note that a platform operator that spawns twelve Free Speech stations (as in the example described at pp. 131-34 supra) could follow the model used successfully by business incubators in enterprise zones throughout the country. In this model, small entrepreneurs each occupy a building whose design allows for crossfertilization among the small entrepreneurs, on-site training by cooperating large firms or by educational institutions, and shared facilities such as computer networking, food and janitorial services, printing and duplication, and a telephone switchboard. Using this mode, the Free Speech Radio companies could realize operating efficiencies, learn from the platform operator and from

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257/ (continued from p. 147)

Without attempting to limit additional creative mechanisms that may be developed, some general guidelines and examples of qualifying programs can be provided. For example, a group owner might create an SBA-like program which offers to eligible participants:

1. Management or technical assistance
2. Loan guarantees
3. Direct financial assistance through loans or equity investment
4. Training
5. Business planning assistance.

> Alternatively, a group owner could enter into a joint venture with an established Small Business or Minority Enterprise Small Business Investment Company (SBIC or MESBIC) to accomplish the intended objective....We also might consider an administrative relationship between the stations' owners. Properly structured, such an arrangement might provide a greater incentive for investment in the operations of hitherto untested owners as well as allow these owners to enjoy some of the administrative efficiencies associated with group ownership.

Id. at 6391-82 ¶¶22, 24-25.

one another, and remain entirely independent in their provision of program services. Furthermore, state and local tax abatement or tax deferral programs are often available to those using this business model.

This potential for incubation would be particularly useful as a means of stimulating minority ownership, particularly inasmuch as minorities in senior broadcast management positions must bridge quite a chasm in order to graduate to ownership in today's market. The jump from management to ownership is a big step that few qualified managers have an opportunity to take. A completely different skill set is required for ownership. Managers need to learn completely new skill sets to become owners. Recognizing this, in 2000 the National Association of Broadcasters created the Broadcast Leadership Training Program, which teaches ownership skills to experienced broadcast managers. MMTC has attempted to assist several graduates of this outstanding program to find their first stations -- but our task has been quite difficult because few financial institutions will provide financing for any first-time owner (especially a minority) and few properties fall within the financial reach of those lacking bank financing or senior investors. Free Speech Stations would do much to enable first time minority owners to gain a foothold in the industry. For many minority broadcasters, Free Speech Broadcasting would serve as a mezzanine environment that facilitates the transition between managing and owning a fulltime station. Other minority broadcasters could choose instead to make their careers in Free Speech Broadcasting.

The physical incubation of new full power broadcast stations could be supplemented with additional features of incubation programs, such as liberal attribution treatment of passive investments by the incubating company. One way to stimulate minority ownership through incubation would be to allow a company operating an incubator program that supplies technical and training support to small disadvantaged new licensees to have ownership attribution set at 49% EDP for two years, during which time the incubated licensees would work their way back down to 33%.258/

b. Channel Bifurcation Would Serve As A Powerful Remedy For The Present Effects Of Discrimination, And It Can Be Structured To Prevent More Discrimination

An agency must reevaluate its policies in light of fundamental changes in circumstances.259/ The threat to minority ownership spawned by the loss or irrelevancy of the minority ownership policies could not manifest a more fundamental change in circumstances. As described above, channel bifurcation would create market conditions potentially favorable to the incubation and retention of minority owned broadcast stations.260/

258/ The EDP (equity/debt plus) rule was adopted in 1999 in Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (Report and Order), 14 FCC Rcd 12559 (1999). It provides that where the investor is either a major program supplier (including network and intermarket time brokers that supply over 15% of a station's total weekly broadcast programming hours) or a same-market media entity subject to the broadcast multiple ownership rules, the investor's "interest in a licensee or media entity in that market will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33% of the total asset value (equity plus debt) of the licensee or media entity." Id. at 12559 (fn. omitted).

259/ See, e.g., Geller v. FCC, supra.

260/ See pp. 148-54 supra.

The Commission has had some success using eligibility criteria to promote minority ownership [261] Thus, the model for a race-conscious program already exists.

As we have noted, one reason for the endemic low representation of minorities among broadcast owners is that the Commission has again and again failed to seize opportunities to produce more minority owners.[262] In recent years, the Commission has failed to act to promote minority ownership because of uncertainty regarding the constitutionality of race conscious programs after Adarand III. However, the 10th Circuit's decision approving DOT's modestly race-conscious small disadvantaged business program in Adarand VII has now assumed the status of a final order.[263] Other agencies have also tailored their programs to conform to Adarand III.[264] Thus, the Commission has at its disposal a road map to create federal race-conscious remedial initiatives where they are necessary. Furthermore, the Commission has already done extensive research that justifies these

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261/ See Clear Channels, supra. Our concept is more narrowly tailored that the program in Clear Channels. In our concept, eligibility for SDBs would not run indefinitely. If no qualified SDBs were interested within a reasonable time, other entities would become eligible.

262/ See pp. 90-99 supra.

263/ See p. 7 n. 12 supra.

264/ The SBA has issued new rules that conform its eligibility and contractual assistance requirements to Adarand III. Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals (Final Rule), 63 Fed. Reg. 35726 (June 30, 1998). This SBA rule provides a race-neutral model which the Commission can import into its own rules.

initiatives.[265] Thus, all that remains is for the Commission to design a program that is narrowly tailored. A minorities-only set aside would be unlikely to pass constitutional muster. However, we have proposed a program that would benefit small disadvantaged businesses, with minority status conferring a rebuttable presumption of disadvantage. Moreover, our design would be minimally intrusive by applying only to initial eligibility. Thus, our design is even less intrusive than the program in Adarand VII, and therefore it should pass constitutional muster.

5. Channel Bifurcation Would Substantially Reduce The Commission's Regulatory Costs

In three ways, Free Speech stations would reduce the expense of regulation, both for the Commission and its regulatees.

First, Free Speech Stations are unlikely to generate high impact, time draining structural enforcement action. Since they would increase viewpoint diversity attendant to a relaxation of the ownership rules, they would remove much of the pressure consolidation places on the Commission's ability to promote competition and diversity.

Second, for each Free Speech Station created, an Entertainment Station is created. Entertainment Stations will have fewer public obligations than Traditional Stations, again permitting a reduction in resources devoted to regulation.

Third, if a community group could become a Free Speech Licensee, or could expect easy access to the airwaves from Free Speech Licensees, demand for LPFM ownership would be sharply

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265/ See p. 7 n. 12 supra.

reduced. LPFM licensees would mostly be geographic narrowcasting entities, such as neighborhood groups or groups in markets too small to generate channel bifurcation. While Free Speech Stations will not completely eliminate demand for LPFM stations, they will reduce much of LPFM's engineering and regulatory pressure on the Commission and its full power licensees.

The Free Speech Stations themselves are unlikely to require much regulatory oversight. The licensees will be highly motivated to provide viewpoint diversity. The listeners, often members of demand-intensive niche audiences, will probably be especially vigilant in making sure that the content they need is provided. This scenario -- highly motivated and socially conscious licensees and attentive consumers -- makes it unlikely that the Commission will need to expend any significant enforcement resources on Free Speech Radio.

C. By Using Section 202(b)(2) Of The Act, The Commission May Implement Channel Bifurcation Without New Legislation

No new legislation would be needed for the Commission to implement channel bifurcation as proposed in these Comments. It can do this under Section 202(b)(2), which affords the Commission authority to allow an entity to own, operate or control more radio stations in a market than the number specified in 47 C.F.R. §73.3555(a)(2) "if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio broadcast stations in operation." A new "radio broadcast station" is exactly what bifurcation creates, irrespective of its number of operating hours.266/

On its face, Section 202(b)(2) is not self-executing; yet the Commission has never conducted a rulemaking proceeding to implement Section 202(b)(2). The Commission promised to conduct such a

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266/ See 47 C.F.R. §73.1715, which authorizes commercial share-time operations, and refers to each of the operations sharing time as a "radio station." Each station has its own call letters, license, hours of operation, and licensee privileges and responsibilities just like any other radio station. The terms "broadcast station" and "radio station," as defined in the Communications Act, do not mention any minimum operating hours. See 47 U.S.C. §§153(5) and 153(35). Commercial stations' minimum hours of operation are a percentage (2/3) of the number of daytime and non-nighttime hours on which they are authorized to broadcast. See 73 C.F.R. §73.1740(a)(1). The Commission has noted that Section 73.1740 contains "no mention of any minimum hours of operation applicable to individual time sharers." HATCO-60, 60 RR2d 1521, 1527 ¶20 (1986). Consequently, if the Commission authorized a twenty-hour per week station, that station would be a new "radio broadcast station" within the meaning of Section 202(b)(2).

proceeding, however.[267] This proceeding can serve as the proceeding the Commission promised to undertake in order to implement Section 202(b)(2).

In addition to its authority under 202(b)(2) to allow for bifurcation, the Commission also possesses authority to adopt classifications such as "Traditional Broadcaster," "Free Speech Station" and "Entertainment Station," defined herein,[268] which are necessary in order to implement channel bifurcation. Among the Commission's general powers are to "[c]lassify radio stations,"[269] and "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class,"[270] The Commission has broadly interpreted its authority to "classify", encompassing, inter alia, a decision to create a class of microwave services useful specifically for public as opposed to private

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267/ Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) (Order), 11 FCC Rcd 12368, 12370 n. 2 (1996) (promising that "[t]he implementation of this particular provision will be addressed in a subsequent Notice of Proposed Rulemaking.") One purpose of Section 202(b)(2) was apparently to allow a platform operator to build out a construction permit and add it to the platform without having to divest another station. However, nothing in the language of Section 202(b)(2), or its sparse legislative history, suggests that this provision would not apply to channel bifurcation. See Joint Explanatory Statement of the Committee of Conference, Statutes and Treaties Volume, Communications Regulation, Stat-2001, 2041 (1995) (Conference Report accompanying the Telecommunications Act, stating only that Section 202(b)(2) was intended as "an exception to the local market limits.")

268/ See p. 118 supra.

269/ 47 U.S.C. §303(a).

270/ 47 U.S.C. §303(b).

point-to-point service, and a decision to authorize STV operations.[271]

Similarly, the Second Circuit relied on Sections 303(a) and 303(b) to uphold a Commission rule prohibiting the use of amateur radio stations to transmit business communications.[272] Such classifications, based as they are on the purposes of the transmissions, are similar to a potential classification of radio stations into Entertainment and Free Speech facilities.

Finally, after "classifying" stations, the Commission is authorized to impose different regulatory requirements on stations in the various classifications. Section 309(g) authorizes the Commission to act on broadcast applications, and permits it to "adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section."[273] The Commission has long relied on Section 309(g) as authority to impose different regulatory requirements on different classes of facilities.[274]

Consequently, the Commission surely has authority to classify and regulate radio stations primarily as entertainment providers

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271/ See Community Antenna Television Stations (First R&O and Further NPRM), 1 FCC2d 897, 901 ¶¶15-16 (1965) (public microwave service); see also Subscription Television Operations (First Report), 23 FCC 532, 16 RR 1509, 1514-15 (1957) (STV).

272/ Gross v. FCC, 480 F.2d 1288 (2d Cir. 1973).

273/ 47 U.S.C. §309(g).

274/ See Global Land Mobile Satellite, Inc. (Tentative Decision), 6 FCC Rcd 4900, 4903 ¶33 (1991), reaffirmed, Final Decision on Remand, 7 FCC Rcd 266 (1992) (requiring domestic mobile satellite satellite in the upper L-band frequencies to apply for licenses as consortia rather than as individual applicants to be evaluated through comparative hearings.)

and others as nonentertainment programming providers, and to impose different, appropriate regulatory requirements on each of them.[275]

Finally, the Commission is required to take steps to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services,"[276] and it must regulate so as to "make available, so far as possible," communication service "without discrimination on the basis of race, color, religion, national origin, or sex" (emphasis supplied).[277] In regulating broadcast and cable employment, the Commission has read Section 151 of the Telecommunications Act as affirmatively authorizing the adoption of regulations that aim at actively preventing discrimination, rather than merely passively accepting discrimination complaints.[278] Similarly, a concept aimed at promoting access to ownership by new entrants, particularly minorities, would serve the goals of Section 257 and Section 151.

275/ Additional authority for classifying and regulating radio stations under traditional, entertainment and free speech paradigms is found in Section 303(g), which authorizes the Commission to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." It is well established that Section 303(g) authorizes the Commission to undertake structural regulation. See NBC v. U.S., supra (upholding regulation of chain broadcasting); Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961) (upholding regulation of network representation of affiliates in the sale of non-network time); cf. Direct Broadcast Satellites (Report and Order), 90 FCC2d 676, 686 (1982) (authorizing DBS service as competitor to terrestrial television service).

276/ 47 U.S.C. §257(a), discussed at pp. 65-67 supra.

277/ 47 U.S.C. §151 (as amended in 1996), discussed at p. 65 supra.

278/ See 2000 EEO R&O, supra, 15 FCC Rcd at 2350 ¶48.

D. How The Commission Could Implement The Free Speech Radio Concept

1. Rulemaking To Create New Classes Of Licenses

To implement the bifurcation process, the Commission would need to develop and secure OMB approval for three new forms:

a. Application To Bifurcate Channel

b. Application To Convert Traditional License Into An Entertainment License

c. Application To Create Free Speech License

The Commission would also need to make minor modifications to 47 C.F.R. §73.1715, which authorizes commercial share-time operations. For 70 years, the Commission and its predecessor agency permitted share-time operators to mutually determine the hours they will each use and to simply file their joint determination with the Commission, after which the operators are expected to adhere to this operating schedule.[279/] The rule should be changed to provide that the terms of share-time operations between an Entertainment Licensee and a Free Speech Licensee must be approved by the Commission.[280/] Because this type of bifurcation contemplates relief from otherwise applicable operating and structural requirements, the Commission would need to ensure that the division of hours and terms of the arrangement are

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279/ See HATCO-60, supra, 60 RR2d at 1527 ¶¶16-18 (noting that this procedure originated with Section 154 of the Rules of the Federal Radio Commission (February 1, 1932)).

280/ Licensees could still bifurcate and share time in the manner currently permitted by Section 73.1715 of the rules by simply filing a notice with the Commission as long as such bifurcation and sharing of time is not attendant to a proposal by one of the licensees to be an Entertainment Station or to acquire additional stations. As noted earlier, this kind of bifurcation is not incentivized, so it is uncommon. See p. 123 supra.

consistent with Section 202(b)(2). In particular, the Commission would need to verify that the arrangement would bring into being a genuine new "radio broadcast station" as contemplated by Section 202(b)(2), rather than an illusory token or sham operation.

2. Voluntary Elections To Bifurcate

The bifurcation process would be initiated when a Traditional Broadcaster makes a Bifurcation Election, applying to the Commission to divide the channel on which it operates to accommodate an Entertainment License and a Free Speech License.

A Bifurcation Election would be bundled together with a Form 314 application by the Traditional Broadcaster to assign at least 20 hours of non-nighttime airtime to the unrelated entity which would become the Free Speech Licensee. That assignment application would be accompanied by two other applications: an application to convert the 148-hour portion of the broadcast week into an Entertainment Station, and an application to create a Free Speech Station with the other 20-hour portion of the broadcast week.[281/] This application-bundling avoids forcing the Traditional

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281/ The Commission might leave it to the applicants for Entertainment and Free Speech licenses to negotiate whether the Free Speech Station's hours would be spread across a week (e.g., 8-10 PM Monday through Friday) or blocked out in a single day (e.g., 2 PM to midnight Saturday). See Southeastern Bible College, Inc., 85 FCC2d 936, 939-40 (Rev. Bd. 1981) (in comparative hearing for new noncommercial facilities, which included a time-sharing issue, the Board held that the potential confusion that could arise from two markedly antagonistic licensees "switching back and forth during the day from one licensee to the other" would be avoided by allocating "entire days to each of the parties....Complexity is not a necessary concomitant of time-sharing.") Unlike the applicants in Southeastern Bible College, bifurcation applicants following the Free Speech Station model would work collegially and would bundle their proposals for Commission consideration.

Broadcaster to turn in 20 hours of airtime to the Commission, which would then have to select a new licensee through an auction.282/

3. Acquiring A Free Speech License

A Bifurcation Election would generate a Form 314 application to assign a license for 20 hours per week of co-channel operation to the entity which would become the Free Speech Licensee. As with any other Form 314 application, this application would contain the Asset Purchase Agreement governing the assignment. This Asset Purchase Agreement would specify, inter alia, the Free Speech Station's hours of operation and manifest that the Free Speech Station would devote at least half its airtime to nonentertainment programming. Applications to assign a Free Speech Station from one licensee to another would follow much the same procedure.283/

282/ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (First Report and Order), 13 FCC Rcd 15920 (1998) (Competitive Bidding First R&O), recon. denied, 14 FCC Rcd 8724 (1999). The Commission is authorized to limit the eligibility of bidders to specified categories, or to establish a system of bidding credits for designated entities. See 47 U.S.C. §§309(j)(3)(B), 309(j)(4)(A) and 309(j)(4)(D). Fortunately, auctions of Free Speech Licenses would be rare. the Commission would need to conduct an auction only if an incumbent Free Speech Licensee turned in its license or if the Commission nonrenewed or revoked a license. These scenarios are so remote that the Commission could reasonably elect to wait until one of these scenarios arises before developing auction criteria for Free Speech Licensees. Cf. Competitive Bidding First R&O, supra, 13 FCC Rcd at 16005 ¶212 (declining to develop new comparative criteria to resolve the handful of comparative renewal cases ineligible for resolution by auction).

283/ See pp. 170-73 infra.

4. Eligibility To Be A Free Speech Licensee

The Commission should authorize both commercial and noncommercial Free Speech Licensees.[284/] However, the Commission should take three steps to maximize diversity of viewpoints, at least initially.[285/] If these steps are not taken now, but later prove necessary, remedial action would be difficult without grandfathering or divestitures. However, if these steps are taken but later prove unnecessary, their relaxation would be uncomplicated.

284/ In another proceeding, the Commission is refining its policy on noncommercial broadcasting in the nonreserved FM band. Reexamination of the Comparative Standards for Noncommercial Educational Applicants (Second Further NPRM), FCC 02-44 (released February 25, 2002). The fruits of that proceeding can also be applied to Free Speech Licensees. Two situations could result in a Free Speech authorization being auctioned: a Free Speech Licensee deciding to go out of business that turns its license in to the Commission, and a Free Speech Licensee whose license is not renewed or is revoked.

285/ A very good case can be made that the Commission should restrict ownership of Free Speech Stations to local entities, who historically and logically have been regarded as being especially likely to respond to local needs and interests. However, our tentative view is that in the absence of additional empirical research, such a restriction would be difficult to justify in light of Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1991) and Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1992). In those cases, the Commission was had little record evidence showing that a local owner-operator would tend to serve a community better than an absentee owner who hired competent management. In any event, the one to a customer, SDB early eligibility and 50% or more nonentertainment programming regulations suggested herein are probably sufficient to ensure that Free Speech Licensees provide ample local service.

a. One To A Customer Per Market

While there need be no national cap on Free Speech Stations,[286] the Commission should provide that an entity can own or control, directly or indirectly, no more than one Free Speech Station in a market. Since Free Speech Stations are designed to increase the diversity of voices available in a community, it would be absurd to defeat that purpose by allowing one company to own several of them in the same community. A one to a customer per market rule would also promote diversity of viewpoints indirectly by ensuring that Free Speech Stations provide many new entrants with an opportunity to enter the industry and learn the skills required for ownership of radio stations.[287]

Such a one to a customer rule should also provide that a company that owns a Traditional Station or an Entertainment Station cannot own a Free Speech station in the same market. Not only would this provision expand the number of voices in each market, it would avoid a scenario in which two platform operators in the same market each go through the motions of bifurcating -- and then

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286/ A national limit on Free Speech Stations would impede licensees in the new service from using the national network/affiliates business model, which enables stations to cross-subsidize one another, cushion the effects of market or region-specific advertising sales volatility, and provide niche formats that a single station acting alone could not afford to produce. Radio Unica (Spanish language service in medium markets), Mega Broadcasting (Spanish language with high news/talk component) and Multicultural Broadcasting (Asian programming) have shown that this business model works well in serving specialized markets not reached by platforms. Furthermore, the financial markets would likely regard a national cap as so severe a restriction on the new service that only independently wealthy individuals and entities could succeed in the new service.

287/ See p. 153 supra.

simply sell the Free Speech portion of their channels to one another for no consideration, as a tax free exchange.[288/] This scenario, performed (e.g.) by two platforms, each of which has a mainstream talk format, would result in no change in programming, no new voices, and no increase in diversity of sources or viewpoints. Moreover, the favorable tax treatment afforded this approach would confer a financial advantage on same-market incumbents that no new entrant could surpass.

b. **Prohibition Of LMAs**

The point of having Free Speech Stations is to promote diversity of viewpoints in a market. LMAs would take away the very benefit the Commission would have created by bringing Free Speech Radio into existence. The best reason for having LMAs (rescuing failing stations) hardly applies to newly-created stations. In order to promote economic efficiency without LMAs, the Commission should permit and sometimes even encourage business relationships that add financial stability to Free Speech Stations and thus increase the likelihood that they will successfully provide diverse viewpoints. These include JSAs, short-term relaxation of the EDP rule[289/] and legitimate, noncontrolling incubators,[290/] as well as sharing of transmitting equipment and towers.

288/ After the Multiple Ownership Second Report, supra, in 1975, it was common for an owner of a newspaper/TV combination in one city to swap television stations with another newspaper/TV owner in another city.

289/ See p. 163 supra.

290/ See pp. 150-154 supra.

c. Early Eligibility For Small Disadvantaged Businesses

As noted earlier, the Commission should restrict eligibility to small disadvantaged businesses ("SDBs") and should do so in a manner that is constitutionally permissible.[291/] In order to satisfy the narrow tailoring prong of strict scrutiny, the Commission could establish a reasonable time period during which a Traditional Broadcaster wishing to bifurcate would attempt to do so with SDBs.[292/] If no qualified SDB expressed interest within that time, other entities would then become eligible.[293/]

If (but only if) the Commission implements these ownership policies, there is no reason to completely restrict Free Speech Station ownership to new market entrants. In particular, it would

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291/ The successful operation of this early offering to SDBs may be analogized to and predicted from the operation of the former tax certificate policy. A buyer delivering a tax certificate to a seller was seldom able to secure stations at a price discount. The sales typically occurred at almost the same prices that would have obtained in a non-tax-certificate deal; thus, the sellers retained the financial benefits of the tax certificates. The tax certificate's real value was that it brought the minority buyers to the dealmaking table. Buyers were able to deploy the tax certificates as bargaining chips to persuade sellers to negotiate with them. See generally E. Krasnow et al., "Maximizing the Benefits of Tax Certificates in Broadcast and Cable Ventures," 13 COMM/ENT Law Journal 753 (Summer, 1991).

292/ Considerable transparency would be necessary to prevent abuse. It could prove too tempting for a Traditional Broadcaster to take only ministerial steps to give SDBs only a sham notice of a potential bifurcation (or to notify only SDBs it knows are not interested or capable) while secretly arranging to bifurcate to a non-SDB.

293/ This procedure would ensure that no greater burden than necessary befalls non-SDBs. In particular, it would ensure that bifurcation opportunities need not be deferred indefinitely until an interested SDB appears.

make little sense to adopt procedures (such as the SDB early notice procedure described above) to protect and advance minority ownership, and then exclude the struggling minority owned companies already in the business from using Free Speech Radio as a growth opportunity.

5. Phase Out Of Applications For CPs For Traditional Stations, And Phase In Of Bundled Applications For CPs For Entertainment And Free Speech Stations

It is more desirable to have a channel occupied jointly by an Entertainment Licensee and a Free Speech Licensee than just by a Traditional Licensee. Consequently, the Commission should establish a date beyond which it would longer accept construction permit applications for Traditional Licenses. Thereafter it would only accept bundled applications from those seeking an Entertainment License and those seeking a Free Speech License. The applications would stay bundled during the auction to ensure that the selectees are agreeable to one another and are willing to cooperate on essential business matters that do not implicate viewpoint diversity or competition, such as program lead-ins and lead-outs, tower leases, and studio leases.

If the Commission adopts this procedure starting with the twice-postponed FM Auction #37, it could bring into being 700 new radio stations instead of 350. It could also jump start a market for Free Speech Stations, which would be useful in establishing a fair price for these stations as platform owners consider bifurcation.

Interest on auction payments goes to the Telecommunications Development Fund (TDF) pursuant to 47 U.S.C. §§309(j)(8)(C)(iii)

and 614.[294] TDF would be a useful source of financing for Free Speech Stations.

6. Transferability, Assignability And License Modifications For Entertainment Stations And Free Speech Stations

Control of Entertainment Stations could be assigned or transferred to any qualified entity, using forms similar to Forms 314 and 315. After such a sale, the regulatory benefits of being an Entertainment Licensee would attach to the successor Entertainment Licensee, with two exceptions.

First, if the successor Entertainment Licensee owns Traditional Stations in the same market, it must bifurcate enough of them to result in the creation of the same number of Free Speech Stations contemplated by the original "bifurcate one, buy (and bifurcate) one" provision. Otherwise, a platform operator could accomplish indirectly what it could not accomplish directly: ownership of up to eight Traditional Stations as well as a number of Entertainment Stations.[295]

294/ TDF has about $50 million in capital under management. It offers equity financing in relatively modest amounts.

295/ For example, suppose a Traditional Broadcaster, X Corp., owns a standalone station, and bifurcates and then buys and bifurcates another station. X Corp. now owns two Entertainment Stations. It then sells them both to a Traditional Broadcaster, Y Corp., that originally has eight stations. As a result, Y Corp. would own eight Traditional Stations and two Entertainment Stations, and Y Corp. would share time with only two Free Speech Stations. However, under the proposed bifurcation rules, the largest allowable combination of ten Traditional or Entertainment Stations would be Six Traditional Stations and Four Entertainment Stations (reflecting two bifurcations and two purchase-then-bifurcations, and spawning four Free Speech Stations). See p. 129 and Table 1 supra. In this example, Y Corp. could buy X Corp., but only if Y Corp. bifurcated two of its Traditional Stations: AMs or FMs if the stations being bought are AMs; FMs if the stations being bought are FMs.

Second, if an Entertainment Licensee wishes to "re-consolidate" a channel by purchasing the Free Speech Station with which it shares time, it should not be permitted to retain the second Entertainment Station it acquired by having undertaken the original bifurcation. The Commission should scrutinize carefully any behavior under which the larger broadcaster coerces the smaller one to reconsolidate,[296/] and the Commission should require those making a Bifurcation Election to reduce to writing and provide any agreement they might have that establishes or affects the terms under which reconsolidation might occur.

296/ For example, the Commission should strongly enforce a policy that would prevent an Entertainment Licensee from suddenly terminating a tower lease in order to force a Free Speech Station either to erect its own tower or agree to reconsolidation. Cf. George B. Cameron Communications, 71 FCC2d 460, 467 (1979) (holding that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding), repealed (unwisely) in Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process (First Report and Order), 4 FCC Rcd 4780, 4788-89 ¶¶63-70 (1989), recon. denied, 5 FCC Rcd 3902 (1990).

Reasonable time periods (e.g. one year) should be allowed to facilitate any divestitures or additional bifurcations required by these provisions.297/

To ensure that the two time-sharing licensees co-exist peacefully, the Commission should carve out a modest exception to its policy against restraints on alienation. Neither the Free Speech Licensee nor the Entertainment Licensee ought suddenly to discover, to its surprise, that it must share a channel with a new transferee or assignee of its original co-channel occupant that does not wish to cooperate on the sharing of tower space, or programming arrangements governing the time one station signs off and the other signs on. Thus, the Commission should permit a Free Speech Licensee and an Entertainment Licensee to agree in advance that either entity must receive the other's consent to any subsequent sale of its station, as long as such consent is not unreasonably withheld. We do not believe other restrictions on alienation are necessary.298/

297/ See pp. 54-57 supra (describing why a one year divestiture period is necessary to ensure that minority entrepreneurs are not excluded from purchasing spinoff properties).

298/ In particular, there is no need for a Free Speech Station holding period, unless such a station were acquired through a new market entrant policy. The public would not be harmed if a Free Speech Licensee sells its station to another, equally qualified broadcaster. Moreover, since that Free Speech Radio would be brand new, sources of capital would more likely invest in a Free Speech Licensee if it has an exit strategy. In any event, Free Speech licensees are unlikely to be motivated by quick profits from trafficking.

Finally, an application by an Entertainment Licensee and its co-channel Free Speech Licensee to modify their respective hours of operation would be treated as a "major change" (and thus would be subject to the provisions outlined above) if it results in the Free Speech Station having fewer than 20 non-nighttime hours per week. Thus, inter alia, any proposal that contemplates that the Free Speech Licensee would acquire additional hours from the Entertainment Licensee would be treated as a "minor change" and would be processed according to procedures similar to those in 47 C.F.R. §73.1715.

VI. The Commission Should Conduct A Negotiated Rulemaking To Secure Consensus In This Proceeding

MMTC invites the industry's support for the Free Speech Radio concept, and its suggestions on how the plan can be improved.

As we have noted, any erroneous increase in the ownership limits would be almost impossible to correct.[299/] Fortunately, what is proposed here is moderate in scope, with each increase in consolidation offset by a more than commensurate increase in source and viewpoint diversity. Allowing more consolidation without bifurcation would yield a considerable net loss to the public. But consolidation that evolves with bifurcation and Free Speech Radio would benefit all stakeholders -- large, small, majority and minority owned broadcasters, advertisers, people working in radio, and the listening public. It is the classic win-win.

Inevitably, there will be definitional and operational hurdles in refining the Free Speech Radio concept. For example, care will be required in determining eligibility criteria, and in ensuring that the Commission's longstanding definition of nonentertainment programming is still viable. But issues like these are hardly insurmountable. The Commission has dealt with such matters before, and it deals everyday with far more daunting issues of definitions and enforcement. It is much harder to define "political broadcasting" or "indecency" than to define "nonentertainment programming."

This job is not too hard. The Commission should roll up its institutional sleeves and invite the best minds in the

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299/ See p. 46 supra.

In light of the many issues in this proceeding in addition to Free Speech Radio, it will take the efforts of many Solomonic minds, pulling together, to ensure that this proceeding yields a fair balance among platforms, standalones and Free Speech Stations that will promote economic efficiency, diversity of viewpoints and minority ownership.

The way to bring the best minds together is to conduct a negotiated rulemaking.[303/] In this way, all stakeholders can be heard and participate meaningfully.[304/] A consensus reached in this way would be far preferable to the customary and inefficient manner of resolving differences in a rulemaking or in a court test over how many stations is "enough." For once, the Commission might be able to produce a result that is not deemed fair because nobody likes it, but because everyone likes it.

303/ Procedures for negotiated rulemakings are set out in 5 U.S.C. §561 et seq.

304/ As part of a negotiated rulemaking, the Commission should provide research support to assist the negotiating parties. In the wake of Fox Television, the Commission apparently could be compelled to review every one of its thousands of regulations and justify their retention. Regulations should evolve with participation from representatives of large companies, small and minority owned companies, and consumers. The burden on small and minority owned companies and consumers to provide meaningful input in the rulemakings was overwhelming even before Fox Television, and now it boggles the mind. Hundreds of lawyers are available to help large companies participate in rulemaking proceedings. However, only two senior FCC practicioners and four other lawyers work fulltime to file rulemaking comments on behalf of consumers. It is profoundly unrealistic to expect a balanced work product to emerge from unbalanced advocacy.

Respectfully submitted, 305/

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APPENDIX 1

OFORI & ASSOCIATES

RADIO LOCAL MARKET CONSOLIDATION

&

MINORITY OWNERSHIP

Prepared by

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March 2002

Abstract

For the past five years ownership consolidation has exceeded FCC standards designed to safeguard competition and diversity of viewpoint. Consolidation is most accentuated in the smaller markets where 50% of the stations owned by minorities are located. Hence, minority owners seeking affordable stations in the smaller markets may be prevented from acquiring them.

The number of minority owners remained relatively unchanged between 1990 and 1995 and then declined 14 percentage points after passage of the Telecommunications Act of 1996. At least 36 minority owners – accounting for 65 stations – left the radio industry between 1997 and 2001. In addition, the performance of the average minority station, according to several measures, rates below that of majority stations. The inability of minority stations to realize their full free-market potential may be linked to a combination of factors that include ownership consolidation (e.g. limited technical facilities, lack of capital and advertising practices). Given the extraordinary contribution of minority stations to diversity of viewpoint, it is recommended that the FCC take further steps to understand the impediments facing minority competitors in a separate forum.

ACKNOWLEDGEMENTS

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Table of Contents

Acknowledgements ii
List of Tables and Charts iv
Introduction 1
Summary 1
Background 3
Methodology 8
Research Findings 10
Syracuse, New York 25
Conclusion and Recommendations 26
Appendices 28

LIST OF TABLES AND CHARTS

Chart I. Average Audience Share for a Single Firm by Market Range 4
Chart II. Local Advertising Revenue Share Controlled by a Single Firm by Market Range 5
Chart III. Local Advertising Share Controlled by the Top 2 Firms by Market Range 6
Chart IV. Local Revenue Share Controlled by Four Owners by Market Range 7
Chart V. Number of Minority Owners and Average Number of Stations per Owner 11
Chart VI. Minority Privately-Owned Stations by Market Range 13
Chart VII. Minority Publicly Owned Stations by Arbitron Market Range 14
Chart VIII. Average Market Population Size 14
Chart IX. Average Household Effective Buying Income 15
Chart X. Average Local Commercial Share Privately-Owned Stations 19
Chart XI. Average Local Commercial Share Publicly Traded Stations 19
Chart XII. Average Audience Share for Stations Owned by Same Minority Broadcaster 20
Chart XIII. Average Revenue Share Private Stations 21
Chart XIV. Average Revenue Share Publicly Traded Stations 21
Chart XV. Average Revenue Share for Stations Owned by Same Minority Broadcaster 22
Chart XVI. Average Station Revenues Private Stations 22
Chart XVII. Average Station Revenues Publicly Traded Stations 23
Chart XVIII. Average Station Revenue for Stations Owned by the Same Minority Broadcaster 23
Chart XIX. Average Power Ratio of Private Stations 24
Chart XX. Average Power Ratio of Publicly Traded Stations 25
Chart XXI. Average Power Ratio of Stations Owned by Same Minority Broadcasters 25

Table A. Number of Privately Owned Minority Radio Stations. 10
Table B. Number of Stations Acquired as a Result of the AM/FM Clear Channel Merger 12
Table C. Number of Publicly-Owned Minority Radio Broadcasters 12
Table D. Signal Strength of Private AM Firms According to Frequency Range. 16
Table E. Signal Strength of Public Traded AM Firms According to Frequency Range. 16
Table F. Signal Strength of Private AM Firms According to Daytime and Nighttime Power 17
Table G. Signal Strength of Publicly Traded AM Firms According to Daytime and Nighttime Power. 17
Table H. FM Class of Service for Private Stations 18
Table I. FM Class of Service for Publicly Traded Stations 18

Local Market Ownership Consolidation and Minority Broadcasters*

INTRODUCTION

The following study was prepared in support of comments submitted by the Minority Media and Telecommunications Council, a nonprofit organization, in a proceeding of the Federal Communications Commission ("FCC" or "Commission") intended to examine the effects of increased ownership consolidation in local radio markets. The Commission's Notice of Proposed Rulemaking and Further Notice of Proposed Rule Making ("NPRM")[1] acknowledges that since relaxation of the numerical limits on local station ownership, increased ownership consolidation has significantly "transformed" the radio marketplace. The purpose of this study is to analyze and discuss the relationship between ownership consolidation and the competitive ability of minority radio broadcasters.[2]

SUMMARY

Market data provide strong evidence that patterns of ownership consolidation have exceeded the Commission's public interest safeguards. The anti-competitive effects of ownership consolidation are greatest in the smaller markets (i.e. ranked over 100) where nearly 50% of the minority owned are located. Further research, however, needs to be undertaken to determine the extent to which ownership consolidation, in combination with other factors, impedes the ability of minority stations to realize their full free-market potential.

During 1996 and 2000, firms with a dominant share of listeners and advertising revenues exceeded standards established by the Commission to safeguard competition and diversity of viewpoint. The 25% audience cap that was enforced by the Commission prior to the Telecommunications Act of 1996, was exceeded in 222 instances in 1996 and 331 instances during 2000. A firm with multiple radio outlets in the local market controlled an average of 36% of the listening audience. The data also show that the two firms in each Arbitron market with the most dominate share of advertising revenue controlled an average of 74% of the revenue share – exceeding the 70% screen currently enforced by the Commission. Together, these statistics show that numerical limits by themselves are insufficient to safeguard the public interest goals of competition and diversity.

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* This report was prepared by Kofi A. Ofori, Esq. for the Minority Media and Telecommunications Council. Mr. Ofori co-authored *Blackout: Media Ownership Concentration and the Future of Black Radio* and served as Principal Investigator for *When Being Number One is Not Enough: The Impact of Advertising Practices on Minority-Owned and Minority-Formatted Broadcasting Stations.* Mr. Ofori graduated cum laude from Tufts University in 1973 and received his J.D. degree from Boston University School of Law in 1976.

[1] *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* MM Docket 01-317, FCC 01-329, released November 9, 2001.

[2] Throughout this study the term "privately owned" minority station is used to mean those stations that are not publicly traded and in which racial/ethnic minorities own 50% or more of the equity. The term "minority-controlled" station means those that fit the definition of a privately-owned station prior to their initial public offering, that are presently publicly traded and in which a racial/ethnic minority presently serves as chief executive officer. The terms "minority station" or "minority broadcaster" are used interchangeably and refer to "privately owned" and minority-controlled" stations.

The impact of ownership consolidation on minority ownership is most apparent in terms of the decline in the number of minority owners that commenced with the passage of the 1996 Telecommunications Act. In 1991 and 1995, there were 173 minority owners. In 1997, their numbers declined to 169 and continued to decline to their present level of 149. Between 1997 and 2001, 36 minority owners (accounting for 65 stations) left the industry and an estimated 16 new minority firms entered the industry for a net loss of 20 firms. These trends are consistent with prior research that have linked relaxation of the ownership caps with decreasing numbers of minority owned broadcasters.[3]

According to performance measures that include audience share, percentage revenue share, station revenues and power ratio, minority stations consistently operate at levels that rate below majority stations. In this study, privately owned minority stations were compared to private majority stations and minority-controlled stations were compared with publicly traded majority stations. Other performance measures show that in comparison with majority owned stations, minority stations are located in markets that are more densely populated and that have higher incomes per household. However, these favorable market locations have not translated into superior station performance.

The inability of minority stations to perform on levels commensurate with their majority counterparts may be attributed to a several factors. For example, 61% of the stations owned by minorities broadcast on the technically limited AM band compared to 37% for majority stations. Secondly, very few of minority AM stations are assigned to low frequency bandwidths that have the greatest audience reach.

The performance levels of minority stations may also be attributed to the anticompetitive effects of ownership consolidation, which are most accentuated in the higher market ranges. Nearly 50% of the minority stations are located in markets ranked over 100. In addition, advertising practices that discriminate against minority-formatted programming may also adversely affect the station performance of minorities. As noted in the section on Syracuse, New York,[4] the inability to attract advertising greatly contributed to the downfall of three minority-formatted and owned stations in the Syracuse market.

Consistent with overall industry trends towards increased numbers of stations, the number of stations owned by minorities increased from 367 in 1997 to 399 in 2001. The increase in the number of minority owned stations was partly attributable to spin offs from the Clear Channel AMFM merger resulting in seven minority firms acquiring 30 radio stations.[5]

Not included in the number of minority owned stations mentioned above is the vast increase in the number of minority-controlled stations – those stations that are publicly traded but managed

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[3] Ofori et al., *Blackout? Media Ownership Consolidation and the Future of Black Radio,* Medgar Evers College Press, 1997; Ivy Planning Group, L.L.C., *Whose Spectrum is it Anyway?* A Report for the Federal Communications Commission, December 2000.

[4] See page 25.

[5] Figures in this analysis only include those stations that remained under the ownership or control of minorities until 2001. Stations that were acquired by minorities and sold to a majority firm prior to December 2001 were not included.

by racial/ethnic minorities.[6] As of December 2001, four companies (Entravision, Radio One, Radio Unica and Spanish Broadcasting System), accounting for 156 stations, fit this description. Prior to 1997 there were no minority-controlled stations. On average, the performance of these stations was superior to privately owned minority stations, but lower in performance compared to publicly traded majority stations.

While the link between second-tier station performance by minorities and ownership consolidation has not been established, it is important to emphasize that there has been a net loss of 20 minority owners during the period when consolidation intensified. It is also important to note that the anti-competitive effects of ownership consolidation are the greatest in the smaller markets, thus creating a barrier to market entry in markets where stations are otherwise more affordable. Finally, the superior performance of minority-controlled stations over private minority stations suggests that the advantage that these firms enjoy in terms of access to equity capital may have fueled station acquisition and the increased ability to compete with majority group owners. It is recommended that the question of what factors may have contributed to going public on the part of some minority broadcasters, and conversely not others, be explored in a separate forum.

BACKGROUND

In the NPRM, the Commission seeks comment on how it should achieve its public interest goals of diversity and competition within the framework of the numerical limits set forth in Section 202(b) of the Telecommunications Act of 1996 ("1996 Act").[7] Section 202(b) permits a single firm to own from five to eight stations in a local radio market depending on the number of stations in the market.[8] Since 1996, ownership consolidation in the local markets has increased substantially threatening to undermine competition and diversity.[9] As noted in a recent biennial review of the industry, the number of commercial radio stations has increased 7%, while the average number of owners per Arbitron market has decreased 22%.[10]

Prior to the present numerical limits on local ownership, proposed radio sales transactions were subject to an audience share cap of 25% in addition to numerical anticompetitive safeguards.[11] The policy stated that in markets with 15 or more radio stations:

> *...evidence that the grant of any application will result in a combined audience share exceeding 25 percent will be considered prima facie inconsistent with the public interest.*[12]

According to the Commission, the 25% cap was intended to "protect and promote a diversity of voices..."[13] Nonetheless, *in the absence of public comment*, the agency repealed the 25% cap when it adopted regulations intended to implement Section 202(b) of the 1996 Act.[14]

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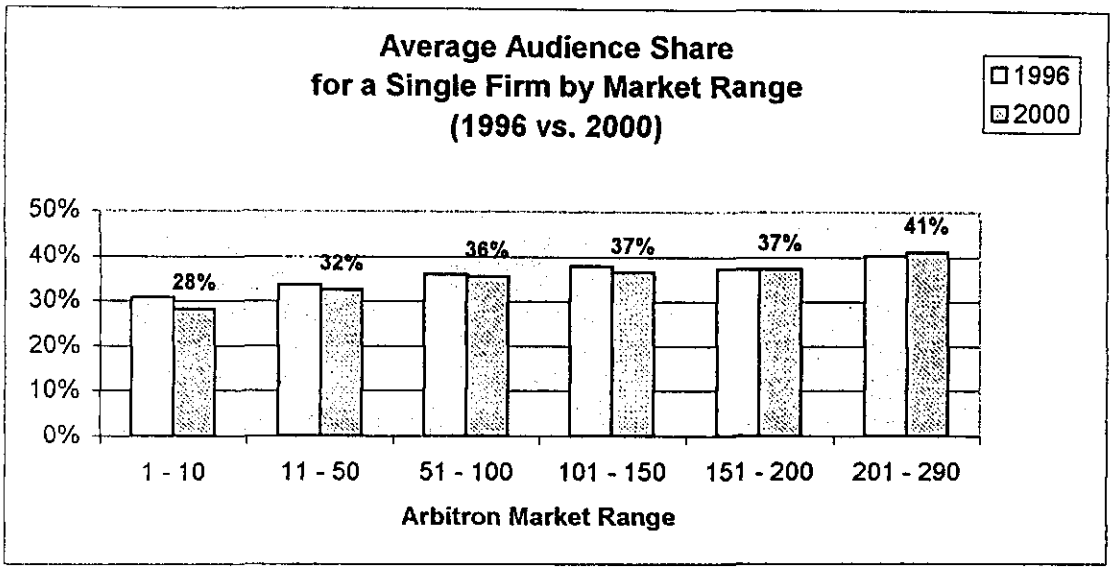
[6] Footnote 2, *supra.*
[7] NPRM paras.15, 19-21 (the Commission notes that Sections 309(a) and 310(d) of the Communications Act of 1934 requires it to issue licenses and approve the transfer of licenses only when those actions are consistent with the public interest).
[8] *See, Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications At of 1996*, 11 FCC Rcd 1268 (1996).
[9] NPRM para.17.
[10] Federal Communications Commission, *Review of the Radio Industry, 2001*, at 37.
[11] *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2776 (1992).
[12] *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6406 (1992)

Notwithstanding repeal of the 25% audience cap, the magnitude of instances in which this public interest safeguard has been exceeded suggests disregard for the Commission's public policy mandate. An examination of the 1996 Arbitron markets with 15 or more stations indicates that there were 222 cases in which a single firm through multiple stations in a local market controlled 25% or more of the audience share. In 2000, there were 331 such cases. A list of broadcasters and the audience share attributable to their combined ownership in local markets is provided in Appendices I and II. On average, these firms controlled 36% of the audience share for both 1996 and 2000. Control of audience share ranged as high as 71% in 1996 and 68% in 2000.[15]

In Chart I,[16] data for each of the Arbitron markets have been aggregated into market ranges. In 1996, the average single firm[17] controlled 31% of the audience share in markets 1 through 10. In 2000, such firms controlled 28% of the audience share for the same market range. The percentage of control over audience share increases as market rank decreases. In market range 201 through 290, the average firm controlled 40% of the audience share in 1996 and 41% of the audience share in 2000.

Chart I. Average Audience Share for a Single Firm by Market Range



After repeal of the 25% audience share cap, the Commission adopted a "50/70 screen" to determine whether proposed radio transactions are consistent with public policy favoring diversity and competition.[18] Under the current scheme the Commission "flags" transactions that would result in one firm controlling 50% or more, or two firms controlling 70% or more, of the advertising revenue in a local market. The results of this study show that the average revenue share controlled

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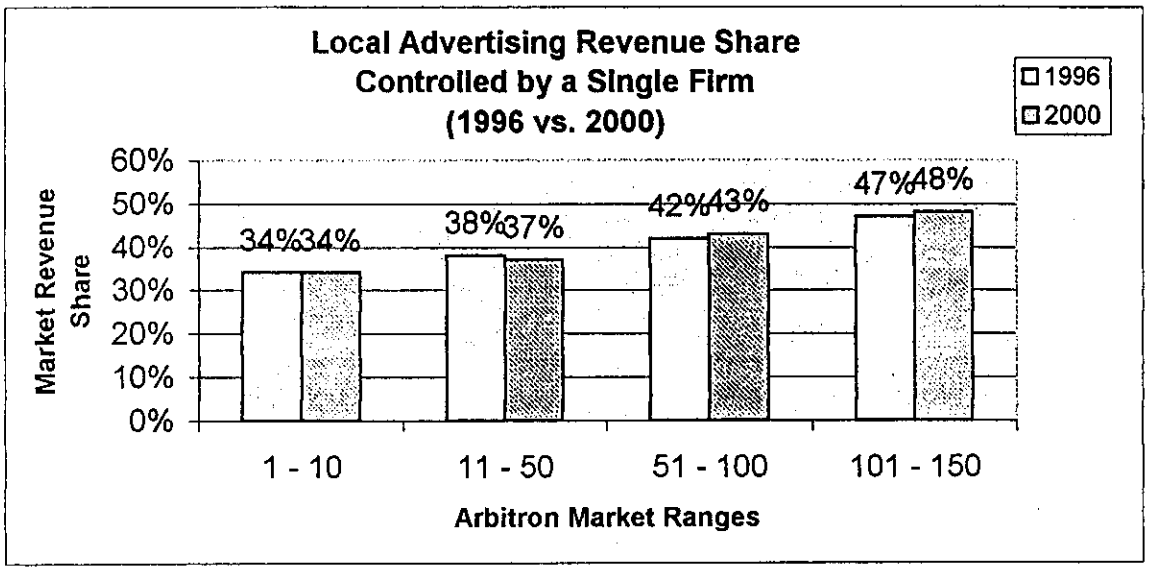
[13] Footnote 11, *supra* at 2780.
[14] NPRM para. 14.
[15] Audience share for the purpose of this study is based upon a station's Local Commercial Share averaged over four quarterly Arbitron ratings periods.
[16] All market and station data were obtained from Media Access Pro software published by BIA Research, Inc.
[17] For the purpose of Chart I, the average single firm includes only those firms that control 25% or more of the audience share in a market where there are 15 or more stations.
[18] AMFM, Inc., 15 FCC Rcd at 16066 n.10.

by the single largest firm[19] is slightly less than 50% screen and that the average revenue share controlled by the two largest firms[20] exceeds the 70% screen. These findings are consistent with those of the Commission.[21] During 1996 and 2000, a single owner controlled an average of 44% and 45%, respectively, of the advertising revenues in the Arbitron markets.[22]

Chart II aggregates advertising revenue data for each of the Arbitron markets into market ranges. In market range 1 through 10, the firm with the largest audience share in 1996 controlled an average of 34% of the local market revenue (or revenue share). The same amount of audience share was attributed to the single largest firm in 2000. For market range 101 through 150, the single largest firm controlled an average of 47% and 48% for years 1996 and 2000, respectively.

Chart II. Local Advertising Revenue Share Controlled by a Single Firm by Market Range



An analysis of the two largest firms in each of the Arbitron markets indicates that they controlled an average of 70% of the revenue share in 1996 and 74% of the revenue share in 2000. These findings were consistent with research conducted by the FCC, which indicates that the two largest firms controlled an average of 72.8% of the revenue share as of March 2001. [23]

Chart III aggregates these data for various Arbitron market ranges. For market range 1 – 10, the two largest firms controlled an average of 56% of the revenue share in 1996 and 58% of the revenue share in 2000. For markets 200 and above, the two largest firms controlled an average of 77% of the revenue share in 1996 and 87% of the revenue share in 2000.

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[19] The "single largest firm" for the purpose of this analysis means the firm that accounts for greatest amount of advertising revenue within a given Arbitron market based upon the combined revenue of the stations that it owns within that market.

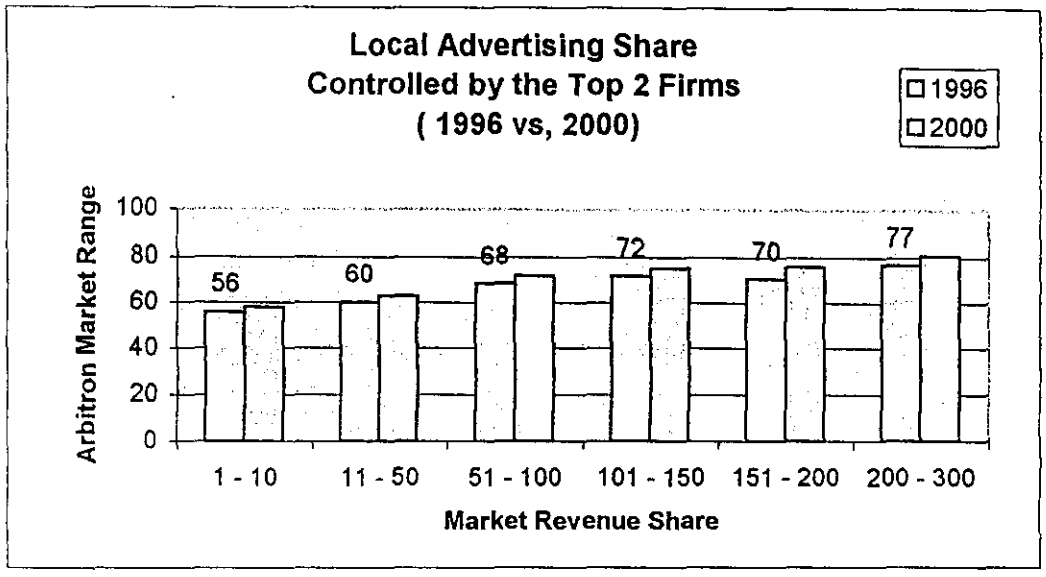
[20] The definition of the "two largest firms" is consistent with the definition for the "single largest firm" and includes the two firms with greatest amount of advertising revenue within a given Arbitron market based upon the combined revenue of the stations that they own within that market.

[21] Footnote 10, *supra*, page 6 and Chart I.

[22] The FCC estimates that a single entity controlled an average of 36% of the market revenues as of March 1996 and 46% as of March 2001. Footnote 10, *supra*, page 6 and Chart I.

[23] Footnote 10, *supra*, page 6 and Chart I.

Chart III. Local Advertising Share Controlled by the Top 2 Firms by Market Range



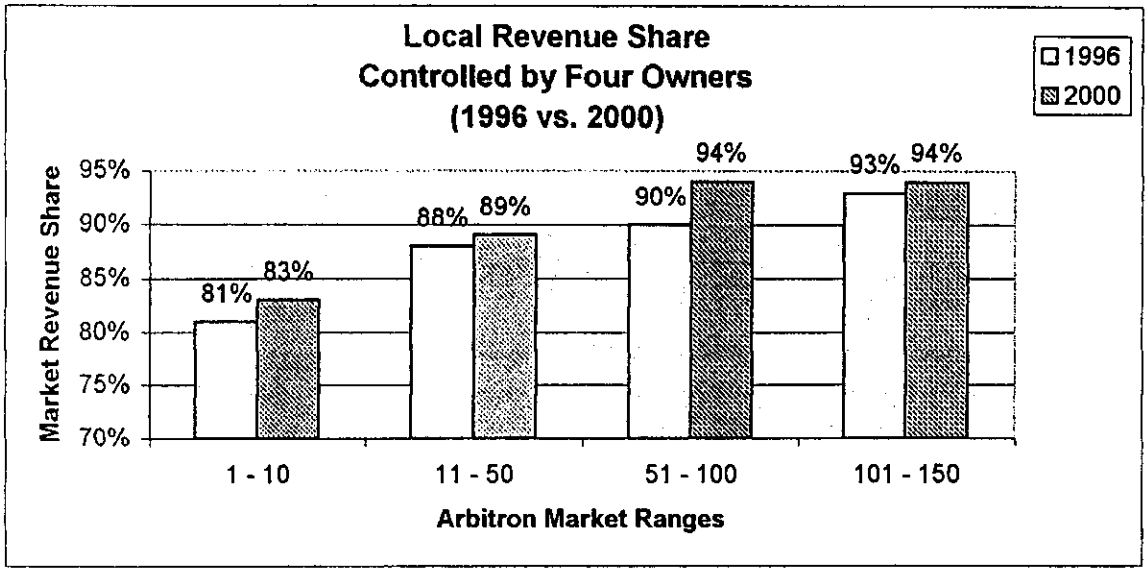
This study also examined the advertising revenue share controlled by the four largest firms.[24] The average advertising revenue share controlled by the four largest firms in each of the Arbitron markets was 91% in 1996 and 93% for the year 2000. The FCC has estimated that four firms control and average of 93% of the revenue share as of March 2001.[25]

Similar to the trend for the single largest firm control of advertising revenues becomes more concentrated as market rank decreases. Chart IV indicates that during 1996 the four largest firms controlled an average of 81% of the revenue share in markets 1 through 10. They controlled 83% of the revenue in 2000. For market ranges 101 through 150, the extent of control increased to 93% and 94% for 1996 and 2000 respectively.

[24] The definition of the "four largest firms" is consistent with the definition for the "single largest firm" and includes the four firms with greatest amount of advertising revenue within a given Arbitron market based upon the combined revenue of the stations that they own within that market.

[25] Footnote 10, *supra*, page 6 and Chart I.

Chart IV. Local Revenue Share Controlled by Four Owners by Market Range



The data show that according to two measures – the 25% audience cap and the 50/70 screen – that ownership consolidation has exceeded public interest safeguards. The data also show that the impact consolidation is greater in the smaller markets where there are generally fewer stations and smaller populations. For example, in the small Eugene-Springfield market, ranked 148 in 2001, Cumulus owns six stations and controls the greatest share of market revenues - 40%. Cumulus, McKenzie River, Clear Channel, and Coast Broadcasting collectively own 14 stations and control 97% of the market's $13,100,000 advertising revenues. The remaining 3% of advertising revenues is shared among the remaining 10 owners with 16 stations.

By comparison, in New York 40 owners share advertising revenues that totaled $823,900,000 during 2000. Infinity Broadcasting, which owns 6 stations in the New York market accounted for 35.7% of the radio ad revenues. The four largest firms, Infinity, Clear Channel, Emmis and ABC, accounted for 17 stations and controlled 81.3% of the revenues. The remaining 36 owners account for 59 stations and less than 20% of the local ad revenues.

In is within this environment of growing consolidation, with greatest impact in the smaller markets, that minority broadcasters have competed. The plight of minority owners is of particular importance given the nexus between First Amendment concerns for diversity of viewpoint and minority ownership.[26] A 1999 study conducted by Santa Clara University on behalf of the FCC found empirical evidence of the link between the racial/ethnic ownership of a station and diversity of news and public affairs programming.[27] The finding was stronger for radio than for television. In comparison to majority owned stations, the Santa Clara study found that:

- Twice as many minority owners tailor national and regional news stories to minority community concerns;

[26] The NPRM states that the policy of diversity calls for "a wide range of diverse and antagonistic opinions and interpretations." NPRM para. 30.

[27] Christine Bachen et al, Santa Clara University, *Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?* (1999).

- Four times as many minority owned radio stations air programming that is minority formatted. Sixty-six percent, or twice as many minority owners play a direct role in station management;
- Substantially more minority owned stations cover news stories different from their chief competitor;
- News and public affairs departments at minority owned stations employ a higher proportion of racial/ethnic minorities;
- A statistical regression analysis shows that as racial/ethnic diversity in the newsroom increases so does program diversity.

Based upon the Santa Clara study it appears that any analysis of the effects of local market consolidation that neglects to consider the impact upon minority ownership would be incomplete.

As further discussed in the following sections, none of the minority broadcasters succeeded in obtaining capital by means of a public offering until after 1996. As of 2001, four minority firms, that own over 150 stations, are publicly traded. However, these firms no longer satisfy the Commission's or NTIA's definition of minority ownership that requires at least 50% ownership of the voting stock to be minority owned.[28] Accordingly, the competitiveness of these publicly traded minority-controlled firms will be treated separately in the discussion below.

METHODOLOGY

In order to examine the relationship between ownership consolidation and minority radio stations the study first quantified ownership consolidation in terms of audience share and advertising share. These measures of consolidation were referred to in the Commission's NPRM.[29] Data for 1996 and 2000 were compared in order to examine consolidation trends since relaxation of the local ownership rules in 1996. The results of these analyses are reported in the Background section, above.

Next, the study compared the performance of minority stations in 1996 and 2000[30] to determine whether changes in the performance levels of these stations might be associated with ownership consolidation trends. The performance measures employed were: a) market rank and market conditions (e.g. average market disposable income); b) potential audience reach as indicated by broadcast service (AM band vs. FM band) and class of service; c) audience listening size as measured by local commercial share;[31] d) share of local market advertising as measured by local revenue share; e) station revenues; and f) ability to convert listening share into revenue as measured by the power ratio.[32] All market and station data was obtained from database software published by BIA Research, Inc.[33] All statistical analyses were performed using SPSS software.

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[28] Footnote 34, *infra*.
[29] NPRM para. 39.
[30] The years 1996 and 2000 were generally used for when data averages for an entire year was required. In certain instances, the years 1997 and 2001 were compared to utilize more up to date information.
[31] The local commercial share is a based upon the Arbitron rating (i.e. for age 12 plus, 6am to midnight) of the station divided by the total listener share for all commercial stations in the market.
[32] The power ratio is calculated by dividing a station's annual revenue by the revenues for all of the stations in the market and multiplying the result by 100. The product is the revenue share. The revenue share is divided by the local