

Overview

Common Frequency, a educational non-profit for furthering broadcasting in the public interest, submits this reply comment for the Federal Communications Commission's ("Commission" or "FCC") "REPORT ON BROADCAST LOCALISM AND NOTICE OF PROPOSED RULEMAKING" ("Report") released January 24, 2008.

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Introduction

Although the public and broadcasters supplied myriad comments concerning the *Report*, very few provided analysis of the current marketplace or provided viable solutions. Many broadcasters hired legal agencies to submit treatises concerning the Commission's inability to regulate outside its legal scope, additionally alluding to the burdens—time and money—of new regulation. There was ample public comment from all sides confirming a general desire to improve radio yet preserve free speech. Our intention is to reply to specific comments, provide greater insight through data, and propose solutions that take the concerns of both broadcasters and listeners into account.

Overview of Comments

In culling a sample of recent comments, it appears that respondents fell chiefly into three groups: 1) people who identified themselves as Christian radio listeners and opposed any further general regulation; 2) other members of the public concerned that radio is not currently serving them, with a smaller number stating otherwise; and 3) broadcast-affiliated entities concerned with specific areas of the proposed rules.

The first group of respondents appeared disconnected from the issue at question (broadcast localism), appearing as solicited responses. Some expressed outrage, and made reference to “censorship,” the “singling out Christian radio,” and “limiting free speech,” etc. A majority of these comments appeared to originate from calls to action by certain broadcasters who appeared to misrepresent the proposed regulation as draconian measures of censorship, regulations against Christian broadcasters, and the FCC's mandate to curtail free speech. Other respondents specifically mentioned their allegiance to broadcasters such as KLOVE radio. Some broadcasters who solicited these comments linked their website to www.savechristianradio.com, which hypothesized the effects of the proposed regulations as such:

[Introduction]: “FCC Proposals could silence Christian Radio! Tell the FCC to keep free speech free and not to tamper with Christian and religious programming”

“Christian broadcast stations could be forced to take programming advice from...atheists, abortionists or secular humanists”

“...such requirements will give Christian Radio’s opponents powerful new tools to harass and possibly silence Gospel inspired voices”

“The FCC is also considering ways it could increase its coercive powers to force speech on unwilling broadcasters”

(Goes on to show how you can cut and paste a comment to the FCC or contact senators and congressmen).

We feel these tactics mislead certain radio listeners, and may be counterproductive, as they do not reflect the Commission’s overall intent of maintaining local public service and its longstanding defense of free speech. Ironically, the substantial amount of comments echoing the above concerns remind us of the media’s consolidated nature, and power to publicize only self-serving perspectives. The media has either not mentioned the rulemaking to the public, or has painted one viewpoint of the proposed rules by appealing to emotion and religion to seduce and align the public under the view of certain media owners.

Many comments were submitted in defense of KLOVE (Educational Media Foundation, “EMF”).¹ When the KLOVE network—built upon lax ownership rules that promoted the proliferation of nationwide networks—has an empire large enough to orchestrate a countrywide call-to-action campaign where all respondents are against localism, this itself indicates the dangers of the lack of regulation and diversity in media, and the power presently in the hands of a few select licensees. The authors of these solicited comments may not even realize that the Commission is trying to extend their participation in local broadcasting, and their ability to start low power radio stations for their own, local communities. This kind of campaign of influence has been seen before. For example, in 1993, Rush Limbaugh aided in dismissing the reinstatement of the Fairness Doctrine by inciting listeners from coast

¹ See the numerous disjointed comments in response to MB Docket 04-233. EMF is the fifth largest owner of full power stations in the US as of 2005, according to records derived from BIA Financial Network.

to coast to rise up and call Congress.² Again, in 2004, Sinclair Broadcasting (which had been able to expand under deregulation to could reach a quarter of US homes), was able to influence voters by running the program “Stolen Honor” before the presidential election, and by blocking an episode of Nightline due to its interpreted political bias.³ In the bigger picture, similar internally-led media campaigns to sway voters, or to lobby for or against regulation occur more often than we perceive.

We respectfully request that the Commission denote the number of comments that appear “solicited” in nature, that appear duplicated, or that are similarly disconnected with the localism issue, or *the Report*, and tally them in a sub-group—with dates denoted—for informational purposes. In addition, we request the Commission note the amount of comments from broadcasters.

General Broadcaster Comments: Broadcasters, for the most part, have not embraced the Commission’s proposed localism regulations. This is to be fully expected, as no industry applauds any additional regulation. New regulation means added quality control, which is perceived as an additional cost of doing business. Two proposals that seemed to receive universal disapproval were the 24-hour studio staffing, and the moving of main studios into the community of license. Common Frequency likewise disagrees with these proposals. We are unsure how these measures will improve upon localism, as they seem to have weak connections to increases in local service. We believe that these measures would impact the operations of educational licensees the hardest.

Some broadcasters based their arguments for deregulation on speculative positions drawn from the Commission’s discourse over deregulation in the 1980’s. Within the proposed FCC rulemakings “In the Matter of Deregulation of Radio” and “In the Matter of The Revision of Programming and Commercialization Policies,

² Referred to as “The Hush Rush Law” in interview with Louise Slaughter (D-NY) (12/04) on Bill Moyers’ program regarding her fight in Congress to reinstate fairness on the airwaves. In the same interview she explains how talk radio killed a seat belt law in Massachusetts.

³ “Anti-Kerry film sparks DNC response”, Katie Benner, October 12, 2004 *CNN/Money*
http://money.cnn.com/2004/10/11/news/newsmakers/sinclair_kerry/index.htm

Ascertainment Requirements, and Program Log Requirements for Commercial Television”, the Commission attempted to give reasoning for deregulation based upon theoretical market concepts. Yet as no convincing data is provided today to back the benefits of deregulation, deregulatory theories should remain debatable unless otherwise proven effective through unbiased studies.

Community and College Broadcasters: (*CBI, UC et al, SRC et al, etc.*): A major concern of non-commercial broadcasters is that their operations could be hurt since these organizations operate on shoestring budgets using primarily volunteer staffs. Common Frequency full-heartedly agrees with this concern. The bulk of culturally diverse and educational programming, and independent news and public affairs, originate with community and student broadcasters. Penalizing these broadcasters for the inadequacies of other broadcasters would be detrimental to their operations. Public broadcasters do have a legitimate reason not take on the burden of extra regulation; their CPB required advisory boards would be duplicative in nature to the proposed rules.

It was also argued that non-commercial educational (“NCE”) stations are not allotted to serve communities identically as commercial licensees under Section 307(b), and thus are exempt from localism requirements, and on this point, we disagree. The Commission has indicated otherwise.⁴ Not all NCE licensees subscribe to upholding localism. Some of the most blatant offenders could be considered worse than commercial licensees. An exemption cannot be given to all NCEs due to the fact that many are exemplary stewards of the airwaves.

Balancing Broadcaster and Public Concerns

⁴ “...the obligation of each broadcast licensee, commercial and noncommercial alike, is and always has been to serve the problems, need and interests of the communities which it is licensed” *Georgia State Board of Education, WVAN-TV license renewal 70 FCC 2d 948 (1979)*.

We insist that there is a middle ground for creating new regulation between broadcaster and public concerns. Commercial broadcasters are chiefly concerned with unjustifiable costs that could be accrued in untested regulation—and whether the expense is worth the extra local public service. Noncommercial broadcasters are concerned with burdensome paperwork, additional costs, and manpower that is beyond the scope of their operating regiment. Our desire is that broadcasters step up to the table and agree to points without defaulting to needless litigation.

Regarding Comments of the National Association of Broadcasters

The National Association of Broadcasters (“NAB”) has indicated that the Commission has not provided compelling evidence to propose additional rules. We believe the NAB has not provided any substantial proof of this claim. The NAB claims the Commission cannot impose any rulemaking concerning localism because “the Commission must supply a reasoned analysis supported by an adequate factual basis.”⁵ Common Frequency asserts that, on the contrary, it has. The Commission has applied the same protocol to obtain evidence as it had in its decision to deregulate radio in 1981⁶. In fact, it declined to extend the comment deadline in 1980, whereas at present it has extended the deadline for further comment. Additionally, petitioners can easily comment on the present proposal via the Commission’s website.

One problem/contradiction we find in the NAB’s argument is that in order to provide substantial evidence concerning whether the industry is or is not serving the public interest, the NAB would be required to systematically document station localism efforts⁷ and compile playlists⁸ for analysis by the Commission. This requirement is one the Commission is suggesting in its current *Report*, yet it is not one the NAB is in favor of. However, in the NAB’s pursuit of a proper “reasoned analysis”⁹ that it is insisting the

⁵ NAB comment p. 2.

⁶ *In the Matter of Deregulation of Radio*, 84 FCC 2d 968 (1981) Para 5-6: The Commission had panels and hearings, and sought comments before making its decision on the same matters at it is currently.

⁷ *Report* para 114, regarding whether the Commission should audit issues/programs.

⁸ *Report* para 112, regarding whether the Commission should monitor playlists.

⁹ NAB comment p. 2.

Supreme Court stipulate, the Commission now finds good cause to ask broadcasters to comprehensively document localism efforts and compile playlists.

Regarding Comments of Congress: Considering that the NAB has spent an estimated 8.9 million dollars in lobbying in 2007,¹⁰ it is no surprise that 123 members of Congress (“Members”) would sign-on to a petition questioning FCC Localism proceedings. These public servants are aiding industry over public interest since the public is essentially in the dark about the issue. As such, there is little chance of constituency backlash connected to any Congressperson’s disapproval of additional localism efforts. *Members* “agree with the Commission that fostering more and better local programming is a laudable goal” but “do not agree that mandates from Washington are the best means of achieving that goal.”¹¹ These *Members*, however, do not prescribe any other way of fostering localism since the market has failed. Many general commenters critical of proposed regulations also do not indicate any measure the Commission could pursue to improve upon localism.

The NAB’s Evidence: The opening examples that the NAB provide argue that deregulation has worked in the public interest by citing a BAI Financial audience analysis¹², the 2002 Biennial Regulation Review¹³ (“Biennial Review”), and a *New York Times* article¹⁴. Yet neither of these offer supporting evidence for deregulation, pertinent to localism.

The BAI report demonstrates only that the quantity of stations serving general programming formats has been changing; it reports nothing about the quality or

¹⁰ Statistic supplied by Center for Responsive Politics.

¹¹ Letter to Hon. Kevin J. Martin, Chairman, FCC, from Rep Marsha Blackburn, et al, US House of Reps (April 15, 2008) (“April 15 Congressional Letter”).

¹² See Comments of NAB in MB Docket No. 06-121, Attachment G, BIA Financial Network, Over-the-Air Radio Service to Diverse Audiences (Oct. 23, 2006).

(http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520004084)

¹³ 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13664-65 (2003).

¹⁴ John R. Quain, “Local Radio is Cutting the Static and Going Digital, Finally”, *The New York Times* (March 25, 2007) (available at

<http://query.nytimes.com/gst/fullpage.html?res=9C03E0D61430F936A15750C0A9619C8B63&sep=13&sq=digital+transition&st=nyt>).

quantity of local content. Merely reporting that stations are broadcasting more programming formats in Spanish, or catering to an “urban” format says nothing about whether local issues in Latino or Black communities are being addressed during airtime. To draw a comparison, one could conclude that low-income minorities in central cities are having their dietary needs adequately served based on the prevalence of corner markets. But on closer inspection, these markets may not be providing fresh fruit or vegetables, but may be selling candy bars, chips, soda, and alcohol—inexpensive, vitamin-poor merchandise that may sell well, but lacks substance.¹⁵ The same level of scrutiny needs to be applied to radio format descriptors. Formats indicate nothing about the content of the programming, and whether or not it has served localism. An urban format could use “urban” as code for the latest and hugest R&B/hip hop hits, without ever serving *local black music artists*, or addressing *black community issues*. Likewise, CHR/dance, CHR/urban, Adult CHR, CHR/pop, and CHR/rock could be considered five different formats, though they all have overlapping artists. A study by *Future of Music* found that “just fifteen formats make up 76% of commercial programming” and “radio formats with different names can overlap up to 80% in terms of the songs played on them.”¹⁶

The Biennial Review concluded that there is a greater total quantity of local news, but that was due to the greater amount of stations available today, not to deregulation. The *Times* article, given as an example, was about digital radio and the possibility of multicasting providing an additional HD channel, not localism. In conclusion, the argument used by the NAB, and its supposed “evidence” is not particularly applicable to the issue at hand—that of localism, and of serving the specific interests of unique, discrete communities.

¹⁵ Referred to as the “Grocery Gap”; there is a problem in low income communities that there is a lack of grocery stores serving healthy food. See “Cities Study Dearth of Healthy Food”, Chris Kenning and Jessie Halladay, *USA Today*, Jan 25, 2008 (http://www.usatoday.com/news/health/2008-01-24-fooddesert_N.htm).

¹⁶ From report *False Premises, False Promises*, by Peter DiCola for the Future of Music Coalition December 2006, p. 82-83 (<http://www.futureofmusic.org/research/radiostudy06.cfm>).

Commenters at Hearings: The NAB claims that the record does not show overwhelming community concern with broadcast stations. Even in their examples—FCC hearings in Maine and South Dakota—the majority of the crowds did not speak in positive terms regarding coverage from local broadcasters.¹⁷ The NAB claims, referring to lack of support over the issue of localism, that “this same pattern is true of the record as a whole.”¹⁸ We feel that this assertion is patently false. At the Los Angeles hearing, where we were present, virtually all commenters did not speak in positive terms at both hearings, and at other hearings the majority of commenters expressed the same. The NAB claims the public submitted a “dearth of quality comments,”¹⁹ by which they mean that little hard data or viable solutions were submitted. But members of the public were only given a couple of minutes each to comment, and it is assumed that most did not have the technical mass media backgrounds to do so. It is up to the Commission to translate solutions based upon general collected testimony.

The NAB hints that the Commission has “thin rationale” for rule changes based upon a small fraction of commenters that may not represent the total.²⁰ Again, the FCC used this same protocol to validate deregulation in the 1980’s. But if this “thin rationale” is not enough evidence, we here provide data from two professional survey firms:

In a 2006 survey by Bridge Ratings,²¹ when asked, "Is traditional radio better off today than it was ten years ago?" the majority of each the groups classified as radio “listeners,” “ad buyers,” and “Congress” all felt radio was not better off. Bridge asserts in the report:

Industries supporting the new legislation predicted it would add 1.5 million jobs and boost the economy by \$2 trillion. By 2003, however, telecommunications’ companies’ market value had fallen by about \$2 trillion, and they had shed half a million jobs.

¹⁷ NAB comment p 5, In Portland Maine: ~114 individuals, “51 described positive coverage”, thus 63 did not describe positive coverage. In Rapid City, South Dakota, ~75 individuals, “33 described positive”, thus 42 did not.

¹⁸ NAB comment p 6

¹⁹ *Ibid.*

²⁰ *Ibid.* p 4-6

²¹ Survey by Bridge Ratings “The 1996 Telecommunications Act – Is Radio Better Off?” Feb 14, 2006, with overview at (http://www.bridgeratings.com/press_020806-Telecom.htm).

And study after study has documented that profit-driven media conglomerates are investing less in news, programming and information, and that local news in particular is failing to provide viewers with the information they need to participate in their democracy.

A phone poll conducted by Greenberg Quinlan Rosner Research of 1000 people found that “70 percent describe consolidation [of media ownership] as a problem.” Additionally by a “56 to 30 percent margin, the public believes there is more bias in ‘national newspapers and broadcasts’ than in ‘local newspapers and news broadcast.’ Consolidation of ownership threatens the autonomy of the local outlets that the public prefers and relies on and eliminates the diversity of voices in the news media that prevents imbalance in news coverage.”²²

“Postcard” Renewal: In the NAB’s *Busting the Broadcast “Postcard” License Renewal Application Urban Legend*, NAB debunks the “urban legend” that the renewal process for a radio station is not a “postcard”, but a “book.”²³ We fail to understand the punch line, however, considering that they reveal the overall time it takes to read and fill out the radio renewal *book*, which is, “voluminous, detailed, and substantive,”²⁴ is only **4.155 hours every eight years.**²⁵ Whether it is the size of a postcard, or the *Encyclopedia Britannica*, four hours is only four hours. The NAB declares this process is “rigorous and thorough,”²⁶ although we are unclear about their meaning. In addition, they detail that “8.1% of all renewal applications either were not granted, have yet to be granted, or were granted with a forfeiture or admonishment.”²⁷ The statement fails to document any cases in which a licensee was denied renewal based upon not serving the local public interest because *a radio renewal form is not contingent upon these details*. According to

²² Greenberg Quinlan Rosner Research Poll October 18, 2007 entitled “Public Opposed to Media Consolidation”. *Can be found at* http://media-democracy.net/files/mdco07m4_public_revised.FINAL_.pdf

²³ NAB comment, Attachment A.

(http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520004079).

²⁴ *Ibid*, p 11

²⁵ *Ibid*, How long does it take to fill out a radio renewal form? The government’s estimate made by the Office of Management and Budget (OMB) states 1.64 hours for the renewal, 1.375 hours for the ownership form, and 1.14 hours for the EEO report, equaling 4.155 hours.

²⁶ NAB comment, p 25.

²⁷ NAB comment, Attachment A, p 13.

FCC CDBS, we queried “renewal” coupled with “denied,” and the database gave us only 6 FM, 4 AM, and 2 TV renewals going back to 1982 that have been denied.

The FCC’s *Report* is responding to criticisms that the FCC does not thoroughly examine whether a licensee has served in the public interest.²⁸ The overall conclusion we draw from the NAB’s evidence is that we cannot fully understand how easy it is for broadcasters to renew licenses, nor how localism or public service plays a part in radio license renewal. Currently, no public interest stipulation exists in the renewal radio form—only technical data, owner information, EEO reporting, and a couple of other, certifications. Because of the limited characteristics of radio, the FCC is, in fact, granted the power to go beyond considerations of financial and technical qualifications at renewal time, and to demand evidence of adequate service in the public interest.²⁹ The current four-hour radio renewal system has no minimum programmatic stipulation for licensees to comply, so the FCC cannot make any judgment concerning whether the licensee is operating in the public interest. According to the Supreme Court, the FCC’s powers are not limited to “engineering and technical aspects.”³⁰ The Supreme Court held the Commission may impose “reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community”³¹. In 1981, several broadcasters asked the Commission for license renewal standards:

A number of licensees [*34] and industry members argue that, although they favor deregulation, they believe the Commission should articulate some standard, mandatory or otherwise, by which licensees could assure via performance that their license would be renewed. Among those taking this position are the National Radio Broadcasters Association and Station WISM. Committee for Community Access, Fisher Broadcasting and Wismer Broadcasting all allege that it is unfair to licensees not to inform them in advance as to what the Commission expects of them. Several commenters favor nonmandatory non-entertainment programming guidelines, adherence to which would ensure the likelihood of prevailing in a license renewal contest. Among them are Entertainment Communications, Inc., Ten Eighty Corporation and the Tribune Company. Bonneville International Corporation suggests that the Commission adopt a standard of quality programming, as determined by the licensee, as an element of operation in the public interest. Susquehanna Broadcasting [*319] Company supports a content-neutral standard,

²⁸ “Report” paragraph 114.

²⁹ National Broadcasting Co, Inc et al. v. United States et al. US 190, 217 (1943) “The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.”, the FCC is “not limited to the engineering and technical aspects of radio communication”

³⁰ *Ibid.*

³¹ *In the Matter of Deregulation of Radio* 73 FCC 2d 457 (1979), citing *supra*.

such as the relation between ascertained needs and programming. NAB argues vehemently on behalf of licensee stability, encouraging adoption of [*35] a "1980 Programming Policy Statement," based on compliance with the Fairness Doctrine and other Commission rules, under which a license would be renewed absent a pattern of abuse or serious dereliction. NAB believes that some evaluation of past performance is necessary in defining a renewal standard, but that this should not be attempted with mathematical precision. Joint comments filed by Dow, Lohnes and Albertson on behalf of several licensees also suggest adherence to other Commission rules, such as the Fairness Doctrine, access for political candidates, equal opportunity employment and lowest unit charge rules, as ensuring a license renewal expectancy. CBS likewise opposes non-entertainment standards per se, but advocates an articulation of a reasonable nonquantitative guideline defining operation in the public interest for license renewal purposes. ABC presses for a definition of adequate past performance, to be phased in over time, which would specify a number of hours of non-entertainment [*320] programming (including PSAs), adherence to which would preclude comparative proceedings on renewal.³²

We partly agree with the NAB's 1981 statement (underlined for clarity), and that of several other prominent broadcasters, who call for some sort of programming standards to gauge renewals. In fact, the Commission pushed for deregulatory measures beyond what the industry and interest groups desired (including NAB, National Radio Broadcasters Association, Department of Professional Employees, National Citizens Committee for Broadcasting, National Citizens Communications Lobby, Office of Communication-United Church of Christ, National Radio Broadcasters Association, etc).³³

Regarding the NAB's Constitutional concern regarding the Commission's limited statutory authority: The Commission, in the past, has sought to provide insight into broadcast matters concerning rules to be debatably guided by judicial or Congressional oversight if it has substantial reason, such as in the 1985 *FCC Fairness Report*.³⁴ Recently the FCC has tackled the subject of fleeting expletives, which borders on a Constitutional issue, but nevertheless the Commission has jurisdiction to at least pursue these issues in the public interest, sometimes leading to the court to provide a sharper definition for proper regulatory path.

Television Programming

³² *In the Matter of Deregulation of Radio* 84 FCC 2d 968 (1981) Appendix E para 43.

³³ *Ibid*, and para 7.

³⁴ *Fairness Report* 102 FCC 2d 145 (1985).

Total News/Public Interest Programming: The NAB makes reference to a 2000 study in which “non-entertainment programming of stations affiliated with the four major networks in 17 markets showed that the average amount of non-entertainment programming offered by these stations in each of those markets was more than double the 10% benchmark that the Commission had specified in its earlier renewal processing guidelines,”³⁵ though it fails to credit the study. It then references a study done by Belo, a broadcaster, and CBS, another broadcaster (“According to CBS, the amount of news and public affairs programming it offered tripled in the period between 1979 and 1990 alone”).³⁶ We are skeptical regarding the credibility of a media company’s self-audited, ambiguous facts, so we looked for an independent study from an identical timeframe with a more scientific sampling rate:

Benton Foundation commissioned a study to examine the level of public affairs programming during a two-week period by more than 100 television broadcast stations in approximately 25 randomly selected markets. The study revealed that the commercial television broadcast stations in these markets devoted an average of 1.1 hours per week (or less than one half of 1% of their total time) to local public affairs programming, and that competitive conditions, market demographics, and stations characteristics did not significantly affect how much local public affairs programming was aired. Thus, the Benton Foundation concluded that the Commission should require broadcasters to air a minimum level of public affairs programming if the public wants to have more of such programming than its study revealed.³⁷

Reference to this study, taken from a report from ex-FCC Chairman William Kennard, is more on-topic with the Commission’s inquiry into localism (and not just “non-entertainment” programming). The *less than one half of 1%* public affairs programming on average, that this source cites, should be a concern.

The NAB goes on to state that the “number of hours of news and public interest programming aired on television stations has increased over the decades,”³⁸ referring to the Biennial Review. However, they do not acknowledge that this is because the

³⁵ NAB Comment, p 29.

³⁶ *Ibid.*

³⁷ *Report to Congress on the Public Interest Obligations of Television Broadcasters as They Transition to Digital Television*, William E. Kennard, Chairman, FCC.

³⁸ NAB comment, p. 29, reference to *2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13664-65 (2003).

number of licensed stations has gone up, not because each station is broadcasting more news and public affairs programming.

More accurately, in a study by Ronald Bishop and Ernest A. Hakanen, television programming schedules from 1976 (before deregulation) were analyzed, 1985, and 1997 found that the number of public affairs programming in the markets studied had declined over the years: “There was a significant decrease in the number of hour-long programs aired and a significant relationship across all markets between the year studies and the days of the week on which a program aired.”³⁹

Duopolies: Consolidation of ownership also affects local news programming. A 2005 study found that duopoly stations (two stations in a market controlled by a single owner) aired “significantly less local news programming than their same market non-duopoly counterparts.”⁴⁰

Local vs. Nationally-Owned Stations: In regard to locally-owned stations, which have been on the decrease, FCC researchers Keith Brown and Peter Alexander, in an FCC working paper, determined that locally owned news stations provided more than five-and-a-half minutes more of local news for each half-hour newscast.⁴¹

Independent Productions: At the Los Angeles FCC hearings, members of the television industry echoed that independent producers had been hurt by deregulation. Due to the repeal of Financial Interests and Syndication Rules (FinSyn), “the number of independent suppliers has slipped from 23 in the early '90s to two currently -- Sony and Warner Bros” and, “In the 1992-93 season, 66% of network primetime television was created by independent producers, with the networks accounting for the remaining 34%. Today, in the 2006-07 season, the independents' share has fallen to

³⁹ *In The Public Interest? The State of Local Television Programming Fifteen Years after Deregulation*, Ronald Bishop and Ernest A. Hakanen, *Journal of Communication Inquiry* 2002; 26; 261.

⁴⁰ A report by Micheal Zhaoxu Yan and Yong Jin Park, Dept of Communication Studies, University of Michigan, Sept 2005, *Can be found at* (http://web.si.umich.edu/tprc/papers/2005/488/tprc2005_yan.pdf).

⁴¹ *Do Local Owners Deliver More Localism? Some Evidence From Local Broadcast News*, Working Paper, June 17, 2004 Federal Communications Commission.

24%, while the networks and their affiliates own and control 76% of primetime television."⁴²

Deregulation Originally Relied on Questionable Data

The two key motivations for re-regulating public interest requirements are: 1) Is there supporting data to validate a decreased amount of public service (and/or disapproval from the public), and 2) were original assumptions and data for deregulation flawed? We believe both to some degree.

Elimination of Programming and Ascertainment Guidelines for Television: The reference frame from which the Commission derived data on television programming levels was over a time period of the 1970's when programming regulation was put into effect, although in part, independent UHF channels were exempted from programming guidelines. The results showed, UHF's performed programmatically the same as stations with FCC program guidelines. However, in FCC report data, it does not separate the control group from the experimental group—they simply interact in the marketplace in competition. We think the FCC minimum standards for VHF—plus ascertainment—set the standard for programming for each market, encouraging the UHF's to compete with them, discrediting the outcome of the study. The Commission then used data to come to terms that ascertainment and guidelines were not needed anymore:

The current figures for non-entertainment programming categories show percentages for beyond those sought under the guidelines. These figures indicate that non-entertainment programming is a financially important part of the broadcaster's revenue and that there are reasons other than regulatory oversight to engage in this programming⁴³

There could be another conclusion to this also. Could it be that ascertainment dictated a certain minimum number of issues to be covered by public affairs/information programming, and that additional informational programming—over FCC guidelines—

⁴² “A call for more owners - H'wood players to FCC: TV hurt by consolidation” by By Carl DiOrio, *Hollywood Reporter*, Oct 4, 2006, quoting Producer Tayler Hackford.

⁴³ *In the Matter of The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television* (“In the Matter... Television”) 98 F.C.C.2d 1076 (1984), para 49.

responded to this need? The Commission was assuming that competition led to the levels of programming higher than the base levels recommended by the FCC. If this were true, it would be assumed that in larger markets, where ad revenue and competition is higher, stations would perform better; this is a debatable assumption. James Wollert and Michael Wirth write:

Since television stations operating in smaller television markets are expected to earn lower profits and since station which earn lower profits are expected to provide less public interest programming...[“taxation by regulation”, *see footnote*], stations facing less over-the-air television competition could be expected to provide less public interest programming because their profits are lower⁴⁴. The results show [from the television data]... that the average station which operated in a ‘low competition’ market (one or two stations) devoted a larger portion of its broadcast day to informational programming than did the average station in a three station market, and almost as much as the average station operating in a ‘high competition’ (four or more) setting.⁴⁵

This weakens the competition theory. But even disregarding the above, if *more stations equals more competition equals more informational programming per channel* is true—the first theory—then eventual deregulation of ownership, which happened later, would yield less informational programming, which was shown in the 2005 study.

The FCC also proposes that in a deregulated market, stations not meeting minimum programmatic guidelines in categories would be taken care of by other stations compensating for them: “Failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations.”⁴⁶ This ideology may allow for a snowball effect. What happens if a broadcaster provides the least local/information/educational programming in the market turns the most profit, saving money on not producing local-affiliated programming, and the other stations follow. What if paid infomercials turn more profit than actual ratings? The effect would be a total decrease in localism over several years time.

⁴⁴ Reference Richard Posner, ‘Taxation by regulation’, *Bell Journal of Economics and Management Science*, Vol2, p 22,1971, calls these types of systems “taxation by regulation”. The assumption is that broadcasters spend some of their profits on unprofitable (or less profitable) public interest programming for public obligations.

⁴⁵ See “Control by Government or Market” James A. Wollert and Michael O. Wirth, *Telecommunications Policy*, September 1982 p 155-163. (see p. 159-160).

⁴⁶ *In the Matter... Television* 98 F.C.C.2d 1076 (1984), para 22.

Radio: Artificially-Imposed Scarcity Negates Marketplace Theories: Regulation Is The Alternative

The low cost and ease of production—and possibilities of more band capacity and programmatic diversity—make radio more accessible than television for new entrants to break in to. Programming types are endless, but are limited by how efficient the government allots channel placement in a finite spectrum. Television is planning to switch to a superior channel model come February 2009. For the future of radio, instead of digital multiplexing—which would have brought superior sound quality, more channels, and more diversity—we are stuck with an antiquated FM system from the 1940's, maintained as the status quo through industry lobbying, with a piggy-backed ineffective digital stream.⁴⁷ One of our key arguments of why deregulation has failed radio is because the marketplace was intercepted by big business to boost “scarcity”.

FCC has downplayed key aspects of the *scarcity*⁴⁸ issue in recent eras due to reasoning that never came to fruition, thus depriving the public of diversity and localism. In 1979, the Commission provides two reasons that scarcity need not to be a contemporary issue: “interference among radio users” and “total quantity of spectrum allocated to radio.”⁴⁹ The FCC says that the governing of interference on the AM and FM bands can, and have, been changed over time (“these do not necessarily remain constant over time”) to provide more channels (“Changes in these parameters change the total number of stations...”) without changing the total spectrum allocated (“...even when the total amount of

⁴⁷ IBOC broadcast doesn't even cover a stations 60dbu contour, provides interference on the FM band, and does not allow for any new licensees.

⁴⁸ See *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 388–390 (1969), referring to the underlying rationale that broadcasting is different when it comes to free speech. Since the general public does not have access to the airwaves due to the scarcity of channels, a licensee must “conduct[p.1124]himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.” Furthermore, “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”

⁴⁹ *In the Matter of Deregulation of Radio* 73 FCC 2d 457 (1979), Para 124.

spectrum allocated to the broadcast radio service is constant”).⁵⁰ The solution to scarcity in its deregulated market plan was simply to add more channels over time to keep with market demand. This has not materialized.

The one attempt to redeem this reasoning was creation of a Low Power FM (LPFM) service⁵¹, in which the NAB counteracted that interference would be a byproduct, lobbying for the Radio Broadcasting Preservation Act of 2000.⁵² Thus according to the industry, the band is at capacity, but according to data from a scientific, independently-produced study (referred to as “Mitre Report”), it is not.⁵³ The Congressional mandate does not bode well with the Commission’s proposed manor of solving the “diversity” problem under deregulation.

The FCC says diversity needs to be promoted (“The Commission's concern... also relates to the diversity of the programming”⁵⁴), but it questioned whether regulatory efforts like the Fairness Doctrine, Ascertainment, and EEO requirements, would be the best approach in *Deregulation of Radio*. Instead the Commission recommends “a better key to attaining many voices, however, is a structural one--maximizing the number of stations in a market.”⁵⁵ However, most urban markets hold virtually the same amount of channels as they had in the 1980’s. No promised plan has been amply enacted to address either scarcity or diversity.

Other than LPFM, the implement of channel expansion, Eureka 147 Digital Audio Broadcasting (DAB), promised to bring superior fidelity and increased channels. The US chose In-Band On-Channel (IBOC) DAB over Eureka 147 DAB for very specific underlying reasons. Even before IBOC was implemented it was known to be *inferior* to Eureka 147⁵⁶; the major selling point of IBOC was its ability to sustain the scarcity of

⁵⁰ *Ibid*, Para 125.

⁵¹ Report and Order in MM Docket 99-25, FCC 00-19 (2000).

⁵² This Act limited LPFM by requiring third adjacent channel interference protections.

⁵³ Mitre Report suggest that third adjacent channel interference protections may not be necessary.

⁵⁴ *Ibid*, Para 191.

⁵⁵ *In the Matter of Deregulation of Radio* 73 FCC 2d 457 (1979), para 193.

⁵⁶ Eureka 147 is the digital standard that the rest of the world has opted to replace analog FM. See *EIA/NRSC DAB SYSTEM LAB TEST RESULTS: AN ASSESSMENT*: “On August 22, 1995, the Digital

bandwidth to maintain the profitability of current licensees and suppress the ability of new applicants. A report in 1999 from the United States to the non-profit World-DAB concurs:

While the Eureka 147 system has emerged as clearly superior in laboratory and field tests carried out by CEMA (Consumer and Electronics Manufacturers Association), the National Association of Broadcasters opposes the adoption of Eureka 147 in the USA. This opposition is based on... concerns that DAB [Eureka 147] would introduce new competition. In practice, the IBOC trials carried out so far have shown various problems. The digital signal is not robust against multipath problems and might interfere both with the FM-carrier and adjacent channels.⁵⁷

Clearly, upgrading to Eureka 147 would have been exactly in line with the Commission provided in *Deregulation of Radio*—why scarcity was a thing of the past—and how deregulation (more competition) would work in the public interest. Broadcasters derailed this essential principal by choosing an inferior system to artificially limit the amount of broadcast licenses available in each city. Moving to Eureka 147 would have allowed for very efficient use of bandwidth, carrying several audio signals per frequency. This would have allowed for many new entrants to local radio markets, in which new competition would create diversity and better programming, as the Commission predicted in *Deregulation of Radio*. The NAB did not want this to happen:

...for broadcasters in this country with well-established brands, if you will, the idea of moving to a whole new portion of the band was, to me, a nightmare. Well, thanks to Bob [President, Ibiquity] and his folks, and many others, IBOC has turned into, at least as far as I am concerned, a marketer's dream.⁵⁸

Audio Radio Subcommittee of the Electronic Industries Association (EIA) released the results of independent laboratory tests conducted on seven proponent Digital Audio Broadcasting (DAB) systems. Measurements and related audio recordings for each system were made at NASA's Lewis Research Center (LeRC) in Cleveland OH. Subjective assessments of the audio recordings were carried out at the Communications Research Center (CRC) in Ottawa ON, under contract to the EIA. These tests are the first time all proposed DAB systems were assessed by an independent body using the same evaluation criteria". The report concluded, "The Eureka 147 System produced results that were far superior to any of the IBOC systems with respect to audio quality, signal reliability and non-interference to existing analog services." (<http://www.nrcdxas.org/articles/EIA-NRSLabtest.html>).

⁵⁷ USA's country progress report to World-DAB November 1999, accessible via archive at (<http://web.archive.org/web/20000621104001/http://www.worlddab.org/dabworld/countryupdates.htm>).

⁵⁸ Quote from John Dille (2002 Chairman of the NAB Radio Board; previously chaired the Radio Advertising Bureau, the NAB Congressional Relations Committee, and is the former President to the Indiana Radio Broadcasters Association.) at NAB 2002 IBOC Technology Launch, Las Vegas, NV April 8, 2002.

Proving the elimination of scarcity, however, was one of the essential premises for the elimination of public interest requirements like ascertainment. Today scarcity is a growing issue:

- Unlike Eureka DAB, IBOC would not provide any spectrum recovery and it would not create any new bandwidth capacity.⁵⁹ The adjacent channel bleed-over from a redundant IBOC channel (the same audio broadcast as the primary analog broadcast, and same owner) covers up lower strength signals on adjacent channels. Thus, “the implementation of IBOC means that there will be even less spectrum space left for new operators or services on the current FM dial,”⁶⁰ such as LPFM, and less diversity of the channels that could already be received from fringe-reception analog channels. What is even more problematic is that IBOC is losing marketplace acceptance,⁶¹ and the industry is in talks of increasing IBOC power levels, further inducing interference, and scarcity.⁶²
- The use of translators extends, or redundantly reinforces, established broadcasters at the expense of new broadcasters using those channels for LPFM service. The recent proposal to use FM translators for AM stations continues this domination of the airwaves by current owners, and stokes scarcity.
- The selling prices of radio stations have increased over the years. Recently, Radio One sold KRBV-FM (Los Angeles) for \$137.5 million dollars (it was the 28th ranked radio station in the market).⁶³ In comparison, a premium price of \$45 million was paid for a same-market station, KROQ, in 1986. A radio station

⁵⁹ “FMX+RBDS=IBOC. Will the same formula that befell past attempts at FM improvement apply to IBOC as well?” Skip Pizzi, *Radio World*, March 2002.

⁶⁰ Ala-Fossi, Marko and Stavitsky, Alan G. (2003) “Understanding IBOC: Digital Technology for Analog Economics”, *Journal of Radio & Audio Media*, 10:1, 63-79.

⁶¹ Bridge Ratings Study “HD Radio vs. Internet Radio - Which is Radio's Future?”: The number of people interested in having HD radio is reportedly down. “This eye-opening statistic should produce concern on the part of the radio industry which is literally banking on HD radio to cement its ‘digital future’.”

⁶² “HD Radio Coverage Is A Power Issue” by Leslie Stimson, *Radio World* May 21, 2008.

⁶³ *Radio and Records*, Los Angeles Market Ranking, Spr 08 P1, 1.1 rating.

roughly sells for a multiplier of its cashflow.⁶⁴ That multiplier is also affected by such factors as coverage, market population, and competition. Since many urban areas are growing, urban stations are incrementally increasing in value. Due to deregulation, which decreases competition, advertising dollars become more concentrated among fewer owners, which increases cashflow, and elevates the market value of a radio license. The trend of the increasing value of a radio license in the hands of fewer people indicates that radio licenses are an increasingly scarce resource.

Scarcity can not only be seen as a finite amount of channels, but more precisely a finite amount of owners or networks.⁶⁵ The channels notion assumes there are a diversity of channels to facilitate free speech, but more precisely this means a diversity of owners.

The current deregulatory model assumes scarcity is decreasing. However, according to report data from Future of Music Coalition the amount of FM stations licensed has at least doubled from 1975 to 2005, but the total amount of owners among AM/FM stations had either remained constant, or approximately decreased since 1975.⁶⁶ That may not be so astounding, but according to measurement of metro cume persons, the top ten radio companies had a total market share of 65.3 percent in 2005 (the top four firms had 48 percent of the listeners).⁶⁷ Nay Sayers may point out the diversification of total media sources outside terrestrial broadcast should be taken into consideration. However, ninety percent of the top 50 cable TV stations are owned by the same parent companies that own the broadcast networks.⁶⁸ The top 20 internet news sites are owned by the same media conglomerates that control the broadcast and cable networks.⁶⁹ The Justice

⁶⁴ See Albarran, Alan B. and Patrick, W. Lawrence (2005) "Assessing Radio Station Value: A Review of Academic Literature and Analysis of Contemporary Industry Models", *Journal of Radio & Audio Media*, 12:1, 3 – 13.

⁶⁵ See *NBC v. United States*, 319 U.S. 190 (1943); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 798–802 (1978).

⁶⁶ From report *False Premises, False Promises*, by Peter DiCola for the Future of Music Coalition December 2006, p. 33, See chart.

⁶⁷ *Ibid*, p. 39.

⁶⁸ *Can the Web beat Big Media?* by Farhad Manjoo May 21, 2003 (www.Salon.com).

⁶⁹ Source: Nielson//NetRatings (see <http://www.cyberjournalist.net/features/netratings/0203netratings.htm>).

Department just approved the XM-Sirius merger, allowing for a monopolization of satellite radio. Scarcity appears to be more of a concern now than it has in the 1970's.

If the Commission believes “radio is analogous to other goods and services” with “economic scarcity tend[ing] to induce changes in the amount of spectrum available for radio” by “willingness to adopt technological advance that will increase the number of stations”⁷⁰, what happens to the economic/public service model when technology concerning extra channels are artificially minimized (e.g., axing Eureka 147, LPFM) through political lobbying among its current beneficiaries? Or, what happens when a broadcast organization, or broadcast association, uses its own consolidated media powers gained through deregulation to influence public support to bolster its own dominance via petitioning, voting, and lobbying (e.g., EMF, Sinclair, NAB⁷¹). Intervention of this sort tampers with market forces, thus requiring the reciprocation of regulation. Because of our current situation, we assert that scarcity is to be re-regulated more according to *Red Lion*, “where the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”⁷² Additionally, we believe that the Commission has not fully accounted for Section 303(g) of the Communications Acts, which requires “the larger and more effective use of radio in the public interest” through new and experimental methods. IBOC does not extend ownership of channels to new parties, is ineffective, and arguably not in the public interest.⁷³ One way to encourage localism is to license more channels to new owners, not questionable technology to current owners.

Diversity in a Scarce, Deregulated Commercial Environment

What happens when the ideology of a commercial licensee is in conflict with valid community viewpoints to be aired that jeopardize absolute profit maximization. Consider

⁷⁰ *In the Matter of Deregulation of Radio* 73 FCC 2d 457 (1979), para 127, 128. Having scarcity minimized by market forces is a key piece of having deregulated media work in the public interest.

⁷¹ See explanation prior in this document.

⁷² *supra*, *Red Lion*.

⁷³ Inferior technology, as mentioned. Additionally 66% of consumers not view interested or interested at all according to Arbitron and Edison Media Research, 2008 study “The Infinite Deal”.

that the major networks ABC, NBC, CBS, and FOX have refused to air commercials from the Adbusters Media Foundation, a public awareness organization concerning the education of sociological, environmental, and health dangers consumption/overconsumption.⁷⁴ Another example could include, in 1997, the Fox affiliate in Tampa, Florida fired two reporters and suppressed a story they had produced about one of the Fox network's major advertisers, Monsanto, concerning the health effects of Bovine Growth Hormone (BGH).⁷⁵ Or on a more subtle basis, consider what happens when inexpensive music programming garners the same (or less) ratings than a local public affairs show. Since public affairs programming has production fees associated with it, running the music programming would then be the choice for maximizing net profit.

There are examples where the political bias of large broadcasters reign over free speech. Consider the repeated refusal of networks to air ads from anti-war advocates to liberal groups like MoveOn.org, or conservative groups like United Church of Christ, regardless of factual basis. Or during Super Bowl XXXVIII, CBS refused to air an ad criticizing the growing federal budget deficit, but aired a spot celebrating the White House National Drug Control Policy.⁷⁶ These are all cases that illustrate that even paying customers cannot air legitimate public service concerns on their own airwaves. These commercial broadcast policies essentially at odds with the *Red Lion* judgment.

The Commission visited the tangential concept of minority viewpoints being denied while broadcasters cater to the lowest common denominator. The FCC recognized “the imperfection of the market in this respect”⁷⁷ but proposed one of two regulatory approaches to address this problem:

The structural approach, favored by other commenters and proposed in the *Notice*, would attack the problem when it exists by devising a regulatory scheme that maximizes the opportunity for additional stations to commence operation and by encouraging ownership by and employment of members of minority groups. Wherever these potential

⁷⁴ See (<http://youtube.com/watch?v=lxIFLrxyD84>).

⁷⁵ See (<http://www.inmotionmagazine.com/fox.html>).

⁷⁶ “Ad Rejection By CBS Raise Policy Questions”, Rutenberg, Jim, Jan 18, 2004, *New York Times* (available <http://query.nytimes.com/gst/fullpage.html?res=940CE6DB1439F93AA25752C0A9629C8B63>).

⁷⁷ *In the Matter of Deregulation of Radio* 84 FCC 2d 968 (1981), Appendix D, “The Economic Model and Discussion of Comments Filed Relative to It”, Para 30.

stations are economically viable, the increased competition and consequent market fragmentation would reduce expected market shares and create incentives for licensees to seek more specialized audiences. Because specialized audiences may be too small to support full-time programming, time brokerage and time sharing within a station could be encouraged... We have already implemented many structural rules that have had the desired effect of increasing minority taste programming and generally favor the structural approach to this issue. In addition, pay radio, which until recently was not economically viable, is now beginning to be provided on cable systems that have very large capacities.⁷⁸

The first subject mentioned was making channels available to minority groups; this obviously never materialized since minority ownership is at a low point.⁷⁹ The Commission suggested buying time on stations to broadcast neglected community issues, which seems unlikely due to the steep costs associated purchasing commercial airtime for any community member or group. Additionally, it is likely that the licensee would still have editorial objection to controversial content. Pay radio, or SCA services, are outdated services, and are poor substitutes for reaching constituencies. The Commission additionally pointed to EEO and minority ownership policies as a way of maintaining specialty programming to low income individuals.⁸⁰ The Minority Media and Telecommunications Council (MMTC) calls the FCC's EEO Enforcement "a stunning failure", with its calculations showing that "minority news employment at non-minority-owned English-language radio stations is statistically zero--about where it was in 1950."⁸¹

With deregulation, neither the Commission or broadcasters have addressed what marketplace features provide coverage of diversity of issues when widespread consolidation pairs down ownership to a point where the remaining licensees subscribe to ideologies that will not allow certain pertinent issues to be covered. The opportunity for new competition is currently not provided, and the accountability of broadcasters to carry diverse viewpoints is unenforceable.

⁷⁸ *Ibid.*

⁷⁹ Women, comprising 51 percent of the population, own 6 percent of commercial stations, and racial/ethnic minorities, comprising 33 percent of the population, own 7.7 of commercial stations. According to Turner, S. Derek, (2007) "Off The Dial: Female and Minority Radio Station Ownership in the United States", *FreePress*.

⁸⁰ *In the Matter of Deregulation of Radio* 84 FCC 2d 968 (1981), Appendix E para 93.

⁸¹ "MMTC: Minorities 'Purged' From Radio News" *Radio World*, May 5, 2008, see (www.rwonline.com/pages/s.0100/t.13717.html).

Three of the top seven licensees who owned the most radio stations in the country are religious licensees.⁸² Although we fully stand behind the free speech rights of broadcasters, if the ideology of the broadcaster is to educate the public behind one point of view, how does the marketplace respond to this when there are no more frequencies left to air alternative viewpoints? What about non-commercial broadcasters? Since non-commercial educational broadcasters (NCEs) do not compete in a commercial marketplace level for ad dollars, they don't subscribe to deregulatory formulas of competition to serve listener interests. Unlike the NCE band's original creation for extension of the classroom activities⁸³, very few NCEs behave like this nowadays. Although NCEs do not compete for ad dollars, many now compete for listeners. This competition has turned NPR to emphasize on "attracting relatively affluent and well-educated listeners."⁸⁴ "NPR has fallen far short of living up to its mission statement, formulated by William Siemering at its founding in 1970, that it would 'speak with many voices'; 'encourage a sense of active constructive participation, rather than apathetic helplessness.'"⁸⁵ Siemering's document stated, would not regard the NPR audience as a "market."⁸⁶, although today it now has. If NPR—a network of stations that mainly has centrally-produced public affairs and news for informational programming—is the only public/educational choice in many radio markets, this complicates the Commission's justification that NCEs would pick up some of the diverse cultural void on the radio:

...we would agree that there are some cultural tastes and programming preferences so outside of the mainstream that commercial stations cannot reasonably be expected to respond to them. That is why the government has reserved channels for noncommercial use and has provided financial assistance.⁸⁷

Former FCC Chairman Kennard gives heavy weight to diversity:

⁸² According ranking of top 20 broadcasting companies listed in "The State of the News Media 2007: An Annual Report on American Journalism". Subsection on Ownership, by the Project for Excellence in Journalism.

⁸³ 47 CFR 73.503, referring to NCE licensing "for use in connection with the regular courses".

⁸⁴ Article on Tom McCourt's book "Conflicting Communication Interests in America: The Case of National Public Radio" by Mary Vipond, *Canadian Journal of Communications*, Vol 25, No 3 (2000).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ In the Matter of Deregulation of Radio, 84 FCC 2d 968 (1981) Appendix E, para 103.

In assessing the public interest, we must stay focused on the two key aspects of the public interest: promoting competition and promoting diversity. Not only are both of these goals rooted in nearly half a century of communications law and policy but these goals remain relevant because broadcasters still serve as the most important source of news and information for Americans.⁸⁸

And former Commissioner Susan Ness:

Only through a diversity of voices can we nurture our shared freedom, our common bonds, our local and national communities. And excessive consolidation of a local market can drive out competition, reducing the diversity of voices.⁸⁹

Another major holder of NCE licenses are religious broadcasters. Christian NCE stations have blended with commercial radio styles to popularize the Christian Contemporary format. Although available on many NCE channels, it is indiscernible in feel from some commercial radio adult contemporary formats except for the internal song messages; this has irked traditional Christian educators.⁹⁰

Licensing on NCEs is determined by first-come first-served, and not educational basis. Without ascertainment, if all educational frequencies in a designated place are owned by *Christian broadcasters, non-local studio-waived stations, or NPR affiliates*, does that mean those listening audiences will only be educated with *Christian values, non-local programming, or unenthused sectarianism*? Additionally, NCE stations have no enforcement code to actually broadcast any educational material. Commercial television is mandated to run childrens educational television programming. Thus, the FCC rules require commercial television to run more educational programming than non-commercial educational radio stations—an anomaly.

Although well-intentioned, the “public interest” regulatory scheme, motivated by piecemeal rules of unproven ad hoc advertising and listener market theories⁹¹, reserved

⁸⁸ Kennard, W. March 3, 1998, p.2 *FCC Daily Releases*.

⁸⁹ Chambers, T. (2001). “Losing Owners: Deregulation and small radio markets.” *Journal of Radio Studies*, 292-315 (p 293).

⁹⁰ Students of Bob Jones University may not listen to Christian Contemporary music in their dorms: (www.bju.edu/prospective/expect/rhall.html).

⁹¹ Example: Deregulation based upon unproven theoretical assumptions instead of market testing and continual oversight, collection of data, and regulatory optimization; see reasoning in *Deregulation of Radio* 84 FCC 2d 968 (1981) for example.

educational channels that have no educational responsibility⁹², no direct enforcement or collection of data to guide it⁹³, asymmetric policy⁹⁴, and by occasional politically-motivated ideology from staff and Congress⁹⁵, has arguably lost some credibility in regard to rule making according to intrinsic communication principle. If Constitutional issues run against this scheme of properly regulating in the public interest, the Commission should either 1) seek clarification from the courts and have Congress forge backing rules (although industry lobbying is a wall), or 2) develop a new system based on new models, or models that use feedback data to hone regulation (see our proposed alternative solution).

Overall Effect of Deregulation on Music Radio

In a study done by Steve S. Lee (Vanderbilt University), Lee tested the relationship between industry structure and cultural product diversity using models pioneered by Peterson and Berger (“Measuring industry concentration, diversity, and innovation in popular music”, 1975), Rothenbuhler and Dimmick (“Popular music: concentration and diversity in the industry”, 1982), Burnett and Weber (“Concentration and Diversity in the Popular Music Industry 1948–1986”, 1989) and others. Using information from *Duncan Radio Market Guide*, *Broadcasting & Cable Yearbook*, and *Billboard* airplay charts, Lee found “the results are crystal clear. The number of songs reaching the top ten of all four music charts [mainstream, modern, country, and AC] dropped dramatically”⁹⁶ over the key years of radio deregulation/consolidation (1992-2002). From this conclusion we can draw that there is a drop in the number of artists being promoted on commercial radio.

⁹² No auditing is performed on educational radio to view if it is broadcasting educational radio; no regulations exist to enforce educational radio.

⁹³ Examples: The FCC has no content based requirements for radio, doesn’t collect or track any information about their programming, and automatically renews radio licenses without any type of public service scrutiny.

⁹⁴ Content regulation of broadcast, cable, and satellite are all different, yet their end usage is the same.

⁹⁵ Examples: *Staff*: Proactive FCC elimination of Fairness Doctrine, deep-sixing report on locally owned stations providing more news; *Congress*: Intervening over indecency, children’s programming, and limiting low power FM.

⁹⁶ See Lee, Steve S., “Predicting cultural output diversity in the radio industry, 1989–2002”, (Department of Sociology, Vanderbilt University), *Poetics* 32 (2004) 325-342.

What Do Other Countries Do?

We wanted to see if decreased localism was only a concern within American commercial radio. In recent years, concepts of deregulation and commercial radio have made it into other countries, if not already there. To our surprise, localism is a concern in many countries. It appears widely perceived in many western democracies that market forces do not solely provide for adequate local or regional coverage of art, news, and culture. Whether by government decree, or by licensee or broadcast association self-imposed policy, many countries now have rules guiding local or regional content:

Britain: On local commercial radio, the Office of Communications (Ofcom) has specific definitions for “localness”, and requires a minimum number of hours per week for local-made programming, that may include, for example “news, information, comment, outside broadcasts, what’s-on, travel news, interviews, charity involvement, weather, local artists, local arts and culture, sport coverage, phone-ins, listener interactivity, etc”.⁹⁷ BBC, controlled by the government, appears to have no stipulation, although Radio 1 has pledged that 35% of its airplay will be made up of UK artists after domestic artist airplay had been “halved in the last five years.”⁹⁸

Canada: Since 1973, the Canadian Radio-television and Telecommunications Commission (“CRTC”) has required a 35% content requirement for music that was at least partly written, produced, or recorded by Canadians.⁹⁹ For French-speaking Canada, there is also regulatory minimum for French-language vocal music, increasing from 55 to 65% in 2006.¹⁰⁰ Additionally, they require one-third “local” programming¹⁰¹, which must include spoken “spoken word material of direct and particular relevance to the

⁹⁷ In reference to (UK) Communications Act 2003, Section 314. with quoted example taken from Ofcom’s website (www.ofcom.org.uk).

⁹⁸ “Radio 1 Defends Music Policy”, *BBC News*, July 7, 2003 (<http://news.bbc.co.uk/2/hi/entertainment/3051886.stm>).

⁹⁹ Refer to Canadian Radio Regulations, 1986 (SOR/86-982), Part 1 Section 2.2.

¹⁰⁰ Broadcasting Notice of Public Hearing CRTC 2006-1, para 2.

¹⁰¹ Reaffirmed in CRTC 1998-41, which CRTC is given authority by Subparagraph 3(1)(i)(ii) of the (Can) Broadcasting Act states that programming provided by the Canadian broadcasting system should “be drawn from local, regional, national and international sources”; CRTC must also operate in respect of Canadian equivalent First Amendment rights (Canadian Charter of Rights and Freedoms, #2).

community served, such as local news, weather and sports, and the promotion of local events and activities.”¹⁰² CRTC produces annual monitoring report, using a number of indicators, to measure the success of policies, and places them on its website for everyone to see, including music and local programming.

Australia: Under the (Aus) Broadcasting Services Act 1992, Australian Communications and Media Authority (“ACMA”) is required to impose a “local content license condition on licensees” for broadcasting “material of local significance.”¹⁰³ Regional commercial radio licensees are required to broadcast the applicable number of hours of local content during daytime hours: 5 minutes “racing and remote” stations, 30 minutes for small stations, and three hours for all other licensees.¹⁰⁴ Additional rules apply to license transfers, definitions of local, reporting, review, and record keeping. Australia additionally has an Australian music quota—as much as 25%—for commercial radio stations.¹⁰⁵ Statistics on the quotas are compiled by Commercial Radio Australia and submitted voluntarily to the Australian Music Performance Committee (AMPCOM). AMPCOM is a voluntary body that was set up to monitor performance annual reports.¹⁰⁶

New Zealand: Overall, there are few broadcast regulations for radio post-1989—no ownership/cross-ownership limits no quotas.¹⁰⁷ Instead of government-mandated quotas, the Radio Broadcaster Association (RBA) has worked with the New Zealand Music Industry to establish a 20% New Zealand artist content target for radio stations (excluding state and student stations).¹⁰⁸

¹⁰² As defined in CRTC 1993-38.

¹⁰³ ACMA *Media Release 116/2007*, 25 Sept 2007.

¹⁰⁴ ACMA *Additional Regional Commercial Radio License Condition-Material of Local Significance, Notice 19 Dec 2007* for subsection 43(1) of the Broadcasting Services Act 1992.

¹⁰⁵ The *Australian Music Performance Code* (Code 4 of the (Aus) Commercial Radio Codes of Practice).

¹⁰⁶ See Australian Recording Industry’s website for AMPCOM (www.aria.com.au/pages/ampcom.htm).

¹⁰⁷ Formed under New Zealand Post and Telegraph Act 1921; See New Zealand Broadcast Act 1976, and Broadcasting Act 1989.

¹⁰⁸ See RBA’s site (<http://www.rba.co.nz/ISSUES.htm>).

Norway: In Norway, 75 % of the programming must originate from the license area and on weekdays¹⁰⁹, and there are rules for locally produced programs containing local material to be broadcast.¹¹⁰

Netherlands: For broadcast networks, municipalities are required to establish a program service console to advise programs regarding the social, cultural, and religious needs of the local community.¹¹¹ A group called the Press Fund (Bedrijfsfonds voor de pers) has been created for the purpose of maintaining and promoting diversity of the press.¹¹²

Denmark: Local private TV and radio stations “may have conditions about local news or other programs in their license”. “Local TV stations in a 24 hours network must have at least 30 minutes pr. day of local news or other local programmes focusing on the local community and must accept non-commercial TV stations licensed in a window 9-12 a.m.”¹¹³

France: Quotas are applied on French television stations, where 40 percent of programs must be French and 60 percent European. A quota of 40 percent French songs is required for radio stations.¹¹⁴

South Africa: Airplay quota currently exists; South Africa is in the process of increasing their quota from 20% to 40% South African content.¹¹⁵

Germany: Each German state has its own media laws. For example, in Schleswig-Holstein media law stipulates that radio services which are aired 24 hours a day and throughout the whole federal state shall, for two hours of the daily transmission time,

¹⁰⁹ Medietilsynet, Section 7-7-first subsection of the Broadcasting Regulations.

¹¹⁰ Medietilsynet, Section 7-6 no 1 of the Broadcasting Regulations.

¹¹¹ Staatsblad van het Koninkrijk der Nederlanden, Section 82k.

¹¹² Staatsblad van het Koninkrijk der Nederlanden, Section 123.

¹¹³ Danish Mediesekretariatet website: (<http://www.mediesekretariatet.dk/bilag/diverse/brochure.pdf>).

¹¹⁴ Loi no 94-88 du 1er février 1994 modifiant la loi no 86-1067 du 30 Septembre 1986 relative à la liberté de communication.

¹¹⁵ Independent Communications Authority of South Africa’s (ICASA) *South African Music/Television Content Regulations* (1997) stipulated 20% SA content cap per authority of ECA Section 61(2)(c); currently ICASA has a pending Inquiry, prescribing new quotas of 40%.

contain windows which address political, economic, social and cultural issues in the region.¹¹⁶ In the state of Bremen, the media law states that radio programs must present both sides of opinions.¹¹⁷

Ireland: The Broadcasting Commission of Ireland (BCI) requires a minimum level of 20% news and current affairs programming across the broadcast day and two hours between 7am and 7pm.¹¹⁸ BCI can enter into “local content contracts” as a contingency of the license¹¹⁹ and may ascertain the needs of the community in respect to broadcasting on its own accord or by the request of a community group.¹²⁰

Although we do not advocate the adoption of any specific measure utilized by any other country, the overall conclusion is that the commercial radio model, in practice in many countries, does not often account for localism or regionalism. We could go even further to declare that *decreased localism* is an inherent global attribute of commercial radio. In other westernized countries, government telecommunication agencies work with broadcasters to determine policies for minimum standards, whether by regulation or self-imposed guideline, to account for local public service.

Opponents may charge that American liberties, such as First Amendment rights, champion ideologically superior broadcast freedoms. Many western democracies have identical free speech statutes of equal protection to the United States. For example, *Reporters Without Borders* ranked the top 139 countries based upon press freedom using factors such as censorship, pressure, monopolies, regulation of the media, etc, and found that 16 countries could be classified as freer or as free as the United States when it comes to press freedom, including—from the countries mentioned above—Norway, Netherlands, Canada, Ireland, Germany, Sweden, Denmark, France, and Australia.¹²¹ We

¹¹⁶ See Staatsvertrag über das Medienrecht in Hamburg und Schleswig-Holstein, Art 2, Section 26.

¹¹⁷ See Bremisches Landesmediengesetz Section 13.

¹¹⁸ Operating under the terms of (Ireland) Section 15 of the Radio and Television, 1988, as amended by Section 62 of the Broadcasting Act, 2001.

¹¹⁹ Part V, Section 38, (Ireland) Broadcasting Act, 2001.

¹²⁰ Part V, Section 40, (Ireland) Broadcasting Act, 2001.

¹²¹ See (http://www.nationsonline.org/oneworld/freedom_of_press.htm).

can be assured that the media regulations adopted by these countries are subjected to fair amount of scrutiny regarding free speech provisions.

Many countries have developed localism measures just in the last few years. It appears that the FCC is on track with other countries regarding its interpretation that the general population desires greater local service in the age of global commercial radio homogenization. Australia's regulations are fairly recent (late 2007). Several countries have developed a domestic quota system following Canada's lead: France, South Africa, New Zealand, and Australia. All countries have developed monitoring provisions to test the effectiveness of such measures. For France, "despite continued complaints about the absence of quality French music, a listener survey indicates that the stations most affected by the quota actually increased their market share in the first three months of the year."¹²² Both the French and Australian systems are being tweaked to cater to station formats. In New Zealand, where the media is less regulated than the United States, the Radio Broadcaster Association (RBA), the equivalent of the NAB in New Zealand, voluntarily imposed a quota for NZ artists on commercial radio. "Overall it is a great result, and there is no evidence that the voluntary quota system has damaged audience levels, which was always our major concern," RBA executive director David Innes says.¹²³

The central issue is what policies we can pursue in America to encourage radio pursue localized content. Maybe the best way to look at what is possible for radio is to look at the positive role it has played in the past, when programming was more innovative.

The Need For Innovative Programming, Not More Formats

¹²² "French Radio Quota Hasn't Alienated Fans : Listeners Stick With 'le Rock'" *International Herald Tribune*, by Daniel Tilles April 20, 1996 http://www.ihf.com/articles/1996/04/20/radio.t_1.php).

¹²³ *New Zealand Radio Quotes Are Exceeding Targets*, *Billboard*, by John Ferguson, February 22 2003.

This limiting of artists allowed for airplay, as mentioned in the Vanderbilt study (above), with strict formats and independent promoters¹²⁴, has crippled music innovation. New forms of music and art are not supported in the marketplace mainly because in the beginning they appear foreign and unmarketable. Regional sounds—Northern Soul (example: Stax Record catalog), Philly Soul (example: songwriters McFadden and Whitehead), Northwest garage rock (example: The Kingsmen’s “Louie Louie”) didn’t evolve out of radio formatting; nor did punk (example: The Clash), college rock (example: REM), or grunge (example: Mudhoney). These artistic movements were not the product of radio listener research and playlisting; they evolved on specific local radio shows (50’s-60’s, to a regional AM audience), local freeform stations (60’s-70’s), and local college radio (70’s-80’s). College radio, the last frontier, has been easy prey to format takeovers by NPR-ization, or their licenses being sold, since the frequencies are so scarce. College radio is dependent upon fringe (non-protected) coverage, which had been breached by new translators in the 90’s. Additionally, the major labels had redoubled their promotion efforts towards college stations in the 90’s, adding to the homogenization of airplay.

Once new rock’n’roll genres—psychedelic, progressive, new wave—all started as fringe elements, but were quickly absorbed into popular culture with the help of disc jockeys choosing new artists for airplay on their own accord—such as Jim Ladd¹²⁵, Tom Donahue¹²⁶, and Rodney Bingenheimer.¹²⁷ New genres of today—such as *indie rock* (referred to as “indie”)—cannot break into the mainstream. Although *indie*, as a genre, has been around since the 90’s—and also has the capacity to form wider base of appeal compared to the current alternative format staple *rage rock*—the radio industry refuses to embrace it due to its part-independent label/part un-pioneered connections.

¹²⁴ “Labels pay upwards of \$150,000 to promoters to push a song at Top Forty radio stations. In smaller markets, it is common for that money to pay for items such as promotional T-shirts and bumper stickers, or to directly feed a station’s budget” from “Payola Probe Heating Up”, by Bill Werde, *Rolling Stone*, Nov 1, 2004.

¹²⁵ Influential Los Angeles Disc Jockey, KLOS/KMET.

¹²⁶ Pioneered KMPX San Francisco, considered to be one of the first alternative “free form” commercial stations; soon afterwards the San Francisco rock scene thrives.

¹²⁷ Disc Jockey on KROQ Los Angeles that strongly influenced the emergence of the Los Angeles punk scene in the late 1970s, the first to break-in airplay for the careers of Blondie, Van Halen, Duran Duran, The Go Go’s etc.

If the current radio climate existed in the 50's and 60's we might not even have popularized rock music. The last rock music movement of "grunge" was popularized by accidental press hype scam by Sub Pop records¹²⁸ that led to Nirvana signing to a major label. Still, to this day, popular/rock music on the radio still follows a derivative homogenization of "early 90's sound" *fifteen years later* because radio formats are under lock and key of the music industry, devoid of any regional artist development. The few college and community stations that have not been converted to NPR affiliates are the sole providers of new music on the airwaves. The "CMJ" charts¹²⁹ contain viable artists on major labels that commercial radio refuses to play. Simply put, it would appear that the current marketplace does not have enough competition to allow for niche and innovative programming entries. New, independent broadcasters are the source of innovation. As Ted Turner states:

In the current climate of consolidation, independent broadcasters simply don't survive for long. That's why we haven't seen a new generation of people like me or even Rupert Murdoch--independent television upstarts who challenge the big boys and force the whole industry to compete and change.¹³⁰

Recommendations

Radio needs to partake in qualitative measures involving local and regional talent, reach out to diverse communities, and allow for more flexibility of music airplay. These may be difficult to translate into regulation, but it is not an impossibility:

- The FCC should collect data on commercial programming in order for there to be a scientific assessment of what is missing; let this data be available to the public. Our neighbor Canada, with a similar commercial radio system to ours, does this (<http://www.crtc.gc.ca/eng/publications/reports.htm#monitoring>); there is no substantial burden on their broadcasters to do this.

¹²⁸ Refer to the documentary "Hype!" (1996, Helvey-Pray Productions) for explanation.

¹²⁹ *College Music Journal* charts, mainly compiling college and community radio airplay.

¹³⁰ "My Beef With Big Media: How Government Protects Big Media—and Shuts Out Upstarts Like Me", by Ted Turner, *Washington Monthly*, July/August 2004.

- Data on playlists should be collected and be made available. This is not an added cost for a commercial radio stations since they already have software-driven playlists, and report airplay through Billboard. NCE's should be exempt because the undue burden, and non-commercial nature of their programming. The data could be looked at by a voluntary body, like in Australia (Australian Music Performance Committee).
- The idea of local or independent artist play "quotas" in the United States, voluntary or regulated, would probably no fly. The problem in the US is not domestic artists, but with the narrow selection of songs played on the radio, and the lack of local or regional music support. For commercial music stations, a report on what local arts and non-major label artist they have played, or what local music events were covered (whether the station has an entertainment calendar) would be useful. The data could be used to start a dialog between musicians the radio industry.
- The idea of a "station advisory board" raises a lot of questions to what this means. Broadcasters fear that these boards may take up a lot of time and cause a lot of format tampering. Nevertheless, some type of local or regional board is a good idea idea to connect a station with its community. Reasoning: Public Radio stations have community advisory boards.¹³¹ NPR stations seem to run without undue tampering from the public. In addition, there seems to be no data that points to advisory boards having sunk the ratings of public stations. To the contrary: listenership of commercial stations have tended to go down, while Public Radio actually maintains, or has had increases in listenership.¹³² Maybe advisory boards could simply be more like "ascertainment boards", in which they find what issues matter to the community, report these findings to the station, and the station reports whether they addressed these concerns in a report to the FCC.
- The idea that terrestrial radio owners need multiple streams/frequencies of specialized music genres (like Sirius/XM) to be more competitive is a

¹³¹ 47 U.S.C Section 396(k)(8)

¹³² Arbitron report, "Public Radio Today: how America Listens to Public Radio"

wasteful use of spectrum. Broadcasters can use the one channel they have now to diversify programming by expanding playlists or using specialty shows that cater to niche interests. A sole example of an innovative commercial radio programming format is Los Angeles' Indie 103.1 FM (KDLA/KDLE-FM).¹³³ The station hosts over twenty in-house produced specialty shows (talk, genres of music), and plays music often chosen by the disc jockey.

- The local public service of studio-waived stations need to be addressed; these stations need some sort of local connection—local issues requirement, advisory board, etc.
- If the FCC relies of members of the public to file petitions to deny in the renewal process, it must give clearer language into public interest definitions. Some type of criteria needs to be crafted to further understand what operating in the *public interest* is, or more concisely, what is *not considered operating in the public interest*.
- For more ideas, see Common Frequency's original comment to the FCC regarding MB Docket 04-233.

Whatever The Case, The FCC Has License To Fix The System

One of the central issues concerning localism has to do with the failure of a system to uphold the public interest when the broadcaster does not adequately respond to its public interest obligations. The question of what happens when the marketplace does not

¹³³ The sole example of a US commercial station embracing a part "indie" format—Indie 103 (KDLA/KDLE Los Angeles)—came about by accident. Clear Channel paid Entravision (KDLA licensee) money to re-format the station "indie/alternative" to knock KROQ's (LA, CBS Radio, "alternative" format) ratings off. This competition forced KROQ to start integrating indie bands into its rotation, which allows for the breaking of new artists like Modest Mouse and Arcade Fire; this did not last long. As soon as KROQ found its ratings were unaffected by Indie 103's competition because of reception issues (KDLA/KDLE are low wattage Class A stations that do not cover the entire LA market), KROQ shifted back to status-quo, big name alt rock to appeal the music industry. The indie format stuck with KDLA/KDLE because its signal is confined to urban LA and the cost, winning over the centralized bohemian demographic, but remains questionable since the owners primarily holds Spanish stations.

stimulate a broadcaster to meet its public service obligations was addressed by the Commission in its move towards radio deregulation:

It is our expectation that the added flexibility that broadcasters will have to respond to their audiences will indeed produce such results. There remains the possibility that, at least in some isolated cases, this might not happen. Fortunately, there are built-in mechanisms to allow us to detect such an occurrence. Part of the public interest obligation of any licensee is to address issues of importance to the community as a whole or, in larger markets with many stations, to the station's listenership. If a station is not addressing issues, citizens will be able to file complaints or petitions to deny. We continue to encourage citizens to meet with their local broadcasters to discuss their concerns, but if they do not receive satisfaction, they should take the complaint or petition to deny routes. These long standing channels will allow the Commission to continue to monitor the performance of licensees, and indeed will better indicate the responsiveness of licensees than do fixed guidelines.¹³⁴

Our primary concern is that these “built-in mechanisms” never have manifested themselves. Commencing in the early 80’s, the general public inherited the job of making sure American media served the local public interest, except since there is no definition of “public interest”, and no tools to enforce it, the procedure is moot. The Commission expects the public to hire lawyers, perform costly research, and utilize a ruleless, ambiguous regulatory system if a station is not serving the public. This system has not worked. But the Commission stated an option in 1981 regarding if the proposed (current) system did not work as planned:

...if we eliminate our noncommercial and nonentertainment program guidelines, we are prepared to take whatever steps are necessary in the public interest should the marketplace fail.¹³⁵

If experience in the real-world radio marketplace shows these assumptions to be in error and leaves these expectations unfulfilled, then the Commission will have the clear duty to revisit its actions.¹³⁶

The Commission may further regulate if “when there is strong prima facie evidence that the market has in fact broken down.”¹³⁷ This is how we interpret that: When stations in the broadcast community have not served in the “public interest”, which has been defined

¹³⁴ *In the Matter of Deregulation of Radio* 84 FCC 2d 968 (1981) Para 109

¹³⁵ *Ibid*, Para 108

¹³⁶ *Concurring statement* of Commission Joseph R. Fogarty on *Deregulation of Radio* 84 FCC 2d 968 (1981), citing *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979) as proof

¹³⁷ *WNCN Listeners Guild v. F.C.C.*, 610 F. 2d 838 (D.C. Cir. 1979)

as the "fullest and most effective use" of the airwaves¹³⁸, the FCC may intervene. This could be clearly interpreted, at the least, that if 1) we can show that stations have operated better in the past, and 2) they have not been currently working up to this level over a recent duration of time, then we would have proof that we are not using the airwaves to the "fullest and most effective use." The reasoning provided in this comment has at least demonstrated some evidence to assert that the Commission has permission to further regulate.

Alternative Recommendation: Modified "Geller" Option

If the FCC cannot adequately address localism improvements using the current *servicing in the public interest* system, we propose that a substitute option exists based upon Henry Geller's¹³⁹ "Pay or Play" model. In the original Pay or Play model, "broadcasters would be given the choice of maintaining the existing regime of public interest obligations, or of paying a share of revenues to bypass those obligations, while receiving in return an expedited license renewal process."¹⁴⁰ Before commenting on why we would not advocate this system without modification, we furnish Geller's abbreviated explanation on why the current *public interest* system does not work well (*below taken from Geller's "Promoting the Public Interest in the Digital Era"*):

The objective [of serving in the public interest] is to obtain high-quality public-service programming. But the government cannot review for quality; that would be much too subjective. So we are dependent on the broadcaster to produce such high-quality programs. The noncommercial system has demonstrated that it will strive to do that, even though it is expensive. The commercial system, under fierce and growing competition, has no such history or incentive.

It is anomalous to be still applying the seventy-five-year-old public trustee content scheme to this one medium of video distribution, broadcasting, while powerful new

¹³⁸ National Broadcasting Company v. United States, 319 U.S. 190 (1943)

¹³⁹ "Henry Geller is a Washington, D.C. telecommunications attorney and law professor with a distinguished career in United States communications policy making and regulation. He worked at the FCC) at several intervals from 1949 until 1973, serving as General Counsel for six years (1964-70) and then becoming Assistant to FCC Chairman Dean Burch. He later served as Administrator of the NTIA for three years (1978-81) during the Carter presidency. His contributions to national telecommunications policy making led to the National Civil Service Award in 1970." From *The Museum of Broadcast Communications*.

¹⁴⁰ *Advisory Committee on Public Interest Obligation of Digital Television Broadcasters*, November 9, 1998 via Executive Order No. 13038: The Committee to study and recommend the public interest responsibilities that should accompany the broadcasters' receipt of digital television licenses.

media are soundly not under such content regulation. Thus, multi-channel video program distributors (chiefly cable and direct broadcast satellite (“DBS”)) serve 85.3% of U.S. television households. The vast majority of the public makes no distinction between basic cable (and DBS) channels and broadcast channels.

[There is no public interest requirement in broadcast license renewal¹⁴¹] This means that with the exception noted, eliminating the public-interest content requirement would not result in any change apparent to the viewing public.

In view of the above considerations, it makes excellent policy sense to adopt a new regulatory scheme for broadcasting as we enter the new century. There is still a strong need for the provision of public service programming—high-quality educational material, cultural programming, in-depth informational fare, etc. We should look to the noncommercial sector to provide this high-quality public service—not to behavioral content regulation of the commercial system, which has been and will continue to be a failure in this respect. It follows that the noncommercial system should be more adequately funded to meet its heightened responsibility in the digital era; the commercial broadcasters should be relieved of their obligation to present public-interest content programming, and in lieu thereof, should pay a modest spectrum usage fee, which would go to supplement the current inadequate funds for public telecommunications.

In my view, it is time now to acknowledge that we no longer should care whether or not the commercial broadcaster plays in the public service field—that instead we want the commercial broadcaster to pay for its use of the public spectrum so that public broadcasting can be enabled to make a needed maximum contribution to educating and informing children and the electorate. The motto should be: Play if you want, but pay you must.¹⁴²

Geller’s rationale is concise: futility plagues the *public interest* regime, so why not change it? If there is no definition of public interest, no proof of serving the public interest within the license renewal process, and no way of enforcing programming quality, then the Public Interest Obligation regulatory scheme is simply an exercise in futility. The alternative is simply having all broadcasters pay into a fund to subsidize public interest programs in the non-commercial realm. The only problems with this alternative, if not activated properly, are:

1. The current media, in its consolidated form, has power to promulgate one-sided issues for their own benefit. Subtracting any official “public interest” statute may

¹⁴¹ Except for children’s educational programming, also ambiguously regulated

¹⁴² From Henry Geller’s “Promoting the Public Interest in the Digital Era” available <http://www.law.indiana.edu/fclj/pubs/v55/no3/Geller.pdf>

lead down a slippery slope of exacerbating this mentality. *Public interest* is, if anything, an insurance policy against the most negligent licensees.

2. The current media owns all the programming distribution outlets (channels/frequencies)—there are no current reserved channels for more non-commercial sources.
3. If there were more educational channels reserved, these frequencies would most likely go the way of many current NCE channels: no enforceable localism, diversity, or educational requirements under an ambiguous *public interest* statute.
4. Implementing such a system could be mired in Congressional statute overhaul. The end product could be loaded in special interest requirements from the heavy-handed.

However, there is a way to implement a system without modifying much the FCC's current regulatory scheme. The system would be as follows:

1. Each commercial broadcaster may be given two options: A) abide by new public interest/localism regulations (“The 2008 Localism Requirements”), or B) opt to waive the new requirements and receive expedited license renewal if they can fulfill their localism/public interest requirement in another fashion via a modified “Geller Pay-Or-Play Model”
2. The Commission, with Congressional blessing, sets up a “Corporation for Community Media” (“CCM”), a 501(c)(3) which funds local educational low power radio, television, and community media centers (CMC). The contingency for a community media entity obtaining funds is based upon similar stipulations of the CPB: Open Meetings, EEO, community advisory board, etc, and additional stipulation of a station report concerning localism (outlining diversity, access, and programming). Community Media Entities with small budgets—not already taking part in CPB programs—can apply for CCM funds.
3. Commercial broadcasters choosing option “B” (from above) would donate a set amount (determined by the FCC) to CCM, and in particular the Community

Media Fund (or Geller Program Fund). Because CCM is not government-affiliated, the money donated to CCM is tax-deductible for the commercial broadcaster, which would be an incentive to participate.

4. The CCM earmarks and distributes money from the Geller Program Fund for different types of grants that promote localism: educational community radio operating grant, educational community television operating grant, low power facilities grant, independent producers grant, etc.

While a Geller Program Fund, distributed by the Corporation for Community Media (CCM), would assist Community Media Centers and already existing non-commercial broadcast outlets, it does not solve the problem of allocating future spectrum in areas that do not currently have a non-commercial broadcast outlet or community media center.

One proposal for this might be:

1. The FCC allocates new channels in each city for low power radio and television frequencies to another non-profit called “Community License Corporation” (“CLC”) for *direct ownership by CLC* (See 6). These frequencies include: Low Power FM frequencies based upon translator (contour-to-contour) rules with identical translator broadcasting power levels. These LPFM stations would have elevated status compared to translators, but lower status than full power stations. Low Power TV frequencies would be designated, like LPTV, except strictly for non-commercial educational use. There are ample channels/frequencies already in cities currently available for usage.
2. CLC is a nonprofit corporation with FCC representatives, community radio broadcast representatives, and a Corporation for Community Media representative. Frequencies are granted from the FCC directly to CLC instead of to individual licensees. Because the FCC cannot directly mandate *strict* educational and localism requirements for NCE channels (or any channel without a Congressional mandate) allocating more channels in the traditional NCE fashion

to individual licensees will not work. However, if CLC is the official licensee, it *can* mandate stipulations to local “sub-licensees.” In its charter, CLC will outline that these channels have free speech entitlements—the CLC cannot censor—but sub-licensees have to adhere to a minimum bar of diversity, education, and localism. CLC gives free sub-ownership of these channels for five-year commitments to applicants that present the best proposal for operating inclusive as possible. Operation of the frequencies can be renewed through CLC upon showing minimum requirements. In addition, the FCC allocates channels to CLC in key specified locations to maximize/optimize the usage of the remaining FM and TV bands. CLC-LPTV channels could be readily sub-licensed to current community cable access channels for immediate start-up. Alternative: The CLC concept could be bypassed if Congress designated special licensing criteria for these educational low power stations that stipulated specific use for these channels.

3. CCM grants money from the Geller Program Fund to CLC sub-licensees, independent producers of news, public affairs, or documentaries, and educational, cultural, community, and entertainment-related radio and television programs. Entertainment programs will need an aspect of either the three other criteria (educational, cultural, community) to qualify.
4. A commercial broadcaster’s alternative contribution toward CCM is *not* seen as a pay-off in place of localism and operating in the public interest, but merely an alternative means of fulfilling its localism requirement through supporting low power educational broadcasters in the *same community*. The arrangement is seen as a donation from one station to another station to develop programming for that community. The commercial broadcaster can further expedite the processing of their application renewal if it shows a positive remodel connection to local CCM participants (donating old equipment, sharing tower space, giving advice, etc). This relationship is only applicable through LPFMs, LPTVs and Community Media Centers via the CCM, and by no other relationship between full power

radio or television broadcaster. CCM stations and centers can thank commercial broadcasters by running underwriting announcements. The idea is to foster a positive relationship between commercial and noncommercial broadcasters to, in tandem, serve in the public interest.

Conclusions

We believe the following could aid in localism:

More studies: The debate on whether television and radio are serving the local public interest will be fruitless without neutral parties collecting data culled from appropriately defined samplings. Finding out the amount of news and public affairs produced at the local level on TV and radio is a good place to start. Comparing the amount produced by sub-groups like locally-owned entities, broadcasters that ascertain or have advisory boards, and educational licensees—public, community, college, and religious—is also noteworthy.

Ongoing reporting: Commercial licensees could regularly report levels of programming types to see if there are benefits to certain regulatory schemes. Since payola and independent promoters have been an issue for radio, commercial licensees could also report playlist tallies, and disclose gifts to prove no financial ties to record labels. Between broadcasters, musicians, and both independent and major record labels, a voluntary association could be set up similar to AMCOM Australia (<http://www.aria.com.au/pages/ampcom.htm>) to monitor music airplay on commercial stations.

More options for new entrants: To dilute the concentrated media that is currently underproducing local public service programming, allow more frequency licensing opportunities in urban areas to local educational non-profits that desire to produce educational and community programming (hint: more LPFMs).

Focus on diversity: Encourage diversity of voices and extend broadcast opportunities to women, people of color, youth, and people of differing socioeconomic backgrounds rather than encouraging more radio formats, which do not represent diversity.

Radio licensing renewal oversight: Require more stringent re-licensing procedures that lend more scrutiny to local public interest programming.

Apply new policy evenly, but do not penalize volunteer, community non-commercial broadcasters that are already serving their local communities and have limited resources to do so. However, provide more scrutiny to larger non-commercial broadcasters with main studio waivers to make sure each studio-waived community is being served.

Consider community advisory boards for stations, but obtain more public and broadcaster input to what this could entail.

Pursue only effective policies: Policies such as 24-hour staffing and moving the studio to the community of license have questionable consequences with regard to increasing local public service. We do not see a correlation.

* * * *

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