Niche Tipping Point in most markets is barely more than eight stations, it would be risky for the Commission to allow larger platform sizes in the expectation of thereby generating more niche service. Instead, Commission policy should favor a balanced collection of platforms and standalones, thereby ensuring that both hybrid service and unique niche formats are offered. Such an approach would advance "the wider use of radio in the public interest," 47 U.S.C. §303(j), and would also offer the greatest hope for the economic success of the radio industry since it draws as many audiences as possible into radio's tent.[76/]

2. Consolidation Cannot Trigger The Adoption Of New Formats By Small Operators

The Commission tentatively believes that "radio stations generally can and do change format in response to perceived profit opportunities....this ability to change format fairly rapidly and at relatively low cost may often defeat an attempt by a station group to dominate a format or target a demographic in a local market."[77/] The Commission also tentatively believes that "the

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75/ (continued from p. 40)

money not controlled by platforms to support the surviving standalone stations in any format" or to permit platform owners to "buy (and convert to mainstream hybrids) so many stations that too few standalones are left to serve the needs of substantial niche audiences." Platform Size and Programming Formats, supra, at 22.

76/ Format heterogeneity maximizes the revenue potential of the industry as a whole. Consumers with intense preferences for only one format may regard radio as having nothing to offer them. They will either underutilize radio (and its advertisers) or not use radio at all. Thus, when the radio stations in a market broadcast several substantial niches, revenue flow into the radio industry as a whole would be maximized.

77/ NPRM at 19882 n. 104.

existence of other stations which could change format may be a check on adverse effects of concentration."[78] Neither assertion is correct. Small operators can seldom afford the transaction costs of changing formats. Many standalone owners chose their formats long before anyone imagined that Congress would authorize eight station platforms. A standalone station owner unfortunate enough to have chosen a format that is vulnerable to adoption by a platform is often doomed if a platform duplicates its format.

A change in station format typically requires at least $10,000 in unrecoverable costs, and $25,000 would not be unusual. In MMTC's experience as a media broker, here are some of the minimum costs attendant to a format change:

Market research to select the right new format	5,000
Buying out contracts of employees unable to work in the new format	4,000
Penalty for early cancellation of syndicated programming contracts for old format	1,000
Hiring bonuses and relocation expenses for new employees familiar with the new format	5,000
Repainting station van	1,000
Designing and printing new letterhead, logos, giveaway items	1,500
Supplemental training for sales staff	2,500
Promotion	2,500
Retainer for new talent service servicing commercials suitable for the new format	1,000
Bar tab for nervous investors	100
Total	$23,600

78/ Id. at 19882-83 ¶47.

Even if a format change could be done for just $10,000, and even if the station owner guessed right the first time when it picked the new format, such an expense could mean the difference between profit and loss for the year. It is not uncommon for even a competitive standalone station in a medium market to generate less than $200,000 in gross revenues in a year.[79] That is barely enough to cover the owner's draw, the electric bill, syndication, a salesperson, a couple of parttime announcers, a traffic system, a contract engineer and rent. The idea that such a station can suddenly jump and write a check for $10,000 is absurd.

On the other hand, a platform owner can often change to a new format with ease, causing profound instability and revenue loss to a standalone station occupying that format. Here is a platform owner's budget for a format change:

79/ Data estimates from Duncan's Radio Market Guide (2001) include a number of examples involving relatively highly ranked facilities. In Macon (2000 ARB Rank 147), the highest billing radio entity is U.S. Broadcasting LP (eight station platform with revenue share 59.8 and $7,700,000 annual revenue), and the fifth largest is David A. Rodgers (AM standalone with revenue share of 1.0 and $130,000 annual revenue). In Erie (2000 ARB Rank 156), the highest billing entity is NextMedia (five station platform with revenue share 57.3 and $5,960,000 annual revenue) and the third largest is Pennsylvania State University (AM standalone with revenue share of 1.3 and $130,000 annual revenue). In Binghamton (2000 ARB Rank 166), the highest billing entity is Citadel (five station platform with revenue share 57.0 and 5,999,000 annual revenue) and the fourth largest is Equinox (FM standalone with revenue share of 1.4 and $150,000 annual revenue). In Montgomery (2000 ARB Rank 142), the highest billing entity is Cumulus (seven station platform with revenue share 50.9 and 8,150,000 annual revenue) and the seventh largest is J&W Promotions (AM standalone with revenue share of 0.8 and $120,000 annual revenue). In Beamount-Port Arthur (2000 ARB Rank 127), the highest billing entity is Clear Channel (four station platform with revenue share of 48.4 and $7,020,000 annual revenue) and the fourth, fifth and sixth largest each are AM standalones with revenue shares of 0.7, 0.7 and 0.6 and annual revenues of $100,000, $100,000 and $90,000 respectively.

Market research to select the right new format [that knowledge is generated at corporate by employees on payroll already]	0
Buying out contracts of employees unable to work in the new format [they can be moved across the hall to another station in the same platform]	0
Penalty for early cancellation of syndicated programming contracts for old format [there's a quantity discount for this programming, so there is no cancellation fee]	0
Hiring bonuses and relocation expenses for new employees familiar with the new format [they can be transferred from across the hall]	0
Repainting station van	1,000
Designing and printing new letterhead, logos, giveaway items	1,500
Supplemental training for sales staff [the staff already knows how to sell every mainstream format]	0
Promotion	2,500
Retainer for new talent service servicing commercials suitable for the new format [this work is done in-house]	0
Bar tab for nervous investors	0
Total	$5,000

Even when a standalone station can afford a change in format, it may be unable to make such a change for nonpecuniary reasons. Many standalone operators, particularly minorities, got into radio in order to "do good and do well." Their investors bought stock specifically because they knew the station would be serving the minority community.[80/] Abandoning that core audience could necessitate returning the investment of an outraged original stockholder. A publicly traded company seldom faces this issue.

Consequently, the marketplace for formats operates imperfectly. When a platform operator duplicates a successful format of a standalone, the less well financed standalone almost never wins the competition for advertising dollars. In some formats (such as urban and Spanish) advertisers often only buy one station "deep" in the list of stations in that format. Thus, the station ranking second or third among those in that format often must struggle just to make payroll. In our experience, this scenario too often forces the sale of the standalone station to nonminority owners. The result is less viewpoint diversity and no gain in format diversity.

All of this points again to the recommendation MMTC articulates throughout these Comments: the Commission should strive for a balance between platform owners and standalones, thereby allowing for economic efficiencies, variety and viewpoint diversity.

80/ A 1996 review by MMTC of the 222 radio stations owned by African Americans in February, 1995 showed that 158 of them, or 71%, programmed formats such as urban, Black talk, or Black gospel that were designed to serve African American populations. (Sources: National Association of Black Owned Broadcasters (February, 1995 roster) and Broadcasting & Cable Yearbook 1995 (February, 1995)). African American radio station owners' desire to serve their own communities is not a stereotype, it is a fact. See Metro Broadcasting, 497 U.S. at 579-84 (discussing the need to demonstrate that race sensitive policies are not based on stereotypical assumptions).

C. Because Consolidation Tends To Be Irreversible, The Regulatory Response To Consolidation Should Be Measured And Cautious

With one minor exception,[81] over the past two generations there has never been a Commission decision that imposed greater structural regulation on broadcasting. As a practical matter there are only two ways to re-regulate. One is grandfathering -- inherently an undemocratic and inegalitarian reward for having had an ancestor who took advantage of more relaxed rules.[82] The other is divestitures, which are sometimes arbitrary.

Consequently, the regulatory response to consolidation should be measured and cautious. It should strive for an industry with a good balance of platforms and small operators, coexisting in an environment in which both business models can operate successfully.

We comment below on some of the key issues attendant to local radio ownership consolidation.

81/ See Multiple Ownership of Standard, FM, and Television Broadcast Stations (Second Report and Order), 50 FCC2d 1046, 1084 (1975) ("Multiple Ownership Second Report") (requiring combinations of community's only TV with its only newspaper to be broken up through divestitures).

82/ "Grandfathering" got its name from the "grandfather clauses" used to suppress African American voter participation in the early 20th Century. See Chandler Davidson, Minority Vote Dilution 70 (1984) (explaining that grandfather clauses were one of a number of "disenfranchising measures" aimed at Black voters.) A close relative of grandfathering is "legacy admissions," under which places are reserved at universities for those sharing DNA with the beneficiaries of former, expressly racist admissions policies. Since minorities were virtually excluded from broadcasting for the the industry's first three generations, grandfathering would extend this injustice into succeeding generations. See discussion at pp. 71-104 infra.

1. **There Is No Substitute For Free, Local, Commercial Radio**

The NPRM asks whether other types of media outlets are adequate substitutes for radio.83/ MMTC adds its voice to those of many other commenters who respond with a resounding no. Owing to its immediacy, receiver portability, and universal free access to consumers, radio broadcasting is indispensable and irreplaceable as a means of serving local communities.

Different media serve different needs. Proponents of "convergence" equate all media, but people use different media in different ways. Free radio is unique in its role in the home, on the road and at the workplace, and it is unique in its power to interconnect all of society.

First, radio is the medium of multitasking -- the only medium which can be enjoyed while doing something else. Like a polite guest, it does not demand our undivided attention. Thus, it is the medium of first resort for factory workers, nurses, filing clerks, washer repairpeople, file clerks at FCC/Capitol Heights, deliverypeople, migrant laborers -- those who do the nation's hard work. And radio is irreplaceable as a means of reaching those in automobiles, and those engaged in recreation.

Second, radio's inexpensiveness and its occasional, albeit inadequate selection of specialized and niche programming make radio an essential connection to the world for racial and language minorities and for the poor. The cost of radio to the consumer --

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83/ Id. at 19875 ¶32.

the mere cost of a receiver -- is far less than the cost of any other medium.

Third, radio is the gateway to all other media. A substantial number of today's leading television and cable personalities, executives and producers began their careers in radio.

Fourth, radio's affordability and accessibility make it by far the most attractive gateway to minority ownership of the media of mass communications.

Compared to TV, cable, newspapers and the Internet, radio has unique attributes: it has the highest percentage of households using the medium (99%), and thus is the only medium that can be relied on to reach the entire nation. It has a very higyh percentage of adults reporting use of the medium (84%, second to television's 94%). It has the highest number of hours per adult per year: 1024, with television's 805 a distant second.84/ Satellite and Internet radio are unlikely to change these statistics in the near or even the middle term.85/

Any degradation of free radio, including the kind of structural deregulation that diminishes viewpoint diversity, would be unfair to those who place special reliance on the medium -- particularly working people, the poor and minorities. Thus, the

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84/ These statistics are derived from U.S. Census Bureau, Statistical Abstract of the United States: 2000 (U.S. Department of Commerce, 2000), Tables, 17, 722, 909, 910-911, 931, 932, and 937.

85/ As we have shown, neither Internet radio nor satellite radio has profoundly changed the dynamics of the free radio marketplace, any more than cable television in the 1950s profoundly changed the dynamics of the free television marketplace. See pp. 39-40 supra.

Commission should avoid radical, destructive deregulation of the radio industry's ownership structure.

2. **Bright Lines Rules Are The "Least Worst" Regulatory Paradigm For Radio**

The NPRM asks whether a bright line rule or case-by-case review is the preferable regulatory paradigm.86/ Both choices are flawed.

Case-by-case review is arbitrary. It promotes subjectivity, defies consistent application, and often leads to regulation by waiver, under which the ceiling usually swallows the floor.87/

Bright line rules are feeble. They often disable the agency from deterring abuses, or from distinguishing between "good" and "bad" consolidation.88/

If the Commission is forced to choose between arbitrary and feeble, feeble deserves to win every time. A bright line rule (assuming the line is really "bright" and not subject to waivers) has the advantage of being easy to understand and less likely to provoke litigation -- a plus for MMTC's constituency of small entrepreneurs. Securing access to capital is difficult enough for small entrepreneurs without piling on the additional costs imposed by delays attendant to case-by-case reviews of transfer and

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86/ Id. at 19886 ¶¶57-58.

87/ All 23 requests to waive the "Top 50 Policy" were granted, compelling the Commission to declare that the policy had been swallowed by its waivers. See Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations) (Report and Order), 75 FCC2d 585, 590 (1979) ("Top 50 Policy Repeal"), recon. denied, 82 FCC2d 329 (1980), aff'd. sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982).

88/ See discussion at pp. 24-28 supra.

assignment applications. Moreover, litigation over subjective standards is an expensive game for which small businesses, consumers and civil rights advocates have few resources and in which they have enjoyed little success. Consequently, bright line rules are usually friendlier to small business and the public, and are more compliant with the goals of Section 257 and the Regulatory Flexibility Act than are rules developed under a case-by-case paradigm.

The NPRM also asks whether a rebuttable presumption that the ownership caps are in the public interest (under the "bright line" paradigm) could lead to inconsistent results based on whether a petition to deny is filed.[89] The answer is no. The Commission is obliged to review all of the facts presented by an application even if a petition to deny is withdrawn or was never filed at all. If the mere possibility of complaints from the public raised a specter of inconsistent prosecution, then every regulation would be subject to inconsistent prosecution simply because the public does not always succeed in bringing the most egregious matters to the prosecutor's attention.

Finally, the Commission should resist the temptation to combine bright line and case-by-case review, spawning "fuzzy line review" or bright lines with enough wiggle room to accommodate that oxymoron, the "permanent waiver." Such a combination would express the undesirable traits of both parents -- arbitrariness from the case-by-case parent, feebleness from the bright line parent.

89/ Id. at 19873 ¶27.

3. The Commission Should Allow Large Companies To Absorb "Failed" Stations But Not "Failing" Stations

The NPRM asks whether platform owners should be able to absorb "failing stations" or "failed stations" as an exception to the eight station rule.90/ We would counsel against the absorption of failing stations, but would endorse the absorption of stations that have failed so badly that they are dark and cannot restored to the air the current licensee before the license expires.

In its 1999 local television ownership decision, the Commission authorized the formation of duopolies through absorption of a failing station.91/ MMTC regards that as a mistake, but even if it were reasonable for television, it is unreasonable for radio because it is so easily abused in a small balance-sheet business.

As Enron proves every day, creative accounting, done out of the sight of government or the public, can make almost any business appear to be successful. Yet it is even easier to make a business appear to be failing, because accountants' ethics are seldom on the line when they are asked to use the most conservative set of accounting assumptions. Any accountant can make almost any standalone radio station appear to be failing, since a radio station's P&L is usually so small that an adjustment in one or two discretionary items can make a profit look like a loss. For the uninitiated, here is how this is done:

90/ Id. at 19891-92 ¶75.

91/ Television Local Ownership Order, supra, 14 FCC Rcd at 12938 ¶79 (authorizing otherwise impermissible duopolies "where at least one of the stations has been struggling for an extended period of time both in terms of its audience share and in its financial performance.")

- overcompensating executives and board members
- buying a new company car or van before it is needed
- paying an early round of dividends
- parking key assets in an affiliated partnership
- collecting sure-pay accounts in the next quarter
- writing off slow-pay accounts in the name of "goodwill"
- expensing rather than depreciating new equipment
- buying rather than leasing towers and tower sites
- dispatching executives and staff to nonessential out of town conventions
- funding scholarships for children of station executives
- setting aside an endowment for "golden parachutes."

These techniques would not materially diminish the value of the station to a platform owner, but they would enable a platform owner to go to the Commission, in absolute good faith, and claim that the station is failing and needs to be "rescued."[92/] A large balance sheet business like a television station might find it difficult to make such a claim, but it is easy for most radio stations to do. It would be so easy for a radio station to declare

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92/ The television "failing stations" rule requires that an ostensibly failing station provide an affidavit stating, *inter alia*, that the only "reasonably available" buyer is the duopolizer. *Television Local Ownership Order*, *supra*, 14 FCC Rcd at 12939 ¶81. The rule does not require that small companies be contacted with an offer to merge and form a stronger company. Instead, the rule only requires that an "independent broker" must state that "active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received." *Id.* Anyone can pass that test.

itself failing that a "failing station" exception to the ownership rules would swallow the rule.93/

A "failing station" exception would bad policy even if it weren't so easy to manipulate. Many distinguished and successful companies in radio today would have qualified as "failing" in their early days -- including ABC, Radio One, Cumulus and Big City. Fortunately, we did not lose these companies to a "failing station" exception to the multiple ownership rules.

A weak competitor should not always be sacrificed to the biggest bidder. Instead, such a company should be encouraged to join forces with another weak competitor and thereby create a strong competitor. Although many small stations are under great pressure to sell out to platform owners, the Commission should resist the urge to incentivize even more consolidation in this way.

The equities on "failed" stations cut in the opposite direction. Platform owners, like other broadcasters, should be allowed to pick up dark stations that are in danger of exceeding the one-year off-air limitation that would lead to forfeiture of their licenses.94/ Thus, a "failed station" policy would be analogous to the policy objectives of Section 202(b)(2) of the Act, which contemplates that platform owners should be allowed to absorb facilities where the result would be putting a new station

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93/ A station may genuinely "fail" because a platform owner has targeted it for destruction through such entirely legal means as duplicating its format, offerings its advertisers very low-cost spots, or hiring away the target station's key talent. It would be the height of irony to allow the very company that forced a station to fail to be rewarded with the failed station's FCC license.

94/ 47 C.F.R. §73.1750.

on the air.[95] A "failed station" policy would also be harmonious with the Commission's tradition of mercy for the failed station's stockholders when the company genuinely faces ruin.[96]

4. Divestitures Should Not Be Required Under Distress Conditions

When platform owners agree to a merger that would place them over an ownership cap, the Commission typically waives the rules to allow some reasonable amount of time to close the sale of spinoff properties. The length of the waiver period is the subject of such transparent FCC lore that almost anyone can break the code: a waiver of six months is expected to result in a quick sale, and a waiver of eighteen months sometimes would not result in any sale at all because the underlying ownership cap is going to be relaxed.

Twelve months should be the standard waiver period. Six months is almost never enough time in today's market to sell a radio station without either receiving a distress price or being able to consider only the bids of members of the small fraternity of other platform owners that can readily pay cash. Six month waivers are antithetical to diversity because most small and minority entrepreneurs cannot raise capital that quickly.[97]

95/ See discussion of Section 202(b)(2) at pp. 158-61 infra.

96/ See, e.g., Second Thursday Corp. (Reconsideration), 25 FCC2d 112 (1970) (allowing sale of bankrupt station after designation for hearing, where wrongdoers do not profit from sale).

97/ See, e.g., Midwest Communications, Inc., 7 FCC Rcd 159, 160 (1991) (holding that a "forced" sale could unnecessarily restrict the value of the station and artificially limit the range of potential buyers, to the exclusion of minorities). While large companies often can buy stations by writing a check, a small entrepreneur typically must secure commitments from several sources

(n. 97 continued on p. 55)

Longer waiver periods enable platform owners to afford small and minority entrepreneurs a meaningful opportunity to bid.[98/]

In the current marketplace, it is daunting for any entrepreneur to raise capital quickly, and it is especially difficult for minorities to do so.[99/] The difficulty faced by

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97/ (continued from p. 54)

-- control group equity holders, passive investors mezzanine money, senior debt and subordinated debt. The time required to assemble such a package is the time it takes the slowest of these contributing sources to process its paperwork and make a decision.

98/ See, e.g., Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd 5012, 5036 ¶47 (1996) (weighing favorably, as part of CBS' showing in support of a one-to-a-market rule waiver in connection with the CBS/Infinity merger, the fact that Infinity "has already filed an application to assign one of the stations it will divest to a minority-controlled entity"); Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (holding that Viacom's proposal to seek out minority buyers for two radio stations to be spun off from its merger with Paramount "would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver"); Combined Communications Corp., 72 FCC2d 637, 656 ¶45 (1979) (declaring that the opportunity to approve the spinoff of WHEC-TV, Rochester, NY from the Gannett/Combined Communications Corp. merger to a minority owned company "represents a most significant step in the implementation of our continuing effort to encourage minority ownership of broadcast properties.")

99/ See Mark R. Fratrik, "The Present Difficulty in Selling Radio and Television Stations," BIA Financial Network, October 17, 2001, appended as Attachment 27 to the Cross-Ownership Showing in the Applications for Transfer of Control of The Ackerley Group, Inc. from the Shareholders of Ackerley to Clear Channel Communications, Inc., File Nos. BTCCT-20011017aci et al. at 8. Fratrick accurately points out that "banks now are only lending up to five times the station's cash flows where previously that maximum amount was six times" and adds:

> Where this lack of funding is most problematic is the funding of new companies, some headed by minorities and women, which do not have the "track record" of success. Without some examples of successfully acquiring and running stations, these individuals will have the most difficulty in securing needed financing during this period of added uncertainty.

Id. at 8-9.

minorities in securing access to capital was confirmed by a recent and authoritative study commissioned by the FCC.100/ Minorities' lack of access to capital is so well documented that it may be the subject of official notice.101/

Traditionally, spinoffs of stations from major merger transaction have presented many of the best opportunities for minorities and new entrants to acquire quality facilities with full coverage signals. For example, in connection with mergers in 1997

100/ William Bradford, "Study Of Access To Capital Markets And Logistic Regressions For License Awards By Auctions," University of Washington (2000). Using regression analysis, Dr. Bradford examined the capital market experiences of current broadcast license holders with respect to race, gender, the year of application or acquisition, business cash flow, equity, and size of firm (full time employees). Dr. Bradford found that minority broadcast license holders were less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision. Minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other variables.

101/ See National Telecommunications and Information Administration, U.S. Department of Commerce, Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States (December, 2000) at 45-46. Minorities often experience artificial barriers to obtaining credit or financing. See, e.g., Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Department of Commerce, Capital Formation and Investment in Minority Enterprises in the Telecommunications Industries (1995) (documenting artificial barriers faced by minorities in obtaining credit or financing for communications ventures). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Fifth Report and Order), 9 FCC Rcd 5532, 5573 ¶98 (1994) (discussing the "important and highly-publicized" 1992 study by the Federal Reserve Bank of Boston that concluded that an African American or Hispanic applicant in the Boston area is roughly 60% more likely to be denied a mortgage loan than a similarly situated White applicant); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 852-53 (1982) ("1982 Minority Ownership Policy Statement") (authorizing the use of limited partnerships as capital formation tools in conjunction with the then-extant minority ownership policies).

and 1999, Infinity Broadcasting Corp. spun off five large market radio properties to minorities, with two more pending. And in connection with mergers in 1998 and 2000, Clear Channel Communications spun off 49 radio properties to minorities. The stations involved in those four transactions that minorities still own constitute approximately 7% of all minority owned and controlled radio stations, and we estimate that they account for about 20% of the total asset value of all minority owned radio properties. Most notably, this was all achieved voluntarily in fair market transactions.

A systematic, openly articulated policy that no waiver period will be shorter than twelve months would encourage lenders and investors to finance small and minority entrepreneurs. Such a policy would also be consistent with Section 257 by reducing a well known and particularly egregious market entry barrier.[102/]

5. The Commission Should Propose Tax Incentives That Foster Both Competition And Viewpoint Diversity

The NPRM asks how the Commission should dispose of existing combinations that would not comply with the rules.[103/] The best

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102/ A close analogy is found in the Commission's 1981 decision to repeal the grossly unrealistic Ultravision Rule. In Financial Qualifications Standards, 87 FCC2d 200 (1981), the Commission repealed the requirement that a construction permit applicant have reasonable assurance of financing to cover a year of no-revenue operation. See Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision"). In adopting a more realistic three month reasonable assurance period, the Commission held that the one-year standard "conflict[ed] with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses." Financial Qualifications Standards, supra, 87 FCC2d at 201.

103/ NPRM at 19888 ¶65.

approach is to restore the policy that formerly allowed for capital gains deductions where a sale fostered competition and diversity. As noted in the previous sections, sufficient time should be allowed for divestitures in order to afford minority an opportunity to secure the capital needed to acquire the divested properties.

In 2000, the Commission recommended to Congress just such a tax incentive program. It would

> permit[] deferral of taxes on any gain from the sales of telecommunications businesses to small telecommunications firms, including disadvantaged firms and firms owned by minorities or women, as long as that gain is reinvested in one or more qualifying replacement telecommunications businesses. 104/

The Commission should reemphasize to Congress the desirability of rapidly adopting this approach.

104/ Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, 15 FCC Rcd 15376, 15445 ¶184 (2000).

III. Consolidation's Likely Impact On Minority Entrepreneurship And Employment In Radio

In the conclusions to his study on Consolidation and Minority Ownership (Appendix 1 to these Comments), Kofi Ofori sets out the current status of minority media ownership:

- Between August, 1997 through December, 2001, the number of stations owned by privately held minority owned companies increased from 367 to 399. 105/

- The number of privately held minority owners decreased from August, 1997 to December, 2001 from 169 to 149 -- from a high point of 173 in 1991. 106/

- As the number of privately held minority owners declined, the average number of stations owned by each owner increased from 1.48 in 1991 to 2.68 in 2001. 107/

- In local markets the number of minority owners declined from 1.42 owners per market in 1997 to 1.19 owners per market in 2001. Thirty-six minority owners, accounting for 655 stations in August 1997, left the industry before December, 2001, and many of them attributed their departure to consolidation. 108/

- In August, 1997, there were no publicly held broadcast licensees controlled by minorities. By December, 2001, there were four such firms owning a total of 156 stations. These firms are Entravision (52 stations), Radio One (63 stations), Radio Unica (16 stations) and Spanish Broadcasting System (26 stations). 109/

- Much of the increase in minority ownership can be attributed to spinoffs from a single transaction, the 1999 Clear Channel acquisition of AM-FM. As of December, 2001, 30 stations sold to minorities in that transaction are still owned or controlled by minorities. 110/

105/ Consolidation and Minority Ownership, supra, at 10.

106/ Id.

107/ Id.

108/ Id. at 11.

109/ Id. at 12.

110/ Id. at 11-12.

Based on his analysis of the operational success of minority owned and controlled stations relative to majority owned stations, Ofori concludes:

> Based upon several performance measures, minority stations have not realized the same economic potential realized by majority stations. This pattern holds true for the present as well as the time frame immediately following passage of the 1996 Telecommunications Act. Stations owned by minority firms that are publicly traded also perform at levels below their majority counterparts. While these trends continued throughout the period of increased ownership consolidation, the data does not necessary link station underperformance with ownership consolidation. Further research should be undertaken to compare present data on station performance with data prior to the relaxation of the numerical limits.
>
> Secondly, other variables, in addition to ownership consolidation, may have adversely affected station performance (e.g. discriminatory advertising practices and lack of capital). However, the data does suggest that ownership consolidation has resulted in the decline in the number of minority owners - a development that commenced with the relaxation of the numerical limits. The fact that the number of minority owners remained level from 1990 until the passage of the 1996 Act and then sharply declined is of particular significance and should be of concern to the Commission. The author recommends that further research examine:
>
> - The factors associated with the departure of certain owners from the marketplace;
> - The market circumstances under which new competitors entered the market;
> - The factors that enabled certain firms to go public and prevented others from going public;
> - The extent to which access to equity capital and other factors have enhanced the ability of minority-controlled firms to compete against majority group owners.
>
> The relatively superior performance of four minority-controlled firms, that own 156 stations, suggests that access to equity capital has been a significant factor in their ability to compete. On the other hand, other broadcasters, such as Multicultural Radio with 29 stations and a wide variety of program formats, have also been able to rapidly acquire new stations in major markets without the assistance of Wall Street. This apparent paradox has not been examined by this study. Given that it has been firmly established by other studies that minority broadcasters contribute

> significantly to diversity of viewpoints, it would advance public policy to take further steps in another forum to gain a better understanding of station underperformance and superior performance on the part of minority competitors. 111/

Although the number of minority owned stations has increased, almost all of the increase has come about because four minority controlled companies are publicly traded and thus have competitive access to capital. These gains were offset by the loss of 20 minority owned companies from 1997 to 2001. Some of those companies left the industry by merging with others, and some may have left because they could not attract outstanding management. But many others were capably run, and would have remained in the industry had they had an opportunity to compete. By losing these companies, the industry has suffered a significant loss in intellectual and cultural diversity.

Between 1996 and 2001 minorities caught some lucky breaks: a growing peacetime economy, equity funds designed to promote minority ownership, and management of the largest platform owners by leaders committed to promoting minority ownership. These factors surely helped offset and even reverse some of the pressure on minority ownership that is traditionally generated by consolidation, inasmuch as there is nothing inherent in the nature of a consolidating market that promotes minority or small business ownership.

111/ *Id.* at 26-27.

There is no guarantee the growth in minority ownership will continue indefinitely. Indeed, the opposite is likely to occur if consolidation is allowed to continue unabated. In most industries, as consolidation proceeds, eventually there simply are no more assets left in play for which small and minority entrepreneurs can bid competitively against larger companies.

Consolidation surely has had one unfortunate side effect that inhibits future gains in minority ownership: it has stopped the growth of broadcast employment.[112/] Larger platforms save operating expenses through such means as voicetracking and by combining their stations' news, traffic, engineering, sales, traffic, and back office functions. These trends reflect rational business decisionmaking, but their result is that many highly skilled employees chase an ever-shrinking supply of the jobs that remain. As a result, those new to (and formerly excluded from) broadcasting have few opportunities to build their careers.[113/]

112/ According to the Commission's annual broadcast employment databases (maintained from 1971 through 1997), there were 153,058 fulltime broadcast employees in 1995 but only 149,975 in 1997. FCC, 1997 EEO Trend Report (June 6, 1998) at 756. See also John M. Higgins, "Media's pink slip blues," Broadcasting and Cable, January 28, 2002, pp. 30, 31 (according to U.S. Bureau of Labor Statistics data, radio employment declined 0.4% in 1999, increased 0.4% in 2000 and decreased 0.4% in 2001).

113/ From 1998-2001, MMTC produced approximately ten job fairs per year throughout the country to help newcomers to radio gain initial employment. Our average attendance was over 250. At our last six job fairs, we gave each registrant a pre-stamped postcard to return if she got a job. Not a single card came back with confirmation of a hire. Apparently there were only a handful of jobs relative to the number of applicants.

Incumbent employees realize that if they lose their jobs, there will be fewer employers in town to approach for a job, and those few employers will have fewer jobs available at any rate of pay. Minorities, who typically lack the job tenure of other employees, inevitably face the phenomenon of "last hired, first fired" and thus will be disproportionately impacted by the job shrinkage attendant to consolidation.

Nothing inherent in the nature of consolidation will bring about more minority ownerhsip. In the long run, unregulated consolidation inevitably forces out most minority entrepreneurs and creates new barriers to entry in ownership and employment. The fact that minorities have not suffered a rout in the past six years is a testamant to the strength of programming formats often used by minorities,[114/] the goodwill of industry leaders, and most of all the skill and endurance of minority owners.

The bottom line is that the 1996-2001 increase in minority owners' share of industry asset value from about 0.8% to 1.2% is no reason to declare victory and withdraw the regulatory troops. By 1863, the Union Army had brought about a comparable increase in the percentage of former slaves who could read. Fortunately, President Lincoln did not stop there.

114/ *See* Platform Size and Program Formats, *supra*, pp. 21-22.

IV. Structural Regulation and Minority Ownership

A. The Commission Can Deploy Its Rulemaking Power To Advance Minority Ownership

The Commission has the power to promote minority ownership through its supervision of allotments and licensing. As early as 1975, the D.C. Circuit first instructed the Commission to consider the effects of its spectrum management policies on minority access to the airwaves.115/

The Commission's best known effort to directly promote minority ownership through structural regulation took place in 1985. The previous year, over the strenuous opposition of the nation's civil rights organizations, the Commission increased national radio and TV ownership caps from 7 AM, 7 FM and 7 TV ("7-7-7") to 12 AM, 12 FM and 12 TV ("12-12-12").116/ Congressman Mickey Leland, a member of the House Communications Subcommittee, pointed out that this higher level of consolidation would inhibit minority ownership. The Commission reconsidered its plan, and improved the rule by providing that a company owning 12 AM, FM or TV stations could also hold a minority interest in a 13th or 14th

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115/ Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) ("Garrett").
An early but short-lived effort to promote minority ownership through structural regulation occurred in Clear Channel Broadcasting in the AM Broadcast Band, 78 FCC2d 1345, 1368-69 (1980) ("Clear Channels"), in which the Commission made minority ownership one of the criteria for acceptance of certain applications for new service on the domestic Class I-A clear channel AM stations. Five years later, after the new rule spawned about three minority owned stations, the Commission repealed Clear Channels. Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules (Report and Order), 102 FCC2d 548, 558 (1985) ("Clear Channels Repeal"), recon denied, 4 FCC Rcd 5218 (1989).

116/ Multiple Ownership of AM, FM and Television Broadcast Stations (R&O), 100 FCC2d 17 (1984).

station that was controlled by entrepreneurs of color.117/ In 1994, the Commission revised the Mickey Leland Rule to permit minorities to own up to 25 AM and 25 FM stations (five more per service than the then-applicable 20-20 national cap).118/ Although the "Mickey Leland Rule" yielded only modest benefits (having been used by only four companies until it was rendered moot by the 1996 Act), the Commission had the right idea when it experimented in this way. Now that the Commission is almost without other tools to promote minority ownership, it should take a fresh look at opportunities to promote minority ownership through structural regulation.

B. The Statutory Ownership Caps Must Be Read Together With Congress' Instructions To Ban Discrimination And Eliminate Market Entry Barriers

Section 202(b) was not the only provision of the Telecommunications Act relevant to diversity and competition in radio. Most notably, Congress amended Section 151 of the Communications Act to provide that the Commission was created

> [f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service... (new 1996 language emphasized).

Furthermore, in Section 257 of the Telecommunications Act, Congress directed the Commission to complete a proceeding "for the

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117/ Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on Reconsideration), 100 FCC2d 74, 94 (1985) (holding that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.")

118/ See Revision of Radio Rules and Policies (Second MO&O), 9 FCC Rcd 7183, 7191 (1994).

purpose of identifying and eliminating...market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...."119/ Section 257 establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity."120/ Congress also expects the Commission to report, every three years, on "any regulations prescribed to eliminate barriers within its jurisdiction...."121/

Section 257 was drafted with the promotion of minority ownership in mind.122/ Thus, Section 257 analysis has often been a key linchpin of Commission rulemaking decisions on issues that directly impact minority participation in the industries it

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119/ 47 U.S.C. §257(a). The Commission did complete that proceeding. Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd 16802 (1997).

120/ 47 U.S.C. §257(b).

121/ 47 U.S.C. §257(c).

122/ Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

> [W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely under represented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).