

Transformation: The 1996 Act Reshapes Radio

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I. INTRODUCTION

While the Telecommunications Act of 1996 (“1996 Act”) focused largely on updating common carrier policy, several provisions modified broadcast—especially radio—licensing and ownership.¹ Any change in media ownership policy soon generates hot debate in this era of ever-tighter consolidation across the economy, and these statutory changes and the proceedings they prompted were no exception.

Critics have long lamented that media are controlled by too few big owners.² Persuaded that ownership diversity was vital to the public interest,

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.). The law’s provisions formed a series of amendments to various parts of the baseline Communications Act of 1934.

2. While now more than three decades old, the best survey of research on this issue remains WALTER S. BAER ET AL., CONCENTRATION OF MASS MEDIA OWNERSHIP: ASSESSING THE STATE OF CURRENT KNOWLEDGE (1974).

for decades the Federal Communications Commission (“FCC”) limited radio and television station ownership at both the local market and national levels. Various FCC policies sought to increase content diversity, economic competition, and ethnic minority entry and participation.³ Such policies followed the presumption that ownership of print or electronic media outlets affected their content and that diverse editorial points of view are important in a democracy.⁴ At the same time, control of advertising outlets (such as radio stations) has been one important factor in determining healthy competition at both market and national levels.⁵

Taking these and other presumptions into account, broadcast ownership policy has traditionally questioned how many outlets (individual media, such as a radio station) may be controlled by any one ownership voice.⁶ While the online world is changing the concept of a local marketplace, issues of ownership have typically focused more on market rather than national levels, as audiences select among those media outlets available to them. A New Yorker has little interest in what media are available to audiences in San Diego.

Many factors contribute to the decision to acquire one or more media outlets, the potential for making a profit chief among them. If ownership of several media outlets in one market offers the option of greater return through increased efficiency, such as automation or shared resources, so much the better. In some cases, ownership of multiple media has been pursued to expand economic or political power—Hearst or Murdoch come to mind. Availability of investment capital and low interest rates are also important facilitators. Changing technology has often encouraged

3. For a historical review, see Christopher H. Sterling, *Television and Radio Broadcasting*, in WHO OWNS THE MEDIA? CONCENTRATION OF OWNERSHIP IN THE MASS COMMUNICATIONS INDUSTRY 299 (Benjamin M. Compaine & Douglas Gomery eds., 2d ed. 1979).

4. Whether ownership diversity prompts increased variety of content is another matter. However, with several research papers suggesting that while consolidation may limit market entry, it may also (if ironically) help to increase program variety as the monopoly owner seeks the widest possible audience reach. E.g., Peter Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q. J. OF ECON. 194 (1952); Steven J. Berry and Joel Waldfogel, *Do Mergers Increase Program Variety? Evidence from Radio Broadcasting*, 116 Q. J. OF ECON. 1009, 1010 (2001) (concluding that consolidation “reduces station entry [but] . . . increases product [program] variety.”).

5. For an in-depth assessment of the issues and status across a variety of media, see BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA? COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY (3d ed. 2000). For the radio and the music business specifically, see *id.* at 285–358.

6. For one longitudinal use of the voice-and-outlet idea, see Christopher H. Sterling, *Trends in Daily Newspaper and Broadcast Ownership, 1922–70*, 52 JOURNALISM Q. 247 (1975).

consolidation. And obviously, policy changes can affect ownership, as the 1996 Act's provisions have demonstrated over the past decade.

II. LICENSE RENEWALS

While the 1996 Act increased radio station license terms from seven to eight years, the more important policy change affected license renewals. For decades, broadcasters had pressed both the FCC and Congress to establish some degree of "renewal expectancy" if a licensee provided acceptable service.⁷ While few licenses were ever challenged in so-called comparative renewals, and fewer still denied, the issue remained hotly controversial and kept legions of attorneys busy at a high cost to broadcasters even if licenses were nearly always renewed. One notable case involved fourteen licenses worth over one billion dollars, several of which were eventually reassigned.⁸ While process seemed at times to overtake substance in these proceedings, the FCC had little choice given the statutory requirements in the 1934 Communications Act ("1934 Act").⁹

With a sweep of its legislative hand, Congress removed all this with a new subsection (k) added to Section 309 of the 1934 Act. It requires that a license be renewed if the licensee fulfills three requirements: (A) the station has served the public interest, convenience or necessity; (B) the licensee has not been found guilty of "serious violations" of the Act or FCC rules; and (C) the licensee has committed "no other violations" of the Act or FCC rules, "which, taken together, would constitute a pattern of abuse."¹⁰ These generalized standards—none of which speak directly to the quality of the program service provided—are very easy to meet for the vast majority of stations. Only if a licensee is found *not* to meet these standards, and then only if "no mitigating factors justify the imposition of lesser sanctions," can the FCC deny a license.¹¹ And only after such a denial may the FCC even begin to consider a different licensee. Put simply, the "comparative"

7. For a history of the comparative renewal process, see Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of the Abuses to the Renewal Process, *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC*, 3 F.C.C.R. 5179, 5186–88 (1988).

8. Christopher H. Sterling, *Billions in Licenses, Millions in Fees: Comparative Renewals and the RKO Mess*, 2 GANNET CTR. J. 43 (1988).

9. See 47 U.S.C. § 309(e) (2000) (requiring comparative hearings if more than one applicant for a broadcasting station sought the same facilities).

10. *Id.* § 309(k)(1)(A)–(C). The phrase "public, convenience or necessity" dates to the 1927 Radio Act and is repeated verbatim as the standard of regulatory discretion at several points in the 1934 Act as well. It has never been defined by statute, but rather by the steady accretion of court cases that have generally, but not always, held that the phrase means whatever the current FCC defines it to mean.

11. *Id.* § 309(k)(3).

aspect of renewals was eliminated. Renewals became all but automatic, making the eight-year term more a matter of minor administrative review than any real threat of a loss of license for outlets that broadcast for decades.¹²

This change is interesting on two counts. Most importantly, it removes any regulatory discretion from the FCC—the rule is written such that licenses *will* be renewed save for egregious violations. The burden of proof to deny appears to be on the FCC as competitor consideration is prohibited. It does not get much clearer than that. And to underline its intent, Congress made this provision retroactive to renewals after May 1, 1995, eight months before the 1996 Act was passed—just about the only retroactive enactment in the 1996 amendments.

As best as can be determined, there have been no licenses vacated or not renewed under these 1996 provisions—other than a relative handful of licensees (nearly all AM) that have voluntarily surrendered their permits to operate. Or turning the statement around, the 1996 provisions clearly worked just as broadcasters hoped they would. Lacking comparative renewals—or fear of such—active membership in the broadcast bar has declined accordingly. An issue that for years took up reams of paper and hours of legal billing has virtually disappeared.

III. LOCAL OWNERSHIP

Of presumably lasting impact are the 1996 Act's provisions concerning how many stations one owner can control in a single market. Until 1992 FCC adhered to its duopoly¹³ policy forbidding a licensee to own more than one station of any type—AM, FM, TV—in a given market. With the 1996 amendments, Congress (acknowledging the huge post-1945 growth in the number of radio outlets from about 900 to some 12,000) concluded that such a one-to-a-customer rule was no longer necessary in radio. Instead, using a graduated scale based on market size, defined by how many outlets were licensed, legislators allowed ownership of up to eight AM or FM stations as outlined in the following table:¹⁴

12. See Mark D. Schneider, *Renewal Procedures and Expectancy Before and After the Telecommunications Act of 1996*, COMM. LAW., Summer 1996, at 9, 9–10; Lili Levi, *Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243, 244–48 (1996).

13. Defined as a situation in which two companies own all or nearly all of a radio market, the term came to mean ownership of no more than one AM and FM (and, though much later, one OR the other) station in the same local market. “Local” in this sense means communities where stations substantially overlap their signal coverage.

14. Telecommunications Act, § 202(b)(1) (codified at 47 C.F.R. § 73.3555).

TABLE 1
NUMBER OF RADIO OUTLETS THAT ONE OWNER CAN HAVE PER MARKET

<i>IN A MARKET WITH:</i>	<i>A SINGLE LICENSEE CAN CONTROL UP TO THIS MANY COMMERCIAL RADIO STATIONS:</i>
45 OR MORE RADIO OUTLETS	UP TO 8, NO MORE THAN 5 IN THE SAME SERVICE (AM OR FM)
30–44 OUTLETS	UP TO 7, NO MORE THAN 4 IN THE SAME SERVICE
15–29 OUTLETS	UP TO 6, NO MORE THAN 4 IN THE SAME SERVICE
14 OR FEWER OUTLETS	UP TO 5, NO MORE THAN 3 IN THE SAME SERVICE

Under examination, however, these seemingly firm limits are actually flexible. The 1996 Act allows for a licensee to own more than the number of stations shown if an applicant can demonstrate that to do so “will result in an increase in the number of radio broadcast stations in operation.”¹⁵ Presuming no added interference, this would not seem a difficult standard to achieve where frequencies remain vacant. On the other hand, the law says no single owner can control more than half the stations in any market. The market ownership caps refer, of course, only to numbers of stations—they say nothing about the audience popularity or economic power of those stations. One outlet is seen as the equivalent of another. Yet clearly a multiple outlet cluster located in a major market will rapidly become a jewel in the crown of any multiple station owner.

The 1996 Act also called for continuing reassessment of all ownership policy. Section 202(h) requires the FCC to review all of its broadcasting ownership rules every two years.¹⁶ This has led to a series of FCC studies and proceedings and more than a few court reviews and reversals. Regular reports on the state of radio broadcast ownership appeared through 2001.¹⁷

15. *Id.* § 202(b)(2).

16. This was later changed to four years when it became clear the FCC was falling behind.

17. See FCC, Review of the Radio Industry, <http://www.fcc.gov/mb/policy/radio.html> (last visited Mar. 21, 2006).

In a special 2002 staff research report, FCC data showed that since the 1996 Act, there had been a decline in the number of separate station owners in most radio markets. New York saw a drop from thirty-three owners to twenty-two in that five year period, while Los Angeles declined from thirty-nine to twenty-eight, Chicago from fifty-nine to thirty-seven, and Washington, D.C. dipped from thirty-one down to twenty-one.¹⁸ While a few markets remained little changed and a handful actually saw an increase in competition, the predominant trend was clear—fewer owners operated more stations. Indeed, though the overall number of radio outlets rose by 5.4% in the five years following the 1996 legislation, the number of station voices (owners) declined by more than a third (34%).¹⁹

Armed with industry data and lobbying, as well as three-quarters of a million public comments (virtually all of the latter against further loosening of the rules), the FCC issued an extensive set of broadcast and cable ownership policy changes in June 2003.²⁰ Included was a rule changing how radio markets would be defined for the purposes of attributing station ownership. Rather than using station signal contours (maps showing predicted coverage areas based on power, antenna location, etc.), the FCC said it would apply geographic market definitions as established by Arbitron, the radio ratings company. Under the Arbitron method, all stations licensed to communities in a market *and* stations licensed elsewhere but substantially listened to (or “home”) in that market will count toward the limits shown in the table—a more stringent definition than had prevailed since 1996. The decision added that both commercial and noncommercial outlets will be counted in determining the number of stations in a market. This change was one of the few to be upheld when most of the remaining FCC rules, including an FCC decision to retain the existing radio ownership caps based on market size, were stayed and then remanded in a court appeal.²¹ As is its normal practice in such rulemakings, however, the FCC said it would not require divestiture of radio stations that exceeded the new market definition until and unless they are sold or traded.

18. George Williams & Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* app. F (FCC, Media Bureau Staff Research Paper, Media Ownership Working Group, Paper No. 11, 2002).

19. *Id.* at 3.

20. See 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620 (July 2, 2003); Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46286 (Aug. 5, 2003) (codified at 47 C.F.R. pt. 73).

21. Most of the other rules were remanded for further consideration by the FCC in June 2004. See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 2904 (2005).

And several large owners did exceed the statutory limit of eight outlets—in 2003, for example, Clear Channel alone owned from eleven to fifteen stations per market, under the old definition, in sixteen different communities—and controlled nine stations in a dozen further cities and towns.²² Some of these were smaller and overlapping markets that “allowed”—again, under the old market definition—Clear Channel to control well over half of the audience and advertising revenue, even though such cases appeared to exceed limits set by Congress in 1996. Few of these stations have been sold or traded in the years since.

The remand by the court, however, was an important aspect of the FCC’s radio reasoning. In its mid-2003 rules package, the FCC posited that five more-or-less equal-sized station owners defined its ideal goal for a competitive radio market. Yet the actual ownership situation across the country does not approach that goal—most markets are dominated by one or two owners of multiple stations who control the most popular outlets as well. Assailed by both pro-deregulation spokespersons claiming that many types of market structures can be competitive, as well as citizens’ groups who argued that the FCC’s own data made clear few markets achieved such a structure, the court remanded this part of the revised radio rules for additional FCC consideration. The FCC was to determine whether five competitors was the right goal, and if so why, and how to achieve that or any modified goal.²³

IV. NATIONAL OWNERSHIP

Unlike the somewhat nuanced approach to local market ownership, the 1996 amendments very clearly eliminated any national radio station ownership cap. Into the early 1980s, the FCC had allowed a single owner no more than seven AM and seven FM stations, as well as seven television stations, no more than five of which could be on VHF channels. Beginning in 1981, successive FCC rules changes slowly increased the number of AM and FM stations that could be owned to twelve of each, then eighteen, and finally to twenty²⁴ and twelve in television. Congress took the ultimate step with its 1996 amendments, wiping out any radio limitation at all. Just a month later, the FCC implemented these provisions to eliminate its national radio multiple ownership rule. The full effects of this change soon became

22. John Dunbar & Aron Pilhofer, *Big Radio Rules in Small Markets*, THE CENTER FOR PUBLIC INTEGRITY, Oct. 1, 2003, <http://www.openairwaves.org/telecom/printer-friendly.aspx?aid=63>.

23. *Prometheus*, 373 F.3d at 421.

24. These limits could be exceeded to a total of twenty-three stations if owned by an ethnic minority.

apparent, unintended though they may have been.²⁵

Radio's changing ownership profile makes clear that eliminating the national ownership cap has had substantial impact. Whereas CBS was the largest radio owner in terms of revenue with thirty-nine stations and 6% of overall radio revenue, a month after the new law was passed, by late 1998, Infinity, with 158 stations and nearly 17% of revenue, had taken the lead. Over the next four years, station transfers (sales) expanded greatly, and prices for good properties shot up accordingly. Many long-time station operators sold out to the growing radio groups. The number of owners of radio stations dropped by a quarter (from 5,100 to about 3,800) between 1996 and 2001.²⁶ By March 2002—just five years after the amendments were passed—the radio industry had consolidated to the structure it still holds today. Clear Channel, with 1,156 stations across the country, took in nearly 27% of total industry revenue. Adding Infinity, 184 stations and nearly 18% of revenue, the top two group owners controlled more than 44% of total radio revenue in the country.²⁷ By late 2005, radio's overall picture had changed only marginally—the second largest owner was now Cumulus with just over 300 stations, while Infinity dropped to fourth with 178—due in part to the telecommunications/information sector financial meltdown that began in 2000 and dried up investment capital. But any measure of ownership depends on what numbers are being applied. Looked at in terms of audience in late 2005, for example, Clear Channel reached nearly 107 million listeners a week—more than a third of the country's population—while 58 million tuned in to runner-up Infinity. The largely rural stations owned by Cumulus ranked only tenth with 8.5 million.²⁸

V. IMPACT AND OUTLOOK

While other factors contributed to radio's consolidation, the 1996 amendments were the primary cause. Indeed, that concentration is a continuing though now more gradual trend. The declining number of radio owners has redefined local radio markets where one owner often controls half of the listening options, contributing to homogenized programming

25. Concerning the issue of intent, see Christopher H. Sterling, *U.S. Communications Industry Ownership and the 1996 Telecommunications Act: Watershed or Unintended Consequences?*, in *MEDIA POWER, PROFESSIONALS, AND POLICIES* 56 (Howard Tumber ed., 2000).

26. COMMON CAUSE EDUCATION FUND, *THE FALLOUT FROM THE TELECOMMUNICATIONS ACT OF 1996: UNINTENDED CONSEQUENCES AND LESSONS LEARNED* 10 (2005), available at http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/FALLOUT_FROM_THE_TELECOMM_ACT_5-9-05.PDF [hereinafter COMMON CAUSE EDUCATION FUND].

27. Williams & Roberts, *supra* note 17, at app. C.

28. *Who Owns What*, Oct. 5, 2005, at 1–2 (on file with the Author).

that has created a “mall” of similar-sounding stations across the nation. The largest single owner, Clear Channel, operates 10% of all the radio stations and reaches a third of the nation’s population, while the largest ten owners together control two-thirds of radio listening and advertising revenues.²⁹ Pursuit of economies of scale have substantially reduced locally-produced programming as well as employment. Given the narrowing radio music menus and the proportion of time devoted to advertising—as well as the decline of local news and public affairs programming (many stations provide none)—it is no surprise radio is experiencing something of a crisis of self-confidence.

Much of this was probably unintended when Congress passed the 1996 amendments package. Adhering to pleas from broadcast lobbyists for regulatory relief of a business that was not making much money and was not a primary news resource anyway,³⁰ many congressmen presumed they were merely clearing regulatory underbrush, as it was often stated, left over from the days of a much smaller radio-television business. But the resulting change was more far reaching than already indicated. Growth in station ownership by ethnic minorities, for example, appears to have flattened if not fallen off: one petitioner to the FCC cited a 14% drop in minority ownership of radio outlets since 1996.³¹ This decline is blamed in part on high station prices, which have tempted the few minority stations to sell out while making it hard for others to enter the market.³² The popular music business has its own concerns which focus on the tight control of radio stations, concert venues, and even billboards by Clear Channel and a few other major players.³³

Is there any way to repair the damage that critics argue has been done to radio by the 1996 changes in the law? As Congress considers new legislation, it might consider the case of radio and the impact of unintended consequences. Two things seem worth a revisit—the virtual assurance of license renewal—in which case, why have a license at all?—and the dominance of but one or two consolidated radio station owners in most markets. Negotiating a roll-back of the 1996 provisions, even a minor shift in degree, would face fierce lobbying by the radio business, but the results

29. See Future of Music Coalition, *Radio Deregulation: Has It Served Citizens and Musicians?* 3 (Nov. 18, 2002), <http://www.futureofmusic.org/images/FMCradiostudy.pdf> [hereinafter Future of Music Coalition].

30. See COMMON CAUSE EDUCATION FUND, *supra* note 25, at 10.

31. *Id.* at 11.

32. The last official report is now six years old, though new data has been gathered. See generally NTIA, MTDP Resource Center, <http://www.ntia.doc.gov/opadhome/mtdpweb/resources.htm#reports> (collecting minority ownership statistics reports) (last visited Apr. 8, 2006).

33. See Future of Music Coalition, *supra* note 28, at 4–9.

might actually be beneficial to a radio business facing serious competition for audience ears. And they would certainly assist media diversity.

Radio seems to have lost its luster, especially for many younger listeners. The decline in radio listening has been driven by expanding technological options—MP3 players, particularly the ubiquitous iPods, and growing satellite subscription services (e.g., XM and Sirius Satellite Radio, which reached close to eight million subscribers as this was written). While many in radio are rightly concerned about these external threats, some argue radio must tend to its own house to attract and hold listeners. Though the business is once again seeking to reinvent itself to better compete in its developing multichannel digital marketplace with varied formats and by reducing advertising time, the role of radio's post-1996 consolidation in this transition is open to question. While multiple-owner deep pockets may help cushion change, what is the cost in program variety and local service to listeners? If radio's consolidation turns out to have been a mistake—as many strongly feel to be the case—undoing it will be difficult at best. We will live with the results for a long time.