

## Note

### PUMP UP THE VOLUME: CHANGES IN RADIO POLICY AND THE MARKETPLACE REQUIRE CREATION OF A NEW LOW POWER FM SERVICE TO PROTECT THE PUBLIC'S RIGHT TO INFORMATION

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On July 21, 1996, Alan Freed, using a twenty watt transmitter, violated federal law<sup>1</sup> by broadcasting dance music from his downtown Minneapolis apartment without a license.<sup>2</sup>

Approximately 100 days later, U.S. Marshals raided Mr. Freed's apartment, seized his transmitter, and forced him off the air.<sup>3</sup>

In 1993, Stephen Dunifer violated the same law by setting up a fifty watt transmitter to broadcast community news, discussions, interviews, and music to the Berkeley/Oakland area.<sup>4</sup> After a long court battle, the United States District Court for the Northern District of California granted summary judgment in favor of the FCC, thereby shutting down Dunifer's station.<sup>5</sup>

Not content with fines, injunctions, or seizures, the FCC brought criminal charges against Lonnie Kobres, with the potential penalty of 28 years in prison and \$3.5 million in fines,<sup>6</sup> for broadcasting his "Christian patriot political view of a tyrannical government at war with its own

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<sup>1</sup> F.C.C. regulations state that "[t]he transmission (or interruption) of radio energy in the FM broadcast band is permissible only pursuant to a station license." 47 C.F.R. § 73.277 (1998).

<sup>2</sup> Mr. Freed used the 97.7 FM signal to broadcast "Beat Radio" to listeners in a three mile area. See Brian Lambert, *Buccaneers of the Dial: Call 'em Pirates or Micro-Broadcasters, Tiny, Almost-Legal Broadcasters are Sailing Into Minnesota Airwaves*, ST. PAUL PIONEER PRESS, June 7, 1998, at E1.

<sup>3</sup> See Lambert, *supra* note 2. See also Kimberley Yurkiewicz, *Where Is Beat Radio Now?*, CAKE, April 1997, at \_\_\_\_\_.

<sup>4</sup> See Stephen Dunifer, *FRB Splash Page*, (visited October 8, 1998) <<http://www.freeradio.org/>>. Mr. Dunifer used the 104.1 FM signal to broadcast under the name "Free Radio Berkeley." *Id.* Free Radio Berkeley operated with the help of 100 volunteers. *Id.*

<sup>5</sup> See *United States v. Dunifer*, 997 F. Supp. 1235, 1244 (N.D. Cal. 1998).

<sup>6</sup> See Jim Nesbitt, *FCC Goes After Radio Pilots With a Vengeance*, THE NEW ORLEANS TIMES-PICAYUNE, July 12, 1998, at A30 ("While most of the microbroadcasters caught in the FCC net face only civil charges and the loss of their equipment, the stakes are far higher for Kobres, who was convicted of criminal charges in federal court in February of illegal broadcasting. He faces a potential 28-year prison sentence and \$3.5 million in fines at a hearing this month."). The prosecutor actually sought six to nine months in prison and/or a \$10,000 fine. See Dean Solov, *Illegal Broadcaster Avoids Prison, Receives Probation*, THE TAMPA TRIBUNE, July 15, 1998 at \_\_\_\_\_. The prosecutor urged the court to "send a strong message to microbroadcasters nationwide." *Id.*

people” from his home near Tampa.<sup>7</sup> After a jury convicted him of broadcasting without a license,<sup>8</sup> Kobres’s neighbors persuaded the judge to give him a “light” sentence,<sup>9</sup> consisting of six months of house arrest, three years of probation, and a \$7500 fine.<sup>10</sup>

These three radio “pirates,”<sup>11</sup> or microbroadcasters, as many prefer to be called,<sup>12</sup> are not alone. Currently, there are between 100 and 1,000 microbroadcasters in the United States.<sup>13</sup>

Motivated by increased homogenization of the airwaves<sup>14</sup> and armed with cheap<sup>15</sup> mobile<sup>16</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Bill Coats, *Radio Pirate Gets House Arrest*, ST. PETERSBURG TIMES, July 17, 1998 at \_\_\_\_\_. Although not every neighbor agreed with his political views, they did not see Kobres as a threat, but rather, as an “asset to the community” and “a good Christian gentleman.” *Id.*

<sup>10</sup> *Id.* Kobres is appealing his conviction. *Id.*

<sup>11</sup> See Paul Davidson, *Radio Pirates Urge FCC to End Crackdown*, USA TODAY, October 5, 1998, at B2; see also Nesbitt, *supra* note 6. A “pirate” or “microbroadcast” station is an unlicensed station operating at less than 100 watts. See *id.* Although some microbroadcasters scorn any form of government licensing, many would welcome the opportunity to operate legally. See *id.* The FCC currently refuses to license any stations that broadcast at less than 100 watts of power. See 47 C.F.R. § 73.211 (1988).

<sup>12</sup> See Simon Peter Groebner, *Pirate Radio Wavemaking*, CITY PAGES, October 23, 1996 at \_\_\_\_\_.

<sup>13</sup> See Paul Davidson, *Radio Pirates Urge FCC to End Crackdown*, USA TODAY, October 5, 1998, at B2. For websites of well-known microbroadcasters, see *Radio Mutiny - West Philly Pirate Radio 91.3FM* (visited October 8, 1998) <<http://www.svaha.com/radiomutiny/>> (Radio Mutiny, Philadelphia: local and international news, eclectic music, religion, gay/lesbian); *GRID Radio, 96.9 FM, Cleveland* (visited October 8, 1998) <<http://www.thegrid.com/radio969.htm>> (GRID Radio, Cleveland: gay/lesbian theme); *SPURT Radio, 102.5 FM* (visited October 8, 1998) <<http://www.geocities.com/SunsetStrip/Studio/6622/>> (SPURT Radio, Berkeley/Oakland: solar-powered radio); *San Francisco Liberation Radio 93.7 FM* (visited October 8, 1998) <<http://www.slip.net/~dove/>> (San Francisco Liberation Radio, San Francisco: political activism); *Free Radio Berkeley* (visited October 8, 1998) <<http://www.freeradio.org/>> (Free Radio Berkeley, Berkeley/Oakland: community news, activism); *Beat Radio Network* (visited October 8, 1998) <<http://www.beatworld.com/>> (Beat Radio, Minneapolis: dance/disco music); *Micro Kind Radio 105.9 FM San Marcos, TX* (visited October 8, 1998) <<http://www.mediadesign.net/kindmenu.htm>> (KIND Radio, San Marcos, TX: community news, politics, music); *The FCC and Community Radio Stations* (visited October 8, 1998) <<http://home1.gte.net/lkobres/>> (Lutz Community Radio, Tampa: religion, states’ rights, libertarianism).

<sup>14</sup> The chairman of the FCC has recognized that “we recently have experienced the most dramatic increase in consolidation in the broadcast industry in our history.” WILLIAM E. KENNARD, FEDERAL COMMUNICATIONS COMM’N, SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD, IN RE 1998 BIENNIAL REGULATORY REVIEW, MM Docket No. 98-35, 1998 WL \_\_\_\_\_ (F.C.C. 1998). Commissioner Ness has expressed concern that this media consolidation has had an adverse effect on diversity. SUSAN NESS, FEDERAL COMMUNICATIONS COMM’N, SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS, IN RE 1998 BIENNIAL REGULATORY REVIEW, MM Docket No. 98-35, 1998 WL \_\_\_\_\_ (F.C.C. 1998). Commissioner Tristani fears that consolidation has posed additional risks: the consolidation of editorial voices and the loss of localism. See Gloria Tristani, Remarks before the Texas Broadcasters Association (September 3, 1998) (transcript available on the internet (visited September 9, 1998) <<http://www.fcc.gov/Speeches/Tristani/spgt811.html>>). Tristani does not fear lack of diversity in format as much as she fears lack of diversity in viewpoint. *Id.* She illustrates this danger by example: CNN has several different services or formats – CNN, CNN Headline News, CNN International, etc. *Id.* Although CNN has provided several formats, there is still only one voice: CNN’s. *Id.* Even Congress has recognized “the nexus between diversity of media ownership and diversity of programming.” H.R. CONF. REP. NO. 97-765, at 24 (1982).

equipment, microbroadcasters across the country have engaged in open, notorious, and hostile possession<sup>17</sup> of various FM frequencies in the interest of removing barriers to free speech.<sup>18</sup>

Their broadcasts have not gone unnoticed: large radio stations and the National Association of Broadcasters (NAB) have put increasing pressure on the FCC to shut down microbroadcasters.<sup>19</sup> On the other hand, small businesses, individuals, and community groups have urged the FCC to change its rules to allow licensing of microbroadcasters.<sup>20</sup>

This Note argues that the FCC's refusal to license low power broadcasters is poor public policy and unconstitutional. Part I provides a history of radio regulation. Part II provides a brief summary of some of the constitutional issues surrounding the current licensing scheme. Part III describes how current policies and regulations have caused the radio market to malfunction,

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The consolidation of broadcast ownership, homogenization, deregulation, and the trend away from localism have, in part, led to a grass-roots movement to legalize low power community radio. See, e.g., *Community Low Power FM Radio (LPFM)* (visited September 5, 1998) <<http://www.airwaves.com/LPFM/goals.htm>>.

<sup>15</sup> Free Radio Berkeley sells partially-assembled transmitter kits, ranging in price from \$285 for ½ watt to \$485 for 40 watts. See *On the Air Quick!* <[http://www.freeradio.org/store/frb\\_pkg.html](http://www.freeradio.org/store/frb_pkg.html)>. Stephen Dunifer, founder of Free Radio Berkeley, has sold 300 of his kits worldwide. See Davidson, *supra* note 11.

<sup>16</sup> Stephen Dunifer, founder of Free Radio Berkeley, made broadcasts of community news, political commentary, and eclectic music from a transmitter in his backpack after the FCC ordered him off the air. See Davidson, *supra* note 11.

<sup>17</sup> At least one commentator has suggested treating broadcasters who use vacant frequencies as common law owners. See JESSE WALKER, CATO POLICY ANALYSIS NO. 277, WITH FRIENDS LIKE THESE: WHY COMMUNITY RADIO DOES NOT NEED THE CORPORATION FOR PUBLIC BROADCASTING 16 (1997). Walker also suggests treating interference as a form of trespass. *Id.* at n.62 (citing Louise M. Benjamin, *The Precedent that Almost Was: A 1926 Court Effort to Regulate Radio*, JOURNALISM QUARTERLY, Autumn 1990 at 578; Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990)). See also Krystilyn Corbett, *The Rise of Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611 (1996) (comparing the public trust model of broadcast regulation with a private market model).

<sup>18</sup> Some microbroadcasters, such as Alan Freed, compare unlicensed broadcasting to Rosa Parks's decision to take a seat at the front of the bus. Mark Wheat, *Free Radio Returns*, PULSE, Dec. 3, 1997, at \_\_\_\_\_. Although microbroadcasters know they are breaking the law, they defend their actions on the grounds that the law is unjust. *Id.*

<sup>19</sup> See David Hinckley, *Industry Big: Scuttle the Pirates*, NEW YORK DAILY NEWS, May 12, 1998, at 71; *Weekend Edition – Saturday* (Nat'l Pub. Radio broadcast, Dec. 6, 1997); Dean Solov, *Squelched Pirates Stay off the Air*, TAMPA TRIBUNE, Aug. 10, 1998 at \_\_\_\_; Jesse Walker, *Rebel Radio: the FCC's Absurd New Crusade*, NEW REPUBLIC, March 9, 1998, at \_\_\_\_\_.

<sup>20</sup> See Nickolaus E. Leggett et al., *Petition for a Microstation Radio Broadcasting Service*, Fed. Communications Comm'n RM No. 9208 (June 26, 1997) (proposing FCC should license low power FM broadcasting at less than one watt); J. Rodger Skinner, Jr., *Proposal for Creation of the Low Power FM (LPFM) Broadcast Service*, Fed. Communications Comm'n RM No. 9242 (Feb. 20, 1998) (proposing three-tiered low power FM licensing of stations broadcasting from one to 3,000 watts); Howard K. McCombs, Jr., *Amendment of Part 73 of the Rules & Regulations*

proposes possible solutions, and endorses FCC creation of a new low power FM service as the most effective means of solving the problems created by today's malfunctioning radio marketplace.

## I. HISTORY OF RADIO REGULATION

### A. Legislation

#### 1. The Radio Act of 1927

After several failed turn-of-the-century attempts at radio regulation, the U.S. government abandoned all attempts to control access to the airwaves in 1926.<sup>21</sup> Pandemonium ensued, and

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*to Establish Event Broadcast Stations*, Fed. Communications Comm'n RM No. 9246 (June 24, 1996) (proposing creation of a low power, temporary "event" license).

<sup>21</sup> The first attempt at government regulation of radio began with the Wireless Ship Act of 1910. *See* Wireless Ship Act of 1910, ch. \_\_\_\_, 36 Stat. 629. This statute entrusted enforcement to the Secretary of Commerce and Labor (the "Secretary"). This statute prohibited certain steamers from leaving port unless equipped with working radio equipment and a skilled operator. Shortly thereafter, ship-to-ship and ship-to-shore communications rapidly became overcongested, resulting in complaints from the Navy that radio communications had degenerated into "etheric bedlam." *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 213 (1982) (citing S. REP. NO. 659, at 4 (1910)). Congress responded by enacting the Radio Act of 1912, which forbade operation of radio equipment without a license, allocated certain frequencies to government use, and imposed certain other restrictions on radio broadcasts. *See* Radio Act of 1912, ch. 287, 37 Stat. 302, 303, *repealed by* Radio Act of 1927, ch. 169, 44 Stat. 1174, *repealed by* Communications Act of 1934, ch. 652, § 602a, 48 Stat. 1064, 1102. The Radio Act of 1912 had little impact on commercial broadcasting until 1921, when the first standard broadcasting stations began to appear. *See* *National Broad. Co. v. United States*, 319 U.S. 190, 210-11 (1943). Commercial broadcasting quickly became popular, and by 1923, there were several hundred broadcasters throughout the country. *See id.* Since the Radio Act of 1912 had not designated frequencies for the use of commercial broadcasters, the situation eventually became chaotic. *See id.*; *Red Lion Broad. Co. v. Federal Communications Comm.*, 395 U.S. 367, 375 (1969); *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 104 (1973). As a result, the Secretary, upon the recommendation of the National Radio Conference,<sup>21</sup> established a policy of assigning "channels" to particular stations. (A "channel" is a band of radio frequencies designated by the center frequency. *See* 47 C.F.R. § 73.310(a) (1998). For example, an FM channel is "[a] band of frequencies 200 kHz wide and designated by its center frequency." *Id.* The FM band begins at 88.1 MHz and proceeds to 107.9 MHz in .2 MHz increments. *See id.* In certain circumstances, the FCC will allow a broadcaster to operate on 87.9 MHz, which is .2 MHz below the standard FM band. *See* 47 C.F.R. § 73.512 (1998). This frequency is also known as Channel 200. *See id.* Although radio stations are commonly referenced by their frequency in ordinary speech, FCC regulations usually refer to radio stations by their channel number. These channel numbers correspond directly to the FM frequencies, beginning with Channel 200. For example, Channel 200 is 87.9 MHz, Channel 201 is 88.1 MHz, Channel 202 is 88.3 MHz, and so on. *See id.*) It soon became apparent that there were too many broadcasters and not enough radio channels to allow each licensee to broadcast exclusively on a single frequency. To remedy the situation, the Secretary attempted to increase the supply of broadcasting opportunities by requiring broadcasters to reduce the power of their transmissions and by allocating several licensees to a single channel, on a time-sharing basis. *See National Broad. Co.*, 319 U.S. at 211. This solution, however, because a number of court decisions stripped the Secretary of his power to deny licenses or place time-sharing or power restrictions on licensees. *See Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923) (denying the Secretary of Commerce and Labor discretion to refuse to grant a license); *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926)

eventually “[w]ith everybody on the air, nobody could be heard.”<sup>22</sup> The situation became so unbearable<sup>23</sup> that President Coolidge urged Congress to enact legislation to remedy the problem and to prevent radio from losing all value to society.<sup>24</sup>

Congress responded to the President’s plea by enacting the Radio Act of 1927.<sup>25</sup> The Radio Act of 1927 created the Federal Radio Commission (FRC) and endowed it with broad licensing and regulatory powers.<sup>26</sup> Congress also gave the FRC the power to reduce interference between stations by enabling it to impose frequency and power restrictions.<sup>27</sup> Perhaps most noteworthy was Congress’ delegation of power to the FRC to take regulatory action “as public convenience, interest, or necessity requires.”<sup>28</sup> This language, which essentially directed the FRC to ensure diversity in broadcasting, became known as the “public interest” standard, and has frequently been the focus of policymaking and litigation<sup>29</sup> throughout radio’s regulatory history.

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(holding that Secretary of Commerce and Labor does not have the power to impose frequency, power, or time sharing restrictions on a licensee); 35 Op. Att’y Gen. 126 (1912). In desperation, the Secretary simply abandoned any effort to regulate radio, and urged broadcasters to undertake self-regulation. See *National Broad. Co.*, 319 U.S. at 212. The broadcasters failed to police themselves. See *Id.*; Cindy Rainbow, Comment, *Radio Deregulation and the Public Interest: Office of Communication of The United Church of Christ v. Federal Communications Comm’n*, CARDOZO ARTS & ENT. L.J. 169, 172 n.23 (1985) (citing Comment, *The FCC’s New Equation for Radio Programming: Radio Wants – Public Interest*, 19 DUQ. L. REV. 507, 514 (1981)). From July of 1926 to February of 1927, almost 200 new stations went on the air. See *National Broad. Co.*, 319 U.S. at 212. These stations used any frequency they desired, at any power level, without regard to the interference they caused to other stations. See *id.*

<sup>22</sup> See *National Broad. Co.*, 319 U.S. at 212-13.

<sup>23</sup> The problem of scarcity is routinely used by the courts to justify the FCC’s authority to regulate broadcasting. See Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1012-18 (1989) (discussing the five versions of the scarcity theory present in case law and legal literature: static technological scarcity, dynamic technological scarcity, excess demand scarcity, entry scarcity, and relative scarcity).

<sup>24</sup> See *National Broad. Co.*, 319 U.S. at 212-13 (quoting H.R. DOC. NO. 483, at 10 (1926)).

<sup>25</sup> See Radio Act of 1927, ch. 169, 44 Stat. 1174, *repealed by* Communications Act of 1934, ch. 652, § 602a, 48 Stat. 1064, 1102.

<sup>26</sup> See Radio Act of 1927, ch. 169, 44 Stat. 1163, § 4(a). The FRC had the authority to promulgate regulations “not inconsistent with the law as it may deem necessary to prevent interference and to carry out the provisions of this Act.” See *id.* at § 4(f).

<sup>27</sup> See *id.* at § 4(a).

<sup>28</sup> See *id.* at § 4.

<sup>29</sup> For example, the “fairness doctrine,” which requires discussion of public issues on broadcast stations to be given fair coverage, arose out of the public interest standard. See *Red Lion Broad. Co. v. Federal Communications Comm’n*, 395 U.S. 367, 377 (1969) (quoting *Great Lakes Broad. Co.*, 3 Federal Radio Comm’n Ann. Rep. 32, 33 (1929), *rev’d on other grounds by* 37 F.2d 993 (D.C. Cir. 1930) for the proposition that the “public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle

## 2. The Communications Act of 1934

The Communications Act of 1934<sup>30</sup> replaced the Radio Act of 1927. This legislation established the FCC as a replacement for the FRC, proscribed limits to the FCC's power to regulate in the public interest by forbidding censorship, and explicitly directed the FCC not to treat broadcasters as common carriers.<sup>31</sup> With the exception of these new limits on the FCC's authority, the Communications Act of 1934 was only a minor departure from the Radio Act of 1927.<sup>32</sup>

## 3. The Telecommunications Act of 1996 and Market Consolidation

Congress intended the Telecommunications Act of 1996 to be the most deregulatory telecommunications legislation in history.<sup>33</sup> Congress' stated philosophy was to "encourage competition . . . create more choices . . . and enable companies to compete in the new telecommunications marketplace."<sup>34</sup> By directing the FCC to remove restrictions on the number of stations that a single owner could possess nationwide and by requiring the FCC to relax its local ownership restrictions,<sup>35</sup> the Telecommunications Act of 1996 so far has had the opposite effect, at least with respect to radio. Instead, the Act precipitated what FCC Chairman William E. Kennard described as "the most dramatic increase in consolidation in the broadcast industry in

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applies . . . to all discussions of issues of importance to the public"). The FCC no longer enforces the fairness doctrine. *See* In re Complaint of Syracuse Peace Council against Television Station WTVH, 2 F.C.C.R. 5043, ¶ 98 (1987).

<sup>30</sup> *See generally* Communications Act of 1934, ch. 652, 48 Stat. 1064.

<sup>31</sup> *See* Communications Act of 1934, ch. 652, 48 Stat. 1066. The statute provides that "[c]ommon carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." *Id.*

<sup>32</sup> *See* Federal Communications Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 137 (1942) (noting that, with the exception of the creation of the Federal Communications Commission, Congress did not substantially alter its objectives with respect to radio by enacting the Communications Act of 1934).

<sup>33</sup> *See* Telecommunications Act of 1996, 47 U.S.C. § 1 et seq.; *see also* 142 CONG. REC. H1145-06, H1146 (1996) (statement of Rep. Linder).

<sup>34</sup> *See id.*

<sup>35</sup> *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202 (1996).

our history.”<sup>36</sup> Evidence of the anti-competitive effects of consolidation can be seen in radio’s profitability.<sup>37</sup>

Robust profits should ordinarily be a cause for celebration, not concern. The problem with the current situation, however, is that these profits are increasingly flowing to an ever-shrinking number of owners.<sup>38</sup> Since the Act was adopted, nearly 40% of U.S. radio stations have changed ownership, and there have been at least 1000 radio mergers.<sup>39</sup> Ownership of radio stations has concentrated into the hands of the top ten owners, who have doubled their holdings.<sup>40</sup> The number of individual owners, on the other hand, has been cut in half.<sup>41</sup> Thus, it has become apparent that the increase in profitability must stem, at least in part, from the decrease in competition.

This decrease in competition has resulted in dwindling consumer choice, in direct contravention of the Act’s stated purpose.<sup>42</sup> Programming has become more homogenized, and broadcasters are providing less local content.<sup>43</sup> Many rural stations, for example, have

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<sup>36</sup> See WILLIAM E. KENNARD, FEDERAL COMMUNICATIONS COMM’N, SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD, IN RE 1998 BIENNIAL REGULATORY REVIEW, MM Docket No. 98-35, 1998 WL \_\_\_\_\_ (F.C.C. 1998).

<sup>37</sup> Successful radio stations have an average cash flow margin of 40%, compared with 30% for cable and 15% for network television. See Matthew Schifrin, *Radio-Active Men: Whether Soccer Moms, Commuters, or Vacationers, Americans Spend a Lot of Time in Cars. Tom Hicks and Other Smart Players Have Figured Out How to Turn This to Their Maximum Advantage*, FORBES, June 1, 1998 at \_\_\_\_\_. After covering fixed costs, 85% of radio revenues flow to the bottom line, subject only to taxes. See *id.* Thanks to a dramatic acceleration in the price of radio advertising, the bottom line is getting increasingly larger. See *id.* The price of radio advertising has increased at roughly triple the rate of inflation. Unsurprisingly, Wall Street has recognized that radio is a good investment: radio stocks have climbed by well over 500% since 1995. See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See David Johnston, *U.S. Acts to Bar Chancellor Media’s L.I. Radio Deal*, NEW YORK TIMES, Nov. 7, 1997 at C10.

<sup>40</sup> See Sarah Ferguson, *Rebel Radio*, THE VILLAGE VOICE, May 19, 1998 at \_\_\_\_\_.

<sup>41</sup> See *id.* Consolidation has had an especially dramatic effect on minority broadcasters, who experienced the largest decrease in ownership since the federal government began keeping statistics. See Anthony DeBarros, *Radio’s Historic Change*, USA TODAY, July 7, 1998 at A1. Between 1995 and 1997, for example, the number of black-owned stations decreased by 26%. See *id.*

<sup>42</sup> See 142 CONG. REC. H1145-06, H1146 (1996) (statement of Rep. Linder).

<sup>43</sup> See *Community Low Power FM Radio (LPFM)* (visited September 5, 1998) <<http://www.airwaves.com/LPFM/goals.htm>>; DeBarros, *supra* note 41.

abandoned most, if not all, of their local programming.<sup>44</sup> In some cases, entire rural areas are without local radio, especially at night.<sup>45</sup> These trends have reduced consumer choice by limiting access to a variety of viewpoints.

When enacting the Telecommunications Act of 1996, Congress knew that a decrease in diversity of ownership would result in a decrease in consumer choice.<sup>46</sup> Although it is possible for a single owner to provide a variety of choices for consumers, the sincerity of the viewpoints expressed is just as important as the viewpoints themselves. The Supreme Court recognized this principle nearly thirty years ago by declaring that diversity of viewpoint requires a diversity of speakers; proxies are an inadequate substitute.<sup>47</sup> By concentrating ownership of the broadcast spectrum into an ever-shrinking number of owners, differing viewpoints and programming formats are now provided only by proxy, if at all. In short, concentrated ownership has had the effect of increasingly denying consumers of meaningful choice in the radio marketplace.

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<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See* 142 CONG. REC. H1145-06, H1146 (1996) (statement of Rep. Beilenson) (expressing concern that relaxed ownership restrictions could pose a serious threat to the principles of broadcast diversity and localism); 142 CONG. REC. H1145-06, H1171 (1996) (statement of Rep. Conyers) (expressing concern that the Telecommunications Act of 1996 will lead to unprecedented media concentration at a time when more diverse media voices are needed); *See* H.R. CONF. REP. NO. 97-765, at \_\_\_\_\_, *reprinted in* 1982 U.S.C.A.N. 2261, \_\_\_\_\_ (noting the nexus between diversity of media ownership and diversity of viewpoint); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). It is important to note that Congress retained the public interest standard by directing the FCC to “repeal or modify any regulation it determines to be no longer in the public interest.” *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996) (directing the FCC to lower barriers to market entry and to promote diversity of media voices: “(a) . . . the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision of ownership of telecommunications services. . . . (b) . . . NATIONAL POLICY – In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, §§ 257(a), (b) (1996)). Directing the FCC to remove barriers to market entry and to promote the diversity of media voices appears to contradict Congress’ instructions to loosen the FCC’s multiple ownership restrictions.

<sup>47</sup> *See* *Red Lion Broad. Co. v. Federal Communications Comm.*, 395 U.S. 367, 392 n.18 (1969); *see also* SUSAN NESS, FEDERAL COMMUNICATIONS COMM’N, SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS, IN RE 1998 BIENNIAL REGULATORY REVIEW, MM Docket No. 98-35, 1998 WL \_\_\_\_\_ (F.C.C. 1998) (arguing that “[a]ntagonistic’ sources can only be truly antagonistic . . . if they are separately owned and genuinely compete in the marketplace of ideas”).

The dearth of consumer choice could be remedied if the Act’s goal of “enabl[ing] companies to compete”<sup>48</sup> had been met. Unfortunately, only the largest companies can enter, let alone compete, in today’s marketplace. In the early 1980s, it was realistic for a small business to purchase and operate a full-power radio station.<sup>49</sup> The relaxation of ownership rules, however, greatly increased the value of a broadcast license.<sup>50</sup> Now, with the market value of a full-power station at roughly \$25 million (or more, in larger markets),<sup>51</sup> purchase of a broadcast station is a reality only for the largest business enterprises. Even if a small business could arrange to finance the purchase of a \$30 million station, the odds of remaining independent are slim, especially since it is common for two or three owners to account for 90% of advertising revenues in a given market.<sup>52</sup> Thus, barriers to market entry created by the Act have worked contrary to its stated goals.

## **B. 1929-1976: Policies and Regulations Favor Diversity and Competition over Homogenization and Monopolization**

### **1. Policy Favoring Localism, Competition, and Diversity of Viewpoint**

In one of the earliest decisions testing the FCC’s rulemaking authority, the Supreme Court upheld FCC restrictions on “chain broadcasting.”<sup>53</sup> In *National Broadcasting Co. v.*

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<sup>48</sup> See 142 CONG. REC. H1145-06, H1146 (1996) (statement of Rep. Linder).

<sup>49</sup> When FCC Chairman William E. Kennard “started in the early ‘80s, you could buy a small AM or FM radio station for an amount of money that made it within the grasp of a small business. . . . Unfortunately, with radio consolidation and deregulation by Congress, that’s no longer possible.” Frank Ahrens, *Yo Ho Ho and a Battle of Broadcasters*, WASHINGTON POST, Oct. 6, 1998 at D2.

<sup>50</sup> See *Community Low Power FM Radio (LPFM)* (visited September 5, 1998) <<http://www.airwaves.com/LPFM/goals.htm>>; *Comments on the Notice of Inquiry in the Matter of 1998 Biennial Review by Americans for Radio Diversity*, MM Docket No. 98-35 (1998).

<sup>51</sup> See Brian Lambert, *It’s the Christian vs. the Pirate vs. the Mayo Man in a Battle for FM Radio Space that Involves Parties from Duluth to Rochester*, ST. PAUL PIONEER PRESS, Nov. 2, 1996 at \_\_\_\_; Kristin Tollotson, *Nice ‘Beat,’ and You Can Dance to It, but 97.7 FM Has No License from FCC*, MINNEAPOLIS STAR-TRIBUNE, Aug. 16, 1996 at \_\_\_\_.

<sup>52</sup> See DeBarros, *supra* note 41; IN RE 1998 BIENNIAL REGULATORY REVIEW, MM Docket No. 98-35 ¶ 19, 1998 WL \_\_\_\_ (F.C.C. 1998)

<sup>53</sup> “Chain broadcasting” is “the simultaneous broadcasting of an identical program by two or more connected stations.” See *National Broad. Co. v. United States*, 319 U.S. 190, 194 n.1 (1943) (citing 47 U.S.C. § 153(p))

*United States*,<sup>54</sup> two of the three major broadcast networks challenged the FCC's chain broadcasting regulations<sup>55</sup> on grounds that the regulations exceeded the FCC's statutory authority and on constitutional grounds.<sup>56</sup> The FCC aimed the contested regulations at six contractual provisions which it deemed to be contrary to the public interest.<sup>57</sup> It found these clauses objectionable primarily because they hindered the growth of new networks, deprived communities of available programming, had anti-competitive effects, prevented the scheduling of local programming at desirable hours, and prevented licensees from independently determining which programming would best serve the public interest.<sup>58</sup>

The Supreme Court upheld the challenged regulations. It began by rejecting the argument that the Communications Act of 1934 limited the FCC's powers to regulation of the engineering and technical aspects of radio.<sup>59</sup> The Court pointed out that the Act's governing principle was promotion of the "public interest, convenience, or necessity."<sup>60</sup> When making licensing decisions, the Court recognized that the FCC must "provide a fair, efficient, and equitable distribution of radio services to each of [the several States and communities]."<sup>61</sup> In other words, the "public interest" to be served was "the interest of the listening public in 'the

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(1934)). The FCC stayed enforcement of the regulations pending the outcome of the National Broadcasting suit. *See National Broad.*, 319 U.S. at 196.

<sup>54</sup> *National Broad. Co. v. United States*, 319 U.S. 190 (1943).

<sup>55</sup> *See* 47 C.F.R. §§ 3.101-3.108 (1941). The National Broadcasting Company and the Columbia Broadcasting System opposed the regulations. *See National Broad.*, 319 U.S. at 192. Mutual Broadcasting System, Inc. supported the regulations. *See id.*

<sup>56</sup> *See id.* at 209.

<sup>57</sup> The clauses under attack were exclusive affiliation agreements that prevented affiliated from broadcasting the programs of other networks, territorial exclusivity agreements that prevented networks from selling programs to more than one affiliate in a given area, term of affiliation clauses that bound affiliates to a given network for at least five years, network optional time clauses that granted networks the option to require affiliates to air its programming during certain designated hours, right to reject clauses that did not give affiliates a reasonable opportunity to refuse to air network programming, and clauses controlling advertising rates. *See id.* at 198-209. The FCC also adopted local ownership restrictions that essentially limited networks to ownership of one station per market. *See id.* at 207-08.

<sup>58</sup> *See id.* at 199-208.

<sup>59</sup> *See id.* at 215-16.

<sup>60</sup> *See id.* at 215.

<sup>61</sup> *Id.* at 216.

larger and more effective use of radio’ . . . to secure the maximum benefits of radio to all the people of the United States.”<sup>62</sup> Given the broad language of the Act and the scarcity of radio channels, the Supreme Court could not find any basis for restricting the FCC’s rulemaking authority to the technical and engineering impediments to the “larger and more effective use of radio.”<sup>63</sup>

In short, the Supreme Court’s *National Broadcasting Co.* opinion adopted the “scarcity” rationale<sup>64</sup> to justify government regulation of the airwaves. By upholding the challenged regulations, the Supreme Court endorsed the promotion of localism, competition, and diversity of viewpoint as acceptable exercises of the FCC’s rulemaking authority.

## 2. Policy Favoring Diversity of Ownership

In 1953, the FCC adopted “multiple ownership” rules,<sup>65</sup> directed at preventing concentration of ownership in the broadcasting industry.<sup>66</sup> These rules required the FCC to deny all applications for a broadcast license whenever granting a license would result in concentration of ownership in a manner inconsistent with the public interest, convenience, or necessity.<sup>67</sup>

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<sup>62</sup> *Id.* at 216-17 (quoting 47 U.S.C. § 303(g) (1934)).

<sup>63</sup> *See id.* at 217-18. The Court also examined the legislative history of the Communications Act of 1934, and ultimately concluded that support could not be found for “the cramping construction of the Act pressed upon us.” *Id.* at 220-21.

<sup>64</sup> The Court recognized that freedom of speech is abridged to many who wish to use the limited facilities of radio. *See id.* at 226. Unlike other modes of expression, radio is not inherently available to all; broadcast spectrum is scarce. *See id.* This unique characteristic of radio, in the Court’s opinion, justified government regulation. *See id.* Noting that the issue would be different if Congress authorized the FCC to choose among applicants on the basis of their political, economic, or social views, the Court concluded that denial of a license based on failure to operate within the “public interest, convenience, or necessity” was not a denial of free speech. *See id.* at 226-27.

<sup>65</sup> *See* 47 C.F.R. § 3.35 (1953) (multiple ownership of AM radio stations); 47 C.F.R. § 3.240 (1953) (multiple ownership of FM radio stations); 47 C.F.R. § 3.636 (1953) (multiple ownership of television broadcast stations).

<sup>66</sup> *See* *United States v. Storer Broad. Co.*, 351 U.S. 192, 193 (1956).

<sup>67</sup> *See* 47 C.F.R. § 3.35 (1953) (multiple ownership of AM radio stations); 47 C.F.R. § 3.240 (1953) (multiple ownership of FM radio stations); 47 C.F.R. § 3.636 (1953) (multiple ownership of television broadcast stations). The rules explicitly presumed that granting a license to a single entity with ownership interests in five television stations, seven AM radio stations, or seven FM stations would be contrary to the public interest, convenience, or necessity. *See id.*

In 1956, the Supreme Court upheld a challenge to the multiple ownership rules, despite the fact that they required existing companies to divest some of their holdings. In its opinion, the Court conceded that the Act did not specifically authorize multiple ownership restrictions.<sup>68</sup> The Court, however, found authority for the rules in Congress' "grant of general rulemaking power not inconsistent with the Act or law."<sup>69</sup> Recognizing that Congress sought to assure fair opportunity for open competition in the use of mass media, the Court refused to interpret the Act to bar limitations on ownership concentration.<sup>70</sup> Thus, by upholding these regulations in spite of their harsh consequences, the Court added diversity of ownership to the scope of the FCC's rulemaking authority.

### 3. The Fairness Doctrine

The Fairness Doctrine was perhaps the most controversial policy ever implemented by the FCC. Its earliest form originated shortly after creation of the Federal Radio Commission.<sup>71</sup> In its *Great Lakes Broadcasting Co.* decision, the Federal Radio Commission announced that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that this principle applies . . . to all discussions of issues of importance to the public."<sup>72</sup> The Federal Radio Commission later used this principle to justify the denial of license renewals and construction permits.<sup>73</sup>

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<sup>68</sup> See *Storer Broad. Co.*, 351 U.S. at 203.

<sup>69</sup> *Id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *Great Lakes Broad. Co.*, 3 Federal Radio Comm'n Ann. Rep. 32 (1929), *rev'd on other grounds by* 37 F.2d 993 (D.C. Cir. 1930). See also *Chicago Fed. of Labor v. Federal Radio Comm'n*, 3 Federal Radio Comm'n Ann. Rep. 36 (1929); *KFKB Broad. Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (1931).

<sup>72</sup> See *Great Lakes Broad. Co.*, 3 Federal Radio Comm'n Ann. Rep. at 33.

<sup>73</sup> See *Trinity Methodist Church, S. v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932); *Young People's Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178 (1938).

Over time, the FCC issued several opinions and promulgated a number of regulations to clarify the doctrine.<sup>74</sup> Its most basic form, however, was twofold:<sup>75</sup> the Fairness Doctrine compelled broadcasters to give adequate coverage to public issues,<sup>76</sup> and that coverage had to fairly and accurately reflect opposing viewpoints.<sup>77</sup>

In *Red Lion Broadcasting Co. v. Federal Communications Commission*,<sup>78</sup> two broadcasters challenged the Fairness Doctrine on the basis that it violated the First Amendment.<sup>79</sup> On appeal, the Supreme Court conceded that First Amendment interests affect broadcasting. It maintained, however, that the unique characteristics of radio justified treating the Fairness Doctrine as a content-neutral time, place, and manner restriction, rather than a content-based restriction on free speech.<sup>80</sup> The Court noted that giving broadcasters the right to exclude opposing viewpoints would be equivalent to using amplifiers to drown out civilized speech, and thus held that a broadcaster's right to free speech "does not embrace a right to snuff out the free speech of others."<sup>81</sup> Instead, the Court held that licensees are obligated to act as fiduciaries of the public.<sup>82</sup> The court emphasized that:

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<sup>74</sup> See 47 C.F.R. § 73.123 (1968) (implementing the Fairness Doctrine to regulate personal attacks and political editorials).

<sup>75</sup> See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

<sup>76</sup> See *United Broad. Co.*, 10 F.C.C. 515 (1945).

<sup>77</sup> See *New Broad. Co.*, 6 P & F Radio Reg. 258 (1950). Licensees had to pay for presentation of opposing viewpoints if they could not find sponsors. See *Cullman Broad. Co.*, 25 P & F Radio Reg. 895 (1963). In addition, licensees had to initiate presentation of opposing viewpoints if no other sources were available. See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); *Metropolitan Broad. Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Ass'n*, 6 P & F Radio Reg. 283 (1950).

<sup>78</sup> See *Red Lion Broad. Co. v. Federal Communications Comm'n*, 395 U.S. 367 (1969).

<sup>79</sup> See *id.* at 370-74.

<sup>80</sup> See *id.* at 386-87 (citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

<sup>81</sup> See *id.* at 387 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>82</sup> See *id.* at 389, 392 n.18, 394. The court also quoted legislative history that stated "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." See *id.* at 383 (quoting S. REP. NO. 562 (1959), reprinted in 1959 U.S.C.C.A.N. \_\_\_\_\_, 2571. This treatment of broadcasters as trustees of public property, as opposed to owners of private property, has commonly been referred to as the "public trust model" or the "trusteeship model." See, e.g., Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 213-21 (1982); Krystilyn Corbett, *The Rise of Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611, 615-28 (1996).

[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. Speech concerning public affairs is more than self-expression; it is the essence of self-government. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the FCC.<sup>83</sup>

By upholding the Fairness Doctrine, the Supreme Court endorsed not only government *promotion* of viewpoint diversity; it also endorsed *compulsion* of viewpoint diversity.

### **C. 1976-Present: Policies and Regulations Favor Homogenization and Monopolization over Diversity and Competition**

#### **1. Policy Relaxing Diversity Requirements to Protect Businesses**

In 1976, the FCC placed new restrictions on cross-ownership of newspapers and broadcast stations.<sup>84</sup> The regulations sought to prevent future cross-ownership of newspaper-broadcast combinations and to undo certain existing newspaper-broadcast combinations.<sup>85</sup> Noting, however, that divestiture of existing newspaper-broadcast combinations could result in “disruption for the industry and hardship for individual owners,”<sup>86</sup> the FCC weighed its concerns about concentration of ownership against its fears of creating economic hardship.<sup>87</sup> Concluding that “a mere hoped for gain in diversity” did not justify inevitable disruptions in ownership, the FCC chose to order divestiture in only the most egregious cases.<sup>88</sup> Accordingly, the FCC

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<sup>83</sup> See *Red Lion Broad. Co.*, 395 U.S. at 390.

<sup>84</sup> See generally 47 C.F.R. § 73.636 (1976) (restricting cross-ownership of newspapers and television stations); 47 C.F.R. §§ 73.35, 73.240 (1976) (restricting cross-ownership of newspapers and radio stations).

<sup>85</sup> See National Citizens Comm. for Broad. v. Federal Communications Comm’n, 555 F.2d 938, 943 (D.C. Cir. 1977), *rev’d in part by* 436 U.S. 775 (1978). See also Second Report & Order, 50 F.C.C.2d 1046, 1076 (1975) (forbidding transfer of both halves of a newspaper-broadcast combination to the same owner, except by inheritance, stating the FCC’s refusal to issue broadcast licenses to a local daily newspaper, and requiring licensees that acquire a newspaper to dispose of the broadcast station within one year).

<sup>86</sup> Second Report & Order, 50 F.C.C.2d 1046, 1078 (1975).

<sup>87</sup> See *id.* at 1073.

<sup>88</sup> See *id.* at 1080. The FCC explained that a newspaper-broadcast combination would be considered “egregious” if it had an “effective monopoly in the marketplace of ideas” with respect to a local community. See *id.* at 1081.

adopted a policy requiring divestiture only when no other newspaper or city-grade broadcast station operated in the locality of the combination, essentially “grandfathering” most existing newspaper-broadcast combinations.<sup>89</sup>

The Supreme Court upheld the “grandfather” regulations, thereby reversing a lower court holding that divestiture, not “grandfathering” was the only means available to implement the FCC regulations.<sup>90</sup> While recognizing that the FCC had long acted on the theory that diversity of control of the mass media had been a primary factor in its licensing considerations, the Court pointed out that diversification of ownership was not the sole consideration relevant to the public interest.<sup>91</sup> The Court noted that the FCC, when determining whether licensing would serve the public interest, had considered factors other than diversification of ownership, such as the anticipated contribution of the owner to station operations, the licensee’s programming proposals, the licensee’s past broadcast record, and the prevention of undue disruption to existing service.<sup>92</sup> In addition, the Court tacitly approved of considering economic harm to individual owners when determining whether a policy favoring divestiture would be in the public interest.<sup>93</sup> By allowing the FCC to weigh these factors heavily during the rulemaking process, the Court approved a policy shift from ranking diversification of ownership as a primary factor to “diversification of ownership [as] a relevant but somewhat secondary factor.”<sup>94</sup>

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<sup>89</sup> *See id.* at 1082.

<sup>90</sup> *See National Citizens Comm. for Broad. v. Federal Communications Comm’n*, 555 F.2d 938 (D.C. Cir. 1977), *rev’d in part by* 436 U.S. 775 (1978). The D.C. Circuit concluded the FCC erred by requiring evidence to clearly show that cross-ownership would harm the public interest before ordering divestiture. *See id.* at 962, 966. The court also found that the record contained only inconclusive evidence that divestiture was more harmful than cross-ownership or vice-versa. *See id.* at 959-66. The court, in ultimately requiring divestiture in all cases, recognized that gains in diversity from divestiture may be merely speculative. *See id.* at 965. Despite this, the court held that the FCC should not have permitted “grandfathering,” because “divestiture is the most promising method for increasing diversity that does not entail governmental supervision of speech.” *See id.*

<sup>91</sup> *See National Citizens Comm. for Broad. v. Federal Communications Comm’n*, 436 U.S. 775, 781-82 (1978).

<sup>92</sup> *See id.* at 782-83.

<sup>93</sup> *See id.* at 787.

<sup>94</sup> *See id.* at 781, 809. The Court’s convoluted reasoning indicated that it knew it was creating a dramatic policy shift. A comparison between the reasoning employed by the D.C. Circuit to determine that the FCC must require

## 2. Discontinuation of Low Power FM Licensing to Reduce Competition

In 1976, the Corporation for Public Broadcasting (CPB)<sup>95</sup> filed a petition<sup>96</sup> with the FCC seeking, among other things, to treat low power FM stations as secondary stations.<sup>97</sup> The FCC responded by refusing to grant licenses to new low power FM stations altogether,<sup>98</sup> thereby phasing out legalized low power FM broadcasting in the United States. The purpose of this change in policy was, among other things, to allow large non-commercial broadcasters more

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divestiture with the reasoning employed by the Supreme Court to uphold “grandfathering” illustrates this point. The D.C. Circuit relied, in part, on Supreme Court decisions interpreting new FCC regulations that would result in divestiture or forfeiture to conclude that diversity of ownership, even if it would require divestiture, would best promote the public interest. *See* National Citizens Comm. for Broad. v. Federal Communications Comm’n, 555 F.2d 938, 962-63 (D.C. Cir. 1977); *see also id.* at 945 nn.6-9. In contrast, the Supreme Court relied on decisions concerning licensing renewal to uphold the “grandfathering” clauses, based on a licensee’s “legitimate renewal expectanc[y] that is implicit in the structure of the Act.” *See* Federal Communications Comm’n v. National Citizens Comm. for Broad., 436 U.S. 775, 805 (1978); Citizens Communications Ctr. v. Federal Communications Comm’n, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971); In re Formulation of Policies Relating to the Broadcast Renewal Applicant, 66 F.C.C. 419, 420 (1977); Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970). The Supreme Court, however, could not use its prior divestiture cases to support its position because those cases clearly required the sacrifice of business interests to promote diversity. *See National Broad. Co. v. United States*, 319 U.S. 190 (1943) (upholding the FCC’s chain broadcasting regulations, which required NBC to divest one of its dual networks); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (upholding the FCC’s multiple ownership regulations, which required Storer to divest some of its broadcast outlets). Considerations inherent in renewal of a license are not the same as considerations inherent in promulgating new multiple ownership rules. By promulgating more restrictive multiple ownership rules, the FCC puts existing licensees on notice that some of them will no longer have a legitimate renewal expectancy, because certain ownership combinations will be presumed to no longer meet the public interest standard. *See, e.g.*, 47 C.F.R. § 3.240 (1953) (presuming ownership in more than five FM stations is contrary to the public interest). In contrast, renewing a license under an existing regulatory scheme justifiably leads to a renewal expectancy (absent a change in regulations), because licensees have been put on notice of the requirements for renewal and have thereby been encouraged to meet those requirements.

<sup>95</sup> The Corporation for Public Broadcasting provides three types of federal grants to educational broadcasters: community service grants, station development grants, and program acquisition grants. *See* 47 U.S.C. § \_\_\_\_ (396??). In order to qualify for these grants, eligible outlets must have at least five full-time, paid employees, operate at 100 watts or more, operate at least 18 hours per day, seven days per week, receive at least \$195,000 per year from non-federal sources, and demonstrate either a minimum level of listenership or a minimum amount of local financial support. *See* JESSE WALKER, CATO POLICY ANALYSIS NO. 277, WITH FRIENDS LIKE THESE: WHY COMMUNITY RADIO DOES NOT NEED THE CORPORATION FOR PUBLIC BROADCASTING 5 (1997) (citing Corporation for Public Broadcasting, *Corporation for Public Broadcasting Adopts New Performance Standards for Public Radio Grantees*, Press Release, January 22, 1996).

<sup>96</sup> *See* Notice of Proposed Rule Making, 41 Fed. Reg. 16,973 (March 17, 1976).

<sup>97</sup> *See* In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C.2d 240, ¶ 11 (1978). A secondary station is required to move to a different frequency or cease operations to accommodate primary stations. *See id.* at ¶ 27.

<sup>98</sup> *See* 47 C.F.R. § 73.511 (1978).

opportunity to broadcast in the FM band, which was increasingly becoming crowded by small non-commercial broadcasters.<sup>99</sup>

The CPB's petition sparked substantial response.<sup>100</sup> Opponents criticized the CPB for proposing rule changes without sufficiently involving existing low power broadcasters in the process.<sup>101</sup> They characterized the process as "staged behind closed doors" and feared that the CPB and NPR intended not to improve service, but rather, to eliminate competition.<sup>102</sup>

Opponents also portrayed the battle as a classic David vs. Goliath "conflict between well-funded, expensive, heavily bureaucratized, heavily narcotized institutions and the rowdy, slightly seedy, mostly poverty-stricken non-institutional community stations."<sup>103</sup>

The opponents advanced three main arguments in support of keeping low power FM. First, low power FM stations, unlike most CPB-funded stations, had strong local ties and provided truly local service.<sup>104</sup> In addition, eliminating low power FM would also eliminate training opportunities for those seeking to pursue a career in broadcasting.<sup>105</sup> Finally, the opponents argued that in many situations, a new station could only be started on a small scale.<sup>106</sup> These budding stations could not realistically expand until their public acceptance had grown to

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<sup>99</sup> See *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240, ¶ 16, 24 (1978).

<sup>100</sup> See *id.* at ¶ 13. Proponents shared the CPB's view that effective, nationwide public radio service required licensing stations with more substantial facilities. See *id.* They also argued that the FCC could license sixty five to seventy five more high-power stations nationwide by eliminating low power FM. See *id.* at ¶ 16.

<sup>101</sup> See Walker, *supra* note 17, at 11 (quoting Scott M. Martin, *Educational FM Radio: The Failure of Reform*, 34 Federal Communications L.J. 443 n.65 (1982) (quoting Petition of the Intercollegiate Broadcast System)).

<sup>102</sup> See *id.*

<sup>103</sup> See Edd Rountt et al., *THE RADIO FORMAT CONUNDRUM* 277-78 (1982).

<sup>104</sup> See *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240, ¶ 13, 18 (1978). The CPB countered this argument by alleging that low power broadcasters did not target local communities, but rather, served them by "the accident of the transmitter location." See *id.* ¶ 18.

<sup>105</sup> See *id.* at ¶ 19. Some commercial broadcasters supported the opponents' position with respect to training. See *id.*

<sup>106</sup> See *id.* ¶ 13, 20. The National Federation of Community Broadcasters countered this argument by claiming that it was not very expensive to upgrade to a 100-watt station. See *id.* ¶ 20.

a sufficient level.<sup>107</sup> Thus, by eliminating low power, the FCC would eliminate the “stepping stone” small businesses relied upon to mature into larger businesses.<sup>108</sup> In other words, by eliminating low power, the FCC would effectively raise barriers to market entry, precluding small businesses from establishing a foothold in the radio industry.

The FCC eventually concluded that low power FM could not be allowed to function in a manner which defeated opportunities for larger, more efficient operations to provide service to the public.<sup>109</sup> Accordingly, the FCC announced that it would no longer license FM stations who proposed to broadcast at less than 100 watts.<sup>110</sup> The FCC gave existing stations two years to either relocate to a different portion of the spectrum or upgrade to 100 watts.<sup>111</sup> Many of the stations who upgraded survived.<sup>112</sup> In contrast, those who could not upgrade, for the most part, vanished.<sup>113</sup> By the late 1980s, illegal low power stations began to fill the void left by the FCC’s shift in policy.<sup>114</sup>

### **3. The Rise of the “Market Forces” Approach to Regulation**

The D.C. Circuit, in a series of opinions issued in the 1970s,<sup>115</sup> developed what became known as the “format doctrine.”<sup>116</sup> The format doctrine outlined circumstances under which the FCC was *not* required to hold hearings before approving a format change for entertainment programming. Essentially, the court did not require hearings when notice of a proposed format

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<sup>107</sup> See *id.* at ¶ 13.

<sup>108</sup> See *id.* at ¶ 13, 20.

<sup>109</sup> See *id.* at ¶ 24.

<sup>110</sup> See 47 C.F.R. § 73.511 (1978).

<sup>111</sup> See 47 C.F.R. § 73.512 (1978).

<sup>112</sup> See Walker, *supra* note 17, at 12.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *Citizens Comm. to Save WEFM v. Federal Communications Comm’n*, 506 F.2d 246 (D.C. Cir. 1974); *Citizens Comm. to Keep Progressive Rock v. Federal Communications Comm’n*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broad. Serv. v. Federal Communications Comm’n*, 478 F.2d 919 (D.C. Cir. 1973); *Hartford Communications Comm. v. Federal Communications Comm’n*, 467 F.2d 408 (D.C. Cir. 1972); *Citizens Comm. to Preserve the Voice of the Arts in Atlanta v. Federal Communications Comm’n*, 436 F.2d 263 (D.C. Cir. 1970).

<sup>116</sup> See *Federal Communications Comm’n v. WNCN Listeners Guild*, 450 U.S. 582, 587 n.4 (1981).

change did not precipitate “significant public grumbling,” when the segment of the population preferring the existing format was too small to be accommodated by available frequencies, when there was an adequate substitute in the service area, or when the format would not be economically feasible even if the station were managed effectively.<sup>117</sup> In all other cases, the FCC was required to hold a hearing.<sup>118</sup>

The FCC disagreed with this position, insisting that the choice of entertainment formats should be left to the judgment of individual licensees.<sup>119</sup> In response to the format doctrine, the FCC issued a Notice of Inquiry,<sup>120</sup> seeking public comment on whether the public interest would be better served by FCC scrutiny or by reliance on market forces.<sup>121</sup>

The clash between the FCC and the D.C. Circuit eventually resulted in Supreme Court review of the Memorandum Opinion. In *Federal Communications Comm’n v. WNCN Listeners Guild*,<sup>122</sup> a number of citizens groups who sought to preserve certain entertainment formats challenged the FCC’s Memorandum Opinion.<sup>123</sup> The D.C. Circuit held that the Memorandum Opinion violated the Communications Act of 1934.<sup>124</sup> All parties appealed.

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<sup>117</sup> See *Federal Communications Comm’n v. WNCN Listeners Guild*, 610 F.2d 838, 842-43 (1979), *rev’d by* 450 U.S. 582 (1981).

<sup>118</sup> See *id.*

<sup>119</sup> See *Federal Communications Comm’n v. WNCN Listeners Guild*, 450 U.S. 582, 587 (1981).

<sup>120</sup> See Notice of Inquiry, Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580 (1976).

<sup>121</sup> See *Federal Communications Comm’n v. WNCN Listeners Guild*, 450 U.S. 582, 587-88 (1981). Following a period of public notice and comment, the FCC issued a Memorandum Opinion, concluding that the Communications Act of 1934 did not compel the FCC to review format changes, that review would pose substantial administrative problems for the FCC, that review would discourage innovation in programming, and that Congress intended to have market forces determine whether a station’s formatting decisions would promote its ultimate survival. See Memorandum Opinion & Order, 60 F.C.C.2d 858, 858-861 (1977). In addition to explaining why agency review would be detrimental, the FCC advanced three reasons to explain why allowing market forces to dictate format would be beneficial. First, according to the FCC, competition among broadcasters in large markets had already produced “an almost bewildering array of diversity in entertainment formats.” See *id.* at 863. Next, market forces promote not only diversity of formats, but also diversity *within* a given format. See *id.* at 863-64. Finally, the FCC concluded that since the market is more flexible than government regulation, it will respond more quickly to changes in public tastes. See *id.* at 866 n.8.

<sup>122</sup> See *Federal Communications Comm’n v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

<sup>123</sup> See *id.* at 585-86.

<sup>124</sup> See *id.*

The Supreme Court reversed the D.C. Circuit.<sup>125</sup> It noted that the Act did not define the public interest standard, and acknowledged that the standard was “a supple instrument for the exercise of discretion by the [FCC].”<sup>126</sup> The Court also acknowledged its tradition of deference to the FCC’s rulemaking decisions, so long as those decisions were reasonable.<sup>127</sup> Recognizing that “diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act,” the Court approved of the FCC’s decision to balance the policy of promoting diversity against the policy of avoiding unnecessary restrictions on a licensee’s discretion.<sup>128</sup> The Court, however, warned to FCC to “be alert to the consequences of its policies and . . . stand ready to alter its rules if necessary to serve the public interest more fully.”<sup>129</sup>

By allowing the goal of avoiding financial harm to be considered as a factor in overriding the goal of promoting diversity, the Supreme Court in *National Citizens Committee* specified a situation in which business interests could override diversity.<sup>130</sup> Likewise, the *WNCN* decision specified a situation in which business interests, as dictated by market forces, could be allowed to override the FCC’s longstanding tradition of giving primary consideration to promoting diversity when making policy decisions.<sup>131</sup>

#### **4. A Brief Return to Promoting Diversity**

Citing increased demand and unused capacity, the FCC amended its rules in 1983 to permit the operation of an increased number of FM broadcast stations, despite objections from major networks that the increased competition would harm them financially.<sup>132</sup> Commonly

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<sup>125</sup> See *id.* at 604.

<sup>126</sup> See *id.* at 593.

<sup>127</sup> See *id.* at 594-96, 600.

<sup>128</sup> See *id.* at 596.

<sup>129</sup> *Id.* at 603.

<sup>130</sup> See *supra* notes 91-94 and accompanying text.

<sup>131</sup> See *supra* notes 122-29 and accompanying text.

<sup>132</sup> See *In re Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 F.C.C.2d 152, ¶ 5-23 (1983).

referred to as “Docket 80-90,” this change in rulemaking sought to ensure reception of at least one radio station to everyone, to provide diverse service to as many people as possible, and to provide outlets for local expression addressing each community’s needs and interests.<sup>133</sup>

Opponents of Docket 80-90 relied primarily on arguments that increasing the number of stations would cause too much competition in the marketplace for existing stations and cause signal interference to listeners located outside of existing stations’ primary service areas.<sup>134</sup> The FCC dismissed these arguments by asserting that it should not second-guess a market’s potential by curtailing competition. The FCC also argued that any loss to listeners outside the primary service areas would be “more than compensated for by the provision of new services, particularly to those communities without local services.”<sup>135</sup>

As a result of Docket 80-90, the number of radio stations increased by about 50%.<sup>136</sup> Because of the nature of the growth in the number of radio outlets, Docket 80-90 enjoyed very little popularity. Large broadcasters assailed Docket 80-90 on the basis that it created too much competition and a fragmented radio marketplace.<sup>137</sup> Promoters of community radio scorned it on the basis that it did not require enough accountability from new owners, who often bought and sold radio stations for a quick profit without giving a thought to providing local service to the communities in which they were licensed.<sup>138</sup> Despite its failures, Docket 80-90 signified an

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<sup>133</sup> See *id.* at ¶ 17.

<sup>134</sup> See *id.* at ¶ 13, 18, 24-37.

<sup>135</sup> See *id.* at ¶¶ 18, 31.

<sup>136</sup> See *Comment of National Lawyers Guild Committee on Democratic Communications*, Fed. Communications Comm’n RM No. 9208 (\*not dated\*). See also *Comments of the National Assoc. of Broads.*, Fed. Communications Comm’n RM Nos. 9208, 9242, 9246 at 15 (April 27, 1998) (discussing the increase in the number of FM stations under Docket 80-90).

<sup>137</sup> See *Comments of the National Assoc. of Broads.*, Fed. Communications Comm’n RM Nos. 9208, 9242, 9246 at 15 (April 27, 1998) (discussing the increase in the number of FM stations under Docket 80-90). Eventually, the FCC relaxed its ownership rules. See *Revision of Radio Rules & Policies*, 7 F.C.C.R. 2755, 2756-57 (1992).

<sup>138</sup> See *Community Low Power FM Radio (LPFM)* (visited September 5, 1998) <<http://www.airwaves.com/LPFM/goals.htm>>.

attempt by the FCC to once again place an emphasis on diversity. Perhaps as a result of its failures, this return to promoting diversity was short-lived.<sup>139</sup>

## 5. Abolishment of the Fairness Doctrine

In 1987, the FCC declared the Fairness Doctrine unconstitutional.<sup>140</sup> This declaration arose out of the FCC's 1985 Fairness report and the *Meredith Corp. v. Federal Communications Commission* case.<sup>141</sup>

In 1985, the FCC conducted “a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine.”<sup>142</sup> The FCC found that regulatory intervention to promote diversity of viewpoint on a station-by-station basis was no longer needed, due to the explosive growth in the number and types of information sources available in the marketplace.<sup>143</sup> In addition, the FCC found that the Fairness Doctrine inhibited the expression of unpopular opinions,<sup>144</sup> placed the FCC in the intrusive role of scrutinizing program content,<sup>145</sup> created the opportunity for abuse for political reasons,<sup>146</sup> and imposed unnecessary costs on the government and broadcasters.<sup>147</sup> While explicitly refusing to determine the doctrine's constitutionality, the FCC expressed its opinion that the Fairness Doctrine might have been contrary to the guarantees of the First Amendment.<sup>148</sup> The report recognized that the

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<sup>139</sup> Both Congress and the FCC eventually took action to undo the strain of increased competition on broadcasters. *See, e.g.*, Revision of Radio Rules & Policies, 7 F.C.C.R. 2755, 2756-57 (1992) (relaxing ownership restrictions); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202 (1996) (directing the FCC to loosen its multiple ownership regulations).

<sup>140</sup> *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, ¶ 2 (1987).

<sup>141</sup> *See* Meredith Corp. v. Federal Communications Comm'n, 809 F.2d 863 (D.C. Cir. 1987).

<sup>142</sup> *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, ¶ 3 (1987). *See also* Inquiry Into § 73.1910 of the Commission's Rules & Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

<sup>143</sup> *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, ¶ 4 (1987).

<sup>144</sup> *See* Inquiry Into § 73.1910 of the Commission's Rules & Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 188-90 (1985).

<sup>145</sup> *See id.* at 190-92.

<sup>146</sup> *See id.* at 192-94.

<sup>147</sup> *See id.* at 194-96.

<sup>148</sup> *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, ¶ 5 (1987).

Supreme Court had upheld the Fairness Doctrine in its *Red Lion* decision, but argued that the factual considerations underlying *Red Lion* had eroded.<sup>149</sup>

In *Syracuse Peace Council v. Television Station WTVH*, the FCC determined that WTVH had violated the Fairness Doctrine by airing advertisements favoring construction of a nuclear power plant without airing contrasting viewpoints.<sup>150</sup> Meredith Corporation, the owner of WTVH, asked the FCC to reconsider its decision, arguing among other things, that the Fairness Doctrine was unconstitutional on its face and as applied to the particular facts of the situation at hand.<sup>151</sup> The FCC denied Meredith's request for consideration notwithstanding its opinion with respect to the Fairness Doctrine's constitutionality, on grounds that determination of the doctrine's constitutionality was best left to Congress or the courts.<sup>152</sup> The FCC's decision was eventually upheld by the D.C. Circuit.<sup>153</sup>

By abolishing the Fairness Doctrine, the FCC once again placed great faith in the ability of the marketplace to achieve diversity of viewpoint. This position, especially in light of the

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<sup>149</sup> *See id.*

<sup>150</sup> *See Syracuse Peace Council v. Television Station WTVH*, 99 F.C.C.2d 1389 (1984), *remanded sub nom.* *Meredith Corp. v. Federal Communications Comm'n*, 809 F.2d 863 (D.C. Cir. 1987).

<sup>151</sup> *See Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, ¶ 8 (1987).

<sup>152</sup> *See id.* at ¶ 10.

<sup>153</sup> The D.C. Circuit held that the FCC's refusal to consider Meredith's constitutional arguments was arbitrary and capricious, and remanded the case to the FCC with instructions to consider the constitutional claims. *See Meredith Corp. v. Federal Communications Comm'n*, 809 F.2d 863, 874 (D.C. Cir. 1987). Upon reconsideration, the FCC noted that First Amendment considerations were an integral component of the public interest standard. *See Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, ¶ 20 (1987). Any regulation that impeded First Amendment objectives, therefore, necessarily disserved the public interest. *See id.* The FCC then analyzed the Fairness Doctrine's constitutionality and rejected it, primarily on the grounds that it chilled speech and imposed too much editorial control over the content of broadcasts. *See id.* at ¶¶ 42-57. To a large extent, the FCC justified its decision on grounds that the marketplace has sufficiently provided diverse sources of information and viewpoints to the public. *See id.* at ¶¶ 55-56. The FCC found that the Fairness Doctrine, in practice, chilled speech because whenever a broadcaster covered controversial issues of public importance, it ran the risk of having complaints filed against it. *See id.* The courts have upheld the FCC's decision to abandon the Fairness Doctrine. *See, e.g., Arkansas AFL-CIO v. Federal Communications Comm'n*, 11 F.3d 1430 (\_\_\_\_\_, 1993) (upholding FCC's refusal to enforce the Fairness Doctrine). Perhaps the most unusual aspect of the FCC's opinion appeared in dicta: the FCC questioned the scarcity rationale as a justification for differentiating between regulating broadcast media, which is constitutional in most cases, and regulating print media, which is unconstitutional in most cases.

Fairness Doctrine's harshness<sup>154</sup> and the explosive growth in the number of radio outlets following Docket 80-90,<sup>155</sup> was reasonable in the 1980s. The FCC heavily relied on expansion in the number of outlets (and owners, given the strict multiple ownership restrictions in effect at the time) to justify its position that market forces could achieve diversity of viewpoint.<sup>156</sup> Logic, therefore, would dictate that a contraction in the number of outlets (or owners, if a loosening of ownership restrictions were to occur) would require a change in position in order to compensate for loss of diversity. Although the FCC needn't reinstate the Fairness Doctrine, it should reconsider its policies when the realities of the marketplace no longer promote diversity of viewpoint.<sup>157</sup>

## 6. The Death of Affirmative Action

Until recently,<sup>158</sup> the FCC required broadcasters to maintain equal employment opportunity policies.<sup>159</sup> A recent court decision, however, caused the FCC to suspend its affirmative action regulations indefinitely.<sup>160</sup>

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<sup>154</sup> See *supra* notes 71-83 and accompanying text (pointing out that the Fairness Doctrine compelled broadcasters to present diverse viewpoints).

<sup>155</sup> See *supra* notes 115-31 and accompanying text (describing the explosive growth in radio outlets following Docket 80-90).

<sup>156</sup> See *supra* notes 132-39 and accompanying text.

<sup>157</sup> See *supra* note 129 and accompanying text.

<sup>158</sup> The FCC suspended its regulations requiring broadcasters to file equal employment opportunity reports on September 29, 1998. See *Commission Suspends Requirements for Filing of EEO Forms*, Fed. Communications Comm'n MM No. 98-13 (Sept. 29, 1998).

<sup>159</sup> See generally 47 C.F.R. § 73.2080 (1998) (outlining equal employment opportunity requirements). Under the old regulations, broadcasters had to provide equal employment opportunities to all qualified persons; broadcasters could not discriminate on the basis of race, color, religion, national origin, or sex. In addition, each station had to implement affirmative action programs which informed employees and applicants of the programs. To ensure compliance, the FCC conducted mid-term reviews, based on employment profiles to be filed by the licensed broadcasters.

<sup>160</sup> See *Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344, 346 (D.C. Cir. 1998). KFUE (the "church"), a Missouri-based Lutheran broadcaster, filed renewal applications with the FCC in 1989. Claiming that KFUE failed to hire enough black employees, the NAACP filed a petition to deny the applications. The church responded by stating that it had, in fact, hired black employees. The church, however, required all applicants to have knowledge of Lutheran doctrine and classical music training. Very few minorities in the area could have met both criteria. As a result, the church argued, the NAACP could not use proportional representation to show that it had engaged in discriminatory hiring practices. Finding no evidence of intentional discrimination, the FCC refused to deny the church's renewal application. It did, however, require the church to submit more frequent

The abolishment of affirmative action is the most recent event in a trend, which started roughly twenty years ago, of de-emphasizing diversity. Granted, none of the policy changes, in isolation, could fairly be characterized as being solely responsible for the homogenization of radio. When taken in combination, however, the cumulative effect of court opinions favoring business interests over diversity,<sup>161</sup> FCC regulations outlawing low power FM,<sup>162</sup> abandonment of the Fairness Doctrine,<sup>163</sup> consolidation of radio ownership under the Telecommunications Act of 1996,<sup>164</sup> and abolishment of affirmative action<sup>165</sup> strongly suggests a harsh climate for viewpoint diversity in radio.

## II. CONSTITUTIONAL ISSUES

### A. First Amendment Issues

The Supreme Court has always recognized that First Amendment<sup>166</sup> guarantees apply to broadcasting.<sup>167</sup> Due to the scarcity rationale, however, the Court has never applied the same First Amendment standards to broadcasters that it has applied to the print media.<sup>168</sup> Instead, the

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reporting of its equal employment efforts. Citing *Adarand Constructors, Inc. v. Peña* on appeal, the court urged the D.C. Circuit to apply strict scrutiny to the regulations. *See generally Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to government contract preferences for minority business owners). The D.C. Circuit agreed, and declared the affirmative action regulations to be unconstitutional. *See Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344, 356 (D.C. Cir. 1998). As a result, the FCC suspended its affirmative action regulations indefinitely. *See Commission Suspends Requirements for Filing of EEO Forms*, Fed. Communications Comm'n MM No. 98-13 (Sept. 29, 1998).

<sup>161</sup> *See supra* notes 84-94 and accompanying text.

<sup>162</sup> *See supra* notes 96-114 and accompanying text.

<sup>163</sup> *See supra* notes 140-56 and accompanying text.

<sup>164</sup> *See supra* notes 33-52 and accompanying text.

<sup>165</sup> *See supra* notes 157-59 and accompanying text.

<sup>166</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>167</sup> *See, e.g., Red Lion Broad. Co. v. Federal Communications Comm'n*, 395 U.S. 367, 386 (1969) (citing *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948)); *Federal Communications Comm'n v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978).

<sup>168</sup> *See Red Lion*, 395 U.S. at 386-87; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952); *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

Court gives broadcasters far less First Amendment protection that it gives any other form of communications media.<sup>169</sup>

Nowhere is this more apparent than in broadcast licensing. With rare exceptions, the government does not require a license to engage in speech using any medium other than broadcasting.<sup>170</sup> Broadcasting has always been treated as a privilege, not a right.<sup>171</sup> By failing to grant licenses to all applicants, the FCC systematically denies certain individuals use of the medium prior to the actual expression of their ideas. Because of its routine denial of free-speech opportunities, the FCC's licensing system closely resembles a system of prior restraints<sup>172</sup> and raises the suspicion that the rejected applicants were denied licenses based on the content of their proposed broadcasts.<sup>173</sup>

### **1. Prior Restraints**

Prior restraints are presumed unconstitutional,<sup>174</sup> and the government has the burden of providing sufficient justification to overcome the heavy presumption against a prior restraint's validity.<sup>175</sup> The courts have tolerated them "only where [they] operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."<sup>176</sup> In order to be upheld, a system of prior restraints must withstand the three prongs

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<sup>169</sup> See *Pacifica*, 438 U.S. at 748; *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 380 (1984).

<sup>170</sup> See *Pacifica*, 438 U.S. at 748.

<sup>171</sup> See *National Broad. Co. v. United States*, 319 U.S. at 227; *Red Lion*, 395 U.S. at 389; *Columbia Broad. Sys.*, 412 U.S. at 112-13.

<sup>172</sup> A system of prior restraints is a system which authorizes public officials to deny individuals access to a forum prior to the expression of their message. See BLACK'S LAW DICTIONARY 828 (6th Ed. 1991).

<sup>173</sup> See *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 641-43 (1994).

<sup>174</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (\_\_\_\_); *Schneider v. New Jersey*, 308 U.S. 147, 164 (\_\_\_\_); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (\_\_\_\_); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

<sup>175</sup> See *New York Times*, 403 U.S. at 714.

<sup>176</sup> See *Bantam Books*, 372 U.S. at 639.

of the *Freedman* test.<sup>177</sup> First, the system of prior restraints must place the burden of proving the regulations do not restrict protected speech on the censor.<sup>178</sup> Next, the censor must either issue a license or get a court order restraining the speaker within a brief, specified period of time.<sup>179</sup> Finally, the system must be set up so that any interim restraining order shall receive prompt judicial review, in order to minimize the detrimental effect of any erroneous restraint.<sup>180</sup>

When courts have applied constitutional prior restraint analysis to the FCC's licensing scheme, the analysis has been dubious.<sup>181</sup> In fact, the Supreme Court has never applied anything resembling a "compelling interest" standard to broadcast regulations, despite First Amendment implications.<sup>182</sup>

## 2. Content-Based Regulation

In addition to resembling a system of prior restraints, the FCC licensing scheme also closely resembles content-based regulation of speech. Content-based regulations "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."<sup>183</sup> Regulations that stifle speech on account of its message, or that require the speaker to convey a message favored by the government, contravene individuals' First Amendment right to

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<sup>177</sup> See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

<sup>178</sup> See *id.* at 58.

<sup>179</sup> See *id.* at 58-59.

<sup>180</sup> See *id.* at 59.

<sup>181</sup> For example, in *United States v. Dunifer*, the defendant, an unlicensed broadcaster, used the *Freedman* standard to argue that the FCC's licensing scheme was an unconstitutional system of prior restraints. See *United States v. Dunifer*, 997 F. Supp. 1235, 1243 (N.D. Cal. 1998). The district court concluded that FCC rules satisfied *Freedman*, even though a denial could take six months to a year, and even though the waiver process could take even longer. See *id.* at 1243-44; see also Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Alter or Amend Judgment at 3-4, *United States v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998) (No. C 94-03542 CW) (describing the process for obtaining a license); Defendant's Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e), *United States v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998) (No. C 94-03542 CW) (describing the process for obtaining a license). The *Dunifer* court's weak application of *Freedman* to the FCC's licensing scheme perhaps reflects the judicial system's general reluctance to tamper with broadcast regulations. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973) (giving "great weight to the decisions of Congress and the experience of the Commission").

<sup>182</sup> See *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 376 (1984).

<sup>183</sup> See *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643 (1994).

determine which ideas and beliefs deserve expression.<sup>184</sup> Accordingly, the courts subject such laws to strict scrutiny when aimed at forms of communication other than broadcasting.<sup>185</sup>

By requiring broadcasters to use their licenses to promote what the FCC believes to be in the public interest, the government encourages broadcasters to stifle speech that might not meet the public interest standard, and strongly encourages broadcasters (under threat of refusing to renew their licenses) to convey messages the government believes to promote the public interest. The Court has attempted to characterize the regulations as content-neutral time, place and manner restrictions unrelated to the content of speech.<sup>186</sup> It has done this by justifying government regulation as necessary to prevent signal interference.<sup>187</sup> In other First Amendment cases, however, the Supreme Court has not allowed mere assertion of a content-neutral purpose to save a law, which otherwise was content-based, from strict scrutiny.<sup>188</sup> As noted previously, however, the Court does not apply the same standard to broadcasting that it applies to other media.<sup>189</sup>

### **3. Rights of Listeners vs. Rights of Broadcasters**

Constitutional analysis of First Amendment rights associated with broadcasting often involve resolving the tension between the broadcaster's right to determine which ideas and beliefs deserve expression<sup>190</sup> and the public's right to receive access to information from diverse and antagonistic sources.<sup>191</sup>

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<sup>184</sup> See *id.* at 641.

<sup>185</sup> See *id.* at 642 (citing *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Riley v. National Federation for the Blind*, 487 U.S. 781, 798 (1988)).

<sup>186</sup> See *supra* note 80 and accompanying text.

<sup>187</sup> See *supra* notes 26 & 64 and accompanying text.

<sup>188</sup> See *Turner Broad.*, 512 U.S. at 642-43.

<sup>189</sup> See *supra* note 64 and accompanying text.

<sup>190</sup> See *Turner Broad.*, 512 U.S. at 641. See also *Leathers v. Medlock*, 499 U.S. 439 (1991) (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).

<sup>191</sup> See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

In the early days of broadcast regulation, the public's right to access almost always prevailed over a broadcaster's right to journalistic freedom.<sup>192</sup> The oft-quoted principle, enunciated by the Supreme Court in the *Red Lion* opinion, was that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>193</sup> The public's right to receive information from "diverse and antagonistic sources" was viewed as "essential to the welfare of the public."<sup>194</sup>

The courts jealously guarded the public's right to receive information from diverse and antagonistic sources, giving almost no weight to broadcasters' right to exercise journalistic discretion.<sup>195</sup> The courts, placing heavy emphasis on spectrum scarcity, condemned broadcasters who failed to air opposing viewpoints as "snuff[ing] out the free speech of others."<sup>196</sup> They often interpreted instances of journalistic decision-making as contrary to preserving the "uninhibited marketplace of ideas in which truth will ultimately prevail."<sup>197</sup> Armed with the Fairness Doctrine, the FCC used heavy-handed tactics to deny broadcasters the right to present one viewpoint on an issue of public importance without presenting opposing viewpoints, even at their own expense.<sup>198</sup>

The courts and the FCC primarily feared monopolization of the marketplace of ideas carried over the airwaves.<sup>199</sup> The First Amendment, in their view, condemned monopolization of the marketplace of ideas as repugnant to First Amendment goals, regardless of whether the

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<sup>192</sup> See *supra* notes 65-70 (discussing multiple ownership restrictions); *supra* notes 71-83 (discussing the Fairness Doctrine).

<sup>193</sup> *Red Lion Broad. Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969).

<sup>194</sup> See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

<sup>195</sup> See *supra* notes 71-83 (discussing the Fairness Doctrine).

<sup>196</sup> See *Red Lion*, 395 U.S. at 387.

<sup>197</sup> See *id.* at 390 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>198</sup> See *supra* notes 71-83 (discussing the Fairness Doctrine).

<sup>199</sup> See *Red Lion*, 395 U.S. at 390-91.

government or private licensees created the monopoly.<sup>200</sup> The Supreme Court was especially suspicious of regulations favoring the affluent or those with access to wealth.<sup>201</sup> By the 1970s, however, the courts began to pay more attention to broadcasters' rights to editorial freedom, eventually applying a "narrowly tailored" test to restrictions on a broadcaster's right to editorialize.<sup>202</sup>

## B. Commerce Clause

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<sup>200</sup> See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (holding that "[f]reedom of the press from governmental interference under the First amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.").

<sup>201</sup> See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973) (noting that the FCC was justified in concluding that, in the context of editorial advertisements, "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth." The Court continued by criticizing the lower court's holding, in part, on the basis that the right of access to broadcast media "would have little meaning to those who could not afford to purchase time in the first instance.").

<sup>202</sup> In *Columbia Broadcasting System v. Democratic National Committee*, the Supreme Court upheld a broadcaster's right to reject editorial advertising. See *id.* at 132. In doing so, the Court recognized the public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." See *id.* at 102. It treated broadcasters as public trustees of the airwaves, and expressed its concern that a system weighted heavily in favor of the affluent could not preserve the marketplace of ideas for very long. See *id.* at 117, 123. This time, however, the Court examined the licensee's rights. The Court explicitly recognized that Congress intended to permit private broadcasters the widest editorial freedom possible, consistent with their public interest obligations. See *id.* at 110. Accordingly, the Court held that broadcasters could exercise their discretion to reject editorial advertising without running afoul of the Fairness Doctrine. See *id.* at 130. The Court again emphasized broadcasters' First Amendment rights in *Federal Communications Commission v. League of Women Voters* by explicitly balancing the public's interest in balanced coverage of issues against broadcasters' right to exercise their editorial judgment to strike down a federal law banning editorializing by broadcasters who received federal funding. See *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 402 (1984). The Court recognized that the public's interest in balanced presentation of issues required restraints upon broadcasters that were not imposed on other media. See *id.* at 377. These restrictions, however, were to be upheld only when they were "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues." See *id.* at 380. The Court, by adopting the "narrowly tailored" test, appears to have adopted the test announced in *United States v. O'Brien*. In *O'Brien*, the Supreme Court held that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Bans on editorializing were seen by the Court as unconstitutional regulations motivated by a desire to curtail expression of a particular point of view by denying one group of people the right to address a selected audience on controversial issues of public policy. See *League of Women Voters*, 468 U.S. at 384. Even if the ban was aimed at entire topics, as opposed to particular viewpoints, the ban would still require careful scrutiny, in the Court's opinion, to determine whether it was "an impermissible attempt to allow a government to control the search for political truth." See *id.* (citing *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980)). The ban ultimately failed the "narrowly tailored" prong of the Supreme Court's standard. See *id.* at 385-86, 398-99. The Supreme Court generally frowns upon regulations that "restrict the speech of some elements of our society in order to enhance the relative voice of others." See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The Commerce Clause grants Congress the power to “regulate Commerce . . . among the several States.”<sup>203</sup> In the past, Commerce Clause challenges to Congress’ ability to regulate radio have failed.<sup>204</sup> This is not surprising, given the Supreme Court’s reluctance to strike down legislation under the Commerce Clause, even if the legislation concerned commerce that was almost entirely intrastate.<sup>205</sup>

Perhaps to resolve any doubt about Congress’ intent to regulate both the interstate and intrastate aspects of radio broadcasting, Congress amended § 301 of the Communications Act in 1982 to provide that the FCC’s jurisdiction extended over both interstate and intrastate commerce.<sup>206</sup> Thirteen years later, the Supreme Court’s *Lopez* opinion cast new doubt on Congress’ ability to regulate non-commercial intrastate activities.<sup>207</sup>

In *Lopez*, the Supreme Court held that the Commerce Clause did not empower Congress to ban gun possession within 1000 feet of a school,<sup>208</sup> thereby striking down the Gun-Free School Zones Act of 1990.<sup>209</sup> The Court identified three broad categories of activities that Congress could regulate under its Commerce Clause power.<sup>210</sup> First, Congress could regulate

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<sup>203</sup> See U.S. CONST., Art. I, § 8, cl. 3.

<sup>204</sup> See *Federal Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) (stating that “[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.”); *Fisher’s Blend Station, Inc. v. Tax Comm’n*, 297 U.S. 650, 655 (1936) (noting that “[b]y its very nature broadcasting transcends state lines and is national in its scope and importance – characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause.”). It is important to note that in both cases, the stations involved broadcast across state lines. See *Nelson Bros.*, 289 U.S. at 271-72 (broadcasting in Illinois and Indiana); *Fisher’s Blend*, 297 U.S. at 651-52 (involving one station that broadcast throughout eleven states and parts of Canada and another station that broadcast throughout 48 states).

<sup>205</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (refusing to strike down legislation restricting consumption of home-grown wheat).

<sup>206</sup> See H.R. CONF. REP. NO. 97-765, at 15 (1982). Congress amended § 301 to eliminate Commerce Clause challenges by CB radio operators whose transmissions violated FCC regulations. See *id.*

<sup>207</sup> See *United States v. Lopez*, 514 U.S. 549, 602 (1995).

<sup>208</sup> See *id.*

<sup>209</sup> The Gun-Free School Zones Act of 1990 made it a federal offense “for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(1)(A) (1988).

<sup>210</sup> See *United States v. Lopez*, 514 U.S. at 558.

*channels* of interstate commerce.<sup>211</sup> Next, Congress could regulate *instrumentalities* of interstate commerce, or *persons or things* in interstate commerce, even though the threat may come from activities that were wholly intrastate.<sup>212</sup> Finally, Congress could regulate activities having a *substantial* relation to, or *substantially* affecting interstate commerce.<sup>213</sup> In short, the Supreme Court in *Lopez* expressed its unwillingness to uphold a statute enacted under Commerce Clause authority when the regulated conduct was entirely intrastate and its connection to interstate commerce was not substantial. The FCC’s authority to regulate noncommercial, intrastate broadcasts, therefore, may be in doubt as a result of the *Lopez* opinion.

### **III. THE CASE FOR A NEW LOW POWER FM SERVICE**

#### **A. The Problem: Current Policy Has Created a Malfunctioning Radio Marketplace**

Beginning in the 1970s, the FCC, Congress, and the courts, through a series of policy changes, began to move away from promoting diversity of ownership and diversity of viewpoint in broadcasting.<sup>214</sup> These policy changes led to a number of inequities: monopolization of the radio industry, homogenization of programming, and abandonment of local programming,

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<sup>211</sup> *See id.*

<sup>212</sup> *See id.*

<sup>213</sup> *See id.* at 558-67. The Court observed that the Gun-Free School Zones Act was a criminal statute that had nothing to do with commerce, and reasoned that it could not uphold it unless it was connected with a commercial transaction, which viewed in the aggregate, substantially affected interstate commerce. In its analysis, the Court never doubted that possession of a firearm within a school zone was an entirely intrastate activity. Thus, its analysis focused on whether such conduct substantially affected commerce. The Court went out of its way to emphasize that the effect must be *substantial*; in its opinion, Congress could not use “a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.” It then observed that the statute contained no jurisdictional element to ensure, through a case-by-case inquiry, that firearm possession affected interstate commerce. It continued by observing that Congress made no legislative findings regarding the effects on interstate commerce of firearm possession in school zones. Finding that no substantial effects were visible to the naked eye, the Court stated that it would have to “pile inference upon inference” in order to arrive at an effect on interstate commerce substantial enough to uphold the statute. The Court was unwilling to do this, despite the fact that it had done so in the past. *See id.*

<sup>214</sup> *See supra* Part I. C. (discussing the decline of government policies to promote diversity).

especially in rural areas.<sup>215</sup> None of these changes, taken in isolation, can fairly be blamed for the current state of programming in radio. When considered in the aggregate, however, these measures have effectively shifted the government's broadcasting policy away from protecting the public's right to information and towards protecting large broadcasters' bottom line. At one time, government policy acted as a strong force guiding broadcasters towards diversity in their programming decisions. Now, the only force guiding broadcasters' programming decisions is the marketplace; not the marketplace of ideas, but the marketplace of advertising dollars.

One could argue that the advertising marketplace fosters diversity in programming by encouraging broadcasters to target niche audiences, thereby delivering a "demographic" to advertisers for targeted advertising.<sup>216</sup> This approach seems logical, and in fact, it might have worked under different conditions. In today's marketplace, however, the approach fails miserably. Since acquisition of an existing station typically costs \$25 million (or more, in larger markets), broadcasters, although typically profitable, often carry heavy debts associated with mergers and acquisitions. As a result, their programming needs to target the "mainstream" audiences that attract large advertisers, thereby ignoring the programming needs of underrepresented segments of the population.<sup>217</sup>

In addition to targeting their programming towards "mainstream" audiences, broadcasters are strongly encouraged to air viewpoints most favorable to their supporters and stifle viewpoints that cast them in a bad light. In the current marketplace, editorial discretion does not belong to the broadcasters. Instead, parent corporations and large advertisers ultimately get the final say in

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<sup>215</sup> See *supra* notes 33-52 and accompanying text (discussing the decline of service in rural areas and the consolidation and homogenization of radio).

<sup>216</sup> See *Consolidation Changes Face of Radio*, USA TODAY, July 7, 1998, at \_\_\_.

<sup>217</sup> See *Comments on the Notice of Inquiry in the Matter of 1998 Biennial Review by Americans for Radio Diversity*, MM Docket No. 98-35 (1998). For example, a recent government study has shown that large advertisers tend to engage in widespread racial discrimination. See Paul Farhi, *Advertisers Avoiding Minority Radio*, WASHINGTON

what will or will not be aired. For example, one Florida station manager, responding to criticism of his decision not to air a series of unflattering investigative reports on Monsanto's bovine growth hormone after receiving threatening letters from Monsanto's counsel, stated "[w]e paid \$3 billion for these television stations. We will decide what the news is. The news is what we tell you it is."<sup>218</sup>

It should come as no surprise, then, that the 1990s saw an explosion of illegal, "pirate" radio stations. These stations attempted to fill a void created by a malfunctioning radio marketplace. Although their formats varied dramatically, the most notable programming came from religious broadcasters and broadcasters who presented political viewpoints drastically to the left or drastically to the right of the mainstream. These broadcasters had a common bond: FCC policy, by eliminating the Fairness Doctrine and by abandoning affirmative action, made it impossible for their viewpoints to be aired by existing licensees. Furthermore, by discontinuing low power licensing and encouraging market consolidation, the federal government made it impossible for these broadcasters to legally set up stations of their own. Recent government policy has effectively censored the viewpoints of all speakers who are not sufficiently "mainstream" to be aired by existing licensees.

## **B. Possible Solution: Congressional Action**

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POST, Jan. 13, 199, at F1. The study, in fact, found that 91% of minority-owned stations encountered advertiser "dictates" not to buy ads on their stations. *See id.*

<sup>218</sup> *See, e.g.,* Sheldon Rampton & John Stauber, *This Report Brought to You by Monsanto*, THE PROGRESSIVE, July 1, 1998 (discussing a Florida television station's decision to cancel an unflattering investigative series on Monsanto's bovine growth hormone after Monsanto's counsel sent a threatening letter to the station. Responding to objections by the investigating reporters, the station manager stated "[w]e paid \$3 billion for these television stations. We will decide what the news is. The news is what we tell you it is."); David Corn, *Saturday Night Censored*, THE NATION, July 13, 1998, at \_\_\_ (pointing out that NBC's Saturday Night Live pulled an animated cartoon criticizing conglomerate control of the media after General Electric responded negatively); *Comments on the Notice of Inquiry in the Matter of 1998 Biennial Review by Americans for Radio Diversity*, MM Docket No. 98-35 (1998) (discussing the airing of the successful debut of *The Lion King* by several ABC affiliates. ABC is owned by Disney, producer of *The Lion King*).

When Congress enacted the Telecommunications Act of 1996, it included provisions directing the FCC to modify its multiple ownership regulations.<sup>219</sup> The legislation resembled a draft regulation, and did not appear in the Act as codified. In this manner, Congress directed the FCC to change its regulations without actually including its instructions in the United States Code.

Congress could easily use a similar process to establish a new low power FM service, or at least direct the FCC to promulgate new regulations to encourage community radio, support small business, and restore radio service to rural areas and underserved communities. Chances are, however, that Congress won't. The Telecommunications Act was seen by many as legislation bought and paid for by the broadcast industry, which staunchly opposes any new low power FM service and strongly supports market consolidation. One of the harshest criticisms of the Telecommunication Act's directive to lift multiple ownership restrictions was the lack of public debate.<sup>220</sup> According to Americans for Radio Diversity, the broadcast industry provided almost no coverage of this dramatic shift in policy away from localism and towards market consolidation.<sup>221</sup> Coincidentally, this was the industry which stood the most to gain from enactment of the Telecommunications Act of 1996.<sup>222</sup> Although Congressional action is one possible solution, given the influence of the powerful broadcasting lobby, legislative reform is unlikely.

### **C. Possible Solution: Judicial Action**

#### **1. Challenge the Current Licensing Scheme as a System of Unconstitutional Prior Restraints**

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<sup>219</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202 (1996).

<sup>220</sup> See *Comments on the Notice of Inquiry in the Matter of 1998 Biennial Review by Americans for Radio Diversity*, MM Docket No. 98-35 (1998).

<sup>221</sup> See *id.*

<sup>222</sup> See *id.*

Proponents of microbroadcasting have at least a few possible grounds upon which to mount court challenges to the FCC's refusal to license low power FM. To begin with, the FCC's licensing scheme, especially when applied to low power FM, resembles a system of prior restraints. In order to be upheld, a system of prior restraints (i.e., a licensing scheme) must withstand scrutiny under the *Freedman* test.<sup>223</sup> *Freedman* requires the FCC, "within a specified brief period," to either issue a license or get a court order restraining the broadcaster from broadcasting.<sup>224</sup> Under *Freedman*, the FCC's procedures cannot lend an effect of finality to its decision not to license.<sup>225</sup> The Supreme Court imposed these requirements on licensing agencies because it feared that without prompt, judicial safeguards to protect an applicant's First Amendment rights, a rejected applicant might find it too burdensome to seek review of the agency's determination.<sup>226</sup>

The FCC's licensing scheme fails to satisfy the *Freedman* test. Since the FCC does not license low power FM broadcasters, any applicant for a low power license will automatically be denied. In order to get court review, an applicant must first work its way through the FCC's waiver process<sup>227</sup> or initiate a petition for rulemaking, which could take months, if not years, to accomplish.<sup>228</sup>

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<sup>223</sup> See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

<sup>224</sup> See *id.* at 58-59.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.* The *Freedman* test actually consists of three prongs. The Supreme Court, however, has held the first and third prong inapplicable to licensees. They only apply when a government official engages in "direct censorship of particular expressive material." Although these prongs do not apply, the Court recognized that a licensing scheme could still be struck down if it failed to meet the second prong of *Freedman*. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990); see also *United States v. Dunifer*, 997 F. Supp. 1235, 1243 (N.D. Cal. 1998) (holding the first prong of *Freedman* to be inapplicable to FCC licensing).

<sup>227</sup> See 47 C.F.R. § 1.3 (1998).

<sup>228</sup> See Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Alter or Amend Judgment at 3-4, *United States v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998) (No. C 94-3542 CW); Defendant's Notice of Motion and Motion to Alter or Amend Judgment at 6, *United States v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998) (No. C 94-3542 CW).

Some microbroadcasters, in fact, have embarked upon the waiver and petition process by submitting petitions for rulemaking. The first such petition has been pending before the FCC for almost three years.<sup>229</sup> Oddly enough, a federal court in San Francisco upheld a prior restraint challenge to the FCC's licensing scheme, in part, because the FCC had these waiver and petition options available.<sup>230</sup> Apparently, the court believed that the waiver and petition process was sufficiently brief to satisfy *Freedman*, despite the fact that this process could take several years. Given the substantial amount of time between submitting a petition and receiving a final determination, a more realistic conclusion would be that the process is so burdensome that it discourages applicants from seeking review in the first place, lending a sense of finality to any FCC rejection of a low power FM broadcaster's licensing application.

## **2. Challenge the Current Licensing Scheme on the Basis that it Constitutes Content Based Discrimination As Applied**

In addition to the prior restraint argument, microbroadcasters have a credible argument, in the context of the current radio marketplace, that the FCC's refusal to license microbroadcasters constitutes content-based discrimination.

Granted, none of the FCC regulations explicitly forbid any speech based on its content. The effect, however, of refusing to license low power broadcasters, combined with the hyper-inflated market values of existing broadcast stations as a result of the Telecommunications Act, has been to create a situation where government inaction results in *de facto* censorship of all viewpoints except those within a certain range of the "mainstream." Silencing of non-mainstream viewpoints should raise serious questions about the effect of government policy on

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<sup>229</sup> See Howard K. McCombs, Jr., *Amendment of Part 73 of the Rules & Regulations to Establish Event Broadcast Stations*, Fed. Communications Comm'n RM No. 9246 (June 24, 1996) (proposing creation of a low power, temporary "event" license).

<sup>230</sup> See *United States v. Dunifer*, 997 F. Supp. 1235, 1244 (N.D. Cal. 1998).

First Amendment guarantees, especially when the silenced viewpoints are religious or political.

When analyzing challenges to content-based discrimination, courts have often used the *O'Brien* standard. The *O'Brien* standard upholds a government regulation affecting speech if the regulation “is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>231</sup>

Denial of low power licensing cannot fairly be said to be unrelated to the suppression of free expression. Under the current scheme, unconventional political views, minority viewpoints, and religious viewpoints are routinely suppressed, and no safeguards to prevent this suppression currently exist. Thus, a policy denying low power broadcasters the opportunity to become licensed, combined with a lack of safeguards to allow their proposed viewpoints to be expressed within the framework of the status quo, necessarily leads to the conclusion that government policy, within the current market framework, is not unrelated to the suppression of free expression.

In all fairness, it is impossible to achieve complete freedom of expression on the airwaves because of the scarcity of available spectrum. The government must impose some restrictions to allow the airwaves to be utilized in an orderly, efficient fashion. These incidental restrictions, however, must be “no greater than is essential” to the furtherance of orderly, efficient use of the airwaves. In addition, the restrictions must be “narrowly tailored” to promote the goal of preventing interference, and nothing more.<sup>232</sup>

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<sup>231</sup> See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>232</sup> See *id.*

Existing illegal broadcasters have proved that the current restrictions are not narrowly tailored, because these stations rarely broadcast at a sufficient level of power to interfere with the protected contours of existing stations. Since a number of radio “pirates” have engaged in broadcasting without running afoul of the government’s goal of preventing interference, the ban on low power FM cannot possibly be “narrowly tailored.” Thus, the rules eliminating the entire class of low power broadcasters is overinclusive, and cannot withstand constitutional scrutiny.

### **3. Challenge the FCC’s Ability to Regulate Intrastate, Noncommercial Broadcasting under the Commerce Clause**

Prior to the Supreme Court’s *Lopez* decision, Congress was given virtually unlimited power to legislate pursuant to the Commerce Clause. *Lopez*, however, required legislation to have more than a trivial nexus to interstate commerce.<sup>233</sup> The analysis of microbroadcasters’ plight neatly parallels *Lopez*.

First, to the extent that the FCC can assess, and has assessed, criminal penalties for unlicensed broadcasting, the regulations are criminal, not commercial in nature, in much the same way that the Gun-Free School Zones Act was a criminal statute.<sup>234</sup>

Next, wholly intrastate radio operations can neither be channels nor instrumentalities of interstate commerce, because they do not cross state lines.<sup>235</sup> In order to uphold licensing of intrastate, noncommercial radio, it must have a *substantial* effect on interstate commerce.<sup>236</sup>

As stated previously, the lower twenty channels on the FM spectrum are reserved for noncommercial broadcasting. Commercial broadcasting in this range of spectrum is forbidden. Thus, any noncommercial, intrastate broadcasting in this portion of spectrum cannot affect

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<sup>233</sup> See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

<sup>234</sup> See *id.* at 561. The FCC, however, rarely seeks criminal penalties for broadcasting without a license. Although the FCC rarely seeks to impose criminal penalties for broadcasting without a license, this option is available, and from time to time, it will pursue criminal sanctions. See Jim Nesbitt, *FCC Goes After Radio Pilots With a Vengeance*, THE NEW ORLEANS TIMES-PICAYUNE, July 12, 1998, at A30.

interstate commerce because, although stations in this portion may be interstate, they cannot legally be engaged in commerce. Granted, intrastate non-commercial broadcasters could interfere with the radio transmissions of interstate non-commercial broadcasters. Even if this occurred, the federal government would not have jurisdiction to regulate, because although the interstate non-commercial broadcasters engage in interstate activities, these activities are not commerce *by definition*. Preventing interference on this portion of the FM band by intrastate broadcasters, under the *Lopez* analysis, is therefore wholly within the jurisdiction of the states, not the FCC.

Regardless of the constitutional arguments in favor of striking down the ban on low power FM, judicial action may not be the best way to proceed because courts do not have the power to implement new regulations. At most, the courts could strike down the ban on low power broadcasting, perhaps resulting in chaos until the FCC could promulgate a new low power service. The best, and most orderly way to proceed, would be through FCC action.

#### **D. Possible Solution: FCC Action**

On January 28, 1999, the FCC issued a Notice of Proposed Rulemaking (NPRM) announcing that it intends to implement a new low power FM service.<sup>237</sup> The NPRM sought comments on its proposal to establish three new classes of radio licenses. The first class, LP-1000, would permit licensees to broadcast at 1000 watts of power, with an approximate service

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<sup>235</sup> See *United States v. Lopez*, 514 U.S. 549, 567 (1995).

<sup>236</sup> See *id.* at 559.

<sup>237</sup> See FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999). This Notice of Proposed Rulemaking came in response primarily to three petitions submitted for FCC consideration. See Nickolaus E. Leggett et al., *Petition for a Microstation Radio Broadcasting Service*, Fed. Communications Comm'n RM No. 9208 (June 26, 1997) (proposing FCC should license low power FM broadcasting at less than one watt); J. Rodger Skinner, Jr., *Proposal for Creation of the Low Power FM (LPFM) Broadcast Service*, Fed. Communications Comm'n RM No. 9242 (Feb. 20, 1998) (proposing three-tiered low power FM licensing of stations broadcasting from one to 3,000 watts); Howard K. McCombs, Jr., *Amendment of Part 73 of the Rules & Regulations to Establish Event Broadcast*

radius of 8.8 miles.<sup>238</sup> LP-1000 licensees would be given primary status<sup>239</sup> and would be required to follow most or all of the rules applicable to full-power broadcasters.<sup>240</sup> The second and third classes, LP-100 and “microradio,” would permit licensees to broadcast at 100 watts and 10 watts, respectively.<sup>241</sup> These stations would not be required to follow most of the rules applicable to full-power broadcasters and would be given secondary status.<sup>242</sup>

Under the NPRM, all low power stations would enjoy a streamlined electronic application process, with a turnaround time of two or three days.<sup>243</sup> In addition, low power stations would be subject to strict ownership restrictions.<sup>244</sup> The FCC proposed that existing broadcasters would not be allowed to own or have any joint sales or marketing agreements with low power stations.<sup>245</sup> Furthermore, the new rules would prohibit anyone from owning more than one low power station in the same community.<sup>246</sup> The FCC also sought comments on whether it should impose a limit of five to ten low power stations nationwide.<sup>247</sup> Finally, the FCC sought comments on whether the new low power service should be limited to non-commercial broadcasting.<sup>248</sup>

## 1. Potential Problem with the FCC Proposal: NAB Opposition

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*Stations*, Fed. Communications Comm’n RM No. 9246 (June 24, 1996) (proposing creation of a low power, temporary “event” license).

<sup>238</sup> *See id.*

<sup>239</sup> *See In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240 ¶ 27 (1978). A primary station enjoys protection from interference from other primary and non-primary stations; a secondary station is required to move to a different frequency or cease operations to accommodate primary stations.

<sup>240</sup> *See FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM*, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999).

<sup>241</sup> *See id.* A 100 watt station would have a service radius of approximately 3.5 miles, and a 10 watt station would have a service radius of approximately one or two miles. *See id.*

<sup>242</sup> *See id.* A station with secondary status is required to move to a different frequency or cease operations to accommodate stations with primary status. *See supra* note 239.

<sup>243</sup> *See FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM*, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999).

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *See id.*

<sup>247</sup> *See id.*

<sup>248</sup> *See id.*

The National Association of Broadcasters (NAB) is staunchly opposed to creating a new low power service.<sup>249</sup> The NAB fears that implementing a new low power service will create more than 4,000 new stations in an already-overcrowded FM band.<sup>250</sup> This overcrowding, in the NAB's opinion, will undoubtedly lead to signal interference with existing stations.<sup>251</sup>

Mass Media Bureau Chief Roy Stewart believes that the NAB's estimate of 4,000 new stations is exaggerated.<sup>252</sup> In his opinion, the new low power service would create several hundred, not several thousand, new licensees.<sup>253</sup> Regardless of the number of new stations, the FCC is keenly aware of interference, and Chairman Kennard has vowed not to allow the new low power service to create any unacceptable interference.<sup>254</sup> In fact, the NPRM explicitly addressed the interference problem, and proposed to create a number of anti-interference protections, including minimum distance separations, to remedy any potential problems.<sup>255</sup>

Chairman Kennard is highly skeptical of the NAB's expressed interference concerns, and has warned the broadcast lobby not to use "interference as a smokescreen for other matters," namely, increased competition.<sup>256</sup> Chairman Kennard made his position clear at the 1998 NAB conference: "[w]e cannot deny opportunities to those who want to use the airwaves to speak to their communities simply because it might be inconvenient to those of you who already have these opportunities."<sup>257</sup> Despite Chairman Kennard's skepticism of the NAB's motives, the NAB must be taken seriously, since it is a powerful organization that will undoubtedly lobby

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<sup>249</sup> See Edward O. Fritts, *Statement of NAB President/CEO Edward O. Fritts in Response to FCC Proposal to Create a Low-Power "Micro-Radio" Service*, (visited Jan. 29, 1999) <<http://www.nab.org/Statements/S0199.htm>>.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *FCC Launches Low-Power FM Rulemaking, Questions Interference*, COMMUNICATIONS DAILY, Jan. 29, 1999, at \_\_\_\_\_.

<sup>253</sup> See *id.*

<sup>254</sup> See *id.*

<sup>255</sup> See FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999).

<sup>256</sup> See Stephen Labaton, *FCC Offers Low-Power FM Stations*, NEW YORK TIMES, Jan. 29, 1999, at C1.

Congress for legislation stripping the FCC of its authority to create the new low power FM service.<sup>258</sup>

## 2. Potential Problem with the FCC Proposal: Amnesty

Mass Media Bureau Chief Roy Stewart is currently inclined to allow licensing of “pirates” who voluntarily stopped broadcasting after receiving FCC warnings.<sup>259</sup> He is highly skeptical, however, of granting licenses to “pirates” who had to be shut down by FCC action.<sup>260</sup>

In order to avoid complicated legal and policy issues, the FCC should not automatically deny licenses to new applicants on grounds that they were previously shut down. Instead, the FCC should “grandfather” all applicants who engaged in unlicensed broadcasting prior to the effective date of the new rules.

As stated above, the government policy forbidding low power FM is of questionable constitutionality, resembling both content-based discrimination and a system of prior restraints.<sup>261</sup> The Supreme Court, in its *City of Lakewood v. Plain Dealer Publishing Co.* opinion, directed citizens faced with an unconstitutional restraint on First Amendment freedoms to “ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.”<sup>262</sup> By failing to “grandfather” radio “pirates,” the FCC will needlessly open itself up to litigation surrounding the constitutionality of the ban on low power. If the courts find the old regime to be unconstitutional, the FCC will not be able to

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<sup>257</sup> See Paul Van Slambrouck, *Microradio as Antidote to Mergers*, CHRISTIAN SCIENCE MONITOR, Jan. 28, 1999, at 3.

<sup>258</sup> See generally, *Comments on the Notice of Inquiry in the Matter of 1998 Biennial Review by Americans for Radio Diversity*, MM Docket No. 98-35 (1998) (describing how the broadcasting lobby successfully convinced Congress to direct the FCC to remove nationwide ownership restrictions while simultaneously squelching public debate).

<sup>259</sup> See *FCC Launches Low-Power FM Rulemaking, Questions Interference*, COMMUNICATIONS DAILY, Jan. 29, 1999, at \_\_\_\_\_.

<sup>260</sup> See *id.*

<sup>261</sup> See *supra* Parts II. and III.C.

<sup>262</sup> See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988). In addition, the *Dunifer* court recognized that failure to apply for an FCC license would not deprive a “pirate” broadcaster of standing to

punish the “pirates” by automatically denying them a license. Simply “grandfathering” the “pirates” would eliminate the hassle and expense of defending against lawsuits challenging the constitutionality of the ban on low power.

Granting amnesty to “pirates” would also avoid the appearance of favoring big business over small-time radio outlets. In 1976, the FCC adopted new rules limiting cross-ownership of newspapers and broadcast outlets, but “grandfathered” most existing businesses out of fear of creating “hardship for individual owners.”<sup>263</sup> The Supreme Court approved of the FCC’s “grandfathering” proposal, despite its detrimental effects on diversity.<sup>264</sup>

Undoubtedly, failure to “grandfather” the pirates would create “hardship for individual owners,” despite the strong likelihood that these applicants would *increase* programming diversity. In other words, the case for “grandfathering” the “pirates” is *even stronger* than the case for “grandfathering” the newspaper-radio combinations, because it would promote the FCC’s stated goal of “additional diversity in radio voices and program services,” instead of detracting from it.<sup>265</sup> To avoid the appearance of hypocrisy and to eliminate needless litigation, therefore, the FCC should not foreclose licensing opportunities to those who engaged in unlicensed broadcasting prior to implementation of the new rules.

### **3. Potential Problem with the FCC Proposal: The Telecommunications Act of 1996**

The Telecommunications Act of 1996 allows one entity to own up to eight broadcast stations in a single market.<sup>266</sup> The Act also directs the FCC to eliminate “any provisions limiting

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challenge the FCC’s regulatory scheme if that scheme was unconstitutionally overbroad. *See United States v. Dunifer*, 997 F. Supp. 1235, 1243 (N.D. Cal. 1998).

<sup>263</sup> *See supra* notes 84-89 and accompanying text.

<sup>264</sup> *See supra* notes 90-94 and accompanying text.

<sup>265</sup> *See* FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999).

<sup>266</sup> *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202 (1996).

the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.”

**a. The One-Per-Market Problem**

The limitation of one low power station per market violates the Act’s requirement that the FCC allow ownership of up to eight stations per market.<sup>267</sup> The eight-per-market provision probably would be satisfied if existing stations could own low power stations, because these stations could use a combination of low power and full power outlets to achieve maximum ownership. Allowing full power stations to own low power outlets, however, would defeat the FCC’s goal of “increasing diversity in radio voices.”<sup>268</sup> Of course, the FCC could simply permit owners of low power stations to own up to eight outlets per market, but this would also defeat the goal of increasing diversity of ownership.

**b. The Nationwide Ownership Limit Problem**

Imposing a nationwide ownership limit of five to ten low power stations would also violate the Act because it would limit the number of stations that could be controlled by a single entity nationwide. Allowing unlimited nationwide ownership of low power stations, however, defeats the NPRM’s stated goals of providing “community-oriented” programming and increasing diversity of ownership.

**c. One Solution: Limit *Who* May Own a Low Power Station, Not the *Number* of Stations a Single Entity May Own**

In order to satisfy the Act’s requirements and promote the NPRM’s stated goals, a different approach is required: the FCC should restrict *who* may own a low power station, instead

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<sup>267</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202 (1996). The Act does not allow the FCC much discretion in determining the maximum number of stations per market. For example, in the largest markets, the Act *requires* the FCC to allow ownership of eight stations by a single entity. See *id.*

<sup>268</sup> See FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999).

of restricting the *number* of stations owned by a single entity. To promote local ownership and diversity without running afoul of the Telecommunications Act, the FCC could limit ownership of low power stations to entities that do not exceed a certain fraction of the net worth threshold of the Small Business Administration's definition of a small business.<sup>269</sup> Licensees who no longer met the small business definition could be required to divest or restructure their business to meet the definition of a "small business."

By limiting the size of the entity that can own a low power station, the FCC would greatly increase the odds that a station will be locally owned, thereby promoting "community-oriented" programming without imposing the prohibited numerical restrictions. If the fractional definition of "small business" is set low enough, a single entity will probably not be able to afford more than one outlet. Of course, imposing a "small business" restriction would not *guarantee* that a single entity could only own one outlet; it would merely increase its likelihood.

If there are several markets where the price of low power stations is severely depressed, a small business could conceivably own several stations, if the "small business" threshold is high enough. Under these conditions, the holder of multiple low power licenses could provide service to markets that would otherwise be abandoned, thereby increasing diversity in those markets. This would be most useful in remote, rural areas where economies of scale would be needed to make a low power station feasible. To promote the FCC's goal of increasing service in rural areas,<sup>270</sup> therefore, the FCC could raise the "small business" threshold for operators who broadcast entirely in rural areas, without resorting to the prohibited numerical limitations.

#### **4. Advantages of the FCC's Proposal**

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<sup>269</sup> Currently, the SBA defines a small business as an entity having less than \$6 million net worth and less than \$2 million in annual profits. See Skinner, *supra* note 236, at 7.

<sup>270</sup> See FCC PROPOSES LICENSED LOW POWER FM RADIO; SEEKS COMMENTS ON ENGINEERING, SERVICE RULES FOR NEW SYSTEM, MM Docket No. 95-25, 1998 WL \_\_\_\_\_ (F.C.C. 1999).

The NPRM, if modified to avoid problems with the Telecommunications Act of 1996, is a vast improvement over the status quo. First and foremost, it relies on the market to keep the price of low power licenses reasonable. By limiting ownership to small businesses, the modified FCC proposal will essentially weed out all large, interstate corporations from the bidding. Since the pool of bidders will be limited to small businesses, the fair market value of a low power station will necessarily remain low. Furthermore, the cost of operating a low power station has already been demonstrated to be minimal. By streamlining the application process, the FCC proposal further reduces operating costs by removing administrative barriers to market entry. This will serve to make low power broadcasting attractive, thereby providing a catalyst for job creation within the broadcast industry.

The combination of low entry costs and low operating costs, in turn, will keep acquiring and operating a low power station within the reach of small businesses, community service organizations, and underrepresented religious and minority groups. By implementing regulations that create a marketplace of affordable low power radio outlets, the FCC can simply rely on market forces to promote localism and increase diversity. This, in turn, will promote the Telecommunications Act's stated goal of "enabling companies to compete."<sup>271</sup>

Low power FM, by its nature, will cover only a limited geographical area. Since the coverage of low power FM is limited, low power stations will deliver smaller audiences to advertisers. Smaller audiences, in turn, should lead to lower advertising rates for small businesses, who currently are precluded from advertising on radio due to its costs. In short, low power FM has the potential to boost small businesses. For this reason, the FCC should not limit low power FM to non-commercial outlets.

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<sup>271</sup> See Telecommunications Act of 1996, 47 U.S.C. § 1 et seq.

To survive, commercial low power stations will need to deliver audiences to advertisers that are currently underserved by existing radio outlets, because existing outlets have already successfully covered “mainstream” audiences and attracted the large advertisers. To attract advertisers, therefore, commercial low power stations will need to target both local businesses and specific niche markets. Since low power broadcasters will tend to target audiences that are currently ignored by existing stations, direct competition with these stations will necessarily be minimal.

### **CONCLUSION**

The government’s current policy against licensing low power broadcasters, in light of the vanishing safeguards to promote diversity, is outdated and probably unconstitutional. Changes in the marketplace over the past several years, coupled with changes in government broadcasting policy, have created a situation where the government routinely engages in *de facto* censorship by not addressing barriers to market entry. By establishing a low power FM service, the FCC can reverse the damage created by twenty years of policy which has led to the silencing of diverse viewpoints and a surge in illegal broadcasting. If implemented properly, this new service can coexist with the full power stations, enhancing, rather than detracting from, the marketplace of ideas. To protect the public’s right to receive information from “diverse and antagonistic sources,” to promote small businesses, and to create more employment opportunities in radio broadcasting, the FCC should quickly implement its proposed low power FM radio service. If Congress blocks the FCC’s attempt to implement low power FM, the courts should declare the existing policy against licensing low power broadcasters unconstitutional on the basis that it violates the First Amendment and the Commerce Clause.