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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

1997

In the Matter of)	
Review of the Commission's)	MM Docket No. 91-221
Regulations Governing)	
Television Broadcasting)	
Television Satellite Stations)	MM Docket No. 87-7
Review of Policy and Rules)	
To: The Commission		

COMMENTS OF SPECTRUM DETROIT
(Text and Exhibits A-F)

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COMMENTS OF SPECTRUM DETROIT

1. These comments respond to the Commission's Second Further Notice of Proposed Rule Making released November 7, 1996.

I.
Identity of Spectrum Detroit

2. Spectrum Detroit, Inc. is a Michigan corporation owned by seven African-American individuals, virtually all of whom reside in Detroit, Michigan or the greater metropolitan area.

3. Bishop Brooks, a resident of the Detroit metro area for 45 years, is the founding (and current) Pastor of the New St. Paul Tabernacle, Church of God In Christ, of Detroit, and is the Prelate of the Michigan Diocese of the Church of God In Christ (comprising 85 churches located throughout the state). Bishop Brook's church produces an inspirational and informational nonentertainment television program, March of Faith, which, as of December 1994, had been telecast weekly by WGPR television, now WWJ-TV, since shortly after the station signed on the air in 1975.

4. Six other prominent and civicly-active citizens are involved in Spectrum Detroit. They are Sharon Madison, President

and CEO of Madison International of Michigan, one of the oldest and largest African-American design firms in the country; W. Lawrence Long, founder, President and CEO of the W. Lawrence Long Insurance Agency of Detroit; Samuel Logan, Jr., Vice President and General Manager of the Detroit-based Michigan Chronicle, the oldest and largest black newspaper in the state; Mel Farr, President and owner of Mel Farr Automotive Group based in the Detroit metro area and a former Detroit Lion; Dave Bing, President of Bing Steel, located in Detroit, and a former Detroit Piston; and Joel I. Ferguson, a resident of Lansing, Michigan, President and sole shareholder of Lansing 53, Inc., the licensee of Station WLAJ-TV, Channel 53, ABC affiliate in Lansing, and a past Chairman of the Board of Trustees of Michigan State University.

5. Spectrum Detroit is representative of locally-owned small businesses, whose principals consist of or include minorities and women, desiring to acquire ownership in radio and television broadcast stations. Spectrum Detroit is challenging the acquisition of WWJ-TV by CBS, Spectrum Detroit, Inc. v. FCC, No. 95-1443 (D.C.Cir. docketed August 28, 1995) and the mergers of CBS-Westinghouse and CBS-Westinghouse and Infinity, Spectrum Detroit, Inc. v. FCC, No. 97-1055 (D.C.Cir. docketed January 27, 1997).

II. Summary

6. The Commission should not abolish the one-to-the-market rule. This would be contrary to the will of Congress and would

aggravate concentrations of control of broadcast stations, lessening the already small competition and diversity provided by local owners, small business, minority owners and women owners. This same unlawful and unwise result would flow from continuation of the rule with the "five factors" waiver which renders the rule a nullity. The rule should be retained with that waiver deleted. Alternatively and preferably, the "five factors" waiver provision should be replaced by a waiver provision for local owners, small business, minority owners and women owners.

7. If the Commission abolishes the rule or retains the "five factors" waiver which renders the rule a nullity, in light of massive preliminary waivers that have been granted conditioned on the outcome of this proceeding, such a rule determination is fairly subject to the charge that it was made prior to the receipt and consideration of comments and reply comments in this proceeding, contrary to law.

III.

The one-to-the-market ownership rule (Notice at ¶¶59-79)

8. The rule forbids common ownership of a radio station and a television station in the same market. 47 C.F.R. §(c). There are three categories of possible exceptions to the rule. 47 C.F.R. Note 7. One is a rule waiver, on which the Commission looks with favor, based on an objective criterion relating to the size of the market and the number of independent voices in the market. Id., Note 7(1). Another is a rule waiver, on which the Commission also looks with favor, based on so-called "failing

stations" under case law interpretations. Id., Note 7(2). Spectrum Detroit does not quarrel with either of these waiver provisions.

9. The third category of exception to the ban on radio and television cross ownership in the same market is what has become known as the "five factors" waiver test. The text of the rule on that score states:

Other waiver requests will be evaluated on a more rigorous case-by-case basis, as set forth in the Second Report and Order in MM Docket No. 87-7, FCC 88-407, released February 23, 1989, and Memorandum Opinion and Order in MM Docket 87-7, FCC 89-256, released August 4, 1989.

Id., Note 7 following (2). These comments are addressed to this ground for waiver of the rule which, in effect, renders the rule a nullity.

A.

Abolition of the one-to-the-market rule
is contrary to the will of Congress

10. From 1934 until 1996, federal communications policy regarding the multiple ownership of radio and television broadcast stations¹ was based on FCC regulations, commencing with Rules Governing Standard and High Frequency Broadcast Stations, 5 F.R. 2382 (1940). In the past several years, the Congress has conducted a top-to-bottom review of the Communications Act, resulting in the Telecommunications Act of 1996, which enacted a comprehensive overhaul of the law unparalleled in the previous 62 years of regulation under the

¹ Radio and television stations referred to in these comments are commercial stations.

Communications Act of 1934. In that process, the Congress, for the first time, adopted statutory provisions governing multiple ownership of radio and television broadcast stations.

11. Radio stations - national limit. Under FCC regulations, the national limit on the number of radio stations has been increased from an initial limit of six counting both AM and FM in 1940, to seven stations in each class in 1953, to 12 stations in each class in 1984 and to 18/20 stations in each class in 1992.² The Telecommunications Act of 1996 mandated a dramatic change, directing the FCC to amend its rules to eliminate all restrictions on the number of radio stations which may be commonly owned throughout the nation. Section 203(a).

12. Radio stations - market limit. The Commission has had rules restricting the number of AM and FM stations that can be under common ownership in the same market. Throughout much of the life of the Commission, only one AM station and one FM station could be commonly owned in the same market. In 1992, the FCC rule was changed to allow two AM and two FM stations in the larger markets (subject to a cap of 25% of the total audience) and a maximum of three AM-FM stations in smaller markets. Radio Multiple Ownership Rules (Reconsideration), 71 RR2d 227 (1992). The Telecommunications Act of 1996 changed these provisions in a dramatic way as well. In the largest markets, eight stations may

² Rules Governing Standard and High Frequency Broadcast Stations 5 F.R. 2382 (1940); Amendment of Sections 3.35 etc., 18 FCC 288 (1953); Multiple Ownership (Seven Stations Rule), 56 RR2d 859 (1984); Radio Multiple Ownership Rules (Reconsideration), 71 RR2d 227 (1992).

now be commonly owned (no more than five FM stations). The limit reduces with the market size to seven stations, six stations and then a maximum of five stations in the smallest markets. There is no limit on audience share of a given owner in any given market. Section 202(b).

13. Television stations - national limit. The pattern is much the same for television. In early years, the national limit for a given owner was five stations, Amendment of Sections 3.35, etc., 18 FCC 288 (1953), then seven of which two must be UHF, then 12 plus two more if minority controlled, subject to a governor of 25% of the national audience, Multiple Ownership (12-12-12 Reconsideration), 57 RR2d 966 (1985). The Telecommunications Act eliminated any numerical total limit on television stations owned nationally and increased the governor to 35% of the national audience. Section 202(c)(1).

14. Television stations - local market limit. The FCC has not permitted ownership of more than one television station in the same market. The Telecommunications Act of 1966 directs the FCC to conduct a rulemaking proceeding to review whether to change this restriction. Section 202(c)(2).

15. One-to-the-market limit on cross ownership of radio and television stations in the same market. As television stations became established throughout the nation, in 1970 the Commission adopted a one-to-the-market rule, expressed in terms of no more than one full time broadcast station (radio or television) in the market. Previous combinations were grandfathered subject to

divestiture upon future sales of the stations. Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 FCC2d 662, 18 RR2d 1735 (1970), on reconsideration, 28 FCC2d 662, 21 RR2d 1551 (1971). During this era, special considerations were given to UHF television stations because of their financial difficulties, the idea being that profitable radio stations could support the advent of UHF television service. Most waivers of the rule were granted on that basis. However, some waivers were granted in other circumstances and the agency decisions did not provide an adequate line of reasoning, causing the Court of Appeals to remand a waiver case directing the Commission to adopt clearer standards. Astroline Communications Co. v. FCC, 857 F.2d 1556 [65 RR2d 538, 544-45] (D.C.Cir. 1988).

16. In response to that remand, the Commission adopted the one-to-the market rule, 47 C.F.R. §73.3335(c), and waiver standards, 47 C.F.R. §73.3555, Note 7, essentially as currently in place, i.e., waivers (looked on with favor) in the top 25 markets having more than 30 independent broadcast outlets and in the case of financially failing stations, together with the so-called "more rigorous" five factors waiver standard. Second Report and Order, supra, 4 FCC Rcd 1741, 1753-54, affirmed on reconsideration, Memorandum Opinion and Order, 4 FCC Rcd 6489, 6493 (1989).

17. In enacting the Telecommunications Act of 1996, Congress was aware of the one-to-the-market rule against common

market. While the Telecommunications Act of 1996 mandated dramatic changes in the law relative multiple ownership of radio stations per se and relative to multiple ownership of television stations per se, the statute contains a single, limited provision relative to joint ownership of the two classes of stations together in the same market:

RELAXATION OF ONE-TO-A-MARKET.--With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

Section 202(d).

18. To abolish the one-to-a-market rule altogether, and permit unfettered common ownership of radio and television stations in the same market, subject only to the separate rules regarding market ownership of radio stations per se and television stations per se, would be contrary to the statutory scheme and structure regarding multiple ownership of radio and television broadcast stations so thoroughly considered and expressed by Congress in the Telecommunications Act of 1996.

B.

The "five factors" waiver is inherently arbitrary and capricious and should be abolished or totally recast

19. These factors, Second Report and Order, supra, 4 FCC Rcd at 1753-54, and Memorandum Opinion and Order, supra, 4 FCC Rcd 6489, are:

(a) Public service benefits of a waiver such as the economies of scale, cost savings, and programming and service

benefits.

(b) The types of facilities involved, such as whether the proposed radio-TV combination involves a VHF or UHF television station, coupled with an AM or an FM station, as well as the size or class of the stations involved.

(c) Waiver requests of parties that already own a number of stations in the market will face a higher hurdle than parties with fewer outlets.

(d) In reviewing the financial difficulties of a station as a ground for waiver, the Commission will consider whether the station has "long been offered for sale, to no avail."

(e) A review of the nature of the relevant market in light of the Commission's traditional diversity and competition concerns.

20. If the waiver cases prior to the adoption of these five factors were arbitrary and capricious under the D. C. Circuit Court's ruling in the Astroline case, the five factors are worse. This structure of incredibly subjective categories reminds one of the "Spruce Goose," an experimental airplane built by Howard Hughes, who started working on it during World War II and continued working on the project for some 20 years using his own money after government funding ran out. Because of the wartime shortage of metal, the plane was made out of plywood, hence the name. Intended to transport large quantities of war materiel or as many as 800 fully-equipped troops at one time, the plane was

enormous. Each wing was one hundred yards long. Counting the body of the plane, which itself was eight stories tall, the total wingspan was more than the length of two football fields. The plane had eight huge propeller-driven engines, all in a row. The "Spruce Goose" was, it must be said, a helluva structure. The problem is, it could never get off the ground.³

21. The five factors waiver standard could never get off the ground either. The flaws inherent in five wildly subjective factors were vastly worsened when the Commission, in its 1989 decision on reconsideration, stated that in considering such waivers it would not necessarily look at all five factors in any given case. 4 FCC Rcd. at 6491. Thus, the parties (and the Commission) could selectively consider, from waiver case to waiver case, some of the subjective factors but not others.

22. Nonetheless, the Commission intended that a waiver of the rule based on these factors be sparingly applied. In the 1989 decision on reconsideration, the Commission stated " . . . we emphasize that we do not foresee approving any combination involving a television station and more than one radio station in the same service unless it clearly can be demonstrated to provide unique public interest benefits." 4 FCC Rcd. at 6493 [emphasis supplied].

³ More accurately, off the water. The "Spruce Goose" was to be a seaplane. Still more accurately, the "Spruce Goose" did actually fly on one occasion, piloted by Mr. Hughes himself, shortly before he went into seclusion, reaching an altitude of 70 feet for a one mile trip in Long Beach Harbor. Drosin, Michael, Citizen Hughes, Holt Rinehart and Winston (1985) at 48.

23. This would have been in sync with the landmark court decision relative to the obligation of an administrative agency to administer its regulations and consider waivers sparingly. WAIT Radio v. FCC, 418 F.2d 1153 [16 RR2d 2107] (D.C. Cir. 1969), Circuit Judge Danaher, dissenting. That case involved a request for waiver of the clear channel regulations to permit a directional antenna that would protect the dominant stations on the channel while achieving white and gray area coverage. The Commission denied the request in an order that, in effect, required a successful attack on the basic rule itself in order to support a waiver. In reversing the Commission on the premise that it was obliged to consider facts and circumstances that might support a waiver, the Court described the function of waivers of agency regulations as a required "safety valve" to deal with the occasional situation where the facts and circumstances do not fit within the letter and intent of the regulation.

24. In addition to calling for "unique" circumstances to support a waiver in the report and order adopting the rule, the text of the rule itself described the waiver standard as a "rigorous" one. 47 C.F.R. §73.3555, Note 7, text following Note 7(2). The Commission has never quit calling the standard "rigorous." It used this phrase in granting massive waivers in the CBS-Westinghouse and CBS-Westinghouse-Infinity mergers, discussed in the following section. Stockholders of Infinity Broadcasting Corporation, slip opinion, FCC 96-495, released

December 26, 1996, at ¶16.

25. Some rigorous standard. We have studied the reported decisions to determine those in which a waiver has been granted or denied (under the five hopelessly subjective factors, which may or may not be applied in any given case). This study shows that the following reported waivers of the rule were granted in small, medium and large markets during the period commencing in July 1989 through July 1996:

(a) Duane J. Polich, also cited as P-N-P Broadcasting, Inc., 4 FCC Rcd. 5596 (July 1989), Commission, Member Dennis concurring, Pullman, Washington market.

(b) Great American Television and Radio Co., Inc., 4 FCC Rcd. 6347 (August 1989), Commission, Member Dennis dissenting, Kansas City market.

(c) Holston Valley Broadcasting Corp., also cited as Dennis J. Kelly, 5 FCC Rcd. 507 (January 1990), Commission, Bristol-Kingsport-Johnson City, Tennessee market.

(d) Tulsa 23, 5 FCC Rcd. 727 (February 1990), Commission, Tulsa, Oklahoma market.

(e) Perry Television, 5 FCC Rcd. 1667 (March 1990), Review Board, Perry, Georgia market.

(f) Kyles Broadcasting, Ltd., 5 FCC Rcd. 5846 (October 1990), Commission, Memphis, Tennessee market.

(g) South Central Communications Corporation, 5 FCC Rcd. 6697 (November 1990), Commission, Knoxville, Tennessee market.

(h) Guy Gannett Publishing Co., 7 FCC Rcd. 1787 (February

1992), Commission, Miami, Florida market.

(i) United Radio Group, Inc., 7 FCC Rcd. 2207 (March 1992), Commission, Member Barrett dissenting, Rapid City, South Dakota market.

(j) Ramar Communications, Inc., 7 FCC Rcd. 3310 (May 1992), Commission, Albuquerque, New Mexico market.

(k) Liggett Broadcast, Inc., 7 FCC Rcd. 7124 (November 1992), Commission, Hanford, California market.

(l) Moosey Communications, Inc., 8 FCC Rcd. 5247 (August 1993), Commission, Bakersfield, California market.

(m) Hispanic Radio Broadcasters, 8 FCC Rcd. 6406 (September 1993), Commission, San Antonio, Texas market.

(n) BREM Broadcasting, 9 FCC Rcd. 1333 (March 1994), Commission, Member Barrett concurring, Pensacola, Florida market.

(o) KVI, Inc., 9 FCC Rcd. 1330 (March 1994), Commission, Seattle, Washington market.

(p) Salt of the Earth Broadcasting, Ltd., 9 FCC Rcd. 3621 (August 1994), Commission, Member Barrett concurring, Syracuse, New York market.

(q) First Broadcasting Company, 10 FCC Rcd. 2904 (February 1995), Commission, San Francisco, California market.

(r) Golden West Broadcasters, 10 FCC Rcd. 2081 (February 1995), Commission, Los Angeles, California market.

(s) Burt H. Oliphant, 10 FCC Rcd. 2708 (March 1995), Commission, Member Barrett concurring, Glendive, Montana market.

(t) Secret Communications Limited Partnership, 10 FCC Rcd.

6874 (April 1995), Commission, Cincinnati, Ohio market.

(u) 1310, Inc., 10 FCC Rcd. 7228 (June 1995), Commission, San Francisco, California market.

(v) Alta Gulf FM, Inc., 10 FCC Rcd. 7750 (July 1995), Commission, St. Petersburg, Florida market.

(w) Media/Communications Partners Limited Partnership, 10 FCC Rcd. 8116 (July 1995), Commission, Member Barrett concurring, Toledo, Ohio and Flint, Michigan markets.

(x) Big Ben Communications, Inc., 10 FCC Rcd. 8129 (July 1995), Commission, Memphis, Tennessee market.

(y) WGPR, Inc., 10 FCC Rcd. 8140 (July 1995), Commission, Detroit, Michigan market.

(z) Atlantic Morris Broadcasting, Inc., 10 FCC Rcd. 9495 (August 1995), Commission, Philadelphia, Pennsylvania market.

(aa) River Cities Broadcasting Corp., 10 FCC Rcd. 10620 (September 1995), Commission, St. Louis, Missouri market.

(bb) Tribune Sacramento Radio, Inc., also cited as Henry Broadcasting Co., 11 FCC Rcd. 1175 (1995), Commission, Member Barrett issuing a statement, Denver, Colorado market.

(cc) Newmountain Broadcasting II Corp., 11 FCC Rcd. 2344 (1996), Mass Media Bureau, Phoenix, Arizona market.

(dd) Capital Cities/ABC, Inc., 11 FCC Rcd. 5841 (1996), Commission, Chairman Hundt issuing a statement, Member Quello approving in part, dissenting in part, Member Chong approving in part, dissenting in part, Members Barrett and Ness issuing statements, Los Angeles and San Francisco markets, adopting

waivers previously granted in the First Broadcasting and Golden West decisions, ¶¶ (q) and (r), above.

(ee) Louis C. DeArias, Receiver, 11 FCC Rcd. 3662 (1996), Commission, Member Barrett concurring, Spokane, Washington market.

(ff) US Radio Stations, L.P., 11 FCC Rcd. 5772 (1996), Mass Media Bureau, Memphis and Little Rock markets.

(gg) Kelso Partners IV, L.P., DA 96-1193, released July 26, 1996, Mass Media Bureau, Memphis market.

26. During the same period of time from July 1989 through July 1996, while the foregoing avalanche of waivers came pouring through the floodgates that are supposed to be a "safety valve" for those occasional or "unique" situations for which the rule is not intended, guess how many reported cases we found in which waiver requests were denied in the administration of the rule against owning a television station and radio station in the same market?

27. Two. At that time, before the advent of massive cross ownerships approved in the CBS-Westinghouse and CBS-Westinghouse-Infinity mergers, they were humongous deviations from the rule. One was Kargo Broadcasting, Inc., 5 FCC Rcd. 3442 (June 1990), Commission, in which the Mormon Church was denied a waiver to acquire a third FM station in the Salt Lake City market where it already had two television stations, two FM stations and a local daily newspaper, The Deseret News. The other was New City Communications of Massachusetts, Inc., 10 FCC Rcd. 4985 (May

1995), Commission, Member Quello concurring, in which the Cox communications conglomerate was denied a waiver to acquire a second FM station in the Atlanta, Georgia market where it already had a television station, a clear channel AM station, an FM station and the two dominant newspapers, the Atlanta Constitution and the Atlanta Journal.⁴

28. In a decision involving a different multiple ownership rule waiver, now departed Commissioner Barrett referred to his "...longstanding belief that the Commission's continuous grant of waivers of its rules does little more than to eviscerate their effectiveness...", Broad Street Television, L.P., FCC 96-106 [2 Comm. Reg. (P & F) 1079], released March 12, 1996, dissenting statement. That is precisely what has occurred here. The rule against television station and radio station ownership in the same market was waived in 33 reported cases involving all-sized markets over a seven year period. The rule against television station and radio station ownership in the same market was applied during that seven year period in only two reported waiver cases. In the reasoned and lawful administration of a government agency regulation, all of this simply cannot be.

C.

Case history of application of the
five factors standard

29. The texts written by the agency in explaining the 33

⁴ This case was affirmed on appeal in a decision which expressed doubts about the Commission's waiver analysis in this case and the efficacy of the rule itself. WSB, Inc. v. FCC, 85 F.3d 695, [3 Comm. Reg. (P & F) 427] (D.C. Cir. 1996).

reported cases listed in ¶25 granting waivers are an aggregation of subjective statements and evaluations which constitute a legal no-man's land without rational lines of distinction or intelligible precedential value. The massive waiver under the five factors in the CBS-Westinghouse and CBS-Westinghouse-Infinity mergers is a case in point.

30. In the CBS-Westinghouse merger, permanent waivers under the existing rules were granted: In the Detroit market, Westinghouse-CBS co-own a television station with two FM stations, as well as an AM station. In New York City, they co-own a television station with two FM and two AM stations. In Los Angeles, they co-own a television station with two FM and two AM stations. In Chicago, they co-own a television station with two FM stations and three AM stations. In Philadelphia, they co-own a television station with two FM stations and two AM stations. In San Francisco, they co-own a television station with two FM stations and two AM stations. Stockholders of Infinity Broadcasting Corporation, supra, at ¶¶13-48.

31. In the CBS-Westinghouse-Infinity merger, waivers were granted contingent upon the outcome of this rulemaking proceeding (about which we shall have more to say later): In Detroit, the television station is now coupled with four FM stations and two AM stations (an increase from two to four radio stations over the Westinghouse-CBS merger waiver). In New York City, the television station is now coupled with three FM and four AM stations (increase from four to seven stations). In Los Angeles,

the television station is now coupled with four FM and two AM stations (increase from four to six stations). In Chicago, the television station is now coupled with six FM and four AM stations (increase from five to eight stations). In Philadelphia, the television station is now coupled with three FM and three AM stations (an increase from four to six stations). In San Francisco, the television station is now coupled with five FM and three AM stations (an increase from four to eight stations). In Boston, a new waiver request, the television station is coupled with five FM stations and one AM station. In the Baltimore/Washington market, also a new waiver request, the television station is coupled with six FM and two AM stations. Stockholders of Infinity Broadcasting Corporation, supra, at ¶¶64-91.

32. In all, television stations located in eight of the top nine major television markets in the nation (ranked 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th based on 1994-1995 Nielsen Designated Market Area TV households) are co-owned with an aggregate of 53 radio stations. In each instance, the television and radio station co-ownership would violate the one-to-the-market rule but for waiver under the five factors standard, which permits Westinghouse-CBS and Westinghouse-CBS-Infinity to cite self-serving facts and precedent for any and all reasons they wished to argue, under any and all of the five factors they wished to argue about, omitting those they didn't wish to discuss, and which permits the Commission to accept the highly

selective factual presentations without legitimate thought to the underlying purpose of granting waivers sparingly under a rigorous standard to the point of requiring a showing of uniqueness in relation to the public interest.

33. One factor relies on economies of scale from a merger of a television station and a radio station. All mergers can be said to involve economies of scale. A merger of the ABC-CBS-NBC-Fox network television stations in a market no doubt would produce enormous economies of scale.

34. Another factor relies on the numbers of other radio and television stations, and other media of mass communication, in the market. All markets the size of New York City, Los Angeles, Chicago, Philadelphia, San Francisco, Boston, Baltimore/Washington and Detroit, have large numbers of other radio and television stations, and other media of mass communication.

35. Another factor involves the programming and service benefits leading to extensive presentations of the programming service that will be provided under the merged operation. All radio and television stations in markets the size of New York City, Los Angeles, Chicago, Philadelphia, San Francisco, Boston, Washington/Baltimore and Detroit can offer extensive presentations of the programming service that they provide. Surely, this agency cannot lawfully make judgments based on a subjective evaluation of programming service, but that is what is done in case after case under this factor.

36. One of the factors in support of a waiver request is that where a station has financial difficulties with a showing that the station has "long been offered for sale, to no avail." CBS-Westinghouse and CBS-Westinghouse-Infinity elected to ignore this factor. So did the Commission. All of the waiver requests for New York City, Los Angeles, Chicago, Philadelphia, San Francisco, Boston, Detroit and Washington/Baltimore involve major market stations which, it can be stated without fear of contradiction, enjoy healthy financial operations. Indeed, the television station in Detroit, for example, was the subject of a pending offer by principals of Spectrum Detroit to purchase the station along with an FM station for \$34 million, a sum larger than the \$24 million paid by CBS for the television station, now owned by CBS-Westinghouse-Infinity under rule waivers permitting them to own and operate no fewer than six radio stations in the same market, four of which are FM stations, adding to the enormous cash flow generated by these broadcast operations.

37. Parties who already own a number of stations in the same market are supposed to face a higher hurdle than parties with fewer outlets in the market. All of the waivers granted in the CBS-Westinghouse and CBS-Westinghouse-Infinity mergers involve parties that have more stations, or at least as many stations, as any other broadcaster in the market, and the aggregate combination of television and radio station cross ownership for which waivers have been requested is unprecedented in the history of the agency.

38. Under the five factors standard, the Commission has waived the one-to-the-market rule into oblivion. This is no less contrary to the will of Congress than if the Commission were to abolish the rule by administrative fiat in this proceeding. The five factors fiction should be abolished leaving administration of the rule based on two objective standards which have been rationally applied and concerning one of which the Telecommunications Act of 1996 has mandated a specific, objective change. Alternatively, the five factors should be jettisoned and replaced by objective factors rationally related to the public interest served by competition and diversity to which the instant rulemaking proceeding is addressed and to which we now turn our attention.

D.

To foster competition and diversity, the one-to-the-market rule should be waived for stations owned by local residents and small businesses including minorities and women

39. On the subject of competition and diversity, one must start by asking the burning question, how many broadcast outlets should CBS-Westinghouse-Infinity own in order to guarantee the widest possible dissemination of the HOWARD STERN SHOW to our nation's people?

40. In order to provide the Commission with some concrete idea of the change in broadcast ownership following enactment of the Telecommunications Act of 1996, we have attached the following news articles from the broadcast industry's authoritative publication, Broadcasting and Cable:

(a) Article in June 24, 1996 issue entitled "Mega-deal rocks radio" containing a map of the United States depicting 14 television stations and 83 radio stations with the caption "It's a Westinghouse/CBS/Infinity Nation," showing combined shares of radio revenues as 36% in New York, 26% in Los Angeles, 32% in Chicago, 44% in Philadelphia, 30% in Detroit, 39% in Boston, 21% in Washington/Baltimore, 19% in San Francisco (all markets in which a television station is also owned under the five factors waiver). Exhibit A.

(b) Article in July 8, 1996 issue listing the "Top 25 Television Groups". Exhibit B.

(c) Article in July 1, 1996 issue listing the "Top 25 Radio Groups". Exhibit C.

(d) A series of articles: February 19, 1996, entitled "Radio supergroups: The buying begins"; March 18, 1996, entitled "Sinclair tops TV limits; eyes 35%"; April 15, 1996, entitled "Sinclair's \$2.3B powerhouse, \$1.2 billion purchase of River City gives company 29 TV and 34 radio stations"; May 20, 1996, entitled "One week: \$1.9 billion"; June 10, 1996, entitled "Clear Channel tops 100, Heftel tender offer would boost portfolio to 112 stations"; July 8, 1996, entitled "Tribune's Renaissance, \$1.13 billion purchase of six more TV's brings broadcaster into one-third of U.S. homes"; July 22, 1996, entitled "Murdoch claims New World, News Corp.'s \$3 billion play creates largest station group, surpasses Westinghouse/CBS"; July 29, 1996, entitled "Capstar grows with Osborn radio group"; September 2, 1996,

entitled "Chancellor makes another big buy, Acquisitive group pays \$365 million for 12 stations in Washington, Phoenix, Minneapolis, Milwaukee"; September 30, 1996, entitled "Belo now 11th-largest TV group owner"; and January 27, 1997 listing "TV's Top 10" and "the biggest TV group deals of 1995 and 1996".

Exhibit D.

(e) "Cover Story: Station & Cable Trading," a special report covering transactions during the year 1996, February 3, 1997 issue. Exhibit E.

(f) Article in October 28, 1996 issue entitled "It's no Secret: Private companies fold in face of deregulation. Station group couldn't grow, so it had to go." Exhibit F.

(g) For the record, in a separate folder, the weekly "Changing Hands" features during the period January 1996 to February 1997. Exhibit G.

41. To the extent this gold rush of mergers and acquisitions fulfills the objectives of the Congress as reflected in the Telecommunications Act of 1996, no question is raised here. Congress decided that broadcast owners should be freed of many restraints on acquiring additional properties and, within the bounds of the statute, that is the federal law of the land. As this gold rush continues and plays itself out, there will be a new grid of 200+ radio station groups (maybe even higher), a dwindling number of television group owners with 30 or even more stations until the 35% cap nationwide is reached and radio marketplaces where a few broadcasters own from three to five FM