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

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
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

COMMENTS OF
AMERICAN WOMEN IN RADIO AND TELEVISION, INC.

AMERICAN WOMEN IN RADIO AND TELEVISION, INC. ("AWRT") hereby submits comments in response to the Notice of Proposed Rulemaking ("NPRM"), FCC –02-249, released September 23, 2002, in the above-referenced proceeding.

In this NPRM, the Commission seeks comment on whether to retain, modify or eliminate several of its broadcast ownership rules, including the Local TV Multiple Ownership Rule, the Radio/TV Cross-Ownership Rule, the Newspaper/Broadcast Cross-Ownership Rule, the Local Radio Ownership Rule, the National Television Cap and Dual Network Rule.[1] AWRT believes that any modification or elimination of these rules and policies, particularly the rules and policies

[1] 47 C.F.R. §§ 73.3555(b), 73.3555(c), 73.3555(d), 73.3555(a), 73.3555(e) and, 73.658(g), respectively.

focusing on local ownership, must be guided by the public interest values of promoting "viewpoint" and "source" diversity and increasing competition in local markets. Any rule or policy change implemented by the Commission should encourage acquisition opportunities in local markets for independent companies, particularly those owned by women. For the Commission to allow greater concentration of control in local markets, be it in either the local radio or local television markets, without also adopting a program(s) to promote acquisition opportunities for women-owned companies, is contrary to the overriding public interest policy of maintaining robust and diverse local radio and television industries.

I. INTRODUCTION.

AWRT is a national, non-profit organization dedicated to advancing the impact of women in electronic media and allied fields through educating, advocating and acting as a resource for its members and the industry. AWRT members are professional men and women employed in radio, television, cable, advertising and closely allied fields. For more than 50 years, AWRT's mission has been to promote the entry and advancement of women in management and ownership of broadcast companies and related businesses. As an integral part of its support of women's advancement in the broadcasting industry, AWRT has actively participated in numerous Commission proceedings that have addressed ownership and employment issues.[2] Accordingly, AWRT participates in this proceeding because of its critical

[2] Indeed, AWRT actively participated in the Commission's predecessor rulemaking proceeding regarding local radio ownership, which has been incorporated herein. *See Comments of American Women in Radio and Television* submitted March 27, 2002, *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets*, MM Docket Nos. 01-317 and 00-244, FCC 01-329, rel. November 9, 2001. AWRT hereby incorporates by reference its Comments from that proceeding and attaches those Comments in Appendix A hereto ("Radio Comments").

implications for future ownership opportunities for women-owned businesses in the radio and television industries.

II. THE 1996 ACT DOES NOT CREATE A PRESUMPTION THAT THE COMMISSION IS REQUIRED TO REPEAL ANY OF ITS BROADCAST OWNERSHIP RULES.

Before deciding whether to retain, modify or eliminate any its broadcast rules, the Commission seeks comment on the standard it should use in determining whether to keep a rule as is, modify it or eliminate it. Specifically, the Commission seeks comment on the interpretation of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") which provides that the Commission shall biennially review its rules to "determine whether any of such rules are necessary in the public interest as a result of competition [and] repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act Section 202(h), 47 U.S.C. § 161. The Commission asks whether it must find a rule indispensable in order to retain it or whether it may retain the rule if the current record shows that the Commission would be justified in adopting the rule in the public interest under the current circumstances.

AWRT submits that to retain a rule, the Commission need only find that the rule merely continue to serve the public interest and not that the rule is indispensable. To construe this phrase differently would impose on the Commission a higher standard in determining whether to keep the rule than is required in order to adopt a rule. As the Commission pointed out, this could lead to an absurd pattern of repeal followed by readoption followed by repeal followed by readoption *ad nauseum*. *See Petition for Rehearing or Rehearing En Banc* submitted April 19, 2002 by the Commission in Case Nos. 00-1222, et al. before the D.C. Circuit at pp. 8-9. Moreover, nothing in the 1996 Act itself or its legislative history mandates, discusses or even supports the draconian requirement that the Commission find a rule indispensable to its goals in

order to retain it. Rather, all the 1996 Act requires of the Commission is a review of its rules every two years to ensure that changes to the marketplace have not outpaced the Commission's regulations, and only if the marketplace has changed enough so that the rule no longer serves the public interest should the Commission be required to eliminate it. Accordingly, AWRT submits that the Commission may maintain any rule which continues to serve its policy goals.

III. DIVERSITY OF OWNERSHIP SHOULD REMAIN AN IMPORTANT COMPONENT TO THE COMMISSION'S REVIEW OF ITS LOCAL RADIO AND TELEVISION OWNERSHIP RULES.

The Commission states that diversity is its paramount policy goal and that "viewpoint diversity has been a touchstone of the Commission's ownership rules and policies." NPRM at ¶ 35. The NPRM further affirms that diversity has been and is one of the guiding principles of the Commission's multiple ownership rules so that no single person or group has an "inordinate effect" on public opinion. NPRM at ¶ 33. However, the NPRM also questions whether viewpoint diversity should continue as a primary goal of the Commission's decision-making. NPRM at ¶ 41. AWRT submits that it is incumbent upon the Commission to protect and encourage diversity in the local market place. AWRT deems protecting and enhancing viewpoint diversity to be the overarching purpose in any Commission determination to modify (or eliminate) any of its local radio and television rules because, as the Commission has long recognized, viewpoint diversity is "essential to democracy."[3]

[3] Even the courts recognize that the public interest embraces the public policy of diversity and that this is a permissible policy for the Commission to advance. *Fox Television Stations, Inc.*, 280 F.3d 1027, 1042, *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002).

1. The Commission Must Continue to Protect Source Diversity in Order to Maintain Robust Viewpoint Diversity.

To achieve diversity of viewpoint, the Commission uses outlet diversity and source diversity as surrogate measurements. The Commission recognizes that outlet diversity is instrumental to promoting viewpoint diversity because the greater the number of outlets in a market, the more likely the public is to receive diverse viewpoints. NPRM at ¶ 36. The Commission also views source diversity – the public's access to multiple content providers and owners – as a proxy for viewpoint diversity. NPRM at ¶ 41 and n. 116. As the Commission recognizes, the greater the number of sources, the greater the number of viewpoints. Likewise, the courts recently reaffirmed the Commission's policy of considering diversity of ownership as a means of achieving viewpoint diversity.[4] AWRT submits that to preserve and enhance viewpoint diversity in every local market, the Commission should focus on increasing the number of "outlets" and "sources" in any given market; rather than reducing them through relaxation or elimination of its broadcast ownership rules. Only if the Commission does so will it secure "diverse and antagonistic opinions" broadcast in every local market.

In considering its source diversity goals, AWRT urges the Commission to consider increasing gender source diversity as an important Commission goal when considering any change allowing further consolidation under its local ownership rules. Although the Commission asks for empirical data between the level of ownership diversity and the level of consolidation in local markets, as AWRT noted in its Radio Comments, there are very few statistics available to demonstrate that the number of women-owned broadcast stations is abysmally low.[5] In fact, to AWRT's knowledge, no studies have been done to show whether

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4 *Sinclair v. FCC*, 284 F.3d 148, 160 (D.C. Cir. 2002).

5 Radio Comments at p. 6.

consolidation has led to a increase or decrease in the number of women-owned, or for that matter minority-owned, stations in a market.[6] However, the most recent Economic Census (taken in 1997) shows that of all women-owned businesses, only two percent of women-own businesses are in the transportation, communications and utilities category.[7] Accordingly, AWRT presumes that the number of women-owned broadcast stations remains very low even without considering the impact of consolidation.

AWRT notes, however, that consolidation has substantially reduced source diversity in local markets. With every new in-market ownership combination there is one less source of diverse information available to the public.[8] And, despite the lack of empirical evidence, AWRT is of the view that gender diversity in particular has been stymied by the substantial level of consolidation that has taken place in the broadcast industry since the enactment of the 1996 Act. As AWRT stated in its Radio Comments, in the majority of local radio markets two or three radio groups control the majority of radio stations. In a significant number of the larger television markets, the same owner owns two television stations. This level of consolidation has made it only that much more difficult for women to enter the ownership market. Consequently,

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[6] Although the Commission now collects data on gender with its biennial ownership reports, the raw data on file with the Commission has never been complied in any meaningful or useful way. AWRT continues to urge the Commission to compile the gender (and minority) ownership data contained in the 1999 and 2001, and shortly to be filed 2003, biennial Form 323s. Such data compilation is critical to a meaningful discussion of diversity in the broadcast industry. Moreover, with the requirement that these forms be submitted electronically, the Commission now should be able to electronically collate this information on a going-forward basis, thereby ensuring that such information will be readily available for the next biennial review.

[7] *See* http://www.census.gov/csd/mwb/Womenp.htm. Data from the 2002 Economic Census is not yet available. However, AWRT expects there will have been little improvement to women-owned businesses in these categories due to the high barriers to entry, including lack of access to capital, found in the telecommunications sector.

[8] The Commission should not assume that simply because a large radio group owner or multiple television station owner offers a variety of formats that the market receives diverse viewpoints. Indeed, because one entity ultimately is responsible for all content in a market, AWRT believes that commonly-owned media outlets should be considered as only a single "voice" since that one entity has editorial control over the news and programming offered on all of its stations.

when considering changes to its local ownership rules, AWRT encourages the Commission to include in its ownership diversity goals, the goal of increasing the number of women-owned businesses in the radio and television industries.

2. Market Forces Are Not Enough to Ensure Local Markets Remain Source and Viewpoint Diverse.

The Commission seeks comment on whether it can rely on market forces to foster diversity, emphasizing the significantly increased number of media outlets available to the public. AWRT urges the Commission to remember that not everyone has access to such outlets and that those most in need of viewpoint diversity are those most likely not to have access to the Internet, cable, DBS and DARS. AWRT further submits that access to nationally available programming found on cable, DBS and the Internet has little impact on diversity at the local level. Indeed, AWRT believes one will seldom see a program dealing with local issues of schools, crime and the local sports produced by non-local producers (unless of course the item is "sensational").

AWRT also emphatically believes that market forces alone cannot and will not increase gender diversity of ownership and may even inhibit increasing women-owned broadcast stations because women cannot compete with the big national conglomerates. For example, venture capital is much less accessible to women-owned businesses and without such capital women-owned businesses cannot substantially compete for the purchase of a station (or in this era, even a construction permit to build a new station).[9] Although AWRT does not have empirical data, common sense dictates that limiting the number of stations owned by a single owner in any given market will increase the number of owners in that market, thereby increasing the number of

[9] *See Business Week Online*, February 18, 2002, http://www.businessweek.com/magazine/content/02_07/b3770117.htm. and http://www.businessweek.com/magazine/content/02_07/b3770118.htm.

sources providing information and, thus, the level of viewpoint diversity. Therefore, it is exceedingly important for the Commission to continue to maintain rules that limit multiple-station local ownership. Market forces alone cannot, and likely will not, lead to the availability of gender source diversity in a market.[10]

3. The Commission Should Include Only "Local" Voices in Any Analysis of its Local Ownership Rules.

The Commission again seeks comment on how it should define "voices" in a market. AWRT submits that the Commission should include only those local voices actually present in a market (i.e., the Commission should not include any non-local programming provided by cable, satellite or Internet services as a market voice). In fact, AWRT does not believe any market source should count as a voice under the Commission's rules unless it is actually shown to carry local programming.

AWRT also believes any "voice" analysis should include analysis of whether the market is gender and minority diverse before allowing any further consolidation in that market. AWRT urges the Commission not to modify its rules in any manner that would allow a current market owner to increase its number of local stations owned if such ownership will negatively impact the likelihood of achieving gender diverse ownership in the market.

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[10] Many of the large conglomerates that have consolidated the broadcast medium continue to be male dominated. "[W]omen are significantly underrepresented as corporate leaders in the largest communications companies . . . . [T]op echelon executives . . . are still overwhelmingly male." The Annenberg Public Policy Center of the University of Pennsylvania, "The Glass Ceiling in the Executive Suite: The 2nd Annual APPC Analysis of Women Leaders in Communications Companies," p. 4. *See* http://www.appcpenn.org/reports/2002/glass-ceiling-v2.pdf. Consolidation has led to decreased availability of management positions in which women can obtain hands-on knowledge they could use to own and operate their own communications companies.

4. Conclusion.

The principle purpose behind the Commission's broadcast ownership rules is the promotion of a diversity of viewpoints in each local market. Restrictions on local radio and television ownership remain necessary and in the public interest in order to achieve diversity of ownership and specifically gender diversity. As the Commission considers its rules, it should take all steps necessary to enhance and protect the ability of women to enter the realm of broadcast ownership.

For all of the foregoing reasons, AWRT requests the Commission retain, and as necessary enhance, its ownership rules and polices that protect and promote viewpoint and source diversity, especially gender diversity, in its local markets. To do otherwise simply is not in the public interest.

Respectfully submitted,

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By: _____

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January 2, 2003

APPENDIX A

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

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

To: The Commission

COMMENTS OF
AMERICAN WOMEN IN RADIO AND TELEVISION

AMERICAN WOMEN IN RADIO AND TELEVISION, INC. ("AWRT") hereby submits comments in response to the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (the "NPRM"), FCC 01-329, released November 9, 2001, in the above-captioned proceeding.

As will be further detailed below, AWRT urges that any modifications to the Commission's local radio ownership rules and policies be guided primarily by the public interest values of promoting "viewpoint" and "source" diversity (as described in Section II. B below) and increasing competition in local radio markets. To that end, any rule or policy change should encourage, not stymie, acquisition opportunities in local radio markets for independent companies – particularly those owned by women. Indeed, if the Commission were to permit greater concentration of control among large group owners in local radio markets without also adopting a program to promote acquisition opportunities for women-owned companies, such

relaxation of the current local radio ownership rules would be contrary to the paramount public interest inherent in maintaining a robust and diverse radio industry.

I INTRODUCTION

AWRT is a national, non-profit organization dedicated to advancing the impact of women in electronic media and allied fields through education, advocacy and serving as a resource for its members and the industry. AWRT members are professional women and men employed in radio, television, cable, advertising and closely allied fields. For more than 50 years since its founding, AWRT's mission has been to promote the entry and advancement of women in management and ownership of broadcast companies and related businesses. As an integral part of its support of women's advancement in the broadcasting industry, AWRT has actively participated in numerous Commission proceedings that have addressed ownership and employment issues. Accordingly, AWRT participates in this proceeding because of its critical implications for future ownership opportunities for women-owned businesses in the radio industry.

II. DIVERSITY IN LOCAL RADIO MARKETS IS A FUNDAMENTAL PUBLIC INTEREST VALUE AND GOAL WHICH SHOULD BE PRESERVED AND PROMOTED BY COMMISSION ACTION.

A. The FCC Must Continue to Exercise its Public Interest Mandate to Promote Diversity in its Review of Proposed Radio Transactions.

AWRT focuses its comments on a fundamentally important aspect of this proceeding's endeavor to reframe the Commission's local radio ownership rules and policies -- the Commission's longstanding goal of promoting diversity in local radio broadcasting. In that regard, AWRT will initially respond to certain questions raised in ¶¶23-27 of the NPRM with respect to the interplay between the Commission's public interest mandate under §310(d) of the

Communications Act of 1934, as amended (the "1934 Act")[1] and §202(b) of the Telecommunications Act of 1996 (the "1996 Act")[2]. The NPRM requests comments on three alternate interpretations of the statutory framework within which the Commission should function going forward in its review of radio station transactions,. Each interpretation bears on the question whether in this post-1996 Act era, the agency retains its public interest authority to promote diversity and competition in local radio markets.

The first possible interpretation of the FCC's current statutory framework, as described at ¶25 of the NPRM, is that Congress conclusively determined that the numerical limits in §202(b) of the 1996 Act establish local radio station concentration levels that are consistent with the public interest in diversity and competition. Under this interpretation, the Commission's review of radio station license assignments and transfers of control would be limited solely to determining whether the proposed transaction complies with the numerical limits of §202(b). The Commission would be precluded from considering any other public interest factors, such as market diversity or competition.

This interpretation is fundamentally flawed because it rests on the presumption that §202(b) supersedes the Commission's public interest authority granted under §310(d) of the 1934 Act. That presumption would be erroneous because §202(b) does not contain any mention

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[1] As explained in ¶21 and Footnote 59 of the NPRM, under §310(d) of the 1934 Act, the Commission is authorized to approve the transfer/assignment of a radio license when it is found that the public interest, convenience and necessity will be served thereby. This authority has long been held to authorize a regulatory scheme designed to promote the goals of diversity and competition in the broadcast industry.

[2] This section of the 1996 Act significantly relaxed the FCC's limits on the number of radio stations a single party may own in a given market.

of supersession and therefore cannot properly be construed to supersede the public interest authority granted under §310(d). This simple truth is borne out by §601(c)(1) of the 1996 Act, which provides: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in this Act or amendments." 1996 Act, §601(c)(1), 110 Stat. at 143. In short, §202(b) cannot be read and should not be interpreted to have eliminated the Commission's public interest mandate to promote diversity and competition in connection with the assignment and transfer of radio station licenses authorized under §310(d). Accordingly, the Commission has no credible basis for the view that it can no longer exercise its public interest authority when reviewing radio station transactions.

The second possible interpretation of the statutory framework, as described at ¶26 of the NPRM, is that §202(b) exclusively addresses diversity concerns, as suggested by its heading -- "Local Radio Diversity" -- and leaves only competition concerns to be addressed by the Commission under its public interest mandate. In other words, the Commission still has the authority under §310(d) to address competition, but not diversity concerns. As with the first interpretation above, this one also stands on less than firm footing. Indeed, the NPRM even acknowledges the inherent weakness of an interpretation that is suggested solely by the heading of §202(b); as admitted at Footnote 63, "...the Commission has not always given meaning to statutory headings." AWRT urges the Commission not to ascribe any interpretative significance to the heading in this instance either. Indeed, it should require far more than the three-word heading of Section 202(b) to make the Commission yield its public interest authority to address diversity concerns to the cold number of §202(b). Thus, just as the first flawed interpretation above was rejected, this one also does not pass muster.

In AWRT's view, the third alternative interpretation of the Commission's statutory framework is the only one of the three that is potentially in harmony with both common sense and the statutory provisions in question. Under this interpretation, described at ¶27 of the NPRM, a rebuttable presumption exists that the numerical limits of §202(b) provide acceptable levels of local radio ownership. Thus, the Commission must approve a proposed transaction that complies with the numerical limits of §202(b) absent a specific reason to conclude that diversity or competition in the market would be harmed if the parties consummated the proposed transaction. Unlike the first two interpretations, this one rightfully acknowledges that the effect of §202(b) has been to limit, but not totally eviscerate, the Commission's exercise of its public interest mandate under §310(d) to address diversity concerns. Accordingly, AWRT believes the Commission should adopt the foregoing interpretation and use this proceeding to develop well-articulated and delineated criteria for a diversity-based showing that could overcome the §202(b) presumption. In this context, AWRT urges the Commission to include among the factors that could rebut the §202(b) presumption, a specific showing that viewpoint and/or source diversity in the market in question would be materially, adversely impacted by the transaction.

Recognizing that the foregoing suggestion requires further fleshing out, AWRT nonetheless exhorts the Commission <u>not</u> to ignore in its revamped regulatory scheme the critically important public interest mandate to promote (and, since the passage of the 1996 Act, to preserve) viewpoint and source diversity in the radio industry. Nor should the Commission continue to permit this all-important public interest value to remain vague rhetoric without any substantive place in the Commission's regulatory scheme. Rather, the Commission should seize the opportunity in this proceeding to affirmatively promote and preserve viewpoint and source

diversity in local radio markets by permitting a substantial showing of the absence of such diversity to rebut the §202(b) presumption.

Also, to promote viewpoint and source diversity in local radio markets, the Commission should urge Congress to establish a tax certificate program that would permit an owner of multiple same-market radio stations to defer taxes on any gain from the sale of one or more of these stations to a small business that is owned by women or minorities, as long as that gain is reinvested in one or more qualifying replacement businesses.

B. The Goal of Diversity - - What it Should Mean; How its Success or Failure Should be Measured; and Consolidation's Impact

1. The meaning of diversity in the context of this proceeding.

In the NPRM, "viewpoint" diversity is described as "ensur[ing] that the public has access to 'a wide range of diverse and antagonistic opinions and interpretations.'" NPRM at ¶30. And, "source" diversity is described as "ensur[ing] that the public has access to information and programming from multiple content providers." Id. In providing these descriptions, the NPRM cites to the prior descriptions of these two terms that the Commission provided to Congress in the *1998 Biennial Regulatory Review - - Review of the Commission's Broadcast Ownership Rule and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Notice of Inquiry, 13 FCC Rcd 11276 (1998) (the 1998 Report). It is noteworthy that the description of source diversity in the 1998 Report is broader than that offered in the NPRM. The 1998 Report describes source diversity as "ensur[ing] that the public has access to information and programming from multiple content providers **and owners.**" 1998 Report, 13 FCC Rcd at 11278 (¶6) (emphasis added).

a. Ownership Diversity

The NPRM at ¶ 30 asks whether there are other aspects of diversity that the Commission should consider. As an initial matter, AWRT strongly urges the Commission to recapture "ownership" diversity as a sub-classification of source diversity and consider it in this proceeding. In this regard, the Commission should acknowledge that diversity among station owners inherently contributes to source diversity, particularly with regard to stations' offerings of locally produced programs. Similarly, the Commission should consider ownership diversity to be a sub-classification of viewpoint diversity because more and different owners in a single market certainly can ensure that more "diverse and antagonistic opinions and interpretations" will be aired in the market.

In sum, in this proceeding, the Commission cannot and should not ignore the vitally important role that diversity of ownership plays in a local radio market, both in the obvious contribution to market competition and in its contribution to viewpoint and source diversity. Ownership diversity therefore should be brought out of the Commission's closet and placed front and center in this proceeding. And, as discussed in Section II. A above, ownership diversity should be promoted in the Commission's revamped regulatory scheme that should also include a new tax certificate program to encourage more ownership diversity, particularly among women-owned and minority-owned stations.

b. Gender Diversity

Implicit in the above discussion of ownership diversity, but nonetheless requiring a loud and clear statement, AWRT urges the Commission to consider gender diversity as a sub-classification of ownership diversity that demands to be promoted in the Commission's revised local ownership rules and policies as already described above.

In this connection, while AWRT acknowledges that the NPRM justifiably urges commenters to submit empirical data to support their views,[3] regrettably, we do not currently have data in hand to demonstrate that the number of women-owned radio stations is pathetically low - - even though we know it to be true. On a somewhat brighter note, after years of AWRT exhorting the Commission to collect ownership data for women in the broadcast industry, the agency began that collection in 1999 by requiring gender information for principals of broadcast licensees to be reported in their stations' Ownership Reports (FCC Form 323). To AWRT's knowledge, the raw data now on file with the Commission in the 1999 and 2001 biennial Ownership Reports has not been compiled in any meaningful way.[4] Hence, even though material and relevant information to this proceeding is "in-house," it is not readily usable. AWRT therefore urges the FCC to compile the gender data contained in the 1999 and 2001 biennial FCC Form 323's filed by radio station licensees because of the critical bearing such data would have on the diversity issues that should be addressed in the instant proceeding.[5]

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[3] See, e.g., NPRM at ¶¶ 28, 30, 36,

[4] AWRT is aware that the Annenberg Public Policy Center ("Annenberg") in Washington, D.C., planned to conduct a gender study of broadcast station ownership based on data in FCC Ownership Reports. However, a representative of Annenberg recently informed AWRT that the project has been cancelled.

[5] Should the FCC staff desire outside assistance in the data compilation, AWRT may be able to provide that assistance.

2. How the success or failure of the Commission's diversity goal should be measured.

AWRT believes that the success or failure of source and viewpoint diversity in a given radio market requires a careful analysis of a host of different data and characteristics of the stations in the market, included among them: (1) the number of independently owned stations in the market; (2) the number of women-owned and minority-owned stations in the market; and (3) specific programming characteristics of all stations in the market, i.e., a quantitative assessment of local, regional and national news, public affairs and other non-entertainment programming and in-station produced programming.

In response to the NPRM's questions at ¶¶ 32-33, AWRT also believes that an appropriate and accurate diversity analysis requires radio to be viewed separately from other media outlets. In that regard, AWRT strongly believes that the unique audio-only and mobile quality of radio, as well as fundamental programming differences between radio and video media (television, cable, satellite and other multi-channel video programming providers and the Internet), require that video media, including the Internet, not be considered in a diversity analysis of radio. And, given our view that radio should be viewed apart from other media for a diversity analysis, AWRT also believes that the appropriate geographic area over which to measure radio diversity is the local market served by the radio stations.

3. The Impact of Consolidation Upon Diversity

In response to the NPRM's questions at ¶¶36-38 seeking comments on the relevance of media consolidation to local radio ownership rules and policies and to diversity, AWRT takes the firm view (again without empirical data to offer for the reasons previously stated) that gender diversity, in particular, and ownership diversity, in general, have been stymied by the substantial

ownership consolidation that has taken place in radio markets since the enactment of the 1996 Act. For first-hand anecdotal evidence of the impact of consolidation on ownership diversity, we commend to the reader's attention, "Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing", a December 2000 study prepared for the Commission's Office of the General Counsel by Ivy Planning Group LLC. The 173-page study is available on the Commission's web site at http://www.fcc.gov/opportunity/meb_study/historical_study.pdf. Copies of pertinent pages of the study are attached hereto for the reader's convenience.

Finally, with regard to the consolidation/diversity issue and the questions raised in ¶38 of the NPRM, AWRT urges the Commission not to turn traditional concepts of diversity on their head solely because large group owners may offer content variety on their multiple radio stations in a given market. Indeed, because one entity is (or related entities are) ultimately responsible for all such content, and the variety thereof is likely selected by and/or approved from a common source, AWRT believes commonly owned media outlets should be considered a single media "voice" in evaluating diversity. More specifically, it does not make sense to treat increased media consolidation as contributing to diversity if the common owner exercises editorial discretion over news and programming offered on all of its stations. In sum, it does not make sense to conclude that consolidation has lead to greater diversity in local radio markets.

III CONCLUSION

As shown above, there is nothing in the statutory framework governing the Commission's local radio ownership rules that prohibits the Commission's exercise of its public interest authority to ensure that a radio transaction is consistent with the goal of promoting

diversity within local radio markets. To that end, it is right and proper that the Commission adopt new local radio ownership rules and policies that will affirmatively promote viewpoint, source and ownership - - particularly gender - - diversity in local radio markets, whether by permitting rebuttal to §202(b) numerical limits or urging Congress to enact a tax certificate program that would provide incentives for multiple radio station owners to sell to women-owned and minority-owned businesses.

Respectfully submitted,

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WHOSE SPECTRUM IS IT ANYWAY?

HISTORICAL STUDY OF

Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing

1950 TO PRESENT

Prepared for
The Office of General Counsel
Federal Communications Commission
by
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DECEMBER 2000

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5. Effect of Deregulation and Consolidation

On par with discrimination as a long-standing barrier to broadcast and wireless entry, study participants cited industry consolidation pursuant to the 1996 Act, as a fundamental and significant barrier to entry in recent years.

Johnny Shaw, an African-American radio station owner, characterizes the raising of the caps on the number of radio stations one can own in a market as *"the lowest blow for independent owners. I think that probably has hurt more than anything else. (JShaw185, p. 21)*

> ➢ ***The Shift from Local, Independent Owners to Large National Group Owners – Opening the Floodgates That Virtually Wiped Out Small Radio Stations***

With the consolidation resulting from the 1996 Act, there has been a shift away from independent local owners to large, Wall Street-financed group owners. Manuel Davila, a Hispanic radio broadcaster, recognizes the shift from community focus to earnings per share.

> *[I]t's basically all corporate, you know, because they have to answer to . . . investors now. The investors don't give a damn if it's an Hispanic radio station or it's a Black disk jockey or it's a Chinese salesperson. They care about if they get 10 cents on the damn investment... . All the government did is help the big guys. And that's what's happened. The big guys, corporate America, have taken over communications, and it seems to be okay with everybody, or it seems to be okay with everybody that's of importance, I guess. Now I may not like it. You may not like it. My dealerships[who advertise with me] may not like it but, hell, there's nothing he can do about it. (MDavila128, pp. 50-51)*

Many believe that the deregulation of broadcasting was motivated and driven by politics, i.e. donations made to legislators by large broadcasting enterprises. John Tupper, a White television licensee suggests that *"[C]ongress and the FCC shouldn't be fooled by the contributions being made by the networks to their campaigns for the purpose of gobbling up more of the voices out there that are going to be more homogenized over time. (JTupper216, p. 36)*

Mary Helen Barro, a Hispanic former broadcaster, talked about the impact of raising the caps as *"open[ing] the floodgates."* While caps had been lifted gradually from 1985 to 1996, the big jump allowed by the 1996 Act *"ended up wiping us all out."* She went on to say:

> *The big corporations got what they wanted, and the little people are out of business. Bottom line. ... They kept bumping them up because you know the big corporations wanted it.... (W)e were pleading with them, we were saying, "No! You're going to put us out of business! We can't grow fast enough, we can't . . ." . . .(W)e went to the FCC, we went to hearings, we wrote letters . . . to the Congress. It did not matter. (MHBarro190, p. 13)*

Manuel Davila, a Hispanic broadcaster, blames the government for the predicament in which small broadcasters find themselves today. He feels that the only thing the 1996 Act is going to do for the *"little guy"* is help him or her get a better price for his station once he or she sells because he or she can not compete anymore.

> *Who's going to lend us $30 million [to buy a station]? Because the government, the government had dictated that big business is going to own communications. And that's the government's fault, man. Because somewhere along the line the government said it was all right to own 400 radio stations. ... (L)et me tell you the scenario that I see.*
>
> *Originally you could own seven stations. . . . Okay, that's kind of back in the old days. And then that changed to 14 because there was AM and FM. And then as the people acquired what they needed to acquire – and I'm not knocking it but, you know, the big guys, they acquired what they needed, but they said, you know, it's time to change the rule again. So let's go to 20 stations. Okay, the government says yeah. They ram this thing through. Now they can own 20 AMs and 20 FMs, something like that. And then all the big guys buy what they can buy. And then they said, you know, we think it's better if we own 25. Well, the government changes the rule again ... And now they can own all these things.*
>
> *And they're saying this is all to help the little guys. I haven't seen a little guy get big yet, you know. I'm not saying they haven't, okay. Then the government says, you know what, the big guys have bought all the markets that they can possibly own, New York, LA, Chicago, San Antonio, Dallas, Houston, El Paso, et cetera, et cetera, et cetera, down the row. You know what, we think those rules should be changed so we can own two FMs in those markets because we've bought everything we can buy and we want to get bigger. So the government says, you know, that's a great idea. The next thing you know, the rules have changed, again, under the pretense to help the little guy. All this did for the little guy is allow him to sell his station. That's about all this did for the little guy. Because he couldn't afford to buy the big guy out, so he had to almost out of default sell. (MDavila128, pp. 45-46.)*

Mary Helen Barro also acknowledges that deregulation did not help the independent broadcasters, but rather put them out of business. She further sees market consolidation as a threat to freedom of speech as smaller and often minority-owned and minority–formatted stations are forced out of business.

> *They put us out of business bottom line.... Yeah, no doubt about it. I'd be in business today if it weren't for the FCC.... the American Hispanic-Owned Radio Associations broadcasters [fought] individually for years as the FCC and the Congress kept pushing for higher ownership caps, trying to gratify the large corporations who wanted to expand and they wanted to buy up stations and expand. Now there were some small broadcasters who did want to sell. There was no doubt about that. But for every one that wanted to sell, there were 10 of us that were struggling to stay in business.*

> *And when the FCC raised the ownership cap, they literally shoved us out of the business. And if you look at broadcasting today, you will see that the vast majority are large corporations, fewer minorities ... And what I don't think has been discussed up 'til now but what I consider a very grave threat is loss of freedom of speech. With fewer and fewer companies owning more and more licenses, there is a real threat to freedom of speech. (MHBarro190, pp. 1-2)*

➢ *Economies of Size and Scale*

The findings of this study point to an unprecedented level of market dominance and influence enjoyed by public companies utilizing scale economies, inexpensive capital, stock-funded acquisitions of licenses, and similar financial and operational advantages. These attributes of size and scale represent insurmountable obstacles to competitiveness for small, women- and minority-owned companies lacking such advantages.

In broadcasting, participation by small and local businesses had been historically supported due to a regulatory structure that set licensee ownership levels and encouraged local ownership. Through the 1980's and early 1990's, the industry saw significant increases in minority and female ownership, stemming from regulatory initiatives that included comparative hearing minority ownership policies, distress sales, and tax certificates. Since 1996, however, small, women- and minority- owned companies, and the communities they serve, have, and continue to be, dramatically impacted by a broadcast industry rapidly responding to the deregulatory nature of The Act by consolidating license ownership.

(a) Impact Upon Licensees

➢ *Deregulation as a Barrier to Entry*

Deregulation and the resulting industry consolidation have formed multi-faceted barriers to new entry for small, women- and minority-owned companies. The dramatic increase in the price of stations, and the predominance of Wall Street-funded companies with stock and stations to use as currency for station acquisition, have severely disadvantaged the small, independent broadcaster. Given the history of limited access to capital traditionally experienced by small companies, and especially those owned by woman and minorities, it appears that this disadvantage is virtually insurmountable.

Brian McNeill, a media investment banker, explains how the economic landscape for broadcasters has changed in recent years.

> *... (T)he bulk of our business used to be financing entrepreneurs in the radio and television business, but as consolidation has played itself out, most of the assets have gone into the hands of public companies, there are just quite frankly less opportunities*

> *for private companies and entrepreneurs, and even less opportunities still for start ups. There's just less opportunities.... (A) much greater proportion of the stations are owned by large public companies so there's just less turnover, there's less activity, and in fact, prices have been driven up by public companies and that makes it harder for entrepreneurs to make the numbers work. So for both of those reasons there is just a lot less activity for private companies and entrepreneurs and individuals to buy assets in the media businesses. (BMcneill513, pp. 5-6)*

Mr. McNeill goes on to talk about how this change of station ownership from private to public companies has negatively affected small businesses.

> *(M)aybe I'm naïve and maybe there's a lot of prejudice and hardship that goes on at a level that I'm not aware of, but I think the world is getting pretty focused on quality and pretty color- and gender-blind. I think the difficult thing is that the structure of the industry has changed, and I think it's just really difficult now because ten years ago, there was a very small percentage of the assets in the hands of public companies. A very large [number] of the assets are [now] in the hands of public companies and that's just made doing deals a lot harder for everybody... It shifted into high gear in 1996, when they had the 1996 Deregulation Act. ... So since 1996, it's more the private and small companies [that] are disadvantaged, vis-à-vis, big and public companies. That's been a more dominant theme than minorities and women being disadvantaged. (BMcneill513, p. 25)*

Art Gilliam, an African-American radio broadcaster, explains how this shift affects access to both acquisition opportunities and capital.

> *The [large companies] can go to the market place, get funded and buy properties, they can also bid up the price because they can wait for a number of years to turn a profit. So you have a situation where they're able to obtain financing ... so that creates upward pressure in terms of pricing. So it's very difficult to find stations and to compete for financing with companies that are in that position. (AGilliam117, p. 19)*

Frank Montero, former Director of the FCC's Office of Communications Business Opportunities, talked about the change from a different perspective. Historically, he has seen that small, minority- and women-owned companies have " *... frequently focused on the smaller markets or the medium-sized markets as opposed to the big markets because the economies are easier to maintain ...* " He remarks that initially consolidation took place in the larger, more lucrative market. He sees that changing now and notes that new entrants will have more difficulty than before. " *... I can tell you that consolidation is definitely moving downstream as you are seeing these large companies definitely starting to inquire into the middle and I think eventually into the smaller markets. I think that doesn't bode well for new entrants, for new people coming into the marketplace. (FMontero509, pp. 10-11)*

> *Deregulation as a Barrier to Expansion*

For small, women- and minority-owned companies already operating as licensees, deregulation and consolidation have meant severe difficulties in growing their stations, adding to their holdings and remaining competitive. Growth of existing operations is generally a function of advertising revenue and access to working capital. Growth in holdings is a function of access to large sums of capital. With discrimination in advertising and the capital markets coupled with the effect of deregulation on national advertising practices and station prices, smaller broadcasters have virtually lost their ability to compete.

Alfredo Alonzo, a Hispanic male radio licensee, explains how deregulation has restricted the growth opportunities for small businesses.

> *You know when the FCC deregulated ownership, in '96 was it? I really feel that that hurt the small business owner because of the fact that these larger entities were able to buy literally almost all the radio stations in the big markets. And it really didn't leave a whole lot of pickings for anybody else. A case in point, in Tampa, we happen to have 2 AMs and an FM in Tampa, and if you look at Cox, Clear Channel, and CBS, between the three companies, they own like 80% of all the radio stations in the market. So it only leaves 20%. Before 1996, the most you could own was 2 AMs or 2 FMs [in each market]. And prior to that, a number of years before, the most you could own were 8 AMs and 8 FMs throughout the whole country. So I just feel that deregulation has hurt the ability of a small business entrepreneur to really grow. Because you just don't have assets available to you. These companies have grown; they set up these portfolios where they have, you know, 8 radio stations in their given market, and since they're not forced to sell because they could legally own them, they drove up the price because they were able to pay more money than the small business owner, so I really think deregulation has hurt the small businessman more than anything else. (AAlonzo377, pp. 7-8)*

Erskine Faush, a Black television station owner, told us of his recent attempt to buy a station in Birmingham, Alabama. He made an offer on the station and thought he had a deal. "*... but over the weekend something happened to that deal and one of the major companies came in with more bucks and bought it. (EFaush238, pp. 12-13)*

Even though Mr. Faush was trying to buy another station, many small broadcasters are being marginalized and often forced to sell. Mateo Camarillo, a Hispanic broadcaster, says:

> *... (A)s I mentioned to you, my preference is to look at the world with more rosy-colored glasses than looking at it half empty and being pessimistic about things. But you know, as I see things, it's a real challenge, it's difficult to see positive things with the trends, the impact of consolidation, with the market being controlled by the big guys and the impact with most minorities not being big guys, being marginalized and squeezed to the point that ... if it wasn't for their dedication and commitment to community, it [would] make life real difficult. But still their life is difficult. I see few rays of hope. (MCamarillo375, pp. 27-28)*

Tyrone Brown, an African-American communications attorney and former FCC Commissioner, understands that the need to grow or die is what is driving many small broadcasters, and largely minorities, to sell their stations. *"Well, I can't get big enough to stay in this game so I better get out now." (TBrown510, p. 11)*

Patrick Prout, an African-American radio licensee, told us why he was selling his station.

> *If one does not have a huge number of stations – at least that's my perception and it's my belief and others' – one cannot survive as a small broadcaster.... when you have to compete now that the cap is off in terms of how many stations one can own in a particular marketplace. We were actually in an LMA [Local Marketing Agreement] situation. We ended up in an LMA situation.... (T)he owners of the stations that we were LMA-ing to were selling their stations, and we decided to go in as part of the package. For one, we would get out from under this thing. Secondly, I'm still on a full-time basis trying to drive cash flow to feed my family. So I couldn't afford to – just to - put the time into this endeavor, and decided I might as well just sell it. (PProut284, p. 9)*

➢ *Economies of Size and Scale as a Barrier to Expansion*

Small, women- and minority-owned companies report their viability is being made more vulnerable due to increasingly larger consolidated competitors who enjoy natural operational advantages that smaller companies cannot match. With more stations, one has more clout with advertisers. For single-station or very small group owners, the remaining piece of the advertising pie is very small.

Additionally, larger, more well-financed broadcasters have the capital to finance station improvements, attract and retain top management and on-air talent, and purchase syndicated programming. For some, the struggle to stay competitive in today's market reality is no longer worth it.

Diane Sutter, a White former television licensee, also explains that size and scale have impacted the small licensee's ability to compete.

> *Well, the trouble with doing anything in radio is ... the monopoly game has already been played for a long time, and if you can't get 4 or 5 or 6 or 8 stations in a market I think it's very difficult to survive. I think that's already happened... for me, I don't think there's a place for me in radio right now. I mean let's face it; when Lowry Mays [Chairman of Clear Channel] is selling off a bulk of stations that if someone had bought those would have been the 3rd largest group in the country and Mel Karmizan's [CEO of CBS radio] got 180. That's not an arena in which someone like myself can compete very successful(ly)... (DSutter205, pp. 23-24)*

Dorothy Brunson paints a bleak picture for African-American-owned television stations, such as hers, over the next few years. Ms. Brunson predicts that being small, non-network-affiliated stations, struggling to get carried by cable and satellite systems and still being required to conform to the new digital television requirements, will cause all of them to be out of business in the next two years.

> *When I look at the number of African-Americans that own television stations in this country, I think there's twelve of us, if I recall correctly.... And I'm sure that in the next two years, we won't exist. There will probably be none, because certainly, it's going to be more difficult for me. As high definition comes about, I've got to find funding to do that.... (L)ike right now, because I'm not [affiliated with] one of the big four [networks], the cable and the satellite companies don't have to carry me for two years. How am I going to survive for two years? And that's happening to all of the smaller market stations, where we [African-Americans] are. Two of us are in large markets and the others are in small- to medium-sized markets.*
>
> *What's going to happen when the satellite (television) companies don't have to carry you, and that becomes as important as cable...And what happens to most carriers in the interval? For us, it's life and death. But for others, they can market because they've got the better programs. Well, you sell out. You've got to get out. There's no way you can survive, you've got to get out. So then [the station under the new owner] becomes an ABC affiliate or somebody else who can go in and lower the boom on those [satellite and cable] guys.*
>
> *And the Commission says, well go in and ... negotiate with those guys. I have not been able to get in the door. I haven't been able to get in the door of those satellite companies'. Those cable guys, I'm still fighting against the opposition from most carriers of seven to eight years ago... There's just no way that we can survive. In radio, you probably can do a little better, because you don't have the technical, you know, those hindrances. And you're not on the cutting edge, but I just don't see, I don't see many of us staying in television. I just don't see it. I talked to five to six of these people all the time. And they're scared. I mean, we can do the basics, but we can't compete with the big guys, you know, we just don't have the wherewithal. Someone said, well, why don't you all band together? But if you take a lot of little nothings and put them together, you still got a big nothing. (DBrunson105, pp. 23-24)*

➢ *Small Businesses Unprepared for Speed and Impact of Consolidation*

Mary Helen Barro, a Hispanic former radio broadcaster, shared the impact that consolidation has had on her life. She lost her stations as did some of her Hispanic colleagues. Consolidation happened too quickly for her to put into place a meaningful competitive strategy. At 61, she is "*on food stamps*" and back in college to get herself "*... a teaching credential so I can earn a living.*" She feels lucky that she did not lose everything. She knows many who did.

Patrick Prout, a Black radio licensee, asks the FCC to find some way to help the small owners, a lot of whom are minorities, compete with the larger players.

> *With the consolidation and the mega broadcasting companies today, that certainly has driven a lot of small players out of the marketplace and a lot of your African-Americans who are coming in – or minorities, period, coming in -- were the smaller players. Some sold to make money and get out. Others sold because they felt they had to. They couldn't compete. I think the FCC needs to somehow figure out how they can put an umbrella around the small players or do something to help the small players compete with the larger players. (PProut284, p. 19-20)*

➢ *The Impact on Access to Capital*

Beyond their relative disadvantage with respect to simple access to capital, small, women- and minority-owned companies perceive a diminished supply of capital available to them, resulting from structural changes and responses in the industry with consolidation, and with harmful impact on their ability to enter the industry and sustain their businesses.

Where personal resources and perhaps a bank loan used to be the cash requirements for license acquisition, ballooning station prices have necessitated access to huge sums of both debt and equity financing. Stations are now selling for millions rather than hundreds of thousands of dollars. Whereas before, banks might finance three-quarters of the cash needed to buy a stations, they are currently lending only up to approximately one-third of the purchase price for stations. The balance has to be financed with either venture capital funds or personal assets. Few people have personal assets large enough to forego the venture capital route.

Having been traditionally hampered in their efforts to acquire capital during the pre-1996 Act years, small businesses and especially minorities, are virtually precluded from gaining access to the financial wherewithal needed to be able to participate in today's consolidating broadcast marketplace.

Charles Cherry, a Black radio broadcaster, tells us that *"Consolidation sucks. ... (T)wo-thirds of the people that were in this business five years ago are now gone and [for] the people who want to stay in and grow the business there's no incentive because you can't get any help from anybody to do it. I mean, they just look at you like, you're just too small." (CCherry262, pp. 24, 28)*

Michael Carter, a White radio licensee, who benefited from high station prices when he sold his station, acknowledges that consolidation has hurt the *"little guy."*

> *Well, [raising the caps] helped me. It helped me get more money for WHB [upon the sale of the station], but it's not good for radio. What's good for Mike doesn't mean it's good*

> *for the industry . . . because a little guy like me doesn't have a chance to get in today. We really don't with these mega corporations. I don't have a chance.... You can't compete with their money. Three radio stations in Kansas City sold the other day for $113 million. I can't raise that. (MCarter230, pp. 14, 15)*

Manny Davila, a Hispanic radio broadcaster, shares the irrationality of the prices as they relate to the amount of capital a small radio operator can possibly raise for station acquisition.

> *What [does the FCC] do? Well, we're going to make it better. We're going to do a bidding process [among the buyers]. We're going to do a bidding process and make it fair for everybody. So you and I go bid for – you know, what are we going to bid? How would you like [to be] doing the cable network in New York, how about that? I want the cable network in New York. You and I go bid. What are you going to bid, girl? What am I going to bid?*
>
> *Well, I've got – damn, I've got 50 pencils here, man. And with your 25 bucks, we've got 25 bucks here. Oh, by the way, this guy just bid $10 million and he don't even know [squat] – but he's got it. You know ... come on, has it opened up for all of America? No, it's opened up for corporate America. Are we saying that maybe we should be on the corporate ladder? Yes, we should be on the corporate ladder. Have we had a chance, a real fighting chance to get on the corporate ladder? Hell, no, we haven't. Because, unless you're lucky, and actually got a station in a big market a long time ago – we don't have a chance.... I talked to a guy in San Antonio. And the guy says, well, you know, they're going to sell these stations for $40 million, two FMs that I'd like to buy, $40 million. Where is this guy going to get $40 million? (MDavila128, p. 51)*

Mary Helen Barro shared her story about how the timing of the FCC's announcement regarding the lifting of the ownership caps killed her deal to buy additional radio stations and ultimately forced her into bankruptcy. She was *"(t)wo weeks away from signing a refinancing deal that would have kept me alive and I would have ended up with 2 AM s and 2 FM s.... Two weeks away from signing my papers, the FCC announces that they're going to raise the ownership caps and this time they're going to raise them so high, ... (i)t scared my financing to death and they backed out. They said, "That's the end of small business in broadcasting." ... So my whole house of cards fell apart.... And, well, I went through bankruptcy. I lost everything. Yeah, I wasn't able to go through on the deal, I lost my FM, OK? My FM that I had on the air, I lost it." (MHBarro190, pp. 11-12)*

> *Impact on Cost of Capital*

Along with access to capital, cost of capital constitutes a competitive disadvantage and barrier to entry for small, women- and minority-owned companies. Large, publicly-traded companies have an advantage due to their ability to acquire debt financing at lower interest rates than can their small business counterparts; and they can use their stock as payment for station and company acquisitions.

As Diane Sutter, a White former television licensee, explains, a lower cost of capital enables the purchaser to bid a higher price than a could a competitor who had access only to more expensive money.

> *Well, if a deal is going to a broker, it's virtually an auction. And, it's very unlikely that an entrepreneur, especially in a larger market, that an entrepreneur can compete [in an auction for a station] because of his cost of money. So once you get to an auction... I couldn't compete with the public marketplace, because the cost of my money versus the cost of a Sinclair, of a River City at the time, of any of these other groups, when they have public financing, when they have public money, and their multiples, you know, they were trading [their stock on the stock market] at 15, 16, 17, 18 times multiples.*
>
> *So they could afford to pay a 14 or a 15 times multiple [that is the purchase price was a multiple of cash flow] to buy a station. And they had other stations that they had acquired earlier in a less inflationary market, so they could amortize their cost throughout and spread them throughout their stations, so an entrepreneur like myself, who had expensive money, if you will, I would bid $20 million on a station, and Sinclair would bid $23, $24 [million] because their cost of money was so much less than mine, they could afford to do that. (DSutter205, pp. 13-14)*

➢ *Competition for Revenue – the Struggle for a Proportionate Share*

Small, women- and minority-owned broadcasting businesses experience particularly acute problems in the advertising marketplace since deregulation according to existing licensees competing against much larger firms. Access to national advertisers' dollars is especially difficult and very necessary for independent station survival. This lack of access raises a huge market entry barrier for them.

Consolidation has affected not only the rates that one can get for advertising slots but also the absolute amount of dollars. Large group owners in a market can offer national advertisers packaged deals within and across markets, essentially eliminating the need for ad dollars to be spent with small, independent broadcasters. Large group owners are gaining a disproportionate percent of total market advertising dollars relative to their market share of listeners.

Benny Turner, an African-American radio broadcaster who first got into radio in 1985, explains it this way.

> *[The 1996 Act] has basically allowed for consolidation of ownership which in this market has allowed a concentration of ownership that affects the rates that we are able to get for our product, and it's basically decreased competition and has almost given ownership in this market the power to basically give their urban formats away, which is what we basically pursue. [It is very difficult to grow our station, to have it be economically viable] because we basically have been competing against [companies*

> *who] had several formats and basically what they tell the advertisers is, "If you buy our country station or rock station, we'll basically give you the urban station", and so it made it difficult for us to command a decent rate, when they were basically giving the [urban] format away. (BTurner108, pp. 10-11, 12)*

Francine Rienstra, a White radio licensee, says that *"Nowadays, because of the deregulation and the [companies] owning so many stations, we've got really four groups in this market that wield the entire ratings and wield the entire dollar. And everything else is struggling. (FRienstra360, p. 29)*

Richard Weaver-Bey, a Black radio station owner, addresses the effectiveness of having more stations to "sell" to advertisers.

> *And since consolidation we've seen an extraordinary dip in our ability to sell because you have Infinity and SFX and Clear Channel buying up five and six stations in the market, consolidating, moving all of their stations into one location, and when their salespeople go out they can sell five stations in one swoop. And so why does an advertiser need to think about a small station that's in a little corner of the market? (RWeaver-Bey171, p. 12)*

(b) Impact Upon the Public

Licensees and key market players interviewed expressed significant concern as to the impact of consolidation on the public; freedom of speech; diversity of views; and on quality of service to small, rural and minority communities, and the resulting increases in barriers to entry for small, women- and minority-owned companies. Henry Rivera, communications attorney and former FCC Commissioner, made this observation.

> *Well I think that [the lifting of the ownership caps] has hurt ... because you are seeing a consolidation of the radio industry that I don't think anybody envisioned. And you have a lot of people who were in the business who are selling out. Or people who are going up against these big conglomerates, trying to buy a station; and they can't afford the same prices because [the consolidation is] driving the prices up. So it is not a climate that induces a diversity of voices and viewpoints. Rather it's a climate that encourages consolidation and voices. So any time you've got that kind of a situation, you're going to have fewer minorities involved in the broadcast industry. It's just a, it's just the way things are. (HRivera516, p. 13)*

➢ *Loss to the Public Interest*

Erskine Faush, an African-American television licensee, spoke passionately about the obligations broadcasters assume as public trustees and the impact industry consolidation is having on diversity of opinion and voices.

Let me put it this way. I never thought I'd see in my lifetime prior to the Telecommunications Act, you know, the mega-mergers and so forth, that that much control of this industry would be in the hands of a few people. I think it has had its impact in terms of diversity of opinion, [and the] access of the community. I think it's had a profound effect.

... (W)e always understood that, as a public trustee, the community's interests, not only just your being able to have a viable entity in order to make money – and, of course, that's not a bad word at all, you know, in business. In our economy, you are either going to make money and stay in business or you don't make any and you're out. It's very simple. But by the same token you have an obligation as a licensee and public trustee to act in the public interest with those things that are going to make, hopefully, the quality of life better for people.

And we have sought to do that in every way we can, to be involved in the voice of the voiceless and to give access and be involved in those things that are going to serve the public interest. And seemingly much of that is on the back burner. In fact, we have, you know, at least in my opinion, persons who obviously have no broadcast experience, persons who are in the business... with only a profit motive. Again, I'm not saying that that's a bad idea, but it's always been our understanding from everything that we've understood coming out, that this industry had an obligation, that the airwaves belonged not to you. You are a trustee. And when you are entrusted with anything that belongs to someone else ... you have an obligation to act in their interest and not just your own.

... I think serious injury has been done, and frankly I don't know how it will ever be corrected. I think that we would have been out of business at this time, along with many others ..., except that we have a survival mentality and it's been forced upon us by generally the whole ethos of society. And given our experience, again, in coming up through the, prior to the, civil rights movement, the struggles that all of that engendered, coming from that time to where we are today – and I'm not unmindful of the tremendous strides that have been made, but I'm also keenly aware of how far it remains to go. (EFaush238, pp. 13-15)

➢ *Loss of Freedom of Speech*

With fewer and fewer companies owning more and more licenses, there is a real threat to freedom of speech... (Mary Helen Barro, former Hispanic radio broadcaster) (MHBarro190, p. 2)

Many licensees saw a loss of freedom of speech as a serious consequence of market consolidation. They attributed this impact to the diminishing number of small and minority-owned stations and the consolidation of broadcast properties into the hands of the few. They expressed concern that formats, news and public service programming were becoming

homogenized and less targeted to the needs of individual communities. Overwhelmingly, they worried that no one would serve the segment of the market to which they had committed themselves if they were forced to either close or sell their station.

Mary Helen Barro offered her view.

> *We little broadcasters dedicated a great deal of time and effort to community service, to public service, to informing, especially those of us in Spanish radio. We had a lot of activities to inform people about what was going on to educate them, to encourage them to become citizens, to register and vote, and become active in the process. The big corporations, they do a minimum token job of that.*
>
> *Your small broadcasters were much more dedicated to community involvement and getting people involved in the process. Your big corporations don't do that. And I think it's been a great loss to the community. And, as I say again, freedom of speech. ... You don't understand the real threat to freedom of expression that has occurred due to the FCC's policies. Not only did you shut out the little guy, you shut out the opportunity for expression. So it's not like other industries. When you're talking about broadcasting, when you're talking about media, you're talking about freedom of speech. (MHBarro190, p. 15)*

➤ *Loss of Diversity of Viewpoint*

The Commission has long since recognized that a "[d]iversity of ownership fosters [a] diversity of viewpoints,"[29] and aptly observed in its *Statement on Policy on Minority Ownership of Broadcasting Facilities* that "[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience....and enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." [30] The Commission's cornerstone responsibility of protecting and acting in the best interest of the public interest requires the agency to promote a diversity of viewpoints.[31] Many of the interviewees expressed concern over the loss of diversity of viewpoints.

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[29] In the Matter of 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2000 WL 791562, FCC 00-191 (June 20, 2000).

[30] *See Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978).

[31] *See Public Interest Obligations Of TV Broadcast Licenses*, Notice of Inquiry, 14 FCC Rcd. 21,633 (1999)(The Commission's "public interest standard should promote diversity over the public airwaves.").

John Tupper, a White television licensee and network affiliate, remembered a time when there was more diversity among owners of affiliate stations and the innovation that came from that diversity.

> *[You had] ideas that came from affiliates who were innovative because there was more diversity spread about in the license holding which resulted in basically better programming, new ideas being tried, et cetera. ... (W)hen you get away from that and you deal with all ideas emanating from programmers in Burbank, you get a different mix of service to the public than if you had more diversity in the ownership. (JTupper216, p. 36)*

Erskine Faush, an African-American television broadcaster who has devoted himself to responsible, informative broadcasting to his community, is proud of the contribution he has been able to make.

> *[Members of the community] know ... we are the friend that they can call, whatever they need. We have a talk program on in the mornings and so forth where we attack the issues, and have been doing it for years, of giving a voice to the community. And this is what we exist on because, as I said, we grew up in that time when we felt that that was an obligation to the community to be involved and to be the voice of those who had no voice. And I'm glad somebody is paying attention [with this study] to some of the things that's going on, you know.... I'm glad to have this opportunity, not for my sake but for the generations and things that will come along. There's a long way yet to go. And somebody needs to be picking up the mantle and running forward with it. (EFaush238 pp. 24-25)*

➢ *Loss of Community Service*

The theme of centralized broadcasting versus a local community focus emerged repeatedly throughout the interviews. Benny Turner shared that he was concerned about the local voice being lost with consolidation. *"Yes it does pose a threat and creates a greater opportunity for syndicated or centralized broadcasting away from the local community. (BTurner108, p. 14)*

Trent Boaldin, a White wireless licensee whose family owns wireless and cable systems, expressed that *"(s)erving the community is very much a driver for what we do. I mean this is a family business. I'm a third generation member of the family. (TBoaldin307, pp. 21)*

Mateo Camarillo, a Hispanic radio licensee, expressed concern that large corporations are more interested in serving their shareholders than they are in serving the communities from which their audience come.

> *And I really believe that ownership has a lot to do with the end product, whether you're talking about voice, service to the community, truly fulfilling the public trusteeship that you have in that license, to serve all of the public that's in your community, because you*

> *know a corporation in New York City doesn't have the same [interests], the shareholders are interested in a profit, and they may not be as interested in serving the neighborhood in Barrio Logan. (MCamarillo375, p. 28)*

Manny Davila, another Hispanic radio broadcaster, got into radio to serve his community.

> *We're the last independent(ly) owned station in San Antonio, and we're the last radio station that somebody can come into off the street with a tape that he recorded in his garage and we will play the damn song... And so you're talking about guys that got into radio when the FCC basically said that this is a community thing, and you're supposed to help the community. And we said, you know, that's the kind of jobs that we want, and in the meanwhile we might even make some money, because it was never the money that motivated us. (MDavila128, pp. 21-22.)*

Others, such as Richard Weaver-Bey, an African-American, discussed their discomfort with selling their stations believing that there will no longer be a voice of the community it serves when the station is gone.

> *Diversity of voices and views is a pillar of our democracy.... So right now we're looking at selling the station, and I really am not comfortable having to do that because I understand how strongly the station is needed in the community and that it is the voice of our community. (RWeaver-Bey171, p. 8, 14)*

Johnny Shaw, who with his wife, Opal, owns a radio station, feels an obligation to serve his African-American community. His commitment was expressed this way.

> *"... (I)t goes back to the service that we provide for the community. And I feel that I'm obligated, because this window of opportunity [to acquire a station] was open for us, to do this. To me, when we acquired that license from the FCC, it's kind of like we married the community, and we agreed that we would serve the community. I think when you sell, again, to the larger companies, I think you are selling your community out, because the larger companies are only going to focus on advertising dollars. They are not going to care about announcing the PTA meeting of the night. Do you know what I'm saying? . . . and I'm sure in talking to me you can tell I'm big on this idea of serving the community, being in the community, being a part of the community. (JShaw185, p. 22, 31)*

> *Loss to Minority Communities*

Minority licensees especially felt their commitment to their respective communities - to keep them informed, to empower them, to report on current events from the perspective of those whom the events would most impact.

Mateo Camarillo, a Hispanic radio licensee, was one such broadcaster.

> *I'm an immigrant and ... I've always identified with the Hispanic community; and my first discipline is social [work]. I have a Masters in social work. I started a school of social work to train Hispanics to work with the Hispanic community. So I'm very committed to the community that I grew up in that I feel obligated to pay back and develop that community. And one of the things that is very obvious is that it doesn't have the required resources or tools to be able to develop.*
>
> *One of the commitments I have made to myself is to help empower the Hispanic community to be at least on equal footing and one of the issues is information. And information is not readily available. The closest thing to information are papers that come out once a month or every 2 weeks, or whatever; it's not real-time information. So by the time you learn about an opportunity, whether it's a job application, or a request for a proposal, the deadline has passed. The opportunity [has passed]. So that is knowledge, such as that the City Council is meeting to decide the fate of something important to you or the school board is going to decide about the quality of education for your kid. You know you don't get the information when you need it. So I had always wanted to help get real time information so that people can be more efficient and effective in trying to do things that impact their life. (MCamarillo375, p. 8)*

William Saunders, and African-American, entered broadcasting because he wanted to make sure that the news about his community was reported accurately and completely. *"And every time that we did something, when it would end up on the radio and TV and the newspaper, it was different from what we did. And I felt that there had to be a way that we could tell people what we were about, the truth about the whole situation, and that basically is how I got involved."*

Many participants discussed how the perspective of the speaker affects the nature of what is spoken. Mr. Saunders highlighted that point.

> *The information that people need, they normally get it from a certain source; and then they get it better if it's presented by the source that also [is] impacted by that kind of information. So I think that that's the driving force and I think that's what the original Telecommunications Act was about in 1934, was to really be able to serve the community. (WSaunders163, pp. 15-16)*

Mr. Saunders adds, *"... (W)e really like to do the kind of programs that work for our community. I would like to see a program that ... could deal with having a teacher of the 3rd grade coming in on the afternoon just for kids to do homework. And to be able to have that kind of program sponsored by somebody. I think that is important. (WSaunders163, pp. 10-11)*

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THE SUPREME COURT OF NEW HAMPSHIRE

Grafton

No. 2001-440

KOOR COMMUNICATION, INC.

v.

CITY OF LEBANON

Argued: September 11, 2002

Opinion Issued: December 12, 2002

Clauson & Atwood, of Hanover (K. William Clauson on the brief) and Fred Hopengarten, of Lincoln, Massachusetts, by brief and orally, for the plaintiff.

Gardner & Fulton, P.L.L.C., of Lebanon (H. Bernard Waugh, Jr. on the brief and orally), for the defendant.

Booth, Freret, Imlay & Tepper, P.C., of Washington, D.C. (Christopher D. Imlay on the brief), for the Society of Broadcast Engineers, Incorporated, as amicus curiae.

NADEAU, J. The plaintiff, Koor Communication, Inc., appeals the denial of its motion for partial summary judgment and the grant of summary judgment in favor of the defendant, the City of Lebanon, in this declaratory judgment action challenging a zoning ordinance. We affirm in part, reverse in part and remand.

The Trial Court (Fitzgerald, J.; Burling, J.) found the following facts. The plaintiff obtained a permit from the Federal Communications Commission (FCC) to construct a commercial AM radio station with four antenna towers, each at a height of 266 feet. The plaintiff proposed to locate the station on Etna Road, in an area of the city zoned light industrial. The city's zoning ordinance, however, allows radio towers only in rural zoning districts and only to a maximum height for new towers of forty-two feet.

The plaintiff requested a variance, which the city's zoning board of adjustment (ZBA) denied. Rather than appeal the ZBA's decision, the plaintiff filed this declaratory judgment action challenging the zoning ordinance on numerous grounds.

The plaintiff moved for partial summary judgment on the ground, among others, that the ordinance is preempted by the Federal Communications Act of 1934, as amended, 47 U.S.C. §§ 151-613 (2000). The plaintiff alleged that the proposed 266-foot height of its antennas is the minimum allowed under federal law, and therefore no antenna tower meeting the city's height restriction could comply with federal height requirements.

The Trial Court (Fitzgerald, J.) found neither express nor implicit preemption, but concluded that "genuine issues of material fact remain[ed] with respect to whether the zoning ordinance actually conflicts with the federal law." Accordingly, the court denied the plaintiff's motion.

The city also moved for summary judgment, contending that its height restriction was legal and constitutional. The Trial Court (Burling, J.) granted the city's motion on all issues, including preemption. The court again found no express or implied preemption, and found there to be no actual conflict at issue. The court held:

> The federal permits granted to the [plaintiff] ensure that the broadcast towers comply with federal standards. Local land use regulations govern the development patterns in the community. The court finds and rules that there is no actual conflict. See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (actual conflict occurs where compliance with both federal and state requirements is a physical impossibility).

The court also held that the plaintiff's claim that the zoning ordinance effected a taking of its property without just compensation (taking claim) failed as a matter of law.

We apply the following standard of review.

> In reviewing the trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. If our review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment. We review the trial court's application of the law to the facts de novo.

Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000) (quotation and citations omitted).

The plaintiff argues, among other things, that the city's height restriction is preempted by federal law. Under the Supremacy Clause of the Federal Constitution, state law is preempted where: "(1) Congress expresses an intent to displace state law; (2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or (3) state and federal law actually conflict." Disabilities Rights Center, Inc. v. Comm'r, N.H. Dept. of Corrections, 143 N.H. 674, 676 (1999). "Federal regulations have the same preemptive force as federal statutes." Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 321 (2d Cir.), cert. denied, 531 U.S. 917

(2000).

"An actual conflict exists when it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishments and execution of the full purpose and objective of Congress." Disabilities Rights Center, 143 N.H. at 678 (quotation omitted). The plaintiff argues that it is impossible to comply with both the city's ordinance, which prohibits any antenna of a height greater than forty-two feet, and federal law, which requires a minimum antenna height of 266 feet for the type of station proposed by the plaintiff, namely, a Class B station at 720 kHz, see 47 C.F.R. § 73.189 (b)(2)(ii) (2001). The plaintiff also contends that it is impossible for a station of any class, operating at any AM broadcast frequency, to meet both the FCC's minimum height requirements and the city's height restriction. See 47 C.F.R. §§ 73.189, 73.190 (fig. 7) (2001).

The city asserts that it is not physically impossible to comply with both laws, contending that "[p] hysical impossibility occurs only when one law is a mandate and the other a prohibition." Thus, the city argues that because the plaintiff is not required by federal law to construct a 720 kHz AM broadcast station in Lebanon, but merely desires to do so, it can comply with both laws by simply not constructing its proposed antenna.

The city cites no authority for its narrow interpretation of physical impossibility, and we are not persuaded. We note that the principal case cited by both the city and the trial court as authority for the physical impossibility doctrine undermines the city's position. In Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 133-34 (1963), the Supreme Court addressed whether a California law that prohibited the sale or transportation in California of immature avocados, as determined by oil content, was preempted by federal regulations that assessed the maturity of Florida-grown avocados by standards other than oil content. The Court stated:

> A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. That would be the situation here if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.

Id. at 142-43 (citations omitted). The Court's example precludes the argument that a Florida grower could comply with both laws simply by not selling its avocados in California.

Like the Court's example in Florida Avocado Growers, the federal and local regulations at issue here set incompatible restrictions on the same variable: oil content in Florida Avocado Growers and antenna height here. Figure 7 of 47 C.F.R. § 73.190 graphically shows the minimum antenna heights required for AM broadcast stations at various frequencies. At no frequency does the minimum height appear to fall below forty-four meters or approximately 144.36 feet. Accordingly, we conclude that for anyone seeking to operate a new FCC-licensed AM station in the city, compliance with both the zoning ordinance and federal law is a physical impossibility.

We note that we are not dealing with a situation in which the plaintiff might comply with both federal law and the local ordinance by locating the facility in a different zoning district of the city. It has been recognized, even in an area of FCC regulation containing explicit preemption rules, that "[a]lthough

courts have found local ordinances preempted when a height limitation is imposed, they recognize that zoning is typically a function reserved for local regulation. Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." Evans v. Board of County Com'rs, 994 F.2d 755, 761 (10th Cir. 1993) (quotation omitted) (amateur radio). "Moreover, local authority over siting of broadcast towers, based on considerations not within the exclusive regulatory authority of the FCC, remains unimpaired." Freeman, 204 F.3d at 324. Thus, this opinion does not hold that the plaintiff's FCC license gives it unrestricted authority to site its antenna tower anywhere in the city notwithstanding valid zoning ordinances that do not frustrate federal objectives. Rather, we merely hold that where it is impossible to comply with federal law and the zoning ordinance at any location in the city, an actual conflict exists and the local law is preempted.

The city argues that it has not completely excluded communication towers, and that the trial court correctly so found. Specifically, the trial court found that "the City permits an existing cluster of towers on Crafts Hill." The city points out that affidavits it submitted to the trial court show that there are eleven communication towers in Lebanon and that it has "allowed new, taller towers on Crafts Hill, based on the doctrine of the expansion of nonconforming uses." However, the city has failed to demonstrate how the existence of other towers in the city would enable the plaintiff to comply with both federal law and local regulation. As the city presented evidence that the plaintiff owns no real property in Lebanon, it may be inferred that the plaintiff does not own property on Crafts Hill. Moreover, there was no evidence presented that the plaintiff could obtain permission from the owner of the Crafts Hill site to place a tower there, even assuming it could get a special exception from the ZBA to exceed the height restriction. Thus, the city failed to raise a genuine issue of material fact as to the possibility of compliance with federal and local law by locating a tower on Crafts Hill.

The city also argues that the weight of applicable authority is against a finding of preemption here. Specifically, the city contends that we should look to cases involving amateur radio antennas decided prior to the FCC's promulgation of an explicit preemption rule regarding amateur radio. See 47 C.F.R. § 97.15(b) (2001). The city asserts that these cases "uniformly held that local zoning of tower or antenna height was not preempted."

We agree with the city that the pre-rule amateur radio cases are helpful to our analysis here, but we actually find in them support for preemption in this case. For instance, in determining that federal law did not preempt a local zoning ordinance limiting the height of radio and television antennas, the court in Schroeder v. The Municipal Court of the Los Cerritos Judicial District, 141 Cal. Rptr. 85, 87-88 (Ct. App. 1977), appeal dismissed, 435 U.S. 990 (1978), reasoned:

> [T]he federal regulation of amateur radio operators (47 C.F.R. §§ 97 et seq.) reveals no detailed regulation of antenna height, but rather one blanket limitation on height to 200-foot (47 C.F.R. § 97.45), plus extensive height regulation of antennas in the vicinity of airports. The FCC has not exhibited concern over antenna height where airport safety is not involved. By contrast, many detailed regulations govern the assignment of frequencies and the prevention of interference phenomena (see e.g., 47 C.F.R. §§ 97.73, 97.131, 97.133), and there can be no doubt that federal regulation has pre-empted control in those areas.

See also Guschke v. City of Oklahoma City, 763 F.2d 379, 383 (10th Cir. 1985).

In the case of AM broadcast stations, there are detailed regulations mandating minimum antenna heights, see, e.g., 47 C.F.R. §§ 73.189, 73.190 (2001), at least in lieu of proof to the FCC that required minimum field strengths can be achieved by an antenna of less than the specified minimum height, see 47 C.F.R. §§ 73.186, 73.189 (2001). Such detailed regulations weigh in favor of a finding of preemption. Cf. Schroeder, 141 Cal. Rptr. at 88.

The differing underlying regulations for AM broadcast stations and amateur radio also undermine the city's argument that the FCC's promulgation of explicit preemption rules in areas such as amateur radio implies the absence of preemption in areas where the FCC has not promulgated explicit preemption rules. The city argues: "The Plaintiff's claim of implied preemption cannot be correct, because if it were, the promulgation of explicit preemptive rules in the case of amateur radio and cell phone antennas – as well as FCC's 1997 proposal (never adopted) for preemptive rules for broadcast antennas – would have been meaningless acts." Because different broadcast media are subject to different regulations, the extent of which would affect whether explicit preemption in that area was necessary or not, such a generalization is invalid.

We also reject the city's argument that the FCC's failure to adopt proposed preemptive rules that would have covered all broadcast facilities indicates a lack of federal preemption. See Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities, 62 Fed. Reg. 46241 (proposed August 19, 1997). We have noted that "[t]he legislature expresses its will by enacting laws, not by failing to do so." Merrill v. Manchester, 114 N.H. 722, 728 (1974). The same holds true for the FCC and its promulgation of regulations.

The plaintiff next challenges the trial court's grant of summary judgment to the city on the plaintiff's taking claim. The court had previously held, based upon the plaintiff's failure to appeal the ZBA's decision, that "[t]o the extent that the plaintiff is seeking compensation for an unconstitutional taking, injunctive relief, or damages occasioned by the ZBA's denial of the variance applied for in 1998, the instant action is barred under the doctrine of res judicata." The court also held that the plaintiff's taking claim failed because "there is no legal support for plaintiff's argument that a license can constitute a property interest for the purposes of a regulatory taking or inverse condemnation."

In its notice of appeal, the plaintiff challenged both rulings. In its brief, however, the plaintiff argues only that the trial court erred in not recognizing an FCC license as property. The plaintiff's brief fails to challenge the trial court's res judicata holding. Since a party waives arguments not briefed, even if raised in the notice of appeal, see MacMillan v. Scheffy, 147 N.H. 362, 363 (2001), and the trial court's res judicata holding provided an alternative basis for its grant of summary judgment to the city on the plaintiff's taking claim, we uphold the court's decision without addressing the merits of the parties' arguments.

We also need not address the city's arguments regarding the validity of its zoning ordinance under a substantive due process analysis because we hold that the ordinance is nevertheless preempted by federal law.

Affirmed in part; reversed in part; remanded.

DALIANIS and DUGGAN, JJ., concurred.