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The Public Interest, Convenience, or Necessity: A Dead Standard in the Era of Broadcast Deregulation?

*The [Federal Communications] Commission, if public convenience, interest, or necessity will be served thereby, . . . shall grant to any applicant therefor a station license provided for by this act.*¹

I. Introduction

The Communications Act of 1934² established the Federal Communications Commission³ and directed it to license broadcasting stations using as its standard "the public convenience, interest, or necessity."⁴ Although the standard is somewhat vague, the Commission developed a number of policies designed to protect the public interest as it is served by broadcasting.⁵

1. Communications Act of 1934, 47 U.S.C. § 307(a) (1982 & Supp. V 1987).

2. 47 U.S.C. §§ 151-805 (1982 & Supp. V 1987).

3. *Id.* § 151. The Act gave the newly formed Commission broad jurisdiction to regulate "interstate and foreign communication by wire or radio" as described in the Act's title. Within this jurisdiction were radio broadcasting (Subchapter III) and common carriers (Subchapter II), among other things. Television, in its infancy at the time, was not mentioned specifically in the Act; however, television uses radio frequencies for transmission. See, e.g., S. HEAD, BROADCASTING IN AMERICA 31, 34, 51-52 (3d ed. 1976). Television thus came within the Commission's jurisdiction over radio broadcasting. Transmission by government-owned stations was excluded from the Commission's jurisdiction. 47 U.S.C. § 305. Cable television did not exist when the Act was passed; however, as this technology developed and started to play an increasing role in the communications marketplace, the Commission asserted jurisdiction over it. Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

4. 47 U.S.C. § 307(a) (1982 & Supp. V 1987).

5. For example, the nonentertainment programming guidelines, 47 C.F.R. § 0.281(a)(8) (1982), which required stations to program a prescribed amount of nonentertainment (generally news and public affairs) programming; the requirement that stations maintain their main origination studios within their communities of license, 47 C.F.R. § 73.1125 (1986), which was intended to ensure that stations would stay in contact with their communities of license; the ascertainment rules, 27 F.C.C.2d 650 (1971), 53 F.C.C.2d 3 (1975), 57 F.C.C.2d 418 (1975), and 61 F.C.C.2d 1 (1976), which required that stations conduct formal studies every year to determine the significant problems and needs of their communities and develop programming designed to address those

However, during the 1980s, a mood of deregulation and free-market competition swept through Washington, and much of the broadcast regulation designed to ensure that radio and television stations serve the public interest, convenience, or necessity was eliminated.⁶ In many cases, regulations were eliminated to reduce what broadcasting stations themselves considered overly burdensome requirements.⁷ However, the Commission also eliminated or substantially relaxed regulations designed to promote the public interest through diversity of viewpoint, programming, and ownership, something it has long considered important.⁸ This Comment will focus on three specific deregulatory actions the Commission has taken in recent years: the relaxation and elimination of the multiple ownership rule;⁹ the relaxation of the radio duopoly rule;¹⁰ and the relaxation of the one-to-a-market rule.¹¹

Section II of this Comment will provide a brief overview of the history and evolution of broadcast regulation and the public interest standard, and will describe some of the policies the Commission adopted to ensure that stations would serve the public interest; Section III will describe the elimination or relaxation of these policies; Section IV will describe twenty-four hour

problems and needs; and the anti-trafficking provision, 47 C.F.R. § 73.3597 (1982), which strongly discouraged licensees from selling their stations unless they had owned them for at least three years. This provision was intended to ensure that licensees maintained a commitment to the public interest in the community of license; the Commission considered ownership turnover in less than three years inimical to the public interest. Report and Order, 32 F.C.C. 689, 690-91 (1962).

6. Such eliminations included: the nonentertainment programming guidelines, 84 F.C.C.2d 968 (1981); the main studio rule, 2 F.C.C. Rec. 3215 (1987); the ascertainment requirement, 84 F.C.C.2d 968 (1981); and the anti-trafficking provision, 52 Rad. Reg. 2d (P & F) 1081 (1982).

7. For example, stations argued that they could, and would, ascertain the problems and needs of their communities without a formal procedure imposed by the Commission. See Deregulation of Radio, 84 F.C.C.2d 968, 1076-77 (1981); cf. S. HEAD, *supra* note 3, at 354.

8. See Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306, 310 (1970); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

9. Report and Order, 100 F.C.C.2d 17 (1984) [hereinafter the Multiple Ownership Decision].

10. Report and Order, 4 F.C.C. Rec. 1723 (1989) [hereinafter the Duopoly Decision].

11. Report and Order, 4 F.C.C. Rec. 1741 (1989) [hereinafter the One-to-a-Market Decision]. The one-to-a-market rule was also known as the radio/television cross ownership rule. *Id.*

satellite radio programming services, a recent development which has had a substantial impact on the broadcasting industry and on its service of the public interest; and Section V will analyze the status of the public interest standard in light of the Commission's deregulation of the broadcast industry.

II. History of Broadcast Regulation and Establishment of the Public Interest Standard

A. *The Genesis of Broadcast Regulation*

Regulation of radio (or "wireless," as it was called at the time) began in the United States in 1910 with the amendment of the Interstate Commerce Act,¹² bringing interstate and foreign wire and wireless communication under federal jurisdiction.¹³ Also in 1910, the Wireless Ship Act was enacted.¹⁴ This Act required large passenger ships to carry radio equipment capable of exchanging messages at a distance of 100 miles,¹⁵ but it did not require ship radio operators to monitor their radio apparatus.

On April 15, 1912, the ocean liner *Titanic* sank.¹⁶ Although another radio-equipped ship, the *Californian*, was only fifteen miles away, its radio operator had signed off fifteen minutes before the *Titanic's* operator sent his first distress message.¹⁷ More than 1500 people were killed in the disaster, including the *Titanic's* radio operator, who died at his radio set.¹⁸

As a direct result of this tragedy,¹⁹ the Radio Act of 1912²⁰ was enacted. This was the first comprehensive American radio legislation. Among other things, the Act adopted the international distress signal,²¹ prohibited interference with distress sig-

12. 36 Stat. 539 (1910).

13. S. HEAD, *supra* note 3, at 127.

14. 36 Stat. 629 (1910).

15. *Id.* § 1.

16. Ballard, *How We Found Titanic*, NAT'L GEOGRAPHIC 696, 704 (December 1985).

17. S. HEAD, *supra* note 3, at 127.

18. *Id.*

19. W. BITTNER, BROADCAST LAW AND REGULATION 5 (1982). See also S. HEAD, *supra* note 3, at 94, 127.

20. Pub. L. No. 62-264, 37 Stat. 302 (1912).

21. *Id.* § 4 (Sixth). (The Radio Act was divided into subsections denoted "First," "Second," and so forth.)

nals,²² and empowered the Secretary of Commerce and Labor²³ to issue licenses²⁴ and specify frequencies.²⁵

One of the weaknesses of the 1912 Act was that it failed to specify grounds upon which the Secretary could deny applications for radio licenses. Congress had intended the Act simply to prescribe a registration process.²⁶ This became a serious problem as broadcasting stations, dramatically rising in number,²⁷ began increasingly to interfere with one another.²⁸ Many station operators understandably grew frustrated by the interference and, attempting to increase the efficacy of their signals, began to change frequency, power, location, and operating schedule in violation of their licenses.²⁹ One such station was Zenith Radio Corporation's WJAZ in Chicago. The Secretary of Commerce

22. *Id.* § 4 (Ninth).

23. The Secretary of Commerce and Labor became known as the Secretary of Commerce in 1913. S. HEAD, *supra* note 3, at 128.

24. Radio Act of 1912, Pub. L. No. 62-624, § 1, 37 Stat. 302, 302-03 (1912), *repealed* by ch. 169, § 39, 44 Stat. 1162, 1174, *which was repealed* by Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102.

25. *Id.* § 2.

26. S. HEAD, *supra* note 3, at 128.

27. There were only "about three" stations providing regular service in 1920. W. EMERY, BROADCASTING AND GOVERNMENT 23 (1971). By the end of 1925 there were almost 600 stations on the air and 175 applications for new stations. *National Broadcasting Co. v. United States*, 319 U.S. 190, 211 (1943).

28. Part of the problem was that there was a very limited number of frequencies (channels) available for stations to use. The 1912 Act had not specified which frequencies were to be used for broadcasting. The Secretary of Commerce initially selected two frequencies (750 and 833 kHz) on which all broadcasting stations were to operate. *National Broadcasting Co.*, 319 U.S. at 211. Later, with the number of stations growing rapidly, he assigned 96 frequencies between 550 and 1500 kHz (roughly the same as today's AM band) to standard (AM) broadcasting. *Id.* Unfortunately, this was not enough to solve the problem. The interference situation was exacerbated by the instability of the stations' transmitters; among other things, the transmitters were incapable of remaining precisely on their assigned frequencies.

An amusing example was the radio station of Aimee Semple McPherson, a popular evangelist of the 1920s. The station, operated from McPherson's "temple" in Los Angeles, was closed down by a government inspector because it "wandered all over the wave band." S. HEAD, *supra* note 3, at 129. McPherson then sent a telegram to the Secretary: "PLEASE ORDER YOUR MINIONS OF SATAN TO LEAVE MY STATION ALONE. YOU CANNOT EXPECT THE ALMIGHTY TO ABIDE BY YOUR WAVELENGTH NONSENSE. WHEN I OFFER MY PRAYERS TO HIM I MUST FIT INTO HIS WAVE RECEPTION. OPEN THIS STATION AT ONCE." *Id.* McPherson was persuaded to hire a competent engineer and the station was allowed to reopen. *Id.*

29. S. HEAD, *supra* note 3, at 129.

sued Zenith under the Radio Act of 1912, but the court held³⁰ that the Act had given the Secretary no standards under which he could deny a station's license application.³¹

With the Secretary thus stripped of what little discretion he may have had in licensing stations, and with increasingly intolerable interference undermining the effectiveness of radio broadcasting, the failure of the Radio Act of 1912 became apparent. More than 200 new stations received licenses and went on the air during the next year,³² making the interference situation even worse. Ultimately, it became difficult for people in many parts of the country to receive any interference-free radio service at all.³³

It was obvious that new radio legislation was needed. The result was the Radio Act of 1927,³⁴ which established the five-member Federal Radio Commission.³⁵ Perhaps the most important departure from the 1912 Act was that the newly created Commission had discretion in licensing stations: it was to award broadcasting licenses only when doing so would serve the "public convenience, interest, or necessity."³⁶

This public interest standard was not a new concept in governmental regulation in 1927. Starting in the late 1800s, much of Congress' regulation of the railroads focused on the public interest standard.³⁷ Over the years it has been applied in the regulation of two basic and interrelated types of activities: first, activities involving government-granted monopolies;³⁸ and second, use

30. *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

31. *Id.* at 618.

32. S. HEAD, *supra* note 3, at 130.

33. *Id.* at 130-31.

34. Radio Act of 1927, Pub. L. No. 69-169, 44 Stat. 1162 (1927), *repealed by Communications Act of 1934*, ch. 652, § 602(a), 48 Stat. 1064, 1102.

35. *Id.* § 3.

36. *Id.* § 9.

37. See *Munn v. Illinois*, 94 U.S. 113 (1877), in which the United States Supreme Court upheld Congress' right to regulate the use of private property when the use was "affected with a public interest." *Id.* at 130. Private property became "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Id.* at 126.

38. Among these are telephone companies and power utilities, where monopolies may be necessary because of the impracticability of separate telephone and electrical wires installed by different companies in the same area; also included are railroads, where limited rights-of-way preclude the operation of more than one company's railroad.

of public resources by private individuals or entities for private gain.³⁹ Its first application to broadcasting was in the Radio Act of 1927.

Under the 1927 Act, however, control of communication by wire and radio was still spread among a number of agencies.⁴⁰ In 1934, the Communications Act of 1934⁴¹ was enacted. The Act repealed the Radio Act of 1927,⁴² established the seven member Federal Communications Commission,⁴³ and consolidated the regulation of most wire and radio communication under the Commission's jurisdiction.⁴⁴ Most importantly, the 1934 Act preserved the public interest, convenience, or necessity standard from the 1927 Act.⁴⁵

B. Evolution of the Public Interest Standard

There is good reason for applying a public interest standard in broadcast regulation. Broadcast channels are "scarce" (that is, there are not enough available channels for all of those who wish to broadcast), and the electromagnetic spectrum⁴⁶ has been deemed, since the beginning of broadcast regulation, to be a

See, e.g., *Essential Communications v. American Tel. & Tel.*, 610 F.2d 1114, 1118 (3d Cir. 1979).

39. Again, telephone companies and power utilities are included here because they use public land for the installation of wires; likewise, railroad tracks run on public land. Of course, these industries are allowed to profit from their use of publicly owned resources, as long as there is a corresponding public benefit. *See, e.g.,* *United States v. Joint Traffic Assoc.*, 171 U.S. 505, 570 (1898).

40. Jurisdiction of wire and wireless communication was split among the Federal Radio Commission, the Interstate Commerce Commission, and the Postmaster General. S. HEAD, *supra* note 3, at 133.

41. 47 U.S.C. §§ 151-805 (1982 & Supp. V 1987).

42. *Id.* § 602(a).

43. *Id.* § 151.

44. *Id.* § 601. Jurisdiction over government-owned stations was excluded. *Id.* § 305.

45. The language regarding the public interest standard is essentially the same in both Acts. Compare 47 U.S.C. § 307(a) (1982) with § 9 of the Radio Act of 1927, Pub. L. No. 69-169, § 9, 44 Stat. 1162 (1927). The objectives of both Acts were substantially the same. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) (in essence, the 1934 Act repealed the 1927 Act and reenacted its provisions); 47 U.S.C.A. §§ 601, 603, 604 (1962 & Supp. 1989).

46. The spectrum of electromagnetic radiation includes all television and radio channels, both broadcast and nonbroadcast (aviation, police, fire, and mobile telephone, to name a few). For a more detailed explanation of the nature of electromagnetic radiation, see S. HEAD, *supra* note 3, at 21-57.

publicly owned natural resource.⁴⁷ This "scarce public resource" rationale formed the foundation on which broadcast regulation was based.⁴⁸ Furthermore, it is plain that private individuals and entities may apply for and be granted licenses to use the public airwaves; and it is equally plain that unless they are operating on channels reserved for non-commercial use,⁴⁹ these private individuals or entities are allowed to profit from their broadcasting activities.⁵⁰ Application of the public interest standard to broadcasting is thus consistent with its traditional application in other governmental regulation.

The application of the standard to broadcasting, however, is perhaps more complex than it is when applied to other industries because of the first amendment considerations involved.⁵¹ The search for a manageable standard was difficult. In 1928, the Federal Radio Commission announced its interpretation of the basic principles of the standard:

The commission also believes that public interest, convenience, or necessity will be best served by avoiding too much duplication of programs and types of programs. . . .

47. See, e.g., Communications Act of 1934 § 301, 47 U.S.C. § 301 (1982) ("It is the purpose of this Act . . . to provide for the use of [the airwaves], but not the ownership thereof . . ."); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a [broadcast] license.").

48. See *National Broadcasting Company v. United States*, 319 U.S. 190, 213 (1943). Note that this scarcity rationale, used to justify the application of a public interest standard in government regulation, is consistent with the government-granted monopoly rationale. See *supra* note 38 and accompanying text. An entity licensed to broadcast on a frequency has exclusive control, granted by the government, over that frequency in that geographic area; simultaneous use of the frequency by another user would cause objectionable interference. It was just this kind of interference which led to chaos on the airwaves during the 1920s and the subsequent enactment of the Radio Act of 1927. See *supra* note 28 and accompanying text; text accompanying note 33; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-77 (1969).

49. The Commission has reserved FM channels 200-220 (87.9-91.9 MHz) for non-commercial educational use. 47 C.F.R. § 73.501 (1988). Additionally, a number of television assignments are reserved for non-commercial educational use. 47 C.F.R. § 73.606 (1988).

50. This is the public-resource/private-user/private-gain rationale, which also justified application of a public interest standard. See *supra* note 39 and accompanying text.

51. The application of the first amendment here concerns not as much the broadcasters' rights of free speech as the public's right to be informed. See *infra* notes 52-55 and accompanying text; text accompanying note 98; note 185; *Red Lion*, 395 U.S. at 386-92.

In view of the paucity of channels, the commission is of the opinion that the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form. For example, the public in large cities can easily purchase and use phonograph records of the ordinary commercial type. A station which devotes the main portion of its hours of operation to broadcasting such phonograph records is not giving the public anything which it can not readily have without such a station. . . . The commission can not close its eyes to the fact that the real purpose of the use of phonograph records in most communities is to provide a cheaper method of advertising for advertisers who are thereby saved the expense of providing an original program.

While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public. . . .

Advertising should be only incidental to some real service rendered to the public, and not the main object of the program. . . .

In conclusion, the commission desires to point out that the test — "public interest, convenience, or necessity" — becomes a matter of comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. . . . The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser.⁵²

52. Statement Made by the [Federal Radio] Commission on Aug. 23, 1928, Relative to Public Interest, Convenience, or Necessity, 2 F.R.C. Ann. Rep. 166 (1928), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 52-55 (F. Kahn ed. 3d ed. 1978). *See also In re Great Lakes Broadcasting Co.*, F.R.C. Docket No. 4900, *cited with approval in* Public Service Responsibility of Broadcast Licensees (the FCC's "Blue Book," Mar. 7, 1946, *reprinted in* DOCUMENTS OF AMERICAN BROADCASTERS, *supra*, at 132):

Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. . . . The emphasis should be on the *receiving* of service and the

As radio became increasingly influential in American society, references to first amendment concerns for a vigorous press started to appear in court and Commission decisions. In *National Broadcasting Co. v. United States*,⁵³ Justice Murphy wrote:

Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern.⁵⁴

In 1965, the Commission expressed its view of broadcasters' first amendment responsibilities:

As the Supreme Court has stated, the first amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." That radio and television broadcast stations play an important role in providing news and opinion is obvious.⁵⁵

Thus, as broadcasting evolved to play an increasingly im-

standard of public interest, convenience, or necessity should be construed accordingly. . . . In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of public issues may be broadcast.

Id. at 155-56 (emphasis in original). It is important to note that these articulations of the public interest standard established criteria against which stations could be evaluated. As important as these criteria were when two or more applicants were battling for a new license, they became even more important when one or more applicants challenged an incumbent broadcaster's license. See *infra* notes 87, 90, and 157 for a brief description of the comparative hearing process.

53. 319 U.S. 190 (1943).

54. *Id.* at 228 (Murphy, J., dissenting).

55. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 n.4 (1965) (citation omitted). See *infra* text accompanying note 94.

portant role in American society, the interpretation of the public interest standard as applied to broadcasting grew to take on constitutional proportions. The Commission's concern in this area was manifested through the establishment of a number of rules and procedures intended to ensure that broadcast licensees served the public interest.⁵⁶

The public interest standard as it applies to broadcasting has never been interpreted to mean simply what the public wants to hear or view. Rather, much of the scholarly writing on the standard focuses also on what the public ought to hear or view.⁵⁷ This phrasing perhaps only restates the first amendment concerns of the courts and the Commission that an informed electorate is essential to the effective working of democratic government.⁵⁸ Unless the electorate has sufficient information to make informed decisions, democratic government cannot work.⁵⁹

The theory underlying broadcast regulation is that a broadcast license is a public trust, and that a broadcast licensee is therefore a public trustee.⁶⁰ A license is temporary authority⁶¹ from the federal government to use one of the scarce and publicly owned broadcast channels.⁶² In exchange for the privilege of using this scarce public resource and for being allowed to profit from such use, the licensee is obligated to serve the public interest, convenience, or necessity.⁶³

56. For a discussion of these rules and procedures, see *infra* notes 64-98 and accompanying text.

57. See, e.g., Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479, 481 (1959) ("a broadcaster must not merely cater to existing tastes and interests but must make at least a modest effort toward improving and widening them"); J. TUNSTALL, *COMMUNICATIONS DEREGULATION* 151 (1986) ("critics were . . . comparing U.S. radio with junk food — 20 different kinds of fast food, but no nourishing meals . . .").

58. See *infra* note 232.

59. See, e.g., *Deregulation of Radio*, 84 F.C.C.2d 968, 980-82 (1981).

60. See *McIntire v. William Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597, 599 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

61. The maximum license term was originally three years. Communications Act of 1934, ch. 652, § 307(d), 48 Stat. 1083, 1084 (1934) (redesignated and amended 1981). In 1987 it was increased to seven years for radio stations and five years for television stations. Order, 2 F.C.C. Rec. 3805 (1987). See *infra* note 157.

62. See *supra* note 48 and accompanying text.

63. 47 U.S.C. § 307(a) (1982).

C. FCC Policies to Exact Compliance with the Public Interest Standard

It is beyond question that the electronic mass media have tremendous potential power for disseminating news and information to the public.⁶⁴ To ensure that stations exercised this power responsibly, the Commission established a number of rules and procedures. Among these were the nonentertainment programming guidelines for both radio and television.⁶⁵ These guidelines were intended to ensure that stations devoted a specified percentage of their broadcast schedules to news and public affairs programming.⁶⁶ Stations were also required to maintain their main origination studios within their communities of license,⁶⁷ and to conduct annual "ascertainment studies."⁶⁸ The

64. A recent study by the Roper Organization indicated that 65 percent of the American public turn to television as the source of most of their news, and 49 percent consider television to be the most believable news source. Roper Organization, *America's Watching: Thirtieth Anniversary Report* at 14-15 (1989). See also 67 CONG. REC. 5558-59 (bound ed. Mar. 13, 1926) (statement of Rep. Johnson):

There is no agency so fraught with possibilities for service of good or evil to the American people as the radio. As a means of entertainment, education, information, and communication it has limitless possibilities. The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. . . . [Broadcasting stations] can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a Republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people.

65. 47 C.F.R. § 0.281(a)(8) (1982).

66. *Id.*

67. 47 C.F.R. § 73.1125 (1986).

68. 61 F.C.C.2d 1 (1976); 57 F.C.C.2d 418 (1975); 53 F.C.C.2d 3 (1975); 27 F.C.C.2d 650 (1971). The Commission first required commercial stations to conduct ascertainment studies in the Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2314, 2316 (1960). In 1971 the Commission issued its detailed Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 682-87 (1971), and in 1975 its Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants, 57 F.C.C.2d 418, 441-46 (1975), amended by 61 F.C.C.2d 1 (1976).

Under the Commission's procedure, each commercial broadcast licensee was required to conduct annual interviews with members of the general public, 57 F.C.C.2d at

Commission had long put a premium on local programming serving demonstrated public needs.⁶⁹ These rules were designed to ensure that stations would stay in touch with the problems and needs of their communities, and that they would air programming responsive to those problems and needs.⁷⁰ The Commission's intention was that stations participate directly in the discussion of issues of public importance.

These rules and procedures were an attempt by the Commission to ensure that stations used the frequencies they had been allowed to use for the dissemination of local news and public affairs at least some of the time (and to establish minimum standards against which stations could be measured when their licenses came up for renewal⁷¹). However, there was also a number of more or less technical rules intended to ensure that the broadcasting industry as a whole served the public interest. Among these was the "anti-trafficking rule,"⁷² which regulated the transfer of broadcast licenses. The Commission believed that trafficking in licenses (buying and then quickly selling stations for profit) undermined service to the public interest because the station owners never developed a sense of responsibility to the community of license.⁷³ The anti-trafficking rule strongly discouraged the sale of a station unless the station owner had held the license for at least three years.⁷⁴

Recall that there are two basic rationales for applying a

444-45, and with leaders of significant community groups, *id.* at 442-44; 27 F.C.C.2d at 682-85. From these interviews, the licensee was to list significant community problems and needs, 57 F.C.C.2d at 419, and then develop and air programming addressing at least some of those problems and needs. 27 F.C.C.2d at 685-86. The written records of the interviews, the list of problems and needs, and the descriptions of the programming were reviewed when the station's license came up for renewal (every three years). For details of these procedures, see *Ascertainment of Community Problems by Broadcast Applicants*, 53 F.C.C.2d 3 (1975).

69. See, e.g., Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, *supra* note 68, at 2312-16; the Commission's "Blue Book," reprinted in *DOCUMENTS OF AMERICAN BROADCASTING*, *supra* note 52, at 183-88; National Broadcasting Co. v. United States, 319 U.S. 190, 203 (1943).

70. Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, *supra* note 68, at 2312-18.

71. See *infra* notes 87, 90, 157, and accompanying text for a brief discussion of license renewal procedures, challenges, and comparative hearings.

72. 47 C.F.R. § 73.3597 (1982).

73. See Report and Order, 32 F.C.C.2d 689, 690 (1962).

74. *Id.* at 691.

public interest standard in broadcast regulation. First, frequencies in the electromagnetic spectrum have always been considered to be a scarce and publicly owned natural resource.⁷⁵ It was apparent even in the 1920s that there was a far greater number of people who wanted to broadcast than there were available frequencies.⁷⁶ Second, this scarce public resource was being used by private users for private gain.⁷⁷

Consistent with and even necessary to both of these rationales were the Commission's rules regarding multiple ownership. The Commission always had a strong policy favoring diversity of viewpoints and programming in the communications marketplace.⁷⁸ It endeavored through several rules to promote this policy by maximizing the number of owners of media outlets.

First, the multiple ownership rule⁷⁹ limited the number of stations a single entity could own to seven AM, seven FM, and seven television stations, no more than five of which could be VHF ("rule of sevens").⁸⁰ This rule was intended to prevent a single group owner from becoming overly dominant in the national marketplace of ideas.

Second, the radio duopoly rule⁸¹ established minimum geographic distances between commonly owned stations in the same service.⁸² This rule was an attempt to minimize the local geo-

75. See *supra* text accompanying notes 46-48.

76. See Remarks of Secretary of Commerce Herbert Hoover, Fourth National Radio Conference, Proceedings and Recommendations for Regulation of Radio 6 (November 9-11, 1925), quoted in W. EMERY, *supra* note 27, at 28: "We can no longer deal on the basis that there is room for everybody on the radio highways. There are more vehicles on the roads than can get by, and if they continue to jam in, all will be stopped."

77. See *supra* notes 39, 50, and accompanying text.

78. See, e.g., Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-96 (1965).

79. 47 C.F.R. § 73.3555(d) (1984).

80. An entity that owns more than one broadcast station in a single service (Standard (AM), FM, and television are the three broadcast services) is commonly referred to as a group owner.

81. 47 C.F.R. § 73.3555(a) (1988).

82. Standard (AM), FM, and television are the three broadcast services; therefore, the rule required a certain minimum distance between two commonly owned AM stations, two commonly owned FM stations, or two commonly owned television stations.

The minimum distance was not specified in miles, but rather in terms of the signal strength from each station. The rule prohibited overlap of the 1 mv/m signal strength contours for the commonly owned stations. The strength of any station's signal at a particular point is measured in millivolts of radio frequency energy induced by the station's

graphic areas in which two different stations in the same service under common ownership could be heard; it was intended to reduce the possibility of an undue concentration of media control within a particular local marketplace of ideas.

Third, the one-to-a-market rule⁸³ prohibited cross-ownership of radio and television stations in the same market, excepting grandfathered radio-television combinations.⁸⁴ Like the radio duopoly rule, the one-to-a-market rule was intended to reduce the likelihood that a single entity would become overly dominant within a local market.

These three rules reflected both the first amendment concern that broadcasting serve the public interest and the desire to distribute equitably and fairly the limited number of broadcast licenses among the greatest possible number of applicants.⁸⁵ The vigor of the Commission's commitment to maximum diversification of ownership was evident in its 1965 Policy Statement on Comparative Broadcast Hearings.⁸⁶ The Commission stated:

We believe that there are two primary objectives toward which the process of comparison [in comparative hearings⁸⁷] should be

signal in a wire that is one meter long; hence, the unit millivolts per meter, or mv/m. R.H. KINLEY, *STANDARD RADIO COMMUNICATIONS MANUAL* 31 (1985). A 1 mv/m contour is the set of all points surrounding the station's antenna, on the surface of the earth, at which the signal strength is 1 mv/m. The higher the number of mv/m, the stronger and therefore clearer the signal. A signal strength of 1 mv/m produces a good signal for FM radios and a fair signal for AM radios. Telephone interview with Edward F. Perry, Jr., Technical Consultant, Educational FM Associates, Duxbury, Mass. (Apr. 10, 1990).

83. 47 C.F.R. § 73.3555(b) (1988).

84. 22 F.C.C.2d 306, 309 (1970). The radio duopoly and one-to-a-market rules were known together as the local (or regional) concentration rules.

85. The rule of sevens was something of a compromise of the Commission's policy of maximum diversification. For a discussion of this policy, see *infra* notes 86-94 and accompanying text. The compromise was adopted to avoid undue disruption of multiple station holdings at the time the rule was promulgated. Report and Order, 18 F.C.C. 288, 295 (1953). The Commission granted waivers of the local concentration rules from time to time when such waivers were found to be in the public interest. See, e.g., *Hawaiian Broadcasting System*, 8 F.C.C. 379 (1941). However, the rule of sevens was inflexible. See W. EMERY, *supra* note 27, at 249-50 (regardless of the facts, no entity could own more than seven AM, seven FM, and seven television stations, no more than five of which could be VHF). See also *infra* note 127.

86. 1 F.C.C.2d 393 (1965).

87. A comparative hearing is a hearing, held before an FCC administrative law judge, at which two or more applicants for a single license are represented. The hearing may occur when two or more applicants apply for a single new license, or when one or more applicants challenge an incumbent broadcaster's license renewal application. S.

directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities. . . .⁸⁸

1. *Diversification of control of the media of mass communications.* — Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.⁸⁹

The Commission then discussed other factors it would consider in comparative hearings:

2. *Full-time participation in station operation by owners.* — We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. . . . This factor is . . . important in securing the best practicable service. It also frequently complements the objective of diversification, since *concentrations of control are necessarily achieved at the expense of integrated ownership.*

. . . Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations.⁹⁰

Thus, under traditional regulation of broadcasting by the Commission, the goal of maximizing diversity of control of broadcasting stations at both the national and local levels was consistently seen as an element of prime importance as it related to both the scarcity of frequencies concern and the first amendment concern of the public interest, convenience, or necessity standard. Importantly, the Commission's goal was not to secure

HEAD, *supra* note 3, at 348.

88. 1 F.C.C.2d at 394. The Commission's footnote at this point is reproduced in part as the text accompanying note 55, *supra*.

89. 1 F.C.C.2d at 394.

90. *Id.* at 395-96 (emphasis added). The four other factors the Commission said it would review were: proposed program service, *id.* at 397-98; past broadcast record, *id.* at 398; efficient use of frequency, *id.* at 398-99; and character, *id.* at 399. The Commission also noted that it might review other factors if warranted. *Id.*

some amount of diversification; rather, it was to secure the *maximum possible* amount of diversification. In its First Report and Order amending rules concerning multiple ownership of standard, FM, and television broadcast stations,⁹¹ the Commission stated:

A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.⁹²

In its Second Report and Order,⁹³ the Commission underscored the importance of diversification of control:

Our diversification policy is derived from both First Amendment and anti-trust policy sources. The Federal Courts have consistently upheld our use of these grounds in efforts to promote diversity of control over the electronic media of mass communications. In its earliest opinions construing the Communications Act, the Supreme Court recognized that regulation of broadcasting was designed to preserve competition and prevent monopoly. The Supreme Court said in *Red Lion Broadcasting Co. v. FCC*: "It is the purpose of the First Amendment to preserve an uninhibited market place 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." The Court then concluded: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. . . ."⁹⁴

The concerns involved in the public interest, convenience, or necessity standard thus evolved steadily during the period from 1927 through the 1970s.⁹⁵ The Commission's primary con-

91. 22 F.C.C.2d 306 (1970).

92. *Id.* at 311.

93. 50 F.C.C.2d 1046 (1975).

94. *Id.* at 1048-49 (citations omitted).

95. The public interest standard was first applied to broadcasting in 1927. See

cern at the outset was with fair and equitable distribution of broadcast facilities in light of the fact that there were not enough frequencies available for all of those who wanted to broadcast.⁹⁶ As the broadcasting industry developed into a major force in American society, the scarcity rationale remained, as indeed it had to,⁹⁷ and the public interest standard took on constitutional dimensions. The primary focus of the first amendment concern became the right, and really the need, of the public to receive a wide range of information so that our democratic form of government would work most effectively.⁹⁸ Maximum diversification of control of broadcast facilities, nationally and regionally, was a key policy in fulfilling this goal. A broadcast licensee was a public trustee, given temporary authority by the Commission to use the publicly owned airwaves to serve the public interest. This was the way things stood until the 1980s.

supra notes 34-36 and accompanying text. The Commission began deregulating the broadcasting industry in the 1970s. J. TUNSTALL, *supra* note 57, at 29. The deregulatory pace accelerated tremendously under the Reagan administration in the early 1980s. *Id.* at 30. All of the deregulatory actions considered in this Comment took place during the 1980s. See *infra* notes 99-143 and accompanying text.

96. See First Report and Order, 22 F.C.C.2d 306 (1970):

[O]ne person should not be licensed to operate more than one broadcast station in the same place, and serving substantially the same public, unless some other relevant public interest consideration is found to outweigh the importance of diversifying control. It is elementary that the number of frequencies available for licensing is limited. In any particular area there may be many voices that would like to be heard, but not all can be licensed.

Id. at 311. See also the discussion of this scarcity rationale, *supra* notes 46-48 and accompanying text.

97. With more commercial broadcasting stations on the air now than ever before (4966 AM, 4251 FM, and 1088 television stations, *Summary of Broadcasting & Cable, BROADCASTING*, Dec. 25, 1989, at 11, col. 1), there are obviously fewer available frequencies now on which new stations can be authorized. The available spectrum space cannot simply be expanded to allow a greater number of broadcast stations to go on the air; to do so would displace other licensed users, including aircraft, police and fire departments, and shortwave international broadcasting, among others. There are fewer available channels than ever before, and almost invariably there are numerous applicants for each. See *infra* note 157.

98. See *supra* text accompanying notes 51-55 and 94; *infra* note 232.

III. Deregulation of Broadcasting

A. Broadcast Deregulation in General

In pursuing its deregulatory agenda, the Commission has done away with many of the rules and procedures it had earlier determined were necessary to protect the public interest. For radio, it eliminated the nonentertainment programming guidelines,⁹⁹ justifying this by stating that "marketplace solutions can be consistent with public interest concerns,"¹⁰⁰ that "significant amounts of nonentertainment programming of a variety of types will continue on radio,"¹⁰¹ and that "stations will continue to present such programming as a response to market forces."¹⁰² In the same proceeding, the Commission eliminated the requirement that stations conduct ascertainment studies to determine the problems and needs of their communities.¹⁰³ It dismissed concerns that free market competition would tend to limit broadcasters in their assessment of community problems to those of the economically significant segments of the community,¹⁰⁴ and left the methods of assessing community problems and needs to broadcasters' "good faith discretion."¹⁰⁵ In this proceeding, the Commission also eliminated its commercial guidelines,¹⁰⁶ stating that marketplace forces would more effec-

99. Deregulation of Radio, 84 F.C.C.2d 968, 971 (1981).

100. *Id.* at 974.

101. *Id.* at 977.

102. *Id.* at 978. The Commission also noted that many commenters were concerned that it was planning to eliminate the fairness doctrine, *see infra* text accompanying note 118, among other provisions. 84 F.C.C.2d at 974. (The Commission refers to parties who file comments in connection with its proceedings as commenters. *See, e.g.*, the Multiple Ownership Decision, 100 F.C.C.2d 17, 31 (1984).) However, it supported its elimination of the nonentertainment guidelines by noting that the fairness doctrine "cannot be modified by the Commission. [It] simply [is] not subject to deregulation by the Commission." *Id.* In eliminating the nonentertainment guidelines, the Commission emphasized that stations would still have to adhere to the fairness doctrine. 84 F.C.C.2d at 979. Yet in 1987, the Commission declared the doctrine unconstitutional, leaving the broadcasting industry with no explicit requirement that it program any news or public affairs at all. Syracuse Peace Council, 2 F.C.C. Rec. 5043, 5047 (1987). *See infra* note 117 and accompanying text.

103. 84 F.C.C.2d at 971.

104. *Id.* at 997-98.

105. *Id.* at 998.

106. *Id.* at 971.

tively curb excessive advertising¹⁰⁷ and that "[n]o government regulation should continue unless it achieves some public interest objective that cannot be achieved without the regulation."¹⁰⁸

The television programming and commercialization policies and ascertainment requirements were also eliminated.¹⁰⁹ The Commission again trusted "market incentives" to take the place of governmental regulation to ensure that television stations serve the public interest.¹¹⁰ Additionally, the requirement that stations maintain their main origination studios in their cities of license¹¹¹ was eliminated in 1987,¹¹² and the anti-trafficking provision¹¹³ in 1982.¹¹⁴

Until 1986, the Commission imposed restrictions on AM-FM simulcasting.¹¹⁵ This restriction was eliminated, and now commonly owned AM and FM stations in the same market may simulcast 100% of the time.¹¹⁶

Finally, and perhaps most importantly, the Commission declared the fairness doctrine facially unconstitutional.¹¹⁷ The fair-

107. *Id.* at 1003.

108. *Id.* at 1006.

109. Report and Order, 98 F.C.C.2d 1076 (1984).

110. *Id.* at 1077.

111. 47 C.F.R. § 73.1125 (1986).

112. 2 F.C.C. Rec. 3215 (1987).

113. 47 C.F.R. § 73.3597 (1982).

114. 52 Rad. Reg. 2d (P & F) 1081 (1982).

115. 47 C.F.R. § 73.242 (1984). Simulcasting is the practice in which an owner of an AM and an FM station in the same market airs the same programming on both stations within 24 hours. *Id.* § 73.242(b).

116. Report and Order, 103 F.C.C.2d 922 (1986). This allows the common owner to program two stations at once, saving operating costs by airing the same programming on both the AM and FM stations. Thus, one of the two frequencies is wasted because two different frequencies (one AM and one FM) are used to provide a single programming service. *But see supra* text accompanying note 92; *National Broadcasting Co. v. United States*, 319 U.S. 190, 218 (1943) ("With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.") (quoting the Commission's Report on Chain [Network] Broadcasting of May 2, 1941). Arbitron, a major radio ratings service, estimates that 1430 stations are simulcasting under the new rule. *Simulcasting: Two Much of a Good Thing*, BROADCASTING, Aug. 15, 1988, at 59.

117. Syracuse Peace Council, 2 F.C.C. Rec. 5043, 5047 (1987). By this action, the Commission "undertook, in effect, to overrule the opinion of the Supreme Court in *Red Lion Broadcasting Co. v. FCC* [395 U.S. 367 (1967)]." Hyde, *FCC Action Repealing the Fairness Doctrine: A Revolution in Broadcast Regulation*, 38 SYRACUSE L. REV. 1175, 1175 (1987). Hyde was an FCC Commissioner and Chairman during the 1940s, 1950s, and 1960s, and was Acting Chairman when the fairness doctrine was promulgated. *Id.*

ness doctrine had required stations to air at least some local programming on issues of public importance and to present opposing viewpoints to balance the presentation.¹¹⁸ The repeal of the doctrine is important to note here because the Commission partially justified its elimination of the nonentertainment guidelines¹¹⁹ by emphasizing that stations would have to continue to air balanced programming on issues of public importance under the fairness doctrine.¹²⁰

Underlying all of these deregulatory actions are the notions, first, that the Commission is still concerned (as it must be) with the public interest,¹²¹ and second, that the best way to serve the public interest is to eliminate as much regulation as possible and allow stations to respond only to the economic incentives of the "marketplace." This theory is absolutely inadequate.¹²²

B. Deregulation of Multiple Ownership

The Commission has a congressional mandate to license broadcasting stations only when doing so would serve the public interest, convenience, or necessity. So that it could most effectively carry out this mandate, the Commission established rules, procedures, and regulations intended to ensure that broadcasting stations, operating under its authority, served the public interest.¹²³ Among these were the multiple ownership rule,¹²⁴ the radio duopoly rule,¹²⁵ and the one-to-a-market rule,¹²⁶ all in-

The Commission's elimination of the doctrine came less than two months after President Reagan's veto of a congressional attempt to codify it. R. Zaragoza, R. Bodorff, & J. Emord, *The Public Interest Transformed: The Trusteeship Model Gives Way to a Marketplace Approach*, in *PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING* 27, 32, 47-48 nn.66-69 (J. Powell & W. Gair eds. 1988). After his veto of the legislation, President Reagan stated, "[t]here is no reason to substitute the judgment of Washington bureaucrats for that of professional broadcasters." *Radio World Annual* at 16 (1989).

118. See *supra* note 94 and accompanying text.

119. Deregulation of Radio, 84 F.C.C.2d 968 (1981).

120. *Id.* at 976, 979.

121. The Communications Act requires the Commission to license stations only when doing so would serve the public interest, convenience, and necessity. 47 U.S.C. § 307(a) (1982 & Supp. V 1987)).

122. See *infra* notes 154-245 and accompanying text.

123. See *supra* notes 65-98 and accompanying text.

124. See *supra* note 79 and accompanying text.

125. See *supra* note 81 and accompanying text.

126. See *supra* note 83 and accompanying text.

tended to reduce the possibility of an undue concentration of control both nationally and locally.¹²⁷ These three rules, not only individually but more particularly in combination, were intimately bound up both with the rationale justifying application of the public interest standard to broadcasting (the fact that a scarce public resource is being used, to the exclusion of other potential users, by a private user for private gain)¹²⁸ and with the first amendment concerns that the marketplace of ideas contain as many diverse and antagonistic voices as possible.¹²⁹ However, the Commission, having now decided that free market competition was somehow better than government regulation of broadcasting, either eliminated or substantially relaxed all three of these provisions, in concert with Reagan administration policy¹³⁰ and pressure from the broadcasting industry itself.¹³¹

In 1984, the Commission substantially relaxed the multiple ownership rule:¹³² the rule of sevens was changed in 1984 to the rule of twelves (twelve AM, twelve FM, and twelve television stations) for six years.¹³³ The limitation will be completely elimi-

127. Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306, 307 (1970):

The concentration of control rules aim at achieving the aforementioned twofold objective [fostering maximum competition in broadcasting and promoting diversification of programming sources and viewpoints] *nationally and regionally* by providing that a license for a broadcast station will not be granted to a party if the grant would result in that party's owning, operating, or controlling more than a specified number of stations in the same broadcast service. For AM the number is 7, for FM it is 7, and for TV it is 7, with no more than 5 being VHF. The rules also provide that a grant will not be made, even though it would not result in exceeding these specified maximums, if it would result in undue concentration of control contrary to the public interest

Id. (emphasis added).

128. See *supra* notes 48, 50, and accompanying text.

129. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). See also *supra* notes 52-55 and accompanying text.

130. As early as 1967, President Reagan, then Governor of California, opposed what he saw as a trend toward increased restraint on the commercial broadcasting industry. *THE FIRST 50 YEARS OF BROADCASTING* 187 (Broadcasting Publications 1982).

131. Many broadcasters, and the National Association of Broadcasters (NAB), a powerful industry lobby, filed comments with the Commission in connection with all three actions (the Multiple Ownership Decision, 100 F.C.C.2d 17 (1984), the Duopoly Decision, 4 F.C.C. Rec. 1723 (1989), and the One-to-a-Market Decision, 4 F.C.C. Rec. 1741 (1989)). See *infra* note 230 and accompanying text.

132. 47 C.F.R. § 73.3555(d) (1984).

133. Multiple Ownership Decision, 100 F.C.C.2d 17, 18 (1984). Minority group own-

nated in 1990,¹³⁴ assuming that the Commission decides, as it is likely to,¹³⁵ that the public interest would not be adversely affected. This final delimitation will allow a single group owner to own as many radio and television stations as it cares to and can afford to buy.

In 1989, the Commission relaxed the radio duopoly rule:¹³⁶ where the rule originally prohibited the overlap of the 1 mv/m contours of commonly owned AM or FM stations,¹³⁷ the new relaxed rule prohibits the overlap of the 3.16 mv/m contours of commonly owned FM stations and the 5 mv/m contours of commonly owned AM stations.¹³⁸ The new rule eliminates the discrimination against AM stations caused by the earlier uniform 1 mv/m standard for both AM and FM stations; however, it also allows commonly owned AM or commonly owned FM stations to be considerably closer together than before,¹³⁹ and more people will be able to receive relatively strong signals from two different stations in the same service owned by the same entity. The Commission seems no longer concerned that the proximity of commonly owned stations will cause an undue concentration of control within a local area; it justifies this by referring to the expansion that has taken place in the "communications marketplace" since the original rule was promulgated.¹⁴⁰

ers may own up to 14 television stations. 47 C.F.R. § 73.3555(d)(1) (1988).

134. Multiple Ownership Decision, 100 F.C.C.2d at 18.

135. Alfred Sikes, who became Chairman of the Commission in 1989, generally favors the deregulation of broadcasting. Harris, *Biz Sikes Up For FCC Boss; Where Is He on the Issues?*, Variety, July 5, 1989, at 43, col. 3.

136. Duopoly Decision, 4 F.C.C. Rec. 1723 (1988).

137. See *supra* note 82 and accompanying text.

138. These are the so-called primary city grade signal contours. The AM and FM contours were different (5 mv/m for AM, 3.16 mv/m for FM) because AM radios are typically less sensitive than FM radios; a signal strength of 1 mv/m produces a less listenable signal on an AM radio than it does on an FM radio. See *supra* note 82.

Because the old duopoly rule used the 1 mv/m standard for both AM and FM stations, it discriminated against commonly owned AM stations: two or more commonly owned FM stations conforming to the rule could readily be heard in the area where the signals intersected, while for commonly owned AM stations the signals could not be heard as well in the area in which they intersected.

139. Common ownership of two stations in the same service in the same principal city will continue to be prohibited. Duopoly Decision, 4 F.C.C. Rec. 1723 (1988).

140. Duopoly Decision, 4 F.C.C. Rec. at 1726. The Commission referred to the increased number of radio and television stations, as well as to cable television and home video cassette recorders (VCRs). *Id.*

The one-to-a-market rule¹⁴¹ now provides for favorable commission review of waiver requests. These waivers, which will allow new radio/television cross ownership within the same market, will likely be granted in certain circumstances.¹⁴²

In combination, the relaxation or elimination of these three rules will now make it possible for a single entity to own and control stations which blanket the entire country. It will also be possible for this single entity to own more than one station in the same service which can be heard or viewed in the same geographic area. Finally, single entities will be allowed, in many situations, to own both radio and television stations in the same market. The Commission has decided that "marketplace forces" will create natural limits on these tendencies, and that these "natural" forces are in some way better than the "artificial" limitations on multiple ownership imposed by commission regulation.

IV. A New Development: Twenty-Four-Hour Satellite Radio Programming Services

A development which has had a profound impact on the broadcasting industry is the emergence of satellite distribution of network programming. In 1979, the noncommercial network National Public Radio became the first radio network to deliver all of its programming to member stations via high fidelity communications satellite.¹⁴³ This was the first time that live, high fidelity stereo distribution of programming to hundreds of stations nationwide was possible on a regular basis. Commercial radio networks soon followed, and by 1983 most were distributing their programming via satellite.¹⁴⁴

141. See *supra* note 83 and accompanying text.

142. There are three situations in which the Commission will favorably review waiver requests: first, in the top 25 television markets when there would be at least 30 independently-owned "voices" in the market after the proposed consolidation (a "voice" is a station or group of stations in a single market under common ownership), One-to-a-Market Decision, 4 F.C.C. Rec. 1741, 1751-52 (1989); second, in markets other than the top 25 where a financially failed station is involved in the proposed consolidation, *id.* at 1752-53; and third, any other circumstances, subject to a more rigorous case-by-case review by the Commission, *id.* at 1753-54.

143. Lowenstein, *Satellite Distribution: Lifeline for Public Radio in the United States*, EBU Rev., July 1987, at 24.

144. Telephone interview with Jeffrey Sudikoff, Chairman and Chief Executive Of-

Traditionally, networks, both radio and television, served a station by bringing it national programming (entertainment, news, and public affairs) with which it could supplement its local programming. This national programming was often too expensive for a local station to produce on its own. Affiliation with a network thus allowed a local station to concentrate its resources on producing local programming.

During the 1980s, a period during which the Commission embarked upon the wholesale deregulation of broadcasting,¹⁴⁵ a new type of network developed. These new networks are designed to provide subscribing stations with twenty-four hour a day programming formats, delivered in high fidelity stereo via satellite. The only local material transmitted by the stations is typically a few minutes each hour of local commercials; all of the programming (which is exclusively, or nearly exclusively, entertainment and national commercials) is supplied by the networks.¹⁴⁶

In communication theory, one who controls a communication channel is known as a gatekeeper.¹⁴⁷ Under traditional regulation, the Commission's policy of maximizing diversity of programming and viewpoints was served by its corollary policy of maximizing the number of gatekeepers.¹⁴⁸ Even disregarding the effects of the Commission's elimination or relaxation of the multiple ownership,¹⁴⁹ duopoly,¹⁵⁰ and one-to-a-market rules,¹⁵¹ the development of satellite-delivered twenty-four-hour programming services has significantly reduced the number of gatekeepers in radio, despite the increase in the number of stations during the past thirty years.¹⁵² These networks have virtually

ficer, IDB Communications Group, Inc., Los Angeles, Cal. (Apr. 10, 1990).

145. See *supra* note 95.

146. Stations are no longer explicitly required to air any news and public affairs at all. See *supra* notes 99-105 and 117-20 and accompanying text.

147. See, e.g., R. HIEBERT, D. UNGURAIT, & T. BOHN, *MASS MEDIA* 25, 114-25 (1979).

148. See *supra* notes 85-98 and accompanying text.

149. See *supra* note 79 and accompanying text.

150. See *supra* note 81 and accompanying text.

151. See *supra* note 83 and accompanying text.

152. Stations that air substantially all of their programming from these programming services have, in effect, delegated the gatekeeping function to the services, contrary to the prohibition against delegation of control to another. See FCC Report on Chain Broadcasting, *quoted in* *National Broadcasting Co. v. United States*, 319 U.S. 190, 205 (1943). See also Commission *en banc* Programming Inquiry, *supra* note 68, at 2311-12

eliminated local programming on a significant number of stations.¹⁵³

V. Analysis

"What sort of part do I play . . . ? Is it an important part?"

"Just about the most important part in the show."

"The lead?"

"No, the commercial."

— *Make Room for Daddy*, 1959.

In 1959 it was a joke on a television sitcom. Today it is the government-sanctioned reality. The many deregulatory actions

("The licensee, is, in effect, a 'trustee' in the sense that his license to operate his station imposes upon him a nondelegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.").

153. It is estimated that between 2000 and 2500 radio stations air programming from the 12 largest satellite programming services for between 12 and 24 hours a day. Telephone interview with Robert Unmacht, Editor of THE M STREET JOURNAL, a broadcast industry newsletter based in Alexandria, Va. (Apr. 11, 1990).

One of the largest satellite programming services, Satellite Music Network (SMN), was recently purchased by Capital Cities/ABC. Radio World, Sept. 6, 1989, at 2, col. 3. SMN provides programming to about 1000 radio stations. *Id.*

In addition, Capital Cities/ABC also operates a number of other radio networks, including: ABC Talkradio, with 350 affiliates, Letter from Rich Wood, Director of Station Relations, Talk Programming, ABC Radio Networks (Mar. 19, 1990); ABC Contemporary, with 223 affiliates, BROADCASTING CABLE YEARBOOK 1989 F-44 to F-45 (Broadcasting Publications 1989); ABC FM, with 139 affiliates, *id.* at F-45; ABC Rock, with 102 affiliates, *id.* at F-45 to F-46; ABC Information with 553 affiliates, *id.* at F-46 to F-47; ABC Entertainment, with 555 affiliates, *id.* at F-47 to F-48; ABC Direction, with 388 affiliates, *id.* at F-48 to F-49. ABC thus supplies programming to 2310 radio stations across the country, or about 25% of all the commercial radio stations in the United States. (This figure does not include the 1000 stations carrying programming from SMN). Additionally, the ABC Television Network has 223 affiliates. *Id.* at F-44.

One can gain additional perspective on Capital Cities/ABC's impact in the marketplace of ideas when one considers that the company owns eight major-market television stations reaching 24.4% of total ADI (Area of Dominant Influence) television homes. CAPITAL CITIES/ABC, INC., 1989 ANNUAL REPORT 11 (1990). (The Commission prohibits common ownership of television stations which collectively reach 25% or more of ADI television homes. 47 C.F.R. § 73.3555(d)(1988).) Capital Cities/ABC owns 11 AM and 10 FM stations, including AM/FM/TV combinations in three cities, AM/FM combinations in seven cities, and an AM/TV combination in one city. *Annual Report* at 11-12. Its radio stations reach 25.7% of the United States. *Id.* at 12. It owns 10 daily and 77 weekly newspapers, *id.* at K-9, and 79 other consumer, special interest, and trade publications. *Id.* at K-10 to K-12. Additionally, it owns significant interests in three cable television networks: 33% of Lifetime, 38% of Arts & Entertainment (A&E), and 80% of Entertainment and Sports Programming Network (ESPN). *Id.* at 12-13.

taken by the Commission have changed the face of the broadcasting industry, and have had a devastating effect on the public interest standard, not to mention the public interest itself.¹⁵⁴

Originally, radio and television stations "paid" for the otherwise essentially free use of the frequencies allocated to them¹⁵⁵ by fulfilling certain programming obligations.¹⁵⁶ The requirement that stations fulfill these obligations was intended to serve the public interest by ensuring that the public's first amendment right to be informed was satisfied. In no sense, then, was a station's use of a frequency "free"; nor was it permanent.¹⁵⁷

154. Lorenzo Milam, who has built and operated a number of noncommercial community-based radio stations, wrote in his whimsically titled book, *SEX AND BROADCASTING*:

Broadcasting as it exists now in the United States is a pitiful, unmitigated whore. At some stage in its history, there was a chance to turn it to a creative, artful, *caring* medium; but then all the toads came along, realizing the power of radio and television to hawk their awful wares. The saga of broadcasting in America is littered with the bodies of those who wanted to do something *significant* — and who were driven out [or more correctly, sold out] by the pimps and thieves who now run the media.

L. MILAM, *SEX AND BROADCASTING: A HANDBOOK ON STARTING A RADIO STATION FOR THE COMMUNITY* 19 (3d ed. 1975) (emphasis and brackets in original).

155. At various times, the Commission has charged fees associated with broadcast applications; however, it has never collected anything in the nature of a spectrum use fee. Telephone interview with James Gattuso, Deputy Chief, Office of Plans and Policy, Federal Communications Commission, Washington, D.C. (Apr. 20, 1990).

156. For example, stations had to undertake formal studies to determine the problems and needs of their communities. See *supra* note 68. They had to air a certain amount of nonentertainment programming. 47 C.F.R. § 0.281(a)(8) (1982). Under the fairness doctrine, they had to provide balanced presentation of issues of public importance in their local community. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369-70 (1969).

157. The continuing requirement that each station fulfill these programming obligations was enforced by the Commission's license renewal procedures. Broadcast licenses were issued for a period of three years. 47 U.S.C.A. § 307(d) (1962). As part of the Omnibus Budget Reconciliation Act of Aug. 13, 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & ADMIN. NEWS (95 Stat.) 736 (codified at 47 U.S.C. § 307 (1982)), Congress authorized the Commission to extend broadcast license terms. In 1987, the Commission increased license terms to seven years for radio stations and five years for television stations. Order, 2 F.C.C. Rec. 3805 (1987).

Six months before the license's expiration date, the licensee was required to notify the public, normally on the air, that it was applying for renewal of its license, 47 C.F.R. § 73.3580(d) (1988), so that members of the public, if dissatisfied with the station's programming, could challenge the renewal by filing either a petition to deny the renewal or a competing application to take over the frequency. Applications challenging the license of an incumbent licensee must normally be filed no later than one month before the license's expiration date. 47 C.F.R. § 73.3516(e) (1988).

All of this changed under deregulation. The Commission's elimination of the nonentertainment programming guidelines,¹⁵⁸ the ascertainment requirements,¹⁵⁹ and the fairness doctrine¹⁶⁰ have left stations with no explicit programming obligations at all. In eliminating the nonentertainment guidelines and the ascertainment requirements, the Commission stated that licensees would still have to exercise "good faith discretion" in ascertaining the needs of their communities,¹⁶¹ to be "responsive to the issues facing their community,"¹⁶² and to continue to adhere to the fairness doctrine.¹⁶³ It trusted that stations would continue to provide news and public affairs programming because of "market forces."¹⁶⁴ When the Commission declared the fairness doctrine unconstitutional in 1987,¹⁶⁵ stations were left with no real regulatory or statutory requirements to air news or public affairs programming, balanced or otherwise.

By eliminating these requirements, the Commission also

While incumbent licensees were entitled to a "reasonable expectation" of renewal because of their substantial investment in their facilities, this procedure was designed to ensure that stations failing to meet their programming obligations would face the possibility of non-renewal. Normally, a station's renewal application could be denied only when the station failed to meet its programming obligations; the Commission was reluctant to deny license renewals or to deny applications for license transfer when members of the public objected to the entertainment format (rock, top 40, classical, jazz, etc.) of the station, or to a change of format. *See Changes in Entertainment Formats*, 37 RAD. REG. 2d (P & F) 1679 (1976). *But see Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (disappearance of unique formats may justify Commission intervention).

When a renewal application was challenged, the Commission normally designated the two (or more) applications for comparative hearing. *See supra* note 87.

158. The nonentertainment programming guidelines required stations to air a prescribed amount of nonentertainment programming. 47 C.F.R. § 0.281(a)(8) (1982). The guidelines were eliminated in 1981. *Deregulation of Radio*, 84 F.C.C.2d 968 (1981).

159. The ascertainment rules required stations to conduct formal studies every year to determine the significant problems and needs of their communities and develop programs addressing those problems and needs. 53 F.C.C.2d 3 (1975); 27 F.C.C.2d 650 (1971). The rules were eliminated in 1981. *Deregulation of Radio*, 84 F.C.C.2d 968 (1981).

160. *See supra* note 117 and accompanying text.

161. *Deregulation of Radio*, 84 F.C.C.2d at 998.

162. *Id.* at 978.

163. *Id.* at 979. The Commission had attempted to placate those who opposed its elimination of the nonentertainment programming guidelines by stating that stations would still be required to adhere to the fairness doctrine. *Id.* at 976, 979. *See supra* text accompanying note 118.

164. *Deregulation of Radio*, 84 F.C.C.2d at 978.

165. *Syracuse Peace Council*, 2 F.C.C. Rec. 5043 (1987). *See supra* note 117.

eliminated most of the standards by which a station would be evaluated in a comparative hearing.¹⁶⁶ This substantially weakened the status of a renewal challenger, and increased the incumbent licensee's expectation of renewal¹⁶⁷ to near certainty.¹⁶⁸

The effects of these deregulatory actions are not difficult to judge. Television news programs are filled with increasingly sensational "hard" news, and many stations claim to be fulfilling their public interest responsibilities by airing such programs as *A Current Affair* and *Geraldo*.¹⁶⁹ In a typical market, the aver-

166. For a brief description of the comparative hearing process, see *supra* notes 87, 90, 157, and accompanying text.

167. See *supra* note 157.

168. In the same proceeding in which it eliminated the radio nonentertainment programming guidelines, ascertainment requirements, and commercialization guidelines, see *supra* note 5, the Commission also eliminated the requirement that stations maintain program logs, the only official documents reflecting what was actually broadcast. Deregulation of Radio, 84 F.C.C.2d 968 (1981). It also eliminated the program logging requirements for commercial television stations. Report and Order, 98 F.C.C.2d 1076 (1984). Thus, there remain no official documents that renewal challengers may utilize to examine an incumbent licensee's overall programming. Cf. R. HORWITZ, *THE IRONY OF REGULATORY REFORM* 210 (1989) ("[T]he Reagan-sponsored Paperwork Reduction Act of 1980 reduces the recordkeeping and reporting obligations of regulated firms, thereby making the enforcement of rules more difficult.").

As if this were not bad enough, the National Association of Broadcasters (NAB) is urging the elimination of the comparative license renewal process. *Radio World*, Feb. 22, 1989, at 10, col. 1. The House of Representatives has proposed a bill, H.R. 1136, which would amend the Communications Act of 1934, 47 U.S.C. §§ 151-805 (1982 & Supp. V 1987), to prohibit the filing of competing applications in connection with a station's license renewal application unless the station had either violated the Commission's rules or failed to present any programming addressing local issues. *Radio World*, Apr. 12, 1989, at 1, col. 4. These actions appear to have been taken in response to the recent rash of competing applications filed for the purpose of obtaining a cash settlement in exchange for the withdrawal of the applications.

Because the Commission has indicated, by its elimination of the nonentertainment programming guidelines, that it is unwilling to require stations to provide any specific amount of news and public affairs programming, it would appear that if a station presented any amount of programming directed at local issues, the renewal of the station's license would be more or less automatic. This would virtually guarantee stations permanent access to the frequencies assigned to them — in other words, possession, for all intents and purposes. *Contra supra* note 47 and accompanying text. The House bill, if enacted, would remove from the present licensing system the important safety valve which provides a procedure under which broadcasters who do not serve the public interest can lose their licenses.

169. A brief examination of newspaper program descriptions for *Geraldo* is illuminating. For the week of November 6, 1989, the program was scheduled to cover the following topics: pregnant women behind bars, women in prison, teen-age prostitutes, and nymphomaniacs. *N.Y. Times*, Nov. 5, 1989, § 11 (Television), at 20, 26, 33, 45.

age FM station airs three and one half minutes of news per hour.¹⁷⁰

The reasons for these programming responses to "market forces" are clear. Originally, Congress and the Commission intended the broadcasting industry to play a crucially important role in American society by contributing to the marketplace of ideas through news and public affairs programming, and to lead community discussions on issues of public importance.¹⁷¹ By allowing stations to respond only to "market forces," the Commission has given every broadcast licensee carte blanche to operate only with the maximization of its audience in mind — in other words, to chase ratings, and so maximize its revenues, by giving the public more of what it wants.¹⁷² This has turned upside down the concept that stations are supposed to be community leaders, exercising a public trust to fulfill the vital first amendment need of the public to be informed.¹⁷³ Now stations are followers, responsible only to the financial bottom line.

Also turned upside down is the notion that stations exist primarily to provide programming services for the public.¹⁷⁴ In theory, the station was the provider of a product. The product was the programming, and the consumer of the product was the listener or viewer. The public's first amendment right to be informed was the paramount concern in broadcast regulation.¹⁷⁵ Advertisers provided necessary revenue to allow stations to provide this service in exchange for program sponsorship and com-

170. J. TUNSTALL, *supra* note 57, at 152. There are usually more radio stations in larger markets than there are in smaller markets. Some stations in larger markets provide more substantial amounts of news and public affairs programming (for example, all-news stations in major markets). However, these stations often provide capsulized, headline-type coverage of news events, thus limiting the value of their service in a first amendment context.

171. See *supra* notes 52-63, 94, and accompanying text.

172. Certainly, the public interest standard includes considerations of what the public wants to hear and view, but not to the exclusion of what it ought to hear and view. See *supra* note 57 and accompanying text. However, the deregulatory actions the Commission has taken in recent years have encouraged stations to ignore all considerations except what the public likes and wants. The Commission's maverick deregulatory actions have trashed the first amendment concerns of Congress and the Supreme Court.

173. See *supra* notes 51-63 and accompanying text.

174. See *supra* notes 46-63 and accompanying text.

175. See *supra* notes 46-63 and accompanying text.

mercial announcements.¹⁷⁶

Now, with the economic marketplace as the only real regulator, the functions performed by the participants have changed. The station provides a service by delivering a quantity of potential buying power — the listening or viewing public — to the advertiser. The audience, or rather the potential buying power that the audience represents, is the product; the advertiser is the consumer of the product; and the station is the purveyor.¹⁷⁷ If the ratings drop, the station scrambles to find out why. If, as is usual, the programming is the “culprit,” it is adjusted or changed to recover the lost ratings points. Whereas radio or television stations once existed primarily to inform the public and secondarily to provide entertainment, they now exist primarily to deliver buying power to advertisers. The entertainment and especially the informational functions have been reduced to secondary importance, at best.

This “free market” approach to broadcast regulation, or, more accurately, non-regulation, has redefined the phrase “public interest, convenience, or necessity.”¹⁷⁸ Originally, the public interest standard contemplated programming that the public ought to hear or view — the news and public affairs programming required by the first amendment public trust concept — along with what it wanted to hear or view (entertainment programming).¹⁷⁹ Now the standard contemplates only programming that the public wants to hear or view — mostly entertainment. A broadcast licensee which gives the public only what it wants will achieve the maximum rating,¹⁸⁰ while a licen-

176. See *supra* text accompanying note 52.

177. The Commission itself acknowledged this characterization in the Duopoly Decision, 4 F.C.C. Rec. 1723, 1732 n.42 (1989).

178. 47 U.S.C. § 307(a) (1982 & Supp. V 1987).

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

180. The listening or viewing public decides what it likes, and listens to or views the programming of the stations that provide it. This, of course, influences the ratings. The stations respond to the ratings by adjusting their programming to maximize them. The stations try to give the public more of what it likes and less of what it does not, as evidenced by the ratings. With increased ratings, stations may charge more for advertising time. In short, stations attempt to maximize their profits by giving the public more of what it wants. This is the goal of the economic marketplace to which the Commission has left much broadcast regulation. This chase of maximum profits, unfettered in the deregulated climate the Commission has created, tends to eliminate programming that the public ought to hear or view but may not like (for example, news and public affairs

see which airs public service programming (which is generally less popular, and more expensive to produce) will likely suffer in the ratings and thus in its profitability.

If one subscribes to the theory that, for the most part, the public tends to sink to its lowest level of political, social, and cultural awareness in the absence of countervailing forces, the Commission's decision to allow the economic marketplace to regulate broadcasting is particularly disturbing. The electronic mass media have unequaled power in contemporary American society, and because of this power they have enormous responsibilities. However, the removal of regulations and the increasing role of the economic marketplace allow stations to ignore the public trust concept¹⁸¹ and to use the publicly owned airwaves solely for private gain with little corresponding public benefit. This offends the whole history and theory of broadcast regulation, the Communications Act, and in this context, the first amendment.

The public's first amendment right to receive a wide range of information from diverse sources has thus been subordinated to the desire of advertisers to reach the maximum amount of buying power, and to the desire of stations to maximize their profits by satisfying their advertisers. Deregulation has been extraordinarily beneficial for the broadcast industry.¹⁸² Each station now has essentially permanent access to the broadcast channel assigned to it. Although this channel is theoretically a public resource,¹⁸³ each licensee now has government approval to program its station, or stations, with only "market forces" in mind, maximizing its revenues through whatever programming the "market" responds to. Moreover, each station has, for all intents and purposes, gained ownership of the frequency assigned to it because of the near certainty of license renewal.¹⁸⁴

programming).

181. For a discussion of the public trust concept, see *supra* notes 46-63 and accompanying text.

182. In an editorial, BROADCASTING noted: "Between [outgoing FCC Chairman Dennis Patrick] and his predecessor, Mark Fowler, broadcasters and other Fifth Estaters have had the best telecommunications policy run of their lives." *End of an Era?*, BROADCASTING, Apr. 10, 1989, at 98.

183. See *supra* note 47 and accompanying text.

184. See *supra* note 157. The electromagnetic spectrum is publicly owned, and the Communications Act, as interpreted by the Supreme Court, provides that "no person is

The Commission has thus allowed the broadcasting industry to reap enormous profits from the use of publicly owned frequencies by allowing it to respond only to the forces of the economic marketplace, without corresponding public benefit and therefore at the expense of the public's first amendment right to be informed.¹⁸⁵

to have anything in the nature of a property right as a result of the granting of a license." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

185. For a discussion of the public benefit and the public's right to be informed, see *supra* notes 46-63 and accompanying text.

Broadcasters have long complained that any attempt by the government to regulate programming constitutes an abridgment of their first amendment right of free speech. See, e.g., T. SNIDER, *Serving the Public Interest: Voluntarily or by Government Mandate?*, in *PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING* 87 (J. Powell & W. Gair eds. 1988):

Broadcasters are in the business of communicating with the public through their programming. So are newspapers, magazines, signs, direct mailers, and sky-writers. But none of them is burdened with a *content* public interest standard.

.....

Why are broadcasters singled out and saddled with a programming content public interest standard by which they live or die? . . . Very simply, it's because Congress, in violation of the First Amendment, decided to treat broadcasters as second-class citizens. How long are we going to sit still for this?

.....

Broadcasters are second class citizens in the business community. They can never enjoy full freedom of speech until Congress passes a law that eliminates comparative renewal based on programming content. Passage of such a law should be the number-one priority of free, over-the-air broadcasters. The comparative renewal process is an abomination that allows a challenge to a license based on programming content promises. We broadcasters deserve license renewals like all non-broadcast users of the spectrum when we adhere to technical standards. . . . We must not pay too high a price — and codifying the public interest standard and the Fairness Doctrine is too high.

Comparative renewal proceedings involve contests between businessmen. They have nothing to do with the public's rights. The public still has the right to petition or complain, just as they do with other licensed businesses.

The airways are not, nor can they be, owned by the public. Broadcasters are not public trustees. Indeed we do not have any more special obligation to the public than other types of businesses that are licensed. We do not deserve to be burdened with a "public interest" over and above technical operating standards in order to get our licenses renewed or to eliminate comparative renewal. It is unfair that we, and only we, are forced to operate under an unceasing threat by challengers who want to put us out of business — or the government, which wants to control us by denying our First Amendment rights.

For too long we've allowed "Big Brother" to control us. For too long we've meekly accepted unfair treatment and even outright discrimination. We have a case, and we need to make it. We need to stand up and speak for ourselves. If we don't, who will?

It was in this pro-industry climate that the Commission

Id. at 89-93 (emphasis in original).

This argument entirely misses the point. First, the airwaves (or the "æther," as they were somewhat poetically called in the early days of broadcast regulation) are deemed to belong to the public. See *supra* note 47 and accompanying text. Second, the airwaves are "scarce" — there is simply an inadequate number of frequencies available to accommodate all of the people who wish to broadcast, notwithstanding the Commission's misplaced assertions about the increased number of stations and the availability of alternative technologies. See *infra* notes 192-96 and accompanying text; *contra supra* note 48 and accompanying text. On these foundations, Congress decided that broadcasting stations should be licensed only when they would serve the public interest, convenience, or necessity. See *supra* text accompanying note 36.

Under this scheme, broadcasters are indeed public trustees, charged with the responsibility of using publicly owned frequencies for the benefit of the public. See *McIntire v. William Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597, 599 (3d Cir. 1945) ("a radio broadcasting station must operate in the public interest and must be deemed to be a 'trustee' for the public."). See also *Schaeffer Radio Co.*, a 1930 Federal Radio Commission case, reprinted in part in *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5 (1950):

A broadcasting station is public in purpose and character and any use of it as a private or individual affair is repugnant both to policy and legislation. The conscience and judgment of a station's management are necessarily personal, but the station itself must be operated as if owned by the public. No person may consider broadcasting facilities as his mere personal chattel. It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest. Furnish the programs and judgment and keep the pecuniary reward, if any, but remember it is our station, not yours.' The standing of every station is determined by that conception. There is no other foundation on which it may be established and maintained. Its value and influence must rest entirely on its consecration to the public service.

Id. at 14.

It would be impossible for the Federal Communications Commission to satisfy its congressional mandate without establishing at least some requirements concerning the manner in which its broadcast licensees program their stations. The nonentertainment programming guidelines and the fairness doctrine were directed toward promoting the vigor of the broadcasting industry's contribution to the marketplace of ideas; they were not attempts by the Commission to coerce stations to air programs on certain topics or programs reflecting particular viewpoints. Any such attempt would certainly not pass constitutional muster, and would in any event violate the Communications Act. Section 326 of the Act provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1982 & Supp. V 1987). See also *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943):

"With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. . . ."

dealt yet another blow to the public interest standard: stating that the scarcity of broadcast frequencies was no longer a concern,¹⁸⁶ the Commission in 1984 relaxed the multiple ownership rule¹⁸⁷ to allow individual entities to own up to twelve AM, twelve FM, and twelve television stations.¹⁸⁸ This limitation will likely be completely eliminated in 1990,¹⁸⁹ allowing a single entity to own as many broadcast properties as it cares to. The Commission also relaxed the local concentration provisions,¹⁹⁰

Freedom of utterance is abridged to many who wish to use the the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

Id. at 218, 226 (quoting the Commission's Report on Chain Broadcasting). See also *supra* note 52 and accompanying text; Commission *en banc* Programming Inquiry, *supra* note 68.

Just as unprofitable is the complaint of broadcasters that they should be free of government-imposed programming regulations because no such regulations could constitutionally be applied to the print media. The print media utilize *private* resources — paper and ink. Any person with financial resources adequate to purchase the necessary supplies and equipment may start a newspaper or magazine. Broadcasters, on the other hand, utilize a resource which is not only owned by the public, and which therefore cannot be bought or sold, but also one of which there is an inadequate supply. Anyone with adequate financial resources may purchase the equipment and supplies necessary to broadcast on radio or television. These assets typically cost a small fraction of what it would cost to purchase an existing station. Yet without a license from the Commission, no transmitter may be put on the air. 47 U.S.C. § 301 (1982) ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."). In many areas of the country, no frequencies are available, and the only access an otherwise qualified citizen has to the airwaves is through the purchase of an existing station, often at grossly inflated prices. See *infra* note 244.

Each broadcaster is granted government permission to use a slice of the publicly owned airwaves to the absolute exclusion of any other potential user in that geographic area. Great profits can be made from that use. The central first amendment concern focuses on the public's right to receive information, not on the broadcaster's right to speak with no restrictions. See *supra* note 51. For broadcasters to suggest that the government should be prohibited from requiring them to program their stations for the benefit of the public represents the height of hypocrisy and arrogance.

186. Multiple Ownership Decision, 100 F.C.C.2d 17, 19, 37-38 (1984); Duopoly Decision, 4 F.C.C. Rec. 1723, 1726-27 (1989); One-to-a-Market Decision, 4 F.C.C. Rec. 1741, 1743 (1989).

187. See *supra* note 79 and accompanying text.

188. See *supra* notes 132-33 and accompanying text.

189. See *supra* note 135.

190. The radio duopoly rule and the one-to-a-market rule were intended to reduce

again stating that the scarcity of frequencies was no longer a concern.¹⁹¹

To support this contention, the Commission pointed to the expansion of the communications marketplace that has occurred since the original rules were promulgated.¹⁹² At that time, there were far fewer radio and television stations than there are now, and cable television service and home video cassette recorders (VCRs) either did not exist or had not yet become an important part of the communications marketplace.¹⁹³ Now, with more than 9200 commercial radio stations, nearly 1100 commercial television stations, and with cable television service and VCRs in more than half of the television households in the United States,¹⁹⁴ the Commission has concluded that broadcast channels are no longer scarce,¹⁹⁵ and that restrictive government regulations are no longer justified.¹⁹⁶

In this regard, the Commission has pulled a linguistic fast one. There are two different definitions of "scarcity": first, it may mean an inadequate supply; and second, it may mean a small number.¹⁹⁷ Historically, the scarcity rationale justifying broadcast regulation focused on the first definition: because the electromagnetic spectrum was publicly owned,¹⁹⁸ because the number of channels available for broadcasting was limited, and because there were more people who wished to broadcast than there were available channels,¹⁹⁹ the government had to determine which applicants were granted licenses to broadcast and

the possibility that a single owner would become overly dominant in a local market through the ownership of two or more nearby stations in the same service or the ownership of both radio and television stations in the same market, respectively. *See supra* notes 81-84 and accompanying text.

191. Duopoly Decision, 4 F.C.C. Rec. 1723, 1726-27 (1989); One-to-a-Market Decision, 4 F.C.C. Rec. at 1741, 1742-43 (1989).

192. Duopoly Decision, 4 F.C.C. Rec. at 1726; One-to-a-Market Decision, 4 F.C.C. Rec. at 1743.

193. Duopoly Decision, 4 F.C.C. Rec. at 1726; One-to-a-Market Decision, 4 F.C.C. Rec. at 1743.

194. Duopoly Decision, 4 F.C.C. Rec. at 1726.

195. *Id.*

196. *Id.*

197. *See* FIRESTONE & JACKLIN, *Deregulation and the Pursuit of Fairness*, in TELECOMMUNICATIONS POLICY AND THE CITIZEN 111-12 (T. Haight ed. 1979).

198. *See supra* note 47 and accompanying text.

199. *See supra* notes 48, 76, and accompanying text.

which were not. In making this determination, the Commission had to decide which applicants would best serve the public interest, convenience, or necessity.²⁰⁰

However, the Commission, in relaxing and eliminating the multiple ownership and local concentration rules, has ignored the fact that there is simply an insufficient number of frequencies to go around (the first definition of scarcity), and has focused instead on the overall size of the communication marketplace (what it considers to be a lack of scarcity, under the second definition).²⁰¹ This approach completely misses the point.

The goal of the multiple ownership and local concentration rules was to avoid the tendency toward monopolistic control of the broadcast mass media; this was to be effectuated by maximizing the number of gatekeepers.²⁰² By allowing "market forces" to regulate in these areas, the Commission has paved the way for just such monopolistic control. If the multiple ownership limitation is eliminated, a group owner will be able to own a very large number of radio and television stations. The relaxation of the radio duopoly rule will make it possible for a group owner to own two or more stations in the same service that can be heard in the same area.²⁰³ The relaxation of the one-to-a-market rule will allow increased cross-ownership of radio and television stations in the same market. Under deregulation, a single group owner could theoretically own stations that blanket the entire country. Moreover, there could be significant geographical areas in which two or more of this owner's radio stations could be heard simultaneously; and finally, this owner could own television stations in many of the same markets in which it also owned radio stations.

This scenario, admittedly extreme, will be possible if the Commission lifts the "rule of twelves"²⁰⁴ in 1990, as is expected.²⁰⁵ This is especially true now that the local concentra-

200. See *supra* note 63 and accompanying text. See also FIRESTONE & JACKLIN, *supra* note 197, at 107.

201. See FIRESTONE & JACKLIN, *supra* note 197, at 111-12.

202. See *supra* note 147 and accompanying text.

203. See *supra* notes 136-39 and accompanying text.

204. See *supra* notes 132, 133, and accompanying text.

205. See *supra* note 135.

tion rules have been relaxed.²⁰⁶

These rules, which were intended to ensure maximum diversification of viewpoints and programming through maximum diversification of ownership,²⁰⁷ have been swept aside because the Commission incorrectly considers the scarcity rationale to be obsolete in light of the increased size of the communication marketplace. Ironically, the Commission states that it still considers diversity of viewpoints and programming to be important,²⁰⁸ but it says that there is not necessarily a connection between these and diversity of ownership.²⁰⁹

The Commission is allowing the number of gatekeepers to shrink, and is thus opening the door for precisely the kind of concentrated control that Congress, the courts, and at one time the Commission itself feared would develop in the absence of limiting regulations. Even before deregulation, the number of gatekeepers was not as large as it might have been. The prevalence of the television networks had decreased the number of gatekeepers long before deregulation. The ABC television net-

206. See *supra* notes 136-42 and accompanying text. While the scenario may be extreme, it is not unrealistic. In cable television, an industry in which ownership is essentially unregulated, Tele-Communications, Inc. (TCI), a cable multiple system owner, owns 692 cable systems serving over 9.5 million subscribers. BROADCASTING CABLE YEARBOOK 1989 D-308, D-309 (Broadcasting Publications 1989). TCI also has interests in numerous other systems serving over 3.1 million additional subscribers. *Id.* at D-300 to 311. There are a total of approximately 47 million cable subscribers in the United States. *Id.* at D-3. This means that a single company owns or has interests in cable systems that serve more than 25 percent of all the cable subscribers in the country. As if this were not sufficiently concentrated, TCI recently bought a 50 percent interest in Showtime Networks Inc., which owns the cable premium services Showtime and The Movie Channel. *TCI Makes Its Equity Play for Showtime*, BROADCASTING, Oct. 23, 1989, at 40, col. 1. Sen. Albert Gore (D-Tenn.) called this acquisition "an alarming development in the continuing saga of TCI's drive to dominate the industry." *Id.*

207. See *supra* notes 79-83 and accompanying text.

208. The Commission focused on viewpoint diversity in the Multiple Ownership Decision, 100 F.C.C.2d 17, 24-31 (1984). See also the Duopoly Decision, 4 F.C.C. Rec. 1723, (1989) ("[T]he ultimate objectives of the duopoly rule, like our other multiple ownership rules, have been to promote economic competition and diversity of programming and viewpoints in order to further the public interest. . . ."); the One-to-a-Market Decision, 4 F.C.C. Rec. 1741, 1742 (1989) ("[T]he ultimate objective of the radio-television cross-ownership rule is to enhance consumer welfare through the promotion of economic competition and diversity of programming and viewpoints.") (emphasis in original); *id.* at 1743 ("It is important to realize that we are retaining our traditional concern for encouraging diversity of programming and viewpoints").

209. Multiple Ownership Decision, 100 F.C.C.2d at 31-34 (1984); Duopoly Decision, 4 F.C.C. Rec. at 1727; One-to-a-Market Decision, 4 F.C.C. Rec. at 1744.

work, for example, has 223 affiliates.²¹⁰ During prime time, when by definition the largest number of people are watching television, ABC thus provides programming to more than twenty percent of the commercial television stations in the United States.²¹¹ CBS and NBC command similar percentages;²¹² thus, fifty-seven percent of the commercial television stations in the country are "controlled" by three gatekeepers during the time that the largest number of people are watching.

The emergence during the 1980s of twenty-four hour satellite radio networks has drastically reduced the number of gatekeepers in that medium as well. One of the largest such networks, Satellite Music Network (SMN), has more than 1000 radio affiliates.²¹³ While these stations are not owned by SMN, they are controlled by it just as television network affiliates are controlled by their networks.²¹⁴ Thus, there are more than 1000 fewer gatekeepers among the 9200 commercial radio stations in the United States than there would be without SMN.

Exacerbating the situation is the fact that SMN was purchased by ABC in 1989.²¹⁵ This means that ABC, a single gatekeeper, now controls twenty percent of the commercial television stations during prime time and about eleven percent of the commercial radio stations for substantial portions of each day. These figures do not include the 2310 radio stations affiliated with ABC's seven other radio networks.²¹⁶ If this is not an example of unduly concentrated control, it is difficult to imagine what would be.

The new prevalence of the twenty-four hour satellite networks has been made possible largely by the Commission's elim-

210. BROADCASTING CABLE YEARBOOK 1989 F-44 (Broadcasting Publications 1989).

211. Strictly speaking, network affiliation does not strip a station's owner of control over its own station: the station owner may reject network programming. However, network affiliation brings large revenues to many stations, and most elect to carry substantially all of the networks' prime time programming. Thus, the networks have *de facto* control over the stations during prime time.

212. The CBS television network has more than 200 affiliates. BROADCASTING CABLE YEARBOOK 1989 F-50 (Broadcasting Publications 1989). NBC has 203 affiliates. *Id.* at F-55.

213. Radio World, Sept. 6, 1989, at 2, col. 3.

214. See *supra* notes 152-53 and accompanying text.

215. Radio World, Sept. 6, 1989, at 2, col. 3.

216. See *supra* note 153.

ination of the nonentertainment guidelines²¹⁷ and the fairness doctrine.²¹⁸ The drastic reduction in the number of gatekeepers occasioned by the popularity of these networks among stations should cause the Commission to take every possible step to maximize diversity of ownership. Instead, it has done just the opposite.²¹⁹

The situation is no better in the expanded communication marketplace to which the Commission referred when it relaxed the multiple ownership and local concentration regulations. While it is certainly true that cable television service brings an increased number of channels into each subscriber's home, the number of gatekeepers is limited.²²⁰ The Commission's references to VCRs are similarly misplaced. While it may be true that most homes now have at least one VCR, it is inappropriate to rely on the VCR's popularity in eliminating or relaxing regulations intended to ensure the vigor of the marketplace of ideas.²²¹

217. Deregulation of Radio, 84 F.C.C.2d 968 (1981). See *supra* notes 99-102 and accompanying text.

218. Syracuse Peace Council, 2 F.C.C. Rec. 5043 (1987). See *supra* note 117 and accompanying text.

219. The Commission relaxed the multiple ownership rule, 100 F.C.C.2d 17 (1984), and proposed eliminating any restriction on the number of stations an individual entity may own. *Id.* at 18. This reduces the number of gatekeepers nationwide. The Commission also relaxed the radio duopoly rule, 4 F.C.C. Rec. 1723 (1989), and the one-to-a-market rule, 4 F.C.C. Rec. 1741 (1989), thus allowing the number of gatekeepers in local markets to shrink.

220. For example, Cable News Network, CNN Headline News, Turner Network Television (TNT), and Superstation WTBS are all owned by Ted Turner's Turner Broadcasting System, a single gatekeeper. BROADCASTING CABLE YEARBOOK 1989 D-318 (Broadcasting Publications 1989). Home Box Office owns Cinemax. *Id.*: Nickelodeon/Nick at Nite, Music Television (MTV), and Video Hits One (VH-1) are under common ownership, as are The Movie Channel and Showtime. *Id.* Recall that TCI also owns 50 percent of Showtime. See *supra* note 206.

Twenty years ago, former FCC Commissioner Nicholas Johnson noted that cable television "offers some reason to hope for an end to the tyranny of banal mass-audience programming we have all come to know, if not love." N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 152 (1970). In 1989, the television critic Tom Shales noted: "When cable TV started, we were promised cultural enrichment, a cornucopia of diversity and programming aimed at minority interests. What we got was music videos, program-length commercials, and home shopping networks." The Herald Statesman (Yonkers, N.Y.), Nov. 16, 1989, § B (Lifestyles), at 1, col. 1 (reprinted with permission from The Washington Post Writers Group, Nov. 16, 1989).

221. People who own VCRs usually use them for recording programs on broadcast television or cable and watching them at different times. National Association of Broad-

In spite of its obligations under the Communications Act of 1934,²²² the Commission has replaced the public interest standard, imposed on it by Congress, with its own private interest standard. The beneficiary of this standard is, of course, the broadcast industry. The Commission eliminated or relaxed restrictions on the industry in two major areas — news and public affairs programming and multiple ownership — relying on strikingly parallel reasoning: first, it eliminated one regulation, justifying this by stating that stations would still have to satisfy a second regulation; then it eliminated or substantially relaxed the second regulation. When the Commission eliminated the nonentertainment programming guidelines,²²³ it stated that broadcasters would still be required to broadcast these types of programming through adherence to the fairness doctrine.²²⁴ In 1987, the fairness doctrine was eliminated.²²⁵ In 1984, the Commission relaxed the national multiple ownership rule (the rule of sevens),²²⁶ stating that “the appropriate market for ideas is primarily local”²²⁷ Implicit in this statement is that continued restrictions on *local* multiple ownership would minimize the marginal decrease in diversity the Commission expected to occur when the rule of sevens was relaxed or eliminated. In 1989, the Commission substantially relaxed the local multiple ownership rules.²²⁸

Through this process of inverse bootstrapping, the Commis-

casters, *VCR Audience/Market Profiles & Advertisers' Intentions*, 6 Broadcast Marketing & Technology News 5, April/May 1989. This makes the VCR merely an extension of those media. VCRs are also commonly used for watching rented or borrowed movies. Caravatt, Videocassettes Explore the Demographics, *American Demographics* (Dec. 1985) (reprinted as Research Memo, Videocassettes and the New Specialty Tape Market, National Ass'n of Broadcasters (Dec. 1985)). The entertainment value of a VCR is clear, but VCRs do not play a significant role in the first amendment marketplace of ideas.

222. 47 U.S.C. §§ 151-805 (1982 & Supp. V 1987).

223. See *supra* notes 6 and 99 and accompanying text.

224. See *supra* note 102 and accompanying text.

225. See *supra* note 117 and accompanying text.

226. See *supra* notes 79, 80, and accompanying text. The rule of sevens was changed to the rule of twelves in 1984; in 1990, the Commission will likely remove any limitation on national multiple ownership. See *supra* notes 133-35 and accompanying text.

227. Multiple Ownership Decision, 100 F.C.C.2d 17, 54 (1984).

228. The duopoly and one-to-a-market rules, which restrict local multiple ownership, are collectively known as the local concentration rules. See *supra* note 84; notes 136-42 and accompanying text.

sion has made it abundantly clear that the broadcast industry, and not the public, is the beneficiary of deregulation.²²⁹ In each of the three multiple ownership proceedings, the Commission relied heavily on comments submitted by members or representatives of the industry.²³⁰ It referred repeatedly in all three proceedings to the cost savings that stations would realize if the rules were eliminated or relaxed,²³¹ and it stated that these cost savings *could possibly result* in increased news and public affairs programming.²³² The Commission thus employed a kind of balancing process, weighing the concededly speculative benefits to the public, brought on by the cost savings that stations would realize, against the loss to the public of the benefits of maximum diversification of ownership. The subordination of the public interest to the private interest of the industry is evident when one considers that the Commission has the power to regulate in these areas. It may require stations to air certain amounts of news and public affairs programming, as it did through its nonentertainment programming guidelines;²³³ it may require sta-

229. The significance of this has not been lost on the industry. See *supra* note 182 and accompanying text.

230. See, e.g., the Multiple Ownership Decision, 100 F.C.C.2d 17, 25 nn.22 & 24, 31 nn.47-61, 41 nn.63-72 & 81, 44 n.100, 52 n.124, 53 n.128, 54 n.130 (1984); the Duopoly Decision, 4 F.C.C. Rec. 1723, 1730 nn.15-23 & 25, 1732 nn.50-56 & 58 (1989); and the One-to-a-Market Decision, 7 F.C.C. Rec. 1741, 1755 nn.16-22 & 26, 1757 nn.42-44 & 49, 1758 n.58, 1759 n.73, 1760, nn.73-80 & 95 (1989).

231. Multiple Ownership Decision, 100 F.C.C.2d at 45-46; Duopoly Decision, 4 F.C.C. Rec. at 1725, 1727; One-to-a-Market Decision, 4 F.C.C. Rec. at 1746-47.

232. "[G]roup ownership can foster news gathering, editorializing and public affairs programming" Multiple Ownership Decision, 100 F.C.C.2d at 44-45 (emphasis added). "[T]he cost savings and aggregated resources of combined radio-radio operations may also contribute to programming benefits to the public, especially with regard to the type of programming that the multiple ownership rules were intended to encourage — news, public affairs, and non-entertainment programming." Duopoly Decision, 4 F.C.C. Rec. at 1727 (emphasis added). "[T]he cost savings and aggregated resources of combined radio-television operations may also contribute to programming benefits to the extent that there may be more news, public affairs and other non-entertainment programming." One-to-a-Market Decision, 4 F.C.C. Rec. at 1748 (emphasis added).

Ironically, the Commission noted in the multiple ownership decision that "[t]he Supreme Court has instructed that the public interest standard that governs the Commission's policies invites reference to First Amendment principles. A cherished First Amendment principle crowns speech that addresses political or public affairs with maximum constitutional protection because of its centrality to efficacious democratic government." Multiple Ownership Decision, 100 F.C.C.2d at 35 (citation omitted).

233. 47 C.F.R. § 0.281(a)(8) (1982).

tions to provide balanced coverage of issues of public importance, as it did under the fairness doctrine,²³⁴ and it may limit multiple ownership, both nationally and locally, to ensure that the public enjoys the benefit of maximum diversification, as it did through its multiple ownership,²³⁵ duopoly,²³⁶ and one-to-a-market²³⁷ rules. Each of these policies was considered essential to the public interest standard.²³⁸

However, rather than require stations to meet both requirements of the standard (that they program a prescribed amount of news and public affairs programming,²³⁹ and that ownership diversification be maximized²⁴⁰), which it concedes are important,²⁴¹ the Commission will now allow ownership diversification to be reduced, perhaps substantially, in the hope that stations *may* invest some of the money they save through combined operation in news and public affairs programming.²⁴²

The effects of this are clear. Before deregulation, stations "paid" for the use of the frequencies assigned to them by, among other things, airing news and public affairs programming responsive to community needs.²⁴³ These types of programming are not inexpensive to produce; but stations were required to air them as a benefit to the public corresponding to the public's inability to use the channel or allocate it to another user. All programming expenses, including those incurred in the production of this required programming, were paid for out of the stations' revenues.

Now, despite the often enormous profitability of broadcast properties,²⁴⁴ the Commission has decided that stations must be

234. See *supra* notes 94, 118, and accompanying text.

235. See *supra* note 79 and accompanying text.

236. See *supra* note 81 and accompanying text.

237. See *supra* note 83 and accompanying text.

238. See *supra* notes 78-98 and accompanying text.

239. See 47 C.F.R. § 0.281(a)(8) (1982).

240. See *supra* notes 86-94 and accompanying text.

241. See *supra* note 209 and accompanying text. See also *supra* notes 79-98 and accompanying text.

242. See *supra* note 232 and accompanying text.

243. See *supra* notes 155-57 and accompanying text.

244. The only commercial classical music FM station in Los Angeles was recently sold for \$55 million. Beacham, *Gold Fever Strikes LA's Radio Market*, *Radio World*, Sept. 27, 1989, at 1, 22. The new owner immediately changed the format to contemporary hits. *Id.* at 1. The media consultant Jeff Pollack noted that the Commission's lifting

“paid” to air news and public affairs programming, which is un-

of the anti-trafficking rules has placed radio in the hands of impatient investment bankers seeking short term solutions to generate cash necessary to pay off their huge debts. He stated that when buyers “spend \$55 million on a station, they don’t want to hear [long term plans] to develop an audience. . . . They want it now.” *Radio World*, Oct. 25, 1989, at 2, col. 4.

In a discouraging editorial, *Radio World* noted:

The loss of commercial classical radio in LA touches on issues which go beyond that of one format or one city’s listenership.

The decision by new owners of KFAC to compete with the plethora of rock music stations was clearly the result of the financial speculation running rampant in the radio industry.

Record-breaking station prices continue to carry a heavy debt service and force new owners to take drastic revenue-producing action.

In some stations this takes the form of cutbacks which take their toll on the technical plant. In other markets, the cost is one of format diversity, as is the case with KFAC, which was LA’s only commercial classical station.

While the demise of the three-year anti-trafficking rule is certainly a factor in the leveraged buyouts, it is by no means the only culprit.

Reducing a station’s value to that of an “investment” is a far cry from the public interest mandate of the Communications Act of 1934.

While it’s true that a prosperous station is in a better position to serve its community of license, it’s also true that when financial gain is the sole motivation for station acquisition the concerns of the public — as well as many in the broadcast industry — can get lost in the shuffle.

The newly seated FCC should take a second look at its deregulatory policies and weigh them carefully against public interest concerns.

And those involved in the buying and selling would do well to factor in the idea of service to their communities of license along with entrepreneurial concerns.

A broadcast license should be more than a license to make money.
Radio World, Sept. 27, 1989, at 5.

The Commission, in a moment of almost unparalleled arrogance, stated that the scarcity rationale, which has justified the regulation of broadcasting since 1927, no longer justifies limits on multiple ownership. Multiple Ownership Decision, 100 F.C.C.2d 17, 19 (1984). *Contra supra* note 48 and accompanying text. The Commission stated that “because broadcasting stations can be purchased, typically the only genuine barrier to entry into broadcasting is insufficient capital, as is the case regarding entry into the newspaper field.” 100 F.C.C.2d at 19-20 (footnote omitted). It went on to note that its elimination of the multiple ownership rule would not adversely affect minority ownership of broadcasting stations. *Id.* at 46-49.

The Commission has done practically all it can to allow station prices to skyrocket. It has eliminated the nonentertainment programming guidelines, 84 F.C.C.2d 968 (1981), and the fairness doctrine, 2 F.C.C. Rec. 5043 (1987), among others. Now stations are relatively unfettered in their pursuit of maximum ratings and maximum revenues. The Commission eliminated the anti-trafficking rule, 52 Rad. Reg. 2d (P & F) 1081 (1982), which was intended to exclude from station ownership those seeking quick profits.

There is often an enormous difference between the costs involved in starting a new station — analogous to the startup costs of any new business — and the costs involved in purchasing an existing station. By ignoring this difference, the Commission has made

likely to be as profitable as most entertainment programming. The payment is in the cost savings stations will enjoy because of the relaxation or elimination of the multiple ownership rules; and paying the bill is the public, who not only provides the real dollars keeping stations on the air,²⁴⁵ but who must now also pay the price in terms of the effects of reduced diversification of ownership.

VI. Conclusion

The Federal Communications Commission has a congressional mandate to regulate broadcasting under the public interest standard. During the first forty-five years of its existence, the Commission established a number of rules and procedures intended to ensure that each broadcast station serve the public interest, convenience, and necessity. However, during the 1980s, it has eliminated or relaxed many of those provisions, preferring to leave regulation in those areas to "market forces."

The "market" to which the Commission has repeatedly referred is not the marketplace of ideas, the first amendment concept so central to a functioning democracy. Rather, the Commission has based many of its deregulatory actions on the economic marketplace. The benefit to the broadcast industry is clear: stations are more profitable than ever; they are being bought and sold for skyrocketing prices; and they are unfettered by restrictive regulations.

However, the Commission's first responsibility is to the public interest, not to the private interest of the industry it is supposed to be regulating. It must reconsider the impact of deregulation on the public interest. It has the power to require stations to air programming that contributes to the marketplace of ideas. It also has the power to establish rules designed to maximize the diversification of station ownership. Under deregulation, the public is being cheated out of the beneficial use of its

clear the real purpose behind its deregulatory moves: to turn a broadcasting license, insofar as possible, into a license to make money with little or no corresponding public benefit.

245. The audience buys the products and services provided by the advertisers, presumably at least in part because of the broadcast commercials, and the advertisers pay the stations for the commercial airtime. *See supra* text accompanying note 177.

airwaves because of greedy, and increasingly unregulated, exploitation by private entities.

Deregulation has had a devastating effect on the public interest standard and on the public interest itself. If the Commission is unwilling to reregulate the broadcast industry, Congress must act to see that it does.

Marc Sophos†

† This Comment is dedicated to the memory of Eric William Didul (1968-1990). During his short life, Eric developed a real love for broadcasting, and a dedication to its betterment. Those of us who are fortunate enough to have known him are left to speculate on what he might have accomplished.

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