998).

89. Howard, *supra* note 58, at 271, 275.

90. *Id.* at 275 (citing S. REP. NO. 104-23 (1995)).

91. *Id*. at 274 (citation omitted).

92. *Id*. (citation omitted).

93. *Id.* at 276 (citation omitted).

television stations and six radio stations, depending on how many "independently owned media 'voices'" would exist after the transaction.[94]

III. EFFECTS ON STATION OWNERSHIP

The 1996 Act radically redefined the "marketplace" upon which the FCC relied to maintain the public interest standard in broadcasting. The most startling change to the radio marketplace has been an extreme consolidation of station ownership by larger and larger corporations.[95] The buying and selling of radio stations became a virtual free-for-all after the passage of the 1996 Act, as approximately $700 million in transactions took place within the first week after its passage.[96] In fact, *Radio & Records*' first issue after the 1996 Act proclaimed, "Let the deals begin!" and "It's buy, sell, or get out of the way."[97]

Most radio station owners did not simply "get out of the way" of the 1996 Act's profit-making opportunity. The ensuing months showed an impressive number of station transactions, many of which decreased, rather than increased, the overall number of radio station owners. The FCC's most recent call for comment on local radio ownership rules noted that at the time of the 1996 Act's passage, there were approximately 5,100 owners of commercial radio stations nationwide; at the end of 2001, there were approximately 3,800 owners, a decrease of 25%.[98] This decrease occurred even though the total number of stations was at a "robust" 12,932 in June 2001.[99] In fact, in March 1996, "an Arbitron metro market had an average of 13.5 owners; in March 2001, the average was 10.3, a decrease of 22%."[100]

The loosening of the local ownership rules only increased the local consolidation trend that began in the early 1990s with the changes in the duopoly rule and the rise of "local marketing agreements."[101] However, the

94. Review of the Comm'n's Regs. Governing TV Brdcst. TV Satellite Stations Review of Policy and Rules, 66 Fed. Reg. 9039, 9040 (Feb. 6, 2001) (codified at 47 C.F.R. § 73.3555 (2001)).

95. *See generally* Todd Chambers, *Losing Owners*: *Deregulation and Small Radio Markets*, 8 J. RADIO STUD. 292 (2001); Drushel, *supra* note 88.

96. Todd L. Wirth, *Nationwide Format Oligopolies*, 8 J. RADIO STUD. 249, 251 (2001) (citations omitted).

97. Ed Shane, *The State of the Industry*: *Radio's Shifting Paradigm*, 5 J. RADIO STUD. 1, 1 (1998).

98. Rules and Policies Concerning Multiple Ownership of Radio Brdcst. Stations in Local Mkts., and Definition of Radio Mkts., 66 Fed. Reg. 63,986, 63,990 (FCC Dec. 11, 2001) (to be codified at 47 C.F.R. pt. 73) [hereinafter *Multiple Ownership Rules*].

99. *Id*.

100. *Id*.

101. Wirth, *supra* note 96, at 250 (citing Linwood Hagin, *Radio Consolidation*:

national radio market changed dramatically, resulting in a number of "mega-owners"—owners of national conglomerates of radio stations. Clear Channel, the originator of the September 11 list, now owns at least 1376 radio stations as a result of transactions mostly completed since the 1996 Act.[102] While the number of stations Clear Channel owns is unusually large, there are other similar, but smaller, radio conglomerates: Infinity Broadcasting Corp. owns approximately 180 radio stations,[103] and Citadel Communications Corp. at least 205 stations.[104]

The effect of this consolidation on small market radio ownership has been particularly acute. One study found that, although the shift from the trusteeship model to the marketplace model in the early 1980s had a neutral or positive effect on the number of local owners in metropolitan markets of 125,000 residents or less, the 1996 Act ushered in dramatic ownership changes for these markets, including a decrease of local.[105]

Additionally, ownership consolidation has had a sweeping effect on the ownership of certain radio station formats. A study of fourteen different radio formats found that ten of the fourteen were at the threshold of becoming oligopolies based on the ownership concentration of each format.[106] Four companies—Chancellor Media, Clear Channel, Infinity, and Capstar—own a majority of stations that play some of the nation's most popular formats: Top 40, Country, Oldies, and Soft Rock/Lite Rock/Soft Adult Contemporary/Lite Adult Contemporary.[107]

Nevertheless, even if the consolidation of owners in a particular market or format is troublesome, the number of station owners per market or per station format does not offer an adequate picture of the health of the radio industry. A recent study by media researcher Bruce Drushel uses audience share as a measure of market concentration: "Audience share . . .

Applications of National Trends, Paper Presented at 42nd Annual Broadcast Education Conference (Apr. 4, 1997)).

102. Clear Channel Web site, *at* http://www.clearchannel.com/ci_oh.php (last visited Nov. 22, 2002).

103. Infinity Broadcasting Corp.'s Web site, *at* http://www.infinityradio.com (last visited Oct. 1, 2002).

104. Press Release, Citadel Communications Corp., Farid Suleman, CEO of Infinity Broadcasting, Joins Forstmann Little as Special Limited Partner also Named Chief Executive Officer of Citadel Communications (Feb. 20, 2002), *at* http://www.citadelbroadcasting.com/press/pr_full.cfm?press_ID=93.

105. Chambers, *supra* note 95, at 306-07, 310.

106. *See* Wirth, *supra* note 96, at 255. The "traditional thresholds for concern that concentration is leading to oligopolistic or monopolistic activities that will harm the economic marketplace have been when the top four firms control more than 50% of a market." *Id*. at 254 (citation omitted).

107. *Id.* at 255.

provides a measure of potential revenue, sources of data are readily available, and the data are comparable market to market."[108] Using audience share as a measure of ownership power also allows the use of an important antitrust investigation tool, the Hirschman-Herfindhal Index ("HHI"), which measures ownership concentration by summing the squares of the market shares of each of the owners in a given market. An HHI of less than 1000 is considered unconcentrated, whereas an HHI greater than 1800 is considered heavily concentrated. Drushel studied the HHI for the top fifty U.S. radio markets from 1992 through 1997. He found these markets shifted from being unconcentrated (0 to 999) in 1992 to being moderately concentrated (1000 to 1799) in 1997.[109] This data only includes concentration occurring after the 1992 relaxing of the duopoly rule; it does not yet include adequate data regarding changes resulting from the 1996 Act's further deregulation of national and local ownership.

IV. ANALYSIS

The FCC has stated numerous times that its regulations should be guided by two goals: diversity and competition.[110] It is then appropriate to use the FCC's diversity and competition framework to assess whether the current move toward ownership consolidation caused by the 1996 Act is meeting the FCC's goals.

A. *Diversity Analysis*

The FCC's diversity analysis focuses on three types: viewpoint, outlet, and source.[111] Viewpoint diversity is concerned with whether "the media reflect a wide range of diverse and antagonistic opinions and interpretations."[112] Outlet diversity assures that "a variety of delivery services (e.g., broadcast stations, newspapers, cable and DBS [direct broadcast satellite]) [are offering] . . . programming directly to the public.[113] Source diversity means maintaining a variety of producers and owners of information and programming sources—essentially, it is

108. Drushel, *supra* note 88, at 10.

109. *Id*. at 13.

110. Brdcst. Servs.; Radio Stations, TV Stations, 65 Fed. Reg. 43,333, 43,334 (FCC July 13, 2000) (biennial review of broadcast ownership rules). *See also* Brdcst. Servs.; Radio Stations, TV Stations, 63 Fed. Reg. 15,353, 15,354 (FCC Mar. 31, 1998) (soliciting comment for review of broadcast ownership rules) [hereinafter *Review of Rules*]; Brdcst. Servs.; TV Stations, 60 Fed. Reg. 6490, 6494 (FCC Feb. 2, 1995) (further notice of proposed rulemaking).

111. *Review of Rules*, *supra* note 110, at 15,354.

112. *Id.*

113. *Id*.

ownership diversity.[114] While outlet diversity stayed the same or improved since the 1996 Act,[115] and source (ownership) diversity has clearly decreased in that same period,[116] the question remains whether the decrease in source diversity has negatively affected viewpoint diversity in either radio, entertainment, or news content.

For much of the FCC's history, viewpoint diversity and source diversity were considered the same, particularly source diversity within one market.[117] This assumption rests on traditional market principles—the more providers of a service, the more diversity of products and the lower the price (or in this case, because the radio "consumer" pays nothing, lower advertising costs). However, some skeptics of this approach offer a different picture of the radio market, at least for entertainment programming. They theorize that source consolidation within the local market results in more niche programming because a provider will avoid competing against itself. For instance, an owner of five radio stations in the same community would operate the stations as five different formats (country, rock, talk, sports, and oldies, for example) in order to attract five distinct audiences, and thus control a larger audience share overall.[118]

114. *Id*. at 15,354-55.

115. Multiple Ownership Rules, *supra* note 98, at 63,990. The Commission, calling the current media marketplace "robust," offered the following figures: In 2001, there were 12,932 radio stations; 1678 full-power television stations; 2396 low-power television stations; 232 Class A TV stations; and 7 national commercial television broadcast networks. Additionally, in 2000, daily newspaper circulation was 55.8 million; cable television systems served 67.4% of television households; and 56% of Americans had access to the Internet from their homes. *Id*.

116. *See* Section III *infra*.

117. *See* Brdcst. Servs.; Radio Stations, TV Stations, *supra* note 110, at 43,334 ("Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles. As the Supreme Court has said, the First Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .'" (Associated Press v. United States, 326 U.S. 1, 20 (1945)). *See also* Amendment of Sections 73.35, 73.240, and 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM, and TV Brdcst. Stations, *Report and Order*, 45 F.C.C. 1476, para. 3, 2 Rad. Reg.2d (P & F) 1588 (1964) ("[T]he greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."); Amendment of Sections 73.34, 73.240, and 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM, and TV Brdcst. Stations, *Report and Order*, 50 F.C.C.2d 1046, para. 99, 32 Rad. Reg.2d (P & F) 954 (1975) ("Early in its history, the Commission acted to adopt rules to end common ownership of stations in the same service serving substantially the same area. Needless to say, such commonly owned stations could neither be true competitors nor could they offer true diversity.").

118. Drushel, *supra* note 88, at 8. *See also* Williams, *supra* note 67, at 10 ("Diversity of programming should result because the radio industry is still dependent on niche

The results of studies of whether source consolidation increases viewpoint diversity through niche radio formats are mixed. Drushel's 1998 study of the top fifty radio markets suggests that the number of niche formats has increased slightly from 1992 to 1997, and the results are statistically significant.[119] However, Drushel also demonstrated that this increase was not related to source concentration, and the study was performed too soon to adequately measure the effects of the 1996 Act.[120] In addition, Todd Chambers's 2001 study of small markets suggested that niche formats in those markets are generally unaffected by the 1996 Act's deregulation.[121] The FCC itself recognizes the danger of relying on niche radio formats as evidence that deregulation of radio is working. Newly appointed FCC Commissioner Jonathan Adelstein recently spoke about the tendency of the radio industry to create niche formats that are different in name only, not in content.[122] Because of the shifting definition of a "niche format," any claims of increased viewpoint diversity resulting from niche formats created by source consolidation would be premature at best without further study.

Furthermore, the effect of source consolidation on viewpoint diversity in radio news programming is also mixed. Some studies have theorized that source consolidation would result in a "corporate" news format in which radio stations do not maintain their own news wires, while other studies show that news programming would be unaffected.[123] Chambers's 2001 study found that deregulation has had a negative effect, but not statistically significant, on radio news outlets in small markets, and has led to a loss of 1.6 radio news wires per year in small markets since 1996.[124] Again, the effects of source consolidation are tentative enough to warrant caution, rather than wholesale approval, regarding the consolidation that has occurred since the 1996 Act. Thorough studies of the 1996 Act's effects on format and news diversity should be conducted before lauding the 1996 Act as a complete success, or before the passage of any further legislation that is likely to result in source consolidation.

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programming and localism. If programming diversity results from duopolies, then radio audiences will benefit from them.").

119. Drushel, *supra* note 88, at 14.

120. *Id.* at 18.

121. Chambers, *supra* note 95, at 309.

122. FCC Commissioner Jonathan S. Adelstein, The Last DJ?: Finding a Voice on Media Ownership, Remarks at the Future of Music Coalition Policy Summit 2003 (Jan. 6, 2003), *at* http://www.fcc.gov/Speeches/Adelstein/2003/spjsa301.html.

123. Bates & Chambers, *supra* note 8, at 26.

124. Chambers, *supra* note 95, at 308.

B. Competition Analysis

The 1996 Act's push to consolidation has not significantly advanced competition, the FCC's other guiding principle. The radio market traditionally has been "in a state of monopolistic competition, in which there are many owners of stations that appear similar to advertisers and audiences."[125] Station owners naturally want to increase their size because much of a radio station's costs are fixed, meaning that costs are incurred whether advertising revenues increases or audiences increase.[126] Therefore, station owners have an incentive to own a number of stations to take advantage of economies of scale.[127] This often forces station owners to merge with or buy existing local stations because "the number of radio stations in lucrative markets is fixed."[128] Station owners also have incentives to expand nationally in order to take advantage of the benefits of owning several stations in the same format, including savings on format research and production of playlists and jingles.[129]

Nonetheless, the economic health of *all* radio stations is not assured by ownership consolidation. In the early analysis of the 1996 Act's effects, smaller ownership groups became less viable after consolidation.[130] Furthermore, the effect of station consolidation on other industries, such as advertising and music, has been problematic. Under consolidation, advertisers have fewer sellers from whom to buy access to audiences. The result is that advertising revenue in the top fifty radio markets is increasing more quickly than retail sales; additionally, revenue is increasing more quickly in those markets that are more heavily concentrated.[131] Although national format oligopolies are giving radio conglomerates unique access to particular types of audiences across the country, which might benefit advertisers (and in turn allows the stations the ability to manipulate advertising rates more easily), this may not be much of an advantage when the majority of advertising earnings (approximately 80%) are derived from local advertising.[132]

The music industry has been affected by consolidation as well. Just as format oligopolies offered advertisers unique access to a particular

125. Drushel, *supra* note 88, at 6 (citation omitted).
126. *Id.* at 5.
127. *Id*. (citation omitted).
128. *Id*.
129. Wirth, *supra* note 96, at 251.
130. Drushel, *supra* note 88, at 16.
131. *Id.* at 18.
132. Wirth, *supra* note 96, at 252-53. It is important to note that, for all the advantages of being able to manipulate advertising rates, specializing in a particular format is a risky strategy if the format becomes unpopular. *Id*. at 253.

audience, so too do oligopolies offer the music industry a way to market music product to a targeted audience.[133] Radio stations then have the leverage to demand perks such as concert tickets, station performances, and other promotional exclusives; the savings from these perks can be used for station giveaways that further enhance a station's popularity (and hurt its competitors).[134] Vertical integration of radio stations also has touched the music industry, as some station owners such as Clear Channel now own many major concert venues for which music industry players must bargain for entry.[135] The power of certain station owners to "make or break" certain artists has even lead to the revival of the early rock-era practice of "payola," with the modification that stations state up front that certain songs have been "paid for" by record labels anxious to be heard on popular stations.[136] Thus, even if the marketplace model is healthy for certain large radio corporations, it may be draining the vigor from the advertising and music industries, which will inevitably harm the radio industry in the long term.

The perceived negative effects of consolidation on the radio, advertising, and music industries have not gone unnoticed in the political spectrum. Wisconsin Senator Russ Feingold has voiced concern over the power of radio corporations in the context of campaign finance reform. In Senator Feingold's opinion, "[T]he elimination of the national radio ownership caps and relaxation of local ownership caps [has] triggered a wave of consolidation and caused harm to consumers, artists, concert goers, local radio station owners and promoters."[137] Feingold's Competition in Radio and Concert Industries Act, introduced on June 27, 2002, addresses

133. For an artist's perspective on the music marketing process, including marketing to radio stations, see Steven Page, *The Barenaked Truth About the Music Biz*, THE GLOBE AND MAIL, Apr. 13, 2002 (on file with Journal).

134. Wirth, *supra* note 96, at 252.

135. Clear Channel Communications Web site, *at* http://www.clearchannel.com/entertainment/ (last visited Nov. 22, 2002).

136. About.com's Music Industry Glossary, *at* http://musicians.about.com/library/glossary/P/bldef-payola.htm?terms=payola (defining payola as "[a] system of bribery developed in the 1950s through which record labels increased airplay of their artists by paying radio station managers and program directors"). *See generally* David E. Thigpen, *Is That a Song or a Sales Pitch*?, TIME, Aug. 3, 1998, at 73. There are, however, indications that record companies are becoming unwilling to pay what radio stations are demanding. Eric Boehlert, *The* "*Bootylicious*" *Gambit*, SALON.COM, June 5, 2001, *at* http://archive.salon.com/ent/feature/2001/06/05/sony_payola/.

137. Senator Russ Feingold, Statement on Market Concentration in the Radio, Concert, and Promotion Industries (June 13, 2002), *at* http://feingold.senate.gov/~feingold/speeches/02/06/2002613529.html.

practices such as payola and multiple ownership of radio stations within a local market.[138]

V. CONCLUSION

The FCC's submission to the marketplace model of radio regulation twenty years ago did not erase its public interest mandate, or its commitment to diversity and competition. Yet, the FCC's deregulatory zeal in the name of the marketplace model, coupled with the passage of the 1996 Act, has resulted in massive station ownership consolidation that has not clearly advanced the public interest, diversity, or competition—in fact, the results are mixed at best, or negative at worst. Because consolidation continues to increase since the passage of the 1996 Act, more research should be done into its effects on diversity and competition before the FCC advocates any further deregulation. Moreover, the FCC should consider ownership consolidation's effects on other industries—including the advertising and music industries—before concluding that any positive economic effects of consolidation for radio stations are sufficient to condone consolidation as economically healthy.

Fortunately, the FCC is doing just that. In October 2001, FCC Chairman Michael Powell formed a Media Ownership Working Group to strengthen the "factual foundation" of the FCC's media regulatory policies.[139] As a part of this fact-finding mission, the FCC released several studies in October 2002. These studies found:

- An increase in both media outlets (television, radio, newspapers, cable, and DBS) and media owners since 1960;

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138. Press Release, Senator Russ Feingold, Feingold Introduces "Competition in Radio and Concert Industries Act" (June 27, 2002), *at* http://feingold.senate.gov/~feingold/releases/02/06/062702medcon.html (currently pending in the Senate Committee on Commerce, Science and Transportation, where it was referred in June 2002).

139. Press Release, FCC, FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group (Oct. 29, 2001), at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124.html. Chairman Powell noted the shaky factual foundation of current regulations:

> For too long, the Commission has made sweeping media policy decisions without a contemporaneous picture of the media market. We need to rigorously examine whether current forms of media regulation are achieving the Commission's policy objectives, and how changes in regulations would affect the policy goals of competition, diversity, and localism.

Id. The FCC also scheduled a February 2003 hearing on the issue of media ownership to supplement the information it was gaining from the studies. Press Release, FCC, FCC Chairman Michael Powell Announces Public Hearing in Richmond, Va. on Media Ownership (Dec. 4, 2002), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-229209A1.doc.

- A decrease in the average number of radio stations per market from 1996 (13.5) to 2002 (9.9);
- No statistically significant change in the number of formats per market;
- An increase in the advertising share of the largest station owners per market (35.6% of advertising revenue in 1996 to 46.8% in 2002);
- No relationship between advertising rates and national radio station concentration per owner.[140]

Additionally, although its fact-finding mission is laudable, the FCC is also beginning to realize that bare economics and carefully worded studies are not enough to encompass the current market's dearth of quality programming. As Commissioner Adelstein remarked:

> What becomes clear in reading these studies is that we cannot measure the effect of radio consolidation simply by calculating advertising revenues or the number of formats. Ownership consolidation in local markets by definition reduces competition and puts programming decisions into the hands of comparatively fewer, often national, players. Therefore, we must consider how consolidation affects the programming choices available to listeners and the level of local public affairs coverage.[141]

Though a return to the trusteeship model of strict content regulation and small ownership caps may be premature, it is clear that the pendulum of deregulation has swung far too wide in the wrong direction. The FCC must continue to commit itself to studying the radio marketplace, both its economics and programming. This will almost certainly result in the reconsideration of the present marketplace free-for-all.

140. Press Release, FCC, FCC Releases Twelve Studies on Current Media Marketplace (Oct. 1, 2002), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A1.doc. Other recent studies confirm the consolidation trend noted in the FCC studies, but conclude that consolidation itself is inherently negative. Todd Shields, *Music Coalition Reports Less Variety in Radio*, MEDIAWEEK.COM (Nov. 18, 2002), *at* http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1763301.

141. Adelstein, *supra* note 122, at 5.