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Introduction[1]

In October of 2006, the United States reached a historic landmark when its population surpassed 300 million people, placing the U.S. as the third most populous country behind China and India[2]. Out of the 300 million people that currently inhabit the U.S., it is estimated that 100 million people, or one-third of the U.S. total population, are ethnic minorities.[3] The number of ethnic minorities that comprise the U.S. population is increasing every year, and demographers are already predicting that the U.S. will continue to become racially and ethnically diverse in the years to come, with the Hispanic demographic comprising approximately 24% of the U.S. population by the time the country reaches the 400 million population mark.[4] As these statistics indicate, and as most Americans know, the U.S. is a very ethnically diverse country.

The contributions that people of color have made in various U.S. industries, and continue to make today, has been impressive and lauded. However, the gains

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[2] Amy Dorsett, *The World of Tomorrow Awaits the 300 million Americans of Today*, SAN ANTONIO EXPRESS-NEWS, Oct. 18, 2006, *available at* http://www.mysanantonio.com/news/metro/stories/MYSA101806.01A.brave.new.america.34fd416.html.

[3] S. DEREK TURNER, FREE PRESS, & MARK COOPER, OUT OF THE PICTURE: MINORITY & FEMALE TV STATION OWNERSHIP IN THE UNITED STATES 2 (Free Press) (Sept. 2006), *available at* http://www.stopbigmedia.com/files/out_of_the_picture.pdf.

[4] Erin Texeira, *U.S. Will Be More Diverse at 400 Million*, SFGATE.COM, Oct. 21, 2006, http://sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/10/21/national/a100547D39.DTL.

that U.S. ethnic minorities have made in the broadcast media ownership sector pales in comparison to the gains that they have made in other industries.[5] Ethnic minority groups[6] currently own less than 4% of all over the air radio and television broadcast stations in the U.S., that are regulated by the Federal Communications Commission.[7] This statistic is startling in light of the Commission's mandate to regulate the use of the broadcast spectrum by issuing licenses to radio and television broadcasters in accordance with the public interest—a concept that, as the Commission has held previously, encapsulates diversity in media broadcast ownership and broadcast content.[8]

Within the last fifteen years, the Commission, despite a prior history of regulatory policies that placed limits on broadcast radio and television ownership, moved towards a "pro-competitive," deregulatory approach towards media ownership. The Commission's deregulatory policies during this period, and Congressional passage of the Telecommunications Act of 1996,[9] have encouraged

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[5] TURNER, *supra* note 3 at 2-3 ("The state of female and minority ownership in the broadcast sector is even more shocking compared to other industries. While female and minority ownership has advanced in other sectors since the late 1990s, it has gotten worse in the broadcast industry").
[6] STUART N. BROTMAN, COMMUNICATIONS LAW AND PRACTICE, 2-37 n.35 (Law Journal Press 2006) (1995) (In general, the Commission defines minority ownership as "more than 50% owned by one or more members of a minority group." The Commission defines "minority groups" to include "Black, Hispanic, American Indian, Alaska Native, Asia and Pacific Islander").
[7] Hope Yen, *Easing Local Media Ownership Rules Would Hurt Diversity, Studies Say*, THE SEATTLE TIMES, Oct. 23, 2006, *available at* http://seattletimes.nwsource.com/html/nationworld/2003318998_webmedia23.html.
[8] FCC v. Nat'l Citizens Comm'n for Broad., 436 U.S. 775, 780 (1978) ("In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power").
[9] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter 1996 Act] (The 1996 Telecommunications Act introduced by Congress advanced a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening

massive waves of media group consolidation that has resulted in less ethnic minority media ownership in over the air broadcast radio and television.[10] The train of FCC deregulation came to a halt, when the Third Circuit Court of Appeals stayed some of the Commission's proposed media broadcast ownership rule revisions, and remanded others for further justification by the Commission.[11] In July 2006, the Commission released its latest Further Notice of Proposed Rulemaking[12] (FNPRM) to analyze the broadcast ownership rules remanded by the Third Circuit Court of Appeals in *Prometheus v. FCC*, and to invite public comment on how the Commission should address the issues raised in *Prometheus* to guide the Commission in future broadcast ownership rule making.

The Commission solicited public comments on the FNPRM through December 2006.[13] It is the purpose of this comment to provide the Commission with additional information to guide it in future broadcast media ownership rulemaking proceedings—specifically as it pertains to the Commission's current local radio ownership rules. Through empirical research discussed in this comment, it is hoped

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all telecommunications markets to competition." The Telecommunications Act of 1996 essentially allowed the Commission to further relax broadcast media ownership restrictions).

[10] *See* TURNER, *supra* note 3 at 3 ("Pro-consolidation policies enacted by the FCC in the late 1990s had a significant impact on minority ownership, indirectly or directly contributing to the loss of 40 percent of the stations that were minority-owned in 1998"); *See also* KOFI A. OFORI, RADIO LOCAL MARKET CONSOLIDATION & MINORITY OWNERSHIP 11 (Ofori & Associates) (Mar. 2002) ("The surge in ownership consolidation that resulted from relaxation of the ownership caps in 1996 coincides with the beginning of the downward trend in the number of minority owners").

[11] Prometheus Radio Project v. FCC, 373 F.3d 372 (3d. Cir. 2004); 2002 FCC Further Notice of Proposed Rulemaking [hereinafter FNPRM].

[12] FNPRM (July 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf.

[13] At the time this comment was written, the FCC released an order on Dec. 15, 2006 extending the time to allow for the public to file comments with the Commission during the media ownership proceedings to January 16, 2007. *See* FCC Order (Dec. 15, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-2514A1.*pdf*.

that the Commission can disseminate this information to aid in the development and justification of future local radio ownership rulings by also taking into account factors such as consolidation, radio market share, and ethnic minority ownership of radio stations by surveying all Arbitron rated radio markets.

This comment proceeds in four parts. First, this comment explains the importance of diversity in media ownership by highlighting the assertion that ethnic minority media ownership often leads to diversity in broadcast viewpoints—an assertion that federal courts have affirmed. Next, the FCC's shift towards a deregulatory approach, and its effect on minority ownership of broadcast media, is discussed. Empirical data and research using the Herfindahl-Hirshchman Index (HHI)[14] (the formula used by the U.S. Department of Justice and the Federal Trade Commission to measure market concentration) to analyze the effect that the Commission's and the 1996 Telecommunication Act's deregulatory initiatives have had on ethnic minority ownership in the Top 36 Arbitron rated, various California Arbitron rated radio markets, and the Mobile, Alabama radio market, surveyed

[14] Herfindahl-Hirschman Index, *available at* http://www.usdoj.gov/atr/public/testimony/hhi.htm [hereinafter HHI] (the HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which HHI is less than 1000 points are considered to be not concentrated/competitive markets and do not raise any antitrust concerns. Markets in which HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and Federal Trade Commission).

from Spring 2005, through Summer 2006,[15] is discussed. As radio has been described as the "Medium of Choice all Day"[16] by the Radio Advertising Bureau,[17] radio plays a significant role in the lives of most Americans as an information source, and as a forum for democratic dialogue—exposing people to diverse viewpoints.[18] Moreover, given that prior federal court cases and several studies referenced in this comment have elucidated a link between broadcast ownership and content, it is critical that the Commission consider factors such as radio market consolidation, radio market share, and minority ownership and minority control of radio stations in these, and all, radio markets in developing and justifying future radio ownership rules. Finally, various policy recommendations to increase ethnic minority broadcast ownership are put forward to aid the Commission in future broadcast ownership rulemaking proceedings.

Why Diversity of Media Ownership Matters: Linking diversity of ownership to diversity in broadcast viewpoint.

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[15] Sources were drawn from RadioandRecords.com in October 2006, http://www.radioandrecords.com/radiomonitor/ratings/index.jsp.

[16] RADIO ADVERTISING BUREAU, 2006 RADIO MARKETING GUIDE & FACT BOOK 7, *available at* http://www.rab.com/public/media/2006RMG&FB-LR.pdf.

[17] The Radio Advertising Bureau is an organization formed some 50 years ago as the sales and marketing arm of the Radio industry. The Bureau, among other things, publishes an annual Radio Marketing Guide & Fact Book containing a comprehensive collection of statistics and information on the listenership of the radio medium. Radio advertisers rely on the statistical information in the Radio Marketing Guide & Fact Book to effectively target their radio commercials and advertisements towards specific segments of the U.S. population. Radio Advertising Bureau Home Page, http://www.rab.com/public/about/about_national.cfm (last visited Jan. 10, 2007).

[18] *See* Christa Corrine McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 594 (2004) ("The current trend toward corporate consolidation within the media industry poses a clear threat to democracy and the marketplace of ideas by allowing far too much power in too few hands").

In promulgating its licensing policies, the Commission has maintained the view that "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints."[19] The Commission has acted on this view by issuing regulations that limit multiple ownership of broadcast radio and television stations because "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest."[20]

The United States Supreme Court has endorsed the Commission's goals of diversity of programs and service viewpoints.[21] In *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court upheld the Commission's regulatory rules barring newspaper/broadcast cross-ownership.[22] The Court found that the structural regulations on ownership met First Amendment standards because they "enhanced the diversity of information" and were "a reasonable means of promoting the public interest in diversified mass communications."[23] In that case, the Supreme Court also affirmed the Commission's reasoning that "[the] term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.'"[24]

Despite the Commission's view that diversity in ownership promoted diversity in programming content, the Commission was initially reluctant to extend

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[19] *See FCC v. Nat'l Citizens Comm'n for Broad.*, 436 U.S. at 780.
[20] BROTMAN, *supra* note 6, at 2-35.
[21] *See FCC v. Nat'l Citizens Comm'n for Broad.*, 436 U.S. at 780.
[22] *Id.*
[23] *Id.* at 781.
[24] *Id.* at 785.

this idea to ethnic minority broadcast media ownership. Several federal court decisions, therefore, clarified this notion for the Commission. In *TV 9, Inc. v. FCC*, the U.S. Court of Appeals for the District of Columbia, in reviewing a comparative hearing to determine the best applicant for a permit to construct a new television broadcast station, ruled that ethnic minority applicants for broadcast licenses should receive additional merit consideration:

> We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.[25]

In *Metro Broadcasting, Inc. v. FCC*, the U.S. Supreme Court upheld the idea that minority ownership leads to diverse broadcast content and viewpoint by holding that the Commission's minority preference programs,[26] did not violate the Fifth Amendment's equal protection clause. In a 5-4 opinion, the majority stated that:

> A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in *Regents of University of California v. Bakke, 438 U.S. 265, 311-319 (1978)* that greater admission of minorities would contribute, on average, to the "robust exchange of ideas."[27]

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[25] TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973).
[26] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (allowing the applicant's race to be a factor to be taken into consideration in the Commission's determination of awarding a broadcast license to competing applicants in a comparative licensing hearing, and the Commission's minority "distress sale" program that permitted a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms, under the equal protection clause of the V Amendment).
[27] *Id.* at 579.

The dissenters in *Metro*,[28] led by Justices O'Connor and Kennedy, found the idea that ethnic minority ownership of stations transcends into diversity in media program content as "too amorphous," and "too insubstantial" to survive strict scrutiny.[29] However, since the *Metro* opinion, several social science studies have supported the theory that ethnic diversity in media ownership leads to diversity in broadcast content and viewpoint.[30]

The Commission's Deregulatory Era & the Telecommunications Act of 1996

In the 1980s, the Commission moved towards a laissez-faire, de-regulatory approach to promote diversity in broadcast ownership.[31] During this period, the FCC embraced the theory that relying on market forces would better foster the public interest principles of competition, diversity, and localism.[32] Mark Fowler,

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[28] Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy.
[29] *See Metro Broadcasting, Inc.*, 497 U.S. at 614.
[30] *See* Matthew L. Spitzer & Jeff Dubin, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (finding a causal nexus between minority media broadcast ownership and diversity in content viewpoint in radio programming); *See also* CHRISTINE BACHEN ET AL., DIVERSITY OF PROGRAMMING IN THE BROADCAST SPECTRUM: IS THERE A LINK BETWEEN OWNER RACE OR ETHNICITY AND NEWS AND PUBLIC AFFAIRS PROGRAMMING? (1999) (finding empirical evidence of the link between the racial/ethnic ownership of a station and diversity of news and public affairs programming. In comparison to majority owned stations, the Santa Clara University study found that:

- Twice as many minority owners tailor national and regional news stories to minority community concerns;
- Four times as many minority owned radio stations air programming that is minority formatted;
- 66%, or twice as many minority owners play a direct role in station management;
- Substantially more minority owned stations cover news stories different from their chief competitor;
- News and public affairs departments at minority owned stations employ a higher proportion of racial/ethnic minorities;
- A statistical regression analysis shows that as racial/ethnic diversity in the newsroom increases so does program diversity).

[31] Gregory M. Prindle, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 295 (2003).
[32] *Id.*

appointed Chairman of the Commission by then President Ronald Regan, advocated that:

> The perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants.[33]

Fowler contended that communications policy should instead defer to market forces in such a way that the "public interest, then, defines the public interest."[34]

With this "pro-competitive" attitude in mind, and encouraged by the tremendous growth in the number and types of mass media outlets available to the public,[35] the Commission began relaxing its broadcast media ownership policies starting with a revision to the "rule of sevens"[36] in 1985. With this revision, the Commission now permitted ownership of twelve AM, twelve FM and twelve television stations, across the nation, by a single broadcast entity.[37] In light of the increase in the number of AM and FM stations between 1980 and 1991,[38] the Commission further relaxed its broadcast ownership rules by raising the radio

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[33] Stephanie N. DeClerk, *Prometheus Radio Project v. FCC: Where Will the Media Deregulation Trend End?* 58 ARK. L. REV. 705, 709 (2005).
[34] *Id.*
[35] GREGORY L. ROHDE, MINORITY BROADCAST OWNERSHIP 31 (Novinka Books) (2002).
[36] Amendment of §§ 3.35, 3.240, and 3.636 of Rules and Regulations to Multiple Ownership of AM, FM, and Television Broadcast Stations, Report and Order, 18 F.C.C. 288, 291 (1953) (In 1953, the Commission issued its first multiple broadcast media ownership rules that limited an organization to owning nationally no more than seven AM, seven FM, and seven television stations (two of which had to be UHF). This rule, along with several other Commission regulations, was an example of the Commission's prior belief that active regulation of radio and television broadcast ownership would promote diversity in the broadcast marketplace, which was consistent with the Commission's mandate to issue broadcast licenses in the public interest).
[37] Amendment of § 73.3555, Report and Order, 100 F.C.C.2d 17 (1984).
[38] *Id.*

ownership limits again to permit national ownership of eighteen AM and eighteen FM stations, across the nation, by any one broadcast organization.[39]

In 1992, the Commission relaxed local and national radio ownership restrictions and adopted a tiered approach to radio concentration that allowed a single entity to own more radio stations in the largest markets (up to three AM and three FM stations, subject to a local audience reach limitation of 25% and a national cap of 30 AM stations and 30 FM stations) and fewer in the smallest markets.[40] The Commission also ruled, for the first time, that licensees could own radio duopolies—radio stations in the same market with overlapping signal contours.[41] The size and number of stations in a given market determined whether a particular duopoly proposal could be granted. Therefore, one owner could have owned any number of stations within a broad metropolitan area without any consideration of duopoly rules, as long as there was no overlap of the principal community contours of the stations.[42]

The 1996 Telecommunications Act

In 1996, Congress overhauled the Telecommunications Act of 1934,[43] by replacing it with a new Telecommunications Act[44] that essentially allowed the

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[39] Memorandum and Order and Further Notice of Proposed Rule Making, *In re Revision of Radio Rules and Policies*, 7 F.C.C. Rcd. 6387 (1992), at ¶ 14 [hereinafter Revision of Radio Rules and Policies].
[40] *Id.*
[41] Revision of Radio Rules and Policies at ¶ 42.
[42] *See* Madden, *Market Definition and Audience Share Issues Under the FCC's Radio Duopoly Rules*, NAB BROADCASTERS' LAW & REGULATION CONF. PAPERS at 3 (1994).
[43] Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064 (1934), 47 U.S.C. § 151 (the Communications Act of 1934 formally created the Federal Communications Commission, and tasked the Commission with the role of regulating the broadcast spectrum and issuing licenses to broadcasters in accordance with the "public interest, convenience, or necessity").

Commission to relax broadcast media ownership restrictions even further. Through passage of the Telecommunications Act of 1996, Congress eliminated all limits on national radio ownership and raised the national television audience reach cap from 25% to 35%.[45] Congress also eased local radio ownership limits, establishing a four-tier sliding scale limit of numerical caps that allowed for as many as eight co-owned radio stations in the largest markets.[46] Congress did not include a new local television ownership rule in the 1996 Telecommunications Act, but directed the Commission to "conduct a rule-making proceeding to determine whether to retain, modify, or eliminate" its existing local television ownership restrictions.[47] The 1996 Telecommunications Act also relaxed the one-to-a-market rule (which generally prohibited common ownership of radio and TV stations in the same market by one entity)[48] by expanding the applicability of waiving the "one-to-a-market radio/television cross-ownership restriction" to the fifty largest markets.[49] Under the new one-to-a-market rule, a single owner could own, operate, or control combinations of up to seven radio stations and one television station in the market, depending on the number of independently owned media voices that remained in

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[44] 1996 Act; *See Prometheus*, 373 F.3d at 384 (the 1996 Telecommunications Act advocated a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").
[45] *Id.* §§ 202(a), (c)(1)(B), 110 Stat. at 110-11.
[46] *Id.* § 202(b)(1), 110 Stat. at 110.
[47] *Id.*. § 202(c)(2), 110 Stat. at 111.
[48] ROHDE, *supra* note 35 at 35.
[49] *Id.*

the market post-merger.[50] Moreover, the Telecommunications Act of 1996 instructed the Commission to review its broadcast ownership rules biennially "to determine whether any of its rules were necessary in the public interest as the result of competition,"[51] and to "repeal or modify any broadcast ownership regulations it determined to be no longer in the public interest."[52]

The Effect of the 1996 Telecommunications on the Radio Broadcast Industry

The passage of the Telecommunications Act of 1996 resulted in massive waves of media consolidation, mergers, and acquisitions in radio and television broadcast ownership.[53] The Commission reported that industry concentration increased as the number of broadcast owners declined nationally by 11.7% from March 1996 to November 1997.[54] Mergers among existing owners resulted in a decrease from 5,105 to 4,507 owners during this period, despite a 2.5% increase in the number of radio stations.[55] Similarly, local markets lost an average of one owner per market, with top ten markets averaging three existing owners per

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[50] Report and Order, *In the Matter of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules*, 14 F.C.C.Rcd 12903 (1999) [hereinafter Local TV Order] at ¶ 100.
[51] 1996 Act § 202(h), 110 Stat. at 111-12.
[52] *Id.*
[53] For example, U.S. Senator Byron L. Dorgan (D – N.D.) noted in his essay, *The FCC and Media Ownership: The Loss of the Public Interest Standard*, 19 N.D. J. L. ETHICS & PUB POL'Y 443, 448 (2005), that "since the 1996 Act, consolidation in the media industry has been overwhelming. Comcast acquired AT&T's cable properties, AOL acquired Time Warner, Viacom acquired CBS, GE acquired Vivendi Universal's television and film assets, and News Corporation acquired DirecTV. Comcast also partnered with Sony Corporation's most recently in agreeing to acquire Metro-Goldwyn-Mayer Inc., one of five remaining U.S. independent film studios."
[54] *See* Notice of Inquiry, *In the Matter of 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 13 F.C.C.Rcd 11276 (1998) at ¶ 18.
[55] *Id.*

market.[56] By comparison, 1067 transactions totaling $24.44 billion occurred in 1997, 952 transactions valued at $22.8 billion occurred in 1998, and 774 deals worth $33.32 billion occurred in 1999.[57]

Peter DiCola, Director of Economic Analysis, and Kristin Thompson, Director of Research for the Future of Music Coalition[58] highlighted the effect that the Telecommunications Act of 1996 had on consolidation and radio ownership in their 2002 report, "Radio Deregulation: Has it Served Citizens and Musicians?"[59] By stating:

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[56] *Id.* at ¶ 19.

[57] ROHDE, *supra* note 35 at 36.

[58] The Future of Music Coalition Home Page, http://www.futureofmusic.org/mission.cfm (the Future of Music Coalition is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. The FMC seeks to educate the media, policymakers, and the public about music/technology issues, while also bringing together diverse voices in an effort to come up with creative solutions to some of the challenges in the realm where music, technology, public policy, and intellectual property law converge).

[59] In 2002, Peter DiCola and Kristin Thomson's extensive study of the effects of consolidation in the radio industry, RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS? A REPORT ON THE EFFECTS OF RADIO OWNERSHIP CONSOLIDATION FOLLOWING THE 1996 TELECOMMUNICATIONS ACT was cited by the Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC.* This report was a historical, structural, statistical and public survey analysis of the effects of the 1996 Telecommunications Act on musicians and citizens. The reports major findings included:

- Ten parent companies dominated the radio spectrum, radio listenership and radio revenues.
- Consolidation has allowed Clear Channel to acquire tremendous market share in the radio broadcast industry.
- Virtually every geographic radio market is dominated by four firms controlling 70% of market share or greater. In smaller markets, consolidation is more extreme as the largest four firms in most small markets control 90% of market share or more.
- Virtually every music format is controlled by an oligopoly. In 28 of the 30 major music formats, nationwide, four companies or fewer control over 50% of listeners.
- A small number of companies control the news Americans hear on the radio.
- A small number of companies control what music is played on specific formats. Coupled with a broad trend toward shorter playlists, this creates few opportunities for musicians to get on the radio. Further, overwhelming consolidation of these formats deprives citizens the opportunity to hear a wide range of music.
- Increased format variety does not ensure increased programming diversity.
- Radio's oligopolies interact with a five-company recording industry oligopoly, hurting musicians and citizens. Eighty to 100 percent of radio charts are dominated by songs released by the five major label conglomerates. This "twin bottleneck" makes access to the airwaves even more difficult for musicians—and reduces choice for citizens, *available at* http://www.futureofmusic.org/images/FMCradiostudy.pdf.

> ...the 1996 Act opened the floodgates for ownership consolidation to occur. From March 1996 to March 2002 the number of commercial stations increased by 5.6 percent—rising from 10,257 to 10,807—while the number of owners declined by 33 percent—from 5,133 to 3,408. Over the same period the size and holdings of a number of the largest station group owners increased drastically. In 1996, the two largest group owners had fewer than 65 stations each.[60]

Several major television and radio broadcast corporations profited tremendously during this new era of relaxed restrictions on television and radio broadcast ownership. Clear Channel Communications, Inc. (Clear Channel) in particular, realized significant financial gains and market share in the radio industry in large part by the incentive to consolidate brought about by the Telecommunications Act of 1996 and the Commission's goal to deregulate broadcast media ownership.[61] At the end of 1996, Clear Channel had $352 million in revenue and owned 101 U.S. radio stations. Three years after the Telecommunication Act of 1996 rule revisions, Clear Channel had "grown to 557 stations, 555,000 billboards and $2.7 billion in sales."[62] In 2001, Clear Channel had $3.25 billion in revenue that accounted for 27.5% of the nationwide revenue share.[63] As a result of consolidation, Clear Channel now owns over 1,200 radio stations in 49 states, and reaches over 100 million listeners in the U.S. each week.[64] Clear Channel has also

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[60] PETER DICOLA & KRISTIN THOMSON, RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS? A REPORT ON THE EFFECTS OF RADIO OWNERSHIP CONSOLIDATION FOLLOWING THE 1996 TELECOMMUNICATIONS ACT 13 (Future of Music Coalition) (2002), *available at* http://www.futureofmusic.org/images/FMCradiostudy.pdf.
[61] *See generally Id.* at 25 (noting in Chart 3-4 that Clear Channels' revenue share in 2001 nearly equaled the share controlled by over 4,600 other parent companies taken together).
[62] DeClerk, *supra* note 33 at 732.
[63] Prindle, *supra* note 31 at 307.
[64] DeClerk, *supra* note 33 at 732.

acquired more than 40 television stations, over 750,000 billboards, and once controlled 105 live entertainment venues.[65]

The Telecommunications Act of 1996 and the State of Minority Radio Broadcast Ownership

The Telecommunications Act of 1996, and the ensuing consolidation that followed, had a negative impact on ethnic minority ownership in radio broadcast media. The 1997 Minority Commercial Broadcast Ownership Report released by the National Telecommunications and Information Administration (NTIA) revealed that minorities owned 322 of the 11,475 commercial radio and television broadcast stations in the U.S. This figure was down from 350 in 1996 and represented 2.8% of total commercial broadcast ownership—falling from 3.1% in 1996.[66] Larry Irving, Assistant Secretary for Communications and Information for the NTIA, speaking at the National Association of Black Owned Broadcasters' Annual Meeting in 1997 noted that the decline in Black media broadcast ownership that year was in part attributed to the sale of US Radio, the largest Black-owned radio broadcast company in the U.S. at that time, to Clear Channel.[67]

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[65] Clear Channel Communications Company History, http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1166&p=hidden (last visited Jan. 10, 2007).

[66] Larry Irving, Assistant Sec'y for Commc'ns and Info. NTIA, Dep't of Commerce, The Big Chill: Has Minority Ownership Been Put on Ice?, Remarks at the Nat'l Ass'n of Black Owned Broadcasters' Annual Meeting (Sept. 11, 1997), *available at* http://www.ntia.doc/gov/ntiahome/speeches/91197nabob.htm.

[67] *Id.*; *See also* Annette Walker, *Black-Owned Radio Stations Struggle to Survive*, BLACK WORLD TODAY, July, 27, 2005, *available at* http://tbwt.org/index2.php?option=content&task=view&id=525&pop (quoting Kofi A. Ofori as stating: "The Clear Channel company's purchase of US Radio, the Black-owned chain of 17 stations, is a good example of how the Telecommunications Act benefited large firms and put small and minority stations at a disadvantage. African-American station owners, even those with multiple holdings like US Radio, are unable to access capital quickly and make new acquisitions.

In 1998, NTIA reported minority broadcast ownership showed a "negligible increase of .1%, from 2.8% in 1997 to 2.9% in 1998, a net gain of 15 stations."[68] The 1998 NTIA minority broadcast ownership report also made several other notable findings concerning minority ownership that year, including:

- Minority owners were reporting that since passage of the Telecommunications Act of 1996 they were experiencing increased competition in securing highly ranked nationally syndicated programming, in attracting advertisers, and earning sufficient advertising revenue.
- Increases in minority ownership totals were negligible when compared to increases in industry totals.
- The most established minority television station owners were selling their stations to non-minority owned companies; and almost 2/3 of minority commercial radio owners were single station owners.[69]

The 2000 NTIA minority broadcast ownership report repeated grim statistics for the state of minority broadcast ownership that year. The 2000 NTIA minority broadcast ownership report noted that minority owners' share of the commercial television market decreased in 2000 by falling to 23 full power commercial television stations total owned by minorities that year (the report attributed the losses to five Hispanic American and four African American-owned stations, and a new identification of two Asian American-owned stations, for a net loss of seven stations).[70] The 2000

Furthermore, after the 1996 legislation, station prices doubled, making new purchases beyond the reach of small entrepreneurs, including African-Americans").

[68] NTIA, MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES (1998), *available at* http://www.ntia.doc.gov/opadhome/minown98/.

[69] *Id.*

[70] NTIA, CHANGES, CHALLENGES, AND CHARTING NEW COURSES: MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES 50 (2000), *available at* http://search.ntia.doc.gov/pdf/mtdpreportv2.pdf.

NTIA minority broadcast ownership report also noted that consolidation still threatened the survival of most minority broadcast owners, who as mostly single station operators, found it difficult to compete against large group owners.[71]

Kofi A. Ofori, a scholar on radio consolidation and minority radio broadcast ownership, noted the effects that the Telecommunications Act of 1996 had on minority ownership in radio broadcasting in his seminal study "Radio Local Market Consolidation & Minority Ownership." He noted that the number of minority owners decreased from 173 in 1991 to 149 in 2001.[72] Additionally, the report stated that the surge in ownership consolidation that resulted from relaxation of the ownership caps in 1996 coincided with the beginning of the downward trend in the number of minority radio broadcast station owners.[73] Moreover, the report noted that several minority owners directly attributed their decision to leave the radio broadcast industry to ownership consolidation.[74] The report cited the example of Short Broadcasting and Salt City Communications—both African American owned firms, each owning a single radio broadcast station, that decided to leave the Syracuse, New York radio market as a result of radio ownership consolidation following the passage of the Telecommunications Act of 1996. In his report, Mr.

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[71] *Id.*
[72] OFORI, *supra* note 10 at 10.
[73] *Id.* at 11.
[74] *Id.*, at 11 n.40 (citing his prior seminal study, OFORI ET AL., BLACKOUT? MEDIA OWNERSHIP CONSOLIDATION AND THE FUTURE OF BLACK RADIO 39 (Medgar Evers College Press) (1997), and quoting radio veteran Ragan Henry, a minority radio station owner who decided to sell his 17 stations to Clear Channel in 1996: "I figured that in some of the markets that we were in, if other people would come in and consolidate those markets, we would be left with what we had [and unable to expand]. That would not basically be good for us in the long run").

Ofori noted that both owners found it impossible to compete against Clear Channel and Citadel Communications Corporation in that particular radio market.[75]

Finally, a September 2006 report by Free Press,[76] "Out of the Picture: Minority & Female TV Station Ownership in the United States," provided one of the most current and complete assessments of the state of minority and female broadcast television ownership in the U.S. Similar to previous studies highlighted above, the Free Press study findings painted a distressing picture of minority television broadcast ownership. The study noted that although minorities comprise 33% of the entire U.S. population, they own only 44 television stations combined, or 3.26% of all television stations broadcasting in the U.S. today.[77] The Free Press study also emphasized that consolidation has crowded out minority owners (who tend to own just a single station and find it difficult to compete with their big-media counterparts for programming and advertising revenue), and that the Commission's deregulatory policies had a significant impact on minority ownership (indirectly, or directly), contributing to the loss of 40% of the stations that were minority owned in 1998. The methodology and conclusions of the Free Press study are discussed in greater detail and length later in this comment.[78]

The Commission's Broadcast Media Ownership Regulatory Review since Passage of the Telecommunications Act of 1996

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[75] OFORI, *supra* note 10 at 26.
[76] Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector. Free Press Home Page, http://freepress.net/content/about (last visited Jan. 10, 2007).
[77] TURNER, *supra* note 3 at 2.
[78] *Id.* at 3.

The broadcasting industry changed considerably in the years following the Telecommunications Act of 1996. The ability for a consumer to access information had increased with the advances in the internet, satellite television, and enhanced cable television services.[79] Noticing these advancements in consumer source diversity and increased competition in radio and television broadcasting, the Commission, consistent with its biennial review requirement to review broadcast ownership rules as meeting the "public interest," reviewed its broadcast ownership restrictions, and decided to amend them.

In 1999, the Commission relaxed its prohibition on common ownership of television stations with overlapping signals.[80] The new television ownership rule allowed for television "duopolies"—two commonly owned television stations in the same Designated Market Area (DMA) as long as: (1) neither station was ranked among the "top four" (i.e. ABC, CBS, Fox, NBC) stations in the markets, and (2) 8 independently owned stations remained in the market post-merger.[81] Sinclair Broadcasting challenged the "eight independent voices" exceptions by asserting that the Commission had not fully explained how this broadcast television ownership rule furthered the Commission's goal of promoting viewpoint diversity in broadcast markets.[82] The District of Columbia Circuit Court of Appeals remanded the "8

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[79] Kristine Martens, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART. & ENT. L. 285, 312 (2004).
[80] *Prometheus*, 373 F.3d at 385-86.
[81] *Id.*
[82] Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

independently owned" element of the broadcast television ownership rule for the Commission's further justification.[83]

In 2000, the Commission announced that it would retain the national television audience reach cap ownership rule at 35% (consistent with the Telecommunications Act of 1996) and its cable/broadcast cross-ownership rules after determining that both rules remained "necessary in the public interest."[84] However, Fox Television Studios challenged the Commission's decision to retain its television audience reach rule and its cable/broadcast cross-ownership rule, and the District of Columbia Circuit Court of Appeals held that the Commission had not sufficiently explained its reasoning for retaining either of these broadcast television ownership rules.[85] The District of Columbia Circuit Court of Appeals remanded the national television ownership rule back to the Commission for further justification and vacated the Commission's cable/broadcast cross-ownership decision as "arbitrary and capricious."[86]

In 2002, the Commission issued its biennial FNPRM to review its broadcast ownership rules, including:

- The Commission's 35% national television audience reach cap rule;
- The Commission's local television rule that was remanded by the District of Columbia Circuit Court of Appeals in *Sinclair v. FCC*;
- The Commission's radio/television cross-ownership rule;
- The Commission's dual network rule;
- The Commission's rule limiting radio station ownership in

[83] *Id.*
[84] *Prometheus*, 373 F.3d at 385.
[85] Fox Television Stations v. FCC, 280 F.3d 1027 (D.C. Cir. 2002).
[86] *Id.*

local markets; and
- The Commission's rule prohibiting newspaper/broadcast cross-ownership.[87]

The Commission modified their radio and television broadcast ownership rules, essentially relaxing them even further in 2003. The Commission modified its existing television ownership rule to allow for television "triopolies" in markets with 18 or more television stations, and television "duopolies" in markets with 17 or fewer television stations.[88] These television broadcast ownership limits were subject to a ban that a single firm could not own more than one "top-four" station (i.e. ABC, CBS, Fox, NBC) in a market.[89] The commission also decided to expand its criteria for waving the rule's ownership restrictions for proposed radio and television broadcast ownership combinations that involved failed, failing, or un-built stations by eliminating the requirement that waiver applicants provide notice of the sale of the "failing" station to minorities ("Failed Station Solicitation Rule" or FSSR).[90] The Commission changed the method for determining radio markets by replacing the "contour-overlap" method with the geography-based market delineations created by Arbitron.[91] The Commission retained the existing numerical limits on radio ownership under the Telecommunications Act of 1996.[92] The Commission repealed their cross-ownership rules and replaced them with new Cross-Media limits that prohibited newspaper/broadcast combinations and

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[87] *Prometheus*, 373 F.3d at 386.
[88] *Id.* at 386-7.
[89] *Id* at 387.
[90] *Id.* at 420.
[91] *Id.* at 387.
[92] *Id.*

radio/television combinations in the smallest markets. The Commission devised a tool to measure these limits, called the "Diversity Index," derived from the Herfindahl-Hirschman Index used by the Department of Justice and the Federal Trade Commission in their antitrust analysis.[93] Furthermore, the Commission changed the national television broadcast ownership rule to allow an organization to own television stations that, in the aggregate, could broadcast to up to 45% of U.S. households.[94]

Prometheus Radio Project v. FCC

Major network organizations, non-profit organizations, and various broadcast media corporations advocating for more broadcast media ownership deregulations and objecting to additional broadcast media ownership deregulation by the Commission were upset over various aspects of the Commission's radio and television broadcast ownership rule changes. The Prometheus Radio Project,[95] along with various other interested parties, filed petitions for review of the Commission's revised broadcast ownership rule changes with various federal courts of appeal.[96]

In reviewing the Commission's proposed broadcast ownership revisions, the Third Circuit Court of Appeals affirmed some of the Commission's rulings and

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[93] *Id.* at 388.

[94] *Id.*

[95] The Prometheus Radio Project is a non-profit organization founded by a small group of radio activists in 1998. The organization's primary purpose is to decentralize the current state of radio media consolidation by building a large community of low-powered FM stations and listeners that they hope will allow for more diverse and democratic content viewpoint in broadcast radio. Prometheus Radio Project Home Page, http://prometheusradio.org/about_us/ (last visited Jan. 10, 2007).

[96] *Prometheus*, 373 F.3d at 388-89 (by virtue of a lottery drawing, the Third Circuit Court of Appeals was selected to hear the challenges to the Commission's broadcast ownership rule changes).

remanded other findings for further justification by the Commission. The Third Circuit Court of Appeals remanded the Commission's elimination of the FSSR for further justification.[97] The Third Circuit Court of Appeals noted that the Commission's intent to implement the FSSR was to "ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled—and consequently more affordable—stations were for sale."[98] The only justification the Commission gave for eliminating the FSSR was its prediction that "the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market."[99] The Third Circuit Court of Appeals found that the Commission failed to consider its original justification for promulgating the FSSR, and the effect that repealing the rule would have on potential minority station owners. The Third Circuit Court of Appeals held that the Commission's repeal of the FSSR was "arbitrary" and "capricious."[100]

Furthermore, the Third Circuit Court of Appeals noted that the Minority Media Telecommunications Council (MMTC),[101] and other similar non-profit organizations had solicited several proposals to the Commission to advance minority broadcast media ownership prior to the Commission promulgating its new

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[97] *Id.* at 421.
[98] *Id.* at 420.
[99] *Id.*
[100] *Id.* at 421, n.58.
[101] The Minority Media Telecommunications Council (MMTC) is a national non-profit organization dedicated to promoting and preserving equal opportunity and civil rights in mass communications. MMTC Home Page, http://www.mmtconline.org/aboutmmtc (last visited Jan. 10, 2007).

media ownership rules in 2003.[102] The Commission, however, failed to consider these proposals.[103] On remand, the Third Circuit Court of Appeals said the Commission should address these proposals in their next notice of proposed rule-making,[104] but the Commission's latest notice of proposed rule-making also fails to take into account MMTC's and other proposals to increase minority broadcast ownership.[105]

The Third Circuit Court of Appeals affirmed the Commission's change in defining the local radio market—going from a "contour-overlap" definition of the local radio market to a geographically defined local radio market.[106] However, the court found that the Commission acted with "arbitrariness" and "capriciousness" in deciding to retain the existing local radio ownership limits under the Telecommunications Act of 1996.[107] Furthermore, the Third Circuit Court of Appeals stated that the Commission did not provide reasoned analysis to support the Cross-Media limits that it chose, and that the Diversity Index formula

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[102] *Prometheus*, 373 F.3d at 421 n.59.
[103] *Id.*; *See also* David Honig, Executive Dir. of the MMTC, How the FCC Helped Exclude Minorities From Ownership of the Airwaves, Delivered at the Fordham University McGannon Lecture on Communications Practices and Ethics, (Oct. 5, 2006).
[104] *Prometheus*, 373 F.3d at 421 n.59.
[105] *See* FNPRM (July 2006); *See also* Honig, *supra* note 103 ("On July 2006, the FCC issued a "Further Notice of Proposed Rulemaking" in which, once again, the FCC contemplated the deregulation of all of its media ownership rules. Now let me try to say this with a straight face: The FCC's Further Notice of Proposed Rulemaking again failed to identify or describe MMTC's fourteen minority ownership proposals, even though these proposals had been remanded to the FCC by the Philadelphia court for specific consideration"); *See also* JAMES L. WINSTON ET AL., COMMENTS OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC. AND THE RAINBOW/PUSH COALITION, INC. 2 (2006) (commenting that the NABOB and Rainbow/PUSH participated in the Commission's 2003 rulemaking proceeding by filing Comments with the Commission that the Commission subsequently ignored), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518535865.
[106] *Prometheus*, 373 F.3d at 423.
[107] *Id.* at 431.

implemented by the Commission to derive its Cross-Media limits was not justified.[108]

Notice of Proposed Rulemaking 2006

In response to the Third Circuit Court of Appeals' findings in *Prometheus*, and in accordance with its biennial review requirements, the Commission issued a FNPRM in July 2006 to seek comment on how to address the issues raised by the court in *Prometheus*—including comments related to the Commission's decision to retain their local radio ownership limits.[109] The Commission is inviting comments, studies, and analysis on how to develop more adequate and justified local radio ownership rules.[110] Though not explicitly stated in the Commission's FNPRM,[111] it is crucial that the Commission consider factors such as radio market consolidation, radio market share, and minority ownership and minority control of radio stations in these markets in developing and justifying its radio ownership rules. The following research has focused on addressing these concerns, particularly related to radio market share, and minority ownership and minority control of radio stations in the Top 36 Arbitron radio markets, various California radio markets, and the Mobile, Alabama radio market.

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[108] *Id.* at 403, 409 ("A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality").
[109] FNPRM (July 2006) at 9.
[110] FNPRM (July 2006) at 11.
[111] *See* DAVID HONIG, INITIAL COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS 1 (2006) (demanding that the Commission revise its July 2006 FNPRM since it fails to, among other things, identify, describe, and consider the minority ownership proposals proffered by the Minority Media Telecommunications Council (MMTC), and other similarly interested groups, remanded by the court in *Prometheus*), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518535946.

Research

The 2006 Free Press study "Out of the Picture: Minority & Female TV Station Ownership in the U.S." suggested that the Commission solicit commentary and review further studies on the current state of minority and female radio broadcast ownership before proposing rule changes affecting radio broadcast ownership. The Free Press study argued that radio is a more important medium than television because there are 10 times as many outlets in the radio broadcast ownership market, and the price of entry for females and minorities is comparatively low in the radio broadcast ownership market.[112] Consistent with the Third Circuit remand of the FSSR in *Prometheus*, the Free Press study suggests that it is critical that the Commission consider empirical analysis of the current state of minority broadcast radio station ownership, and the effect that that the Commission's deregulatory policies have had on minority broadcast radio station ownership. If the Commission is to justify their current local radio ownership limits, consistent with the court's remand in *Prometheus*, the Commission needs to analyze and assess the current state of minority ownership in the radio broadcast industry.[113] Additionally, considering such studies will guide the Commission in future radio broadcast ownership rule making proceedings, and possibly prevent further potential federal court remands.

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[112] TURNER, *supra* note 3 at 36.

[113] *See also* Christine M. Bachen et al., *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, *in* MEDIA DIVERSITY AND LOCALISM: MEANINGS AND METRICS 1, 49 (Philip Napoli ed., Lawrence Erlbaum Assoc.) (2006).

Americans 12 years of age and older use radio as their medium to receive information instead of relying on television/cable, newspapers, and magazines,[114] according to the Radio Advertising Bureau. Moreover, an impressive 94% of all Americans 12 years of age and older tune in to radio for information, entertainment, or discussion of topics over the course of each and every week[115] African Americans, on average, spend over 22 hours a week, per person, listening to radio.[116] Similarly, Hispanic Americans, on average, spend over 22 hours a week, per person, listening to radio.[117] Thus, the ubiquity and importance of the radio broadcast medium in the lives of most average Americans is clear, and even more pronounced for African-American and Hispanic minority groups. Given that prior federal court cases have required the Commission to take race into account when issuing broadcast licenses,[118] and given that there have been numerous studies supporting a causal link between source diversity and content and viewpoint diversity (i.e. that diversity in broadcast media ownership transcends into diversity in broadcast content),[119] it is important for the Commission to review the current status of minority radio broadcast ownership.[120]

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[114] RADIO ADVERTISING BUREAU, *supra* note 16 at 4.
[115] *Id.* at 7.
[116] *Id* at 9.
[117] *Id.* at 10.
[118] *TV 9, Inc.*, 495 F.2d 929; *See also Metro Broadcasting, Inc.*, 497 U.S. 547; *See also FCC v. Nat'l Citizens Comm'n for Broad.* 436 U.S. 775; *See also* Garrett v. FCC 513 F.2d 1056 (D.C. Cir. 1975) (holding that minority ownership by itself was not relevant, but what was relevant was how or if the minority ownership would increase diversity of content, be responsive to community needs, and otherwise serve the public interest).
[119] *See* Spitzer & Dubin, *supra* note 30; *See also* CHRISTINE BACHEN ET AL., *supra* note 30.
[120] The author also acknowledges that the need for the Commission to seriously review and possibly conduct such studies on their own accord is pressing given the fact that the NTIA has no further plans to conduct a study on the current state of minority broadcast ownership in the U.S. *See* Benton Foundation release *NTIA has no Plans to Conduct Minority Broadcast Ownership Study*,

Methodology

The Top 36 Arbitron[121] rated radio markets,[122] select California Arbitron rated radio markets[123] as well as the Mobile, Alabama Arbitron rated radio market were surveyed (from the Spring 2005 Arbitron season through the Summer 2006 Arbitron season) from the established trade journal website RadioandRecords.com.[124] The Top 36 markets were selected based on the availability of complete market share data at the time the information was taken from RadioandRecords.com. The California Arbitron rated markets were selected based on the racial, ethnic, urban and suburban diversity of the state. The Mobile, Alabama radio market was selected because an initial glance at the composition of this market from RadioandRecords.com seemed to indicate that this market might

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available at http://www.benton.org/indix.php?q=node/2232; *See also* Letter from John M.R. Kneuer, Acting Assistant Sec'y for Communications & Info., U. S. Dep't of Commerce, NTIA, to Veronica *Villafañe*, President of the Nat'l Ass'n of Hispanic Journalists (Apr. 27, 2006) (on file with author).

[121] Arbitron (NYSE: ARB) is a radio audience research company in the U.S. It collects data on radio audiences similar to the data collected by the Nielsen Media Research on television audiences. Arbitron collects data by selecting a random sample of the population to maintain a written diary describing what radio programs they have listened to. For each selected household that agrees to participate, Arbitron sends a diary for each member of the household age 12 or older. Each person maintains a diary for one week, typically starting on a Thursday and ending the following Wednesday. At the end of the week, the diaries are mailed back to Arbitron. A new random sample is selected to participate each week. Arbitron surveys are broken down into four key ratings periods, roughly corresponding with the seasons and bearing their names. The term commonly used in the radio industry for these quarterly ratings is "Arbitron book," *available at* http://en.wikipedia.org/wiki/Arbitron.

[122] At the time the author pulled the Arbitron ratings data from RadioandRecords.com in late October, 2006, the Top 36 Arbitron rated markets were (in numerical order from one through thirty-six): New York, Los Angeles, Chicago, San Francisco, Dallas, Philadelphia, Houston, Washington D.C., Detroit, Atlanta, Boston, Miami, Puerto Rico, Seattle-Tacoma, Phoenix, Minneapolis, San Diego, Nassau-Suffolk, Tampa, St. Louis, Baltimore, Denver, Pittsburgh, Portland, Cleveland, Sacramento, Riverside/San Bernardino, Cincinnati, Kansas City, San Antonio, Salt Lake City, Las Vegas, Milwaukee, San Jose, Charlotte, Providence.

[123] Los Angeles, San Francisco, San Diego, Sacramento, Riverside/San Bernardino, San Jose, Fresno, Monterey-Salinas-Santa Cruz, Stockton, Bakersfield, Visalia-Hanford, Modesto, Oxnard-Ventura, Santa Rosa, Victor Valley, Palm Springs, San Luis Obispo, Merced, Chico, Santa Barbara, Santa Maria, Lompoc, and Redding.

[124] http://www.radioandrecords.com/radiomonitor/ratings/index.jsp

be a highly concentrated market,[125] given that 11 radio broadcast organizations[126] share the Mobile, Alabama market. The market concentration for each of the Top 36 Arbitron rated markets surveyed, California markets surveyed, and the Mobile, Alabama radio market was calculated using the Herfindahl-Hirschman Index (HHI),[127] the formula used by the U.S. Department of Justice and Federal Trade Commission to measure market concentration in a given market (see Appendix, Tables 1-3). The market concentration analysis mirrored closely to the technique used by Free Press in their analysis of female and minority television station ownership and market concentration in the television broadcast ownership industry.[128]

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[125] Calculating the HHI for the Mobile, AL radio market revealed that this market was a highly concentrated market in the Spring 2006 Arbitron season (the most recent available at the time the data was pulled from RadioandRecords.com), with an HHI of 2184.54.
[126] ADX Communications, B Tucker Assoc., Clear Channel, Charles Cooper, Cumulus, Dittman, Dot Comm Plus, Goforth Media, Gulf Broadcasting, Martin Broadcasting, Pamal, and Stewart Broadcasting.
[127] *See* HHI, *supra* note 14.
[128] TURNER *supra* note 3 at 22 (analyzing the HHI for television markets and concluding that markets with minority owned stations were less concentrated, in terms of HHI, than markets without minority owned stations in the markets the study had sampled. The universe of full-power commercial television stations was determined using the FCC's CDBS Public Access Database. Each individual station's Form 323 ownership filing was then reviewed, with ownership information assigned using the most recent filings—in most cases, the most recent filings were from 2004-2006. "Ownership" was defined as the gender or race of owners with voting interest that exceeded 50% alone or in the aggregate. If no single gender or race met these criteria, then stations were assigned "no controlling interest status." This status most often was assigned to publicly traded corporations where listed entities did not form a majority of the voting interest. Information concerning stations operating under local marketing agreements – LMAs – was obtained from contracts that were filed with individual Form 323 filings. Data from the National Telecommunications and Information Administration's 1998 and 2000 *Minority Commercial Broadcast Ownership* reports were verified and updated with information from the CDBS database, as well as other publicly available sources and interviews with station representatives. Stations broadcasting on channels 2-13 were assigned VHF status, while stations broadcasting on channels 14-69 were assigned UHF status. Information about the network affiliation and local news content of each station was determined by viewing the station Web sites, checking local programming listing or contacting the station. The data were merged with demographic data at the state and Designated Market Area levels, using information from the U.S. Census Bureau and BIA Financial. Statistical analysis methods such as ANOVA, t-

The radio stations listed in each of the Top 36 Arbitron rated markets, California radio markets, and the Mobile, Alabama radio market surveyed were cross-referenced with the latest FCC broadcast minority ownership report issued in June 2006 (for the 2004-2005 period)[129] to determine which stations in these markets were minority owned. The Free Press study, "Out of the Picture: Minority & Female TV Station Ownership in the United States" noted significant problems with the Commission's latest minority ownership reports including the fact that some station owners who appeared in prior reports, did not show up in the following year's report, but did show up in the latest report.[130] The Commission's minority ownership reports show that certain stations have ownership interests that add up to greater than 100 percent, and in some instances, the type of station facility (AM, FM or TV) is not specified.[131] The Free Press study noted that some of the more alarming inconsistencies in the Commission's ownership reports were that none of the radio stations owned by Radio One, the largest minority-owned radio broadcaster in the U.S., was listed in the report.[132] The Free Press study also stated that these examples suggest that the Commission had not made an honest and "good faith" effort to track and analyze the current shape of minority broadcast

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tests and OLS were performed to examine the statistical significance of market-level ownership and market-level demographics, as well as differences in ownership concentration).

[129] FCC Ownership Minority Report for 2004-2005, *available at* http://www.fcc.gov/ownership/owner_minor_2004-2005.pdf.

[130] TURNER, *supra* note 3 at 7.

[131] *Id.*

[132] *Id.* at 8.

media ownership today, and that the Commission is not concerned about minority broadcast ownership.[133]

Similar difficulties were encountered when cross-referencing radio station ownership data from the FCC database with the information reported in RadioandRecords.com about the Arbitron data from the Top 36 Arbitron rated radio markets, the California radio markets, and the radio market in Mobile, Alabama. The findings were reviewed with Catherine Sandoval, Assistant Professor at Santa Clara University School of Law, and former Director for the Federal Communication Commission's, Office of Communications Business Opportunities, to confirm the accuracy of the minority ownership of the radio stations in the Top 36 Arbitron rated radio markets, California Arbitron radio markets, and the Mobile, Alabama radio markets. Professor Sandoval confirmed that the Commission's minority ownership reports were inaccurate and had omitted a substantial number of radio stations that were owned by minority organizations, or owned by publicly traded, but minority controlled organizations. The Commission failed to note the following organizations as minority owned in their latest radio broadcast station

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[133] *Id.* at 7-8 (the Free Press Report also acknowledged that the inconsistencies and omissions in the latest FCC Minority media ownership reports might be a result of how the larger-group stations reported ownership information, and how the FCC harvested the information for their summary reports. The report noted that most of the licenses of those stations missed by the Commission are "owned" by intermediate entities that are in some cases many degrees separated from the "actual" owner. Some stations filed more than 20 form 323 FCC ownership report forms (one for each holding entity), with the true owners listed on only one of the filed forms. And in many cases, the Free Press Report noted, the actual ownership information is attached as an exhibit and not listed on the actual form. Thus the Commission, which tabulates the information for their summaries by harvesting these electronic forms via an automated process, misses stations that file in this manner. The Free Press report also acknowledged that there is very little oversight of Form 323 filings and the Commission's summary reports produced from them. Moreover, the Free Press Report acknowledged that inaccurate reporting is also attributed to the fact minority broadcast station owners also improperly complete and file the Form 323 forms with the Commission incorrectly).

minority ownership reports: Inner City, Multicultural, Midway, KCOH, Carter Broadcast, Group Inc., Taxi Productions, El Dorado, Milwaukee Radio Alliance, Courier, Bustos Media, All Pro, Border Media Partners, Carlos A. Duharte, ZGS Broadcast Holdings, and Howard University Board. The Commission failed to note the following as publicly traded, but minority controlled organizations in their latest radio broadcast station minority ownership reports: Radio One, Entravision, Radio Campesina, SBS and Mega Communications (See Appendix, Tables 1-3).

Market Concentration: Initial Findings

Calculating the market concentrations for the Top 36 Arbitron rated radio markets, California radio markets surveyed, and the Mobile, Alabama radio market, using the Herfindahl-Hirschman Index (HHI) revealed the following results (See Appendix, Tables 1-3):

- Nine radio markets surveyed in the Spring 2006 and Summer 2006 Arbitron seasons had HHIs less than 1,000 (markets with HHI less than 1,000 are considered to be a competitive markets by the U.S. Department of Justice's standards). Of these nine radio markets, four were Top 36 Arbitron rated radio markets: San Francisco, New York, Dallas, and San Diego. The other competitive markets included: Merced, Monterey/Salinas/Santa Cruz, Oxnard/Ventura, Santa Rosa, California, and Visalia/Tulare-Hanford, California.

- Thirty-nine radio markets surveyed in the Spring 2006 and Summer 2006 Arbitron seasons had HHIs between 1,000-1,800 (markets with HHI between 1,000 and 1,800 are considered to be moderately concentrated markets). Of these Thirty-nine radio markets, twenty-nine were Top 36 Arbitron rated radio markets: Los Angeles, Chicago, Philadelphia, Houston, Washington, D.C., Detroit, Boston, Miami, Puerto Rico, Seattle-Tacoma, Phoenix, Minneapolis, Nassau-Suffolk, St. Louis, Baltimore, Denver, Pittsburgh, Portland, Oregon, Sacramento, Riverside/San Bernardino, Kansas City, Missouri, Salt Lake City, San Jose, Charlotte, Providence, Atlanta, Las Vegas, Milwaukee, and San

Antonio. The remaining California radio markets that were moderately concentrated included: Fresno, Stockton, Bakersfield, Modesto, Victor Valley, San Luis Obispo, Chico, Santa Barbara, Santa-Maria Lompoc, and Palm Springs.

- Five radio markets surveyed in the Spring 2006 and Summer 2006 Arbitron seasons had HHIs greater than 1,800 (markets with HHI greater than 1,800 are considered to be highly concentrated, and mergers that increase the HHI by more than 100 points in these markets raise anti-trust concerns). Of these five radio markets, three were Top 36 Arbitron rated radio markets: Tampa, Cleveland, and Cincinnati. The remaining radio markets surveyed in this HHI category included: Mobile and Redding.

- Radio markets that appeared to fluctuate between the competitive and moderately concentrated HHI market classification from one Arbitron season to the next, as a result of changes in radio broadcast group audience share, included:

    - Monterey-Salinas-Santa Cruz, which was a moderately concentrated market during the Summer 2005, Fall 2005, and Winter 2006 Arbitron seasons (HHI of 1034.89, 1032.65, and 1027.07, respectively), but was a competitive market during the Spring 2006 and Summer 2006 Arbitron seasons (HHI of 835.3 and 992.18, respectively).

    - New York, which was a moderately concentrated market during the Summer 2005, Fall 2005, and Spring 2006 Arbitron seasons (HHI of 1063.19, 1078.46, and 1013.76, respectively), but was a competitive market during the Winter 2006 and Summer 2006 Arbitron seasons (HHI of 968.25 and 972.81, respectively).

    - San Diego, which was a moderately concentrated market during the Fall 2005 and Spring 2006 Arbitron seasons (HHI of 1067.21 and 1013.57, respectively), but was a competitive market during the Summer 2005, Winter 2006, and Summer 2006 Arbitron seasons (HHI of 942.73, 939.01, and 971.49, respectively).

    - Visalia/Tulare-Hanford, which was a moderately concentrated market during the Spring 2005 Arbitron season (HHI of 1057.15), but was a competitive market

during the Fall 2005 and Spring 2006 Arbitron seasons (HHI of 993.64 and 906.07).

- Chicago, which was a competitive market during the Winter 2006 Arbitron season (HHI of 993.34), but was a moderately concentrated market during the Summer 2005, Fall 2005, Spring 2006, and Summer 2006 Arbitron seasons (HHI of 1145.04, 1118.04, 1034.71, and 1053.36, respectively).

- Riverside/San Bernardino, which was a competitive market during the Fall 2005 Arbitron season (HHI of 953.91), but was a moderately concentrated market during the Summer 2005, Winter 2006, Spring 2006, and Summer 2006 Arbitron seasons (HHI of 1127.1, 1035.23, 1063.13, and 1108.79, respectively).

- Washington, D.C., which was a competitive market during the Summer 2005 and Fall 2005 Arbitron seasons (HHI of 960.01 and 993.65), but became a moderately concentrated market during the Winter 2006, Spring 2006, and Summer 2006 Arbitron seasons (HHI of 1047.90, 1034.04, and 1025.46, respectively).

- Additionally, there were radio markets that appeared to fluctuate between the moderately concentrated and highly concentrated classification from one Arbitron season to the next, including:

  - Cincinnati, which was a highly concentrated market during the Summer 2005, Fall 2005, Spring 2006, and Summer 2006 Arbitron seasons (HHI of 2086.65, 1981.49, 1929.96, 1986.53, respectively), but was a moderately concentrated market during the Winter 2006 Arbitron season (HHI of 1750.67).

  - Cleveland, which was a highly concentrated market during the Summer of 2005, Fall 2005, Spring 2006, and Summer 2006 Arbitron seasons (HHI of 1871.9, 1908.79, 1809.38, and 1881.65, respectively), but was a moderately concentrated market during the Winter 2006 Arbitron season (HHI of 1722.7).

- The most highly concentrated Arbitron rated radio market, on average, appeared to be Redding, with an average HHI of 2855.157

from the Spring 2005 Arbitron season through the Spring 2006 Arbitron season.

- The least concentrated Arbitron radio market, on average appeared to be Oxnard/Ventura, with an average HHI of 787.9567 from the Spring 2005 Arbitron season through the Spring 2006 Arbitron season.

- Additionally, San Francisco appeared to be the least concentrated Arbitron radio market, for radio markets with Arbitron data available for the Summer 2006 Arbitron season, with an HHI of 778.77.

Radio Market Concentration & Minority Ownership

Categorizing the Top 36 Arbitron rated radio markets, California radio markets, and the Mobile, Alabama radio market into competitive, moderately concentrated, and highly concentrated markets, in terms of HHI, for the Spring 2006 and Summer 2006 Arbitron seasons, and analyzing radio stations owned by minority owned, and publicly traded but minority controlled business entities revealed the following findings:

- Radio stations owned by business entities that are minority owned, and those owned by publicly traded, but minority controlled business entities, appeared in competitive markets, moderately concentrated markets, and highly concentrated markets, in terms of HHI (See Appendix, Tables 1-3 for detail on these markets categorized in terms of the HHI categories of competitive, moderately concentrated, and highly concentrated markets).

- Of the radio markets surveyed, the following radio markets did not appear to have any minority owned, or publicly traded, but minority controlled, business entities in that particular market: Fresno, Redding, and San Diego.[134]

[134] The author acknowledges that this finding could be inaccurate given the author's reliance on the incomplete and latest FCC minority ownership reports to confirm minority ownership of radio stations in these radio markets.

- On average, there appeared to be a greater percentage of minority owned, and publicly traded, but minority controlled, business entities owning radio stations in competitive and moderately concentrated radio markets (15% for both, respectively), in terms of HHI, than in highly concentrated radio markets (9%), in terms of HHI[135] (See Appendix, Tables 1-3 for detail, and Tables 4-6 for calculations).

Grandfathering under the old caps

Another area analyzed for this comment was the effect that the "grandfathering" phenomenon had on radio market concentration and minority radio broadcast station ownership in those particular radio broadcast markets where the local radio ownership caps were exceeded because of "grandfathering." In *Prometheus*, the Third Circuit Court of Appeals affirmed the Commission's decision to change the local radio market definition from a "signal-contour overlap" to a more concrete and geographically delineated boundary.[136] However, the Commission decided to retain its local radio ownership caps.[137] Organizations that exceeded the existing local radio ownership caps because of the change in the definition of local radio market were not forced to divest their stations that exceeded the caps, but were essentially "grandfathered" in and allowed to retain all of their radio stations

[135] *See* TURNER, *supra* note 3 at 3 (this finding correlates with a similar finding by Free Press in their report on the current state of minority and female ownership in the television broadcast industry, OUT OF THE PICTURE: MINORITY & FEMALE TV STATION OWNERSHIP IN THE U.S. The analysis in that report suggested that minority-owned television stations are more likely to appear in more competitive and less concentrated markets, and that even if the size of the market is held constant, markets with minority owners are significantly less concentrated than markets with minority owners).
[136] *Prometheus*, 373 F.3d at 424.
[137] *Id.* at 430-1; *See also* Radio Broadcast Services, 47 C.F.R. § 73.3555 (2006) (delineating the Commission's local radio ownership rules and radio ownership limits).

under the new local market definition.[138] The Third Circuit Court of Appeals subsequently remanded the Commission's decision to retain the existing numerical limits on radio ownership for further justification.[139]

In his study "Do Radio Companies Offer More Variety when they Exceed the Local Ownership Cap?" Peter DiCola analyzed the Commission's decision to change the definition of the local radio markets from a "signal contour" overlap to a "geographically" defined market, the Commission's decision to "grandfather in" radio stations owned by organizations in radio markets that exceeded the local radio ownership caps, and the effect that this would have on radio broadcast program variety.[140] DiCola found that organizations that owned radio stations in markets that exceeded the local radio ownership cap and were exactly at the cap offered less variety in programming formats in those radio broadcast markets than station groups under the radio ownership caps.[141]

What affect does the "grandfathering" phenomenon have on radio market concentration and minority radio broadcast station ownership in those particular radio broadcast markets where the local radio ownership caps are exceeded because of "grandfathering?" Using DiCola's list of radio broadcast markets that have

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[138] *Id.* at 426-7; *See also* Peter DiCola, *Do Radio Companies Offer More Variety when they Exceed the Local Ownership Cap?, in* DOES BIGGER MEDIA EQUAL BETTER MEDIA? FOUR ACADEMIC STUDIES OF MEDIA OWNERSHIP IN THE UNITED STATES 39, 42 (Benton Foundation & Social Science Research Council) (2006), *available at* http://www.ssrc.org/programs/media/publications/MediaOwnershipReport.pdf.
[139] *Prometheus*, 373 F.3d at 430-1.
[140] DiCola, *supra* note 138.
[141] *Id.*

exceeded the local radio ownership caps as a result of "grandfathering,"[142] and comparing this list to the Arbitron radio broadcast markets analyzed in this comment has revealed the following:

- On average, minority owned, and publicly traded, but minority controlled, group entities owning radio stations were more likely to appear in radio broadcast markets that did not exceed the local radio ownership caps, than in radio broadcast markets that did exceed the local radio ownership caps in the radio broadcast markets analyzed in this comment (See Appendix, Table 7).
    - Minority owned, and publicly traded, but minority controlled, group entities appeared in radio broadcast markets that did not exceed local radio ownership caps 15% of the time on average.
    - Minority owned, and publicly traded, but minority controlled, group entities appeared in appeared in radio broadcast markets that did exceed local radio ownership caps 10% of the time on average.
- Out of the radio broadcast markets analyzed in this comment, there were more radio broadcast markets that exceeded the local radio ownership caps (as a result of "grandfathering") that were also moderately concentrated markets,[143] and fewer radio broadcast markets that exceeded the local radio ownership caps that were competitive[144] or highly concentrated[145] markets (See Appendix, Tables 4-6).

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[142] *Id.* at 48-50, Appendix: Station Groups Exceeding the Local Ownership Cap and Grandfathered In. Listed Alphabetically by Local Market, Fall 2005.

[143] Clear Channel Communications, Inc. exceeded the limit on the total number of radio stations that an organization could own in a particular radio broadcast market in the following markets: Los Angeles, Bakersfield, and Santa Barbara. Clear Channel Communications, Inc. also exceeded the limit on the total number of FM radio stations that an organization could own in a particular radio broadcast market in the following markets: Los Angeles, and Fresno. Next Media exceeded the limit on the total number of FM stations that an organization could own in a particular radio broadcast market, in the following markets: Chicago. Results Radio LLC exceeded the limit on the total number of FM stations that an organization could own in a particular radio broadcast market in the following markets: Chico. Entercom exceeded the limit on the total number of radio stations that an organization could own in a particular radio broadcast market, and the limit on the total number of FM stations that an organization could own in a particular radio broadcast market, in the following markets: Kansas City.

[144] Clear Channel Communications, Inc. exceeded the limit on the total number of radio stations that an organization could own in a particular radio broadcast market, and the limit on the total number

Clear Channel Communications, Inc. and Radio Station Ownership in the Arbitron Radio Markets Analyzed in this Comment

Clear Channel Communications, Inc. (Clear Channel) is currently the number one radio broadcast station corporation. Analyzing the Top 36 Arbitron rated, California Arbitron rated, and the Mobile, Alabama radio broadcast markets for percentage of radio stations owned by Clear Channel revealed that Clear Channel, on average, owned 21% of the radio stations in those radio broadcast markets[146] with Clear Channel owned radio stations (See Appendix, Table 8). Moreover, of the radio markets surveyed in this comment only Puerto Rico and Kansas City did not have any Clear Channel owned stations.

On November 16, 2006, Clear Channel announced that two private capital investment firms (Thomas H. Lee Partners and Bain Capital Partners) had proposed to acquire the radio station conglomerate for $18.7 billion.[147] As a result

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of FM stations that an organization could own in a particular radio broadcast market, in the following markets: San Francisco and San Diego.

[145] Clear Channel Communications, Inc. exceeded the limit on the total number of radio stations that an organization could own in a particular radio broadcast market, in the following markets: Cleveland. Cox Radio Inc. exceeded the limit on the total number of FM stations that an organization could own in a particular radio broadcast market in the following markets: Tampa. Results Radio LLC exceeded the limit on the total number of radio stations that an organization could own in a particular radio broadcast market, and the limit on the total number of FM stations that an organization could own in a particular radio broadcast market, in the following markets: Redding.

[146] New York, Los Angeles, Chicago, San Francisco, Dallas, Philadelphia, Houston, Washington D.C., Detroit, Atlanta, Boston, Miami, Seattle-Tacoma, Phoenix, Minneapolis, San Diego, Nassau-Suffolk, Tampa, St. Louis, Baltimore, Denver, Pittsburgh, Portland, Cleveland, Sacramento, Riverside/San Bernardino, Cincinnati, Salt Lake City, Las Vegas, Milwaukee, San Jose, Charlotte, Providence, Fresno, Monterey-Salinas-Santa Cruz, Stockton, Bakersfield, Visalia-Hanford, Modesto, Oxnard-Ventura, Santa Rosa, Victor Valley, Palm Springs, San Luis Obispo, Merced, Chico, Santa Barbara, Santa Maria, Lompoc, Redding, and Mobile.

[147] Associated Press, *Radio Station Giant Clear Channel Communications Agrees to be Acquired for About $18.7B*, INTERNATIONAL HERALD TRIBUNE, Nov. 16, 2006, *available at* http://www.iht.com/bin/print.php?id=3575564. (*Note: this deal is still subject to approval by the U.S. Dep't of Justice & the FCC).

of the sale, Clear Channel also announced that it will sell 448 of its 1,150 radio stations, all located outside the top 100 U.S. media markets, as well as the company's 42-station Television Group.[148] The radio stations announced for sale are located in 90 markets outside of the top-100 Arbitron Metros.[149] The television stations are located in 24 small and mid-sized markets throughout the country.[150] It is currently unknown if Clear Channel's divestiture of its radio stations will allow for potential minority radio stations owners to gain control of these stations. However, if the past is any indication, then it is quite possible that Clear Channel's release of control of these radio stations could potentially result in positive gains for minority ownership in these radio broadcast markets.[151]

Limitations of the Research

The author acknowledges that there were several inherent limitations on the research conducted for this comment. First, these findings are only limited to the Top 36 Arbitron rated radio markets, select California Arbitron radio markets, and the Mobile, Alabama radio market using Arbitron data from the Spring 2005 Arbitron season through the Summer 2006 Arbitron seasons, and obtained from the trade publication website, RadioandRecords.com, at the end of October 2006. The author acknowledges that RadioandRecords.com has started posting new Arbitron

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[148] Clear Channel Corporate, *Clear Channel Announces Plan to Sell Radio Stations Outside the Top 100 Markets and Entire Television Station Group*, Nov. 16, 2006, *available at* http://www.clearchannel.com/PressRoom.
[149] *Id.*
[150] *Id.*
[151] ROHDE, *supra* note 35 at 37 (noting that Clear Channel had to divest 108 radio stations to gain regulatory approval of its purchase of the AMFM radio station corporation in 1999.); *See also* OFORI, *supra* note 10 at 11-12 (noting that seven minority owned firms acquired some of the divested stations, which lead to an increase of 30 minority owned radio stations during this period.).

information (including new radio market rankings and radio station market share data for the Fall 2006 Arbitron season). Therefore, the findings in this comment need to be updated as the market continually changes. Moreover, the results and analyses in this comment are limited to the small number of radio markets surveyed. In no way are the findings in this comment representative of the entire radio market landscape in the United States. Further comprehensive studies will need to be conducted on all radio markets in the U.S. to determine whether the initial findings in this comment may be extrapolated to apply to the entire radio market, and to see whether the findings in this comment indicate a greater trend in the entire U.S. radio ownership market.[152]

Second, the author did not have access to extensive data on the radio industry, from sources such as BIA Financial Networks, or Media Access Pro (Radio Version), the Commission's CDBS Public Access Database. Nor was the author able to contact minority owners of the various minority owned stations referenced in this comment individually to comprehensively verify the ownership of the minority owned stations analyzed for this comment.[153] All HHI calculations in this study were accurately completed using MS Excel, however, statistical significance was not

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[152] *See* CATHERINE J.K. SANDOVAL ET AL., RE: RECOMMENDATIONS REGARDING THE FCC'S PROPOSED STUDIES FOR THE MEDIA OWNERSHIP PROCEEDINGS 5 (2006) (suggesting that the Commission conduct one such study of all 12,000+ radio stations using the HHI concentration methodology employed in the Free Press study, "Out of the Picture: Minority & Female TV Station Ownership in the United States"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518535748.

[153] As the author relied on the incomplete 2006 FCC minority ownership reports, information obtained from other reports on minority media ownership (*See* OFORI, *supra* note 10; *See also* TURNER, *supra* note 3), and Professor Catherine J.K. Sandoval's (Assistant Professor of Law at Santa Clara Univ. School of Law, and former Dir. for the Fed. Communications Commission's, Office of Communications Bus. Opportunities) plethora of knowledge of the radio broadcast industry to verify the minority ownership of the minority owned, and publicly traded, but minority controlled, radio broadcast corporations analyzed for this comment.

tested using SPSS software, or other similar professional statistical programs, as used by some prior studies that have undertaken more in depth analyses on the current state of minority broadcast media ownership.[154]

Finally, the empirical data discussed in this comment suggest that media ownership consolidation – coinciding with the Commission's relaxation of its radio ownership rules – has lead to a decline in the number of minority owners in the radio broadcast markets surveyed in this comment. As prior studies conducted by foremost researchers on the topic of broadcast media consolidation and minority broadcast ownership have previously asserted, this author hesitates to draw a direct causal relationship between the Commission's deregulatory policies in local radio ownership and the low number of minority radio stations owners in the radio broadcast markets analyzed in this comment.[155] However, the consistency of the conclusions shared by the markets analyzed here and all TV markets analyzed by the Free Press study, "Out of the Picture: Minority & Female TV Station Ownership in the United States," indicate that minority ownership is negatively correlated with highly concentrated markets. This suggests that if the Commission were to permit even more consolidation in radio or television markets, it would likely worsen minority ownership beyond its already low levels.

Proposed Solutions: How the Commission can reclaim an Active role in promoting minority media ownership

[154] *See* DICOLA, *supra* note 60; *See also* DiCola, *supra* note 138; *See also* OFORI, *supra* note 10; *See also* TURNER, *supra* note 3.
[155] *See* OFORI, *supra* note 10 at 26; *See also* DICOLA, *supra* note 60 at 3.

Upon the release of the Free Press study, "Out of the Picture: Minority & Female TV Station Ownership in the United States," Federal Communications Commissioner Michael Copps was quoted as stating:

> There is something terribly wrong when women and minorities comprise such substantial parts of the U.S. population but own so few broadcast television stations. This isn't just a problem. It's a national disgrace. This time the FCC needs to look before it leaps into another abyss. We just should not be voting again on changing media ownership rules unless and until we have tackled this problem and come up with initiatives to redress a crying national need.[156]

If the Commission is truly committed to encouraging minority media ownership, based on the belief that broadcast ownership diversity transcends into diversity in broadcast viewpoint and content, it is critical that the Commission partake in, encourage, and pay attention to past, present, and future public studies on the current state of minority radio and television broadcast ownership. In this regard, it is critical that the Commission seriously review comments that are currently being solicited during its public comment period so that the Commission can promulgate future broadcast ownership rules that are rationally based, legitimate, and not subject to remand by a federal court.[157]

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[156] Free Press, *State of Female and Minority Media Ownership a 'National Disgrace': FCC Commissioners and civil rights leaders react to new study on lack of diversity among TV station owners*, Sept. 20, 2006, *available at* http://freepress.net/press/release.php?id=168.

[157] *See* Press Release, Fed. Communications Comm'n, Comm'r Michael J. Copps Comments on the FCC's Media Ownership Studies (Nov. 22, 2006) ("Today's announcement of the Commission's new media ownership studies, unfortunately, raises more questions in the public's mind than it answers. How were the contractors selected for the outside projects? How much money is being spent on each project—and on the projects collectively? What kind of peer review process is envisioned? Why are the topics so generalized rather than being targeted to more specific questions? When the majority of the FCC voted to loosen the ownership rules in 2003, a federal court took them to task for inadequate justification of their handiwork. My hope has been that the Commission would not head off on the same tangent again—especially at a time when many people already doubt the credibility of the research we do") (on file with author); *See also* John Eggerton, *Dems Want More Info on FCC*

Comment Period

Several recent comments submitted to the commission concerning the current state of minority broadcast ownership offer interesting solutions that the Commission could implement to promote and enhance minority media ownership. First, and foremost, several of the recent comments have advised the Commission to revise its FNPRM issued in July 2006.[158] On August 23, 2006, the Diversity and Competition Supporters filed a "Motion for Withdrawal" of the July 2006 FNPRM and requested that the Commission issue a Revised FNPRM ("Restart Motion").[159] The "Restart Motion," among other things, would force the Commission to re-issue a FNPRM that would identify, describe, and consider the minority ownership proposals proffered by the Minority Media Telecommunications Council (MMTC), and other similarly interested groups, that were ignored by the Commission in the 2002 FNPRM, and remanded by the court in *Prometheus*.[160] The reason behind this action is so that the Commission can develop a full and adequate record to satisfy the notice requirement in the Administrative Procedure Act ("APA"), 5 U.S.C. §553(b).[161]

Comments of the National Association of Black Owned Broadcasters, Inc. and the Rainbow/PUSH Coalition, Inc. (NABOB) have also suggested several other proposals that the Commission could adopt to help enhance the current state of

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Studies, BROADCASTING & CABLE, Dec. 13, 2006, *available at* http://www.broadcastingcable.com/article/CA6399462.html?display=Breaking+News.
[158] *See* HONIG, *supra* note 111 at 1; *See also* JAMES L. WINSTON ET AL., *supra* note 105 at 3.
[159] HONIG, *supra* note 111 at 2.
[160] *Id.* at 2.
[161] *Id.* at 2-3.

minority broadcast radio and television ownership. Foremost, the NABOB comments suggest further comprehensive studies of every licensed broadcast radio and television station to determine the level of minority ownership by taking into account various factors such as market concentration and consolidation.[162] This suggestion echoes similar suggestions that have been offered in previous reports, mentioned in this comment.[163]

Additional comments from the NABOB also suggested that the Commission require divestiture of radio ownership groups that exceed the local radio ownership limits in various radio broadcast markets, and prevent further "grandfathering" practices should the Commission decide to change its definition of the local radio market in the future.[164] This suggestion is consistent with empirical findings in this comment that minority owned radio station ownership groups, and publicly traded, but minority controlled radio station ownership groups were more likely to appear in radio broadcast markets where the local radio ownership limits were not exceeded, than in radio broadcast markets where the local radio ownership limits were exceeded. Additionally, with the divestiture of 448 of Clear Channel's radio stations, as a result of the sale of Clear Channel to private investors, perhaps some financial incentives can be offered to Clear Channel to encourage them to sell these stations to interested minority groups.

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[162] WINSTON ET AL., *supra* note 105 at 6.
[163] *See* DiCola, *supra* note 138 at 46-7; *See also* OFORI, *supra* note 10 at 26; *See also* TURNER, *supra* note 3 at 36-37.
[164] WINSTON ET AL., *supra* note 105 at 10.

Finally, the NABOB comments suggest that the Commission should stop relaxing the broadcast ownership rules because they tend to promote consolidation and squeeze out potential minority broadcast owners.[165] As the empirical analysis in this comment, and several other empirical reports on the state of minority broadcast ownership show, television and radio markets that are highly concentrated tend to have less minority owned television and radio broadcast stations.[166]

Promulgating Rules that Promote Minority Radio and Television Broadcast Ownership

Other recent comments filed with the Commission's latest FNPRM and literature on minority broadcast ownership have also suggested that the Commission return to promulgating media broadcast ownership rules that promote minority broadcast ownership.[167] In *Grutter v. Bollinger*, the U.S. Supreme Court found that the educational benefits that University of Michigan law students obtain from interacting with a diverse law student body furthers satisfies the "compelling interest" element of XIV Amendment equal protection strict scrutiny.[168] Additionally, the Court found that the University of Michigan School of Law's admission's program (considering a student applicant's ethnicity as a "plus" factor among a list of other criteria for choosing applicants for admission to the school of

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[165] *Id.* at 10.
[166] *See* TURNER, *supra* note 3 at 3; *See also* OFORI, *supra* note 10 at 26.
[167] *See* WINSTON ET AL., *supra* note 105 at 10-11; *See also* Leonard M. Baynes, *Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?* 33 U. MICH. J.L. REFORM 87 (1999).
[168] Grutter v. Bollinger, 539 U.S. 306 (2003).

law) was "narrowly tailored" to survive XIV Amendment equal protection strict scrutiny.[169]

The comments report that although the Commission has hesitated to promulgate rules that promote minority media ownership since *Adarand Constructors, Inc. v. Pena*[170] there has never been any direct precedent prohibiting the Commission from taking steps to promote minority ownership.[171] Moreover, recent comments filed by the NABOB suggest that the Supreme Court's decision in *Grutter* allows the Commission to now consider such policies to increase minority radio and television broadcast ownership.[172] Thus, the Commission might be able to advance minority preference policies, so long as they are "narrowly tailored" to advance the Commission's "compelling interest" of diverse media broadcast ownership, transcending into diversity in viewpoint and content (in accordance with the Commission's mandate to issue broadcast licenses in the "public interest, convenience, and necessity").[173]

Conclusion

This comment has suggested that consolidation and highly concentrated radio broadcast markets have a negative impact on minority radio broadcast station

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[169] *Id.*

[170] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that government racial preference programs are subject to strict scrutiny under the equal protection clauses of the V Amendment and XIV Amendment).

[171] *See* WINSTON ET AL., *supra* note 105 at 10-11 ("NABOB and Rainbow/PUSH also pointed out in our Petition for Reconsideration that the U.S. Supreme Court's decision in *Grutter v. Bollinger* eliminates any impediment to adopting rules to promote minority ownership. Although there was never any precedent prohibiting the Commission from taking steps to promote minority ownership, the Commission had shied away from such policies after the Supreme Court's *Adarand* decision. The Supreme Court's decision in *Grutter v. Bollinger* clearly permits the Commission to consider such policies now").

[172] *Id.*

[173] *See generally* Bachen et al., *supra* note 113.

ownership. When considering the importance of broadcast ownership diversity to viewpoint and content diversity, the current state of fewer broadcast owners delivering information on over the air radio and television to the public limits the marketplace of ideas and democratic discourse and dialogue in America.[174] If the Commission is to stay true to its mandate to issue broadcast licenses in the public interest, it is imperative that the Commission seriously analyze the current state of minority radio and television broadcast ownership. The Commission has an opportunity to ask the right questions in the FNPRM, commission studies using the proper contracting methodology to allow for critique of the scope of the studies and selection of the researchers best qualified to do the work, and assess the public comments delivered in its latest FNPRM to guide it in promulgating future media broadcast ownership regulations.[175] Furthermore, it is the hope that the information provided in this note can aid the Commission in future rulemaking proceedings so that abysmal state of minority broadcast ownership can reach a level of parity with other U.S. sectors and industries where minorities have thrived and flourished.

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[174] *See* McLintock, *supra* note 18 at 594.
[175] *See* Press Release, *supra* note 157; *See also* Eggerton, *supra* note 157.