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

In the Matter of	
2006 Quadrennial 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. 06-121
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

COMMENTS OF CLEAR CHANNEL COMMUNICATIONS, INC.

Andrew W. Levin
Executive Vice President, Chief Legal Officer, and Secretary
Clear Channel Communications, Inc.
200 East Basse Road
San Antonio, Texas 75201
(210) 822-2828

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SUMMARY

Clear Channel Communications, Inc. ("Clear Channel") is one of the world's leading media and entertainment companies and is the licensee of locally-programmed and locally-oriented radio and television stations that are dedicated to serving communities across the United States. Clear Channel has been able to expand its ability to deliver superior service to the public in part as a result of the deregulatory changes to the local radio ownership rule that Congress mandated in the Telecommunications Act of 1996 ("1996 Act"). These changes were a result of Congress' recognition of the growing rivalry that terrestrial broadcasters faced at the time of the 1996 Act's passage, and the fact that regulatory relief would aid the industry in its quest to remain competitive. At the same time, Congress directed – in Section 202(h) of the 1996 Act – that the FCC periodically review its media ownership rules, including the local radio ownership rule, to determine whether those rules remain necessary in the public interest as the result of competition. If not, Congress directed that the media ownership rules be repealed or modified. The current state of the media marketplace – in which Americans are overwhelmed by choice and, if anything, have an *over*abundance of options for information, news, local programming, and entertainment – renders the local radio ownership caps entirely unnecessary and subject to repeal or, at the very least, relaxation.

Today, ten years after Congress directed increases in the local radio ownership caps, local radio markets of all sizes across the nation are vibrantly competitive, and the radio industry is far less concentrated than nearly every other communications industry segment. More significantly, free, over-the-air radio also now faces substantial and ever-increasing competition from a dizzying array of alternative platforms. A decade ago, Congress could not even have imagined the emergence of many of these platforms, several of which were only on the horizon in 2003, and none of which ever have been or are today subject to any form of government-imposed

limitations on the number of outlets that can be owned in a local market.

The country's two satellite radio operators – XM and Sirius – can therefore provide listeners with more than 270 channels of programming in every local market across the country. In 1996, it was not at all clear that satellite radio would ever become a real competitor to terrestrial radio broadcasting, and the technology had less than a million subscribers when the FCC issued the *2003 Order*. Today, in stark contrast, satellite radio boasts over eleven million subscribers, having experienced a staggering increase of *over 1000%* in subscribership in just three years. Congress could not even have imagined in 1996 that nearly sixty-seven million Americans would own iPods and other MP3 players that can be used to listen to music programming, or that twenty-seven million would listen to "podcasts" on those devices, because those devices did not even exist a decade ago. They, like satellite radio, also were in their infancy the last time the FCC visited the question of whether the local radio ownership rule should be relaxed in 2003.

Moreover, while Congress may have been able to envision the day when people might listen to music over the Internet, or through music channels on subscription-based cable, DBS or IPTV platforms, the popularity of these services has far surpassed the level that anyone would have expected them to achieve either when Congress first directed relaxation of the local radio ownership limits in 1996, or when the FCC last considered whether those limits remained necessary in their current form in 2003. Congress in 1996 also could not have foreseen that Wi-Max technology would eventually allow people to listen to Internet-delivered audio programming on the go, and Wi-Max was only beginning to emerge in 2003. And there is, of course, no limit on the number of sources of downloadable audio programming – for MP3 players, direct listening over the Internet, or mobile listening via Wi-Max – that a single entity may own, nor is there any limit on the number of subscription-based cable or DBS music channels that a single entity may program. Terrestrial radio broadcasters, by contrast, remain shackled by restrictions on the number of radio stations that they can own in a local market that have not kept pace with the competitive changes that the marketplace has undergone.

At the same time, there is abundant evidence that the increased levels of common ownership made possible by Congress's deregulatory action in the 1996 Act have produced real benefits for American listeners. Clear Channel itself delivers these benefits to listeners every day in the form of vastly increased program choices, including a greater overall number of radio program formats, larger variety in the number of unique songs and artists played on stations regardless of format, and increased outlets for new and emerging artists. Clear Channel also offers its listeners benefits in the form of increases in the quality and content of local news and public affairs programming, expanded emergency preparedness capabilities, and higher levels of participation in events affecting the local communities that Clear Channel stations serve. The benefits provided by these types of programming and community involvement – as Clear Channel's own experience demonstrates – flow directly from the incentives, efficiencies, and economies of scale that are made possible by increased levels of common ownership.

What is more, and as the record before the FCC in 2003 clearly established and as further shown in these comments, the manner in which local radio advertising markets function renders the risk of anticompetitive behavior virtually nonexistent, and any such behavior that nevertheless might occur could easily be remedied by a wide variety of federal and state antitrust enforcement mechanisms. Thus, is it clear that marketplace developments have rendered the current local radio ownership caps entirely unnecessary in light of competition, and that allowing higher levels of common ownership will not cause any competitive harm, but will actually produce net benefits for American consumers.

At the very least, the substantial changes in the media marketplace that have occurred in the last decade, the benefits that have been shown to flow from increased levels of common ownership, and the absence of any risk of competitive harm, warrant *relaxation* of the local radio ownership caps. If nothing else, the FCC should raise the current caps to allow a single entity to own at least ten stations in the nine markets with between sixty and seventy-four stations, and at least twelve stations in the eight markets with seventy-five or more stations. These proposed modifications to the current rule are exceedingly modest, and are needed in order to ensure that terrestrial radio broadcasters can remain meaningful competitors in today's ever-expanding and increasingly fragmented media marketplace. They are also needed in order to ensure that free, over-the-air radio remains available as a choice to those who can afford to obtain audio programming from other sources – and as a vital lifeline for those who cannot – in times of crisis such as the natural disasters and homeland security threats that have increasingly faced our nation in the recent years. Any local limits that the FCC does retain should, moreover, be based on the number of outlets owned rather than market or revenue share – as Congress made clear in the 1996 Act and as the realities of the radio broadcasting industry require – and should not include separate caps on the ownership of AM and FM properties.

For the reasons that Clear Channel has explained previously, the Commission should also revisit its decision in the *2003 Order* to restrict the sale of grandfathered radio station combinations. In addition, because the limited "exception" to this restriction for entities with less than six million dollars in annual revenue has proven to be completely ineffective at achieving its posited goal of increasing participation in the broadcasting industry by new entrants and businesses owned by women and minorities, the FCC should revise that definition to allow more entities to qualify as purchasers of grandfathered combinations, if any restriction on such sales is retained. Finally, to the extent that the Commission chooses to retain limits on cross-ownership of media properties, there should be no separate restriction on radio/television cross-ownership. The FCC's prior determinations regarding cross-ownership – all of which were either not challenged or upheld by the Third Circuit – compel the conclusion that there is no basis for imposing, as the Commission proposed to do in the *2003 Order*, separate restrictions on radio/television cross-ownership in smaller markets.

As former FCC Commissioner James H. Quello recently remarked, "[w]e are in an era of programming super-abundance." In this era, "[t]he 'scarcity' that used to justify government regulation of broadcasting no longer exists," rendering it at best "difficult" – and, indeed, Clear Channel submits *impossible* – "to justify why TV and radio programming should be singled out for detailed regulation."

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COMMENTS OF CLEAR CHANNEL COMMUNICATIONS, INC.

Clear Channel Communications, Inc. ("Clear Channel") hereby submits its comments regarding the above-captioned further notice of proposed rulemaking.[1] As demonstrated below, the marketplace has changed in a manner that renders the existing local radio ownership rule entirely unnecessary and thus ripe for repeal or, at the very least, requires increases in the

[1] *2006 Quadrennial Review of the Commission's Broadcast Ownership Rules – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 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; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-235, 01-317, 00-244, FCC 06-93 (July 24, 2006) ("*2006 FNPRM*").

number of stations that can be owned in the nation's largest markets and elimination of the AM/FM "subcaps." The Commission should also reverse its prior decision to restrict the transfer of grandfathered radio combinations or, at a minimum, expand the class of entities eligible to purchase such combinations. Finally, and consistent with the FCC's own reasoning in the *2003 Order*, there is no basis for maintaining any restriction on the cross-ownership of radio and television stations, regardless of market size.

I. THE FCC IS OBLIGATED BY SECTION 202(h) TO REPEAL OR MODIFY RULES THAT ARE NO LONGER NECESSARY IN THE PUBLIC INTEREST IN LIGHT OF CURRENT COMPETITION LEVELS.

A. Under the Legal Standard Adopted by the FCC in 2003 and Affirmed by the Third Circuit, the FCC Has an Obligation to Change its Rules to Reflect Current Market Realities.

Section 202(h), which governs this quadrennial review proceeding, was an essential part of the sweeping deregulatory program adopted by Congress in the Telecommunications Act of 1996.[2] As the FCC has previously explained, and as the Third Circuit agreed, "[t]he text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace' resulting from that Act's relaxation of the Commission's regulations, including the broadcast media ownership regulations."[3] "Put another

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act"); *see id.*, Preamble, 110 Stat. 56 (stating that the 1996 Act was primarily intended "to promote competition and reduce regulation"); *see also Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 502-03 n.20 (2002) (noting the "deregulatory and competitive purposes of the [1996] Act"); *Reno v. ACLU*, 521 U.S. 844, 857-58 (1997) (recognizing the 1996 Act's overarching goals of "reduc[ing] regulation"). Section 202(h) as initially adopted required the FCC to conduct periodic reviews on a biennial basis. Congress has since amended the statute to provide for reviews quadrennially. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

[3] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004) (quoting *2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4732 (¶¶ 16, 17) (2003) ("*2002 Biennial Review Report*"), *cert. denied*, 125 S. Ct. 2902 (2005); *see 2002 Biennial Regulatory Review–Review of*

way, the periodic review provisions require the Commission to 'monitor the effect of . . . competition . . . and make appropriate adjustments to its regulations.'"[4]

In making determinations under Section 202(h), it is clear that the FCC must analyze the current state of competition and reevaluate its rules in light of changed market conditions.[5] Indeed, the Third Circuit confirmed that Section 202(h) explicitly "[r]ecogniz[es] that competitive changes in the media marketplace could obviate the public necessity for some of the Commission's ownership rules."[6] Thus, the Third Circuit held that Section 202(h) "requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain 'necessary in the public interest.'"[7] The statute mandates that the FCC "periodically . . . justify its existing regulations," thereby imposing "an obligation it would not otherwise have,"[8] and one that "extends *beyond* [the Commission's] normal monitoring responsibilities."[9] In order to justify retention of existing rules intact, the FCC must demonstrate that, based on current

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the Commission's Broadcast Ownership Rules, 18 FCC Rcd 13620, 13624-25 (¶¶10-12) (2003) ("*2003 Order*").

[4] *Prometheus*, 373 F.3d at 391 (quoting *2002 Biennial Review Report*, 18 FCC Rcd at 4727 (¶ 5)); *see Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, *op'n modified in part on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) (Congress intended the biennial review to "continue the process of deregulation" that the 1996 Act commenced).

[5] *See Cellco P'ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004) (affirming standard applicable to FCC biennial reviews pursuant to Section 11 of the Communications Act, which the FCC indicated in the *2003 Order* is the same standard that governs the FCC's 202(h) inquiries); *2002 Biennial Review Report*, 18 FCC Rcd at 4735 (¶ 21).

[6] *Prometheus*, 373 F.3d at 391.

[7] *Id.*

[8] *Id.* at 395.

[9] *Cellco*, 357 F.3d at 99 (emphasis added).

competitive market conditions, a regulation remains necessary in the public interest.[10] If the Commission cannot do so, the regulation "must be vacated or modified."[11]

Even if the FCC's obligations under Section 202(h) extended no farther than those imposed on all federal agencies pursuant to the Administrative Procedure Act, the Commission would still be required to "evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would."[12] Indeed, the Supreme Court has explained that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."[13] In order to justify adoption or retention of a rule, the administrative record must demonstrate the existence of an actual problem in need of regulatory solution,[14] for "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'"[15] It is clear, then, that the FCC bears a heavy burden in this proceeding to justify retention of its ownership rules in their current form. Because, as shown below, the Commission cannot meet this burden as to either the local radio ownership

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[10] *Prometheus*, 373 F.3d at 394-95.

[11] *Id.* at 394; *see id.* at 395 (rules that are determined to no longer be necessary in the public interest "must be repealed or modified"); *see also Cellco*, 357 F.3d at 94 (the 1996 Act mandates that the Commission identify rules that are no longer necessary "followed by their repeal or modification").

[12] *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (quoting *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)).

[13] *Am. Trucking Ass'ns, Inc. v. Atchison. Topeka & Santa Fe Ry Co.*., 387 U.S. 397, 416 (1967); *see NBC v. United States*, 319 U.S. 190, 225 (1943) (the Commission cannot retain a rule "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[ ]").

[14] *See Burlington N. Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[15] *HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted).

rules or the restriction on radio/television cross-ownership, it is obligated to eliminate or modify those rules.

B. **<u>The Text, Purpose, and Context of Section 202(h) Make Clear That the FCC Has an Even Greater Burden than its 2003 Order and the Third Circuit's Decision Establish.</u>**

Clear Channel submits, moreover, that the text, purpose, and context of Section 202(h) make clear that the statute actually establishes an even more stringent legal standard than the one previously adopted by the Commission and affirmed by the Third Circuit.[16] "[I]n any case of statutory construction, [the] analysis begins with the language of the statute,"[17] which here requires a determination of whether rules remain "necessary in the public interest."[18] The ordinary meaning of the term "necessary" is *not* "useful" or "appropriate," but "absolutely required," "indispensable," or "essential."[19] That a strict definition should be attributed to the term "necessary" as it is used in Section 202(h) is made all the more clear by the "deregulatory" purpose that the Third Circuit acknowledged undergirds the 1996 Act in general and Section 202

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[16] Clear Channel has previously established that Section 202(h) imposes a stricter legal standard in a number of prior pleadings filed in relation to the FCC's *2003 Order*, all of which are hereby incorporated herein by reference. *See* Comments of Clear Channel Communications, Inc., MB Docket No. 02-277, at 2-4 (Jan. 2, 2003) ("*Clear Channel 2003 Comments*"); Reply Comments of Clear Channel Communications, Inc., MB Docket No. 02-277, at 2-3 (Feb. 3, 2003) ("*Clear Channel 2003 Reply Comments*"); Brief of Petitioner Clear Channel Communications, Inc., at 20-28, *Prometheus Radio Project v. FCC*, 373 F.3d 373 (3rd Cir. Nov. 3, 2003) ("*Clear Channel Third Circuit Brief*"); Reply Brief of Petitioner Clear Channel Communications, Inc., at 3-13, *Prometheus Radio Project v. FCC*, 373 F.3d 373 (3rd Cir. Jan. 3, 2004) ("*Clear Channel Third Circuit Reply Brief*"); Brief of Respondent Clear Channel Communications, Inc. in Support of Petitioner, at 20-27, *Nat'l Ass'n of Broad. v. FCC*, No. 04-1033 (Feb. 22, 2005) ("*Clear Channel Supreme Court Brief*").

[17] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted).

[18] 1996 Act, § 202(h), 110 Stat. at 112.

[19] *Webster's Third Int'l Dictionary* 1511 (1976); *Oxford English Dictionary* (2001) ("Indispensable, vital, essential, requisite"); *see, e.g.*, *Clear Channel 2003 Comments* at 3; *Clear Channel 2003 Reply Comments* at 2; *Clear Channel Third Circuit Brief* at 20-21.

in particular.[20] The structure of Section 202 further confirms this to be true; subsection (h) is preceded by no fewer than six subsections that dramatically reduced federal media regulation, either by eliminating or substantially relaxing prior limitations on ownership rights.[21] Finally, interpreting the substantive obligation placed upon the agency by Section 202(h) as requiring nothing more than a showing that a rule is "useful" or "appropriate" adds nothing to the duties already imposed on the agency under the Administrative Procedure Act, and thus renders the statutory mandate superfluous, contrary to established canons of statutory construction.[22]

Even apart from the definition of the term "necessary" as it is used in Section 202(h), the statute's language, purpose, and structure make clear that, as the D.C. Circuit previously found, Section 202(h) creates a "presumption in favor of repealing or modifying the ownership rules"[23] and prohibits the FCC from retaining rules based on nothing more than its predictive judgment about their continued utility.[24] It is equally obvious that Section 202(h) is properly interpreted as a one-way ratchet in the direction of *less* regulation, and that the FCC may not *tighten* regulations in a quadrennial review proceeding.[25]

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[20] *Prometheus*, 373 F.3d at 395; *see, e.g.*, *Clear Channel 2003 Comments* at 3-4; *Clear Channel Third Circuit Brief* at 21-25; *Clear Channel Supreme Court Brief* at 2-3, 4-5, 15, 20-21.

[21] *See, e.g.*, *Clear Channel 2003 Comments* at 2; *Clear Channel Third Circuit Brief* at 22-23; *Clear Channel Third Circuit Reply Brief* at 7; *Clear Channel Supreme Court Brief* at 4, 15, 21; *see also* 1996 Act, § 202(i) (repealing statutory ban on cable/broadcast cross-ownership).

[22] *Clear Channel Third Circuit Brief* at 24-25; *Clear Channel Third Circuit Reply Brief* at 5; *Clear Channel Supreme Court Brief* at 22-24.

[23] *Fox*, 280 F.3d at 1048; *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002); *see Clear Channel 2003 Comments* at 4; *Clear Channel Third Circuit Brief* at 25-27; *Clear Channel Third Circuit Reply Brief* at 9-10; *Clear Channel Supreme Court Brief* at 24-25.

[24] *Fox*, 280 F.3d at 1042 ("[t]he Commission's wait-and-see approach cannot be squared with its statutory mandate"); *id.* at 1051 (the FCC may not rely exclusively upon "predictive judgments" or inferences to support a rule); *Clear Channel Third Circuit Brief* at 9-10, 27-28; *Clear Channel Third Circuit Reply Brief* at 11.

[25] *See Clear Channel Third Circuit Brief* at 30-31; *Clear Channel Third Circuit Reply Brief* at

II. THE NUMEROUS CHOICES AMERICANS HAVE FOR NEWS, INFORMATION, AND ENTERTAINMENT RENDER CONTINUATION OF LOCAL RADIO OWNERSHIP LIMITS UNNECESSARY.

A. Today's Consumers Have a Wealth of Options for News, Information, and Entertainment Programming.

A decade after passage of the 1996 Act, the radio industry is more robust and competitive than ever before. There are more than 13,700 free, over-the-air radio stations in the United States today,[26] up from 12,140 in 1996,[27] and, more significantly, up from 6,751 – or an increase of more than *103%* – since 1970.[28] There are *fourteen times* more radio stations on the air today than in the 1940s, when the FCC first commenced regulating ownership of the 910 radio stations then in existence.[29]

The 13,700-plus radio stations in the United States are owned by more than 4400 owners.[30] Clear Channel is but one of the companies owning radio stations, and while it may be

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11-13; *Clear Channel Supreme Court Brief* at 20-24; *see also 2002 Biennial Review Report*, 18 FCC Rcd at 4729 (¶ 11) ("add[ing] or expand[ing]" regulations, "as opposed to modifying or eliminating existing rules," is "beyond the scope" of the biennial review); *2000 Biennial Regulatory Review*, 16 FCC Rcd 1207, 1213 (¶ 19) (2001) ("[A]s a part of the biennial review process, we do not intend to impose new obligations on parties in lieu of current ones, unless we are persuaded that the former are *less burdensome* than the latter and are necessary to protect the public interest.") (emphasis added). *But see Prometheus*, 373 F.3d at 394.

[26] FCC, News Release, *Broadcast Station Totals as of March 31, 2006* (rel. May 26, 2006) (announcing that there are a total of 13,748 AM, FM, and non-commercial FM stations). BIA indicates that, as of August 9, 2006, there are 13,935 U.S.-licensed commercial and non-commercial radio stations, and that there are an additional 339 Canadian radio stations, and 216 Mexican radio stations, that serve United States markets, for a grand total of 14,490 radio stations available to American listeners.

[27] FCC, News Release, *Broadcast Station Totals as of December 31, 1996* (rel. Jan. 21, 1997).

[28] FCC, News Release, *Broadcast Station Totals for January 1970* (rel. Feb. 10, 1970).

[29] Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition is Expanding our Sources of Information and Entertainment*, at 16 (2005), http://newmillenniumresearch.org//archive/Final_Compaine_Paper_050205.pdf ("*Media Monopoly Myth*").

[30] Owner information was obtained from the BIA database.

the largest single owner with 1168, it owns only approximately 8.5% of the nation's total stations. The 90%-plus other stations are owned by thousands of other companies. As a result, the radio business is among the *least consolidated* of the nation's major industries, including other communications businesses. The record industry, for example, is dominated by four companies, which together garner 81.9% of the recorded music market.[31] In the film production industry, six companies have a 90.3% share of the market,[32] and, as to movie theatres, "one company alone . . . owns 18% of all U.S. screens."[33] The top five cable companies enjoy a 95% share of the market,[34] and the top five wireless telecom companies have an 81% share.[35] And the situation is comparable outside of the communications arena – for example, five companies have a 98% share of the car rental market.[36] In the radio industry, by contrast, the *top fifteen companies* do not garner *even half* of the market, only enjoying a combined 45.6% share.[37]

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[31] *See* Nick Bell, Bear Stearns Equity Research, *EMI (EMI.L-255p) – Outperform*, at 2 (Jan. 31, 2006). The 81.9% figure was calculated by adding the shares for each of the four companies listed.

[32] *See* Jeffrey B. Logsdon, BMO Capital Markets, *Weekend Box Office a Little Light, but Still Sees Year-Over-Year Gain*, at 5 (Sept. 5, 2006). The 90.3% figure was calculated by adding the shares for the top six companies listed.

[33] Robert Marich, *Radio M&A Slides to Historic Norms, Weighed Down by Soft Ads*, Kagan INSIGHTS (July 19, 2006), http://www.kagan.com/ContentDetail.aspx?group=5&id=223.

[34] Doug Mitchelson, Deutsche Bank, *Cable/Satellite Spotlight: 1Q06 Preview – It's All About the VOIP Ramp*, at 9 (Apr. 9, 2006). The 95% figure was calculated by adding the number of subscribers for each of the top five cable companies, and dividing that number by the total number of cable subscribers. Subscriber numbers for Comcast and Adelphia were listed separately in the report, but combined for purposes of this calculation, because the merger between the two companies has now closed.

[35] *See* Ted Schadler, Forrester Research, *The State of Consumers and Technology: Benchmark 2006*, at 9 (July 27, 2006). The 81% figure was calculated by adding the shares for each of the top five companies listed.

[36] *See* The Hertz Corporation, Amendment No. 1 to Form S-1 Registration Statement Under the Securities Act of 1933, at 68 (filed Aug. 29, 2005), http://www.sec.gov/Archives/edgar/data/47129/000095012405005214/k94749a1sv1za.htm.

[37] Who Owns Radio, *Top 50 Radio Group Owners by Revenue*,

The abundance of competition in radio also exists at the local level. A 2005 study that randomly examined eight local markets of varying sizes, ranging from the 5th to the 250th ranked Arbitron markets, found a substantial number of separate owners – and an even more significant number of varying formats – in each market.[38] Salt Lake City, Utah – now the 31st ranked Arbitron market – had thirty-seven stations.[39] Citadel, Millcreek, and Simmons each owned six stations, Clear Channel and Bonneville each owned four, and the remainder were owned by eight other companies, for a total of thirteen separate owners.[40] In Yakima, Washington – the 198th ranked Arbitron metro market – there were eighteen stations.[41] Seven were owned by New Northwest; Clear Channel owned six, and the remaining stations in the market were owned by four other companies, for a total of six commercial owners, and the stations aired a total of twelve distinct formats, ranging from Adult Contemporary to Regional Mexican.[42] Even in Cookeville, Tennessee – then the 250th ranked Arbitron metro market and

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http://www.whoownsradio.com/WowRankings.asp?sType=r (last visited Sept. 27, 2006) (subscription required, on file with Clear Channel) (indicating that the top 15 radio group owners had 2005 revenues of approximately $9.793 billion); Radio Advertising Bureau, *Radio Facts: Annual Revenue*, http://www.rab.com/public/pr/yearly.cfm (indicating total 2005 revenue for the radio industry of approximately $21.455 billion) (last visited Oct. 20, 2006). The 45.6% figure was calculated by adding the advertising revenues for each of the top fifteen radio group owners provided by Who Owns Radio, and dividing that number by the total radio advertising revenue provided by the Radio Advertising Bureau.

[38] *See Media Monopoly Myth*, at 20-21, 23-24 (Table 8). The study actually *understates* the number of stations and owners in each of the markets, because it excludes non-commercial stations and those that do not achieve high enough ratings to be measured by Arbitron. *See id.* at 21 ("Excluded are educational and not-for-profit stations and some commercial stations, mostly small ones, which Arbitron does not cover in its measurements.").

[39] *See id.* at 23-24 (Table 8).

[40] *See id.* Today, Clear Channel owns six stations in the Salt Lake City market, while Citadel owns eight, Simmons owns seven, Bonneville owns five, and Millcreek owns four. *See* BIA Financial Network, FCC Geographic Market Definition Report for Salt Lake City-Ogden, UT (Aug. 2006). The fifty-two commercial radio stations that BIA currently assigns to the market are now owned by twenty-one separate owners. *See id.*

[41] *See Media Monopoly Myth* at 21, 23-24 (Table 8).

the smallest market included in the study – the market's eleven stations were owned by seven different owners, and ten different formats were aired.[43] It is evident that local radio markets of all sizes are competitive, and that terrestrial radio station operators view each other as formidable competitors and vigorously attempt to garner the largest audience share.

But the vibrancy of competition between free, over-the-air radio stations is only one part of the story. Radio stations compete with more than just one another, on both a national and local level. Terrestrial radio operators are but one small set of participants in the overall media landscape, which has expanded dramatically in recent years. Today's media marketplace is accurately characterized as bearing "abundance" and "multiplicity" – not "dominance" or "scarcity," let alone "monopoly."[44] Within this vast and constantly-expanding media marketplace, terrestrial radio broadcasters are subject to fresh and ever-growing competition from a vast array of new technologies and services that deliver music, entertainment, and news. These media outlets did not exist in 1996, and today they remain completely unhindered by any

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[42] *See id.* Today, Clear Channel owns five stations in Yakima and New Northwest owns six. *See* BIA Financial Network, FCC Geographic Market Definition Report for Yakima, WA (Aug. 2006). The market still has six separate owners of its nineteen commercial radio stations. *See id.*

[43] *See Media Monopoly Myth* at 21, 23-24 (Table 8). Clear Channel now owns four stations in Cookeville, which is currently ranked 287th by Arbitron. *See* BIA Financial Network, FCC Geographic Market Definition Report for Cookeville, TN (Aug. 2006); *see also* Arbitron, *Arbitron Radio Market Rankings: Spring 2006*, http://www.arbitron.com/radio_stations/mm001050.asp (last visited Oct. 20, 2006). The ten commercial stations currently assigned by BIA to the Cookeville market are owned by four separate owners. *See* BIA Financial Network, FCC Geographic Market Definition Report for Cookeville, TN (Aug. 2006).

[44] *See* Adam D. Thierer, *Media Myths: Making Sense of the Debate over Media Ownership* 11-12 (2005), *available at* http://www.pff.org/issues-pubs/books/050610mediamyths.pdf ("*Media Myths*") (explaining that "if there is a media diversity problem today it is that citizens suffer from 'information overload' because of all the choices at their disposal," and that "[t]he number of information and entertainment options has become so overwhelming that many citizens struggle to filter and manage all the information they can choose from on a given day"); *id.* at 23-42 (describing contemporary media marketplace); *see also* James H. Quello, *Let Broadcasters Be Free*, Broadcasting & Cable, Sept. 4, 2006, http://www.broadcastingcable.com/article/CA6368434.html?display=Opinion ("*Let Broadcasters Be Free*").

ownership regulations analogous to the FCC's local radio ownership rules.

Satellite radio, which offers hundreds of channels of (largely commercial-free) audio programming, is perhaps the most prominent example of a technology that was just a glimmer on the horizon when the current radio caps were adopted but which has since emerged as an extremely significant competitor to free radio.[45] Satellite radio was not commercially available when the 1996 Act was passed, and since the Commission's release of the *2003 Order* has experienced staggering growth, with subscribership levels growing from 797,439 to 11,578,078, for a total increase of *1351%*.[46] Analysts predict that 35 million Americans will subscribe to one of the nation's two satellite radio services – XM and Sirius – by the end of 2010,[47] and a recent

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[45] *See, e.g.*, *Media Myths* at 76 ("traditional terrestrial broadcast radio is being challenged by new forms of competition, especially digital audio radio services (DARS), or satellite radio") (citing Andy Kessler, *Satellite Radio Gets Sirius*, The Wall Street Journal, Mar. 8, 2005, at B2; Sarah McBride, *Two Upstarts Vie for Dominance in Satellite Radio*, The Wall Street Journal, Mar. 30, 2005, at A1; Lorne Manly, *As Satellite Radio Takes Off, It is Altering the Airwaves*, N.Y Times, May 5, 2005, at A1).

[46] Press Release, XM Satellite Radio, *XM Satellite Radio Announces Second Quarter 2006 Results* (July 27, 2006), http://www.xmradio.com/newsroom/screen/pr_2006_07_27.html (reporting 6,899,871 subscribers at end of second quarter 2006); Press Release, XM Satellite Radio, *XM Satellite Radio Holdings, Inc. Announces Second Quarter 2003 Results* (Aug. 3, 2003), http://www.xmradio.com/newsroom/screen/pr_2003_08_07.html (reporting 692,253 subscribers at end of second quarter 2003); Press Release, Sirius Satellite Radio, *SIRIUS Reports Strong Second Quarter 2006 Results* (Aug. 1, 2006), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=205864&cat=Earnings&newsroom= (reporting 4,678,207 subscribers at end of second quarter 2006); Press Release, Sirius Satellite Radio, *SIRIUS Announces Second Quarter 2003 Financial and Operating Results* (Aug. 6, 2003), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=152756&cat=earnings&newsroom= (reporting 105,186 subscribers at end of second quarter 2003).

[47] William M. Meyers, Lehman Brothers, *How Much Will Satellite Radio Affect Terrestrial Radio?: Satellite Radio Represents a Material Threat*, at 2 (Feb. 7, 2005) ("*Lehman Brothers Satellite Radio Report*"). XM has predicted that it alone will end 2006 with total subscribers of between 8.2 and 7.7 million. *See* Press Release, XM Satellite Radio, *XM Satellite Radio Announces Second Quarter 2006 Results* (July 27, 2006), http://www.xmradio.com/newsroom/screen/pr_2006_07_27.html. In July, XM announced that its quarterly revenue had increased 82% between the second quarter of 2005 and the second quarter of 2006, and that it had experienced an increase in subscribership of 56%, for a total of more than seven million subscribers. *Id.* Sirius also announced strong second-quarter results. Its revenue reportedly tripled between the second quarter of 2005 and the second quarter of 2006, for a total of more than $150 million, and the company increased its 2006 guidance for total

study conducted by Edison Media Research and Arbitron revealed that nearly one in five non-subscribers indicate that they are likely to sign up by the end of 2006.[48] The partnerships between the two satellite radio companies and auto-makers, under which receivers are pre-installed in many new models and numerous "free trial" programs are offered, amplifies the competitive threat that satellite radio poses, as terrestrial radio has long been considered the medium that "dominate[s] the car."[49] It is beyond dispute that satellite radio's growing popularity will significantly impact free, over-the-air radio – indeed, Lehman Brothers has predicted that "satellite radio will lower terrestrial radio's advertising growth by approximately 1.5% per year (beginning in 2007)" and that "in-car usage of satellite radio will reduce terrestrial radio's total audience delivery by approximately 0.5% per year through 2013."[50] As a result, long-term revenue growth rate forecasts for the over-the-air radio industry have been cut from 4% to 2.5%, and twelve-month price targets have been reduced by an average of 10%.[51]

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revenue to $615 million and for year-end subscribers to more than six million. *See* Sirius Satellite Radio, Press Release, *SIRIUS Reports Strong Second Quarter 2006 Results* (Aug. 1, 2006), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=205864&cat=&newsroom=.

[48] Edison Media Research, *Internet and Multimedia 2006; On-Demand Media Explodes* (2006) http://www.edisonresearch.com/home/archives/Internet%26Multimedia%202006%20Presentation%20Final.pdf ("*Internet and Multimedia 2006*").

[49] Robert A. Papper, *et al.*, *Middletown Media Studies: Observing Consumers and their Interactions with Media*, *The Media Day*, at 19 (Fall 2005) ("*The Media Day*") (reporting results of observational study regarding usage of a variety of media and showing that 74.8% of radio listening occurred in the car); *see Lehman Brothers Satellite Radio Report* at 4, 8 (forecasting that audience erosion as a result of over-the-air radio listener attrition to satellite radio "will be deepest for in-car listening (45% of total)").

[50] *Lehman Brothers Satellite Radio Report*, at 1, 4.

[51] *Id.* Satellite radio companies are also partnering with wireless phone providers to expand their market reach. *See, e.g.*, Christian Zappone, *Alltel to offer XM on Cell Phones*, CNNMoney.com, Aug. 10, 2006, http://money.cnn.com/2006/08/09/technology/alltel_xmradio/. In addition, satellite radio companies are expanding into the handheld market, clearing the way for satellite radio subscribers to listen on the go. *See, e.g.*, Reuters, *Sirius to Launch New Handheld Later This Summer*, Aug. 1, 2006, http://today.reuters.com/news/articlenews.aspx?type=technologyNews&storyid=2006-08-01T122834Z_01_WEN2806_RTRUKOC_0_US-MEDIA-SIRIUS-HANDHELD.xml&src=rss.

Satellite radio is not the only substantial new competitor to terrestrial radio broadcasting. The forecasts described above have actually been characterized as *conservative* because they do not include "additional threat[s] to radio's audience share" that are posed by portable audio devices, including MP3 players (such as iPods), subscription music services offered via cable television and direct broadcast satellite ("DBS"), or Internet music services.[52] Indeed, it is clear that "consumers are spending more time listening to portable media and downloading music online."[53] As a result of Americans' shifting media consumption habits, "radio listening by adults between the ages of 18 and 34 has declined by roughly 8 percent in the past five years."[54] A recent study of listening trends among the 12-to-24-age group, "the listeners who represent both terrestrial radio's future and its greatest challenge," also shows declines in time spent listening, with a 24% decline among listeners between 18 and 24, and a 22% decline among listeners between 12 and 17.[55] And, the number of people who listen to radio at all in the course of a week has fallen by 14% over the last decade.[56]

Recent estimates indicate that 28% of Americans over the age of 12 – or nearly sixty-seven million – own MP3 players, more than double the number in 2005.[57] As with satellite

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For example, Sirius Satellite Radio has entered the portable music device market, with its new "Stilleto." Richard Menta, *Sirius Stiletto 100, Live Satellite Portable Released*, mp3newswire.net, Aug. 16, 2006, http://www.mp3newswire.net/stories/6002/sirius_stiletto.html.

[52] *Lehman Brothers Satellite Radio Report* at 1.

[53] *Media Myths* at 76.

[54] *Id.* (citing Paul Farhi, *Rock, Rolling Over*, The Washington Post, Jan. 18, 2005, at C1).

[55] *See* Tom Webster, *Follow-Up Edison Media Research Study on 12-24 Radio Listening Shows Sharp Decreases in TSL and Usage*, The Infinite Dial (Sept. 18, 2006), http://www.infinitedial.com/2006/09/followup_edison_media_research.php.

[56] *See* Richard Siklos, *Changing its Tune*, N.Y. Times, Sept. 15, 2006, at C1 ("*Changing its Tune*").

[57] *See* Press Release, Solutions Research Group, *Women in Driver's Seat as Digital Music*

radio, the growing popularity of portable media devices for use in automobiles, in particular, renders the potential for such devices to erode radio audiences even more significant.[58] In fact, many new cars are MP3-ready. And "podcasts" – audio content that can be downloaded automatically from the Internet to an iPod or other MP3 player – are also growing in popularity and constitute a fresh form of competition to terrestrial radio. More than one in ten Americans age 12 and over – or, approximately twenty-seven million people – have listened to an audio podcast.[59] In addition, consumers can now access full-track downloadable music services on their mobile phones, and many mobile phone manufacturers now integrate MP3 players and real-time broadband Internet access capabilities into their handsets.[60] The availability of these

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Market Doubles (July 13, 2006), http://www.srgnet.com/pdf/The%20Pink%20iPod%20Release%20July%2013%202006%20(f).pdf (reporting results of research study). Another source reports that as many as one in five Americans over the age of 12 now own portable MP3 players. News Release Ispos, *Portable MP3 Player Ownership Reaches New High* (June 29, 2006), http://www.ipsos-na.com/news/pressrelease.cfm?id=3124#. This is a significant increase over ownership levels found one year ago (15%), and nearly double the proportion of owners found in April 2003 (11%). *Id.*

[58] *See, e.g.*, Richard Menta, *Drivers Love MP3s*, mp3newswire.net, Aug. 3, 2006, http://www.mp3newswire.net/stories/6002/drivers.html; Reuters, *Apple In Deals to Connect iPod in New Car Models*, Aug. 3, 2006, http://news.yahoo.com/s/nm/20060803/tc_nm/apple_automakers_dc.

[59] *See* Arbitron Radio Listening Report, *The Infinite Dial: Radio's Digital Platforms* 9 (2006) ("*The Infinite Dial*"), http://www.arbitron.com/downloads/digital_radio_study.pdf. This is up from 6 million in 2005. *See* Data Memo from Lee Rainie, Director, and Mary Madden, Research Specialist, Pew Internet & American Life, *More than 6 million American Adults Have Listened to Podcasts; 29% of Those who own MP3 Players Enjoy Web Broadcasts at Their Leisure* (April 2005), http://www.pewinternet.org/pdfs/PIP_podcasting.pdf; *see also Podcast Warning: Radio Beware*, The Hollywood Reporter, July 21, 2006, http://www.hollywoodreporter.com/thr/new_media/brief_display.jsp?vnu_content_id=1002877167.

[60] *See, e.g.*, Verizon Wireless, V-Cast Overview, http://getitnow.vzwshop.com/index.aspx?id=vcast_music (last visited Oct. 20, 2006); Sprint Nextel, Sprint Music Store, http://powervision.sprint.com/home.html (last visited Oct. 20, 2006); Cingular Wireless, MobiRadio, Listen to Over 50 Channels of Digital Radio on Your Mobile Phone, http://www.mobitv.com/radio/radio.php (last visited Oct. 20, 2006); *see also* Verizon Wireless, Everybody Loves Chocolate, http://cache.vzw.com/chocolate/index.html (last visited Oct. 20, 2006) (advertising the "Chocolate" cell phone by LG Electronics as "Part MP3 Player, Part Phone, Totally Sweet").

services – delivered via devices that are widely used by an overwhelming percentage of Americans – provides additional competition to free, over-the-air radio.[61] In an effort to keep up with these changes, Clear Channel itself has launched services on these new platforms, including mobile phone service provider Cingular Wireless, which will begin carrying programming from the number one station in New York City, Clear Channel's WHTZ(FM) "Z100," that can be streamed or accessed on-demand by Cingular customers who subscribe to the new "Z100 Mobile" service.[62]

Internet radio is also a significant competitor to traditional radio broadcasting. Edison Media Research and Arbitron recently found that an estimated fifty-two million Americans listen to Internet radio on a monthly basis.[63] One in five adults between the ages of 18 and 34 listen to Internet radio each week, and weekly Internet radio audiences increased by 50% between January 2005 and January 2006.[64] Indeed, some listeners report that they have "just stopped listening to radio" because they have "access to all this music online" and through other delivery mechanisms.[65] Unlike satellite radio, Internet radio does not normally require the purchase of new hardware; all that is needed is a computer (which most Americans already own) and access

[61] *See* John Silliman Dodge, *Analyst: Mobile Phone Threat to FM Underscores Tech Dominance*, RAIN: Radio and Internet Newsletter, Jan. 30, 2006, http://www.kurthanson.com/archive/news/013006/index.asp; Kim Hart, *As Podcasts Spread, Advertisers Sniff Money*, The Washington Post, July 23, 2006, at F7.

[62] *See* Press Release, Clear Channel, *Clear Channel Radio Launches National Mobile Content Program* (Sept. 6, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1740. Clear Channel expects to launch similar programs involving additional stations over the next year.

[63] *See The Infinite Dial* at 4; *see also Internet and Multimedia 2006*.

[64] *See The Infinite Dial* at 5-6; *see also Internet and Multimedia 2006*.

[65] *E.g.*, *Changing its Tune*.

to a broadband connection (which is quickly becoming ubiquitous in this country).[66] Some Internet radio sources direct users to the streaming broadcasts of local radio stations, but many others offer their own independent music programming.[67] One service, "Pandora Internet Radio," even allows Internet users to create up to 100 of *their own* custom radio stations, based on selected songs or artists, and to share those stations with friends and other users.[68] Music is selected based on the user's personal choice of a band, singer or song, and Pandora creates a new "radio station" that plays only songs with similar musicological characteristics.[69] And Wi-Max technology – which will allow in-car listening to Internet radio – is expected to be available by 2008 and will provide yet another vehicle for Internet radio stations to compete with terrestrial radio broadcasters.[70] Indeed, today "all media," – including both terrestrial radio stations and new Internet-only competitors – are "universally available on the 'Net."[71]

Subscription-based music services offered via cable and DBS – and the new "IPTV" networks being installed by traditional telephone companies – also compete with free, over-the-

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[66] *See* Press Release, Nielsen NetRatings, *Two-Thirds of Active U.S. Web Population Using Broadband, Up 28 Percent Year-over-Year to an All-Time High, According to Nielsen NetRatings* (Mar. 14, 2006), http://www.netratings.com/pr/pr_060314.pdf (reporting 68% U.S. broadband penetration level).

[67] *See Media Myths*, at 74; *see also* Skip Pizzi, *Broadcasters, Pick Your Poison*, Radio World Newspaper Online, Apr. 20, 2006, http://rwonline.com/reference-room/skippizzi-bigpict/2006.04.20-08_rwf_pizzi_april_20.shtml.

[68] *See* Stefanie Olsen, *Pandora's Music Box Inspires Fans*, CNet News.com, July 20, 2006, http://news.com.com/Pandoras+music+box+inspires+fans/2100-1027_3-6096619.html. Pandora is available in both a free, advertiser-supported format, and in a commercial-free, subscription format. Another service called "Last FM" offers similar capabilities to listeners. *See* Last.fm, About Last.fm, http://www.last.fm/about (last visited Oct. 20, 2006).

[69] *See* David Pogue, *Matchmaker Pairs Computer and Stereo*, The New York Times, Feb. 9, 2006 at C1. Pandora stations can not only be listened to using a broadband connection, but can also be heard on stereo equipment using a device called the "Squeezebox." *See id.*

[70] *See* Rick Dearborn, *WiMax Could Be "The New Radio"*, Radio Ink, May 9, 2005, http://www.radioink.com/HeadlineEntry.asp?hid=128818&pt=todaysnews.

[71] *Let Broadcasters Be Free*.

air radio. Music Choice, for example, includes more than fifty commercial-free digital music channels and is available on most cable systems, as well as on Verizon's new "FiOS" network.[72]

In sum, terrestrial radio today competes in a far more robust media marketplace than ever before, and one that only will increase in its competitiveness in the future. None of the new competitors to free, over-the-air radio, moreover, are shackled by government-imposed limitations on the number of outlets that can be owned.[73] Giving terrestrial radio equal treatment by eliminating the local radio ownership caps will enable the free, over-the-air radio industry to remain competitive in today's age of media abundance, and, as shown below, will in fact serve to *increase* rather than decrease consumer choice.

B. Expanded Opportunities for Common Ownership of Radio Stations in Local Markets Will Serve to Further Increase Consumer Choice.

1. The Commission's Own Prior Reasoning, Simple Market Dynamics, and Abundant Empirical Evidence Demonstrate That Higher Levels of Common Ownership Deliver Benefits to American Radio Listeners.

Before 2003, the Commission had sought to justify imposing limits on local radio ownership in part based on concerns about "diversity" and "localism."[74] In the *2003 Order*, however, the FCC finally acknowledged that the local radio ownership rule does not materially advance either of these interests. The Commission could "not conclude that radio ownership concentration has any effect on format diversity," and thus stated that it would "not rely on

[72] *See* Music Choice, About Us, http://www.musicchoice.com/what_we_are/what_we_are.html (follow "About Us" hyperlink) (last visited Oct. 20, 2006).

[73] Nor, of course, are any of these media subject to content regulation, such as the FCC's indecency restrictions. This is why many popular radio personalities, including Howard Stern, now can be heard exclusively on satellite radio. *See, e.g.*, Krysten Crawford, *Life Without Stern Isn't Looking Pretty*, CNNMoney.com (Jan. 27, 2005), http://money.cnn.com/2005/01/27/news/newsmakers/stern_ratings/index.htm?cnn=yes.

[74] *See, e.g.*, *2006 FNPRM*, ¶¶ 4, 7.

[diversity] to justify the local radio ownership rule."[75] The FCC similarly found "little to indicate that the local radio ownership rule significantly advances our interest in localism."[76] At the same time, the Commission determined that there was insufficient evidence that relaxation of the local radio ownership rules would further its interest in promoting either diversity or localism.[77]

The FCC was correct to conclude that limiting the number of radio stations that a single entity may own in a local market does not further its interests in either diversity or localism. On the other hand, the Commission wrongly concluded that allowing increased levels of common ownership would not promote either of these two traditional public interest goals. As explained below, providing expanded opportunities for common ownership of radio stations through elimination of the local radio ownership rule would actually promote diversity and localism, thereby improving consumer choice.[78]

Despite the FCC's equivocation on this question in the *2003 Order,* abundant empirical evidence, as well as the experiences of group owners such as Clear Channel, demonstrate that greater levels of common ownership actually *increase* both diversity and localism. The natural incentives that are inherent in group ownership in general, and particularly in the highly fragmented media marketplace within which terrestrial radio competes, encourage diversification

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[75] *2003 Order*, 18 FCC Rcd at 13742 (¶ 315). As to "viewpoint diversity," the FCC stated simply that "it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information," *id.* at 13739 (¶ 305), and did not state that it was basing the decision to retain the local radio ownership rule on viewpoint diversity concerns, *id.* at 13739 (¶¶ 305, 306).

[76] *Id.* at 13738 (¶ 304).

[77] *Id.* at 13738 (¶ 304), 13742 (¶ 314).

[78] As will be shown in Section II.C. below, local radio ownership limits are also unnecessary to promote competition, which is the third traditional goal that the Commission has advanced to justify their existence.

of content and efforts to ensure that local needs are met. The vast majority of radio stations are owned by dedicated operating companies who *must* meet the needs of local listeners if they are to achieve success by attracting and retaining listeners in the competitive media world. The largest of these, including Clear Channel, are publicly traded companies with an obligation to operate their stations not only to serve the public interest, but also to maximize stock values for the benefit of shareholders.

Due to market dynamics, group owners *cannot* serve the public – or their shareholders – by using stations as megaphones to impose monolithic "viewpoints" and programming choices upon listeners. To the contrary, in order to succeed, group owners must appeal to as many segments of the listening audience as possible, and must be hyper-responsive to the particular needs, interests, and preferences of the local areas they serve. Programming all of its stations – either locally or nationally – to advance a particular viewpoint or to air a particular type of content is simply not a rational option for a group owner. In reality, then, greater levels of common ownership provide efficiencies and economies of scale that group owners have natural incentives to – and do – put to use by *increasing* both diversity of content and their focus on local needs and interests.

The Commission recognized in the *2003 Order* that "consolidation of radio stations can result in efficiencies."[79] The FCC found, moreover, that "[i]n a competitive market, the efficiencies arising out of consolidation will be passed on to listeners through greater innovation and improved service quality" in the form of both more diverse programming and "programming that is responsive to the needs and interests of the local community."[80] As the discussion in

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[79] *2003 Order*, 18 FCC Rcd at 13738 (¶ 303).

[80] *Id.* In the portion of the *2003 Order* concerning the cross-media limits, the FCC similarly found that increasing permissible common ownership levels "creates efficiencies and synergies

Section II.A. above makes clear, today's radio market *is* marked by abundant competition – whether one looks at a narrowly defined "terrestrial radio" market or at a broader market that includes additional competitors such as satellite radio, portable audio devices, Internet radio, cable and DBS, as well as the emerging Wi-Max technology – and would necessarily remain so even absent local radio ownership limits. The Commission's conclusions regarding the benefits in terms of diversity and localism that flow from common ownership are also consistent with prior statements of the agency in the context of its radio ownership rules[81] and other multiple ownership regulations,[82] as well as the findings of a broad range of empirical and academic studies, which span as far back as 1952 and continue to the present, and many of which have been previously cited by the FCC.[83] One widely-used source of industry information reveals,

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that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public." *See id.* at 13760 (¶ 356). The Third Circuit affirmed the Commission's decision on this issue. *See Prometheus*, 373 F.3d at 399-400. Even if the FCC had not explicitly made the same determination with respect to radio, there would certainly be no basis for a different conclusion here.

[81] *Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3276 (¶ 5) (1991) ("stations managed in common can effectively counterprogram each other. . . we believe that increased group ownership . . . may encourage [diversity of programming]"); *see also Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2771-72 (¶ 32) (1992) ("*Radio Rules and Policies Order*") ("[C]ommenters tend to agree . . . that greater combination will not harm diversity because, while competing stations might try to reach the same core audience, a single owner might try to program different stations to appeal to different audience segments in order to maximize its total audience size").

[82] *E,g., Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd 17283, 17291 (¶ 17) (2001); *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 10 FCC Rcd 3524, 3550-51 (¶ 63) (1995) ("*TV Ownership FNPRM*").

[83] *See, e.g., Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 15 FCC Rcd 11253, 11263 n.30 (2000) (citing Bruce M. Owen and Steven S. Wildman, *Video Economics* Chs. 3-4 (Harvard Univ. Press 1992); *TV Ownership FNPRM*, 10 FCC Rcd at 3551 n.81 (¶ 63) (citing Steiner, P.O., *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, Q. J. Econ. 66 (1952)); Steven T. Berry & Joel Waldfogel, National Bureau of Economic Research, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting* (April 1999), www.nber.org/papers/w7080; BIA Financial Network, *Has Format Diversity Continued to Increase?* (2002) (Att. A to Comments of the National Association of Broadcasters, MM Docket Nos. 01-317, 00-244 (Mar. 27, 2002)); Statement of

moreover, that the number of distinct formats available to radio listeners leapt from thirty-two in 1993 to eighty-five in 2005, an overall increase of over 165%.[84] This is also, of course, why satellite radio operators XM and Sirius each program all of their channels with distinct formats that can serve segments of the population with increasingly more narrow sets of interests and desires.

As shown by the attached Statement of Professor Jerry A. Hausman of the Massachusetts Institute of Technology, empirical analysis based on recent data bears out the reality that increased levels of common ownership result in increased program variety.[85] Professor Hausman employed an econometric model using a fixed effects regression and data from 243 Arbitron metro markets between 1993 and 2006.[86] This analysis demonstrates that format diversity increased significantly during this period, with the average number of formats increasing between 1993 and 2001 – the time during which transaction volume was the heaviest – from 11.5 to 16.7, or by more than 45%.[87] Moreover, Professor Hausman found that 25% of the increase in format diversity that occurred between 1993 and 2001 can be directly attributed to increased levels of common ownership.[88] Significantly, as shown below, real-world experience also demonstrates that group owners have natural incentives to counter-program their stations

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Professor Jerry A. Hausman, at 2-3, 11-14, Table 4 (March 2002) ("*Hausman March 2002 Statement I*") (Ex. 3 to Comments of Clear Channel Communications, Inc., MM Docket Nos. 01-317, 00-244 (Mar. 27, 2002) ("*Clear Channel 2002 Market Definition Comments*")).

[84] *See* M Street Directory Format Listings from 1993 and 2005 (Exhibit 1 hereto).

[85] *See* Statement of Professor Jerry A. Hausman, at 2-4 ("*Hausman October 2006 Statement*") (Exhibit 2 hereto).

[86] The study included observations for a number of points within this period, including 1993, 1997, 2001, and 2006. *See id.* at 3.

[87] *See id.* at 4 & Table 1.

[88] *See id.*

and that the efficiencies and economies associated with higher levels of common ownership result in increased diversity and localism.

2. Clear Channel Stations Demonstrate the Increases in Diversity Made Possible by Common Ownership.

The variety of formats aired on Clear Channel stations, as well as many other Clear Channel programming initiatives, demonstrate the diversity that flows from common ownership.[89] For example, Clear Channel has become a pioneer in foreign language programming, introducing wholly new formats – such as La Preciosa, Hurban, Mega, Viva, and Reggaeton – which previously were nonexistent anywhere on America's airwaves. Clear Channel is also a leading broadcaster of "progressive talk" radio, carrying it on stations in markets reaching a total population of more than 248 million. Clear Channel was among the first group owners to pick up the syndicated programming of Air America, and is now the largest Air America affiliate group, accounting for nearly half of its affiliates, including twenty-three stations, six of them in top-ten markets.[90] Clear Channel also airs the syndicated liberal talk programming of Democracy Radio, which includes shows hosted by Ed Schultz and Stephanie Miller, on thirty of its stations. Clear Channel's commitment to progressive talk radio goes beyond its affiliation with Air America and its carriage of other established liberal talk programming; indeed, Clear Channel recently joined forces with The Center for American Progress Action Fund, Jones Radio Networks, and MSS, Inc., to launch a nationwide talent

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[89] It is important to note that Clear Channel corporate management plays no role in determining the content of either news and public affairs programming – which is most closely aligned with the FCC's traditional "viewpoint diversity" concern – or the songs that are played on its stations. Clear Channel's local managers – including approximately 250 local general managers and approximately 900 local program directors – make their own decisions about programming and community events based on extensive audience research conducted at the local level.

[90] Air America was recently forced into Chapter 11 bankruptcy by creditors of the company. Clear Channel intends to continue to air the best available programming from within the progressive talk genre, including Air America.

search contest entitled "Progressive Talk Radio Star," which began on October 9, 2006, with promotions by participating stations and will culminate with a final broadcast in front of a live studio audience in Washington, DC on November 16.

In addition, Clear Channel is a leader in conservative programming, with many of its news/talk stations carrying programming that includes Rush Limbaugh, Glenn Beck, Michael Savage, and Sean Hannity. And in markets where Clear Channel airs programming that serves both sides of the political spectrum, airing shows by, for example, both Al Franken and Laura Ingraham, its CEO likes to say "it is safe to say you will probably hate at least one of our radio stations."[91]

Clear Channel also carries inspirational programming – including "Keep Hope Alive™ With the Rev. Jesse Jackson" in twenty-nine markets, eight of them among the top ten, reaching nearly 100 million potential listeners, and Rev. T.D. Jakes "Empowering Minute" on fifty-five stations across the country. And in 2005, Clear Channel launched "Keys to a Better Life" on twenty-nine stations around the country. "Keys to a Better Life" is a twice-daily report featuring news and information on personal finance, career development, and health and wellness issues that is produced and voiced by expert guests and the award-winning editorial team at Black Enterprise. Clear Channel has also developed programming that is specifically designed to meet the needs and interests of the Gay community, including a one-hour spoken word program that will air on Sunday evenings on stations in several markets, including Denver, Atlanta, and Las Vegas.

Clear Channel stations are often recognized as offering outstanding talent and

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[91] The Progress & Freedom Foundation, *"The Future of the Radio Marketplace" CEO Luncheon Featuring Mark P. Mays, President & CEO, Clear Channel Communications*, Progress on Point, Release 12.24 (Nov. 2005), at 5, http://www.pff.org/issues-pubs/pops/pop12.24markmaysluncheon.pdf.

programming to listeners by leading industry groups. Most recently, three Clear Channel radio stations received 2006 National Association of Broadcasters' Marconi Radio Awards. WMJI in Cleveland, Ohio was named "Oldies Station of the Year," WEBN in Cincinnati, Ohio was named "Rock Station of the Year," and WGCI in Chicago, Illinois was named "Urban Station of the Year."[92] Clear Channel was also recognized with thirty-one awards for industry excellence at the 8th Annual Radio & Records Industry Achievement Awards ceremony held in mid-September. Among other honors, Clear Channel stations received twenty-six format-specific awards for programming in formats ranging from Latin to Smooth Jazz.[93]

Clear Channel's contribution to the increased level of programming diversity available on radio today is not, moreover, limited to its own operation of stations. Clear Channel has also made its stations available for diverse program offerings by others. For example, Clear Channel recently entered into an "historic," five-year, local marketing agreement and option to buy with the licensee of WVON(AM), an independently-owned Chicago station that airs an all-Black information and talk format.[94] As a result of the agreement, WVON(AM)'s licensee, as of September 18, 2006, broadcasts twenty-four hours a day over a Clear Channel station with 10,000 watts more power during the day, and 1000 watts more at night, than WVON(AM)'s own

[92] *See* Press Release, Clear Channel, *National Association Of Broadcasters (NAB) Recognizes Clear Channel Radio With Four Marconi Radio Awards* (Sept. 22, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1761. In addition to the station awards, "The Bob and Tom Radio Show," a syndicated radio program distributed by Clear Channel's Premiere Radio Networks, received a Marconi. *See id.*; *see also* Clear Channel Awards and Honors 2005-2006 (Exhibit 3 hereto) (listing additional awards); Comments of Clear Channel Communications, MB Docket No. 04-233, Exhibit B (Nov. 1, 2004) ("*Clear Channel Localism Comments*").

[93] *See* Clear Channel, Press Release, *Clear Channel Radio Recognized For Industry Achievement by Radio & Records Magazine* (Sept. 26, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1763.

[94] Demetrius Patterson, *Media Analysts and Black Community Leaders Excited About WVON/Clear Channel Deal*, Chicago Defender, Aug. 17, 2006, *available at* http://www.chicagodefender.com/page/local.cfm?ArticleID=6643.

facilities.[95] Community leaders in Chicago have heralded the arrangement as "the most important economic news to hit Black Chicago in years," and one that provides "the only vehicle that we [Black Chicagoans] have to get information and to express our opinions" with expanded reach and the opportunity to create new jobs.[96] As a result of WVON's new twenty-four hour broadcasting capabilities, Rev. Jesse Jackson's "Keep Hope Alive™" show has been expanded to two hours, and the station will also air the weekly meetings of Jackson's Rainbow/PUSH Coalition from 10 to 11 a.m. on Saturdays, as well as a three-hour per day weekday show hosted by Rev. Jackson's daughter, Santita Jackson.[97] Congressman Bobby Rush (D-IL) has recognized the significance of the arrangement between Clear Channel and WVON and the benefits that it will deliver:

> I commend these two local broadcasters, WVON and Clear Channel for coming to this historic agreement. . . . This deal is in the public interest of all Chicagoans and I look forward to hearing the many new programs that will be offered with the extended time WVON will be on the air. This will bring new opportunities to the African American community and business leaders in Chicago.[98]

It is thus beyond dispute that Clear Channel has demonstrated a significant commitment to expanded diversity, through the introduction of new formats, niche programming, and creative arrangements designed to serve diverse interests.

Previously, the FCC has questioned the relevance of increases in the number of formats

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[95] *Id.* The agreement provides for WVON(AM) to provide programming over the frequency and facilities of Clear Channel's WRLL(AM) in the Chicago market.

[96] *Id.*

[97] *See* Robert Feder, *Jackson's Talk Show Joins New WVON Lineup*, Chicago Sun-Times, Sept. 26, 2006, *available at* http://www.suntimes.com/business/feder/72289,CST-FIN-Feder26.article.

[98] Office of Congressman Bobby Rush, Press Release, *Rep. Rush Congratulates WVON and Clear Channel on the Historic Launch Monday of WVON at Its New Frequency 1690-AM* (Sept. 19, 2006), http://www.house.gov/apps/list/press/il01_rush/WVON.html.

available to radio listeners due to allegedly overlapping playlists and speculation that the differences between minor subcategories within major format categories were minimal.[99] Clear Channel, however, has steadily increased the number of unique songs and unique artists played on its radio stations as the number of formats aired on its stations has risen. Indeed, according between 2001 and 2005 Clear Channel stations increased the number of unique songs by 29,330, and the number of unique artists by 5,478, which amounts to an overall increase of 70% in the number of unique songs, and 63% in the number of unique artists.[100]

YEAR	2001	2002	2003	2004	2005
Unique Songs	41478	44190	48435	58197	70808
Unique Artists	8641	9176	9933	12085	14119

In the face of this evidence, it is impossible to say that the variety of music on the air has not steadily increased in the wake of the greater common ownership opportunities made possible by the 1996 Act.

As to allegedly "overlapping" formats, even formats that are supposedly related, or even those that are subsets of a larger format, attract widely different audiences from a demographic standpoint. For example, in the context of country music, it is obvious that a station that airs mostly songs by artists like Patsy Cline should be viewed as airing a different "format" from one that airs mostly songs by artists like Faith Hill, and that the two stations would necessarily have listeners with distinct characteristics. Similarly, regardless of whether "Lite A/C," "Urban A/C,"

[99] *See 2003 Order*, 18 FCC Rcd at 13740-41 (¶¶ 311-312).

[100] Data obtained from Mediabase, an airplay monitoring service. Moreover, free, over-the-air radio stations – and specifically, some owned by Clear Channel – play more unique songs than satellite radio stations. *See Clear Channel: We Play More Unique Songs than XM*, Media Planner Buyer (Aug. 31, 2006) (reporting that data from The Media Audit shows that certain terrestrial radio stations offer more diversity of playlists and programming than XM Satellite Radio, and providing examples, including KBCO-FM (Denver), which has aired 3,959 different song titles since January, eighty-two more than XM's similar station, "Cafe"; and WLQT (Dayton, Ohio), which has aired 2,458 different titles, 1,591 more than XM's "The Blend").

"Hot A/C," and "Mainstream A/C" all seek to attract some category of adult, contemporary listeners, they air substantially different programming and their primary listener base differs significantly. Moreover, *all* of Clear Channel's stations – even those that air the "same" format – are programmed independently, based on extensive audience research at the local level.[101] Thus, a "Lite FM" station in New York may sound very different than a "Lite FM" station in another market. And, even if a single listener or category of listeners might listen to stations in more than one sub-format (for example, a "Lite A/C" station in the morning and an "Urban A/C" station in the afternoon), that would *still* represent a net increase in consumer choice. Accordingly, the so-called "splintering" of formats that has occurred does not alter the conclusion that American radio listeners have far more options today than they have ever had before.

In addition to increasing the variety of formats, artists, and songs aired on its stations, Clear Channel has made significant efforts to promote new artists in particular. Clear Channel conducts and promotes several talent search competitions – including "Nashville Star" (a country version of "American Idol") and "Radio Star." Natalie Loftin – a 2004 "Radio Star" winner – released her first single shortly after winning the contest. Nashvillian Buddy Jewel, the first winner of "Nashville Star," has had several hits since his win, and this year's winner, Murfreesboro's Chris Young, has just released his first single. Clear Channel's WSIX-FM is one of the lead sponsors of "Nashville Star" and is the only radio station in Nashville that is involved with the successful TV talent competition. WSIX hosts and recruits the first three rounds of the competition and runs countless promotions to inform listeners about the event. Previously mentioned "Nashville Star" winners Buddy Jewel and Chris Young can be heard on WSIX and

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[101] *See supra* n.89.

have visited Clear Channel's Nashville "Music Row" studios on numerous occasions.

Nashville is also a prime destination for many aspiring and well known recording artists, so in Nashville numerous artists are "local" because they call the city home or got their start there, including Kenny Chesney, Alan Jackson, Tim McGraw, Faith Hill, Michael McDonald, Cheryl Crow, and dozens of other top recording artists. Other local artists, including Broken Bow, Blind Mule/New Revolution, Equity, Show Dog, Big Machine, Loften Creek, and 903, have been signed to smaller independent labels and are played on Clear Channel stations in Nashville. This type of on-air exposure has led to many successes for local artists; for example, Young Buck, who was discovered in Nashville and was heavily promoted and played on Clear Channel's WUBT, has recently been signed to a major record label.

In addition, Clear Channel recently partnered with Music Nation to develop, sponsor, promote and support a first-of-its kind, multi-genre, online video music competition.[102] As part of the competition, new and established artists will compete for a recording contract with Epic Records and an opportunity to participate in Clear Channel's in-studio performance series, "Stripped."[103]

Another Clear Channel initiative that promotes new talent – aptly called "NEW!" – introduces listeners to music from more than 100 new and emerging artists every ninety days. Through "NEW!," music from emerging artists is featured on the websites of over 400 Clear Channel stations, and is promoted on the air.[104] Artists span the major and independent record

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[102] *See* W. Scott Bailey, *Clear Channel Radio, Music Nation Team up for Star Search,* San Antonio Business Journal, Oct. 20, 2006, *available at* http://sanantonio.bizjournals.com/sanantonio/stories/2006/10/16/daily29.html?jst=b_ln_hl.

[103] *See id.*

[104] *See* Press Release, GarageBand.com, *Clear Channel Radio Expands Support for Developing Artists with NEW* (Sept. 13, 2005), http://www.garageband.com/htdb/companyinfo/pr091305.html.

labels, as well as unsigned artists from GarageBand.com, which is the largest community for independent music.[105] The unsigned artist component of NEW! selects fifty artists every three months, and the "Hometown Hero" component of NEW! provides each station with the opportunity to select a fourth local artist as part of their local program. More than 450 Clear Channel stations in 223 markets participate in NEW!

An example of the success driven by "NEW!" is provided by this message from Yuns, an emerging hip-hop artist:

> After appearing in Clear Channel NEW!, I contacted the GM and PD of KUBE 93 FM in Seattle and he added my song to regular rotation. GarageBand allowed me the opportunity to receive airplay on KUBE 93 and also on Magic 93 KZMG in Boise Idaho (Infinity). I'm also interviewing with KFFM 107.3 and they'll be debuting my song on their station.[106]

Yuns was later signed by 33rd Street Records, the California-based label which is home to superstars such as En Vogue, Outlaws and Peter Frampton, and has signed a digital download agreement with www.ingrooves.com, perhaps best known for their clients Mos Def and Nappy Roots, becoming the first Northwest independent artist to have his own ringtone.[107]

In addition to the "NEW!" initiative and its talent showcase programs, a large number of Clear Channel stations currently air new music shows, many of which have a local focus. Indeed, two thirds of Clear Channel stations responding to a recent survey indicate that they actively promote local artists over the air with radio play, on station websites, and through local

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[105] *See* Press Release, Clear Channel Radio, *Clear Channel Radio's Online Music & Radio Unit Picks NEW! Artist Lineup* (June 7, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1662.

[106] *See* GarageBand.com, Success Story: Yuns, http://www.garageband.com/upload/clear_channel.html (last visited Oct. 20, 2006).

[107] *See* GarageBand.com, Band Bio: Yuns, http://www.garageband.com/artist/yuns (last visited Oct. 20, 2006).

concert events such as "Battle of the Bands." Fifty-two percent produce concerts and events featuring local artists, and 32% have exposed or promoted artists who have subsequently signed contracts with recording studios. Approximately 20% promote more than twenty-five artists annually. Significantly, one third report that featured local artists have gone on to sign record label contracts, underscoring the successful efforts by Clear Channel radio station managers to promote emerging talent.

Clear Channel station WCKY-FM in Findlay, OH, epitomizes the company's efforts to discover talent with the recent success of its "Buckeye Country Star" program, which helped thrust Christle Sterling onto the national country music scene. WCKY listeners had a chance to hear music from local country singers and then voted for the finalist on the station's website. The winner, Christle Sterling, won a session in a professional recording studio where she recorded her first CD. Today, she is considered an up-and-coming country star and her songs are getting considerable radio play time in Ohio. Other examples abound, including New York Q104's "Out of the Box with Jonathan Clarke" and Washington D.C.'s DC101's "Locallix." In all, Clear Channel stations responding to a recent survey listed fifty-seven unique shows that they broadcast featuring local talent.

Clear Channel is also increasing the diversity of content available on free, over-the-air radio by aggressively investing in high-definition digital ("HD") radio, which will dramatically increase both sound quality and programming variety. As of August 17, 2006, 269 of Clear Channel's stations in sixty-six markets were airing HD radio multicasts.[108] Many of these "HD2" multicasts bring entirely new music or spoken-word programming to local listeners. The

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[108] *See* Press Release, Clear Channel Radio, *Clear Channel Adds HD Digital Multicasts to 18 More Markets; Brings Total to 66 Markets and 269 Stations* (Aug. 17, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1721.

multicast programming includes new and/or unsigned artists,[109] in-depth local news,[110] and comedy formats,[111] among others. On one of its Chicago HD2 channels, Clear Channel has also premiered "Pride Radio" which airs music, entertainment, and spoken word content of specific interest to the Gay community.[112] In addition, Clear Channel is in the process of developing additional content for its HD2 channels, including programming focusing on business, Christian interests, and a new talk format targeted specifically at issues affecting women.[113]

Many of the entirely new formats available on Clear Channel's HD2 stations are the result of the efforts of its "Format Lab," which draws from a virtual community of more than two hundred programmers and production professionals to develop fresh and unconventional audio content.[114] All programming generated by Clear Channel's Format Lab is made available to

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[109] Stations multicasting such programming include KBPI, Denver, CO (All New Rock); KDGE, Fort Worth-Dallas, TX (New Alternative); KEEY, St. Paul, MN (All New Country); KHMX, Houston, TX (New CHR); KKRZ, Portland, OR (Indie Rock); KSLZ, St. Louis, MO (All New Hits); KSYU, Corrales, NM (New Hip Hop); and WBZY, Bowdon, GA (New Alternative), among others.

[110] Stations multicasting such programming include KLOL, Houston, TX; WDSJ, Greenville, OH; WRNO, New Orleans, LA; and KDNN, Honolulu, HI, among others.

[111] Stations multicasting such programming include WEND, Salisbury, NC; WWBB, Providence, RI; and WZZR, Riviera Beach, FL, among others. A sample list of Clear Channel's HD2 stations and the type of programming that they offer can be found at http://www.clearchannelmusic.com/hdradio/ (last visited Oct. 20, 2006).

[112] Press Release, Clear Channel, *Pride Radio Comes to Chicago!* (June 16, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1674.

[113] Apart from the HD2 efforts described above, three hundred Clear Channel stations also currently offer their primary broadcasts in HD, enabling anyone with an HD radio tuner to receive crystal clear, digital quality, sound. Clear Channel has committed to ensuring that 95% of its stations in the top 100 markets will be on the air in HD by 2007. By the end of 2006, Clear Channel will have invested more than $40 million in order to meet this goal. In order to make these substantial investments pay off, Clear Channel realizes that it must bring the benefits of HD to listeners in the form of dramatically increased programming choices, which it is doing, as described above.

[114] *See* Clear Channel, Press Release, *Clear Channel Radio to Offer Programming Developed By 'Content R&D Group' to Rival Broadcasters* (Apr. 24, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1618.

rival broadcasters, who can use can the programming as-is or can choose to supplement the elements – which include continually refreshed playlists, imaging and spoken-word vignettes – with their own locally customized content to create fully localized radio channels.[115] The Format Lab blends veteran radio programmers with fresh voices and draws on a number of non-professional radio programmers to lead or consult on some of its channels.[116] The new channels include programming elements for both mainstream and hyper-niche programming, ranging from "Sirens," a channel that exclusively airs songs by female artists who are on the cutting edge of today's music; to "Americana NewGrass," a channel devoted to Americana country style and bluegrass music from today and yesterday; to "The Relaxation Channel," which plays a mix of soothing sounds of nature, peaceful prose, and meditation exercises.[117] This initiative represents yet another example of the innovation, and the ensuing increase in diversity of programming, made possible by the synergies that common ownership creates.

3. Clear Channel Stations Demonstrate the Increases in Local Programming and Local Service Made Possible by Common Ownership.

Clear Channel's focus on local programming and local service also exemplifies the benefits that flow from allowing increased levels of common ownership. As extensively detailed in its comments in the localism docket,[118] and as explained further below, Clear Channel is

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115 *Id.*

116 *See id.* Examples include a personal trainer consulting on the Lab's workout channel, a Broadway veteran programming the Lab's show tunes channel, and an information technology expert driving the Lab's Americana channel.

117 *See* Clear Channel Radio, Format Lab, http://clearchannelmusic.com/formatlab/ (last visited Oct. 20, 2006); *see also* Clear Channel Radio, Format Lab, Americana New Grass, http://clearchannelmusic.com/formatlab/newgrassinfo.htm (last visited Oct. 20, 2006).

118 The *2006 FNPRM* states that it plans to incorporate a summary of the "extensive" record compiled in the localism proceeding into this docket. *2006 FNPRM*, ¶ 8. Clear Channel hereby incorporates its complete comments and reply comments in that docket herein. *See Clear Channel Localism Comments*; Reply Comments of Clear Channel Communications, Inc., MB Docket No. 04-233 (Jan. 2, 2005).

deeply committed to serving the public by identifying issues of importance to its listeners and their distinct local tastes, and by responding with broadcasts of locally-focused and locally-tailored programming, as well as participation in local communities.

Because of the economic and operational efficiencies associated with group ownership, Clear Channel is able to commit very substantial resources to providing local news and other locally oriented programming. While Clear Channel programs a large number of dedicated news/talk stations – many of which air an average of 900 minutes each week of local news and information – its commitment extends much farther than that. Every single one of Clear Channel's radio and television stations airs news and information that is relevant to the communities that it serves every day. Clear Channel has more than 500 full-time local news and information reporters working in 110 separate news bureaus – rivaling any other national broadcast organization, and, we believe, surpassing many. Clear Channel stations are routinely recognized by leading journalism organizations for their excellence in news coverage.[119] And this impressive figure does not even include sports, traffic, and part-time employees.

Clear Channel also has expended considerable resources expanding its stations' emergency preparedness capabilities, further enhancing its operations following last year's experience with Hurricane Katrina and other local crises that affected various parts of the country. Clear Channel's "Disaster Assistance & Response Team" has installed radio transmitters, studio equipment and news gathering packages in trucks and RVs in many cities that Clear Channel serves across the country. Those cities will also house generators, satellite phones, fuel and supplies, even a portable tower on a trailer. An emergency backup satellite system will enable any of the company's radio studios located in the vicinity of a particular city

[119] *See* Clear Channel Awards and Honors 2005-2006 (Exhibit 3 hereto); *see also Clear Channel Localism Comments*, Exhibit B.

with specialized equipment to broadcast their local programming directly to any of the company's tower sites when microwave links or land lines are down or fail. If emergencies force Clear Channel news teams and announcers to abandon their studios, the satellite equipment will enable the station crews of affected areas to broadcast from alternative, nearby locations to provide their listeners with valuable and up-to-date information. The equipment has already been deployed in several cities, with a focus on hurricane-prone areas, and additional cities will be in service before the end of 2006. The locations will span the United States, strategically placed so that at least one is within no more than a day's drive from each of the local markets that Clear Channel serves.[120]

The same efficiencies and economies of scale that have allowed Clear Channel to undertake the efforts described above also enable its stations to present an abundance of public affairs programming that addresses issues of importance to the communities that they serve. For example, in Tennessee, Clear Channel stations produce and air "Tennessee Matters," a locally-produced, weekly public affairs program focusing on important issues impacting Nashville and the entire state. In addition to Clear Channel's radio stations, the show can be heard on many of the seventy-seven Tennessee Radio Network ("TRN") affiliates throughout the state. Many of these stations are in small rural markets and would not be able to provide such a program without this service. Clear Channel's WUBT-FM in Nashville airs an hour-long weekly public affairs program called "Community Concerns" on Sundays, which is hosted by Ronte' "Ms. Ronnie" Dowdy and covers issues of concern to the local African American population of Middle

[120] *See* Press Release, Clear Channel, *Clear Channel Radio Expands Emergency Preparedness Capability* (July 6, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1690. There are six established cities with such facilities: Tulsa, Philadelphia, Orlando, San Diego, Atlanta and Sacramento. Emergency backup satellite systems are now being deployed in all of the Gulf Coast states, and future deployments in expanded markets are planned.

Tennessee and South Central Kentucky. The program features segments on topics such as healthcare, education, housing, community development, and local law enforcement. "Dawson McCallister LIVE," aired on WRVW in Middle Tennessee, focuses on helping teens and young adults and providing a forum in which they can share experiences with one another. And WLAC-AM airs "The Kevin Wall Show" Monday through Friday from 5:00 to 8:00 a.m., which deals with major issues of concern both locally and nationally.

In Portland, Oregon, Clear Channel's KEX provides news and information to the community with a newsroom that is staffed twenty-four hours a day, seven days a week. The station also includes many local interviews with community leaders, civic groups, and newsmakers as a part of local AM and PM Drive programming. KPOJ, the country's most successful Air America affiliate, serves the community with a regular schedule of community leaders, civic groups, and newsmakers during its live, local morning talk program.

Clear Channel's WSOL-FM in Jacksonville, Florida similarly provides consistent local programming and coverage to address issues or topics of concern to Jacksonville listeners. As part of its commitment to deliver local information, the station airs a special program known as "Community Viewpoint" every Sunday from 6:30 until 7:00 a.m. "Community Viewpoint" is a locally based program that gives significant treatment to issues of local concern. The program features a new subject each week, with topics chosen based on phone calls, e-mails, and/or letters to the station from citizens expressing what they consider to be of most concern in the community. All feedback and suggestions are collected, considered, researched, and then the station determines what seems to be of most concern and seeks out an organization to invite into the show to address those issues and concerns. With the show's positive reputation in the community as a source to disseminate information quickly, thoroughly and to a large audience, organizations often seek WSOL-FM out and request to be on the show to spread important messages to local residents.

In Modesto, California, Clear Channel stations air a three-and-a-half hour program called Live and Local, which originates every morning Monday through Friday between 5:30 and 9:00 a.m. The show features news and interviews with local, state, and national leaders, and newsmakers on education, election reform, ethics, tax reform, immigration, the war on terror, plus issues impacting the local community.

Clear Channel West Palm Beach, Florida's stations played an integral role in many relief efforts before, during and after each of the hurricanes of 2005. WFKZ-FM, WCTH-FM, WKEZ-FM were manned and on air during the landfall events. Preventative measures were stressed to the public before landfall and Clear Channel's stations assisted with relief efforts in the local community and local and national fundraising. The stations hosted and promoted several concert benefits for Katrina, Rita and Wilma that raised money for victims both locally and nationally. The public affairs programs on these stations include several live talk shows each week that focus on everything from water safety and hurricane preparedness to cultural events and fundraisers.[121]

In a community as culturally, ethnically and socially diverse as San Francisco, Clear Channel radio stations are leading the way in offering niche public affairs programming that appeals to a wide variety of audiences. In addition to the "Street Soldiers" aired on KMEL-FM and discussed in detail below, KISQ-FM provides a public forum dedicated to the welfare of local children. The program, entitled "Childhood Matters" and hosted by registered nurse, Rona Renner, informs and inspires parents and all who care about children so that every child may be

[121] Additional information relating to Clear Channel stations' efforts during Hurricane Katrina is discussed below. *See infra* pp. 53-55.

happy, healthy, and thrive. Catering to the gay and lesbian population in the San Francisco Bay Area, Clear Channel progressive talk station, KQKE-AM, hosts a weekly two-hour program dedicated to the issues and news important to San Francisco's gay community. Clear Channel's Hispanic radio station serving the San Francisco community, 92.3 La Preciosa, hosts a weekly program dedicated to the local Latino music scene.

And this type of programming is not limited to large metropolitan areas. In Lebanon, NH, the local Clear Channel radio stations air a program called "Your Turn" with local host Terri Dudley, which runs live, three days a week, and provides an open forum to discuss issues of importance to the community and the region. During the winter months in Maine, Clear Channel's stations in August/Waterville (WMCM and WQSS) host a radio program called "Fuel for Families," which increases awareness and raises money to provide heating fuel for families in need. These examples are but a few of many which show how Clear Channel stations are better able to serve the specific interests and needs of their local communities due to the economies and efficiencies made possible by common ownership.

The familiarity of Clear Channel's local managers and other employees with the communities they serve ensures that the programming on Clear Channel stations reflects and responds to community needs and concerns. In an effort to serve its communities even better, Clear Channel has also convened Local Advisory Boards ("LABs") in many markets, in order to solicit feedback on, and improve the performance of, Clear Channel stations in identifying community needs and responding with appropriate programming. Currently, there are twenty-five LABs in operation, and Clear Channel intends to add ten more each year.

The LABs already in operation have resulted in the offering of many new and unique types of locally-oriented and locally-focused programming. For example, the LAB in Bangor, Maine is tackling the issue of creating and sustaining small business in Eastern Maine. In response to the LAB's identification of this issue as particularly significant, Clear Channel developed a program called "Back to Business," a two-hour interactive talk show aired each Saturday, which provides advice and information to small business owners. The LAB's initiatives have also resulted in the development of a segment, now run every Wednesday morning during the highly rated "Main in the Morning" program, that supports small business in the area. In addition, Clear Channel created a website for this program which provides resources for local businesses.[122] Clear Channel's Bangor, Maine stations were recently recognized by United States Senator Olympia Snowe (R-ME) for their provision of this programming and resources and the positive effect that the LAB's initiatives have had on the local community.[123]

The Los Angeles LAB is currently focused on the problem of Bay Area violence. As part of this initiative, Clear Channel radio station KMEL runs a weekly show called "Street Soldiers," which is the "radio voice" of a San Francisco-based non-profit organization of the same name and provides a forum for real discussions about violence, gangs, youth and community safety. Street Soldiers' mission is to keep young people alive and unharmed by violence and free from incarceration. This radio program provides local youths with opportunity and support to build positive lives for themselves, and move into contributing roles in society. KMEL also recently teamed up with the S.O.S. Project (Save Our Streets) to promote a violence-free community celebration at a local park during Labor Day weekend. In addition to supporting the event through public service announcements and website advertising, KMEL sent its popular "Street Team" to the event to distribute prizes and to promote unity in the community.

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[122] *See* http://www.bizbuzzradio.com/ (last visited Oct. 20, 2006).

[123] *See* Commendation to the Back to Business Program, 152 Cong. Rec. S10285 (daily ed. Sept. 27, 2006) (statement of Sen. Olympia Snowe).

In Minneapolis, the Clear Channel LAB has been instrumental in assisting the American Indian Movement by creating a relationship with Clyde Bellecourt, Executive Director of Peace Makers. Clyde came to the LAB and raised the issue of Indian youth suicide, stating that it is reaching epidemic numbers in the community. Clear Channel offered support by providing public service announcements to promote a new suicide hotline targeted at the Native American community in order to combat this growing problem. And, as a result of the feedback received from the Chicago LAB, Clear Channel's Chicago radio stations recently kicked off the political season with a public service campaign valued at $1 million to highlight the importance of voter registration and getting out the vote on the November 7th general election. The "Clear Choice: Register & Vote" campaign will be showcased on all of Clear Channel's stations in the market. And the LAB in Augusta, Maine played a key role in developing the "Fuel for Families" program that is mentioned above. These examples provide only a glimpse of the innovative and specifically-targeted initiatives that have already been – and will be in the future – provided to local listeners as a result of Clear Channel's LAB program.

Clear Channel stations are also heavily involved in activities within the communities that they serve. For example, in August of this year, Clear Channel's Power 99 FM in Philadelphia sponsored "Peace on the Streets," a two-hour event that featured Philadelphia Mayor John Street and boxing champ Bernard Hopkins, drew an audience of more than 1000 Philadelphians, and is part of the station's ongoing Stop the Violence/Increase the Peace campaign.[124] Clear Channel station WKKV in Milwaukee showed its concern for the African-American community by supporting the first major exhibit for America's Black Holocaust Museum, which explores the

[124] *See* Press Release, Clear Channel Local Spirit, *Clear Channel's Power 99 FM Sponsors 'Peace on the Streets' to help End Street Violence in Philadelphia* (Aug. 17, 2006), http://www.clearchannel.com/LocalSpirit/PressRelease.aspx?PressReleaseID=1722.

history and struggles of African-Americans in America, from slavery to the present.[125] Clear Channel stations in Battle Creek, Michigan recently partnered with Archway Cookies and the Red Cross for a "Media vs. Media" blood drive to help collect blood for the Battle Creek area, in which donors were able to vote for their favorite local Clear Channel radio station – WBCK 930, WWKN Super Rock or WBXX Soft Rock 95.3.[126]

In addition, Clear Channel stations in the Denver market recently received an award from the National Association of Broadcasters for excellence in community service. The station's support for the Denver Rescue Mission garnered more than 42,000 pounds of canned goods, 1,000 pounds of clothes, 200 pounds of diapers, and more than $3,000 in cash. In Madison, WI, the six Clear Channel stations worked together to host an annual raffle to benefit the Big Brothers and Big Sisters of Dane County. This event has raised almost $2.4 million over the past eight years. Similarly, in Rochester, NY, WDVI-FM hosts an annual four-day radiothon to benefit a local children's hospital. This year more than $200,000 was raised, bringing the seven-year total for just this fundraiser past the $1 million mark.

In New Orleans, WQUE holds a Teen Summit Concert every year, featuring performances by local and national artists as well as a round table discussion between concert goers and area public officials on the issues that face the audience. WQUE and WYLD-FM are also involved with the National Night Out Against Crime events every year, and both also hold annual school supply drives that benefit the Orleans Parish School District. In addition, WYLD-FM was awarded the Radio Community Service Award in 2005 by the Louisiana Association of

[125] *See* Press Release, Clear Channel Local Spirit, *Clear Channel Radio Station WKKV-FM Lends Support to the America's Black Holocaust Museum* (July 31, 2006), http://www.clearchannel.com/LocalSpirit/PressRelease.aspx?PressReleaseID=1709.

[126] *See* Press Release, Clear Channel Local Spirit, *Clear Channel Radio-Battle Creek Partners with the Red Cross for a Local 'Media vs. Media' Blood Drive* (June 29, 2006), http://www.clearchannel.com/LocalSpirit/PressRelease.aspx?PressReleaseID=1685.

Broadcasters for its outstanding public service during Hurricane Katrina.

In addition to participating directly in these important local community events and fundraising projects, Clear Channel stations commit significant on-air time to promoting all of these activities and encouraging listeners to engage in community service themselves. And, as with the news and other local programming examples provided above, these examples of community involvement represent but the tip of the iceberg in terms of the broad range of community activities in which Clear Channel stations participate.

4. Benefits to the Public in Terms of Greater Diversity and Localism Flow Directly from the Efficiencies and Economies Created by Group Ownership.

The contributions that Clear Channel stations are able to make to their local communities in terms of diversity and local programming flow directly from the greater efficiencies and economies of scale allowed by group ownership. The reality is that larger station clusters can better support diverse and locally targeted programs. Formats and content that appeal to small demographic groups simply do not generate enough revenue to support the costs associated with running a single, stand-alone radio station. When a station airing a niche format or particularized programming is part of a larger cluster, however, an owner can spread costs among multiple stations, paving the way for experimentation and the provision of programming that serves unique, and often otherwise unserved or underserved, audiences.

Larger station groups can also take more risks. The operator of a single station cannot afford to fail – if he does, his business will end. Even the operator of a small cluster of, for example, three stations, necessarily has a low tolerance for risk-taking. If one station among three fails, then the company's bottom line is devastated. However, if one format among ten fails, the financial impact is far more diffuse. This dynamic enables larger group owners to take risks with creative formats, because the price of failure is far lower than with a smaller group.

From an economic standpoint, larger station groups can also invest more resources in upgrading facilities and, specifically, in news and other local programming. Indeed, as it has grown, Clear Channel's per-station capital expenditures have increased substantially. In 1994, when Clear Channel owned only thirty-nine stations, its total capital expenditures were $1.9 million, with $240,000 out of that figure spent on local news operations, across all of its stations. Average per-station expenditures at that time were only $49,000 per station overall, with $6,000 of that being spent on capital expenditures relating to news operations. Between 1999 and 2002, by contrast, during the period that Clear Channel acquired a substantial number of stations as permitted under the 1996 Act, its total capital expenditures rose to an average of more than $114 million per year, with capital expenditures on news-related purchases averaging more than $10 million per year. During this period, Clear Channel spent an average of $111,250 per year on total capital expenditures for each station, with an average of $10,000 per station per year earmarked for news-related capital expenditures. These figures represent an increase of more than 127% in overall capital expenditures, and a 66% increase in news-related capital expenditures, on a per-station basis, between the 1994 and 1999-2002 period. And in 2006, Clear Channel will spend a total of more than $94.2 million overall on capital expenditures, with more than $13.1 million of that earmarked for news. Per station total capital expenditures for 2006 will average $79,000, with $11,000 of that being spent on news, for an increase of 61.2% overall and 83% on news as compared to 1994.[127]

These substantial expenditures, moreover, do not even include amounts spent on news

[127] At certain points between 1994 and the present, Clear Channel's per-station capital expenditures on station betterment and upgrades, as well as news-related capital expenditures, declined somewhat. This is because major expenses are incurred at the time that stations are acquired and assembled into efficiently-functioning groups with superior technical facilities and state-of-the-art newsgathering equipment. These types of expenses do not recur on a yearly basis, because the investments made in technical changes, upgrades, station betterment, and news-gathering resources produce benefits over a longer period of time.

personnel salaries, benefits, and payroll taxes; dues and subscriptions; news and weather service fees; or travel, supplies, or many other news-related expenses, which are extremely significant. In 2006, for example Clear Channel will spend approximately $16.3 million on these types of news-related items for its news/talk formatted stations alone, on top of amounts spent for news at all of its other stations and news-related capital expenditures.

In sum, it is clear that the greater degree of common ownership in radio that was permitted after the 1996 Act has resulted in efficiencies and economies of scale, and that those efficiencies and economies have produced real benefits for today's radio listeners in terms of improved diversity of content and enhanced local news and public affairs programming. In fact, contrary to the views espoused by some media critics, "big is beneficial to consumers, not bad, offering wider selection" of sources for information and entertainment at competitive lower prices for advertisers.[128] Allowing higher levels of common ownership will serve only to allow group owners to expand upon their already significant efforts in this regard, and will deliver net public interest benefits to the public.

C. <u>The Economic Functioning of Local Radio Advertising Markets and the Antitrust Laws Are Sufficient to Guard Against Anticompetitive Behavior.</u>

As shown above, allowing greater levels of common ownership will serve to increase – not decrease – diversity and localism. It is equally clear, as shown below, that competition concerns do not provide an adequate basis upon which to continue to place limits on local radio ownership. The record in the proceeding that led to the *2003 Order* conclusively established that post-1996 Act consolidation had *no effect* on radio advertising rates, even in markets where two owners garnered more than 80% of the radio advertising revenue.[129] Moreover, as Clear Channel

[128] *Let Broadcasters Be Free*.

[129] *See* Statement of Professor Jerry A. Hausman, January 2003, at 4-5 ("*Hausman January 2003*

has previously established, and as further explained in the statement of Professor Jerry A. Hausman, because radio is a differentiated product market, with different stations broadcasting different formats that are targeted to and appeal to different audiences, coordinated behavior between owners is simply not a matter of concern. Because of the differentiated nature of the radio advertising "product," different advertisers will choose to advertise on different stations to promote their products to different consumers. This characteristic of the radio advertising market fundamentally alters any competition analysis, because anticompetitive concerns in a differentiated product market typically do not result from coordinated behavior. Put another way, two group owners in a local radio market cannot collude to raise advertising prices, because they are not marketing the same "product" to advertisers.[130]

The very nature of the radio advertising "product" itself is another factor that makes coordinated actions unlikely between owners. Radio advertising time is a perishable good; if a station owner does not sell a radio ad spot by airtime, then it earns no revenue at all from that spot. As a result, the prices of radio advertising spots vary significantly and constantly over time, because owners have a strong incentive to lower their prices on unsold spots as airtime approaches. This makes coordinated behavior among owners cumbersome and exceedingly unlikely to occur.[131] In addition, as noted below, even increased concentration levels within a particular format, which could create a situation where there is greater market power in terms of identical "products," has been empirically demonstrated to have no effect on advertising prices.

Statement") (Ex. 1 to *Clear Channel 2003 Comments*); *Hausman March 2002 Statement I* at 3-11; *see also* Stephen Stockum, *The Pricing of Radio Advertising: Does Market Concentration Matter?* (Ex. B to Comments of Cumulus Media Inc., MM Docket No. 01-317 (Mar. 27, 2002)).

[130] *See Hausman October 2006 Statement* at 4-5; *see also* Statement of Jerry A. Hausman, March 2002, at 3 ("*Hausman March 2002 Statement II*") (Ex. 6 to *Clear Channel 2002 Market Definition Comments*).

[131] *See Hausman October 2006 Statement* at 5.

In differentiated product markets, anticompetitive concerns instead typically arise from "unilateral effects," where a single firm wields power by cornering the market on all of the differentiated products. In this context, barriers to mobility become more important than barriers to entry.[132] Empirical data show, however, that barriers to mobility do not exist in the radio industry, where stations can change formats with ease and where ratings vary significantly over time. Indeed, Professor Hausman found that nearly half – 43%, to be precise – of the stations in his study changed formats between 2000 and 2006.[133] In addition, Professor Hausman found that volatility in market shares for radio stations is very high. Over the course of a single year, a radio station is more likely to experience a large increase or decrease in market share than it is to experience relatively constant share. Specifically, over a one year period, almost 1.9 times as many stations experience a change of more than 25% (or less than –25%) than experience a change of less than 5% in absolute value. When the time period is increased to two years, the ratio increases to 2.7, and for a three-year period the ratio is 3.7. Accordingly, even over short periods of time, there is substantial volatility in the actual market shares of radio stations, further showing the absence of barriers to mobility in local radio markets.[134]

Another economic analysis, this one conducted by two Department of Justice economists, indicates that format changes increase listening share by nearly 23%, indicating that "major format changes do produce substantial market share gains on average."[135] Thus, "format

[132] *See id.*; *Hausman March 2002 Statement II* at 4, 10-11.

[133] *See Hausman October 2006 Statement* at 5.

[134] *See id.* at 9 & Table 2.

[135] *Id.* at 6 (quoting Charles Romeo, *The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes* (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294505#PaperDownload (published in 27 Review of Industrial Organization (2005))).

changes by smaller station groups may counter the potential exercise of market power by a radio group that acquires a substantial share of a particular audience demographic through merger."[136] Accordingly, any attempt by a local owner to exercise market power by unilateral action could necessarily be defeated by one or more stations switching to a different format or taking other action that would increase its audience share.

The empirical data also show that allowing greater levels of common ownership will not result in higher advertising prices. Indeed, Professor Hausman found that even in markets where two firms control over 80% of radio market revenue, there is no evidence that increases in concentration have led to higher prices.[137] This finding is confirmed by a recent study conducted by Joel Waldfogel and Judy Wulf, which concludes that "there is *no portion* of the change in ad prices" that the study observed "that we can attribute to increased concentration."[138] Moreover, Professor Hausman's prior analysis also demonstrated that even increased concentration *within a particular format* does not lead to higher radio advertising prices, thereby establishing that any increases in radio advertising rates are caused by factors *other than* rising concentration levels.[139] Accordingly, both economic theory and empirical evidence show that increased concentration in the radio industry has not had, and will not have, anticompetitive consequences.

In the unlikely event that a radio group owner attempted to – or was able to – engage in anticompetitive behavior notwithstanding the natural discipline provided by the marketplace, any

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136 *Id.* (quoting same).

137 *See id.* at 7; *see Hausman March 2002 Statement I* at 2, 3-11; *Hausman January 2003 Statement* at 2-9.

138 *Hausman October 2006 Statement* at 7 (quoting J. Waldfogel and J. Wulf, *Measuring the Effect of Multimarket Contact on Competition: Evidence from Mergers Following Radio Broadcast Ownership Deregulation*, 5 Contributions to Economic Analysis & Policy (2006)) (emphasis added).

139 *Hausman March 2002 Statement I* at 10-11 & Table II.

concerns would remain subject to government scrutiny and remediation under the federal antitrust regime and state unfair competition laws. As the Commission acknowledged in the *2003 Order*: "The Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market."[140] The merger review process, whether under the Hart-Scott-Rodino Act or pursuant to the agencies' general Clayton Act authority, sufficiently protects against any isolated danger to competition in specific local markets. The federal merger review process is rigorous and ensures that mergers that require consideration receive a complete economic analysis.[141] The federal agencies primarily charged with antitrust enforcement – the DOJ and the FTC – as well as state attorneys general, have a panoply of powers at their disposal to obtain additional information from merging companies, and frequently exercise those powers to ensure that they

[140] *2003 Order*, 18 FCC Rcd at 13753 (¶ 339); *see Applications of Shareholders of CBS Corp. and Viacom, Inc.*, 15 FCC Rcd 8230, 8234 n.14, 8235 (¶¶ 12 n.14, ¶ 16) (2000) (noting that DOJ has examined the specific issue of concentration in program supply markets and thus declining to address the matter and suggesting that concerns regarding potential abuse of market power should be addressed not by the Commission but by antitrust authorities). In its discussion of the local television ownership rule, the Third Circuit found that the FTC/DOJ merger review process was not sufficient to guard against competitive harm because "the antitrust agencies typically review only large mergers," and because a large percentage of television station transactions fell below the threshold that renders a transaction reportable to federal antitrust authorities. *Prometheus*, 373 F.3d at 414 (citing 15 U.S.C. § 18a(a)). The Commission did not specifically address the sufficiency of the antitrust laws to guard against anticompetitive behavior in discussing the radio rules, nor did the Third Circuit. *See 2003 Order*, 18 FCC Rcd at 13711-47 (¶¶ 235-326); *Prometheus*, 373 F.3d at 431-35. Even if the Third Circuit's statement regarding antitrust enforcement and the local television ownership rule could be read to apply more broadly, the Third Circuit focused myopically upon pre-merger review pursuant to the Hart-Scott-Rodino Act. *Prometheus*, 373 F.3d at 414. As discussed in more detail below, federal and state antitrust statutes actually provide government regulators and private parties with a far greater range of tools to protect against anticompetitive effects. In addition, federal antitrust regulators can and do challenge mergers that fall below the Hart-Scott-Rodino Act thresholds. *See, e.g.*, News Release, Federal Trade Commission, *FTC Challenges Hologic/Fischer Imaging Deal* (July 7, 2006), http://www.ftc.gov/opa/2006/07/hologic.htm.

[141] Indeed, Joel I. Klein, then-chief of the Department of Justice's antitrust unit, stated that it "takes very careful study and analysis to find out if a given merger is likely to have anticompetitive effects. And *our job* is to make sure that the analysis is done properly and, when necessary, thoroughly." Joel I. Klein, *DOJ Analysis of Radio Mergers* 2-3 (presented Feb. 17, 1997), http://www.usdoj.gov/atr/public/speeches/1055.htm (emphasis added).

have before them a complete set of facts upon which to base their competitive analysis.

Among the many tools at the agencies' disposal is Section 7 of the Clayton Act, which broadly prohibits any merger or acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[142] The FTC and DOJ have authority to enforce Section 7, and the statutory prohibition "may [also] be enforced through actions brought by private parties" and state attorneys general.[143] A transaction will be found to violate Section 7 whenever a reasonable probability exists that competition will suffer.[144]

The authority of the DOJ and FTC does not end with the consummation of a merger or acquisition. Instead, the agencies have a full range of enforcement authority that can be invoked at any time to protect against the exercise of market power. Indeed, Section 7 can be enforced after a transaction is closed, and divestiture can be required.[145] In addition, Section 1 of the

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[142] 15 U.S.C. § 18. This statutory prohibition applies outside of the traditional "merger" context to acquisitions of voting securities and assets, including licenses. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 319 (5th ed. 2002) ("*ABA Antitrust Law Developments*").

[143] *See id.* at 325; *see also* 15 U.S.C. § 26 (providing that any person "threatened [with] loss or damage by a violation of the antitrust laws" may obtain injunctive relief); 15 U.S.C. § 15(a) (authorizing any "person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" to recover treble damages). States are "persons" within the meaning of the Clayton Act, and can therefore recover treble damages and costs, including reasonable attorneys fees, and can seek injunctive relief as well. *ABA Antitrust Law Developments* 325 n.66 (citing 15 U.S.C. § 15; *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *California v. Am. Stores Co.*, 495 U.S. 271 (1990)). "State attorneys general can [also] represent" the people of their state as "parens patriae." *Id.* at 325 n.68 (citing 15 U.S.C. § 15c(a)(1)). State attorneys general have played a significant role in challenging mergers and acquisitions under Section 7, "usually in circumstances where the merger would allegedly lessen competition in local geographic markets in their states." *Id.* at 326.

[144] *E.g., United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957); *see Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) ("Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties."); *see also, e.g., United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001).

[145] *See, e.g.*, News Release, Federal Trade Commission, *FTC Challenges Deal Between Enterprise Products Partners and TEPPCO* (Aug. 18, 2006),

Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations."[146] Both criminal and civil sanctions are available for Section 1 violations, and private parties may sue for injunctive relief or damages to enforce its terms.[147] The willful acquisition or maintenance of monopoly power is prohibited by Section 2 of the Sherman Act, and may be enforced by federal officials as well as private parties.[148] Furthermore, Section 5 of the Federal Trade Commission Act gives the FTC additional enforcement authority beyond its power to prohibit conduct that violates the Clayton Act or the Sherman Act.[149] Indeed, the Supreme Court has held that the FTC may "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[150] Moreover, many state attorneys general have independent pre-merger and post-merger enforcement authority under state unfair competition statutes, and many state statutes allow private parties to bring lawsuits to enforce those laws' constraints on anticompetitive behavior.[151]

This fully functioning and multi-layered scheme renders FCC consideration of competition concerns in the radio industry unnecessarily duplicative and superfluous. Because market forces are more than sufficient to guard against anticompetitive behavior, and because

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http://www.ftc.gov/opa/2006/08/teppco.htm.

[146] 15 U.S.C. § 1.

[147] *See ABA Antitrust Law Developments* 1 & 1 n.1.

[148] *See id.* 229 & 229 n.1; *see also* 15 U.S.C. § 2.

[149] 15 U.S.C. § 45.

[150] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

[151] *See ABA Antitrust Law Developments* 810-11 ("Today, every state has an antitrust statute of one sort or another, as do the District of Columbia, Puerto Rico, and the Virgin Islands.").

there is a fully functioning prophylactic regime aside from the Commission's local radio ownership rules that will prevent or provide a remedy for any anticompetitive actions that might nevertheless occur, competition concerns cannot provide a basis for continued FCC regulation of permissible local radio ownership levels.

III. AT THE VERY LEAST, THE FCC MUST MODIFY ITS LOCAL RADIO OWNERSHIP RULES TO TAKE INTO ACCOUNT THE INCREASES IN COMPETITION AND DIVERSITY THAT HAVE OCCURRED IN THE DECADE SINCE CONGRESS SET THE CURRENT LIMITS.

A. There is No Basis for Refusing to Allow Higher Levels of Common Ownership in the Nation's Largest Radio Markets.

If, despite the evidence provided above that the local radio ownership caps should be eliminated in their entirety based on diversity, localism, and competition considerations, the Commission nevertheless determines to retain local radio limits in some form, Clear Channel submits that, at the very minimum, the FCC must increase the number of stations that can be owned in the nation's largest radio markets to take into account the competitive developments that have occurred since Congress set the current limits in 1996. Specifically, the Commission should create two new ownership "tiers," increasing from eight to at least ten the number of stations a single entity can own in the nine markets with between sixty and seventy-four stations, and increasing from eight to at least twelve the number of stations that a single entity can own in the eight markets with seventy-five or more stations.

As discussed in detail above, radio owners currently face abundant and increasing competition both within local terrestrial radio markets and from multiple new platforms.[152] The increased levels of common ownership permitted by the 1996 Act have created efficiencies and economies of scale that have delivered real benefits to the public in terms of substantially

[152] *See supra* Section II.A.

expanded programming diversity and increases in the quality and quantity of local news and public affairs, as well as greater community involvement.[153] At the same time, the enhanced opportunities for clustering stations together in local groups has not had any adverse effect on competition.[154] At the very least, current competition levels and the available empirical evidence support modest relaxation of the local radio ownership rule to allow a small increase in the number of stations that can be owned in the nation's largest markets.

Today, free, over-the-air radio faces many more competitive threats than at any other time in its history, and the competition comes from media that are not crippled by the regulations – including local ownership caps – that stifle the radio industry. In every single local market, satellite radio companies XM and Sirius together deliver 270 channels, while Internet radio stations number over 100,000. IPods and other MP3 players, and the podcasts created for them, along with the emerging Wi-Max technology, give new forms of audio programming nearly unlimited reach. Terrestrial radio operators, by contrast, are limited to a maximum of eight stations, even in the country's largest and most diverse markets. These competitive challenges – and the inequities imposed by the local radio ownership caps – are currently threatening the ability of free, over-the-air radio to remain viable. If nothing else, modest relaxation of the local radio ownership caps, which were adopted at a time when these new sources of competition did not even exist, is essential to provide broadcasters with the financial "breathing room" that will allow them to remain meaningful participants in today's media marketplace.

As noted above, considering *only* in-car satellite radio listening, Lehman Brothers

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[153] *See supra* Sections II.B-C.

[154] *See supra* Section II.D.

recently lowered its initial forecast for terrestrial radio's long-term growth from 4% to 2.5%.[155] Based on a more comprehensive analysis of the broadcast industry's performance, Lehman Brothers also found that the time that Americans spend listening to radio has declined considerably over the past decade, by approximately 6% in the last five years and by 15% in the last decade.[156] Lehman Brothers has predicted that this trend will continue, with time spent listening declining between 2% and 3% annually over the next five years, because "there are simply more consumer choices" available to radio listeners today.[157] Radio advertising revenues are predicted to decline again in 2006,[158] and Lehman Brothers' analysis finds that such revenues, considered as a percentage of total U.S. advertising revenues, have declined steadily since 2002, a trend that is also predicted to continue.[159] And Bear Stearns recently reported that "2006 has been an especially brutal year to radio stocks," with radio stock prices, considered as a group, "down nearly 29%" between late November 2005 and late April 2006.[160] Between early May and the end of July 2006, radio stock prices continued to decline, by approximately 15.3% over just that short period.[161] These declines continue a trend spanning back five years; radio stocks have experienced declines in nineteen quarters since January 1, 2001.[162]

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[155] *See Lehman Brothers Satellite Radio Report* at 1, 4.

[156] *See* Lehman Brothers Equity Research, *Broadcasting Industry Overview: Comparing Broadcasting with Newspapers*, June 2, 2006, at 1.

[157] *Id.* at 11.

[158] *Id.* at 3.

[159] *Id.* at 16.

[160] Victor Miller, Bear Stearns Equity Research, *Radio Symposium Part Three – The Summer of Discontent: Stocks Down, Audiences Up?*, July 31, 2006, at 2.

[161] *See id.*

[162] *See id.*

The inability of free, over-the-air, radio to continue as a vibrant participant in the contemporary media marketplace would deliver a devastating blow to the public interest. It would leave millions of Americans who *cannot* afford to subscribe to satellite radio or the music channels offered by cable operators, to purchase devices like iPods, or to obtain the broadband Internet access necessary to listening to web-streamed radio stations, without any source of audio programming at all. It would leave those who *can* afford to pay for their news, information, and entertainment without the choice of free radio and all that it has to offer. And it would leave *all* Americans without access to a medium that has proven itself to be one of the most valuable in terms of providing vital information in times of crisis.

Indeed, during last year's floods along the Gulf Coast in the wake of Hurricane Katrina, free radio professionals opened impassible roads and waded through life-threatening waters to restore broadcast capabilities so that they could communicate urgent messages to the public. Radio operators, including Clear Channel, put aside corporate affiliations to combine resources and staff to create an unprecedented joint broadcast that saved peoples' lives. When electricity failed, when television broadcasting was impossible, when Internet connections were down and no one could access the web anyway because they had no source of power, free radio worked – and worked well – to communicate to those affected by the crisis the information that they needed to survive.[163]

Internally, and before the storm hit the Gulf Coast, Clear Channel mobilized its

[163] In connection with their extraordinary coverage and dedication to public service during the aftermath of Hurricane Katrina, ten of Clear Channel's radio stations serving the Gulf Coast received the Radio Television News Directors Foundation's prestigious First Amendment Leadership Award *See* Press Release, Clear Channel Local Spirit, *The Radio and Television News Directors Foundation Honors Clear Channel Radio Stations with the First Amendment Leadership Award* (Mar. 9, 2006), http://www.clearchannel.com/LocalSpirit/PressRelease.aspx?PressReleaseID=1572.

employees in the areas most likely to be affected by the storm to make plans – plans that would become increasingly important as the storm approached – regarding how its stations could continue to provide live, local news without studios, which were likely to be devastated. Clear Channel located and stockpiled resources that were needed to continue broadcasting and directed them, first to South Florida where landfall was initially predicted, and then to Mobile, Alabama, when the storm's course changed. When it became obvious that Clear Channel's New Orleans studios would have to be evacuated, Clear Channel made arrangements for its Baton Rouge studio to take control to ensure that local New Orleans news and weather information programming remained available in those areas being hit by the storm. Although Clear Channel's facilities in New Orleans were hit hard, Clear Channel took action to restore broadcasting capabilities – both at its own stations and at those of fellow broadcasters – by rescuing station employees and obtaining generator service and diesel fuel, to ensure that the area's radio stations could deliver critical lifesaving information to the City of New Orleans on a constant basis. Similar efforts were undertaken in Biloxi, Mississippi; Mobile, Alabama; Pensacola, Florida; and Meridian, Hattiesburg, and Laurel, Mississippi, all of which were hard hit by Katrina.

In Katrina's wake, Clear Channel worked closely with other affected broadcasters, to help repair damaged facilities and provide much needed relief supplies. During the crisis, Clear Channel also partnered with other broadcasters to constantly provide emergency information to those who needed it most. This effort – aptly called the United Radio Broadcasters of New Orleans ("URBO") – represents a partnership between Clear Channel, Entercom (one of Clear Channel's fiercest competitors) and Apex Broadcasting, Inc. It was linked to the Louisiana Emergency Operations Center to ensure timely receipt of information by local residents affected by the storm. Even stations not operated by URBO participants sought and were granted permission to air the joint broadcasts, allowing dispersed families to keep informed as to the developing situation. The members of URBO worked with each other and with other broadcasters to provide New Orleans and the surrounding community information, hope, and reassurance when those things were needed the most, providing a telling example of the crucial service that radio provides to local communities, particularly in times of crisis.[164]

The experiences of Hurricane Katrina serve as an important reminder that radio is better able to serve Americans in times of need than the vast majority of platforms in existence today.[165] Unlike many other media – even those able to communicate messages in real-time – radio is portable, can be heard on receivers that run on batteries, and is the closest that any medium comes to being universally available. Moreover, because there are a multitude of stations serving every corner of the country, the likelihood that residents of a particular area would find themselves without service from a single radio station is exceedingly low, even in the case of widespread devastation. It therefore has the capability to serve as a lifeline in times of critical need. In addition, and perhaps most importantly, radio is also inherently *local*, unlike many of its competitors. Providing local information is what radio stations do, making them particularly well-suited for communicating emergency information in times of crisis. Concerns

[164] Clear Channel hereby incorporates by reference the Submission of United Radio Broadcasters of New Orleans in MB Docket No. 04-233 (Dec. 8, 2005), which contains additional information regarding Clear Channel's efforts, and the efforts of URBO, as well as transcripts of the testimony of Dick Lewis, Clear Channel's Regional Vice President for Louisiana and Southern Mississippi, and Diane Newman, Entercom's Operations Manager at WWL(AM), New Orleans, Louisiana at the FCC's Open Meeting on the Effects of Hurricane Katrina (held on September 15, 2005 in Atlanta, Georgia), into its comments in this proceeding.

[165] Indeed, former Director of Homeland Security Tom Ridge attested that broadcasting is in the front line of public safety preparedness and responsiveness. *See* Bill McConnell, *Ridge Takes the Point*, Broadcasting & Cable, June 2, 2003, *available at* http://broadcastingcable.com/article/CA302462.html (quoting Tom Ridge as stating "[t]he media during times of crisis is a critical part of what we do").

relating to communications in emergency situations are especially salient today, given the homeland security issues that our nation faces and in light of the devastation caused by recent national disasters. Failing to take steps needed to preserve free radio would be nothing short of irresponsible in the current climate. Indeed, as long-time former FCC Commissioner James H. Quello recently remarked, "[b]roadcasters need help" to ensure that they can continue to make their "expensive but vital emergency, local-news and community services" available to the listening public in times of need.[166]

The proposal to raise the eight-station limit to at least ten stations in markets with between sixty and seventy-four radio stations and to at least twelve stations in markets with seventy-five or more radio stations is, moreover, exceedingly narrow. Indeed, the Honorable Fred Upton, Chairman of the House Energy and Commerce Subcommittee on Telecommunications and the Internet, has characterized such relief as "embarrassingly modest."[167] It would affect only the seventeen largest markets in the country. And it would allow ownership of, at most, 17% of a market's radio stations. This 17% is comparable to and, indeed, *less than*, the percentage of stations that the present rules allow; under the current limits, a single company may own up to 18% in markets with at least forty-five stations. In the largest markets, moreover, permissible common ownership levels would be *far smaller* in percentage terms. In New York, which according to BIA has 149 stations, ownership of twelve stations would amount to 8%. In Chicago, the percentage would be 9%, and in San Francisco, it would be 11.4%.

The proposed increases in the levels of permissible common ownership in the nation's

[166] *Let Broadcasters Be Free*.

[167] Remarks of Hon. Fred Upton Before the Media Institute, Feb. 16, 2006, at 10 ("*Upton Media Institute Remarks*").

largest markets would also provide the radio industry with help where it may be needed most, as large-market stations are currently facing particularly significant financial struggles.[168] Throughout 2006, smaller radio markets have continued to outperform larger markets, and this trend is predicted to continue.[169] Furthermore, the benefits of allowing greater levels of common ownership in the country's largest radio markets would not necessarily be limited to station clusters located in those markets. Rather, an owner would be able to allocate the increased efficiencies and economies that flow from group ownership in the larger markets to those stations under its control that required the most help, based on internal business needs. In some cases, such stations might well be ones that fall outside of the larger markets. Some stations in mid-sized and smaller markets might well have fewer resources available for important programming such as local news and public affairs, and new, diversity-increasing, initiatives such as HD radio multicasting and format experimentation, than their large-market counterparts. Thus, a decision to modify the local radio caps in large radio markets has the potential to provide important public interest benefits across the entire radio industry and to *all* American radio listeners.

Of course, the nation's largest radio markets also have large and diverse populations with a broad range of listening preferences and needs. As shown previously, allowing increased levels of group ownership will promote content diversity, whether measured in terms of unique songs and artists, distinct formats, or niche programming designed to serve ethnic and social minorities, including programming in foreign languages.[170] Group owners, as noted above, can

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[168] *See generally* Victor Miller, Bear Stearns Equity Research, *The Radio Symposium – Let's Stay Small: Small Markets Continue to Outperform Large*, July 11, 2006.

[169] *See id.*

[170] *See supra* Section II.B.

and do dedicate the resources needed to serve audiences that might not otherwise be well served, and will only undertake additional similar efforts if the local radio caps are increased.[171] Raising the local radio ownership limits in the nation's largest markets thus makes abundant sense not only because of the financial challenges that radio station owners face across markets of all sizes, but also because listeners in the largest markets stand to gain the most.

Recognizing the disparity created by the current local radio limits and the benefits that would be made possible by increasing the caps in the largest markets, Representative Fred Upton has called upon the FCC to increase the local radio ownership limits as proposed herein. As Representative Upton has explained, "there is absolutely no public policy good to justify the same local radio ownership cap for Cincinnati as for New York City, Chicago and Los Angeles."[172] Increasing the local radio ownership limits in the station's largest markets "will confer significant public interest benefits," because "[o]wners would be able to experiment with new formats that improve service to under-served segments of the population, or bring new service to the marketplace for the first time."[173] Similarly, twenty-three members of Congress from both sides of the political spectrum have voiced support for a modest increase in the local radio ownership limits in markets with more than sixty stations, recognizing that "Americans' reliance on free radio for both local news and community-oriented programming, as well as essential 'lifeline' information during emergencies [and] natural disasters," require the FCC to address the "evolving market situation" that free, over-the-air, radio broadcasters face today.[174]

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[171] *See id.* For example, in times of natural disasters or other emergency situations, non-English speaking radio listeners might have a greater breadth of information sources available to them.

[172] *Upton Media Institute Remarks* at 7.

[173] Letter from the Hon. Fred Upton to the Hon. Kevin J. Martin (Feb. 9, 2006).

[174] Letter from Paul E. Gillmor (R-OH), Gene Green (D-TX), *et al.* to the Hon. Kevin J. Martin (June 30, 2006).

The creation of two new large-market ownership tiers would result in a local radio ownership rule that is more balanced and reflective of the competition faced by terrestrial radio broadcasters today. The mandate of Section 202(h) of the 1996 Act, as well as the Administrative Procedure Act, not only authorize this change, they require it. Accordingly, if the FCC determines that local radio ownership caps should be retained at all, then it must adjust upwards the number of stations that can be owned in the nation's largest markets to account for the huge number of diverse and competing stations in such markets, as well as the competitive pressures placed upon the radio industry by new sources of competition that were not even envisioned by Congress or the Commission at the time that the current ownership tiers were adopted.

B. Any Caps on Local Radio Ownership Should be Based on the Number of Outlets Owned, not Audience or Market Share.

In the *FNPRM*, the Commission requests comment on how it should address the Third Circuit's concern that the local radio limits presently in effect do not account for actual market share.[175] For the reasons discussed below, any ownership caps that the FCC chooses to retain should be based on the number of outlets owned, not audience or market share.

As an initial matter, Section 202(b) of the 1996 Act makes clear Congress's view that the number of outlets owned – as opposed to audience or market share – provides the appropriate metric for judging permissible levels of common ownership of radio stations at the local level. Before passage of the 1996 Act, the FCC's local radio ownership rule permitted ownership of the following:

- In markets with 15 or more commercial stations, a single entity could own up to two AM and two FM stations, provided that

[175] *2006 FNPRM*, ¶ 22.

the combined audience share of those stations did not exceed 25%.[176]

- In markets with fewer than 15 stations, a single entity could own up to three stations, no more than two in the same service, provided that the stations accounted for less than 50 percent of the total number of stations in the market.[177]

With respect to the larger tier of markets, then, the Commission's rule expressly included an audience share component. In Section 202(b), Congress expressly directed further relaxation of the local radio ownership limits by requiring the FCC to raise its local radio ownership caps to allow a greater number of stations in markets of various sizes. In so doing, Congress required that the new limits be set based *solely* on the number of radio stations owned, not the audience (or market) share of the proposed station group.[178] As such, Congress not only explicitly incorporated the FCC's pre-existing outlet-based test into the new radio ownership limits that it required the Commission to adopt but also, by failing to carry over the FCC's previous incorporation of an audience share component, rejected reliance on audience share measures in terms of regulating local radio ownership. It is axiomatic that when Congress enacts a statute against the background of settled judicial and administrative interpretation, courts must presume that Congress was aware of the earlier interpretations and effectively adopted them in formulating the statute.[179] In Section 202(b), by *explicitly* choosing an outlet-based test and

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[176] *See Revision of Radio Rules and Policies*, First Order on Reconsideration, 7 FCC Rcd 6387, 6393 (¶ 32) (1992) ("*Radio Rules First Reconsideration Order*").

[177] *See id.*

[178] *See* 1996 Act, § 202(b), 110 Stat. at 110 (allowing ownership of: (1) "up to 8 commercial radio stations" in markets with 45 or more stations; (2) "up to 7 commercial radio stations" in markets with 30-44 stations; (3) "up to 6 commercial radio stations" in markets with 15-29 stations; and (4) "up to 5 commercial radio stations" in markets with 14 or fewer stations).

[179] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* 125 S. Ct. 2688, 2706 (2005) (concluding that Congress enacted statutory definitions contained in the Communications Act "against the background of th[e FCC's] regulatory history"); *Comm'r v. Keystone Consol. Indus.*,

eliminating the previous use of an audience share test in certain-sized markets, Congress did so *expressly*.[180]

Moreover, the Third Circuit's criticism of the Commission's decision in the *2003 Order* to base its local radio ownership rule on the number of stations owned, as opposed to audience share or revenue share, was based primarily on the FCC's assumption – which the Court of Appeals found faulty – that the numerical limits that it retained would ensure the existence of five equal-sized competitors.[181] However, that assumption, or a desire to ensure the existence of five (or, indeed, any number of) equal-sized competitors, is not the primary reason why an outlet-based test is superior to one based upon audience share or revenue share in the context of the local radio ownership rule. As the record before the Commission in 2003 made clear, and as further demonstrated by the attached Statement of Professor Jerry Hausman, the audience and revenue shares of radio stations at any given time are not at all reliable indicators of what the competitive state of the market will be at any point in the future, because of the volatility of

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Inc., 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation" when it enacts a statute); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

[180] While the Third Circuit criticized the FCC for failing to explain its decision not to analyze audience share or market share, *Prometheus*, 373 F.3d at 434, and cited to the Commission's previous 25% audience share limit in support of the Court of Appeals' apparent view that audience share should be taken into account, *id.* at 434 n.81, the FCC did not explain, in the *2003 Order* or its briefs to the Third Circuit, that the elimination of the audience share component of its local radio ownership rule had been compelled by Congress. The Court of Appeals thus appears to have been unaware of this critical fact or, at the very least, did not consider it. Accordingly, the Third Circuit's decision cannot be read to preclude reliance on Congress's choice of an outlet-based test to justify the FCC's continued use of such a test in any local radio ownership rule that is retained in this proceeding.

[181] *Prometheus*, 373 F.3d at 432-34.

audience and revenue shares that flows from the relative ease with which lower-rated stations may achieve ratings and share increases by altering their formats.[182]

Professor Hausman's analysis examines audience share volatility based on information for 5,834 stations in the BIA database between 2002 and 2005.[183] He found that, even over a one-year period, a station is more likely to experience a large change in share than it is to maintain a relatively constant share. Indeed, there are almost 1.9 times as many stations that experience a change of more than 25% (or less than –25%) than there are stations that experience a change of less than 5% in absolute value.[184] When the time period is increased to two years, the ratio increases to 2.7, and for a three-year period the ratio is 3.7.[185] These results indicate that, even over short periods of time, there is substantial volatility in the actual market shares of radio stations, which means that actual market shares are simply not a reliable guide to future competitive significance.[186] The analysis demonstrates, therefore, that it would not be economically appropriate to take actual market shares into account for the purpose of setting ownership limits.[187]

The BIA Volatility Study, which was part of the record before the Commission in 2003, similarly showed that stations' audience shares are extremely volatile, even over exceedingly

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[182] *See Hausman October 2006 Statement* at 7-9 & Table 2; *see also* BIA Financial Network, *Volatility in Radio Market Shares* (March 26, 2002) ("*BIA Volatility Study*") (Att. C to Comments of the National Association of Broadcasters, MM Docket Nos. 01-317, 00-244 (filed Mar. 27, 2002).

[183] *See Hausman October 2006 Statement* at 9. All stations with a non-zero local commercial share for at least one year in the 2002-2005 time period are included in the analysis.

[184] *See id.* at 9 & Table 2.

[185] *See id.*

[186] *See id.*

[187] *See id.*

short time periods. For example, between the Fall 2000 and Spring 2001 rating periods, 23.1% of all reportable stations in Arbitron markets experienced increases in their audience shares of 25% or more. Almost the same percentage of stations – 23% – experienced the same type of increase over the longer period spanning from Spring 2000 to Spring 2001.[188] Eighteen percent of Arbitron reportable stations also experienced decreases in their audience shares of more than 25% during this same time period.[189] In all, 41% of stations experienced ratings changes of 25% or more between Spring 2000 and Spring 2001.

The BIA Volatility Study also specifically examined the impact of format changes on audience share, and found that stations changed formats often and with ease, and that when they did so they experienced considerable increases in audience shares. For example, between Fall 2000 and Spring 2001, over 300 stations in Arbitron markets changed their formats, and these stations experienced audience share increases of an average of 30.8% during the same time period.[190] Over a longer period, format changes were even more common, and stations experienced even greater share gains. Indeed, between Spring 2000 and Spring 2001, more than 10% of all reportable stations changed their formats, and these stations experienced audience share increases of 38.5%.[191]

The ease with which radio stations change their formats, and the concomitant changes in the audience ratings (and, therefore, revenue shares) that they earn, renders both audience share and revenue share data exceedingly poor indicators of the effect that any particular transaction will have on the competitive state of a local market. The number of radio stations that a party

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[188] *BIA Volatility Study* at 4-5.

[189] *Id.* at 4.

[190] *Id.* at 7.

[191] *Id.* at 9-11.

owns is a far better measure, and also takes into account that each station provides an owner with the capacity – and, due to the expense of acquiring and operating a radio station – the incentive to provide programming that will serve the needs of the public.[192]

The Commission's prior experience administering the "flagging" regime – which it wisely declined to retain in the *2003 Order* – further demonstrates the shortcomings inherent in a test based on audience share or revenue. Parties routinely contested matters ranging from the accuracy of BIA revenue estimates to the degree to which out-of-market stations were competitors for local or national advertisers in the relevant local market. These disputes and others, combined with the need for time-consuming and individualized analysis of each specific transaction by FCC staff, resulted in considerable uncertainty and substantial delays, thereby draining Commission resources and increasing applicants' transaction costs. Indeed, now–Chairman Martin expressed concern regarding these issues when the Commission adopted the "flagging" system in 2001: "I am troubled . . . by the number of applications that remain pending before the Commission. I am even more concerned by the length of time that some of these applications have been pending – at times, for several years."[193]

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[192] In the *2003 Order*, and despite the presence of evidence in the record on these issues, the Commission did not expressly address the ease with which operators can change radio station formats or the volatility of radio market shares. Instead, the FCC relied primarily upon its "five equal-sized competitor" rationale to support its choice of an outlet-based test for the local radio ownership rule. *See 2003 Order*, 18 FCC Rcd at 13731 (¶ 289). It was this rationale that the Third Circuit expressly rejected. *Prometheus*, 373 F.3d at 432-34. The Third Circuit did, however, state in *dicta* that it had "already rejected that explanation in the context of the local television ownership rule and the Cross-Media Limits." *Id.* at 434. In each of those contexts, the Third Circuit found the *evidentiary* record to be lacking. *See id.* at 419 (television ownership rule); *id.* at 409 (Cross-Media Limits). By contrast, here there is, as discussed above, actual evidence of a high degree of format and ratings volatility in radio. Moreover, the Third Circuit itself acknowledged that the Commission's approach need not be identical across various media, due to the inherent differences in individual markets. *See id.* at 418 n.52 ("No reason exists, however, for the Commission's local television ownership limits to mirror precisely its local radio ownership limits, particularly given that there are generally more radio stations than television stations in a given market.").

[193] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local*

Moreover, even accepting BIA data as an accurate measure of revenue share or Arbitron ratings as an accurate measure of audience ratings, a significant number of the country's radio stations – indeed, 40% – are outside of Arbitron's defined market areas.[194] For transactions involving those stations, the FCC would therefore find itself embroiled in transaction-specific information requests and likely disputes as to the accuracy of the information provided. Primary antitrust authorities take months to perform similar evaluations, conducting interviews and requesting information from numerous advertisers and other market participants. As the agency primarily charged with regulating communications, rather than enforcing the antitrust laws, the Commission lacks the time, resources, and expertise to conduct fair, accurate, and complete investigations regarding the individualized effects of specific transactions. The use of market share or audience share data would result in a regime more accurately characterized as involving case-by-case analysis than bright line rules, an approach that the FCC has previously wisely rejected, a choice with which the Third Circuit expressly agreed.[195]

The fact that Congress in 1996 expressly required the Commission to continue its practice of judging permissible levels of local radio ownership based on the number of outlets owned, and explicitly mandated discontinuance of the FCC's then-existing practice of taking audience share into account, should be the end of the matter. But even if this legislative

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Markets; Definition of Radio Markets, 16 FCC Rcd 19861, 19910 (2001) (separate statement of Commissioner Kevin J. Martin). Now-Chairman Martin stated that he found "this situation particularly troubling because these radio license transfers are subject to structural ownership limits." *Id.* As he explained, "[t]hese limits on local radio ownership are not merely the result of our own determination, but rather were expressly mandated by Congress" and, as such, "should provide, at a minimum, a guide for any public interest analysis and should help make our review easier, not more complicated." *Id.*

194 *2003 Order*, 18 FCC Rcd at 13729 (¶ 282). In addition, 70% of the counties, and 23% of the population above the age of 12, fall outside of Arbitron rated markets. *Id.*

195 *See Prometheus*, 373 F.3d at 431-32.

determination is not given conclusive effect, any local radio ownership limits that the FCC decides to retain should still be based on the number of outlets owned, rather than audience or revenue share benchmarks, because of the ease with which radio stations change formats, because such format changes and other characteristics of local radio markets render market share and audience ratings highly volatile and unreliable indicators of future market effects, and because an audience share or revenue share test would be extremely difficult to administer in practice.

C. **The Radio Ownership Rule's AM and FM "Subcaps" Are Unsustainable.**

The Commission's *2003 Order* upheld the separate limits within the local radio ownership rule capping the number of the stations that may permissibly be owned in each of the two radio services (AM and FM) (referred to as the "subcaps"). On review, the Third Circuit found that the FCC had not adequately supported its decision to retain the AM/FM subcaps, and had completely failed to explain – either in the *2003 Order* or its appellate briefs – why it is necessary to limit ownership of AM stations at all.[196] Should it determine that radio ownership regulations remain necessary, the Commission must acknowledge the lack of any rational basis for separate AM and FM "subcaps" and abolish them.

The Commission based its 2003 affirmance of the AM and FM subcaps on the "significant technical and marketplace differences between AM and FM stations."[197] It asserted that AM stations have less bandwidth than FM stations, that the fidelity of AM stations is "inferior" to that of their FM counterparts, and that AM signal propagation (unlike FM) varies

[196] *See id.* at 434-35.

[197] *2003 Order*, 18 FCC Rcd at 13733 (¶ 294).

with time of day.[198] These and "other technical differences," reasoned the Commission, "have an effect on radio listenership patterns," such that most of the radio audience comes from the FM service.[199] The Commission also noted that "[r]adio formats can also be affected," and that "many of the AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations."[200]

In essence, then, the separate AM and FM ownership limits rest on a number of Commission value judgments. One is a sweeping generalization about the viability and popularity of the respective services. A single owner, under the FCC's theory, should not be allowed to "overload" its permitted complement of stations in a market with supposedly more popular and robust FM facilities, to the exclusion of AM stations, with their "inferior" signals and relative paucity of listenership.

There is abundant evidence, however, to discredit the notion that AM stations are inherently "weak sisters" of their FM brethren. According to 2006 Arbitron data, AM stations were currently ranked number one in at least eleven of the top fifty markets.[201] Seven additional top-fifty markets had AM stations rated among the top three.[202] In two major markets, two of the

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[198] *See id*. at 13733-34 (¶ 294).

[199] *See id.* at 13734 (¶ 294).

[200] *See id.*

[201] Those stations are KFI, Los Angeles, CA (ranked number one in both the Los Angeles and Riverside-San Bernardino markets); KGO, San Francisco, CA; KYW, Philadelphia, PA; WBZ, Boston, MA; KFYI, Phoenix, AZ; KMOX, St. Louis, MO; WLW, Cincinnati, OH; KSL, Salt Lake City, UT; and WTMJ, Milwaukee, WI. *See* Inside Radio, *Spring PhI Arbitrends/Stocks*, at 4 (May 23, 2006); Inside Radio, *Spring PhI Aribtrends/Stocks* at 5 (May 24, 2006). Inside Radio, *Spring PhI Aribtrends/Stocks*, at 4 (May 25, 2006); Inside Radio, *Spring PhI Aribtrends/Stocks* at 4 (May 26, 2006); Inside Radio, *Spring PhI Arbitrends/Stocks*, at 4 (May 31, 2006); Inside Radio, *Spring PhI Arbitrends/Stocks*, at 4 (June 6, 2006).

[202] WGN, Chicago, IL, ranked second; WSB, Atlanta, GA, ranked second; WCCO, Minneapolis, MN, ranked second: KOA, Denver, CO, ranked third; KDKA, Pittsburgh, PA, ranked second; KXNT, Las Vegas, NV, ranked second; and WIBC, Indianapolis, IN, ranked third. *See* Inside

top three-ranked stations were AM.[203] As one observer recently noted, AM is "a vital, vibrant and profitable force in the universe of audio entertainment."[204]

The performance of Clear Channel's own AM stations across the country demonstrates this truth. In Fargo, North Dakota, for example, Clear Channel's 5 kW directional station KFGO was the number one station in its market, with a 12+ rating of 12.4 and 26.9% of market revenue according to Spring 2006 Arbitron and BIA revenue data for 2005. Five-kilowatt directional station WHP, Harrisburg, Pennsylvania, also ranked number one, with a 9.9% share of revenue in 2005. The list goes on:

- WSYR, Syracuse, New York: ranked second, 9.5% market revenue share in 2005;
- WTAG, Worcester, Massachusetts: ranked third, 10.2% market revenue share in 2005;
- KFYR, Bismarck, North Dakota: ranked fourth, 24.6% market revenue share in 2005;
- WTVN, Columbus, Ohio: ranked second, 9.7% market revenue share in 2005;
- KOGO, San Diego, California: ranked third, 7.6% market revenue share in 2005;
- WMT, Cedar Rapids, Iowa: ranked third, 16.5% market revenue share in 2005.

In markets large, medium and small, AM stations are equaling or exceeding the ratings and revenue performance of their FM counterparts.

Indeed, a number of leading group radio owners have station stables of which all, or a majority, are AM stations. These include Multicultural Radio Broadcasting (the 20th ranked

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Radio, *Spring PhI Arbitrends/Stocks*, at 5 (May 24, 2006); Inside Radio, *Spring PhI Aribtrends/Stocks* at 4 (June 1, 2006); Inside Radio, *Spring PhI Aribtrends/Stocks*, at 4 (June 2, 2006); Inside Radio, *Spring PhI Aribtrends/Stocks* at 4 (June 5, 2006); Inside Radio, *Spring PhI Arbitrends/Stocks*, at 4 (June 6, 2006).

[203] KGO and KCBS ranked first and third, respectively, in the San Francisco market, and WBZ and WEEI ranked first and third, respectively, in the Boston market. *See* Inside Radio *Spring PhI Arbitrends/Stocks*, at 4 (May 26, 2006).

[204] Martin Miller, *AM Still Sends Out a Strong Signal to Rivals*, Los Angeles Times, July 25, 2006, at E1 (citing number one ranking of KFI in Los Angeles and KGO in San Francisco, as well as "Philadelphia, Chicago, San Diego and a host of other major-market cities where an AM station is either ranked No. 1 or in the top five").

radio group owner with forty-three stations, all of which were AM, as of June 5, 2006), ABC Radio (3rd ranked owner, with fifty-one AM stations out of seventy total), Salem Communications (14th ranked owner, with seventy-one AM stations out 106 total), and Crawford Broadcasting (48th ranked owner, with eighteen AM stations out of twenty-nine total).[205] The fact that many major group owners have sustained their businesses largely, or even entirely, on the operation of AM stations is further proof of the vibrancy of AM radio.

It matters not that certain formats may be more prevalent among AM stations or FM stations. Indeed, the notion that "many . . . AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations" – a prominent justification for the Commission's affirmance of the AM and FM subcaps in 2003[206] – represents yet another, particularly troublesome, Commission value judgment. Basing a dichotomy between the radio services on their formats is a content-based determination that the Commission assiduously avoids in nearly all contexts, on both constitutional and policy grounds.

In any case, the Commission's judgment regarding the relative "value" of AM and FM stations is unfounded. In a 21st-century America pervaded by terrorist threats and recent disasters, news/talk AM stations play a vital role in serving their communities. Indeed, the characteristics of AM, which allow stations to reach inexpensive, portable receivers in local communities and in some cases large portions of the country, make AM stations particularly valuable to local listeners in times of crisis:

> AM radios are cheap and ubiquitous and they require little power. Should things really go bad in this country, AM is the most surest way of

[205] *See* Who Owns Radio, *Who Owns What* (June 5, 2006), http://www.whoownsradio.com/WhoOwns.pdf (last visited June 6, 2006) (subscription required, on file with Clear Channel).

[206] *2003 Order*, 18 FCC Rcd at 13734 (¶ 294).

> reaching the citizenry. A handful of the old clear-channel stations can cover the entire nation. And in a pinch you can build a receiver with a handful of wire and some headphones. You don't even need batteries.[207]

Likewise, ethnic-formatted stations are immensely important contributors to the nation and the radio marketplace, helping radio to reach ethnic and minority populations with news, information and entertainment in their language and tailored to their needs. Moreover, ethnic and minority-oriented AM stations present the most likely targets of entry-level acquisitions by small businesses, including minorities. Among the important issues for consideration in this proceeding is the advancement of minority broadcast ownership.[208] The Commission cannot purport to foster this objective while retaining separate service ownership limits based on the "inferiority" of ethnic stations.

In any event, it is an over-generalization to suppose that music formats are meaningfully confined to the FM band. A number of music-oriented formats have a significant presence on the AM dial. As of early summer 2006, a majority of Gospel, Black Gospel, Southern Gospel and Oldies stations, and more than one-third of Country stations, were AM stations.[209] Clear Channel's WCAO(AM), Baltimore, Maryland, with a Gospel format, ranked a solid ninth in the market in Spring 2006 Arbitron ratings and generated $2.4 million of revenue in 2005. In markets throughout the country, AM stations successfully air music formats.

At the core of the AM/FM distinction that underlies the separate service caps are the perceived technical differences between the services. These differences, however, are already

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[207] Harry A. Jessell, *God Bless AM Radio*, Broadcasting & Cable, Aug. 18, 2003, *available at* http://www.broadcastingcable.com/article/CA317522.html (recounting value of local AM stations during New York City blackout in the summer of 2003).

[208] *2006 FNPRM*, ¶ 5.

[209] *See* Inside Radio/M Street Publications, "Inside Radio Format Counts" (September 2006), http://ftp.media.radcity.net/ZMST/insideradio/SEP06TOTALFormats.htm.

blurring and are certain to blur even more in the very near future. The introduction of terrestrial digital audio broadcasting ("DAB") using in-band, on-channel ("IBOC") technology promises virtually to eliminate present limitations on AM signal quality. The IBOC technology allows AM stations to deliver a digital signal of quality comparable to FM stations. The Commission itself has found "compelling evidence that AM IBOC ha[s] the potential to revitalize AM broadcasting and substantially enhance radio service for the listening public."[210] Over 160 AM stations are already broadcasting in IBOC.[211] More are certain to implement IBOC in the near term, particularly once the Commission authorizes IBOC operation for AM stations at night.[212] In the digital radio broadcasting environment, any distinction between the AM and FM services will be a relic of the past. Whatever questionable justification the Commission may previously have maintained for separate AM and FM ownership limits will pass into obscurity in the very near future.[213]

In short, the Commission's rationale for maintaining separate AM and FM numerical

[210] *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, 19 FCC Rcd 7505, 7509 (¶ 8) (2004) ("*DAB FNPRM*"). *See also* Comments of the Named State Broadcasters Associations in MM Docket No. 99-325, at 18 (June 16, 2004) ("IBOC broadcasts have the potential to invigorate AM broadcasting by creating reception comparable to its FM counterpart.").

[211] *See* iBiquity Digital Corporation, Find HD Radio Stations Near You, http://www.ibiquity.com/hd_radio/hdradio_find_a_station (last visited Oct. 20, 2006).

[212] Tests indicate that nighttime interference from AM IBOC stations is likely to occur outside a station's protected nighttime contour. *See* Comments of iBiquity Digital Corporation Concerning Nighttime AM IBOC Service, MM Docket No. 99-325, at 3-4 (June 14, 2004). The radio industry at large supports the prompt authorization of AM nighttime IBOC service with an appropriate interference resolution process, given the surpassing benefits of improved AM service. *See* Reply Comments of the National Association of Broadcasters, MM Docket No. 99-325 (July 14, 2004).

[213] In addition, the Commission's AM expanded band initiative and other regulatory actions taken in the late 1980s and early 1990s sought to, and did, "facilitate an overall improvement and revitalization of the AM broadcast service" and sought to limit interference received by AM stations. *Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273, 6275-76 (¶ 4) (1991).

limits is unsustainable now, and will become even more unsustainable with the passage of time. The justifications the Commission offered for separate service caps in 2003 are based on sweeping, unreasoned generalizations inconsistent with the objective facts: AM stations are successful, critical components of the national radio broadcast service. There is no rational basis for distinguishing between AM and FM stations for purposes of ownership limits now, and with the nationwide rollout of ubiquitous digital broadcasting, any lingering technical distinctions between the services will have been virtually wiped out.

Moreover, the elimination of separate service caps for AM and FM stations will provide opportunities to expand ownership of broadcast stations by minorities, women, and small businesses. A lifting of the "subcaps" is likely to trigger significant acquisition activity, as broadcasters seek to realign their local market clusters by acquiring certain in-market stations while divesting others. The divested properties will in many cases provide opportunities for affordable purchases by modestly capitalized and entry-level owners, including minorities, women and small businesses, who have previously found affordable ownership opportunities to be few and far between.

History has borne this out. In connection with its 2000 merger with AMFM, Inc., Clear Channel "publicly and voluntarily committed" to "provide opportunities for minority companies to purchase stations divested as a result of th[e] transaction."[214] Ultimately, Clear Channel divested approximately forty radio stations to small and minority-owned businesses, representing "the most significant one-time increase in minority ownership in history,"[215] and "boost[ing] the

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[214] *See Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062, 16105 (2000) (statement of Chairman William E. Kennard).

[215] *Id.*

number of minority-owned stations 26%."[216] The minority-owned companies purchasing stations sold off in the course of the transaction included Inner City Broadcasting, Blue Chip Broadcasting, Radio One, and Liberman Broadcasting, and a substantial number of the divested stations were AM properties. Aside from the likelihood that transactions will occur, existing owners currently focusing on AM station ownership to provide ethnic and other niche programming can be expected to take advantage of the loosening of AM ownership restrictions to expand the local market coverage and diversity of their offerings. Elimination of the AM/FM subcaps, therefore, is not only mandated by the lack of any rational basis for their retention, but is likely to foster increased radio ownership by small businesses and minorities.

IV. THE FCC SHOULD REVISIT ITS 2003 DECISION REGARDING THE TRANSFERABILITY OF GRANDFATHERED RADIO STATION COMBINATIONS.

A. The Commission Should Allow Grandfathered Radio Combinations to Be Freely Transferred.

As Clear Channel has explained before, the FCC's 2003 decision prohibiting the intact transfer of grandfathered radio combinations was both misguided as a matter of policy and wrong as a matter of law.[217] As an initial matter, the Commission arbitrarily ignored the fact that group owners invested substantial sums in building radio combinations at the express behest of Congress and the FCC itself. When Congress increased the local radio ownership limits in 1996, it made clear its intent to encourage consolidation in the radio industry in order to bring about the public interest benefits of group ownership.[218] Members of Congress explicitly found that

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[216] Bill McConnell, *The Greening of the MMTC*, Broadcasting & Cable, Sept. 9, 2002, *available at* http://www.broadcastingcable.com/article/CA242662.html.

[217] *See, e.g.*, *Clear Channel Third Circuit Brief* at 42-47; *Clear Channel Third Circuit Reply Brief* at 17-19; *see also Clear Channel 2003 Reply Comments* at 10-15.

[218] *See* 141 Cong. Rec. S8061, S8076 (daily ed. June 9, 1995) (statement of Sen. Pressler); 141 Cong. Rec. S8424, S8433 (daily ed. June 15, 1995) (statement of Sen. Bryan).

"[i]ncreased multiple ownership opportunities will allow radio operators to obtain efficiencies from being able to purchase programming and equipment on a group basis and from combining operations such as sales and engineering."[219] Likewise, both before and after the 1996 Act, the Commission itself found that any concern "about the impact of [the FCC's] rule changes" was outweighed "by the considerable public interest benefit [the Commission] anticipate[d] from a general strengthening of stations as a result of an increase in the local ownership limits."[220]

In reliance on the revised rules, radio operators invested significant sums to consolidate – and improve, to the benefit of the public – their legally acquired station groups. Clear Channel, for example, spent hundreds of millions of dollars to co-locate commonly owned stations in local markets and to combine offices, staff, production studios, and technical facilities, thereby allowing its station clusters to deliver the benefits of the efficiencies and synergies generated by group ownership to local listeners. In addition, it is well-established that the economic benefits flowing from joint station operation lead inevitably to higher values being placed on station groups as compared to individual station sales.[221] Indeed, Clear Channel has itself paid premium prices to purchase pre-existing station groups due to these very benefits. Based on these facts,

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[219] 141 Cong. Rec. S8424, (daily ed. June 15, 1995) (statement of Sen. Burns).

[220] *See Radio Rules First Reconsideration Order*, 7 FCC Rcd at 6393-94 (¶ 33). In individual transactions, the Commission had also repeatedly acknowledged that "operational efficiencies and cost savings" associated with consolidation permit group owners to "provide important public service benefits," including "expanded and varied news coverage, as well as improved and expanded local public affairs programming" and allow companies "to devote greater resources to expanded community service projects and campaigns." *E.g., Am. Radio Sys. Corp.*, 13 FCC Rcd 12430, 12450 (¶¶ 51, 52) (1998).

[221] Both Congress and the Federal Trade Commission have acknowledged that relaxation of local ownership rules has historically increased both the number and financial value of station group sales. *See* 141 Cong. Rec. S8061, S8076 (daily ed. June 9, 1995) (statement of Sen. Pressler); *Radio Rules and Policies Order*, 7 FCC Rcd at 2775 n.91 (¶ 38 n.91) (citing Reply Comments of the Federal Trade Commission, Appendix, Anderson and Woodbury, Efficiencies from Common Ownership of Local Broadcast Media: The Case of AM and FM Radio Stations 26 (1991)).

the Commission acknowledged in the *2003 Order* that "present owners" had legitimate "expectations" of recouping their investments, because they "acquired stations under the current ownership rules."[222] The prohibition on transferability adopted by the Commission in 2003, however, prevents group owners from recouping those very investments.[223] As noted above, in the radio business (as in many others), the whole is worth far more than the sum of its parts may be. By requiring station clusters to be dismantled at the time of sale, the FCC's decision leaves group owners' investments stranded.[224]

The Commission's 2003 decision to prohibit transfers of grandfathered combinations also constituted an abrupt and unexplained about-face from prior decisions. Previously, the Commission had consistently recognized the need to protect the reasonable expectations of radio group owners. For example, in revising its radio rules in the 1990s, the Commission permitted transfers of radio time brokerage agreements that were allowable under its prior rules but

[222] *2003 Order*, 18 FCC Rcd at 13810 (¶ 487).

[223] The Commission's previous statement that "*[b]uyers* will be on notice that ownership combinations must comply at the time of the acquisition of the stations," *id.* (emphasis added), constitutes nothing more than a nonsequitur; of course, purchasers will be on notice, which, as has been shown, will depress station prices. *See* Comments of Clear Channel Communications, Inc., MM Docket No 00-244, at 6 (Feb. 26, 2001) ("*Clear Channel 2001 Market Definition Comments*"). This, however, says nothing about how the expectations of the parties who invested money in assembling and improving radio combinations in full compliance with the local radio ownership rules are protected. The reason for this omission is obvious, because the FCC's policy choice in reality *precludes* sellers from recovering their investments as they reasonably expected they would be able to do. Nor did the FCC's prior statement that "owners [would] have sufficient time to minimize any specific complications due to joint operations," *2003 Order*, 18 FCC Rcd at 13810 (¶ 487), adequately explain why the prohibition on transfers would not have undue adverse effects on group owners, because it addresses only the costs of disaggregation, not the inability to recover investments. Although Clear Channel argued these points in its briefs to the Third Circuit, *Clear Channel Third Circuit Brief* at 44-45, the Court did not address them specifically. The *Prometheus* decision therefore does not preclude the FCC from accepting these arguments here and relying on them to revise its prior decision to prohibit transfers of grandfathered combinations.

[224] While the Third Circuit found that the FCC was not *required* to protect radio owners reasonable investment-backed expectations, *Prometheus*, 373 F.3d at 427, there is nothing in the Court's decision that prevents the Commission from determining that such expectations should have indeed been protected and to revise its decision accordingly.

impermissible under its revised regulations, acknowledging that "[t]o hold otherwise, as a general matter, could severely and unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements."[225] Moreover, the Commission explicitly declined to restrict the transfer of clusters that were acquired in compliance with the audience share limit adopted in its 1992 order but later grew to a level exceeding that limit, because its goal had been "to promote robust competition," and "penalizing enterprises that grow into stronger competitors [was] [in]consistent with this objective."[226] The FCC also has allowed the intact transfer of numerous radio and other broadcast combinations, consistently recognizing that transfer of an existing combination "do[es] not increase the combined advertising shares of . . . existing groups or result in increased levels of ownership concentration."[227] Clear Channel submits that the Commission should revisit its 2003 decision to prohibit the transfer of non-compliant combinations and reach a conclusion that is consistent with these prior determinations.[228]

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[225] *Revision of Radio Rules and Policies*, 9 FCC Rcd 7183, 7193 (¶ 57) (1994).

[226] *Radio Rules First Reconsideration Order*, 7 FCC Rcd at 6397 (¶ 48).

[227] *AMFM, Inc.*, 15 FCC Rcd 16062, 16069 (¶ 15) (2000); *see Solar Broad. Co.*, 17 FCC Rcd 5467, 5475 (¶ 24) (2002); *Jacor Commc'ns, Inc.*, 14 FCC Rcd 6867, 6905-06 (¶ 62) (1999); *Am. Radio Sys. Corp.*, 13 FCC Rcd at 12437-38, 12442-43 (¶ 26); *see also, e.g.*, *EWS News Corp.*, 12 FCC Rcd 20243, 20247 (¶ 15) (1997) (granting a waiver of the one-to-a-market rule stating that "since grant of this application will preserve an existing combination, we do not believe that continued joint ownership of the stations will decrease the level of diversity and competition in the market"); *Houston H. Harte*, 12 FCC Rcd 13418, 13422-23 (¶ 16) (1997) (same); *Paso Del Norte Broad. Corp.*, 12 FCC Rcd 6876, 6882 (¶ 14) (1997) (same); *River City License P'ship*, 12 FCC Rcd 4993, 4997-98 (¶ 13) (1997) (same); *Kelso Partners IV, L.P.*, 11 FCC Rcd 8764, 8768-69 (¶ 11) (1996) (same). *Accord United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, 41558 n.18 (1992), *revised*, 4 Trade Reg. Rep. (CCH) ¶ 13104 (Apr. 8, 1997) (stating that transfers that do not increase ownership concentration are "unlikely to have adverse competitive consequences and ordinarily require no further analysis").

[228] As Clear Channel explained previously, when the Commission departs from precedent it "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC,* 444 F.2d

B. If the Transferability Restriction Is Retained, the Class of Entities That Is Eligible to Purchase Grandfathered Combinations Must Be Broadened.

In the *2003 Order*, the FCC created a narrow exception to the prohibition on the intact transfer of grandfathered non-compliant radio combinations for so-called "eligible entities," which the Commission defined as companies with $6 million or less in annual revenue.[229] The FCC stated its "belie[f]" that this exceedingly limited carve-out "could afford new entrants the opportunity to enter the media marketplace" and "could give smaller station owners already in the market the opportunity to acquire more stations."[230] As explained below, because the exception has proven since its implementation to be wholly ineffective at accomplishing these goals, Clear Channel submits that, if the Commission retains the restriction on transferability, it must, at the very least, expand the limited class of "eligible entities" to whom grandfathered

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841, 852 (D.C. Cir. 1970). Clear Channel argued in its comments in the 2003 proceeding and on appeal from the *2003 Order* that the record rendered it impossible for the Commission to justify a departure from its prior decisions to permit the free transfer of existing radio combinations, and on appeal contended that the FCC had not provided an adequate explanation. *See, e.g.*, *Clear Channel 2003 Reply Comments* at 12-13; *Clear Channel Third Circuit Brief* at 46-48. The Third Circuit noted the FCC's 1992 decision to authorize transfers of noncompliant combinations and that it had "[s]witch[ed] course" in the *2003 Order*, but did not expressly address whether the Commission's reason for doing so was sufficient. *Prometheus*, 373 F.3d at 426. Regardless, and even if the Third Circuit's decision is read as approving of the FCC's change in course, the Court said nothing that would prevent the Commission from revising its transfer policy to be consistent with prior decisions on this issue.

[229] *2003 Order*, 18 FCC Rcd at 13811-12 (¶¶ 489-90). The *2003 Order* defines an "eligible entity" as an entity that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping. At the time of the *2003 Order*, the relevant regulation set a $6 million threshold. As of January 1, 2006, however, the threshold for a small business under the SBA regulations increased to $6.5 million for the "Radio Station" category. *See* 13 C.F.R. § 121.201. In addition, an entity purchasing a grandfathered combination must meet one of the following control tests in order to qualify as an "eligible entity." The eligible entity must hold: (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power; (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity may control more than 25% of the outstanding stock; or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power. *2003 Order*, 18 FCC Rcd at 13811 (¶ 489); *see* 13 C.F.R. § 121.103.

[230] *2003 Order*, 18 FCC Rcd at 13810 (¶ 487).

combinations may be transferred. Doing so is necessary to promote the FCC's asserted objective of increasing participation in the radio industry by small businesses, including those owned by minorities and women.

In its brief filed with the Third Circuit, Clear Channel explained why the threshold set by the Commission would preclude accomplishment of the FCC's posited goals of promoting market expansion by small companies and entry by new owners. Significantly, Clear Channel demonstrated that many of the clusters subject to forced breakup under the Order would be valued at amounts that far exceed the *annual revenue* of "eligible entities."[231] Indeed, *single-station* transactions in mid-sized markets often far exceed $6 million (and even today's higher threshold of $6.5 million) and clusters in similarly-sized markets routinely sell for upwards of *$100 million*.[232] Recent sales data confirms this. A single FM station in the Colorado Springs, Colorado market – the 97th ranked Arbitron Metro Market – recently sold for $17.5 million, nearly *triple the annual revenue* of an "eligible entity."[233] Even in a very small market – for

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[231] *See Clear Channel Third Circuit Brief* at 46 & n.20 (referencing single FM station in York, Pennsylvania that sold for $ 9 million) (citing Changing Hands, Broadcasting and Cable (Mar. 3, 2003), at 29); *id.* (referencing sale of combination of two FM stations and two AM stations in Peoria, Illinois sold for $37 million) (citing Changing Hands, Broadcasting and Cable (Jan. 13, 2003), at 48); *see also Clear Channel Supreme Court Brief* at 19 (referencing sale of single FM station in Jacksonville, Florida, the 50th ranked Arbitron metro market, for $7.75 million; sale of combination of one FM station and one AM station in Hagerstown, Maryland, the 169th ranked Arbitron metro market, for $18 million; and sale of combination of two FM stations in Fresno, California, the 68th ranked Arbitron metro market, for $25 million) (citing *Deals*, Broadcasting & Cable, Dec. 13, 2004, at 40; *Deals*, Broadcasting & Cable, Jan. 24, 2005, at 72).

[232] *Clear Channel Supreme Court Brief* at 19-20 (referencing sale of combination of four FM stations and one AM station in Norfolk, Virginia, the 40th ranked Arbitron metro market, for $80 million) (citing Tony Sanders, *Max Media Re-Enters Norfolk with Barnstable Buy*, Billboard Radio Monitor, Jan. 27, 2005, *at* http://www.billboardradiomonitor.com/radiomonitor/search/article_display.jsp?vnu_content_id=1000778527).

[233] *Deals*, Broadcasting & Cable, May 1, 2006, at 34; *see Deals*, Broadcasting & Cable, Aug. 14, 2006, at 23 (reporting that a single FM station in the Greensboro-Winston Salem-High Point, North Carolina market – the 45th ranked Arbitron Metro Market – recently sold for $15.65 million); *Deals*, Broadcasting & Cable, July 24, 2006, at 26 (reporting that a single FM station in

instance, Rapid City, South Dakota, the 274th ranked Arbitron metro market – a combination of four FMs and 2 AMs recently sold for $19 million.[234] The values of these transactions do not even begin to approach the values of a large number of the combinations that would have to be disaggregated at the time of sale, particularly those in top-ranked markets.[235] Single AM station transactions in large markets have recently approached or exceeded the $10 million mark,[236] with single FM stations in such markets selling for nearly *$100 million*.[237] Combinations in large markets obviously sell for far more, for example, a cluster consisting of four FM stations and one AM station in Dallas-Fort Worth – the 5th ranked Arbitron metro market – recently sold for $95 million.[238] Accordingly, as Clear Channel explained previously,[239] and as shown by the data above, companies with less than $6 (or $6.5) million in annual revenue are, practically speaking, extremely unlikely to be able to obtain the level of financing needed to acquire the radio combinations at issue, rendering the exception a completely ineffective means of furthering the FCC's goals.

Jacksonville, Florida – the 49th ranked Arbitron metro market – sold for $7.65 million).

[234] *Deals*, Broadcasting & Cable, July 24, 2006, at 26; *see Deals*, Broadcasting & Cable, July 31, 2006, at 29 (reporting that 7 FMs and 2 AMs spanning Chico, California – the 199th ranked Arbitron metro market – and Redding, California – the 226th ranked Arbitron metro market – sold for $17.5 million).

[235] *See Clear Channel Third Circuit Brief* at 46.

[236] *Deals*, Broadcasting & Cable, Apr. 17, 2006, at 57 (reporting that single AM station in the Nassau-Suffolk, New York market – the 18th ranked Arbitron metro market – sold for $14 million); *see Deals*, Broadcasting & Cable, June 26, 2006, at 34 (reporting that single AM station in the Dallas-Fort Worth, Texas market – the 5th ranked Arbitron metro market – sold for $9.25 million).

[237] *Deals*, Broadcasting & Cable, Jan. 30, 2006, at 25 (reporting that single FM station in the Philadelphia, Pennsylvania market – the 6th ranked Arbitron metro market – sold for $85.16 million).

[238] *Deals*, Broadcasting & Cable, Aug. 14, 2006, at 22.

[239] *See Clear Channel Third Circuit Brief* at 46; *see also Clear Channel Supreme Court Brief* at 19.

In response to these and other arguments that the Commission should have defined "eligible entities" differently,[240] the Third Circuit directed the FCC, in "the next quadrennial review" (this proceeding), to "reevaluate" whether a change in the exception "will better promote the Commission's diversity objectives," based on the "several years of implementation experience" that the Court predicted the FCC would have gained.[241] The Commission is thus obliged to analyze in this proceeding whether the exception has actually increased participation in the radio business by small group owners and new entrants.

Since the transferability restriction went into effect, however, and due to the very problems that Clear Channel predicted would plague "eligible entities" in terms of obtaining financing, *there has not been a single sale of a grandfathered combination*. The FCC's "exception" to its transferability restriction has therefore been completely ineffective as a means of furthering the agency's purported goal of increasing participation in the radio industry by small businesses, including those owned by minorities and women. If the FCC maintains radio ownership limits and refuses to allow transfers of grandfathered combinations across the board, it must modify the "eligible entity" standard to include a wider range of companies in order to increase the likelihood that the exception will serve its intended purpose of furthering the ability of small businesses, including those owned by minorities and women, to expand their presence in or to enter the radio business.

V. **<u>ANY REVISED "CROSS-MEDIA" LIMITS SHOULD NOT INCLUDE A SEPARATE RADIO/TELEVISION CROSS-OWNERSHIP RESTRICTION.</u>**

If the Commission adopts any cross-media limits, they should not include restrictions on

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[240] Certain other parties had argued that the FCC erred by failing to choose "'socially and economically disadvantaged businesses, . . . as the waiver-eligible class." *Prometheus*, 373 F.3d at 428 n.70.

[241] *Id.*

radio/television cross-ownership. There simply is no evidence that restricting common ownership of radio and television stations is necessary to further either competition, localism, or diversity. In addition, regulation of radio/television cross-ownership is inconsistent with Section 202(b) of the 1996 Act, as well as prior determinations by both Congress and the D.C. Circuit that there is no basis founded in competition or diversity concerns to restrict cable/broadcast cross-ownership.

In its *2003 Order*, the FCC considered whether its current cross-ownership rules were still necessary in the public interest pursuant to Section 202(h). That decision – which was later stayed by the Third Circuit pending the outcome of this proceeding – would have eliminated both the radio/television cross-ownership rule and the newspaper/broadcast cross-ownership rule and replaced them both with a single set of cross-media limits ("CMLs"). The CMLs would have prescribed different rules for cross-ownership depending on the size of the market, as determined by the number of television stations in the market, and cross-ownership would have been completely banned in the smallest markets.[242]

In replacing the cross-ownership rules with the CMLs, the Commission looked principally to its three traditional public interest goals: competition, localism, and diversity. The FCC determined that the radio/television cross-ownership rule as it then existed was not necessary to achieve any of these goals. On appeal, the Third Circuit agreed that competition, localism, and diversity are appropriate standards for the Commission to consider when reframing

[242] Specifically, in the largest markets, with nine or more television stations, cross-ownership of radio stations and television stations would have been unrestricted, subject to the local radio and television ownership caps. In medium-sized markets, with four to eight television stations, if a single entity owned at least one radio station and at least one television station, it would not have been permitted to exceed 50% of the applicable local radio and television ownership caps. In small markets, with three or fewer television stations, cross-ownership between radio and television would have been prohibited.

cross-media limits,[243] but did not specifically review the FCC's decision to repeal the radio/television cross-ownership rule. Among all the various parties who challenged the *Order*, not one argued that the repeal of the radio/television cross-ownership rule was error.[244] This fact, coupled with a new look at the evidence on competition, localism, and diversity, make it clear that not only was the Commission correct to repeal the old radio/television cross-ownership rule, but that there is similarly no justification for promulgating any separate radio/television cross-ownership restrictions at all.

A. <u>A Separate Radio/Television Cross-Ownership Rule Is Not Necessary to Promote Competition.</u>

In its *2003 Order*, the FCC determined that radio and television stations are not considered adequate substitutes by advertisers.[245] The Commission found that the principal economic market in which radio and television stations operate is advertising.[246] If advertisers do not see the two media as substitutes for each other, the FCC reasoned, then they do not compete with each other for advertising dollars. Thus, a common owner of radio and television stations could not adversely affect competition, because the markets are separate.[247] None of the Commission's findings on the lack of competitive harm caused by cross-media ownership were questioned by any party or the Third Circuit.[248] Therefore, the FCC's original findings stand, and there is no basis for reevaluation now.

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[243] *See Prometheus*, 373 F.3d at 398.

[244] *See id*. at 397 n.22.

[245] *See 2003 Order*, 18 FCC Rcd at 13770-71, 13772 (¶¶ 377, 381).

[246] *See id*. at 13748, 13769-70 (¶¶ 331, 375).

[247] *See id*. at 13770-71 (¶ 377).

[248] *See Prometheus*, 373 F.3d at 398.

Further, none of the evidence presented to or cited by the Commission when propounding its *2003 Order* supports the conclusion that radio advertising and television advertising would be any more or less substitutable depending on the size of the market at issue. The factors that led the FCC to its conclusion – data suggesting that advertisers do not consider radio and television to be good substitutes, the difference in audience size, radio's unique ability to target particular demographics better than television, the fact that television viewers are generally more engaged with the programming, differences in costs, and so forth[249] – are based on the inherent nature of the media, not on the size of the markets. Simply put, there is no competitive reason for maintaining any sort of cross-media limit as between television and radio in any market.

B. <u>A Separate Radio/Television Cross-Ownership Rule Is Not Necessary to Promote Localism.</u>

The Commission found that not only does a prohibition on radio-television cross-ownership fail to promote localism, but that it actually harms localism.[250] Indeed, the FCC expressly rejected arguments that cross-ownership of radio and television stations would result in a decrease in the quantity or quality of local programming.[251] Instead, the Commission concluded that when radio and television stations are commonly owned, they can pool resources – both for newsgathering and support – freeing up staff time and money for the production and airing of more local and informational content.[252] The Third Circuit affirmed the FCC's nearly identical reasoning on the effect the newspaper/broadcast cross-ownership rule has on

[249] *See 2003 Order*, 18 FCC Rcd at 13771-72 (¶¶ 379-80).

[250] *See id*. at 13772-73 (¶ 383).

[251] *See id*. at 13773 (¶¶ 384-85).

[252] *See id*.

localism,[253] and any inconsistent approach taken by the Commission in the radio/television cross-ownership context would most likely be subject to judicial reversal.[254]

As with the competitive effects of radio/television cross-ownership, there is likewise no evidence to suggest that common ownership will have a more detrimental impact on localism in a smaller market than in a larger market. The fact that commonly owned broadcast outlets can pool resources has nothing to do with market size. If anything, it is likely that the savings realized through cross-ownership might benefit small markets more than large markets. The largest and best-funded media outlets are often found in the largest markets; small market broadcasters generally have smaller budgets and smaller capabilities. Cross-ownership among small-market broadcasters, however, would *increase* their available resources, enabling them to produce the higher quality and quantity of local news and other content that is regularly produced by more sophisticated and better-funded large market stations.

C. A Separate Radio/Television Cross-Ownership Rule Is Not Necessary to Promote Diversity.

Finally, the FCC found that diversity is not a justifiable reason to support a radio/television cross-ownership rule, calling such a rule "inequitable and outdated," and "unnecessary and anachronistic."[255] Because any analysis of viewpoint diversity must take into account the complete array of available media voices, and not just radio and television, the

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[253] *Id*. at 13772-73 (¶ 383); *see Prometheus*, 373 F.3d at 398-99.

[254] *See Prometheus*, 373 F.3d at 408-09 (criticizing inconsistencies in the Diversity Index); *see also, e.g.*, *Natural Resources Defense Council v. EPA*, 790 F.2d 289, 302 (3rd Cir. 1986) (agency decision arbitrary and capricious where it was "blatantly contradicted by a wealth of evidence in the record, including repeated statements by [the agency] itself"); *Airline Pilots Ass'n v. FAA*, 3 F.3d 449, 450 (D.C. Cir. 1993) (striking down agency decision as "internally inconsistent and therefore unreasonable and impermissible under Chevron"); *General Chemical Corp. v. United States*, 817 F.2d 844, 855 (D.C. Cir. 1986) (finding agency decision arbitrary and capricious because it was "internally inconsistent and inadequately explained").

[255] *2003 Order*, 18 FCC Rcd at 13774-75 (¶¶ 388, 389).

evidence is not sufficient to warrant a ban on cross-ownership between television and radio stations. Today's media landscape is more diverse than ever before – indeed, it is much more so in 2006 than it was in 2003, when the Commission made its initial determination – and even the nation's smallest markets have a wide variety of media voices competing with one another.[256]

In addition, the FCC specifically found that "although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude."[257] The Commission also found that in a media marketplace that is becoming more and more fragmented and competitive, "media owners face increasing pressure to differentiate their products, including by means of differing viewpoints."[258] Importantly, the FCC specifically found that the media landscape was indeed becoming more fragmented and competitive in markets of all sizes – a trend which has continued in the three years since the *2003 Order* was issued.[259] The Third Circuit affirmed each of these conclusions.[260]

While the Commission's determinations discussed above were made in the context of the newspaper/broadcast cross-ownership rule, there is no basis for reaching a different conclusion for radio/television cross-ownership.[261] The overall media marketplace in which radio and television stations compete is the same fragmented and competitive one the FCC considered. There is no independent evidence to indicate that common ownership of a radio station and a television station is more likely than common ownership of a newspaper and a broadcast station

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[256] *See id*. at 13794 (¶ 444); *see also supra* Section II.A.

[257] *2003 Order*, 18 FCC Rcd at 13764 (¶ 364).

[258] *Id*.

[259] *See id.* at 13774 (¶ 387); *see also supra* Section II.A.

[260] *See Prometheus*, 373 F.3d at 399-400.

[261] *See supra* n.254.

to result in common viewpoints being propounded.[262] In the absence of such evidence, there is no basis for restricting radio/television cross-ownership at all.

Further, this conclusion is also true regardless of market size. Again, the record contains no evidence to support the conclusion that commonly owned media outlets in a small market express common viewpoints more often than in a large market. Therefore, a conclusion that common ownership is a greater threat to viewpoint diversity in smaller markets is unfounded.

To the extent that the Commission opts to retain separate restrictions on local radio and television ownership, such limits would be more than sufficient to serve the FCC's diversity- and competition-related goals. As shown above, the evidence shows that the overall number of media outlets in even the nation's smallest markets is growing, allowing an opportunity for more and more diverse and antagonistic voices to be heard in every community across the country. As also shown above, the competitive functioning of the marketplace is sufficient to ensure diversity in local radio markets. Adding a cross-media limit on top of any local radio and television ownership caps that are retained is unnecessary, and would overcompensate for a problem that is at best speculative.[263]

While it is true that "[t]he Commission's finding that a blanket prohibition on . . . cross-ownership is no longer in the public interest does not compel the conclusion that no regulation is necessary,"[264] it is also true that any regulation to be propounded must be justified by reliable evidence and analysis. The FCC analyzed the available evidence and concluded that "[i]n order

[262] Indeed, the Commission's analysis of viewpoint diversity in the *Order* focuses entirely on common ownership of television stations and newspapers, to the exclusion of radio/television combinations. *See 2003 Order*, 18 FCC Rcd at 13761-64 (¶¶ 357-59, 361-62).

[263] The Commission has stated that the separate local caps "will protect and promote competition in the local television and radio markets and, as a result, will also protect and preserve viewpoint diversity within those services." *Id* at 13774-75 (¶ 389).

[264] *Prometheus*, 373 F.3d at 400.

to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion."[265] Yet despite this lack of confidence, the Commission did propose a blanket prohibition on cross-ownership in small markets, and severe ownership limits for radio and television station owners in medium markets.

Concern for viewpoint diversity is not an adequate justification for radio/television cross-ownership restrictions in any cross-media limits the FCC may establish. While the Commission found some evidence that common ownership promotes common viewpoint, it was not reliable enough to justify restrictions on radio/television cross-ownership. Even in smaller markets, where there are fewer overall media voices, competition will ensure diversity, and any local radio and television ownership caps that are retained will do more than enough to ensure a variety of owners and voices in each market.

In sum, the FCC's reasoning – affirmed or at the very least not questioned by the Third Circuit – requires elimination of any specific rule regarding radio/television cross-ownership restrictions in all markets. Neither competition, localism, nor diversity provide a sufficient basis on which to base a radio/television restriction. Rather, a single entity should be allowed to own the full complement of radio and television stations that it can otherwise own in markets of all sizes.

D. A Separate Radio/Television Cross-Ownership Restriction Cannot Be Reconciled with Congress' and the D.C. Circuit's Determinations that there Is no Basis to Restrict Cable/Broadcast Cross-Ownership.

Placing an independent restriction on radio/television cross-ownership is also inconsistent with Congress' decision in the 1996 Act to repeal the closely analogous cable/broadcast cross-

[265] *2003 Order*, 18 FCC Rcd at 13764 (¶ 364).

ownership prohibition, as well as the D.C. Circuit's decision in *Fox* vacating the FCC's decision to retain its separate cable/broadcast cross-ownership regulation in the 1998 biennial review proceeding.[266] As a result of these decisions, in any local market in the country a cable operator may: (1) operate a cable system, (2) program a limitless number of its own cable channels, and (3) own as many radio stations as it may otherwise own under the independent local radio ownership rule. But a company owning *even a single radio station* is severely hampered – and in some markets under the FCC's previously adopted CMLs would have been absolutely prohibited – from owning *even a single television station*. This inconsistency is glaring and, more importantly, without any legal basis at all.

By repealing the statutory ban on cable/broadcast cross-ownership, Congress clearly set forth its view that an absolute prohibition was not needed. Moreover, although the Commission made a feeble attempt to justify retaining the regulatory prohibition on cable/broadcast cross-ownership in the 1998 biennial review, the D.C. Circuit held that the FCC's reasons for doing so – which it asserted included a desire to protect competition and diversity – were "at best flimsy," and that the Commission's "half-hearted attempt to defend its decision in this court [wa]s but another indication that the . . . [r]ule [wa]s a hopeless cause."[267]

There is no meaningful difference between the competition and diversity concerns that the FCC has previously relied upon to justify restricting radio/television cross-ownership and those that the D.C. Circuit found "flimsy"[268] and, with respect to diversity in particular,

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[266] 1996 Act, § 202(i); *Fox*, 280 F.3d at 1049-53.

[267] *Fox*, 280 F.3d at 1053.

[268] *Id.*

"woefully inadequate,"[269] in relation to the cable/broadcast cross-ownership rule. Terrestrial radio and television broadcasters face abundant competition from multiplicitous alternative platforms, and, in any event, the Commission has already concluded that radio and television stations are not direct substitutes for advertisers, and thus do not compete in the same economic market.[270] There is, moreover, no evidence that common ownership of radio and television stations harms diversity, but, to the contrary, abundant evidence suggesting the exact opposite.[271] As such, the decisions by Congress and the D.C. Circuit in the cable/broadcast context require the FCC to refrain from limiting radio/television cross-ownership as well.

E. A Separate Radio/Television Cross-Ownership Restriction Is Inconsistent With the Communications Act.

Finally, separate limits on radio/television cross-ownership, to the extent that they shrink an entity's right to own radio stations below otherwise permissible levels, are inconsistent with Section 202(b) of the 1996 Act. When Congress set local caps on common ownership of radio stations, it expressly permitted broadcasters to own "up to" a certain number of radio stations in a market, depending on the market's size.[272] The limits that Congress set for radio ownership are not contingent on non-ownership of a television station (or even multiple television stations). Section 202(b) is not phrased in the conditional. Congress did not say, for example, that a party

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[269] *Id.* at 1052.

[270] *See supra* Section V.A; *see also Fox*, 280 F.3d at 1051 (finding the FCC's decision to retain the cable/broadcast cross-ownership ban arbitrary and capricious because it completely "failed to consider competition from DBS").

[271] *See supra* Section V.C; *see also Fox*, 280 F.3d at 1052 (finding the FCC's decision to retain the cable/broadcast cross-ownership ban arbitrary and capricious because it was inconsistent with the Commission's determination that "common ownership of two broadcast stations in the same local market need not unduly compromise diversity"). The same is true with respect to localism concerns; the Commission has already concluded that common ownership of radio and television stations does not hamper and, indeed, may promote, localism. *See supra* Section V.B.

[272] 1996 Act, § 202(b).

could own up to eight radio stations in a market with forty-five or more stations "provided that it did not own any television stations;" rather, it said that an entity could own up to eight radio stations, period. The statute therefore does not allow the imposition of a radio/television cross-ownership restriction.

VI. CONCLUSION

The Commission has a statutory obligation in this proceeding to examine whether its media ownership rules remain necessary in light of competitive developments in the contemporary media marketplace and, if not, to repeal or modify them. As shown above, the terrestrial radio industry is itself vibrantly competitive, and free, over-the-air radio broadcasters are subject to a vast and ever-increasing range of new competitors, none of which are subject to arbitrary limits on ownership, almost none of which Congress even could have envisioned in 1996, and many of which did not even exist in 2003 when the FCC last considered modifications to the local radio ownership rule. The available evidence – and Clear Channel's own experiences – show that greater levels of common ownership lead to real consumer benefits in terms of increased program variety and increased and improved local programming and participation in community service. Indeed, the only way for radio broadcasters to *survive* in today's cluttered media environment is to accurately gauge the needs and interests of their audiences and to serve those audiences with the programming that they wish to hear. Nor are local radio ownership limits needed to protect advertisers; the natural functioning of the marketplace provides more than sufficient discipline, and if it failed, there are a variety of antitrust enforcement mechanisms available to provide a swift and effective remedy. It is therefore high time that the Commission repeal the local radio ownership rule in its entirety.

At the very least, the FCC should modify the local radio caps to allow ownership of up to ten stations in markets with between sixty and seventy-four stations, and ownership of at least twelve stations in markets with seventy-five or more stations. Any limits that are retained must respect Congress's choice of an outlet-based test to measure permissible levels of common ownership, a choice which is also compelled by market realities. And because they have no basis in law or reality, the Commission should also, if local radio ownership limits continue on the books at all, eliminate the subcaps on the number of AM and FM stations that a single entity may own in a local market.

The FCC should also revisit its decision to restrict transfers of grandfathered radio station combinations or, at the very least, expand the class of purchasers to whom such combinations may be transferred in order to increase the likelihood that the Commission's goal of furthering participation in the broadcast industry by new entrants, women, and minorities will be accomplished. Finally, as is clear from the FCC's own prior reasoning – affirmed or not challenged by the Third Circuit – there is no basis for retaining any separate limit on radio/television cross-ownership.

Respectfully submitted,

Andrew W. Levin

Andrew W. Levin
Executive Vice President, Chief Legal Officer, and Secretary
Clear Channel Communications, Inc.
200 East Basse Road
San Antonio, Texas 75201
(210) 822-2828

Dated: October 23, 2006

EXHIBIT 1

M Street Directory Format Listings from 1993 and 2005

MStreet Directory – 1993 – 32 Format Listings

FORMAT CODES

As the broadcast industry itself evolves, so do radio station formats. Classifications and definitions are amended from time to time to reflect current trends. Here is the current set of format classifications in use:

AC Adult Contemporary
An adult-oriented pop/rock station, with no hard rock, possibly some non-rock music, and often a greater emphasis on non-current music. AC-OL would be an oldies based AC.

AP Album-Progressive/Modern/Alternative
Eclectic rock, often with wide variations in musical style.

AR Album - Rock
Mainstream rock & roll. Can include more guitar-oriented "heavy metal."

AS Adult Standards
Standards and older, non-rock popular music (1940-1980), appeals to older adults. Often includes softer current popular music.

BG Black Gospel

CH Contemporary Hit Radio (Top-40)
Current popular music, often encompassing a variety of rock styles. CH-RB would be Dance/CHR, CH-AR would be rock-based CHR.

CR Classic Rock
Rock-oriented oldies, often mixed with hit oldies of the 60's, 70's and 80's. sometimes called "Classic Hits."

CW Country
Country music, including contemporary and traditional styles. CW-OL would be country oldies.

DR Drama
Radio dramas, often pre-1950.

ET Ethnic
Programs in languages other than English, French or Spanish. Often brokered and/or block-programmed.

EZ Easy Listening
Gentle, background music often cover versions of popular songs. More uptempo varieties of this format include soft rock originals.

FA Fine Arts - Classical
Fine arts ("classical") music, often including opera, theatre, and/or culture-oriented news and talk.

FF French
French-language programming.

JZ Jazz
Jazz music, usually a loose and eclectic mix; sometimes black-oriented.

NA New Age
Mostly instrumental, often mixed with soft jazz and/or soft AC. Often called "New AC."

NX News
All-news, either local or network in origin. Also in format description if a significant block of time is devoted to news.

FX Farm News

OL Oldies
Formerly popular music, usually rock oldies, with 80% or greater non-current music. CW-OL indicates country oldies; RB-OL, black oldies.

PT Pre-teen
Music, drama or readings intended primarily for a pre-teen audience.

RB Black/soul - Urban
Black-oriented music and programming; can cover a wide range of musical styles, often called "Urban Contemporary."

RC Religious - Contemporary
Modern and rock-based religious music.

RG Religious - Gospel
Traditional religious music; can be black-oriented (BG) or country-oriented "southern gospel" (SG).

RL Religious
Local or syndicated religious programming, sometimes mixed with music.

SA Soft Adult Contemporary
A cross between Adult Contemporary and Easy Listening. Almost wholly non-current, soft rock originals; can also be mixed with adult standards.

SB Soft Urban Contemporary
A mix of soft Urban, Adult Contemporary and Jazz, often heavy in oldies.

SG Southern Gospel
Country-flavored gospel music.

SS Spanish
Spanish-language programming. Spanish-language equivalents of English formats include SS-CW (ranchero music), SS-AC ("modern" music), SS-SA (salsa, tropical) or SS-VA (variety), and formats such as SS-EZ or SS-NX-TK, which match English language formats.

SX Sports
Listed only if all or a substantial block of a broadcast day is devoted to play-by-play, sports news, interviews or telephone talk.

TK Talk
Talk, either local or network in origin; can be telephone-talk, interviews, information, or a mix.

HT Health Talk
All fitness or motivational talk formats.

MT Financial Talk
All financial or "Money-Talk."

VA Variety
Incorporating three or more distinct formats, either block-programmed or simultaneously.

ADDITIONAL CODES:

Z	Station is currently off the air
r	Relays another station's programming
s	Simulcasts another station
*	Non-commercial format
&	Satellite programmed
X-Y	Formats combine
X/Y	Formats alternate (dayparted)
m	Morning
a	Afternoon
e	Evening
n	Night
l	Late night
-	Format is about to change or the format is not available
cp-new	Construction permit for a new station

MStreet Directory – 2004 – 85 Format Listings

The M Street Database Format Codes

As the broadcast industry itself evolves, so do radio station formats. Classifications and definitions are amended from time to time to reflect current trends. Here is the current set of format classifications.

AAA **Adult Alternative**
An eclectic playlist based on rock music but with some other forms of music such as blues, folk and jazz included. The target audience is generally from ages 25 to 54.

ACW **AC & Country**
Just what it says. A near 50/50 blend of music from the two formats.

ADC **Adult Contemporary**
An adult oriented pop/rock station. The Adult Contemporary station will play many of the same records as are currently heard on mainstream CHR stations or were part of mainstream CHR in the 80's and 90's but will leave out those that are at the extremes of rock, rhythmic and rap. The target audience runs from 25 to 54 and may skew

AMR **Americana**
A blending of the rock music played on the AAA station with country and folk music.

BGS **Black Gospel**
Gospel music and spirituals of the type heard in predominantly black churches. The format may also include teaching and ministry programs of varying lengths programmed throughout the broadcast day.

BIZ **Business News**
An all-news or news-talk station focusing on business and financial issues. This can be in the form of news blocks that cover current events in the business world and/or talk shows that dispense financial advice.

BLG **Bluegrass**
A station whose playlist focuses on Bluegrass music. Some traditional sounding country music may be included in the programming as well.

BLU **Blues**
A station whose playlist focuses on Blues music. Some older rhythm & blues or soul music may also be included.

CCN **Contemporary Christian**
A station that sounds very much like an ADC-adult contemporary, CHR-contemporary hit radio or HAC-hot adult contemporary station with the significant difference that the records played are all of a religious rather than secular nature. This format includes sub-genres such as Christian rock and Christian dance. The format may also include teaching and ministry programs of varying lengths programmed throughout the broadcast day.

CHR **CHR**
A format that focuses on current popular music, often encompassing a variety of styles from rock through dance, that appears on the mainstream music charts in music industry trade publications such as Billboard and Radio & Records.

CLA **Classical**
Airplay of orchestral music, chamber music, opera and other forms of non-contemporary vocal music.

CLR **Classic Rock**
Mainstream rock of the 60's, 70's and 80's with little or no current rock music included.

CLX **Classic Hits**
A blend of rock and pop music of the late 60's through early 80's with an emphasis on rock and a total absence of any of the dance music that was part of pop music in this period.

CPN **cp-new**
Assigned to a new station that has been authorized to build its transmitting facility but has never been on the air.

CTY **Country**
A station playing a variety of country music styles. Although this station will play music currently listed in music industry trade publication charts in Billboard and Radio & Records, usic, the amount of older country music played on the station may vary greatly between 25% and 75% of the playlist.

CWO **Classic Country**
This station plays no country music that's currently on the country charts in music industry trade publications. Exactly how old the music played on the Classic Country station is can vary. Some stations could reach back to the 30's while others might play only selections from the 70's and on.

CWT **Traditional Country**
The Traditional Country station aims for a sound that reflects country music before it was made contemporary" through the addition of drums and non-stringed instruments in the 70's. Traditional Country stations play music that's in current release that has this "traditional" sound along with older music with a "traditional" sound.

DNC **Rhythmic-CHR**
A contemporary hit radio station that focuses on rhythmic music.

EIT **80's Hits**
A blend of rock and pop music of the late 70's through early 90's with an emphasis on rock and a total absence of any of the dance music that was part of pop music in this period.

ETH **Ethnic**
Programs primarily in languages other than English and/or directed to groups of specific national origin. These stations often utilize block programming in which programs in one language or of one national group target are followed by programs of a different language or national group target.

EZY **Easy Listening**
This format is distinguished by the programming of "lush" orchestral arrangements of standards and popular songs. Recordings of vocal performances of standards and soft sounding pop tunes may also be included in the programming.

FLK **Folk**
A station whose playlist focuses on Folk music. Some traditional sounding country music and softer rock music may also be included in the programming.

FNA **Format Not Available**
This applies to a station that is involved in program stunting as part of a change to new format.

FRM **Farm**
A station that focuses on providing agricultural or agri-business news and information. This could be accomplished through news-blocks, talk shows or information that's interspersed with the airplay of country music.

GOS **Gospel Music**
Traditional gospel music and spirituals. The code may also be used as a "catch all" for a station that mixes both black gospel and southern gospel. The format may also include teaching and ministry programs of varying lengths programmed throughout the broadcast day.

HAC **Hot AC**
Adult CHR might be another way of looking at this format. The Hot Adult Contemporary station plays much of the same music as the CHR station but avoids music that appeals only to the younger CHR listeners.

INF **Surveillance/ Weather/Traffic**
These are fully licensed radio stations that provide programming that is more commonly associated with Traveler's Information Service (TIS) radio stations. Their programming consists solely of one or more types of information with no other entertainment programming

JAZ **Jazz**
A station that programs music either traditional jazz or smooth jazz or some blend of the two.

KID **Pre-Teen**
Although we call this Pre-teen this station can appeal to children ages six through 16. The format is generally manifest as a very young skewing CHR station with high energy disc jockeys, call-ins and a large proportion of novelty records.

MAC **Modern AC**
Somewhat analogous to the Hot Adult Contemporary stations in that they take the music that is part of a younger skewing format and make it attractive to an older audience. The Modern AC station takes the current modern rock music at the core of Modern Rock stations and blends it with older modern rock music.

MOD **Modern Rock**
A contemporary hit radio station that focuses on modern rock music.

NTK **News/Talk**
A talk station with a heavy news and information orientation. The News/Talk station has a news block in one or more dayparts.

FORMAT CLASSIFICATIONS

NWS — **News**
This station broadcasts continuous news and information for all of the hours its on the air.

OFF — **Silent**
The term "silent" applies to a station that had been operating with a regular format but is now off-the-air. This could be due to a number of circumstances ranging from technical problems through financial difficulties and complexities arising from the sale of the station.

OLD — **Oldies**
Popular music of the 50's, 60's and 70's. Current popular music is played in only rare exceptions.

RCK — **Rock**
Mainstream rock as defined by the artists that appear and have appeared on the "rock" charts in music industry trade publications such as Billboard and Radio & Records.

REA — **Reading Service**
This is a radio reading service aimed at the blind and visually handicapped. It consists of announcers who read aloud from periodicals and books.

REL — **Religious Teaching**
Long form religious teaching or ministry programs. The station may use black gospel, contemporary Christian, gospel or southern gospel music as filler between programs

ROL — **Rhythmic Oldies**
Soul and dance music records of the 60's and 70's that received airplay on the CHR stations of those decades.

QAC — **French Adult Contemporary**
This format blends English and French language pop music with adult appeal. Announcing is in French. Applies only to Canadian stations.

QAH — **French Hot Adult Contemporary**
Similar to Hot AC, with the key difference that the announcing is in French and French language pop music that appeals to a younger adult audience than is the target for the French Adult Contemporary station is blended with compatible English language music. The announcing is in French. Applies only to Canadian stations.

QAA — **French Adult Alternative**
The French language equivalent of the English language Adult Alternative format. Applies only to Canadian stations.

QAR — **French Rock**
The French language equivalent of the English language Rock format. Applies only to Canadian stations.

QCH — **French CHR**
The French language equivalent of the English language CHR format blends both French and English language pop records that are current hits. Applies only to Canadian stations.

QCL — **French Classical**
French language announcing built around orchestral and operatic vocal music. Applies only to Canadian stations.

QCW — **French Country**
The French language equivalent of the English language Country format blends both French and English language Country music records. Applies only to Canadian stations.

QCX — **French Classic Hits**
The French language equivalent of the English language Classic Hits format blends both French and English language rock based music of the 1970's and 1980's. Applies only to Canadian stations.

QNT — **French News-talk**
The French language equivalent of the English language News-talk format. Applies only to Canadian stations.

QNW — **French All-news**
Continuous news anchored in French. Applies only to Canadian stations.

QOL — **French Oldies**
The French language equivalent of the English language Oldies format blends French and English language records that were hits in the station's market in the 1950's, 1960's and 1970's. Applies only to Canadian stations.

QRL — **French Religion**
The French language equivalent of the English language Religion format wit teaching and ministry programs in the French language. Applies only to Canadian stations.

QQQ — **French Variety**
The QQQ code is a catch-all for French language stations whose format we unable to classify and for those French language stations employing Variety programming wherein three or more format types are being programmed eit simultaneously or in blocks. Applies only to Canadian stations.

QSA — **French Soft Adult Contemporary**
The French language equivalent of the English language Soft Adult Contemporary format blends English and French language records of this ge

QTK — **French Talk**
The French language equivalent of the English language Talk format. Appl only to Canadian stations.

SAC — **Soft AC**
An Adult Contemporary station that plays only the softest contemporary pop recordings and leans very heavily on airplay of soft-sounding pop records fro the 60's and 70's.

SGS — **Southern Gospel**
Gospel music and spirituals that have a country music base. The format may also include teaching and ministry programs of varying lengths programmed throughout the broadcast day.

SPT — **Sports**
Talk shows focusing on sports. Play-by-play coverage of sports is not includ this format.

STD — **Adult Standards**
American popular standards mixed with soft popular music, mainly vocal.

TLK — **Talk**
Talk shows of general interest or varied topics. The talk shows can be of bot the call-in and straight interview type.

TVL — **Travel Information**
Stations that carry continuous advertisements and features for tourist destinations.

UAC — **Urban AC**
These stations play the softest contemporary rhythm & blues music mixed wi soft rhythm & blues and soul music of previous years. Generally, the station's playlist favors older music over records that are on the current urban charts of music industry trade publications.

UOL — **R&B Oldies**
Soul and R&B records of the 60's and 70's that received airplay on the black oriented stations of those decades.

URB — **Urban Contemporary**
A blend of the current R&B, rap, hip-hop and dance music that appears on the R&B and urban music charts in music industry trade publications such as Billboard and Radio & Records.

VTY — **Variety**
A station that incorporates three or more distinct formats, either block programmed or simultaneously.

XAA — **Spanish Adult Alternative**
The Spanish language equivalent of the English language Adult Alternative format.

XAC — **Spanish Hits**
Also known as Spanish International, this format contains Spanish language announcing (predominantly) and a blend of contemporary Spanish musical sty including (but not exclusively) Ballada, Cumbia, Merengue, Regional Mexican, Romantica, Salsa and Tropical.

XCC — **Spanish Contemporary Christian**
The Spanish language equivalent of the English language Contemporary Christian format. The format may also include teaching and ministry programs varying lengths programmed throughout the broadcast day.

XCH — **Spanish CHR**
A station that focuses on current Latino popular music (although it may also program some English language dance music), and can often encompass a variety of musical styles determined by whatever is popular in the Latino community. Announcing may be bi-lingual.

XCL **Spanish Classical**
Like the English language Classical station this is a station playing orchestral music, chamber music, opera and other forms of non-contemporary vocal music. The difference is, the announcing's in Spanish.

XCZ **Spanish Classic Hits**
Like the English language Classic Hits station this station concentrates its airplay on the music of the late 1960's through early 1980's only in this case the music is predominantly Latin.

XDP **Spanish Sports**
Sports talk programming in Spanish.

XEZ **Spanish Easy Listening**
This format is distinguished by the programming of "lush" orchestral arrangements of standards and popular songs. Recordings of vocal performances of Spanish language standards and romantica music may also be included in the programming.

XJZ **Spanish Jazz**
A station that programs music from within the full spectrum of jazz although there may be an emphasis on Latin jazz. Announcing is in Spanish.

XMX **Regional Mexican**
A blend of contemporary Mexican musical styles. Some English language music may be blended in as well. Announcing is primarily in Spanish.

XNT **Spanish News-Talk**
A Spanish language talk station with a heavy news and information orientation. The Spanish News/Talk station has a news block in one or more dayparts.

XNW **Spanish News**
Continuous news and information in Spanish for all of the hours the station is on the air.

XOL **Spanish Oldies**
Popular Latin music of the 50's, 60's and 70's. To varying degrees, English pop music of the same period may be incorporated. Current popular is played with only rare exceptions. Announcing is predominantly in Spanish.

XRA **Ranchero**
Ranchero is Mexico's country music. Stations with this format play this music to the virtual exclusion of all other forms.

XRE **Spanish Religious**
A station that offers Spanish language long form religious teaching or ministry programs. The station may use some music as filler between programs

XRO **Romantica**
This is the Spanish equivalent of soft AC in the English world. Romantica music is at the heart of this format but soft examples of other Latino music forms may also be included as well as soft English language adult contemporary records.

XSP **Spanish**
The XSP code is a catch-all for Spanish language stations whose format we're unable to classify and for those Spanish language stations employing Variety programming wherein three or more format types are being programmed either simultaneously or in blocks.

XST **Spanish Standards**
Spanish and Latin popular standards mixed with soft Spanish and Latin popular music, mainly vocal.

XTJ **Tejano**
Stations playing Tex-Mex music predominantly but some Regional Mexican music may also be programmed. The announcing is generally in English or is bi-lingual and often a flow between Spanish and English known as "Spanglish" is heard.

XTK **Span. Talk**
Spanish language talk shows of general interest or varied topics. The talk shows can be of both the call-in and straight interview type.

XTP **Tropical**
This is a format of mainly Caribbean Latin music. While Tropical is at the center of the format, other Caribbean forms such as Cumbia, Merengue and Salsa may be incorporated.

EXHIBIT 2

Statement of Professor Jerry A. Hausman

<u>Statement of Professor Jerry A. Hausman</u>

I. Introduction

1. My name is Jerry A. Hausman. I am the MacDonald Professor of Economics at the Massachusetts Institute of Technology ("MIT") in Cambridge, Massachusetts. I graduated from Brown University in 1968. I received a D.Phil. (Ph.D.) in economics from Oxford University in 1973 where I was a Marshall Scholar. I have been at MIT since completing my D.Phil. My academic specialties are econometrics, the application of statistical methods to economic data, and applied microeconomics, the study of behavior by firms and by consumers. I teach a graduate course in applied industrial organization, which is the study of how markets operate. The title of the course is "Competition in Telecommunications," and competition in the media industry (including radio broadcasting) is one of the topics covered in the course.

2. I have been an associate editor of *Econometrica*, the leading economics journal, and the *Rand (Bell) Journal of Economics*, the leading journal of applied microeconomics. In December 1985, I received the John Bates Clark Award of the American Economic Association, awarded every other year for the most "significant contributions to economics" by an economist under the age of 40. In 1980, I was awarded the Frisch Medal of the Econometric Society. I have been a member of numerous government advisory committees for both the U.S. government and the Commonwealth of Massachusetts. I have published over 150 academic research papers in leading economic journals including the *American Economic Review*, *Econometrica*, and the *Rand (Bell) Journal of Economics*. I have done significant amounts of research in the telecommunications industry. I have published numerous papers in academic

journals and books about telecommunications. I have also done research regarding advertising on television and radio. My curriculum vitae is attached as Exhibit 1.

3. I have previously submitted declarations to the Federal Communications Commission (FCC) and made presentations to the Department of Justice (DOJ) regarding competition in radio, broadcast television, and cable television. In particular, I have submitted statements to the Commission in the media ownership proceedings in January 2003 and March 2002. I have served as a consultant to companies that own radio stations, broadcast television stations, and newspapers. I have also consulted for a variety of companies that sell consumer goods and do large amounts of advertising.

II. Consolidation and Format Diversity

4. In my March 2002 statement I noted that a paper by Steven Berry and Joel Waldfogel had demonstrated that consolidation in the radio industry between 1993 and 1997 had lead to increased format variety.[1] In my statement, I updated the analysis to include data through 2001 and continued to find a positive relationship between consolidation and format diversity. In this section I update that analysis with 2006 data to determine whether the relationship between consolidation and format diversity continues to hold when more recent changes in industry structure are taken into account.

5. I estimate an econometric model using a fixed effects regression that relates the number of formats available in a market to the number of owners in the market and the population of the market. There are 243 Arbitron markets in the sample, and for

[1] S. Berry and J. Waldfogel, "Do Mergers Increase Product Variety? Evidence from Radio Broadcasting," *Quarterly Journal of Economics* 116, 2001.

almost all of the markets I have observations for 1993, 1997, 2001, and 2006.[2] Data for 1993, 1997, and 2001 are from *Duncan's American Radio*. Since *Duncan's* stopped publishing in 2002, I collect data for 2006 from the BIA database. As I will discuss below, I use an estimation technique that accounts for possible differences in the two data sources.

6. The left hand side variable in the econometric model is the number of formats available in the market. The right hand side variables are the number of owners in the market and the population of the market. I also include fixed effects for each market and for each year.

7. The fixed effects estimation technique I use is unaffected by changes in formats that occur across all markets. To determine the effect of consolidation on format variety, the fixed effects technique essentially compares the change in the number of formats in markets that have consolidated to the change in the number of formats in markets that have not consolidated. Since changes in the number of formats common to all markets do not affect this comparison, they do not affect the conclusion about the effect of consolidation on format variety. In particular, my use of a fixed effects technique means that potential differences in the two data sources I use (Duncan's and BIA) will not affect my estimate of the effect of consolidation on the number of formats. For example, a potential concern may be that BIA uses a more detailed classification of formats than Duncan's, which would mean that I would observe an increase in the number of formats from 2001 to 2006 even though the true number of formats may not

[2] Due to changes in Arbitron coverage over time, there are no 2001 observations for Danville, IL, La Crosse, WI, and Waterbury CT, and no 2006 observations for Danville, IL, Owensboro, KY, Sioux Falls, SD, Springfield, IL, and Waterbury, CT.

have changed. However, since all markets would be affected by the change in classification, the change will be accounted for by the fixed effects technique.

8. As in my previous analysis I use two-stage least squares (2SLS) to estimate the model, using the "policy band" approach of Berry and Waldfogel. I define three policy band variables, which are indicator variables that depend on the number of stations in the market.[3] I treat the number of owners as jointly endogenous, and use the policy band variables and policy band-year interaction variables as instruments. To determine whether it is necessary to estimate the model using 2SLS, I perform a Hausman specification test and find that the use of 2SLS is appropriate.[4]

9. Results are in Table 1. The coefficient on the number of owners is statistically significant and negative, demonstrating that a decrease in the number of owners in a market leads to an increase in format variety. Over the period of greatest consolidation (1993 to 2001), the average number of formats in a market increased from 11.5 to 16.7. These results indicate that consolidation was responsible for approximately 25% of the increase in formats during that period, and that consolidation has had a positive effect on format variety throughout the 1993 to 2006 period. I conclude that consolidation in the radio industry has resulted in increased format variety.

[3] The policy band variables are based on the number of stations in the market in 1993 (as measured by the number of stations in the Arbitron book). One variable indicates markets with 15 to 29 stations, the second is for markets with 30 to 44 stations, and the third is for markets with 45 or more stations. These categories are based on Section 202(b)(1) of the Telecommunications Act of 1996.

[4] J. Hausman, "Specification Tests in Econometrics," *Econometrica* 46, 1978.

III. Consolidation and Advertising Prices

10. In my previous statements I explained from a theoretical perspective why increased concentration was unlikely to have anticompetitive effects in the radio industry, and then performed empirical analyses demonstrating that increased concentration had not led to higher advertising prices. In this section I review my previous analysis, and discuss other studies that have addressed this issue.

11. An important factor that affects competitive analysis of the radio industry is that radio is a differentiated market in which different stations broadcast different formats that appeal to different audiences. As the *DOJ/FTC Merger Guidelines* recognize, coordinated interaction is unlikely to occur in differentiated product markets.[5] An additional factor that makes coordinated interaction unlikely to occur in the radio industry is that advertising time is a perishable good. If a radio station does not sell a timeslot by the airtime, it receives no revenue from that timeslot. As a result, advertising prices vary depending on the amount of time until airtime, as radio stations have a strong incentive to lower their price on any unsold timeslots as airtime approaches. Thus it would be difficult for radio stations to maintain prices above competitive levels through coordinated interaction.

12. Instead, anticompetitive concerns in differentiated product markets tend to arise from "unilateral effects," which are actions by single firms to increase price or reduce output.[6] A potential form of unilateral effect in the radio industry would be if one firm obtained a dominant position in a particular format in an attempt to increase prices

[5] "Conversely, reaching terms of coordination may be limited or impeded by product heterogeneity..." (*DOJ/FTC Merger Guidelines*), section 2.11.
[6] Ibid., section 2.2.

for advertising in that particular format. Whether such an attempt would be successful depends on barriers to mobility in the radio industry. The relevant question is whether other radio stations could economically reposition themselves to increase supply and hold down a possible price increase.

13. The ease and frequency of format changes in the radio industry indicates that any attempt to exercise market power by unilateral action would be defeated by other stations switching formats. My analysis of the BIA database indicates that from 2000 to 2006, 43% of radio stations changed formats. A recent paper by two DOJ economists, Charles Romeo and Andrew Dick, confirms that format changes are frequent and stations that change formats successfully increase their share, indicating that antitrust agencies can look to reformatting to counter any potential anticompetitive effects of consolidation.[7] As Romeo and Dick note, the investments required to implement a format change (such as new CDs, disc jockeys, and advertising campaigns) are small.[8] Importantly, they find that major format changes increase listening share by nearly 23%, which indicates that "major format changes do produce substantial market share gains on average."[9] They conclude that "format changes by smaller station groups may counter the potential exercise of market power by a radio group that acquires a substantial share of a particular audience demographic through merger."[10]

14. For the reasons discussed above it is unlikely that concentration the radio industry has anticompetitive consequences. This issue has also been addressed

[7] C. Romeo and A. Dick, "The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes," *Review of Industrial Organization* 27, 2005.
[8] Ibid., p. 353.
[9] Ibid., p. 374.
[10] Ibid., p. 351.

empirically, and studies have found that the consolidation that has occurred in the radio industry have not affected advertising prices. In my March 2002 statement I analyzed the effect of concentration on price using data on actual advertising prices in 37 markets in 1995 and 2001. I found that the consolidation of radio ownership in this period did not lead to higher advertising prices. In my January 2003 statement I extended my previous study by analyzing additional markets that had experienced significant increases in concentration. I found that even in markets where two firms control over 80% of radio market revenue, there is no evidence that increases in concentration have increased the price of radio advertising. My finding that increases in concentration do not affect radio advertising prices is also confirmed by a recent study by Joel Waldfogel and Julie Wulf.[11] Waldfogel and Wulf study 248 markets between 1995 and 1998 and conclude that "[b]ecause the concentration measures are significant in none of the fixed effects regressions, there is no portion of the change in ad prices that we can attribute to increased concentration."[12] Thus based on both theoretical considerations and empirical findings, consolidation in the radio industry has not had anticompetitive consequences.

IV. Volatility of Market Shares

15. In this section I consider the issue of whether it would be useful to take actual market shares into account for setting ownership limits. I begin by reviewing how market shares are used in the *DOJ/FTC Merger Guidelines*, and then provide an analysis of share volatility in the radio industry.

[11] J. Waldfogel and J. Wulf, "Measuring the Effect of Multimarket Contact on Competition: Evidence from Mergers Following Radio Broadcast Ownership Deregulation," *Contributions to Economic Analysis & Policy* 5, 2006.
[12] Ibid., p. 14.

16. Market shares are generally used as one way of determining the potential competitive effect of mergers. According to the *Merger Guidelines*, "[m]arket shares will be calculated using the best indicator of firms' future competitive significance."[13] Although in many cases these will be based on actual market shares, the *Merger Guidelines* note that "[w]here all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign firms equal shares."[14] An article by Gregory Werden, a DOJ economist, provides further discussion of markets where actual market shares are not taken into account (sometimes called "one-over-*n*" markets).[15] According to Werden, "one-over-*n*" markets occur in situations where the ability to compete is determined mainly by intangible assets.[16] The two essential characteristics of these markets are "(1): a finite number of entities possess a readily identifiable set of assets essential for successful competition; and (2) the extent of ownership or control over the essential assets does not distinguish among these entities in any important way."[17]

17. The economic characteristics of the radio industry are such that actual market shares are not a reliable guide to future competitive significance. The essential intangible asset that all radio stations possess is the FCC license. All stations that possess a license have the potential to be successful competitors in the market.[18] Furthermore, as I now

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[13] *Merger Guidelines*, section 1.41.
[14] *Merger Guidelines*, section 1.41, footnote 15.
[15] G. Werden, "Assigning Market Shares," *Antitrust Law Journal* 70, 2002.
[16] Ibid., p. 85.
[17] Ibid.
[18] It should be noted that it may be appropriate to take technical differences across stations into account when determining which stations have the potential to be successful competitors. If a station's signal contour does not encompass a large enough fraction of a particular market, it may not be appropriate to consider that station as a competitor in that

demonstrate, volatility in market shares for radio stations is very high: over the course of a single year, a radio station is more likely to experience a large increase or decrease in market share than it is to experience relatively constant share.

18. To study market share volatility, I collect information on average annual local commercial audience share for stations in the BIA database.[19] I then calculate the percentage difference in share for each station over one, two, and three-year periods, using 2005 as the ending year.[20] The results are presented in Table 2.

19. Table 2 indicates that even over a one-year period, it is more likely for a radio station to experience a large change in share than it is for the station to maintain a relatively constant share. There are almost 1.9 times as many stations that experience a change of more than 25% (or less than –25%) than there are stations that experience a change of less than 5% in absolute value. When the time period is increased to two years, the ratio increases to 2.7, and for a three-year period the ratio is 3.7.

20. These results indicate that even over short periods of time there is substantial volatility in the actual market shares of radio stations, which means that actual market shares are not a reliable guide to future competitive significance. I thus conclude that it would not be economically appropriate to take actual market shares into account for the purpose of setting ownership limits.

market. However, the possibility that a station's signal contour can be modified must also be taken into account.

[19] I collect information on the 5,834 stations in the BIA database that have a non-zero local commercial share for at least one year in the 2002-2005 time period.

[20] The one-year percentage change is (LCS_2005 – LCS_2004)/LCS_2004, the two-year percentage change is (LCS_2005 – LCS_2003)/LCS_2003, and the three-year percentage change is (LCS_2005 – LCS_2002)/LCS_2002.

Table 1: Format Variety Regressions

Dependent variable: Number of formats

Variable	2SLS
Number of owners	-0.1756
	(0.0434)
Population (millions)	6.9021
	(0.8754)
R^2	-
Root MSE	2.06
N	964
Hausman test p-value	0.000

Notes: Regression includes market and year fixed effects. Heteroskedasticity-robust standard errors in parentheses. Policy band variables and policy band-year interaction variables used as instruments for the number of owners. Null hypothesis for Hausman test is that number of owners is not jointly endogenous.

Table 2: Market Share Volatility

	One Year (2004-2005)	Two Year (2003-2005)	Three Year (2002-2005)
%ΔLCS ≤ -25%	17.8%	21.9%	25.7%
-25% < %ΔLCS ≤ -15%	10.2%	10.2%	9.7%
-15% < %ΔLCS ≤ -5%	15.6%	13.5%	12.5%
-5% < %ΔLCS ≤ 5%	19.0%	15.9%	13.1%
5% < %ΔLCS ≤ 15%	12.0%	10.7%	9.1%
15% < %ΔLCS ≤ 25%	7.3%	7.1%	7.0%
%ΔLCS > 25%	18.0%	20.8%	22.9%
ratio of |%ΔLCS| > 25% to |%ΔLCS| < 5%	1.88	2.70	3.71

Notes: Table entries are percentages of radio stations with specified percentage change in audience local commercial share over the period.

June 2006

JERRY A. HAUSMAN
Massachusetts Institute of Technology
Department of Economics
Building E52-271A
Cambridge 02139
(617) 253-3644
jhausman@mit.edu

EDUCATION:

OXFORD UNIVERSITY
D. Phil. 1973 (Ph.D)
B. Phil. 1972

BROWN UNIVERSITY
A.B. (Summa Cum Laude), 1968

THESIS: "A Theoretical and Empirical Study of Vintage Investment and Production in Great Britain," Oxford University, 1973.

FELLOWSHIPS, HONORS AND AWARDS:

Phi Beta Kappa
Marshall Scholar at Oxford, 1970-1972
Scholarship at Nuffield College, Oxford, 1971-1972
Fellow, Econometric Society, 1979.
Frisch Medal of the Econometric Society, 1980
Fisher-Schultz Lecture for the Econometric Society, 1982
John Bates Clark Award of the American Economic Association, 1985
Smith Lectures, Brigham Young University 1986
Jacob Marschak Lecture for the Econometric Society, 1988
Hooker Lectures, Macmaster University 1989
Fellow, National Academy of Social Insurance, 1990
American Academy of Arts and Sciences, 1991.
Fellow, Journal of Econometrics, 1998.
Shann Memorial Lecture for the Australian Economics Society, 2003
Cemmap International Fellow, University College London, 2004
Honorary Professor, Xiamen University, 2005
Biennial Medal of the Modelling and Simulation Society of Australia and New Zealand, 2005
Fellow, Modelling and Simulation Society of Australia and New Zealand, 2005
Condliffe Memorial Lecture, University of Canterbury, NZ, 2005

EMPLOYMENT:

	MASSACHUSETTS INSTITUTE OF TECHNOLOGY
1992-	John and Jennie S. MacDonald Professor
1979-	Professor, Department of Economics
1976-79	Associate Professor, Department of Economics
1973-76	Assistant Professor, Department of Economics
1972-73	Visiting Scholar, Department of Economics

	VISITING APPOINTMENTS:
1986-87	Visiting Professor, Harvard Business School
1982-83	Visiting Professor, Harvard University Department of Economics
	Visiting Positions: University of Washington, Australian National University, Ecole Normale Supérieure, Oxford University, University of Sydney, Wuhan University, Beijing University, University of Western Australia, University College London, Uppsala University, Xiamen University
	U.S. ARMY, ANCHORAGE, ALASKA
1968-70	Corps of Engineers

PROFESSIONAL ACTIVITIES:

Associate Editor, Bell Journal of Economics, 1974-1983
Associate Editor, Rand Journal of Economics, 1984-1988
Associate Editor, Econometrica, 1978-1987
Reviewer, Mathematical Reviews, 1978-1980
American Editor, Review of Economic Studies, 1979-82
Associate Editor, Journal of Public Economics, 1982-1998
Associate Editor, Journal of Applied Econometrics, 1985-1993
Advisory Editor, Economics Research Network and Social Science Research , 1998-
Advisory Editor, Journal of Sports Economics, 1999-
Advisory Editor, Journal of Competition Law & Economics, 2004-
Advisory Editor, Journal of Applied Economics, 2005-
Member of MIT Center for Energy and Environmental Policy Research, 1973-1995
Research Associate, National Bureau of Economic Research, 1979-
Member, American Statistical Association Committee on Energy Statistics, 1981-1984
Special Witness (Master) for the Honorable John R. Bartels, U.S. District Court for the Eastern District of New York in Carter vs. Newsday, Inc., 1981-82
Member of Governor's Advisory Council (Massachusetts) for Revenue and Taxation, 1984-1992
Member, Committee on National Statistics, 1985-1990
Member, National Academy of Social Insurance, 1990-
Member, Committee to Revise U.S. Trade Statistics 1990-1992
Director, MIT Telecommunications Economics Research Program, 1988-
Board of Directors, Theseus Institute, France Telecom University, 1988-1995
Member, Conference on Income and Wealth, National Bureau of Economic Research, 1992-
Member, Committee on the Future of Boston, 1998
Member, GAO Expert Panel to advise USDA on Econometric Models of Cattle Prices, 2001-2
Advisor, China Ministry of Information on Telecommunications Regulation, 2002-
Member, FTC Panel on Merger Evaluation, 2005

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EXHIBIT 3

Clear Channel Awards and Honors 2005-2006

2005 Clear Channel Awards & Recognition

Ad Council
Gold Bell Award for $157 Million Commitment

Radio Ink 2005 Lifetime Achievement Award
Lowry Mays

NAB Lifetime Achievement Award
Lowry Mays

National Multiple Sclerosis Society
Corporate Star Award – Clear Channel Communications

USO
USO Award of Appreciation – Clear Channel Communications

Children's Miracle Network
National Service Award – Clear Channel Communications

American Red Cross
Red Cross Donor Honor Roll – Clear Channel Communications

City of Hope
Spirit of Life Award – Mark Mays, CEO, Clear Channel Communications

National Association of Broadcasters
Education Foundation Service to America Award, Service to Children
WVOR, Clear Channel Television-Jacksonville

Big Brothers Big Sisters, San Antonio Chapter
Corporate Partner of the Year Award – Clear Channel Communications

St. Jude Children's Research Hospital
Award of Appreciation for $7.5 Million in Radiothon Contributions

National MS Society
2005 Corporate Star Award

Radio-Television News Directors Association & Foundation

2005 Edward R. Murrow Regional Award Winners:
Region 2: KFI-AM, Los Angeles, CA, Award for News Series
Region 3: KFYI-AM, Phoenix, AZ, Award for Investigative Reporting

	KOA-AM, Denver, CO, Award for News Series
	KNRS-AM, Salt Lake City, UT, Award for Newscast
Region 4:	KFGO-AM, Fargo, ND, Award for News Series
	KFGO-AM, Fargo, ND, Award for Spot News Coverage
Region 6:	KTRH-AM, Houston, TX, Award for Continuing Coverage
	KTRH-AM, Housotn, TX, Award for News Documentary
	KTRH-AM, Houston, TX, Award for Newscast
	KTRH-AM, Houston, TX, Award for Overall Excellence
	KTRH-AM, Houston, TX, Award for Spot News Coverage
	KTRH-AM, Houston, TX, Award for Web Site Broadcast
	WOAI-TV, San Antonio, TX, Award for News Series
Region 8:	WLAP-AM, Lexington, KY, Award for Continuing Coverage
Region 9:	WMSI-FM, Jackson, MS, Award for Overall Excellence
	WPMI-TV, Mobile, AL, Award for Investigative Reporting
Region 11:	WSYR-AM, Syracuse, NY, Award for News Series
	WHAM-AM, Rochester, NY, Award for Sports Reporting
	WGY-AM, Albany, NY, Award for Spot News Coverage
	WHAM-AM, Rochester, NY, Award for Use of Sound
Region 12:	WRVA-AM, Richmond, VA, Award for Continuing Coverage
	WILM-AM, Wilmington, DE, Award for Spot News Coverage
Region 13:	WFLA-AM, Tampa, FL, Award for Continuing Coverage

<u>Radio Ink's 40 Most Powerful People in Radio</u>

1. Mark Mays, CEO
2. John Hogan, President/CEO Clear Channel Radio
4. Randall Mays, EVP/CFO
5. Stu Olds, CEO, Katz Media Group
6. Kraig Kitchin, President/COO, Premiere Radio Networks

<u>Radio Ink's Top African Americans in Radio</u>

Doc Wynter
VP, Urban Programming
CCR

Lee Clear
RVP/Market Manager
CCR-St. Louis

Brian Knox
SVP/Director Corporate Diversity
Katz Media Group

Muriel Funches
VP/Marketing Manager
CCR-New Orleans

Bruce Demps
SVP, Mid-Atlantic Region
CCR

Angela T. Ingram
Station Manager/RVP, Marketing
WGCI-FM, WVAZ-FM, WGRB-AM

Earl Jones
RVP/Market Manager
CCR-Louisville

<u>Radio Ink's Most Influential Women in Radio</u>
Lisa Dollinger – Clear Channel Communications
Rhonda Scheidel – Premiere Radio Networks
Muriel Funches – CCR
Michele Grosenick – CCR
Jake Karger – CCR
Bonnie Press – Clear Channel Katz Advantage
Kerry McFeetors – Clear Channel Katz Advantage
Kim Bryant – CCR
Linda Byrd – CCR
Kimberly Cutchall – Clear Channel University
Alene Grevey – CCR

<u>2005 Radio Ink Most Admired Engineers in Radio</u>
Jeff Littlejohn, EVP of Engineering
Randy Mullinax, RVP of Engineering
Steve Davis, SVP of Technical & Capital Management
Ben Brinitzer, RVP Programming
John Warner, VP AM Transmission
Greg Savoldi, Reg. Director of Engineering
Charlie Wooten, Director of Engineering and IT

<u>2005 Radio Ink Country PD Awards</u>
Gregg Swedberg, Minneapolis
Kerry Wolf, Milwaukee
Coyote Calhoun, Louisville

<u>2005 Radio Wayne Award Finalists</u>
Director of Sales of the Year
Randy Smith – Tulsa
Kurt Peterson – Madison
Keith Bratel – Milwaukee

NTR Director of the Year
Kelly Krueger – San Francisco

General Manager of the Year
Bob Gourley

Market Manager of the Year
Bennet Zier – Washington, D. C.
Dennis Lamme – Albany
Streetfighter (AE) of the Year
Marnie Simpson – Omaha
Peter Eilenberg – New York
Kim Harrison – Tulsa
Janie Druker-Knight – WXKS-AM/FM, Boston

<u>Radio & Records National Radio Awards</u>
Executive of the Year
John Hogan

Market Manager/GM of the Year
Andy Rosen
Kim Bryant
Sammy George

Syndicated Personality of the Year
Bob & Tom, Premiere Radio Networks

Station of the Year
CHR/POP, KIIS-Los Angeles-John Ivey, PD
CHR/POP, WNCI-Columbus-Michael McCoy, PD
CHR/Rhythmic, KGGI-Riverside-Jesse Duran, PD
Urban AC, WDAS-Philadelphia-Joe Tamburro, PD
Urban AC, WYLD-New Orleans-AJ Appleberry, PD
Urban, WGCI-Chicago-Elroy Smith, PD
Urban, WHRK-Memphis-Nate Bell, PD
Urban, WZHT-Montgomery-Darryl Elliott, PD
Country, WUSY-Chattanooga-TN-Kris Van Dyke, PD
AC, WLTW-New York-Jim Ryan, PD
AC, WTVR-Richmond-Bill Cahill, PD
Smooth Jazz, WNUA-Chicago, Steve Stiles, PD
Smooth Jazz, WCJZ-Charlottesville-Regan Keith, PD
Rock, WMMS-Cleveland-Bo Matthews, PD
Rock, WEBN-Cincinnati-Scott Reinhart, PD
Classic Rock, WFBQ-Indianapolis-Scott Jameson, PD
Oldies, WMJI-Cleveland, Meg Stevens, PD

Music Director of the Year
CHR/POP, Paul "Cubby" Bryant, WHTZ-New York
Urban AC, Jo Gamble, WDAS-Philadelphia
Urban, Tiffany Green, WGCI-Chicago
Country, Gwen Foster, KNIX-Phoenix
Rock, Rick "The Dude" Vaske, WEBN-Cincinnati

Personality/Show of the Year
CHR/POP, Kidd Kraddick in the Morning, KHKS-Dallas
Country, Gerry House, WSIX-Nashville
AC, Valerie Smaldone, WLTW-New York
Classic Rock, Bob & Tom, WFBQ-Indianapolis

Program Director of the Year
Urban, Elroy Smith, WGCI-Chicago
Urban AC, Jamillah Muhammed, WMXD-Detroit
AC, Jim Ryan, WLTW-New York
Hot AC, Jeff Kapugi, WMTX-Tampa
Rock, Scott Reinhart, WEBN-Cincinnati
Gospel, Eileen Collier, WHAL-Memphis

<u>Children's Miracle Network</u>
Fifth Annual Children's Miracle Network Radiothon Awards:
Taped Best Appeal Promo Award – WVOR-TV, Rochester

<u>Ovarian Cancer Coalition</u>
Award of Appreciation, Michael Tozzi, Clear Channel Radio-Philadelphia

<u>Florida Times-Union</u>
Eve Award, Susan Adams Loyd, Vice President/GM, CCTV-Jacksonville

<u>State of New Mexico</u>
Citizen of the Year Award: Sally Adams, President Clear Channel Outdoor-Albuquerque

<u>Syracuse City School District Educational Foundation</u>
Annual Recognition Award, Joel Delmonico, CCR

<u>City of St. Louis, Mayor's Annual Business Luncheon</u>
Business of the Year Award, Clear Channel Radio-St. Louis

<u>Protect the Dream Foundation</u>
Award of Appreciation, Michael Tozzi, Clear Channel Radio-Philadelphia

Henry Dunant Society
Henry Dunant Leadership Circle, Clear Channel Radio-Roanoke/Lynchburg

Ad Council
Clear Bell Award, WKTU, Clear Channel Radio-New York

2005 Austin Music Awards
Radio Personality of the Year, Bobby Bones, KISS-FM, Clear Channel Radio-Austin

Minnesota Broadcaster's Association Media Best Awards
Bringing Community Service Home Award, Clear Channel Radio-Minneapolis/St. Paul

Junior Achievement
Spirit of Achievement Award, Bill Hooper and Clear Channel Outdoor-Oakland

HEB MS 150
Award for Outstanding Participation for CC San Antonio

2006 Clear Channel Awards & Recognition

<u>National MS Society</u>
Shining Star – Clear Channel Communications, Inc.

<u>National MS Society</u>
Hope Award/Dinner of Champions – Mays Family

<u>National Association of Broadcasters</u>
Crystal Award – KLVI-AM

<u>San Antonio Sports Foundation</u>
2005 Salute Award – Clear Channel Communications, Inc.

<u>Columbia University</u>
2006 Alfred I. DuPont Award – Clear Channel Television-Mobile

<u>American Urban Radio Networks</u>
Urban Knight Award – Angela Ingram

<u>American Women in Radio & Television</u>
2005 Achievement Award Winner – Lee Hubby

<u>America's Blood Centers</u>
Media of the Year Award – Clear Channel Radio-Chicago

<u>National Exchange Club</u>
Milwaukee Police Department Crime Prevention Service Award – Clear Channel Radio & Outdoor-Milwaukee

<u>America's Blood Centers</u>
Awards of Excellence – Media Partner of the Year – CCR-Chicago

<u>Radio & Television News Directors Foundation</u>
First Amendment Leadership Award – WBUV-FM, WKNN-FM, WMJY-FM, WQYZ-FM, KHEV-FM, WNOE-FM, WODT-AM, WQUE-FM and WYLD-AM/FM

<u>Radio & Television News Directors Association Regional Murrow Awards</u>

Television:

WTEV-TV Jacksonville, FL -- CBS47 News @ 11, Newscast
WSYR-TV, E. Syracuse, NY -- Newscast 4/27/05
WSYR-TV, E. Syracuse, NY -- Overall Excellence

WSYR-TV, E. Syracuse, NY -- Website
WSYR-TV, E. Syracuse, NY -- Continuing Coverage
WPMI-TV, Mobile, AL -- News Series
WPTY/WLMT-TV, Memphis, TN – Spot News Coverage
KOKI-TV, Tulsa, OK – Writing, Janna Clark Writing Composite
KGET-TV, Bakersfield, CA – Feature: Hard News

Radio:

News Series
KFBK-Radio, Sacramento, CA
Todd's Journal

Spot News Coverage
KFI-AM, Burbank, CA
Metrolink Accident

Newscast
KFYI-AM, Phoenix, AZ
News 6pm Report

Overall Excellence
KFYI-AM, Phoenix, AZ

News Documentary
KOA-AM, Denver, CO
Letters Home

Use of Sound
KOA-AM, Denver, CO
Santa School

Spot News Coverage
KNST-AM, Tucson, AZ
Tucson Floods - 2005

Spot News Coverage
KFGO-AM, Fargo, ND
Plane Down

Newscast
WIBA-AM, Madison, WI
Live News at Noon: Stoughton Tornado

Continuing Coverage
KTRH-AM, Houston, TX
Hurricane Rita

Investigative Reporting
KTRH-AM, Houston, TX
Stray Current

News Documentary
KTRH-AM, Houston, TX
Shuttle - Return to Flight

Overall Excellence
KTRH-AM, Houston, TX

Website (broadcast-affiliated)
KTRH-AM, Houston, TX
ktrh.com

Spot News Coverage
WLAC-AM, Nashville, TN
State Lawmakers Arrested

Newscast
WLAP-AM, Lexington, KY

Use of Sound
WLAP-AM, Lexington, KY

Feature Reporting
WMSI/WQJQ-FM, Jackson, MS
Building Dreams

Feature: Hard News
WMSI/WQJQ-FM, Jackson, MS
Saved By the Bush

Use of Sound
WMSI/WQJQ-FM, Jackson, MS

Spot News Coverage
WGY-AM, Latham, NY
Death on Lake George

News Series
WILM-AM, Wilmington, DE
Chasing Dreams in the First State

<u>National Association of Broadcasters Marconi Radio Awards</u>

Network Syndicated Personality of the Year
"The Bob and Tom Radio Show," Premiere Radio Networks

Oldies Station of the Year
WMJI-FM, Cleveland, OH

Rock Station of the Year
WEBN-FM, Cincinnati, OH

Urban Station of the Year
WGCI-FM, Chicago, IL

<u>Radio & Records Industry Achievement Awards</u>

Nationally Syndicated Personality/Show of the Year
Premiere Radio Networks' "The Bob & Tom Radio Show"

CHR/Top 40 Station of the Year: Markets 1-25
KIIS/Los Angeles, CA

CHR/Top 40 Station of the Year: Markets 26-100
WNCI/Columbus, OH

CHR/Top 40 Station of the Year: Markets 101+
WKCI/New Haven, CT

CHR/Top 40 Music Director of the Year
Paul "Cubby" Bryant – WHTZ/New York, NY (now co-host of the syndicated morning drive program "Wake up with Whoopi")

CHR/Top 40 Personality/Show of the Year
"Kidd Kraddick in the Morning" – KHKS/Dallas, TX

Rhythmic Station of the Year: Markets 1-25
KUBE/Seattle, WA

Urban Station of the Year: Markets 1-25
WGCI/Chicago, IL

Urban Program Director/OM of the Year

Elroy Smith – WGCI/Chicago

Urban Music Director of the Year
Tiffany Green – WGCI/Chicago

Urban Personality/Show of the Year
“Crazy Howard McGee” – WGCI/Chicago

Urban/AC Music Director of the Year
Jo Gamble – WDAS-FM/Philadelphia, PA

Country Station of the Year: Markets 101+
WUSY/Chattanooga, TN

Country Music Director of the Year
Gwen Foster – KNIX/Phoenix, AZ

Country Personality/Show of the Year
“Big D & Bubba” – WSIX – Nashville, TN & Syndicated

AC Station of the Year: Markets 1-25
WLTW/New York, NY

AC Program Director of the Year
Stella Schwartz – KOST/Los Angeles, CA

AC Music Director of the Year
Morgan Prue – WLTW/New York, NY

AC Personality/Show of the Year
“Mark & Kim” – KOST/Los Angeles, CA

Smooth Jazz Station of the Year: Markets 1-25
WNUA/Chicago, IL

Heritage Rock Station of the Year: Markets 1-25
WMMS/Cleveland, OH

Heritage Rock Station of the Year: Markets 26-100
WEBN/Cincinnati, OH

Heritage Rock Station of the Year: Markets 101+
KIOC/Beaumont, TX

Heritage Rock Music Director of the Year
Fritz – WEBN/Cincinnati, OH

Heritage Rock Personality/Show of the Year
"The Dawn Patrol" – WEBN/Cincinnati, OH

Latin Station of the Year
KLOL/Houston

Latin Program Director of the Year
Alex Lucas – KPRC/Monterey, CA

Classic Rock Personality/Show of the Year
"The Bob & Tom Radio Show" – WFBQ/Indianapolis, IN

Texas Associated Press Broadcasters
Best Anchor in State – Randy Beamer, News 4 WOAI (San Antonio)

Austin Chronicle
Best Radio Personality in Austin – Bobby Bones, KISS-FM (Austin)

Associated Press
First Place, Breaking Sports News – Lee Gordon, WTEV CBS47 (Jacksonville)
Second Place, Best Newscast – CBS47 News at 11 (Jacksonville)
Best Continuing News Coverage – WAWS FOX30 (Jacksonville)

AWRT-NYC Chapter
Golden Apple Award – Valerie Smaldone

Oklahoma Association of Broadcasters
Community Service Award – FOX 23, CCT-Tulsa

Focus on Diversity
2005 Excellence in Diversity Award – Clear Channel Radio & Outdoor-Milwaukee

Lone Star Chapter of the MS Society
Appreciation Award, 3rd Place Fundraising Team – Clear Channel-San Antonio

The Press Club of Dallas
Responsible Television Journalism Award – Clear Channel Television-San Antonio, WOAI

Punta Gorda Rotary
Service Above Self Award – Mike Moody

Puget Sound Radio Broadcasters
Crystal Soundie – Michele Grosenick

The Examiner
Southeast Texas Hurricane Heroes – Clear Channel Radio-Beaumont

Texas Association of Partners in Education
Crystal Award – Clear Channel Radio-Beaumont

Allstate Insurance
Allstate Good Hands Award – Clear Channel Radio-Beaumont, KVLI

Tucson American Advertising Federation
2005 Golden Mic Award – Johnjay and Rich, Clear Channel Radio-Phoenix

Humane Society of Louisiana
Outstanding Efforts in Helping Animals During Gulf-Coast Hurricanes – Laura Gonzo, Senior Director-Affiliate Marketing, Premiere Radio

Leukemia & Lymphoma Society
Man of the Year – Mo Foster

Country Radio Broadcasters, Inc.
Tom Rivers Humanitarian Award – John Hines