Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)))	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

May 8, 2002

TABLE OF CONTENTS

Executive Summary

The National Association of Broadcasters ("NAB") submits these reply comments in the FCC's proceeding seeking comment on a comprehensive array of issues relating to multiple ownership of radio stations in local markets. Given the record in this proceeding, NAB believes the Commission has no statutory authority – as well as no basis grounded in diversity or competition concerns – to bypass Congress' judgments in the 1996 Telecommunications Act ("1996 Act") about ownership consolidation in local radio markets.

NAB agrees with the many commenters who concluded that the express numerical limits for local ownership of radio stations set by Congress in Section 202(b) of the 1996 Act are definitive, and that the Commission therefore lacks the authority to reduce the level of ownership consolidation explicitly allowed by Congress or to refuse to approve radio station transactions permissible under the statutory limits. But even if the Commission possessed the authority to ignore Congress' determinations about local radio ownership, those commenters urging the Commission to subject proposed radio transactions to extra-statutory "public interest" review, or to cut back on the allowable levels of radio ownership concentration, have failed to establish empirically that either diversity or competition concerns warrant such action. To the contrary, a number of studies submitted in this proceeding show that ownership consolidation in the radio marketplace (i) has benefited consumers by expanding programming diversity in local markets, and (ii) has *not* produced significant anti-competitive effects or market power for radio groups. Several commenters also agreed with NAB that Commission action cutting back on allowable levels of radio ownership at this juncture would be particularly imprudent because significant competitive imbalances would be created between "early consolidators" and other radio groups, who would then be permanently barred from competing effectively with the groups that consolidated most quickly.

Not only should the Commission at the least refrain from reducing the allowable levels of radio ownership concentration, the Commission has, as NAB and many other commenters discussed, an affirmative obligation under Section 202(h) of the 1996 Act to reexamine the radio ownership caps every two years, in light of competitive changes in the marketplace, to determine whether they remain "necessary in the public interest as the result of competition." Thus, to be in accord with congressional intent with regard to local radio ownership, the Commission must give effect to the ownership standards established in Section 202(b) of the 1996 Act, and must engage in a full review of those ownership rules biennially as Congress also directed in that Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments on the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] In the *Notice*, the Commission sought comment on a comprehensive array of issues relating to multiple ownership of radio stations in local markets. Comments were submitted in response to this *Notice* by numerous broadcasters, trade associations, and media, employee and other advocacy organizations, and they express a wide range of opinions on the Commission's proposals.

In this reply, NAB agrees with the many commenters who concluded that the express numerical limits for local ownership of radio stations set by Congress in the 1996 Telecommunications Act are definitive, and that the Commission therefore lacks the authority to reduce the level of ownership consolidation explicitly allowed by Congress or to refuse to

[1] NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

[2] *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making* in MM Docket Nos. 01-317 and 00-244, FCC 01-329 (rel. Nov. 9, 2001) ("*Notice*").

approve radio station transactions permissible under the statutory limits. But even if the Commission possessed the authority to ignore Congress' determinations about local radio ownership, those commenters urging the Commission to subject proposed radio transactions to extra-statutory "public interest" review, or to cut back on the allowable levels of radio ownership concentration, have failed to establish that either diversity or competition concerns warrant such action. To the contrary, a number of studies submitted in this proceeding show that ownership consolidation in the radio marketplace has benefited consumers by expanding programming diversity without resulting in anti-competitive market power for radio groups. NAB accordingly urges the Commission in this proceeding to comply with congressional intent both by giving effect to the local radio ownership standards established by Congress in the 1996 Telecommunications Act, and by engaging in a full review of those ownership caps biennially as Congress also directed in that Act.

I. Commenters Cited No Statutory Or Other Legal Authority That Would Justify The Commission Failing To Give Effect To The Congressionally Determined Local Radio Ownership Limitations.

In Section 202(b)(1) of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104 § 202(b)(1), 110 Stat. 56, Congress expressly established the number of radio stations that could be commonly owned in local markets of varying sizes. As NAB discussed in its initial comments (at 4-12), Congress' judgments as to what level of ownership concentration would serve the public interest are definitive, and the Commission lacks the authority to override those judgments by preventing or delaying radio transactions that are clearly permissible under Section 202(b)(1). Because "Congress has directly spoken to the precise question" of local radio ownership,[3] the Commission "must give effect to the unambiguously expressed intent of

[3] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Congress" by approving proposed radio transactions that comply with the statutory ownership standards. *Chevron*, 467 U.S. at 843. Moreover, as NAB explained in detail, the Commission cannot rely on its generalized "public interest" authority under the 1934 Communications Act to nullify the specific judgments that Congress made in Section 202(b)(1) about the acceptable levels of ownership concentration and diversity in local radio markets. As made clear by the Supreme Court and lower courts in numerous cases, it is a basic rule of statutory construction that the "[s]pecific terms" of a statute "prevail over the general in the same or another statute."[4] Beyond judicial determinations that specific statutes such as Section 202(b)(1) cannot be "controlled or nullified by a general one," *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974), the courts have more particularly established that administrative agencies cannot rely on their general authority to act in the "public interest" or "public convenience" if in doing so they ignore or contravene congressional intent embodied in a specific statutory provision.[5]

Based on this extensive examination of relevant precepts of statutory construction and applicable case law, NAB accordingly concluded that the Commission has a clear duty to "give effect" to the intent of Congress with regard to local radio ownership, as "unambiguously expressed" in Section 202(b)(1). *Chevron*, 467 U.S. at 843. A number of other commenters in this proceeding agreed with NAB's analysis, similarly concluding that the Commission lacks statutory authority to impose additional public interest requirements on proposed radio

---

[4] *Fourco Glass Co. v. Transmirra Products Corp*., 353 U.S. 222, 228-29 (1957). *Accord Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384-85 (1992); *Radzanower v. Touche Ross & Co*., 426 U.S. 148, 153 (1976); *Markair, Inc. v. Civil Aeronautics Board*, 744 F.2d 1383, 1385 (9th Cir. 1984); and other cases cited in NAB's initial comments at 7-8.

[5] *See Markair*, 744 F.2d at 1385-86; *International Brotherhood of Teamsters v. Interstate Commerce Commission*, 801 F.2d 1423, 1429-30 (D.C. Cir. 1986), *different results reached on rehearing*, 818 F.2d 87 (D.C. Cir. 1987) (decision mooted by subsequent legislation); *Regular Common Carrier Conference v. U.S*., 820 F.2d 1323, 1331 (D.C. Cir. 1987); and other cases cited in NAB's initial comments at 8-10.

transactions complying with the clear numerical limits in Section 202(b)(1), or to otherwise cut back on the level of ownership consolidation specifically permitted by Congress in that section.[6]

Several commenters contrarily contended that the Commission is not bound by the numerical ownership limits set forth in the 1996 Act, but possesses authority to consider other factors, such as diversity and competition, beyond the statutory numerical limits when evaluating proposed transactions.[7] Tellingly, however, these commenters failed to refer to case law or other legal authority explaining why the Commission should not be bound by Congress' clear establishment of permissible levels of ownership consolidation, or how the Commission can simply override Congress' express directives on the specific subject of local radio ownership.[8] Not only are these commenters apparently unable to cite relevant legal authority supporting their position, their contention that the numerical limits are not definitive and do not restrict the FCC's ability to restructure the local radio ownership rules is fundamentally illogical. If the FCC's general public interest authority allowed it to bypass the congressionally established radio ownership standards, why would Congress have even bothered to adopt these numerical caps? Certainly the Commission's public interest authority should not be interpreted so broadly as to

---

[6] *See, e.g.,* Comments of MBC Grand Broadcasting, Inc. at 3-6; Radio One, Inc. at 4; Cumulus Media Inc. at 3-4; Entercom Communications Corp. at 2-3; Clear Channel Communications, Inc. at 4-10; Nassau Broadcasting II, L.L.C. at 3-5; Cox Radio, Inc. at 3-4.

[7] *See, e.g.,* Comments of Dick Broadcasting Co. at 6; Idaho Wireless Corp. at 6; North American Broadcasting Co., Inc. at 14-15; American Women in Radio and Television ("AWRT") at 3-5; National Association of Black Owned Broadcasters ("NABOB") at 12-13.

[8] Certainly none of these commenters mentioned any of the cases discussed in NAB's comments, or even attempted to explain why these and other authorities establishing the precedence of specific statutory provisions over general ones should not apply here.

make the ownership caps set forth in Section 202(b)(1) essentially superfluous.[9] Moreover, the fact that Congress did not explicitly provide that the Commission should not utilize its general public interest authority to override Section 202(b)(1)'s ownership standards does not mean that these standards are only suggestions that the Commission may contravene if it wishes.[10] As the courts have made clear, Congress is not obliged to "expressly *negate* the existence of a claimed administrative power" by writing statutes in "'thou shalt not' terms."[11] Thus, the Commission is not free to treat the statutory radio ownership caps as mere suggestions just because Section 202(b)(1) did not expressly state that the Commission "shall not" claim power under its general public interest authority to override those statutory standards.

In sum, no commenter has cited any case law or other legal authority that would justify the Commission failing to give full effect to the congressionally determined local radio ownership standards set forth in Section 202(b)(1). The record is accordingly clear that the Commission lacks the authority to prevent or delay radio transactions that are permissible under Section 202(b)(1) by subjecting them to any extra-statutory diversity or competition review, or by otherwise cutting back on the level of ownership consolidation expressly permitted by

---

[9] *See, e.g., Hohn v. U.S.*, 118 S.Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998) (stating reluctance to adopt a construction of a statute making another statutory provision superfluous).

[10] *See* Comments of Office of Communication, Inc. of the United Church of Christ ("UCC") at 25-26 (arguing that the Commission may engage in further public interest review of radio transactions complying with Section 202(b) because that section did not explicitly "foreclose further Commission review regarding competitive concerns based on audience share or revenue within a specific market").

[11] *Railway Labor Executives' Ass'n v. National Mediation Bd*., 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (emphasis in original). Indeed, "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id*. (emphasis in original).

Congress in that section. The Commission must therefore reject the various proposals made by commenters for extra-statutory reviews of proposed radio mergers that would in practice cut back on the level of allowable ownership consolidation.[12] Indeed, the Commission, as a number of commenters discussed, bears an affirmative obligation to reexamine the existing radio ownership caps biennially, in light of competitive changes in the marketplace, to determine whether their retention even continues to serve the public interest. *See* Pub. L. No. 104-104 § 202(h), 110 Stat. 56 (1996) (directing FCC to review all of its broadcast ownership rules every two years to determine if they "are necessary in the public interest as the result of competition").[13]

II. The Record Fails To Provide A Basis That Would Justify Any Attempt To Reduce Ownership Consolidation In The Radio Marketplace.

Even if the Commission possessed the authority to ignore Congress' determinations about local radio ownership, the record fails to provide any empirical basis – whether diversity- or competition-related – that would warrant an effort by the Commission to cut back on the level of ownership consolidation in the radio marketplace. The courts have made clear that, to justify regulation, the Commission must, in the first instance, demonstrate the existence of a problem, and then show that its response will directly ameliorate that problem.[14] As discussed below, the

---

[12] *See, e.g.,* Comments of North American Broadcasting at 16 (calling for use of a supplementary "concentration factor" in evaluating radio station combinations); NABOB at 4-5 (FCC should adopt a permanent 40/60 screen for flagging radio mergers); UCC at 27 (FCC should use a 35/60 screen, which would look at both local audience share and radio advertising revenue share, for evaluating radio mergers).

[13] *See, e.g.*, Comments of MBC Grand Broadcasting at 7-8; Cox Radio at 7-9; Radio One at 4-5; Cumulus Media at 16-17; Clear Channel Communications at 10-11; Nassau Broadcasting at 5.

[14] *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985) (where both the existence of a problem and the "beneficial effects" of an agency's response to it are "susceptible of some empirical demonstration, the agency must do something more than merely posit the existence" of the problem); *ALLTEL Corporation v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988)

record here cannot provide the empirical basis for more restrictive Commission regulation of radio ownership because it fails to show the existence of any diversity- or competition-related problems that would be ameliorated by cutting back on the levels of ownership consolidation in the radio market.

A. The Record Does Not Establish by Empirical Evidence that Consolidation Has Adversely Affected Diversity in the Radio Marketplace.

As an initial matter, NAB observes that commenters calling for FCC action to reduce existing and/or prevent further ownership consolidation generally believe that the diversity of radio service provided to the public has declined and that radio service was indeed "better" at some point in the past.[15] Indeed, one commenter explicitly harkened back to "the Golden Age of Radio," when the public enjoyed a variety of "provoking, informational and inspirational programming," evidently in comparison to today's entertainment-oriented programming.[16] NAB submits, however, that claims of a significant decline in the quality of radio programming cannot

---

(finding FCC rule on costs of local exchange carriers to be arbitrary and capricious because it relied "on too many questionable assumptions" and because the FCC had made no showing that the "abuses" that the rule purportedly addressed did in fact exist); *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (court invalidated a FCC criteria for licensing broadcast applicants because the Commission had "no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it").

[15] *See, e.g.*, Comments of American Federation of Television and Radio Artists ("AFTRA") at 3, 5; Minority Media and Telecommunications Council ("MMTC") at 15-23; UCC at 6-8; NABOB at 7.

[16] Comments of MMTC at 122. This commenter later noted, however, that this "Golden Age" was "before format narrowcasting and before television." *Id*. at 138. NAB believes that no useful comparison can be drawn between the radio industry of today, which faces competition from a variety of electronic media, and the "Golden Age" of radio pre-dating the advent of television. Clearly before the development of television when radio enjoyed a monopoly as the only electronic mass medium, the radio industry did offer a wider variety of programming, including, for example, dramas and soap operas. In contrast, consumers today have access to both entertainment programming and informational programming through a variety of other media, and radio has had to adapt to these changed competitive conditions by targeting its programming to a much greater degree than in the past.

serve as the basis for FCC action against ownership consolidation unless these commenters can demonstrate that radio service was somehow measurably more diverse or otherwise "better" in the past than today, that consolidation was the cause of this demonstrable decline, and that preventing additional consolidation would, at the least, halt any further deterioration in radio service. As discussed in more detail below, these commenters do not even agree as to the primary cause of the alleged decline in radio service, and have not documented with clear empirical evidence that any such decline has in fact occurred.

For example, while most commenters asserted that the post-1996 consolidation caused the alleged decline in diversity of radio service, one commenter contended that the FCC's deregulation of radio programming in 1981 was the more likely culprit in the claimed decline of diversity, especially viewpoint diversity. *See* Comments of MMTC at 15-23. Indeed, MMTC asserted that, due to programming deregulation, most radio stations do not transmit "many viewpoints at all." *Id*. at 16. As a factual matter, NAB disputes this contention that programming deregulation in the 1980's has caused a decline in the expression of viewpoints on the radio. Studies discussed in NAB's initial comments (at 18-19) in fact show that there was an "explosion in news, talk, and public affairs formats, on both AM and FM," between 1975 and 1995. "The share of informational formats on FM increased from 4.64 percent in 1975 to 7.39 percent in 1995, but the more dramatic increase was in the AM band where the share of informational programming went from 4.29 percent to 27.60 percent."[17] A very recent report

[17] Thomas W. Hazlett and David W. Sosa, *Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*, Cato Policy Analysis No. 270 at 5, 16 (March 1997). There was a "[p]articularly impressive . . . increase – 20.89 percentage points – in the AM informational share between 1987 and 1995" (that is, after the FCC decided to no longer enforce the Fairness Doctrine). *Id*. at 16. *Accord* Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine A "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. Legal Stud. 279 (1997).

moreover states that 1,133 radio stations are programmed with a "news/talk" format, making it the second-most popular programming format in the country. *R&R Today* at 2 (April 18, 2002).

Given this remarkable expansion in the number of stations with informational formats, it appears inaccurate to say that, as a result of programming deregulation, radio stations today simply do not transmit "many viewpoints at all." Comments of MMTC at 16. Indeed, this "expansion of the number of all-news/all-talk format stations" would "tend to *support* the arguments of deregulation that the public's interest in news and public-affairs programming is being served, if not by every station, at least by stations in many markets."[18] Finally, NAB observes that, even if there had been a decline in viewpoint diversity *resulting from the FCC's deregulation of programming* in the 1980's, this would not necessarily support any changes to the structural ownership rules currently applicable to radio. After all, any solution offered by the Commission to a perceived problem needs to be directly responsive to that problem and likely to ameliorate it in a cost-effective manner.[19]

---

[18] Benjamin J. Bates and Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. Media Econ. 19, 28 (1999) (emphasis added). And as the Commission and the courts have previously correctly recognized, it is not necessary that every radio station broadcast a wide variety of programming, so long as different types of programming (including informational) are available to consumers on a market basis. *See, e.g., Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977-79 (1981) (due to the growth of radio and other informational and entertainment services, it is no longer necessary for government to require "every radio station to broadcast a wide variety of different types of programming" because a "full complement of programming services" will be available through "the totality of stations" in a market); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983) (audiences "benefit by the increased diversity of programs" offered by the growing number of radio outlets "across the market").

[19] *See, e.g., ALLTEL Corp*., 838 F.2d at 560 (FCC's "facially plausible" claim that its rule on the costs of local exchange carriers prevented certain abuses ultimately failed to justify the rule because there was "no showing that such abuse" did in fact exist and "no showing that the rule target[ed] companies engaged in such abuse"); T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 309 (1994) ("[I]t is not sufficient for a regulation to articulate

Most commenters calling for more restrictive FCC regulation of radio ownership blame post-1996 consolidation for reducing diversity in local markets. *See, e.g.*, Comments of UCC at 2, 6-8; AFTRA at 3, 5; NABOB at 7. For instance, UCC asserted that consolidation has caused the decline of diverse local programming, claiming that "consolidation in local radio markets often results in nothing more than programming that is piped in from larger cities." Comments of UCC at 6-8. To support this contention, UCC cited only a single example of a group owner in Boise, Idaho and the lack of locally-originated programming on a *single station* owned by that group. Certainly relying on the example of a single station in a single market (or even a handful of stations in a few markets) is not sufficient to establish empirically that consolidation has resulted in less diverse local programming. But UCC has failed to prove that consolidation has caused a decline in diverse local programming even in the Boise market because it neglected to compare the amount of locally-originated programming offered on stations in Boise today with the amount of such programming offered prior to 1996. Thus, while it may be true that the Boise radio station UCC discussed does not currently air large amounts of locally-originated programming, the record does not show whether that station (or others in Boise) offered significantly greater amounts of local programming prior to purchase by the group owner.

Other commenters decrying the ill effects of consolidation on diversity have similarly failed to conduct a rigorous comparison of radio programming in multiple markets before and after 1996, or to establish empirically a causal connection (or even a correlation) between increased consolidation and a claimed deleterious effect on programming, such as a decline in locally-originated programming. Indeed, the record provides substantial anecdotal evidence that consolidation has led to improved local programming, perhaps especially in smaller markets

---

desirable goals. The regulation must promise to materially advance those goals, and whatever costs it imposes must be outweighed by the benefits the regulation creates.").

where standalone stations previously lacked the resources to air significant local programming.[20] As explained by one commenter, investments in higher quality products, including local/live programming, increased use of listener-driven market research, and upgraded equipment and facilities are "justifiable only if the costs can be spread over a sufficient number of stations in the same local market."[21]

Beyond the anecdotal evidence showing that consolidation had led to improvements in local programming, commenters also provided empirical studies confirming that "there is a statistically significant positive relationship between the level of local ownership consolidation

---

[20] For example, prior to consolidation, six stations now owned by Cumulus Media in Florence, South Carolina "were all programmed exclusively with non-local programming from a satellite feed." Comments of Cumulus Media at 8. But now "all of the Cumulus stations in Florence have live/local programming, including local news updates" and other features such as community calendars. *Id*. at 9. Similarly, after acquiring a group of four stations in the Rockford, Illinois market, Cumulus "improved the quality of the radio product by adding morning newscasts on all the FM stations," which are "produced locally." *Id*. at 13. Clear Channel also increased the amount of local news programming and added local talk shows to stations it purchased in the Syracuse market. *See* Comments of Clear Channel, Exhibit Four at 6-8. Infinity stated that its resources as a group radio owner allowed it to improve "local programming and maintain a full local news staff on a station [in Hartford] once populated almost solely with national syndicated programs." Comments of Viacom, Inc. at 62. West Virginia Radio similarly stated that its ownership of a group of stations in Charleston, WV has allowed it to provide over seven hours per day of "locally produced" news and public affairs programming on its news/talk station. Comments of West Virginia Radio Corp. at 26-27.

[21] Comments of Cumulus Media at 6. Other commenters similarly discussed how the efficiencies resulting from group ownership have produced consumer benefits. *See, e.g*., Comments of Clear Channel, Exhibit Four at 10-11 (in Syracuse, New York market, cost savings realized through "cluster ownership" were reinvested in improved technical facilities and studio equipment, in raising salaries to attract more talented, experienced employees to Syracuse, and in improving programming by, *inter alia*, launching the first successful urban format in the market); Radio One at 11 ("economic synergies associated with clustering" are necessary for it to be able to serve "diverse array of African-American citizens"); Viacom at 61-63 (the "economic cushion" resulting from the cost savings derived from consolidating administrative functions and sharing common sales forces and studio facilities has allowed Infinity to produce higher quality programming, develop local talent, and to provide quality news and information to citizens in the event of an emergency).

and the level of local format diversity." Comments of NAB, Attachment A, BIA Financial Network, *Has Format Diversity Continued to Increase?* at 17 (March 2002) ("BIA Diversity Study") (examining all Arbitron surveyed markets). Another new study examining 240 Arbitron markets in 1993, 1997 and 2001 similarly found "a positive and significant relationship between consolidation and format variety." Statement of Professor Jerry A. Hausman at 13, attached as Exhibit Three to Comments of Clear Channel ("Hausman Study I").[22] It is now beyond dispute that "a decrease in the number of owners in a market leads to an increase" in programming diversity, *id*. at 14, and that this "increased concentration" therefore enhances "listener welfare." Berry and Waldfogel at 18.[23]

Despite the clear evidence showing that consumers have benefited from the enhanced programming diversity produced by ownership consolidation, commenters nonetheless contended that consolidation is inimical to the public interest because it causes a decline in viewpoint diversity. For example, one commenter asserted, without evidence, that a single group

[22] These studies confirmed previous similar studies that found that "increased concentration caused an increase in available programming variety." Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting*, National Bureau of Economic Research, Working Paper 7080 at 25 (April 1999).

[23] UCC's contention that consolidation "may actually inhibit the growth of new formats" is not supported by the record. Comments of UCC at 17. UCC looked at only 17 Arbitron markets, and evidently assumed that consolidation may inhibit the growth of new formats merely because the number of formats offered in those markets increased between 1993 and 2001 to a lesser degree than the number of stations in those markets. However, the fact that the number of stations grew faster between 1993 and 2001 than the number of formats in 17 markets does not show that growth in the number of formats was somehow inhibited by another factor, such as increased consolidation. UCC has identified no logical reason why an increase in the number of stations in a market should necessarily translate into an equivalent increase in the number of programming formats offered in that market. Moreover, multiple empirical studies examining the effects of ownership consolidation have included regression analyses demonstrating a positive, causal relationship between consolidation and format diversity. *See* BIA Diversity Study at 13-17; Hausman Study I at 13-14; Berry and Waldfogel at 17-18. UCC's assertions should accordingly be disregarded.

owner "is incapable of providing the American public 'diverse and antagonistic sources of information,'" and that "a single owner can never be relied upon to provide programming antagonistic to the views or interests of that owner." Comments of NABOB at 13. *See also* Comments of AWRT at 7 (ownership diversity "can ensure that more 'diverse and antagonistic opinions and interpretations' will be aired"). As discussed in NAB's comments (at 25-26), a recent study has, to the contrary, demonstrated -- based on data rather than mere assertion -- that commonly-owned media properties are capable of providing "a wealth of 'diverse and antagonistic' information."[24] This study also noted that the commonly-owned media entities being examined did *not* exhibit a coordinated or consistent "slant" in their coverage of the presidential campaign favoring the candidate more supportive of their position on media ownership deregulation. Pritchard Study at 38, 49. The Pritchard Study therefore directly refutes the contention that consolidated media are "incapable" of providing diverse viewpoints on issues of public concern, including those contrary to the views of the group owner.

The fact that consolidated media groups are fully capable of providing diverse points of view receives additional support from the record in this proceeding. A number of station groups stated that decisions about news and public affairs programming are not made centrally by company management, but by local station personnel, who are free to make all relevant determinations about the content of informational programming aired on local stations. *See, e.g.*, Comments of Clear Channel at 15-16; Viacom at 31-32; Hispanic Broadcasting Corp. at 5-6.

---

[24] David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership,* 54 Fed. Comm. L.J. 31, 49 (2001) ("Pritchard Study"). This study examined the diversity of information and viewpoints regarding the 2000 presidential campaign offered by commonly owned newspaper/broadcast combinations in three markets, and "found substantial diversity in the news and commentary offered by each of the three newspaper/broadcast combinations." *Id*. at 33. In fact, the Pritchard Study "found no evidence of ownership influence on, or control of, news coverage" of the presidential campaign in the cross-owned media properties in the three markets. *Id*. at 49.

Because radio groups leave decisions about the selection and airing of local and national news to individual station and news managers, rather than imposing a uniform "company line" on informational programming, radio groups are not "incapable" of providing diverse viewpoints to listeners. *See* Comments of Hispanic Broadcasting at 5-6 (news/public affairs directors at different Hispanic-owned stations do not consult with each other about news on their stations even when they are located in the same market).

Moreover, as NAB and other commenters discussed, consumers today can access a continually expanding variety of mass media outlets for entertainment, information and opinion, and do not rely solely – or even primarily – on radio as a source of news and information. *See, e.g.,* Comments of NAB at 26-28; Clear Channel at 16-17; Viacom at 13-19. A new empirical study examining outlet diversity in five communities over a 60-year period also found that the public in markets of all sizes has enjoyed continually increasing access to local media outlets throughout this period and that the rate of increase in the number of local outlets actually accelerated after 1996. *See* Comments of Viacom, Appendix A, David Pritchard, *The Expansion of Diversity: A Longitudinal Study of Local Media Outlets in Five American Communities* at 22. Given the evidence of a diverse (and competitive) mass media marketplace where consumers have access to a growing variety of outlets, ownership consolidation in the radio industry could not be seen as "strictly limit[ing] listener access to diverse and antagonistic news programming." Comments of UCC at 28.

B. The Record Does Not Establish by Empirical Evidence that Consolidation Has Caused Significant Competitive Harm in the Radio Marketplace.

A number of commenters contended that the recent consolidation has adversely affected competition in the radio marketplace, especially in the market for advertising. *See, e.g.*, Comments of AFTRA at 8-10; North American Broadcasting at 7-8; NABOB at 10-11; UCC at

18-20. NAB observes, however, that these competitive concerns are based on two significant, and generally unsupported, assumptions about consolidation, competition and the advertising market.

First, commenters expressing concern about reduced competition allegedly caused by consolidation have simply assumed – without discussion, let alone evidence – that the narrow radio advertising market is the relevant market for assessing competition in, and the effects of consolidation on, advertising. *See, e.g.*, Comments of AFTRA at 9; North American Broadcasting at 7-8; UCC at 27. But as NAB pointed out in its comments (at 30-33), the Commission has previously recognized that the appropriate advertising market is broader and that radio stations compete with non-radio outlets, including broadcast and cable television, "for audiences and advertising revenues."[25] Other commenters in this proceeding similarly contended that the advertising product market should not be limited to radio,[26] and several studies submitted for, or discussed in, the record also concluded that radio advertising is not a separate market because television and newspapers (at the least) compete with radio for advertising dollars and because television and newspaper advertising are significant substitutes for radio advertising.[27]

---

[25] *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2757 (1992), *recon. granted in part*, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992) ("*1992 Radio Ownership Order*").

[26] *See, e.g.*, Comments of MBC Grand Broadcasting at 11; West Virginia Radio at 19-20.

[27] *See* Hausman Study I at 10-11 (concluding that study refutes "claims that radio is a separate market" because the results show that radio, television and newspaper advertising "are significant substitutes for each other"); Comments of Clear Channel, Exhibit Six, Statement of Professor Jerry A. Hausman at 2-3 ("Hausman Study II") (relevant antitrust product market should include at least radio, television and newspaper advertising, as empirical results demonstrate that "the prices of TV advertising and newspaper advertising vary with the price of radio advertising, and that TV and newspaper advertising are substitutes for radio advertising"); William Kerr, Ph.D., Capital Economics, *Comments of the National Association of Broadcasters on the Advertising Product Market* at 5 (submitted to Dept. of Justice, Antitrust Division, May

Although precisely defining the relevant product market for advertising is admittedly a challenging undertaking, "the Commission," given the record in this proceeding, "lacks an adequate evidentiary basis to conclude that radio advertising alone qualifies" as the appropriate product market. Comments of Cumulus Media at 24.

Second, while ownership concentration has clearly increased since 1996, commenters critical of consolidation have been content to submit evidence about this increased concentration without then demonstrating that it has produced significant anti-competitive effects or market power for radio groups. For example, UCC submitted showings of an increase in ownership concentration (as measured by audience share) in 33 radio markets, and then baldly concluded that the "high levels of concentration in almost all of the radio markets studied" demonstrate "serious competitive concerns." Comments of UCC at 20. UCC reached this conclusion, however, without any effort to show that these increases have actually produced significant anti-competitive effects in the marketplace, or resulted in anti-competitive market power for radio groups. Other commenters have, moreover, made competition-related assertions that do not seem directly relevant to the Commission's concerns in this proceeding.[28]

15, 1996) (concluding that radio stations "compete[] in a product market that includes . . . a host of other media," including broadcast and cable television and newspapers). NAB's comments (at 32) also cited several academic studies concluding that various media are substitutable for advertising purposes.

[28] For example, AFTRA contended that "consolidation has created an anti-competitive market in music" and that radio group owners have "achieved overwhelming power and control over the music industry in general." Comments of AFTRA at 12. Besides the brief and anecdotal nature of AFTRA's documentation of this allegedly "overwhelming" power of radio station owners over the music industry, it remains unclear why the FCC should be concerned about the relative "balance of power" between the music industry and the radio industry. Certainly complaints by the music industry that it has lost influence vis-à-vis radio station owners do not on their face warrant any FCC intervention. Generalized complaints (such as those in Dick Broadcasting Co.'s comments at 2-3) that consolidation has "led to competitive and 'marketability' difficulties" for standalone stations should also not concern the Commission to the extent that these difficulties arise from the "efficiencies" that "radio station groups achieve . . . relative to

The failure of commenters such as UCC to provide evidence demonstrating that recent increases in ownership concentration have had deleterious marketplace effects appears particularly striking because other commenters submitted studies showing that consolidation has not caused any significant increase in radio advertising rates and may in fact have resulted in lower prices for advertisers.[29] Commenters also suggested that advertisers have benefited from consolidation because they have opportunities for more efficient "one-stop shopping," better customized service and targeted marketing packages. *See, e.g.*, Comments of Viacom at 67; Cumulus Media at 6. Given this lack of evidence in the record that increased ownership concentration has caused significantly higher radio advertising rates or other tangible harm in the marketplace, the Commission simply has no basis upon which to impose further restrictions on radio ownership in local markets. Indeed, the case for any Commission action to address

---

stand-alone stations." R.B. Ekelund, Jr., G.S. Ford, and T. Koutsky, *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration,* 43 J. Law & Econ. 157, 181 (2000). After all, it was these "efficiencies" resulting from consolidation that led the Commission previously to conclude that loosening the local radio ownership rules would serve the public interest. *See 1992 Radio Ownership Orde*r, 7 FCC Rcd at 2760-61. The Commission would have a proper basis for further restricting radio ownership consolidation only if any marketplace difficulties faced by standalone stations were shown to result from the exercise of anti-competitive market power by station groups.

[29] *See* Comments of Cumulus Media, Attachment B, Stephen Stockum, *The Pricing of Radio Advertising: Does Market Concentration Matter?* at 3 (study of over 3000 radio stations concluded that "high levels of market concentration among local radio stations do not result in higher prices," but "actually results in *lower* prices for advertisers, most likely because of substantial efficiencies from local multi-station ownership") (emphasis in original); Hausman Study I at 2-7 (study of radio advertising prices in 37 Arbitron markets concluded that radio ownership consolidation did not lead to higher advertising prices, but in fact found that the average change in radio advertising prices was lower in markets with greater increases in concentration). *See also* Ekelund, *et al., Market Power in Radio Markets* at 181 (empirical study concluded that group ownership led to increased efficiency "without a corresponding increase in market power" of radio broadcasters generally).

concentration in the radio industry appears particularly weak because radio is the *least* consolidated media sector.[30]

Furthermore, as NAB discussed in detail in its initial comments (at 47-48), reducing the number of stations permitted to be commonly owned at this juncture would actually create new significant competition and fairness problems. In light of the consolidation in the radio industry that has already occurred, permanent competitive imbalances would be created in many markets if the Commission were to cut back on the level of permissible future consolidation, as smaller station groups would be prevented from obtaining as many stations as currently controlled by those groups that have already consolidated to the maximum extent possible under existing rules. A number of commenters agreed that this result would be unfair to radio station owners who were not the "early consolidators," and would fail to serve the FCC's interest in promoting vigorous competition in the radio industry.[31]

Finally, NAB notes that several commenters have expressed concern in this proceeding about the levels of minority ownership of radio stations. *See, e.g.*, Comments of NABOB at 3-4;

[30] *See* Comments of NAB at 42-43 and Attachment E (citing Wachovia Securities report that the top ten owners in the radio industry combined earn only 44% of the industry's revenues, making radio less consolidated than other media sectors).

[31] *See, e.g*., Comments of Radio One at 3 ("minority and mid-sized radio station owners" should be permitted to achieve the maximum level of group ownership that other group owners have already achieved); Cox Radio at 12-13 (if FCC were to further restrict consolidation, smaller group owners would not be permitted to achieve the "same economic efficiencies" that other groups already enjoy, and would be prevented from "catching up" with these larger groups); West Virginia Radio at 26 (arguing that any change to ownership rules now would "leave the large combinations untouched" and would result in "uneven treatment" of other broadcasters "trying to remain competitive by taking advantage of the economies of scale offered by consolidation"). And, as discussed in NAB's comments (at 50), the FCC should not address this problem of "uneven treatment" by mandating the divestiture of any existing combinations. *See Notice of Proposed Rulemaking* in MM Docket No. 00-244, FCC 00-427 at ¶ 13 (rel. Dec. 13, 2000) (in pending proceeding on radio market definitions, FCC stated there is "no reason to disturb" existing ownership combinations that "were granted as being in the public interest and in accordance with applicable Commission rules and policies").

UCC at 5-6; MMTC at 61. These commenters discussed, *inter alia*, the decline in the number of separate minority owners since 1996, although, as has also been noted, the number of *stations* owned or controlled by minorities has increased in recent years.[32] NAB takes this opportunity to reiterate its strong support for reinstatement of a tax certificate program that would give companies tax credits if they sold broadcast properties to minorities. NAB regards the Commission's previous tax certificate program as one of the more effective policies in promoting minority ownership of broadcast outlets, and pledges to continue to work for reinstatement of a similar program.

III. Conclusion.

For all the reasons set forth above, the Commission must, at the very least, refrain from taking any action that would cut back on the level of permissible ownership consolidation in local radio markets. Beyond lacking the statutory authority to reduce the level of local ownership consolidation explicitly allowed by Congress or to refuse to approve proposed transactions permissible under Section 202(b)(1), the record in this proceeding provides no diversity- or competition-related basis warranting any further restrictions by the Commission on radio ownership. It would be particularly imprudent for the Commission to attempt to cut back on allowable levels of radio ownership at this juncture because such action would create permanent competitive imbalances between "early consolidators" and other radio owners, who would then be permanently barred from competing effectively with the groups that consolidated most quickly.

---

[32] *See* National Telecommunications and Information Administration, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* at 38 (Dec. 2000) (reporting that "[a]ll minority groups have increased their radio ownership since 1998"); Kofi A. Ofori, *Radio Local Market Consolidation & Minority Ownership* at 10-12, Attached as Appendix One to Comments of MMTC (showing increase in the number of minority owned and controlled stations since 1997).

Not only should the Commission refrain from cutting back on the allowable levels of radio ownership concentration, the Commission has, as many commenters discussed, an affirmative obligation under Section 202(h) to reexamine the radio ownership caps every two years, in light of competitive changes in the marketplace, to determine whether their retention continues to serve the public interest. Thus, to be in accord with congressional intent, the Commission must give effect to the local radio ownership standards established in Section 202(b)(1) of the 1996 Act, and must engage in a full review of those ownership rules biennially as Congress also directed in that Act. NAB urges the Commission to comply fully with congressional intent in this proceeding.

Respectively submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Jerianne Timmerman

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

May 8, 2002

CERTIFICATE OF SERVICE

I, Patricia Jones, Legal Secretary for the National Association of Broadcasters, hereby certify that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 8th day of May, 2002, by first class mail, postage prepaid to the following:

David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street, NW #BG-54
Washington, DC 20010

Christopher R. Day
Angela J. Campbell
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Suite 312
Washington, DC 20001

James L. Winston
Rubin, Winston, Diercks, Harris &
Cooke, L.L.P.
1155 Connecticut Avenue, NW
Suite 600
Washington, DC 20036

Barry D. Umansky
Thompson Hine L.L.P.
1920 N Street, NW
Suite 800
Washington, DC 20036-1600

Thomas R. Carpenter
Ann Chaitovitz
American Federation of Television and
Radio Artists
260 Madison Avenue
7th Floor
New York, New York 10016

Shelley Sadowsky
American Women in Radio and Television
c/o Katten Muchen Zavis Rosenman
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201

s/ Patricia Jones

Patricia Jones