Restoring Localism to Broadcast Communications

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WGN Radio in Chicago recently decided to cancel “The Noon Show,” a daily agricultural program about corn futures, after nearly fifty years on the air. When Orion Samuelson, the seventy-year-old host of show was asked to comment about the cancellation, he said: “I understand that there’s a lot of pressure from owners to go where the money is. But it makes you wonder about serving the local market and diversity in what you hear.”¹

Samuelson’s comments echo the concerns on the part of many Americans that media consolidation has gone too far.² The first wave of media consolidation occurred in the late 1990s as a result of passage of the 1996 Telecommunications Act.³ For example, today there are 34% fewer radio station owners than there were before the 1996 Act.⁴ In June 2003, as a result of its 2002 biennial review of media ownership rules, the FCC encouraged further consolidation in television by lifting the national ownership cap from 35% to 45% as well as relaxing the cross-media ownership rules.⁵ Out of the 250 page Order, about 5 pages are devoted to

¹ Leon Lazaroff, Farm Radio’s Frequency Fading Away, CHI. TRIB., Jan. 21, 2004, at Cl. Samuelson received more than 560 emails from disappointed listeners. Id. Interestingly, about 40% of these comments were from listeners in the Chicago metropolitan area. Id.

² See 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620, 13624 (2003). The FCC received more than 500,000 letters and comments from individual citizens on the ownership review proceedings. “These individual commenters expressed concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition.” Id.


⁵ See 2002 Biennial Regulatory Review, supra note 2, at 13767, 13808,
localism, the policy that requires broadcasters to be responsive to the needs of their broadcast communities. In addition, the FCC's Media Ownership Working Group conducted a study to evaluate local television news and public affairs programming. The study praised the performance of network owned and operated stations over network affiliates or unaffiliated stations.

These actions led to a huge backlash—Americans filed hundreds of thousands of complaints with the FCC. They held protests in twelve different U.S. cities, including one in Los Angeles in front of media conglomerate Clear Channel's headquarters. North Dakota Senator Byron Dorgan led the Senate in passing a bill that would undo the Commission's rule changes, and is now trying to secure approval from the House.

The FCC responded to the backlash by assembling a Localism Task Force to take public comments and schedule hearings in various cities continuing through the summer of 2004 to study the quantity and quality of local news coverage. It is unclear what impact, if any, the Task Force will have in making broadcasters more responsive to their local communities for two reasons. First, the FCC has not opened an official rulemaking proceeding on localism, so it is unlikely that the efforts of the Task Force will result in regulatory changes in broadcasting. Second, many

13843 (2003). Cross-ownership refers to a single owner of different types of media in the same market, for example, common ownership of a radio station and a newspaper.


7. Id. at 6.


panelists are network affiliated TV and radio broadcasters or representatives from large media companies whose statements at the hearings tend to be self-congratulatory. Thus, the Localism Task Force might be little more than political posturing by a Commission taken by surprise at the public outcry last summer over the results of the 2002 Biennial Review of media ownership rules.

There are four negative effects of media consolidation: less diversity in small to medium-sized markets, unresponsiveness during emergencies, playlist overlap and misleading programming. A brief explanation of each of these effects is helpful to understand why concentration is no longer a theoretical worry, but an actual problem today.

First, consolidation’s harms are more pronounced in small- to medium-sized markets, where the number of broadcast owners in an area has decreased drastically over the last few years. In these markets, size necessarily limits broadcast outlets to begin with because there are not enough listeners and advertisers to support more than a handful of stations. Conglomerates such as Clear Channel (which owns 1,200 stations) and Cumulus Media, Inc. (which owns about 300 stations) specifically target these markets because they are “less competitive, have fewer signals... and offer substantial opportunities for further consolidation.” The effects of this purchasing strategy are startling. In Minot, North Dakota, Clear Channel owns 6 of the 8 commercial radio stations; in Mansfield, Ohio, Clear Channel owns 11 of the 17 radio stations that broadcast in the area; in Albany, Georgia,

14. Id.
15. Id.
Cumulus owns 8 of 15 stations.\textsuperscript{16} Overall, Clear Channel owns more than half of the radio stations in many of small- to medium-sized markets.\textsuperscript{17} Put another way, there are only 3 broadcast voices in Minot (even though there are 8 radio stations) as a result of consolidation in that market. Thus, this trend of increased consolidation in small- to medium-sized markets is problematic because fewer media owners results in decreased broadcast diversity.

Second, companies like Clear Channel and Cumulus run their stations in a way that does not require local DJs or local managers, which renders the stations unresponsive to their broadcast communities, particularly during emergencies. The most notorious illustration is a chemical spill that occurred January 18, 2002 in Minot, North Dakota. Officials from the National Transportation and Safety Board tried repeatedly to contact KCJB-AM\textsuperscript{18} (a Clear Channel station\textsuperscript{19} which was the designated emergency response station\textsuperscript{20}) to warn residents not to leave their homes or open windows. No one answered the calls. A similar example comes from the Mansfield, Ohio area, where only 1 of the area’s 17 stations aired weather reports and put callers on the air during severe weather during spring of 2002.\textsuperscript{21} One would think it would be easy for a station to broadcast a warning in response to a call from a listener or safety authority: when the station receives a call, there is little material to prepare (nothing to write or research, no one to interview) and the message to be broadcast over the airwaves is short. All a station needs to issue these safety warnings is someone to answer the phone and make an on-air announcement. Yet, these examples illustrate that many broadcasters choose not to take minimal steps to make sure basic safety-related announcements will be broadcast. If local

\begin{itemize}
\item\textsuperscript{16} Id.
\item\textsuperscript{17} Id.
\item\textsuperscript{18} Survival Factors Group, Nat’l Transp. Safety Board, Chairman’s Factual Report (June 12, 2002).
\item\textsuperscript{19} See Dunbar, supra note 13.
\item\textsuperscript{20} See Survival Factors, supra note 18.
\item\textsuperscript{21} See Dunbar, supra note 13.
\end{itemize}
broadcasters do not air basic safety messages, how can they be expected to be responsive to the community in other ways?

Third, programming practices such as “voicetracking” used by large media companies are misleading if not deceptive. “Voicetracking” means that a DJ in one place records news, weather and call-ins for up to 30 stations nationwide,\(^\text{22}\) such that listeners are led to believe that the station is taking calls and reporting news and weather reports produced locally. The practice has been referred to as “fake radio.”\(^\text{23}\) Senator Dorgan calls voicetracking “antithetical to everything that represents localism.”\(^\text{24}\) He feels that by relaxing the ownership rules, the FCC has created a “device that tells distant owners to pretend they are local.”\(^\text{25}\) Current FCC rules do not limit or prohibit voicetracking, nor has the FCC ever stated that the practice is misleading to consumers, so it will most likely continue until the FCC decides to regulate it.

Finally, consolidation has also led to decreased program diversity and increased playlist overlap, according to a study conducted by the Future of Music Coalition.\(^\text{26}\) The study shows that playlist overlap on stations with different formats can be as high as 76%.\(^\text{27}\) Consequently, there is less diversity in music because of greater song repetition over the airwaves.\(^\text{28}\) At the same time, it has become very difficult for musicians to get their songs on the radio.\(^\text{29}\) For example, Tift Merritt, a rising country music

\(^{22}\) Polakow-Suransky, \textit{supra} note 4, at 39.
\(^{23}\) Polakow-Suransky, \textit{supra} note 4, at 39
\(^{24}\) McConnell, \textit{supra} note 10, at 42.
\(^{25}\) McConnell, \textit{supra} note 10, at 42
\(^{26}\) \textsc{Peter DiCola} and \textsc{Kristin Thomson}, \textsc{Future of Music Coalition, Radio Deregulation: Has It Served Citizens and Musicians?} 4 (Ric Duke \& Gillian Thomson, eds., 2002).
\(^{27}\) \textit{Id.}
\(^{28}\) \textit{Id.}
\(^{29}\) \textit{Id.} at 7. The FMC study found that “80-100% of radio charts are dominated by songs released by the five major label conglomerates. This “twin bottleneck [of greater song repetition and the fact that most of those songs are released by five major labels] makes access to the airwaves even more difficult for musicians [not represented by those labels] – and reduces choice for
star from Raleigh, North Carolina, had extreme difficulty getting her songs on her hometown radio stations despite numerous requests from local fans and successful album sales in the area.30

By engaging in the business and programming practices described above, large media companies disregard local interests and violate the policy of localism. Localism, the policy that requires licensees to respond to their communities' local needs and interests, is an important FCC policy central to the foundation of broadcast regulation.31 The FCC has never officially defined the term, but localism can have several different meanings. Localism can refer to local ownership, management and staff presence. It can refer to local programming such as news and community interest programs. Localism can also mean entertainment programming geared toward the cultural or ethnic groups within a community. However one chooses to think about serving local interests, the various rules the Commission has implemented over the years to promote localism can be placed into one of two categories: structural rules and content rules.

Part II of this comment reviews the various regulatory tools the FCC has used to achieve structural and content localism. Structural rules respond to the geographic conception of localism, including rules governing studio location, staffing and ownership controls. These rules were meant to indirectly achieve localism on the premise that locally owned and operated stations or local staff are more likely to know what the local community needs are and respond to them. Program content requirements, on the other hand, refer to localism in programming, and were meant to achieve localism as a direct result of the regulation. The FCC has used both of these types of regulations over the years to achieve localism with varying degrees of success (most of these rules have been repealed), and a great deal of criticism.32


32. E.g., Thomas G. Krattenmaker & Lucas A. Powe, Jr., REGULATING
Part III discusses ways to achieve greater localism, with particular emphasis on Low Power FM Radio (LPFM). LPFM stations are small radio stations with a broadcast radius of 1-5 miles. They are generally cost less to build and maintain than full-power radio stations. There is room on the broadcast spectrum for hundreds if not thousands of LPFM stations. These inherently local stations have great potential to provide listeners with meaningful alternatives to the conglomerate-controlled full-power stations. The FCC created LPFM service in 2000, but after heavy lobbying by broadcasters, Congress imposed prohibitively high interference protections that essentially barred many prospective LPFM stations from coming into existence. Part III concludes first that revisiting past FCC rules and tailoring them to fit contemporary needs could be a worthwhile way to make full-power broadcasters more responsive to their local communities. In addition, structural and content localism can be achieved by enhancing the LPFM service by adjusting interference rules and allowing stations to be commercial. LPFM stations would also push large conglomerates to be more responsive to community needs through competition for listeners.

II. TRACING LOCALISM

The broadcast licensing system in the United States is based on the premise that broadcast service should be local. From the beginning, radio service in the United States was allocated into various geographic zones. Congress’ authority to regulate broadcasting is based on the scarcity doctrine, the idea that the broadcast spectrum is a scarce resource. Government

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intervention was required in order to ensure efficient use of a finite number of frequencies.\textsuperscript{35} When Congress was deciding how to structure the radio system, it could have adopted the European approach, in which the government licensed radio stations that were powerful enough to reach across the entire country.\textsuperscript{36} Instead, the Commission chose to adopt an allocation scheme for radio service "in which every broadcast station is assigned to a community of license with a primary obligation to serve that community."\textsuperscript{37} Thus, radio was intended by Congress to be inherently local by design.

Another example of how localism is built into the foundation of our broadcast system is public television and radio station structure. In 1967, Congress passed the Public Broadcasting Act\textsuperscript{38} that allocated over $30 million to build educational television broadcasting facilities and noncommercial educational radio facilities.\textsuperscript{39} It also created the Educational Broadcast Corporation, a nonprofit corporation to assist in program development and availability.\textsuperscript{40} Congress designed the program so that each state could apply for funding and have its own educational public facilities.\textsuperscript{41} Again, Congress could have created one or more national stations that simulcast identical programming in each state. Instead, it chose to create a decentralized but interconnected network of public television and radio stations located in each state.\textsuperscript{42} Congress found that creation of this service promoted "noncommercial educational radio and television broadcast

\begin{itemize}
\item \textsuperscript{35} Radio Act, \textit{supra} note 33.
\item \textsuperscript{36} It is technologically feasible to have a radio station strong enough to reach across a region (such as the Midwest or eastern seaboard) or even the entire country.
\item \textsuperscript{37} Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations, Report and Order, 2 F.C.C.R. 3215 (1987).
\item \textsuperscript{38} PUB. L. No. 90-129, 81 Stat. 365 (1967).
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 367.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} Comments of the Association of Public Television Stations, \textit{Localism Task Force}, RM-10803, (filed February 4, 2004).
\end{itemize}
programming which will be responsive to the interests of people both in particular localities and throughout the United States.\textsuperscript{43} Today, there are 357 local public television stations which are operated by local educational institutions and state commissions.\textsuperscript{44} In addition to creating a broadcast system inherently local by design, Congress and the FCC have also imposed (at different times) various structural and program content controls on individual stations to complement this design.

\textit{A. Content Regulation}

In the same way that the FCC aims to maximize the benefits of group ownership while preventing undue concentration in ownership rules, the Commission balanced its need to evaluate programming against licensee’s program choice discretion in the content guidelines. The notion that the government should evaluate programming in order to serve the public interest was initially expressed by the Federal Radio Commission (the FCC’s predecessor).\textsuperscript{45} In those days, the FRC favored listeners’ benefit over licensee discretion by focusing “first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster.”\textsuperscript{46} In the early days, when there were relatively few stations on the air, the needs of the listening public usually meant having a radio station to listen to at all. Consequently, the practical impact of the FRC’s efforts can be summed up by the phrase “more is more.” Large commercial stations were more likely to secure licenses than small newcomers or educational stations because the more powerful the station, the more people that station would reach.\textsuperscript{47}

In the 1950s, the FCC began gathering data pertaining to structural elements such as acquisition, production, ownership,
distribution, sale, licensing and exhibition of programs for television broadcasting.\textsuperscript{48} In November 1959, the FCC broadened the scope of its study to provide a greater focus on whether the regulations in place at that time provided broadcasters with sufficient guidance in program selection.\textsuperscript{49} Several witnesses who testified at hearings urged the Commission to require licensees to include certain types of programs.\textsuperscript{50} These findings of studies and hearings were published in the FCC's Report and Statement of Policy issued in July 1960.

\textit{1. Non-entertainment Program Guidelines}

The Commission issued its first major policy statement on programming in 1946, known as the "Blue Book."\textsuperscript{51} The Blue Book was meant to offer broadcasters guidance as to how to provide well-balanced programming and illustrated the FCC's attempt to balance program evaluation with licensees' discretion in selecting programs.\textsuperscript{52} Because there was little caselaw on this issue, and because the Blue Book did not impose specific criteria pertaining to amounts or types of programming, broadcasters were unclear as to how the FCC expected them to fulfill their duty to their broadcast communities.\textsuperscript{53}

The Commission attempted to resolve the confusion by elaborating on programming guidelines in the 1960 Policy

\textsuperscript{49} Id. at 7291.
\textsuperscript{50} Id. at 7293.
\textsuperscript{51} 1946 Report on Public Service Responsibility of Broadcast Licensees ("Blue Book"). Interestingly, the Blue Book was never published in the Commission's reporter.
\textsuperscript{52} Deregulation of Radio, 84 F.C.C.2d 968 at Appendix E, para. 2 quoting the Blue Book. "The Commission has given explicit and repeated recognition to the need for adequate reflection in programs of local interest, activities and talent...[the] primary responsibility for the American system of broadcasting rests with the licensees of broadcast stations." Id.
\textsuperscript{53} See id. at Appendix E, para. 4.
While the Commission did not want to adopt rigid program requirements, the Report listed fourteen elements it felt were required to meet the public interest and would be considered in future applications:

1. Opportunity for local self-expression,
2. Development and Use of Local Talent,
3. Programs for Children,
4. Religious Programs,
5. Educational Programs,
6. Public Affairs Programs,
7. Editorialization by Licensees,
8. Political Broadcasts,
9. Agricultural Programs,
10. News Programs,
11. Weather and Markets Reports,
12. Sports Programs,
13. Service to Minority Groups,

Although specific types and amounts of programming were not required, the FCC considered applicants’ showings of how they satisfied (or planned to satisfy) the needs of their local broadcast communities.

Mutually exclusive license applications became very detail-oriented as applicants tried to show the FCC their program proposals best served the community. From looking at FCC decisions, it is easy to imagine the time and cost put into such efforts. In a mutually exclusive application for stations to be located in Newport News or Smithfield, Virginia, each applicant submitted detailed program information and evidence of discussion with community leaders. Each applicant provided a breakdown of programming into about 20 categories, along with the percentage of on-air time that would be devoted to each category. For example, one applicant planned to devote 10.2% of

54. See Inquiry, supra note 48, at 7291.
55. Id. at 7295.
56. Applications of the Tidewater Broadcasting Co., Inc, Smithfield, VA; Edwin R. Fischer, Newport News, VA. For Construction Permits, 2 F.C.C.2d 268 (1961). The applicants were not proposing to build stations in the same location, but in two locations where interference would be too great to support two stations, therefore only one of the two proposed stations could be built.
57. Id. at 386, 392-93.
58. Id. at 387, 393.
broadcast time for news, and the other proposed to devote 10.5% for news. The FCC looked at each category of programming, the name and description of each program that would be broadcast, and whose needs the program would satisfy (for example, religious programs of one applicant were intended to meet the needs of people in Tidewater, Virginia, west of the James River).

The FCC has never issued a non-entertainment requirement per se, but depending on how much non-entertainment programming an applicant proposed, the FCC would review the application differently. For example, if a commercial FM license proposal contained less than 5% local programming and 5% news and public affairs programming, the application was subject to review by the full Commission as opposed to staff. But, the Commission did not "identify a quantity... of programming below which no application will be granted and above which all applications will be granted." The Commission eliminated this guideline in 1981 during deregulation proceedings because it felt that broadcasters' duty to inform citizens about local issues affecting them could be achieved without the guideline.

B. Structural Regulations

Structural rules are meant to indirectly promote localism by regulating non-content aspects of broadcasting such as ownership, management, staff, geographic location, equipment and the processes used to select programming. These regulations are based on the idea that locally owned stations and locally produced programs are more likely to be responsive to local needs. This section will discuss several of these rules: the preference for integration of station ownership and management, the main studio

59. Id.
60. Id.
61. See Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to the Chief, Order, 59 F.C.C.2d 491 (1976).
62. See id.
63. Id.
64. See Deregulation, supra note 52, at 977.
rule, media ownership controls and the ascertainment process.

1. Integration of Ownership and Management

The FCC used to award a preference, or extra application points, to license applicants whose owners promised to integrate management and ownership of a station. That is, station owners who also promised to manage the station's day-to-day affairs could secure extra points for integration. At first, this preference was used only as a tie breaker in mutually exclusive license applications. Eventually though, the integration proposal became a crucial part of all license applications. The FCC measured owner-manager integration by using quantitative formula that could be enhanced by qualitative factors, such as an owner's participation in civic organizations or residence within the service area. The applicant who had a higher integration score would be awarded the preference.

The Commission's rationale for the integration preference was three-fold. First, the FCC felt that an owner-manager's direct, day-to-day involvement in the station would give the owner-manager a greater incentive to respond to community needs. Second, the FCC assumed an owner-manager would have a greater

65. Mutually exclusive license applications used to be awarded based on the comparative hearings process, in which the FCC would review proposals submitted by the applicants and award points for various criteria such as integration of ownership and management. Today, mutually exclusive broadcast license applications are resolved by auction. See 47 C.F.R. § 73.3571 (2004) (AM radio applicants); 47 C.F.R. § 73.3573 (2004) (FM radio applicants); 47 C.F.R. § 5002 (2004) (noncommercial educational broadcast applicants).
66. This preference was initially used as a tiebreaker in close cases. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) citing Homer Rodeheaver, 12 F.C.C. 301 (1947).
68. Bechtel, 10 F.3d at 882.
69. Id. at 878.
70. Id.
interest than an absentee owner in seeing the station perform well, and this increased interest would help ensure superior performance.\textsuperscript{71} Third, owner-managers would be in a better position than absentee owners to get information and feedback about how well the station meets community needs.\textsuperscript{72}

The integration score eventually became so decisive in the application process that an applicant could not obtain a license without winning the integration preference.\textsuperscript{73} In other words, the integration preference became a requirement. Susan M. Bechtel, one of four applicants for a license to build a new FM station in Delaware, did not include an integration proposal in her application.\textsuperscript{74} When the FCC rejected her application, she challenged the requirement on the grounds that it was arbitrary and capricious. The D.C. Circuit agreed, and invalidated the integration requirement in 1993.\textsuperscript{75}

The D.C. Circuit found that the integration requirement was arbitrary and capricious for several reasons. First, the Court found that the Commission "appears to have no evidence that the preferred structure even survives among the winners (who could turn around and sell their licenses after one year without requiring the buyer to integrate), much less that it does so among especially outstanding broadcasters."\textsuperscript{76}

In addition, the Court found that the FCC's quantitative formula yielded results that conflicted with the Commission's policy justifications for integration.\textsuperscript{77} While an applicant with a low integration score could recoup some points for qualitative factors such as civic participation, these factors were worth much less in

\begin{footnotes}
\textsuperscript{71} \textit{Id.} at 879.
\textsuperscript{72} \textit{Id.}
\textsuperscript{74} \textit{Bechtel}, 10 F.3d at 877.
\textsuperscript{75} \textit{Id.} at 887.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.} at 882.
\end{footnotes}
the point scheme than the raw integration score. For example, suppose there were two applicants competing for one license. Applicant A’s owner is unfamiliar with the community, has little experience in the broadcasting industry, but proposes to devote 40 hours per week as a manager. Applicant B’s owner, on the other hand, is a longtime resident of the community, has broadcast experience, but plans to devote only 30 hours per week to management of the station. Under the quantitative formula, the FCC would award the integration preference to Applicant A. The points for qualitative factors such as community residence and broadcast experience would not be sufficient for a part-time owner-manager like Applicant B’s owner to override Applicant A’s proposed full-time owner-manager integration proposal.

The idea that radio station owners who also acted as station managers would be more sensitive to community needs is not an unreasonable one. But, because the FCC’s formula placed so much weight on number of hours owners spent as managers, and because the proposal did not guarantee that future owners would do the same, the Court found it was an arbitrary and capricious way to evaluate applications.78 The Court also found other reasons to invalidate the integration preference, which will be discussed in Part III.

2. Main Studio Rule

In the late 1940s and early 1950s, the FCC adopted rules related to program origination and community accessibility to the station, which became known as the “main studio rule.”79 This rule focused on broadcasters’ geographic proximity to their communities. The main studio rule required broadcasters to maintain studios accessible to the public (in terms of physical location within close proximity to the community) with sufficient equipment to produce and broadcast programming.80 The FCC felt

78. Id. at 879, 882.
80. Amendment of Sections 73.1125 and 73.1130 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television
that "a station cannot serve as a medium for local self expression unless it provides a reasonably accessible studio for the origination of local programs." Accessibility to the community would ensure station participation in community activities and make it easy for listeners to offer suggestions or complaints to the station. The Commission felt that the requirement would ensure fulfillment of broadcasters' local service obligations:

As the main studio played the key role in the origination of a broadcast station's programming, its location in the community would assure the use of local talent and ideas. A local main studio would also permit community residents to readily contact the station to voice suggestions or complaints. Further, the location of a station's main studio in the community of license would ensure the station's integration in the activities of the community it is primarily licensed to serve. This interaction would foster responsive programming.

In other words, broadcasters were more likely to produce community-oriented programming if they were required to produce some of their programs locally. This rule remained intact without changes for about 30 years.

In 1987, the FCC revised the main studio rule by eliminating the program origination requirement. The Commission felt it could no longer justify a rule based on the assumption that locally-produced programs were likely to be locally-oriented or feature local talent. In addition, the FCC found that improvements in technology made it possible for broadcasters to originate programming from virtually anywhere; consequently, it became too costly for broadcasters to originate programming from their

81. Id. quoting Promulgation of Rules and Regulations Concerning the Origination Point of Programs, 43 F.C.C. 570, 571 (1950).
82. Id. citing Television Main Studio Location, 43 F.C.C. 888, 890 (1952).
83. Id. at 3217-18.
84. Id. at 3218.
85. Id.
main studio. However, the Commission decided not to do away with the main studio rule altogether. Instead, it gave broadcasters more flexibility in choosing the physical location of the main studio. Even though it repealed the program origination requirement, stations were still required to maintain program production and transmission equipment at the studio.

Critics argue that the current version of the main studio rule no longer serves its purpose in preserving localism and should therefore be repealed altogether. The current rule requires broadcasters to maintain a main studio equipped with program and production facilities, capable of continuous program transmission and with meaningful management and staff presence, as well as a toll-free phone number. The Commission elaborated upon the definition of "meaningful staff and management presence" in 1991 when it said, "We believe that a meaningful presence means more than one full-time clerical person, together with occasional oversight from two management personnel who apparently have no specific work schedule [at the studio] but instead, work at the studio at irregular intervals, aggregating six hours per week." Thus, the appropriate combination of management and staff presence at the main studio is unclear.

Critics argue the FCC should repeal the main studio rule in its entirety because it no longer serves its purpose of promoting localism. They argue that it makes little sense to require broadcasters to maintain production equipment when they are no

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86. Amendment of Sections 73.1125 and 73.1130 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations, 2 F.C.C.R. at 3218.

87. Id.

88. Id.

89. Amendment of Sections 73.1125 and 73.1130 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations, 3 F.C.C.R. 5024, 5026 (1988).

90. Id.


92. See Silverman, supra note 29, at 492.
longer required to produce any programming locally. In addition, critics note that localism is not served because broadcasters are no longer required to keep main studios in close proximity to their local communities. They conclude that because the rule no longer serves its original purpose of enhancing localism, it no longer makes sense for the Commission to impose it.

The next section discusses ascertainment, an information-getting process broadcasters were required to perform in order to get their licenses. Although the ascertainment rules did not focus on stations' physical or staffing structures, they are included in the structural discussion because they were another mechanism designed to indirectly achieve localism.

3. Ascertainment

Like structural rules such as owner-manager integration and the main studio requirements, the ascertainment rules were meant to achieve localism indirectly. The FCC implemented the ascertainment rules as a tool to help broadcasters determine what their local community's needs were, and thereby place broadcasters in a better position to respond to those needs. The ascertainment rules required broadcasters to study local community problems and population demographics under the assumption that licensees who studied their communities were more likely to tailor programs to their local communities. Ascertainment refers to a process of information gathering that broadcasters were required to conduct in order to obtain or renew a license. Applicants were required to study community demographics, survey the public, interview community leaders and keep program logs.

In 1971, the FCC issued a Primer on Ascertainment that

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93. Id. at 493, 495.
94. Id. at 493.
95. Id.
97. Primer on Ascertainment of Community Problems by Broadcast
described in more detail what the FCC expected from new license applicants in order to fulfill these criteria. There were two parts to ascertainment of community problems: consultations with community leaders and consultations with the general public. The first component of the ascertainment process was a study of community demographics. The applicant had to collect current data showing the ethnic, racial and economic breakdown of the community, as well as presence of public service organizations and any other distinctive features in the community. The FCC allowed applicants discretion in this process—they could use data from the U.S. Census Bureau or employ someone to survey a random sample of the community.

Once an applicant identified community issues by reviewing the surveys and demographic information, the applicant had to interview community leaders about these problems. Applicants were directed to “choose members from each of those broad groups that reflect the composition of the city of license” and interview them in person. Interestingly, the FCC required the station owner or high-level manager (as opposed to staff members) to conduct these in-person interviews with community leaders. The rationale behind requiring high-level members to conduct the interviews was to prevent the filtering of information that could occur if staff members conducted interviews and relayed the results to management. The Commission also reasoned, “[T]he person-to-person interview with management of the station is more likely to establish a contact with the station in the interviewee’s mind” so the leader “knows someone to call if he believes there are matters that warrant further discussion.”

Renewal commercial broadcast applicants, public television and public radio licensees were also subject to ascertainment requirements, but the requirements for these licensees were more

98. Id.
99. Id. at 660.
100. Id.
101. Id. at 664.
102. See id.
relaxed than those required for new applications. Commercial renewal licensees were exempt from the community demographic surveys. Although they still had to interview community leaders, the Commission supplied applicants with a list of "structural and institutional elements" common to most communities and directed applicants to interview leaders associated with the listed "elements" or organizations. Public television and radio stations were also subject to ascertainment requirements, including compiling annual reports, documenting community problems and records of programming during the year that addressed those problems. All of the annual reports would be made available to the public and were to be included as part of the licensee’s next renewal application.

Although there is merit in the idea that broadcasters can serve their local communities better if they understand who their communities are, the ascertainment process turned out to be too burdensome to be practical. Ascertainment was burdensome for license applicants in terms of time and money it took to conduct in-person interviews, survey the public and discern community problems. Ascertainment was also burdensome to the FCC, who was forced to get involved in the minutiae of applicants’ ascertainment in order to resolve opponents’ challenges to their completeness or accuracy. Sometimes, the FCC denied licenses or

103. See Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976); Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, Report and Order, 58 F.C.C.2d 526 (1976).

104. Ascertainment by Broadcast Applicants, supra note 103.

105. Id. at 419.

106. Id.

107. Ascertainment by Noncommercial Educational Broadcast Applicants, supra note 103.

108. Id.

109. Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, Report and Order, 98 F.C.C.2d 746, 752 (1984). According to commentators, the ascertainment process cost licensees up to $13,000 per year. Id.
issued demerits for insufficient ascertainment. For example, an applicant for a license in Corpus Christi, Texas presented the Commission one page of the U.S. Census as its ascertainment of community make-up. The FCC found it significant that the applicant failed to include information to reflect the fact that one in five of the families in the area lived under the poverty level. The applicant eventually produced more detailed but outdated information and the FCC found that the improper ascertainment was a significant defect that justified denying the application.

After several years of licensees repeatedly calling upon the Commission to evaluate the factual sufficiency of opponents’ ascertainment, and receiving many comments and complaints about the process, the FCC eliminated the formal ascertainment requirements for radio in 1981 and television in 1984.

The next section will discuss ownership limits, which are meant to govern the structure of the broadcast industry as a whole. Although the Commission adopted and modified the above structural rules and ownership rules at different times and for different reasons, the effect of relaxation of these structural rules compounds the problems caused by media consolidation.


112. Id.

113. Id. at 754.

4. Ownership Restrictions

The structural regulations that have impacted localism in broadcasting the most over the last few years are the changes in ownership rules. These rules govern the structure of the entire industry as opposed to rules aimed at the structure of individual licensees, such as integration and the main studio rule. Like the other structural rules, ownership restrictions promote localism indirectly. Restricting ownership of broadcast stations preserves broadcast diversity within local communities so one voice does not prevail over all others. Before discussing the history of ownership regulations, it is helpful to briefly identify various types of media rules as well as the FCC's definition of "market" for purposes of measuring competition.

Ownership caps limit consolidation by limiting the number of radio or television stations owned by a single owner either nationwide or within a local market. Audience caps restrict common ownership to a percentage of the national audience that one owner's broadcast stations reach. Cross-media rules restrict or prohibit common ownership of different forms of media within a local market. Historically, the FCC has defined markets based on a measurement which focused on stations' overlapping contours.115 This method of market definition often resulted in multiple markets within the same metropolitan area.116 In 2003, the FCC modified its definition of market to be more in line with how economists would define a broadcast market by taking into account entire metropolitan areas together and including noncommercial stations.117

The FCC's first media ownership restrictions limited media companies' power on a national level; restrictions within local markets came later as the FCC's analysis of markets and competition became more sophisticated. The FCC's goal in promulgating these rules has always been to promote competition

117. 2002 Biennial Regulatory Review, supra note 2, at 13717.
while restricting undue market concentration to ensure that a variety of voices would be heard.\textsuperscript{118} The next subsections summarize the history of each of these restrictions up to the 1996 Act. The ramifications of the 1996 Act and subsequent biennial reviews pursuant to the 1996 Act drastically changed the broadcast industry and will be addressed separately.

\textit{i. Ownership Caps}

The first multiple ownership rule prevented FM radio station owners from owning more than six stations in order to “obviate possible monopoly, and encourage local initiative.”\textsuperscript{119} Similar rules for television and AM radio were also adopted in the 1940s and early 1950s.\textsuperscript{120} In 1946, the FCC set a de facto limit of seven stations when it denied CBS’ application for an eighth station.\textsuperscript{121} This rule was later formally adopted by the FCC as the “Seven Station Rule” or the “Rule of Seven” in which a common owner could have ownership interests in seven FM, seven AM and seven TV stations (of which up to five could be VHF stations).\textsuperscript{122} The Rule of Seven remained intact without modification for nearly thirty years. After this long, stable period, the FCC began to make

\textsuperscript{118} 2002 Biennial Regulatory Review, \textit{supra} note 2, at 13639.


\textsuperscript{120} \textit{Id. citing} Federal Communications Commission, Seventh Annual Report, 34 (FY 1941) (1941) (limiting TV stations under common ownership to three); \textit{See} Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcasting Stations, 18 F.C.C. 288 (1953) (adopting ownership limit on AM stations).


series of decisions easing the ownership restrictions to allow more consolidation.

The Commission began to shift its focus from national caps to competition and concentration in local markets: "the more correct focus for... diversity and economic competition... is the number and variety of information and advertising outlets in local markets, a matter that is not addressed by a nationwide restriction on ownership." 123 The Commission lifted the station cap from seven to twelve stations in 1984 with the intent to eventually eliminate it altogether. 124 The FCC felt this action was justified because there were many more television and radio stations (especially FM) operating in 1984 than when the Seven Station Rule was adopted in 1953. In addition, most of the television stations had affiliation agreements with one of the three large networks anyway, so a cap would have limited impact. 125 The FCC also accepted broadcasters' arguments that relaxation of the station ownership cap would allow groups to build base stations in large markets that would support creation of new programs that would compete with large networks and provide consumers a greater range of viewing choices. 126 In 1991, the Commission initiated a rulemaking to reconsider radio ownership caps 127 and ultimately decided to raise the radio station cap to twenty AM and twenty FM stations, while the television cap remained at twelve. 128

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124. Id. The FCC at the time did not feel that lifting the ban would harm the broadcasting industry, but many commentators were fearful of significant and harmful consolidation that would result from lifting the ban, so the FCC raised the cap to twelve stations for the following six years. Id.
125. Id. at 26-27.
126. Id. at 36.
ii. Audience Cap

The Commission’s efforts to balance the benefits of group ownership against the risk of undue concentration in the television broadcasting led it to add a restriction in the form of an audience cap. When the Commission set the television common ownership limit to twelve stations in 1985, it also limited television broadcasters’ audience reach to 25% of the national audience.129 The Commission felt that this audience cap would prevent already large multiple station owners from acquiring more stations without prohibiting small multiple owners the opportunity to expand their reach.130

An interesting quirk to the audience cap rule is the UHF discount. The UHF discount refers to the way the FCC counts the number of homes reached by one UHF station owner. UHF stations, the high-numbered stations on the proverbial television “dial,” provide a significantly weaker signal than the VHF stations (the lower numbers on the “dial”) where the three main networks are located. To compensate UHF owners for their weaker signals, the FCC discounts their audience reach by 50%.131 Thus, broadcasters could theoretically reach over 25% of households when factoring in the discount for UHF stations. This discount based on signal strength is logical, but the discount also undercuts the Commission’s policy to prevent undue concentration by permitting broadcasters with UHF stations to exceed the cap.

iii. Duopoly Cross-Media Ownership Rules

Duopoly and cross-media rules focus on localized markets rather than the numerical limits or audience cap, which apply on the national level. Until the early 1990s, the FCC entirely prohibited duopolies, or common ownership of multiple AM or FM stations

130. Id. at 87.
131. Id. at 93.

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in the same market. The Commission began to ease these restrictions as it attempted to help an ailing radio industry by appropriately draft these rules according to the size of a given market. In 1991, the FCC allowed one person to own up to four same service stations in the same market, as long as the owner did not reach more than 25% of the market's audience. These relaxed duopoly rules for radio did not change until passage of the 1996 Act.

In 1970, the FCC adopted its prohibition of cross-media ownership, which prevents ownership of different media services within the same market. These rules were in effect until passage of the 1996 Act.

iv. Deregulation

There were two waves of deregulation in broadcasting: the first in the 1980s and the second after passage of the 1996 Telecommunications Act. The FCC Commissioners during the Reagan administration received many complaints from broadcasters who felt the FCC imposed too many limitations on broadcasters and that compliance was too expensive. They urged the Commission to leave issues of programming, localism and competition to discretion of licensees and to market forces. The Commissioners agreed and repealed ascertainment rules, program log requirements and nonentertainment programming review rules. Eventually, the D.C. Circuit Court also invalidated the owner-manager integration preference in 1993.

133. Id. at Table 1, Appendix D.
136. Id.
The second wave of media deregulation occurred after passage of the 1996 Telecommunications Act, when Congress relaxed many forms of ownership restrictions. To briefly summarize, the ownership restrictions in place just before passage of the 1996 Act were: one owner could own up to forty radio stations or twelve radio stations nationwide; commonly owned television stations could reach up to 25% of the national audience; commonly owned radio stations within the same local market could not reach up to 25% of the local audience; no common ownership of radio and television stations within a local market was permitted.

The 1996 Act completely changed the broadcasting industry. In radio, the 1996 Act lifted the numerical station cap and allowed a person to control multiple radio stations in a local market, depending on the size of the local market.\(^{138}\) In the smallest markets, one person could not control more than half of the market’s AM or FM stations.\(^{139}\) However, the FCC’s definition of “market” provided a loophole for radio station owners who wanted to own multiple stations in the same area. The Commission’s definition of market was based upon overlapping broadcast signals, and did not at all reflect what most people would consider a competitive market.\(^{140}\) Under this approach, it was possible for one metropolitan area to be counted as several distinct markets.\(^{141}\) This definition of market allowed large group owners to own well over half of all radio stations in areas like Mansfield, Ohio, where one company owns 11 of 17 local radio stations.\(^{142}\)

Without a cap on the number of commonly owned stations, the 1996 Act cleared the way for Clear Channel to own 1,200 radio stations. This degree of common ownership makes economies of scale appealing – large group owners today engage in cost-minimizing practices like voicetracking and pre-recorded call-ins for dozens of stations.\(^{143}\) In essence, the 1996 Act permitted group

\(^{139}\) Id.
\(^{140}\) See discussion supra Part I.B.4.
\(^{141}\) See id.
\(^{142}\) See Dunbar, supra note 13.
\(^{143}\) See Polakow-Suransky, supra note 4, at 39.
owners to franchise radio by offering an identical, recognizable product in mass quantities across the United States. Thus, the 1996 Act took a broadcast service designed to serve the unique needs of a community and turned it into "McRadio." In addition, without any of the other structural or content rules in effect to provide a check on group owners’ programming practices, the radio consolidation process moved rapidly.

In the 1996 Act’s revisions for television, Congress eliminated the numerical station ownership cap, relaxed local ownership rules and raised the national audience cap from 25% to 35%.\(^{144}\) While these changes have not reduced the number of available television channels or reduced viewing choice, most of what we watch on television is controlled by a handful of large media companies and networks such as Viacom, Fox, ABC and NBC.

In the years following the 1996 Act, the broadcasting industry changed considerably. In addition to media consolidation, the advent of the internet, satellite television and enhanced cable television services exponentially increased one’s ability to access information, news and entertainment. The FCC, citing increased source diversity and competition, promulgated controversial amendments to the 1996 Act in June 2003 in favor of further media consolidation. In 2003, the Commission raised the national television audience cap from 35% to 45%, so that one owner can reach nearly half of American television households.\(^{145}\) The Commission also adopted a new local television ownership rule that allows common ownership of TV stations in the same market, depending upon the size of the market and station ratings.\(^{146}\) In radio, the Commission retained the ownership limits in local markets, but implemented a new definition of "market" that includes entire metropolitan areas and noncommercial stations.\(^{147}\) In other words, the former awkward definition of market was dropped in favor of a definition more in line with the way economists define competitive markets. Although these changes

\(^{144}\) 1996 Act, § 202(c).

\(^{145}\) See 2002 Biennial Regulatory Review, supra note 2, at 13815.

\(^{146}\) See 2002 Biennial Regulatory Review, supra note 2, at 13668.

\(^{147}\) See 2002 Biennial Regulatory Review, supra note 2, at 13717.
in radio will probably limit future consolidation, the Commission did not require any owners to sell off any stations in order to comply with the new definition of "market," so any impact upon present levels of consolidation will remain unchanged. In the meantime, however, no television or radio station owners were forced to sell off any stations in order to comply with the new rules, so the current climate in broadcasting is likely to continue indefinitely.

III. SOLUTIONS

After many years of experimenting with regulatory tools aimed at making broadcasters more responsive to their communities, it looks as though the FCC ultimately decided to deregulate, cross its fingers and hope for the best. Although the FCC consistently reaffirms the importance of localism as a policy goal, its actions in eliminating virtually all the rules that were designed to promote localism severely undercut any commitment to localism.

In heavily populated urban areas, it is easier to achieve media diversity and community responsiveness because the broadcasting and advertising pool is diverse enough to serve various community needs. However, current trends in media consolidation will lead to less diversity over the airwaves, which will be particularly problematic in mid-sized cities and smaller areas where there are fewer broadcasters. Possible solutions to the increasing lack of localism in broadcasting include reexamining past structural and content rules, but my primary focus will be on enhancement of the LPFM (Low-Power FM) service.

A. Revisiting Content Regulations

One way the FCC could increase content localism in radio would be to require radio stations to dedicate a percentage of

149. See 2002 Biennial Regulatory Review, supra note 2, at 13643.
150. See Dunbar, supra note 13.
airtime to local news or cultural programming. On one hand, this kind of requirement would be a new and radical change in radio regulation because the FCC has never required specific quantities of a particular type of programming. On the other hand, this kind of requirement is not without precedent; the FCC clearly has the authority to regulate program content including indecency, obscenity and children’s programming.  

The FCC could require broadcasters to devote a given percentage of broadcast time on a daily or weekly basis to locally-oriented programming. Although the amount of programming is fixed in this kind of rule, a broad definition of “local content” that included news, cultural affairs and events, political and historical issues would leave wide discretion to program choice to the licensee. A flat percentage rule would be useful because it would be easy for licensees to understand and the least burdensome for the FCC to enforce, unlike the complicated processes surrounding the ascertainment rules. The rule could be written so that it applies only to stations owned by large group owners, or to stations serving small- to medium-sized markets, where the lack of localism in broadcasting is most pronounced. Instead of reviewing program logs and complicated proposals, the Commission could enforce a local content rule by investigating complaints and levying fines, in the same way it regulates indecency. Admittedly, this type of rule is not a perfect solution, but it would help keep broadcasters in touch with their local service communities.

A local content rule would be a better way to achieve localism than the program-origination rule or the non-entertainment program review procedures. A local content requirement would achieve localism as a direct result of the rule, unlike the indirect nature of the program-origination and non-entertainment rules. A


152. See generally Dunbar, supra note 13.
local content rule would also be preferable to the non-entertainment programming guidelines because those rules served only as delegation guidelines advising broadcasters how the Commission would review license applications. A local content rule would go several steps further than the non-entertainment and program-origination rules in achieving localism by requiring a given amount of locally-oriented programming to be broadcast over the airways. The only potential shortcoming of this type of rule is that it would not guarantee the quality of the locally-oriented programming.

B. Reexamination of Structural Rules

Historically, the structural rules imposed by the FCC were either repealed or radically modified, such as the main studio rule, the integration preference and ownership rules. The Commission’s assumption about these regulations was that local production or ownership resulted in more programming focused on local issues. This logic is rational, but the FCC did not have findings to support these conclusions so the rules based on that assumption were often repealed or invalidated. The FCC could not show that locally-owned or -operated stations, or that locally-produced programming necessarily resulted in locally-oriented programming. Today, however, the FCC could justify these types of rules by showing that absentee group owners who use techniques such as voicetracking are unlikely to produce locally responsive programming. In light of this new spin on an old theory, previous structural rules are worth revisiting.

1. Owner-Manager Integration

In order to achieve greater structural localism, the FCC could...
adopt a new integration rule by requiring licensees to either integrate their owners and management, or possess previous civic involvement in the community and local residence. *Bechtel* does not stand for the proposition that the FCC cannot impose some form of integration between station owners and managers. Rather, the Court held the integration rule in *Bechtel* arbitrary and capricious because the rule was promulgated without factual findings and because the FCC’s mathematical formula yielded unjust results.158

The FCC could promulgate a new integration rule if it could show that owners who do not participate in station management are more likely to be unresponsive to the community in their programming. Although rulemaking and comment procedures are more onerous than implementing policy statements, courts defer to an agency’s findings adopted through a rulemaking proceeding.159

However, a new integration rule is likely to be impractical and unsuccessful. First, even if the FCC successfully promulgated a new integration rule, group owners own too many stations to be expected to be personally involved in managing any of them. Consequently, the rule would be probably be drafted to exempt those owners who already under-serve their local communities. In that situation, the burden of compliance would disproportionately and unfairly fall upon small station owners, who not only have limited human and capital resources to pay for compliance, but should not be the primary target of a new integration rule. Instead, a new rule clarifying station staff requirements would be easier for the FCC to apply and achieve localism more effectively than an integration requirement.

2. Main Studio Staffing Requirements

The Commission should continue to require licensees to maintain “meaningful management and staff presence”160 at their

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160. 47 C.F.R. § 73.1125.
main studios, but should further clarify the meaning of that term. This phrase has been interpreted in Jones Eastern to mean that "a main studio must, at a minimum, maintain full-time managerial and full-time staff personnel."\textsuperscript{161} However, this definition does not give broadcasters adequate direction as to staffing requirements. It makes sense to keep the staffing requirement so someone will be at the studio to respond to community needs or even emergencies, such as the 2001 train accident in Minot, North Dakota. The Commission could make this requirement meaningful by defining it clearly. Like a local content rule, the Commission could enforce the rule by investigating complaints and imposing fines.

\textit{C. Expand Low Power FM}

The most effective way to promote content and structural localism is for the Commission and Congress to expand the LPFM service created in 2000\textsuperscript{162} by easing the interference requirements and allowing some stations to be commercial. LPFM stations use the same band as full-power FM stations, but their signals reach only a few blocks or a couple of miles. The thought behind creating an LPFM service was that these small stations would be inherently local, and could serve traditionally underserved groups such as racial and ethnic minorities, or an entire neighborhood.\textsuperscript{163} Low-power service is ideal for these purposes because the stations cost as little as $6,000 to build $500 per month to operate.\textsuperscript{164}

The FCC and most commenters agreed that all the LPFM stations should be licensed for noncommercial use because they

\begin{footnotes}
\footnote{161. See Policy Statement on Comparative Broadcast Hearings, \textit{supra} note 67, at 3616.}
\end{footnotes}
felt that commercial stations’ goals in maximizing audience size and advertising revenue would hinder their responsiveness to the community. The FCC found that “noncommercial licensees, which are not subject to commercial imperatives to maximize audience size, are more likely than commercial licensees to serve small, local groups with particular shared needs and interests, such as linguistic and cultural minorities or groups with shared civic or educational interests that may now be underserved by advertiser-supported commercial radio and higher powered noncommercial radio stations.”

An example of what the Commission envisioned LPFM to be is WRFR, an LPFM station serving Rockland, Maine. WRFR has about 35 volunteer deejays, who play everything from Native American rain chants to electronica to James Brown. The station also airs some of Maine’s only reporting on the commercial fishing industry. In addition, WRFR presents its own daily call-in program with state and local lawmakers.

By lifting the unduly restrictive interference protections placed upon LPFM stations and allowing limited commercial use, communities across the country could enjoy community-based radio such as WRFR in Rockland, Maine.

1. Interference

Potential interference between full-power and LPFM stations is a legitimate concern for radio broadcasters, and has been a controversial obstacle in getting LPFM service up and running. Initially, after considering engineering studies and comments, the FCC adopted protection from second-adjacent channel interference in order to sufficiently protect the signals of existing broadcast

170. See Comments of the National Association of Broadcasters, Localism Task Force, RM-10803.
stations.171 With this level of interference protection, the spectrum can accommodate about 400 LPFM stations in major metropolitan areas, and many more elsewhere.172 However, Congress unexpectedly enacted third-adjacent channel protection by tacking it onto an appropriations bill on December 21, 2000.173 Increasing the level of interference protection drastically reduced the number of stations that would be licensed nationwide to 70, all the way to zero in some areas and 2 or 3 in others.174 Congress also directed the FCC to conduct further interference studies.175 In order to fully understand the interference issue, some background information about interference is useful.

The FCC’s interference guidelines are based on broadcast channels (i.e. 91.5 FM) and the distance between stations. In general, the closer two stations are to broadcasting on the same channel, the further apart the stations must be located.176 For example, two radio stations that broadcast on the same channel must be located a certain distance apart from each other. Two stations broadcasting on the first-adjacent channel to 91.5 (91.4 or 91.6) also have prescribed distance requirements, but the stations do not need to be as far apart as stations operating on the same channel. Two stations broadcasting on second-adjacent channels to 91.5 (91.3 or 91.7) can be located in closer proximity to each other than those operating on first-adjacent channels.

Third-adjacent channel protection requires a prospective

174. See McConnell, supra note 172, at 22. For example, under the third-adjacent channel regulations, there is no room for any 100 watt stations in Chicago, New York and Los Angeles; room for one 100 watt station in Philadelphia. Id. Instead of the 1,000 LPFM stations envisioned by the Commission, there would only be room for 70. CENTER FOR PUBLIC INTEGRITY, OFF THE RECORD: WHAT MEDIA CORPORATIONS DON’T TELL YOU ABOUT THEIR AGENDAS 32 (2000).
176. For minimum distance requirements, see 47 C.F.R. § 73.207 (2004).
licensee to find a place on the spectrum where there are three unused channels on either side of it, or build a station far enough away from existing stations. Since the radio spectrum is already crowded, it is prohibitively difficult to find a space where there are seven unused channels in a row. Moreover, if the only other way to comply with the interference rules is locating the station far enough away from existing stations, LPFM would become an essentially rural service. Even with these protections, interference is unpredictable — a broadcaster following the rules there could still have interference problems due to factors such as signal strength, atmospheric conditions and the type of material transmitted or received. The Commission protects licensees against unexpected interference by addressing complaints on a case-by-case basis.

Congress should repeal these burdensome requirements because they are not necessary, nor do they serve in the public interest. The FCC comprehensively analyzed interference issues during the rulemaking process, and Congress should defer to its findings. The results of the interference study mandated by Congress reaffirmed the Commission’s earlier determinations that third-adjacent channel protections are unnecessary, and recommended Congress to eliminate them. Although interference is a legitimate concern in broadcasting, the current protections have essentially barred prospective LPFM licensees from obtaining licenses. Congress has unreasonably defeated the FCC’s efforts to promote localism by “increas[ing] citizens’ access to the airwaves” and providing better service to “very localized communities or underrepresented groups within communities.” Lifting these excessive restrictions would help LPFM flourish, especially if LPFM stations were licensed for commercial use.

177. See Creation of Low Power Radio Service, supra note 162, at para. 103.
178. See 47 C.F.R. §§ 73.810, 73.827.
179. See Notice, supra note 163, at paras. 38-50; see Creation of Low Power Radio Service, supra note 162, at 73-104.
2. License LPFM Stations for Commercial Use

Other than political pressures on Congress and the Commission by large broadcasting groups, there is no legal or pragmatic reason why LPFM has to be a strictly noncommercial service. The FCC could develop an allocation plan where it could have discretion, based on demand, to license some stations for noncommercial use and others for commercial use. For example, in a city which could accommodate six LPFM stations, the Commission could choose to designate one or two of those six for commercial use. This bifurcated approach would allow the Commission room for experimentation with commercial low power radio without compromising the Commission’s preference for a noncommercial low power service.

Licensing LPFM for commercial use would have pro-competitive effects by forcing all broadcasters to be more sensitive to the needs of their broadcast communities. Local businesses (such as a mom and pop video rental store) which are too small to advertise on full-power radio, would gain an additional advertising opportunity with commercial LPFM. Thus, full-power radio stations and LPFM stations would not compete for advertising revenue. If full-power and low power stations eventually compete for listeners, this competition would be healthy for broadcasting because it would force full-power stations to be more responsive to community needs and interests. If listeners decided that they prefer the programming broadcast on their local LPFM stations, less responsive, group-owned stations would have no choice but to compete more effectively by providing locally-oriented programming.

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182. The Commission is bound by 47 U.S.C § 309(j) to subject mutually exclusive license applications to a competitive bidding process, while licenses for noncommercial educational are not subject to bidding pursuant to 47 U.S.C. § 397(6).

183. In theory, however, these stations would not compete for listeners because the Commission envisioned LPFM stations to serve those who are not served by traditional commercial radio. See Creation of Low Power Radio Service, supra note 162, at para. 17.
In addition, commercial LPFM stations could provide affordable opportunities for new or small broadcasters, who cannot otherwise compete with large group owners, to enter the competitive market. REC Networks noted, “There was a time when more and more licensees had names such as "(City name here) Broadcasting" or were just in the name of an individual owner. What upsets us now is when we see licensee’s names with words like “investments,” “properties,” “acquisition,” etc.” These comments focus on LPFM as a mechanism to combat the inability of newcomers to compete with huge corporations such as Clear Channel or Infinity. LPFM stations, especially commercial stations, could help prevent or slow continued consolidation in radio by making practices such as voicetracking and fake call-ins less profitable for large group owners. Finally, expansion of LPFM, including licensing commercial LPFM stations, comports with the FCC’s preference to allow competition to be governed primarily by free market forces.

IV. CONCLUSION

While the FCC claims it values localism in broadcasting, its actions send the message that satisfying large media companies’ hunger for profits is more important. The Commission turns a blind eye when identical programming is simultaneously broadcast over the airwaves of many different cities, whether listeners want to hear it or not. The Commission has also allowed further media consolidation despite vigorous protest from many Americans.

The Commission may be reluctant to promulgate new structural or content localism rules because historically, compliance and enforcement of these rules were expensive for licensees and time-consuming for the Commission. Moreover, rules such as formal ascertainment, integration and program-origination generally did


185. E.g., 2002 Biennial Regulatory Review, supra note 2; 98 F.C.C.2d at 751.
not achieve their goal of enhancing broadcasters’ responsiveness to their local communities.

However, the Commission should treat localism as an important policy consideration in light of the negative effects of consolidation that has taken place over the past few years. It is possible for the FCC to implement new rules to effectively achieve localism without the burdensome side-effects that resulted from past rules. For example, listeners would benefit from a requirement that conglomerate-owned full-power stations dedicate time each day to local program content in the form of news, local affairs or cultural programming. However, enhancing LPFM service by easing interference restrictions and licensing some stations for commercial use is the most attractive option because these stations would achieve structural and content localism simply by virtue of their size and focus on service to small communities. Thus, burdensome rules requiring particular types and amount of locally-oriented content or certain structural components would be unnecessary. Finally, allowing some experimentation with commercial LPFM stations would enhance competition by permitting small broadcasters a way to enter the market and by pushing unresponsive full-power stations to better tailor their programming to local needs and interests.

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