

DUOPOLY WARS: ANALYSIS AND CASE STUDIES OF THE FCC'S RADIO CONTOUR OVERLAP RULES

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I. POLITICAL AND ECONOMIC ANTECEDENTS

A. The Deregulatory Philosophy of the 1980s

In the early 1980s the Federal Communications Commission ("FCC" or "Commission") embarked upon a series of deregulatory policies reflective of the political and economic philosophy of the Reagan administration.¹ That philosophy supported the dismantling of specific substantive regulations in favor of "market forces," which it was believed, were more responsive and more efficient than a micromanaged

broadcast communications industry. All that was needed was to remove the handcuffs from Adam Smith's "invisible hand," and the public interest, convenience, and necessity would be served more efficiently and economically than by any bureaucracy in Washington.

During the 1980s, the FCC promoted not only the growth of existing electronic media, but also the development and profusion of new alternative media to compete with the old. In the case of commercial radio, the Commission adopted a number of policies which significantly proliferated the number of com-

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¹ To be fair, a number of deregulatory proposals, such as the deregulation of radio, the Clear Channel Proceeding, 9 kiloHertz spacing, and Docket 80-90, were all the brainchildren of the previous administration under Chairman Charles Ferris, a Democrat appointed by President Carter.

mercial radio frequencies, both AM and FM. In the Clear Channel Proceeding,³ the protection for Class I-A Clear Channels was reduced by 50% in order to permit the allocation of new regional channels and local daytime-only stations.³ BC Docket 80-90, proposed by the Ferris administration, but implemented by Fowler over a three-year period, added over 700 new FM channels throughout the country, most of which were low-powered Class "A" local channels. These, and a number of other regulatory moves, all adopted under the philosophy that "more is better," created a plethora of new audio and video services during the 1980s.⁴

During this period of phenomenal growth in electronic media, the bubble continued to expand. Huge mergers took place, restructuring a large segment of the industry. Prices paid for radio and television stations rose substantially, resulting in financing plans completely dependent on future increases in valuation rather than realistic cash flow. It became evident that the bubble was being stretched beyond its capacity.

B. The Altered Landscape of the 1990s

At the end of the decade, the bubble inevitably burst. Station values plummeted, cash flows decreased, and business failures and bankruptcies were common. Commercial radio stations were hit particularly hard. Some media brokers estimated that radio station values had declined by as much as 50% in

two short years. By 1991, more than half of all commercial radio stations were operating in the red,⁵ and for small market stations the percentage was even higher.⁶

The FCC, seeing that it was presiding over an industry in serious economic trouble, came to realize that its "more is better" and "diversity at any cost" policies, like most panaceas, worked much better in theory than in practice.

C. Initial Attempts at Damage Control

Even before the turn of the decade, the Commission began to realize that its system of mixing allocations of regional and local stations had created an economic imbalance, making it difficult for the small stations to compete.⁷ The Commission instituted a number of policy initiatives to address these imbalances in order to permit small AM and FM stations to compete more effectively in the media marketplace.

First, the Commission modified its rulemaking procedures involving FM channel allotments⁸ making it easier for licensees of low-power FMs to seek and obtain an upgrade to a higher-powered class of station, without placing their existing facilities in jeopardy under the *Ashbacker* rule.⁹ Subsequently, the FCC adopted, by an across-the-board rulemaking, a power increase for all eligible Class A FM stations from three kilowatts effective radiated power

³ *In re Clear Channel Broadcasting in the AM Broadcast Band, Report and Order*, 78 F.C.C.2d 1345, 47 Rad. Reg. 2d (P & F) 1099 (1980).

³ *Id.* para. 18. While the Fowler administration is blamed for much of the deregulatory excesses that contributed to the economic woes of radio, Fowler should be credited at least with the wisdom to reject the proposed 9 kiloHertz spacing for AM radio that was seriously urged by his predecessor, Charles Ferris.

⁴ *In re Modification of FM Broadcast Rules to Increase Availability of Commercial FM Broadcast Assignments, Report and Order*, 48 Fed. Reg. 29,486, 53 Rad. Reg. 2d (P & F) 1550 (1983).

⁵ *In re Revision of Radio Rules and Policies, Report and Order*, 7 FCC Rcd. 2755, para. 2, 70 Rad. Reg. 2d (P & F) 903 (1992), *recon. granted in part*, 7 FCC Rcd. 6387, 71 Rad. Reg. 2d (P & F) 227 (1992) [hereinafter *Radio Rules and Policies Report and Order*].

⁶ *Id.* para. 2. Finding that "as a direct result of this tremendous market fragmentation, many participants in the radio business are experiencing serious economic stress. More than half of all commercial radio stations lost money in 1990, and small stations in particular have been operating near the margin of viability for years." *Id.*

⁷ *In re Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the*

Maximum Transmitting Power for Class A FM Stations, Second Report and Order, 4 FCC Rcd. 6375, 66 Rad. Reg. 2d (P & F) 1473 (1989) [hereinafter *FM Stations Second Report and Order*]. The term, "small" is used here in the sense of power and coverage limitations. For example, Class A FM stations up through the mid-1980s were authorized to operate at a maximum effective radiated power ("ERP") of three kilowatts and a maximum antenna height above average terrain ("HAAT") of 100 meters (328 feet). *Id.* paras. 1, 15. Its "interference-free" coverage was protected at about fifteen miles from the transmitter site. *Id.* para. 47 n.75.

⁸ *In re Amendment of the Commission's Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent Channels, Report and Order*, 51 Fed. Reg. 20,290, 60 Rad. Reg. 2d (P & F) 114 (1986) [hereinafter *FM Adjacent Channels Report and Order*].

⁹ *Id.* para. 2. The Commission previously had held that the policy announced in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (that section 309(e) of the Communications Act requires an evidentiary hearing in all cases where there are mutually exclusive applications) did not apply to FM rulemaking proceedings where a licensee sought an upgrade on its same or an adjacent channel. *In re Application of Malrite of New York, Inc. for Constr. Permit in File No. BP-820408AB, FCC 84-338* (July 12, 1984).

("ERP") to six kilowatts ERP.¹⁰ In the same rulemaking, the Commission also created a new class of FM Station, C-3 (25 kilowatts at 100 meters maximum HAAT), stating that the principal purpose of such action was "to provide additional opportunities for improvement of the facilities of existing Class A FM broadcast stations."¹¹ Finally, the Commission modified its radio duopoly rules to permit common ownership of facilities with overlapping *primary service contours*¹² so long as their principal community contours¹³ did not overlap.¹⁴

II. REVISION OF THE RADIO OWNERSHIP RULES

A. Decisional Antecedents: The Growth of "Local Marketing Agreements"

Prior to the release of its *Report and Order* relaxing the radio duopoly rules in April 1992, the FCC's Mass Media Bureau had begun responding to the economic crisis by issuing declaratory rulings on the legality of joint operating agreements between two radio stations in the same market. "Time Brokerage Agreements" ("TBAs") referred to an arrangement, whereby one station, the time broker, would purchase 100% of the available broadcast time from the other station for a flat monthly fee, and act as the programmer and sales representative for that station. The more generic term, "Local Marketing Agreement" ("LMA") referred to any type of arrangement where one station acted as an agent for

another station in the same market with respect to the sale of advertising time. Most of the agreements that were made included either an option to purchase, or a right of first refusal on the part of the brokering station to acquire the brokered station.¹⁵ The inclusion of such a right was to protect the time broker's long-term investment in building up the station's ratings and sales. If the licensee could terminate the agreement at any time, or sell it to a third party, the time broker would have lost all of the long-term benefits of its investment.

Conversely, the licensee would often have some protection in the agreement to prevent the time broker from walking off and leaving the station in a shambles. An early termination fee, or some guarantee of payment after early termination helped to protect the licensee's economic interest. The efforts of the time broker to protect its investment, and the tendency of the licensee to minimize its own expense, created a situation where violation of FCC rules and policies concerning licensee control and responsibility could occur. Until a ruling by the Mass Media Bureau at the end of 1990, it was widely assumed that the type of agreement such as described above, which provided for the brokering of a substantial portion of a station's time, would violate section 310(d) of the Communications Act¹⁶ and attendant FCC policies.¹⁷

In March 1990, Spanish Radio Network, asked the Commission for a declaratory ruling that a reciprocal time brokerage agreement between two separately-owned spanish language stations in Florida was illegal as a *de facto* duopoly and an unautho-

¹⁰ *FM Stations Second Report and Order*, *supra* note 7, para. 1.

¹¹ *In re* Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations, *First Report and Order*, 4 FCC Rcd. 2792, para. 28, 66 Rad. Reg. 2d (P & F) 338 (1989).

¹² "Primary service contour" is defined in the FCC's technical rules as the 1 mV/m contour for FM stations, 47 C.F.R. §§ 73.211(b)(i), 73.215(a)(1) (1993), and the 0.5 mV/m and 2.0 mV/m contours for AM radio stations, 47 C.F.R. § 73.182(d) (1993).

¹³ "Principal community contours" are defined in the FCC's technical rules for AM stations as the distance out from the AM station's transmitter where its ground-wave radiated energy equals or exceeds five millivolts over one square meter of surface area—5 mV/m. 47 C.F.R. § 73.24(i) (1993). With certain exceptions, an AM station must place a 5 mV/m or greater contour over 80% of its community of license. *Id.* For FM stations, the principal community contour is 3.16 mV/m (alternatively expressed as 70 dBu). 47 C.F.R. § 73.315(a) (1993). The term "principal community contour" is used interchangeably with "principal city contour" or "city-grade contour."

¹⁴ *In re* Amendment of Section 73.3555 of the Commission's

Rules, the Broadcast Multiple Ownership Rules, *First Report and Order*, 4 FCC Rcd. 1723, para. 1, 65 Rad. Reg. 2d (P & F) 1676 (1988).

¹⁵ Of course, these rights could not be exercised unless the Commission modified its duopoly rules to permit common ownership of more than one radio station of the same class. Prior to the adoption of the radio contour overlap rule, the language found in such agreements was conditioned upon the subsequent amendment of the multiple ownership rules by the Commission to permit the acquisition.

¹⁶ 47 U.S.C. § 310(d) (1988 & Supp. 1991).

¹⁷ The case most directly on point was a declaratory ruling by the Commission in 1973 warning prospective purchasers of a station to refrain from taking any managerial responsibilities at the station prior to approval by the Commission's staff of a proposed assignment of the license. *In Re* Request of Phoenix Broadcasting Co. for Approval of Interim Plan for Financing and Participation in Operations of KPHX, Phoenix, Ariz., Pending Determination on Application for Transfer of Control, *Request*, 44 F.C.C.2d 838, 839, 29 Rad. Reg. 2d (P & F) 187, 188-9 (1973); *see also* *In Re* Application of Fine Arts Broadcasting, Inc. for Assignment of License of Station WEZL, Charleston, South Carolina, *Memorandum Opinion and Order*, 57 F.C.C.2d 108, para. 8, 35 Rad. Reg. 2d (P & F) 1169 (1975).

rized transfer of control. The Chief of the Mass Media Bureau issued a letter ruling denying the petition, stating that, upon review of the agreement and the facts as presented by both sides, there had been no unauthorized transfer of control, and that each licensee remained in control of its own programming, personnel and financial affairs.¹⁸ A companion case, *Joseph A. Belisle, Esquire*,¹⁹ released the same date by the Chief of the Complaints and Investigations Branch of the Mass Media Bureau, similarly held that a reciprocal programming and sales arrangement (termed a "network affiliation agreement") between two stations did not violate any FCC rule or policy.

We conclude, however, that regardless of the number of hours of programming KUKU-FM chooses to accept from KWPM, Inc., the Commission approves the implementation of the affiliation agreement, as long [sic] KUKU-FM continues to meet all of the Commission's requirements in meeting its local service obligations, including but not limited to, retaining the right to . . . cut into KWPM, Inc.'s programming in case of an emergency; broadcasting station identifications, maintaining a main studio within the station's principal community contour, covering local community issues for its issues/programs list, as well as maintaining the public inspection file.²⁰

Attempts were made in these rulings to distinguish earlier Commission policy that had banned similar arrangements.²¹ In light of the Mass Media Bureau's later recommendations to the Commission,²² however, it is arguable that the Bureau, aware of the worsening economic crisis, was attempting to respond with the delegated authority and policy tools it

had in hand, to carve out a new policy that would provide relief for at least some radio broadcasters.

The economic situation had worsened dramatically by the end of 1991, forcing the Commission to consider additional measures. In an internal memorandum²³ to then Chairman Alfred Sikes, the Chief of the Mass Media Bureau laid out the cold facts of the economic crisis in radio, and called for a number of changes in regulatory philosophy which would downplay diversity in favor of survival.²⁴

A key proposal for the Commission was to relax its multiple ownership rules for radio, both nationally and locally. Prior to 1991, section 73.3555 permitted the national ownership of twelve AM and twelve FM commercial radio stations;²⁵ however, a licensee was not permitted to own two radio stations of the same class of service (*i.e.*, two AM or two FM), whose principal community contours overlapped, the so-called "duopoly rule."²⁶ The Mass Media Bureau's Radio Industry Overview discussing fragmentation of the radio industry paved the way for later urging that the national ownership limit be revised to permit the ownership of a larger number of stations nationally, as well as the modification of the duopoly rule to permit co-ownership of more than one radio station of the same class.²⁷

On May 30, 1991, the Commission issued a *Notice of Proposed Rule Making ("NPRM")*²⁸ seeking public comment on a proposal to increase the maximum number of radio stations which can be owned nationally, and to modify the radio duopoly rule to permit common ownership of more than one commercial radio station in the same class of service (*i.e.*,

¹⁸ Letter from Roy J. Stewart, Chief, MM, to Roy R. Russo, Counsel, Spanish Radio Network, 5 FCC Rcd. 7586, 68 Rad. Reg. 2d (P & F) 1028 (1990) [hereinafter Letter from Roy J. Stewart to Roy R. Russo].

¹⁹ Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enf. Div., MM, to Joseph A. Belisle, Esq., 5 FCC Rcd. 7585, 68 Rad. Reg. 2d (P & F) 1031 (1990).

²⁰ *Id.*

²¹ Specifically, the Russo ruling distinguished *Phoenix Broadcasting Co.*, *supra* note 17, on the grounds that the prospective purchaser in that case had injected capital into the station to keep its operations afloat, and would assume managerial positions at station. Letter from Roy J. Stewart to Roy R. Russo, *supra* note 18, at 7587, 68 Rad. Reg. 2d at 1030.

²² FCC, MASS MEDIA BUREAU, OVERVIEW OF THE RADIO INDUSTRY (Jan. 1992) (inserted in MM Dkt. No. 91-140 (Feb. 26, 1992)) [hereinafter MMB RADIO INDUSTRY OVERVIEW].

²³ *Id.* While the memorandum was initially intended to be an internal working document not for public release, several copies were "leaked" to the trade press, and the Commission decided to include the memorandum in the record of rulemaking docket MM 91-140.

²⁴ *Id.* The economic crisis brought on by proliferation of

new FM licenses continues. At a speech to the NAB in July 1993, Acting Chairman James F. Quello told broadcasters that he was considering imposing a freeze on the allotment of any more FM channels. "I think in the name of diversity and competition, we've licensed too many radio stations . . . I never thought I'd live to see the day when 60% of radio stations are losing money. . . . I don't see where the public interest would be served by allowing other people to go bankrupt." *FCC Chairman Ponders Freeze on FM Stations*, BROADCASTING & CABLE, Aug. 2, 1993, at 14. As of this writing, no plan to freeze the allotment of new FM stations has been put into effect, nor has any rulemaking designed to improve existing service, rather than create new FM service, been initiated.

²⁵ 47 C.F.R. § 73.3555(d)(1)(ii) (1993). The twelve station limit is extended to fourteen if two stations of those fourteen are minority-controlled. *Id.* § 73.3555(d)(1)(i). The multiple ownership limits do not apply to noncommercial, educational FM station licensees. *Id.* § 73.3555(f).

²⁶ *Id.* § 73.3555(a)(1), (2).

²⁷ See MMB RADIO INDUSTRY OVERVIEW, *supra* note 22.

²⁸ *In re Revision of Radio Rules and Policies, Notice of Proposed Rule Making*, 6 FCC Rcd. 3275 (1991) [hereinafter *Radio Rules and Policies NPRM*].

AM or FM). Fifty-three individuals and groups filed comments in response to the *NPRM*, and thirty-two reply comments were filed, including the reply comments of a number of U.S. Senators and Congressmen.²⁹ On April 10, 1992, the Commission released its *Report and Order*.³⁰

B. The *Report and Order*

With respect to the national ownership limitation, the Commission announced that the national ownership caps should be relaxed to permit an individual or single entity to own up to thirty AM stations and thirty FM stations nationwide.³¹ The Commission justified its decision by pointing to the substantial numerical increase in radio stations throughout the country, as well as other forms of competing media.³²

With respect to the local ownership, or duopoly rule, the Commission noted the increasingly fragmented nature of the local radio marketplace, the economic strain experienced by many radio broadcasters, and the sizeable savings that could stem from joint operation of same-market radio facilities.

Three factors were emphasized in the new regulations: (1) market size; (2) the number of commonly-owned stations in the market; and (3) the audience share resulting from a proposed acquisition.³³ The rules initially adopted divided U.S. radio markets into four different-sized groups.

1. In markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service; provided that the owned stations represent less than 50 percent of the [total number of commercial radio] stations in that market. Common ownership of one AM/FM combination

will continue to be allowed in any event.

2. In markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of [those four] stations does not exceed 25%.

3. In markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the [commonly owned] stations does not exceed 25%.

4. [Finally,] [i]n markets with 40 or more radio stations, a single licensee will be permitted to own up to three AM stations and three FM stations, provided that the combined audience share of the stations does not exceed 25%.³⁴

The Commission defined radio market as the radio metro market recognized by the Arbitron Company, Inc., a corporation in the business of measuring and reporting radio and television audience listening and viewing habits.³⁵ Commercial radio stations that had measurable audience listener ratings in these markets would be counted in order to determine which above-mentioned market "tier" would define that particular market.

It was recognized that not every radio station was in an Arbitron "rated" radio metro market. Where the station or stations in question were located outside any radio metro market, the definition of the relevant market would be determined by the area encompassed by the principal community contours³⁶ of the overlapping stations proposing to have common ownership. The number of stations in the market would then be determined by counting the number of commercial stations whose principal community contours overlapped or intersected the principal community contours of the commonly-owned stations.³⁷

²⁹ The Commission's list of Reply Comments included the names of U.S. Senators Lloyd Bentsen, Albert Gore, Jr., Howard Metzenbaum, Daniel P. Moynihan, and Paul S. Sarbanes. *Radio Rules and Policies Report and Order*, *supra* note 5, at 2794-95, 70 Rad. Reg. 2d at 939.

³⁰ *Id.* at 2755.

³¹ *Id.* para. 18.

³² *Id.* paras. 18, 23. The Commission stated:

The number of radio stations . . . has grown dramatically At the same time, the industry has witnessed a significant increase in the number of competing audio services delivered by cable systems, including music video offerings such as MTV and VH-1 and cable network services In addition, non-radio sources competing with radio owners for audience and advertising revenues have also multiplied, with the number of television stations growing from 883 to 1,489 since 1985 and cable penetration increasing from 41 percent to 64 percent since 1984. [footnote omitted]

[O]ur goal is not to introduce wholesale restructuring of the broadcasting industry Rather, we intend to promote competition and diversity by modifying [the] ownership rules in a manner that directly addresses the long-term economic changes that are endemic to the radio industry.

Id.

³³ *Id.* para. 40.

³⁴ *Id.*

³⁵ Arbitron breaks down its radio markets into a Metro Survey Area ("MSA") and a Total Survey Area ("TSA"). The MSA corresponds to the boundaries of metropolitan statistical areas designated by the United States Bureau of the Census. The Arbitron Company, *Radio County Coverage*, at vi (1993 ed.).

³⁶ *Radio Rules and Policies Report and Order*, *supra* note 5, para. 46.

³⁷ *Id.* For example, if Station A and Station B have overlapping city grade contours and Station A proposed to acquire Sta-

The audience share cap was designed as a second check, after the numerical limitations based on market size, to ensure that a single owner would not acquire an undue concentration of control in a local radio market.³⁸ By necessity, the Commission had to rely here on audience research data published by Arbitron, which was, and remains, the only company performing nation-wide radio audience listening behavior analysis on a regular, periodic basis.

The Commission acknowledged that a number of licensees had already sought to achieve the economies of scale inherent in joint operation by entering into time brokerage agreements. Concern had been expressed both in the *NPRM* and by individual commenters, that the new rules should take same-market time brokerage agreements into account and provide additional regulation over LMAs in order to prevent doubling up and multiplying the number of jointly operated stations in a market by an unlimited factor.³⁹ Accordingly, the Commission adopted new rules which required that whenever one station provided more than 15% of another station's programming where both stations were in the same "market,"⁴⁰ the brokered station would be counted as an attributable ownership interest for purposes of determining compliance with either the national ownership or local ownership limitations.⁴¹ Thus, under the new rules, a local station owner could not broker a station in its market which it could not own under the revised local ownership rules. Additionally, in order to prevent an unnecessary loss of program diversity, the Commission prohibited same-service si-

mulcasting, whether co-owned or owned and brokered in the same market.⁴²

C. The Reconsideration Order

The *Report and Order* drew intense criticism from several quarters, not the least of which was the office of Commissioner Andrew C. Barrett, who partially dissented on the complicated market-tier approach to relaxing the duopoly rule, pointing to its likely impact on small group owners, independent owners, and new entrants in the local radio markets.

Why should small radio players and new entrants be penalized for prior decisions the Commission made to allocate nearly 700 new FM radio stations in Docket 80-90, or add as many AM stations as possible? While I agree with the general view that allocating more stations during the 1980s was not necessarily better for radio industry economics, I do not agree that the Commission must now "cut off" new entrants and small players at the knees in order to reshuffle the economics of the radio industry. Yet, the cumulative effect of the new radio ownership rules has the potential to do just that The beneficiaries of such shorter-term activities will be station brokerage companies, a few large group owners, and the lawyers representing these entities. The likely losers from this action will be small radio group owners, stand alone radio station licensees, small market radio station licensees, new entrants, and last, but not least, the listening public.⁴³

Certain members of Congress also vocally criticized the Commission's decision and warned that appropriations for FCC activities might be in jeopardy unless the rules were modified.⁴⁴ The Commission re-

tion B, the number of stations in the market would include not only Stations A and B, but also all operating commercial radio stations whose city grade contours overlap in whole or in part with those of Stations A and B. Noncommercial educational stations, authorized but unbuilt radio stations, and stations that had been off the air for more than six months were not to be counted in determining market size.

³⁸ *Id.* para. 48.

³⁹ *Radio Rules and Policies NPRM*, *supra* note 28, para. 30. Under the former policy, the Commission had placed no restrictions whatsoever upon the number of stations in a local market which could be jointly operated by a single licensee pursuant to a series of time brokerage agreements. *In re* Petition for Issuance of Policy Statement or Notice of Inquiry on Part-time Programming, *Policy Statement*, 82 F.C.C.2d 107, 48 Rad. Reg. 2d (P & F) 763 (1980). For example, under the new rules, in the largest markets, a single licensee might therefore own outright as many as six radio stations (three AM and three FM), *Radio Rules and Policies Report and Order*, *supra* note 5, para. 40, so long as their combined audience share did not exceed 25%, but could also time broker any number of additional stations with no restriction on whether the combined audience share of the brokered stations, when added to the combined share of the commonly owned stations exceeded 40%, 50%, 75% or more. Thus,

the Commission decided to impute "ownership" to any station in the market that brokered 15% or more of another station's programming in the same market. *Id.* para. 65.

⁴⁰ *Radio Rules and Policies Report and Order*, *supra* note 5, para. 12. In this context, the Commission defined "market" by reference to the area of overlap of the principal community contours of the subject stations. *Id.* para. 46.

⁴¹ *Id.* para. 65. The Commission observed that time brokerage agreements involving stations licensed to different markets raised little public interest concern. "[I]ndeed, they can be difficult to distinguish from network affiliation agreements, of which the Commission has long approved." *Id.* para. 64 n.124.

⁴² *Id.* para. 57. The limited nonduplication rule prohibited same-service stations from duplicating each other's programming by more than 25% if their city grade contours overlapped each other, and the overlapped area constituted 50% or more of the principal community service area of either station. *Id.* para. 66.

⁴³ *Id.* at 2810, 70 Rad. Reg. 2d at 924 (statement of Comm'r Andrew Barrett).

⁴⁴ *Barrett Abstains: Dissent Likely: FCC Ups Radio Maximum to 30 AMs and 30 FMs, Relaxes Duopoly Rule*, *COMM. DAILY*, Mar. 13, 1992, at 1; Randy Sukow, *Sikes Questioned on New Radio Limits*, *BROADCASTING*, Mar. 30, 1992, at 40.

leased a *Reconsideration Order* on September 4, 1993, in response to a number of petitions for reconsideration or clarification of the new rules and to appease congressional committees charged with oversight of FCC activities.⁴⁵

1. Tightening of National Ownership Limitations

In response to Congressional criticism that the Commission had been too liberal in expanding the cap on national ownership from 12-12-12 to 30-30-12, the Commission backpedalled,⁴⁶ and set the national ownership limit at 18 AM and 18 FM stations, which would increase in two years following the effective date of the *Reconsideration Order*, to 20 and 20.⁴⁷ In addition, the Commission stated it would permit an *attributable*,⁴⁸ but not *controlling*⁴⁹ interest in three additional stations of each class of service, where those three additional AM and FM stations were either *minority controlled*,⁵⁰ or controlled by small businesses.⁵¹

While cutting back on the number of AM and FM stations that may be owned by a common group nationally seemed to appease Congress, the Commission's retrenching of the national ownership limitation had little impact on the industry. Only a few

licensees at the time had the full complement of twelve AM and twelve FM stations, and today, more than eighteen months after the effective date⁵² of the *Reconsideration Order*, only one group owner—Clear Channel Communications—has acquired a full complement of thirty-six radio stations.⁵³

2. Revised Definition of Radio "Market"

The more significant change in the *Reconsideration Order* was the revision of the overly complex definition of a local radio market used in the *Report and Order*. In response to significant criticism from the industry, the Commission abandoned the four-tiered definition for a more manageable, two-tier definition of "small" and "large" radio markets.⁵⁴

"Market," whether large or small, was defined in terms of the number of principal community contours of commercial radio stations that overlapped with the stations which were the subject of the duopoly showing.⁵⁵ "Small markets" were those that consisted of fourteen or fewer such stations. In these markets, a party may now own an attributable interest in no more than three stations, no more than two of which are in the same class of service (*i.e.*, AM or FM). One additional limitation was imposed: the

⁴⁵ *In re Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd. 6387, 6406, 71 Rad. Reg. 2d (P & F) 227, 230 (1992) [hereinafter *Radio Rules and Policies Reconsideration Order*]. The Commission identified twenty separate petitions for reconsideration, some filed jointly, that had been filed by industry owners, individuals, law firms and public interest groups, including Capital Cities/ABC, Inc., Cox Enterprises, Jacor Communications, National Association of Black Owned Broadcasters, National Black Media Coalition, National Association of Broadcasters, Telecommunications Research and Action Council, and Office of Communication of the United Church of Christ.

⁴⁶ In a separate statement accompanying the *Radio Rules and Policies Reconsideration Order*, Chairman Alfred C. Sikes candidly admitted:

The large reduction (*i.e.*, from 30 AM and 30 FM in the first *Report and Order* to 18 AM and 18 FM in the *Reconsideration Order*) in the total number of stations that one entity can own nationwide is a simple function of the fact that we live in a city of shared power. We were asked by key members of Congress to reduce the limit and we did.

Id. at 6409, 71 Rad. Reg. at 246 (statement of Chairman Alfred C. Sikes).

⁴⁷ *Id.* para. 14.

⁴⁸ *Id.* The Commission's policies concerning what is or is not an "attributable" ownership interest in a broadcast licensee are explained in notes to 47 C.F.R. § 73.3555 (1993). In general, an attributable interest is defined as any ownership interest which constitutes five percent or greater of the *voting control* of the broadcast licensee or, if the entity is a corporation, the hold-

ing of office or directorship in the corporation, whether or not accompanied by the holding of any equitable ownership interest. Thus, for purposes of determining compliance with the Commission's broadcast multiple ownership policies, with limited exceptions, a 5% voting interest or membership on the board of directors is counted the same as a 100% voting interest. 47 C.F.R. § 73.3555, NOTES 2(a), (h) (1993).

⁴⁹ For purposes of this provision, controlling interest is defined as 50% ("negative control") or greater ("positive control"). See 47 C.F.R. § 73.3555(d)(3)(iii) (1993); *but see* NOTE 1, following § 73.3555(f).

⁵⁰ The Commission's definition of "minority" is "Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander." 47 C.F.R. § 73.3555(d)(3)(iv) (1993). A "minority controlled" licensee is one in which greater than 50% of the voting control of the licensee is held by persons belonging to one or more minority groups. 47 C.F.R. § 73.3555(d)(3)(iii) (1993).

⁵¹ The Commission defined "small business" as a business which, at the time of application to the Commission, had annual revenues of less than \$500,000 and total assets of less than \$1,000,000. *Radio Rules and Policies Reconsideration Order*, *supra* note 45, para. 19.

⁵² *Id.* para. 74; see *In re Revision of Radio Rules and Policies, Final Order*, 57 Fed. Reg. 42,701, 42,704 (1992).

⁵³ Peter Viles, *Clear Channel Plan Would Bypass FCC Ownership Limit*, BROADCASTING & CABLE, Nov. 29, 1993, at 18.

⁵⁴ *Radio Rules and Policies Reconsideration Order*, *supra* note 45, para. 32.

⁵⁵ *Id.* para. 39.

three-station combination must constitute less than 50% of the commercial radio stations in that small market.⁵⁶ For example, if an engineering study determined that a small market consisted of seven or more commercial radio stations, a party could own three of them and still meet the rule. However, if there were only six commercial radio stations in the market, the rules would not permit either the ownership of three stations or the time brokerage of one by an owner of two existing stations, since three stations constituted 50% of the number of the stations in the market.

"Large markets" were those radio markets with fifteen or more commercial radio stations.⁵⁷ If a licensee were part of a large market, it could own up to four stations, provided that no more than two were AM and two were FM. Again, a further restriction was imposed pertaining to the combined *market share* of the three or four stations.⁵⁸ The Commission continued to rely on audience listening behavior statistics as calculated by a professional audience research service. Where the proposed acquisition exceeded a combined audience share of 25%, the Commission considered it *prima facie* evidence that the proposed acquisition would not be in the public interest, due to the resulting concentration of control in the market.⁵⁹

3. Use of Audience Rating Data as a Determinant of Market Power

The Commission rejected the arguments of a number of petitioners to abandon the use of audience share data as a determinant of compliance with the expanded local ownership rules. Many had argued

that such audience share data was inherently unsuitable for purposes of analyzing market power. The Commission contended, however, that use of audience data was a more effective way of accounting for diversity and competition in a particular market than by reference to the technical facilities of the stations involved, which assumed further, that superior technical facilities would result in a greater market share.⁶⁰ At the same time, the Commission made clear that the 25% benchmark was not intended to freeze a combination's market share at a particular level, or to require divestiture of existing three or four station combinations if they later reached that level: "[a]gain, our goal is to promote robust competition, and we do not believe that penalizing enterprises that grow into stronger competitors is consistent with this objective."⁶¹

Other problems inherent in the use of Arbitron data also were addressed. First, the Commission acknowledged that not all radio markets (now exclusively defined by the use of overlapping principal community contours), were within an Arbitron-rated radio metro market.⁶² In 1992, Arbitron had identified 261 Radio Metro Markets, ranging in size from first-ranked New York with an age 12 and older population of 14,024,700, to 261st-ranked Minot, North Dakota (12+ population 46,000).⁶³ Where a proposed duopoly fell outside of a rated market or covered more than one rated market, the use of county-by-county statistics, also collected and published by Arbitron, was to be used.⁶⁴ In the latter case, the method for deriving a *single* "market share" required the *weighting* of each affected station's county shares to derive an average.⁶⁵

The Commission also dealt with the question of

⁵⁶ *Id.* para. 32.

⁵⁷ *Id.* Again, the *number* of commercial radio stations in the market was to be determined by the calculation of the principal community contours of the subject stations and those of each station whose principal community contour intersected that of one or more of the subject stations. *Id.* para. 39.

⁵⁸ *Id.* para. 32.

⁵⁹ *Id.* para. 55.

⁶⁰ *Id.* para. 47.

⁶¹ *Id.* para. 48. In the *Report and Order*, the Commission had indicated that in "extreme cases" it could require divestiture, having not given up its plenipotentiary power to regulate in the public interest. While not specifically saying so, the Commission noted that it would "carefully review" the circumstances through which any station group reached or exceeded a 40% market share. *Radio Rules and Policies Report and Order*, *supra* note 5, para. 56 n.109.

⁶² *Radio Rules and Policies Reconsideration Order*, *supra* note 45, para. 52 n.71.

⁶³ BROADCASTING AND CABLE MARKETPLACE 1992, at E-2

through E-8.

⁶⁴ *Radio Rules and Policies Reconsideration Order*, *supra* note 45, para. 53.

⁶⁵ *Id.* para. 53 n.73. The Commission gave an lengthy example involving two stations and three counties. The total population of the three counties was first determined, and then a weighting factor applied to each county based upon its population as a percentage of the total. That percentage was then applied to the Arbitron audience share for that county, and finally all of the weighted shares were added together. *Id.* The order did not specify whether the population to be counted was the U.S. Census population or the Arbitron AQH 12+ population. In a private letter ruling on a cross-interest waiver request, which involved a county-by-county showing under the new rules, the legal staff of the Audio Services Division advised that the Arbitron AQH 12+ population for each county, being the more conservative number, should be used in calculating the weighted audience share. Letter from Larry D. Eads, Chief, Audio Services Division, to David M. Hunsaker, (Nov. 6, 1992) (granting BAL-920417EA).

whether alternative showings might be used where Arbitron data was either not available, prohibitively expensive to obtain, or contained statistical anomalies that gave a distorted picture of market power.⁶⁶ Specifically, the FCC included a special Note in section 73.3555, which provided:

NOTE: When evaluating audience share evidence submitted under Section 73.3555(a)(1)(ii), the Commission will consider data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other relevant information. Where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for such data. See *Memorandum Opinion and Order* in MM Docket No. 91-140, FCC 92-361 (released Sept. 4, 1992).⁶⁷

The inclusion of such an exception was intended to meet objections that exclusive reliance on Arbitron audience research data was inadvisable. The Commission recognized several situations where alternative showings might be entertained:

We acknowledge that there may be situations where applicants can provide data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other information proving that excessive concentration will not result. Thus, for example, a special survey with a larger sample size could eliminate statistical anomalies. Survey data averaged over a number of survey periods may be appropriately qualified to be used as the practical equivalent of a more recent survey with a larger sample size. Audience data may be available, for example by the extraction of zip code area data, that eliminates anomalies resulting from unusual geographical features associated with the area served by the stations in question. We will thus not preclude applicants from relying on such alternative data.⁶⁸

The Commission reserved to itself, however, the authority to rule on the acceptability of alternative showing data except where it could be clearly and unambiguously resolved by the staff.⁶⁹

⁶⁶ *Radio Rules and Policies Reconsideration Order*, *supra* note 45, paras. 56-57.

⁶⁷ *Id.* para. 56 (NOTE follows 47 C.F.R. § 73.3555(a)(1)(ii) (1993)).

⁶⁸ *Id.* The Commission went on to observe that it would also consider alternative data where a showing had been made that the cost of acquiring it was prohibitive, or where there were a large number of stations in the market and the stations proposing to join were low power AM or FM. *Id.* para. 58.

⁶⁹ *Id.* para. 58 n.78. Experience to date suggests that the staff has interpreted this reservation as absolute, and has consist-

D. Restrictions on Time Brokerage Agreements and Other Joint Ventures

The Commission reaffirmed its rules on time brokerage agreements and other joint ventures, declining to modify them in any material way.⁷⁰ Further clarification of the new rules was provided, however. Of particular importance to prospective buyers, was the clarification that if two stations in the same market enter into a time brokerage agreement, and their combined audience share subsequently surpasses 25%, one station may *not* purchase the other. However, a time brokerage agreement entered into before September 16, 1992 (the effective date of the *Reconsideration Order*) would not have to be terminated early.⁷¹ Brokered stations that were being same-service simulcasted would be required to come into compliance with the rule within one year of the effective date.⁷² Finally, the Commission required that same market time brokerage agreements between stations be filed with the Commission and kept in each station's public inspection file.⁷³

III. CASE STUDIES

While the process of rulemaking, comments, reconsideration petitions, and further comments and replies crystallized a number of issues involving the new rules, the resulting *Reconsideration Order* by no means eliminated the need for further evaluation and interpretation. As a number of stations in medium and larger markets began to seek permanent affiliations in the form of acquisitions rather than time brokerage agreements, other radio licensees in those same markets sought to oppose these consolidations—even if those objectors had already made an affiliation of their own. The stage was set for a series of “duopoly wars,” where the “haves” attempted, through litigation at the FCC, to prevent the “have-nots” from acquiring a greater market share. The remainder of this Article is devoted to an examination of issues raised in four case studies and to an assessment of the effectiveness of the local radio

ently rejected all alternative showings. See *infra*, Part IV.A and accompanying text.

⁷⁰ *Radio Rules and Policies Reconsideration Order*, *supra* note 45, paras. 63-65.

⁷¹ *Id.* para. 66.

⁷² *Id.*

⁷³ *Id.* para. 67. This included pre-existing agreements, as well as agreements entered into after the effective date of the *Reconsideration Order*. Confidential financial information concerning the time brokerage fee, and other charges are permitted to be redacted from public file copies. *Id.*

ownership rule changes in meeting the economic challenges faced by commercial radio in the 1990s.

A. Ratings in Motion - The Charleston, West Virginia Case⁷⁴

As defined by Arbitron in 1992, Charleston, West Virginia, was the 151st-ranked radio metro market.⁷⁵ The Charleston Metropolitan Statistical Area ("MSA") consisted of the counties of Kanawha and Putnam, and according to Arbitron, had a population of 209,200 in 1992. The Total Service Area ("TSA") population, which included adjacent counties, was 675,000 in 1992.⁷⁶ The number of commercial radio stations listed in the Charleston MSA were eight AMs and eight FM's.⁷⁷ Arbitron publishes audience ratings data for the Charleston metro twice a year, based upon a six-week survey period during the fall and spring.

Bristol Broadcasting Company, Inc. ("Bristol") owned WQBE AM-FM in Charleston, West Virginia, and had a time brokerage agreement with WKAZ-FM, in Miami, West Virginia (part of the Charleston MSA). With its country and western music format, Bristol had dominated the Charleston MSA with a 36% or greater audience share for a number of years.⁷⁸ In the spring of 1992, the combined audience share for WQBE AM-FM and WKAZ-FM reached 43.1%.⁷⁹

In the summer of 1992, West Virginia Radio Corporation of Charleston ("West VA Radio"), ac-

quired WCHS(AM) and WVNS(FM), both licensed to Charleston.⁸⁰ A few weeks later, West VA Radio changed the call letters of WVNS to WKWS and the music format to country in an attempt to directly challenge Bristol's dominant position.⁸¹ After the release of the *Reconsideration Order*, West VA Radio entered into negotiations with Franklin Communications Partners, LP, ("Franklin") the licensee of WCAW(AM) and WVAF(FM), also licensed to Charleston, for the purchase of those stations as well. A contract for purchase and sale of the stations was signed on December 24, 1992, and an application for FCC consent was filed on December 30, 1992.⁸² Included in the application was a "duopoly showing," purporting to demonstrate compliance with the newly amended section 73.3555(a)(1) of the FCC's rules.⁸³

At the time the Franklin application was filed, the most recent Arbitron available data for the four-station combination was the Spring 1992 Report, which showed a combined audience share of 18.6% for the four stations.⁸⁴ Three weeks after the Franklin application was filed, Arbitron released the Fall 1992 Report, which showed that the combined share for WCHS-WKWS and WCAW-WVAF had risen to 27.5%, while Bristol's combined share had declined from a high of 43.1% in the Spring 1992 Report to 36.1%.⁸⁵ Some of that drop was no doubt attributable to West VA Radio's change of format on its existing FM, WKWS, to compete directly with WQBE AM-FM.

On February 10, 1993, Bristol filed a petition to

⁷⁴ *In re* Application of Franklin Communications Partners, L.P., Assignor, and West Virginia Radio Corporation of Charleston, Assignee, for Assignment of Licenses of WCAW(AM)/WVAF-FM Charleston, West Virginia, *Memo-randum Opinion and Order*, 8 FCC Rcd. 4909 (1993) [hereinafter *Franklin Communications MO&O*]. The author represented West Virginia Radio Corporation of Charleston ("West VA Radio"), the proposed assignee in this case.

⁷⁵ BROADCASTING AND CABLE MARKET PLACE 1992, at E-3.

⁷⁶ *Id.*

⁷⁷ *Id.* However, as noted below, when utilizing the Commission's principal city contour overlap methodology for determining market size, a much larger number of stations—in the instant case, 22 FM's and 14 AM's, 36 in all—are included in the Charleston "market."

⁷⁸ "Source Spring 1992 Arbitron Radio Local Market Report for Charleston, WV Metro Survey Area. Estimates are 12+ Average Quarter Hour persons Share for Mon-Sun, 6A-12Mid. Copyright, © 1992 The Arbitron Company. Estimates subject to the limitations stated in the report." Used with permission, and submitted to the FCC in connection with the Charleston, West Virginia duopoly case.

⁷⁹ *Id.*

⁸⁰ See FCC, Broadcast Actions (Rpt. No. 21395), *Public Notice*, June 5, 1992, at 11 (granting BAL-920331EC and BAPLH-920331ED on June 1, 1992).

⁸¹ Interview with Dale B. Miller, President of West VA Radio, Feb. 20, 1992.

⁸² Application of Franklin Communications Partners, L.P., for Consent to Assignment of Broadcast Station, in File Nos. BAL-921230EA and BALH-921230EB (June 18, 1993) [hereinafter *Franklin Application*].

⁸³ *Id.* at Ex. C.

⁸⁴ "Source Spring 1992 Arbitron Radio Local Market Report for Charleston, WV Metro Survey Area. Estimates are 12+ Average Quarter Hour persons Share for Mon-Sun, 6A-12Mid. Copyright, © 1992 The Arbitron Company. Estimates subject to the limitations stated in the report." Used with permission, and submitted to the FCC in connection with the Charleston, West Virginia duopoly case.

⁸⁵ "Source Fall 1992 Arbitron Radio Local Market Report for Charleston, WV Metro Survey Area. Estimates are 12+ Average Quarter Hour persons Share for Mon-Sun, 6A-12Mid. Copyright, © 1992 The Arbitron Company. Estimates subject to the limitations stated in the report." Used with permission, and submitted to the FCC in connection with the Charleston, West Virginia duopoly case.

deny the sale, contending that the Fall 1992 Report, released after the filing of the Franklin application, showed that the four-station combination share exceeded the 25% cap imposed by the Commission when it revised its local ownership rules for radio, and thus, the application must be denied.⁸⁶ Bristol based its contention by equivocating on the word "data." Quoting from the *Report and Order*, Bristol admitted that "the relevant share data for the market 'will be determined with reference to the most recent audience data for the market at the time [the] application is filed.'" ⁸⁷ However, Bristol argued that because the fall 1992 audience survey period (September 24 to December 16, 1992) had passed, the most recent data at the time Franklin filed its December 30, 1992 application was the data collected during that survey period. Bristol argued further that the language of the rule made no mention of the data being *published*, and also that the language spoke about a *grant* of the application resulting in a combined audience share exceeding 25%.⁸⁸

Finally, Bristol contended that the rule required the staff to deny, and *even set aside* a previously granted duopoly application up to the point of consummation of the transaction, if more recent audience survey data showing a combined share exceeding the 25% cap were to be made available or otherwise come into existence prior to the date of such consummation.⁸⁹

In a Joint Opposition to Petition to Deny, the seller, Franklin, and, the buyer, West VA Radio responded to the Bristol Petition by contending that the pertinent ratings at the time the application was *filed* formed the basis for eligibility, citing to the same language in the *Report and Order* as did Bristol, and under that standard, the application was grantable.⁹⁰ West VA Radio further pointed out that Bristol's claim that the fall 1992 data was in any

sense available at the time of the application was disingenuous, and included a letter from Arbitron stating that the Fall 1992 Report for Charleston was released on January 21, 1993, and the earliest anyone had been advised of the results of the fall survey was two days earlier, January 19, 1993, when subscribers in the market were advised by telephone.⁹¹

With respect to Bristol's argument that subsequent data could undo a previously eligible combination, West VA Radio disagreed, arguing that the Commission never intended such a result, and cited to the *Reconsideration Order* where the Commission had indicated, in a number of places, that the 25% cap would not be used to require divestiture or breakup of three or four station combinations whose ratings increased above 25%.⁹² West VA Radio also pointed out that such an interpretation would be prejudicial where the applying stations in question had exchanged confidential competitive information as well as an administrative nightmare for the Commission staff to deal with "on again, off again" deals.⁹³ West VA Radio also raised a "clean hands" issue with respect to Bristol, providing the Commission with the information on Bristol's own three-way combination, which had at one time exceeded the 40% mark, and concluded that the public interest would be better served by permitting West VA Radio to compete with Bristol on a level playing field.⁹⁴

After lengthy consideration, the Mass Media Bureau Staff decided to refer the matter to the full Commission, rather than deciding the question on delegated authority. A draft ruling was circulated among the Commissioners, and subsequently re-drafted to meet the concerns of one or more of them. On July 14, 1993 the Commission released a *Memo-randum Opinion and Order* granting the assignment application and rejecting Bristol's petition to deny.⁹⁵

In approving the proposed combination, the Com-

⁸⁶ Franklin Application, *supra* note 82; *Petition to Deny* of Bristol Broadcasting Company, Inc., 3-4 (petition date Feb. 10, 1993) [hereinafter *Bristol Petition*].

⁸⁷ *Bristol Petition*, *supra* note 86, at 4 (citing to 7 FCC Rcd. at 2782).

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 5-6.

⁹⁰ Franklin Application, *supra* note 82; *Joint Opposition to Petition to Deny* of Franklin Communications Partners, L.P., and West Virginia Radio Corporation 6 (joint opposition date Feb. 24, 1993) [hereinafter *Joint Opposition*].

⁹¹ *Joint Opposition*, *supra* note 90, at 6-7.

⁹² *Id.* at 9-10; see *Radio Rules and Policies Reconsideration Order*, *supra* note 45, paras. 48-49.

⁹³ *Joint Opposition*, *supra* note 90, at 10.

⁹⁴ *Id.* at 5, 14. In the midst of this controversy, the station

manager for WQBE wrote a letter to the FCC protesting the sale without identifying his position or the fact that he had once worked for West VA Radio, who fired him after it purchased WCHS-WVNS. Apparently believing that congressional clout was needed, WQBE's manager also wrote Senator Robert C. Byrd, and asked him to contact the Commission on WQBE's behalf. Because of WQBE's filing of its petition to deny, the proceeding had become "restricted," and thus, the Senator's letter on behalf of the constituent constituted an *ex parte* presentation prohibited by the Commission's rules. The Secretary of the FCC wrote back to the Senator explaining the situation and serving copies of the correspondence on all parties. This set off a second series of pleadings in response to the *ex parte* communication.

⁹⁵ *Franklin Communications MO&O*, *supra* note 74.

mission admitted that the rule as revised by the *Reconsideration Order* was ambiguous with respect to the currency of the data to be used in the showing, due to the inclusion of a provision for alternative showings.

[B]ecause the rule was modified to provide for the use of alternative data and additional showings, the text of Section 73.3555(a)(3)(iii) adopted in the [*Reconsideration Order*], did not include the reference to "the most recent published audience share available at the time that the application is filed with the Commission." This was evidently a rule drafting error because when Arbitron or other similar independent survey data are submitted, we intended to continue to evaluate audience share based on the most recent published survey data available at the time that the application is filed. Nothing in the [*Reconsideration Order*] indicates a different intention.⁹⁶

With respect to Bristol's contention that the Commission and staff were obliged to consider new data published after the filing but before the grant of an application, the Commission noted that the 25% cap was a secondary screening device, an additional safeguard, intended to strike a balance between permitting the radio industry to take advantage of economies of scale and preventing undue concentration of control. Because the 25% audience share benchmark was likely more restrictive than antitrust concerns would mandate,

[u]nder these circumstances, we believe that it is not inappropriate or inconsistent with our policies to evaluate audience share in light of the most recent published survey data available at the time the application is filed, rather than requiring an evaluation based on the very latest data from Arbitron or another ratings service that may become available during the pendency of an application.⁹⁷

The Commission further explained that it had "intended for the audience share measure to be relatively simple to ascertain and demonstrate, consistent with [its] objective to craft a rule that would be as simple to apply as possible."⁹⁸ In addition, fairness dictated that the parties to an application who have committed resources in time and money to seek Commission approval of the transaction, not be subjected to continuing uncertainty throughout the ap-

plication process as a result of the release of subsequent audience share data after the filing of the application. Such a policy would also subject the Commission's own resources to unnecessary administrative cost and delay.⁹⁹

Therefore, we will not generally require applicants to amend their applications, pursuant to 47 CFR § 1.65, to report changes in audience share based upon data which is published or becomes available after the application is filed In this regard, we believe the benefits to be gained by affording applicants certainty and reducing their potential application costs, as well as minimizing the processing burdens on the Commission, outweigh any probative value of data which is published or becomes available after the application is filed.¹⁰⁰

The Commission did caution, however, that it would not foreclose the possibility of denying a proposed combination that at the time of filing was under the 25% cap if, during the pendency of the application, newer data is brought to its attention that shows the combined share *significantly exceeds* the 25% share cap.¹⁰¹ While not expressly saying so, the Commission once again referred to the 40% "ceiling" it had stated in the *Report and Order* might cause it to order a divestiture of a previously granted combination.¹⁰² In the Charleston case, however, the Commission specifically found that a post-filing increase from 18.6% to 27.5% was not "sufficiently significant to raise a substantial and material question of fact."¹⁰³

B. In Search of Anomalies, I - The Richmond, Virginia Case

In another capital city, a similar battle was waged over the question of when alternative data, or in this case, *trends data*, might be used in connection with rebutting a showing of compliance with section 3.3555(a)(1).¹⁰⁴ Clear Channel Radio Licenses, Inc. ("Clear Channel"), which held the licenses of WRVA(AM) and WRVQ(FM) in Richmond, Virginia, sought Commission approval on the acquisition of two additional stations, WRNL(AM) and WRXL(FM), also licensed to Richmond.¹⁰⁵ Clear

⁹⁶ *Id.* para. 10.

⁹⁷ *Id.* para. 9. The Commission defined "published" in the context of audience survey data, to mean the time when the data "is officially released by the ratings service in written form, or in another widely legible form such as a computer disk." *Id.* para. 8 n.6.

⁹⁸ *Id.* para. 11.

⁹⁹ *Id.*

¹⁰⁰ *Id.* para. 12.

¹⁰¹ *Id.*

¹⁰² *Id.* para. 12 n.7.

¹⁰³ *Id.* para. 13. The Commission also dismissed the *ex parte* objections filed by WQBE's station manager as irrelevant, unsupported and/or speculative. *Id.* para. 14.

¹⁰⁴ Letter from Larry D. Eads, Chief, Audio Services Division to Marvin Rosenberg, Esq., 8 FCC Rcd. 5568, 5568 (1993) [hereinafter Letter from Larry D. Eads to Marvin Rosenberg].

¹⁰⁵ *Id.*

Channel submitted an exhibit establishing that the majority of overlap of the four stations occurred in the Richmond, Virginia Radio Metro Market, that there were twenty-three other stations whose principal community contours overlapped those of the subject stations, and that the combined audience share for the four stations, based upon the Fall 1992 Arbitron Report for Richmond, was 24.7%.¹⁰⁶

During the public comment period, a petition to deny the application was filed by a competitor in the market, Four Seasons Communications Partners, L.P. ("Four Seasons"), the parent company of WMXB License Partnership, licensee of WMXB (FM), in Richmond. Four Seasons alleged that grant of the application would lead to an undue concentration of local control in the Richmond market by Clear Channel because historically, the combined share of the four stations had always exceeded 25%. The fall 1992 data was thus "anomalous" and unreliable.

In support of its first contention, Four Seasons submitted a statement by its program director alleging that the Fall 1992 Report was the first Arbitron ratings survey since 1986 in which the four stations in question had an audience share of less than 25%, and that the *average* of the four quarterly reports in 1992 was 25.9%.¹⁰⁷

Four Seasons also submitted the declaration of a former employee of WRVQ, who alleged that after Clear Channel purchased that station in June of 1992, no budget was set aside for station promotions, and that little, if any promotional activity was undertaken by Clear Channel for that station.¹⁰⁸ Four Seasons contended that this evidence proved that Clear Channel was deliberating sabotaging its own audience ratings in order to get them down enough to qualify for the proposed duopoly.¹⁰⁹

Given this evidence, Four Seasons argued that the Commission should consider the *trends* data over the entire year or several years, as a better indicator of the combination's real market power, and that, given that the combined share had historically exceeded 25% in all but the fall quarter of 1992 when the application was submitted, the application should be denied. Four Seasons cited to the *Reconsideration*

Order in MM Docket 91-140, as authority for the proposition that trends data may be used in such instances where, as here, "single ratings period does not accurately measure audience share."¹¹⁰ It also argued that only the Commission, not the staff, could grant the application, because the Commission had exclusively reserved for itself the right to review applications where alternate evidence was submitted.

In response, Clear Channel, while not disputing the audience share data for other quarters submitted by Four Seasons, denied the allegation concerning the decrease in WRVQ's promotion budget, stating that it increased the promotional budget by over 31% during the first six months that it owned WRVQ. Clear Channel also stated that it had followed the rule by submitting the most recent audience share data available from Arbitron with its application, and that to permit or require the use of data from previous ratings periods would permit applicants to "cherry-pick" the data they would use, and inject a level of uncertainty into the application process. Finally, Clear Channel contended that the provision in the rules and accompanying policy statement permitting the use of alternative data was meant to benefit the *applicants* (not objectors) by permitting them to introduce other data when the combined ratings share was in excess of 25% due to an anomaly.¹¹¹ Because there was no anomaly, the 24.7% not being a sizeable drop from the previous ratings period as presented by Four Seasons, the use of trends data was not required.

The Commission staff, in granting the application, relied heavily on the Commission's recent pronouncements in the *Charleston* case. Because Clear Channel had presented a *prima facie* case of compliance with the contour overlap rule, the burden of proof was on the objector, Four Seasons, to rebut the presumption of eligibility thus derived. Four Seasons had not presented any specific evidence of deliberate ratings manipulation by Clear Channel, and Clear Channel had submitted specific evidence to the contrary. The allegation that the combined share had never fallen below 25% since 1986 had not been supported with any documentary evidence by Four Seasons. Moreover, the slight decline of the fall 1992

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Arbitron publishes quarterly updates of audience ratings for the Richmond market. According to Four Seasons, the 4-station combined shares for the four quarters of 1992 were 25.8%, 26.5%, 26.6% and 24.7%, respectively. *Id.* at 5568 n.3.

¹⁰⁸ *Id.* at 5568.

¹⁰⁹ *Id.* at 5569. Another issue raised by Four Seasons was that Clear Channel had illegally assumed control of WRNL-

WRXL pursuant to a time brokerage agreement that had not been submitted to the Commission. This separate issue was resolved in favor the applicants and will not be dealt with here.

¹¹⁰ *Id.* at 5568 (citing *Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in MM Dkt. No. 91-140, 7 FCC Rcd. 6387, 6398 n.71 (1992)).

¹¹¹ *Id.* at 5569.

combined share was not a sizeable drop from previous ratings periods so as to regard it as either unreliable or anomalous.¹¹²

Finally, the staff ruled that while the rules permitted the use of data averaged over a number of survey periods in certain situations, a party wishing to offer such evidence must *first establish that such data eliminates statistical anomalies* in the generally accepted and available audience research data.¹¹³

The effect of the staff ruling in the *Richmond* case seemed to preclude the use of any alternative showings except those that establish that Arbitron made a statistical error in calculating the individual station audience ratings from the raw data collected in the field, or that the applicant made an error in combining that data for the stations and period in question. In the former situation, it is doubtful whether an applicant or objector could ever prove errors made internally by Arbitron, since access to the raw data would be limited. As to the latter situation, the likelihood of pure mathematical errors in adding the shares of three or four stations seems remote, and easily corrected. Neither situation is likely to lead to the use, or consideration by the staff, of alternative audience share data. Thus, while the Commission had previously held out a specific hope to participants in the rulemaking proceeding that alternative showings would be accepted, the *Richmond* case suggests that the staff does not want to open up the door to the use of such showings.¹¹⁴

C. In Search of Anomalies, II - The Jonesboro, Arkansas Case

If any doubts remained following the *Richmond* case that alternative data would not normally be accepted, these were eliminated by an October 25, 1993, ruling by the Commission itself on a case with

facts just the reverse of *Richmond*. In *Patteson Brothers*,¹¹⁵ an uncontested case, the Commission was asked to accept trends data to rebut what it contended was an anomalously high combined rating at the time the assignment application was filed. Duke Radio Broadcasting, Inc. ("Duke") was the licensee of KFIN(FM) in Jonesboro, Arkansas, and sought to purchase from Patteson Brothers, Inc. KBTM(AM) and KJBR-FM, both licensed to Jonesboro.¹¹⁶

Although the combined share for the three stations was 34.19%, thus exceeding the cap by over nine percentage points, Duke argued that this should not preclude a grant of the application for two reasons. First, although Jonesboro was a "large market" under section 73.3555(a)(1)(ii) because more than fifteen commercial signals actually overlapped with the subject stations, only eleven of those signals were "listenable" in Jonesboro, and others should not be counted because they were Memphis stations. With this qualification, the market would be considered a "small" one, and no audience ratings data would be necessary; the application could be granted because the proposed three-station combination was less than 50% of the stations in the "market."¹¹⁷ Second, Duke contended that the 34.19% audience share for the three-station combination was an aberration.¹¹⁸ It submitted county data for the three subject stations for the past six years, which averaged 23.4%, significantly less than the 34.19%, and enough to refute any presumption of excessive concentration of control.¹¹⁹

The staff referred the matter to the Commission in order to obtain, *inter alia*, a definitive announcement on the acceptability of alternative trends data instead of only the most recent ratings available.

The Commission rejected Duke's attempt to classify Jonesboro, Arkansas as a "small market," stat-

¹¹² *Id.* at 5570. The staff noted that the newly available first quarter data, which was released after the filing of the application, showed a further drop in combined share to 22.6%. While not relying on the later evidence (*cf. Franklin Communications MO&O, supra* note 74), the staff observed that it did support its conclusion that the fall 1992 data was not anomalous.

¹¹³ Letter from Larry D. Eads to Marvin Rosenberg, *supra* note 104, at 5570. As to Four Seasons' challenge to the staff's authority to rule adversely on its petition, the staff held that no *bona fide* issue of compliance with the 25% cap had been presented. *Id.*

¹¹⁴ *Id.* While the staff was silent as to the reasoning behind this policy, the general acceptability of alternative data adds unnecessarily to the complexity of the case and creates opportunities for additional litigation and nitpicking by would-be objectors to a proposed combination, delaying the implementation of what

the staff perceives to be a *remedial* policy of assisting the commercial radio industry.

¹¹⁵ *In Re Application of Patteson Brothers, Inc., Assignor, and Duke Radio Broadcasting, Inc., Assignee, for Assignment of License of KBTM(AM)/KJBR-FM Jonesboro, Arkansas, 8 FCC Rcd. 7595 (1993) [hereinafter *Patteson Brothers*].*

¹¹⁶ *Id.* paras. 1-2.

¹¹⁷ *Id.* para. 4.

¹¹⁸ *Id.* para. 4. Jonesboro was not in an Arbitron-rated market. The audience data submitted was thus the total of all counties in which the principal community contour of any of the subject stations intersected in whole or in part, as weighted by population. *Id.*

¹¹⁹ *Id.* Although the six-year average was below 25%, the Commission noted that the preceding year's county data also exceeded the 25% limit. *Id.* para. 9.

ing that it found no basis on which to accept the alternative method of defining the market. The Commission pointed out that it had already rejected alternative methods of defining the market in its *Reconsideration Order*:

In this regard, we determined that the contour overlap standard addresses our core concerns of diversity and competition while reflecting actual options available to listeners and market conditions facing the particular stations in question. . . . We have previously concluded that this standard for market definition is likely to be conservative because listeners in rural areas where there are few operating stations, and thus low levels of daytime interference, may be able to receive signals beyond the predicted principal community contour. . . . Duke offers no evidence sufficient to demonstrate that our conclusion in this regard in inaccurate or otherwise unjustified.¹²⁰

As to Duke's alternative data submission, the Commission specifically stated that the presumption of excessive concentration of control derived from the 25% limit "cannot be overcome by trend data that demonstrates an average combined audience share of less than 25%, unless it is first shown how that trend data overcomes a statistical anomaly in the current ratings provided by Arbitron."¹²¹

As to what sort of anomaly the Commission had in mind, it stated that general criticisms of Arbitron's sampling techniques would not be sufficient in the absence of a showing that the purported flaws adversely affected the particular group ratings survey period in question more than other survey periods. In brief, the Commission specifically rejected a proposition generally-accepted in statistical theory, that data averaged over a longer period of time is likely to be more accurate than data from a single sampling period.¹²² Pragmatically speaking, by placing the burden on the proponent to demonstrate why trends data is more accurate than that from the specific single ratings period, the Commission has effectively foreclosed the use of trends data as an alternative in duopoly cases.

Although the Commission refused to grant the application, or grant Duke a permanent waiver of 47 C.F.R. § 73.3555(a)(1), the Commission was persuaded to grant Duke a limited, one year waiver in

which to divest itself of one of the two FM stations. The Commission noted that the stations would be operated separately during the one-year period and that each station would have its own independent sales, programming and operating staffs. The Commission cautioned that no further waiver requests would be entertained, but said nothing about the possibility that during the one-year waiver period, the ratings might drop back below 25%, which could make the transaction eligible for grant.¹²³ Commissioner Barrett, who issued a separate statement, presumably would not have permitted such reconsideration, since he stated that he wanted to subject the station to a distress sale if it had not been sold within the year's time.¹²⁴

D. The Case of the Disappearing Market: Staunton-Waynesboro, Virginia

On January 29, 1993, simultaneous applications were filed asking for consent to the assignment of licenses of WANV(AM), in Waynesboro, Virginia from WANV, Inc., and WANV-FM, in Staunton, Virginia, from High Fidelity Music Show, Inc., to WANV-LP, the proposed assignee.¹²⁵ The general partner of WANV-LP, Clark Broadcasting Company ("Clark"), already held the licenses of WKDW (AM) and WKDW-FM, in Staunton, Virginia. Because these ownership interests were fully attributable under the Commission's ownership attribution policies,¹²⁶ WANV-LP submitted a duopoly showing with its application. The showing demonstrated that there were twenty-seven commercial radio stations with overlapping principal city contours in the composite coverage area of the four stations, and that the combined audience share for the four stations using the Arbitron spring 1992 county-by-county ratings data, was 13%.¹²⁷

Within the thirty-day public comment period, two petitions to deny the applications were filed by competitors in the market. Slocumedia, Inc., Licensee and Assignor of WAYB(AM), in Waynesboro, Virginia, and Hometown Media, Inc. ("Hometown"), its proposed assignee, filed a joint petition,¹²⁸ and M.

¹²⁰ *Id.* para. 6.

¹²¹ *Id.* para. 9.

¹²² *Id.* "In other words, a large sample is more reliable than a small sample." F.H. Zuwaylif, *GENERAL APPLIED STATISTICS* 120 (Addison-Wesley Pub. Co. 1970).

¹²³ *Patteson Brothers*, *supra* note 115, paras. 14-17.

¹²⁴ *Id.* at 7598 (statement of Comm'r Andrew C. Barrett).

¹²⁵ Applications of WANV, Inc., and High Fidelity Music Show, Inc., for Consent to Assignment of Broadcast Station, in

File Nos. BAL-930129EB and BALH-930129GF (Nov. 30, 1993) [hereinafter WANV, Inc., Application]. WANV, Inc. and High Fidelity Music Show, Inc. were under common ownership.

¹²⁶ See generally 47 C.F.R. § 73.3555 (1993), NOTES 1-10 following text of rule.

¹²⁷ WANV, Inc., Application, *supra* note 125. The Arbitron Spring 1992 Report stated that the ratings were based on data collected in the field in the fall of 1991.

¹²⁸ *Id.*; *Joint Petition to Deny* of Slocumedia, Inc., and

Belmont VerStandig, Inc., licensee of WSVA(AM), and WQPO-FM, in Harrisonburg, Virginia (a community located north of Staunton) also filed a petition to deny.¹²⁹

Both of the petitioners objected to WANV-LP's use of Arbitron county ratings for determining the four stations' combined audience share. They argued that section 73.3555(a)(3) of the rules require that where the majority of contour overlap between the stations takes place in a radio metro market or equivalent, the combined audience share is the aggregate listening share within the metro.¹³⁰

At one time, Staunton-Waynesboro had been an Arbitron-rated metro market; however, Arbitron ceased publishing separate ratings for that market in 1989, solely because, according to the petitioners, Arbitron did not receive enough subscriptions for its Staunton-Waynesboro Report to warrant publishing separate ratings for that market. A competing ratings service, Birch Audience Ratings Service, continued to publish ratings for the Staunton-Waynesboro market for two more years, but went out of business in 1991.¹³¹

The petitioners argued that because both Arbitron and Birch previously had defined Staunton-Waynesboro as a rated market, and because the spring 1991 Birch survey had shown that Clark's existing AM-FM combination, WKDW AM-FM, already had a combined share that exceeded 25%, the proposed acquisition should not be approved. To reinforce this argument, the petitioners noted that the entire area of overlap of the four stations occurred in Augusta county, where the four stations had a combined share of 35%,¹³² (citing to section 73.3555(a)(3)(iii), which provides that where the proposed commonly-owned stations serve more than one radio market, the market where the *majority* of overlap occurs should be used in determining audience ratings).¹³³ Further, the petitioners argued, it was arbitrary and contrary to the rule for WANV-LP to use audience ratings from adjacent Rockingham county and the city of Harrisonburg, because only a small percent-

age of the principal city contours of the stations to be acquired extended into those adjacent areas, with the vast majority of the four stations serving only Staunton and Augusta county. To permit the combination, argued the petitioners, would allow Clark to "pit four local radio stations against an AM-FM combination (WTON(AM) and WTON-FM) and one stand-alone (WSKO) in a radio market (Staunton-Waynesboro and Augusta county) with a population of 97,687."¹³⁴ This, argued the petitioners, was contrary to the policy behind the revised radio ownership rules.

In a consolidated opposition, WANV-LP argued that it had abided precisely by the rules, which provided that where a metro market does not exist, audience share figures should be used for all counties that are within the principal community contours of one or more the stations in question, in whole or in part.¹³⁵ WANV-LP pointed out that Arbitron had not published data for the Staunton-Waynesboro market since 1989, and that the Birch 1991 data was outdated and therefore not the most recent audience survey data available,¹³⁶ as required by the rules and as clarified in *Franklin Communications*. WANV-LP also disputed that lack of subscribers was the only reason that Arbitron ceased designating Staunton-Waynesboro as a metro market; there are nine other factors that are considered by Arbitron in designating certain population groupings as a separate radio market, none of which related to subscriber levels.¹³⁷ WANV-LP concluded by accusing the petitioners of attempting to rewrite the multiple ownership rules, long after the time when it was permissible to seek review or reconsideration of those rules.¹³⁸

In reply, Slocumedia, and Hometown repeated their previous arguments and argued that the Birch data was not outdated. They pointed out that Clark was still using the Birch data to promote its own two stations in selling local and national advertising. If current enough for sales purposes, it should be deemed current enough for the duopoly rule.¹³⁹

Hometown Media, Inc. (petition date Mar. 12, 1993) [hereinafter *Slocumedia/Hometown Petition*].

¹²⁹ WANV, Inc., Application, *supra* note 125; *Petition to Deny* of M. Belmont VerStandig, Inc. (petition date March 12, 1993) [hereinafter *VerStandig Petition*].

¹³⁰ *Slocumedia/Hometown Petition*, *supra* note 128, at 10; *VerStandig Petition*, *supra* note 129, at 13.

¹³¹ *Slocumedia/Hometown Petition*, *supra* note 128, at 10; *VerStandig Petition*, *supra* note 129, at 12.

¹³² *Slocumedia/Hometown Petition*, *supra* note 128, at 6; *VerStandig Petition*, *supra* note 129, at 13.

¹³³ 47 C.F.R. § 73.3555 (1993).

¹³⁴ *Slocumedia/Hometown Petition*, *supra* note 128, at 10-12.

¹³⁵ WANV, Inc., Application, *supra* note 125; *Consolidated Opposition to Petition to Deny* of WANV-LP 9 (opposition date Mar. 25, 1993) [hereinafter *WANV-LP Opposition*].

¹³⁶ *WANV-LP Opposition*, *supra* note 135, at 5-6.

¹³⁷ *Id.* Ex. A at 2.

¹³⁸ *Id.* at 11-12.

¹³⁹ WANV, Inc., Application, *supra* note 125; *Reply* of Slocumedia, Inc., and Hometown Media, Inc., 6-8 (reply date Apr. 6, 1993). The Birch combined rating for WKDW AM-FM was 25.6%.

After the first round of pleadings, WANV-LP filed an amendment to its application to include data from an Arbitron Radio Custom Survey Area Report ("CSAR"), which was a compilation of data collected in the spring of 1992 for Augusta county, showing a combined share of 20.7%. WANV-LP argued that if the Commission believed that only audience ratings from Augusta county should be used, the most recent data available placed them under the 25% cap. This started a second round of pleadings. Slocumedia and Hometown filed a consolidated further reply challenging the validity of the CSAR submitted by WANV-LP because there were not enough tabulated diaries, that Clark was aware of this, and had instructed its own former general sales manager (who had since defected and provided affidavits to the petitioners) not to use the CSAR in sales presentations without first disclosing that fact.¹⁴⁰

WANV-LP responded by defending the methodology used by Arbitron in its CSAR as the standard one used in all Arbitron surveys, and that it was submitted to provide the Commission with the most up-to-date information on audience share in Augusta county. The declaration of the general manager of Clark's two Staunton stations stated that he and the former general sales manager had investigated the reliability of the CSAR, and after several discussions with Arbitron, determined that it was reliable.¹⁴¹

In a final shot, the petitioners, in a joint reply, offered a new attack on the reliability of the CSAR by pointing out that during the survey period in question, one of the four stations changed call letters and program format, implying that this was done intentionally to manipulate the ratings (in this case, downward). Further, they again questioned why the Birch data (which showed a much higher combined share) was still being used by Clark as a marketing tool and not the newer data from the CSAR.¹⁴²

The Commission's staff, after ten months, finally acted to grant the WANV applications and rejected the petitions to deny. With regard to the Birch 1991 Report, the staff said that they "[d[id] not believe [they] should give greater weight to data and market definitions generated from a defunct organization that no longer has a continuing collection and publication capability when data have been submitted

from a recognized, reliable and accessible continuing source."¹⁴³

With respect to whether data from the Staunton-Waynesboro area should be used rather than the county-by-county data, the staff resolved the matter without investigating why Arbitron no longer designated the area as a metro market while Birch continued to do so until it went out of business. Instead, the staff stated that because the only rating service still providing audience survey data for the area in question did not designate any of the area as a metro market, greater weight should be afforded to the data and methodology provided by the only company continuing to collect and publish audience share information. Such a policy was justified, the staff said, because the Commission may need to rely on such data in future cases involving the area stations. The continuing availability and wide accessibility of such data warrants the conclusion that it should be relied on as the most probative evidence available as to the applicants' compliance with the FCC's audience share requirements.¹⁴⁴

With regard to the dispute over whether data only from Augusta county, or from all counties touched by the principal community contours of the four subject stations should be presented, the staff stated that the rule was quite clear that *county* data was to be used, and that the *Report and Order* provided a clear and unambiguous methodology for weighting the shares from *each* county where the contours covered *in whole or in part*. For the petitioners to challenge such a methodology was tantamount to seeking reconsideration of the rules, an action inappropriate to an adjudicated case.¹⁴⁵

Having ruled that the most reliable and appropriate data available at the time of filing of the application was the general spring 1992 county-by-county data reported by Arbitron, the staff did not address the compiled CSAR Augusta county data submitted by WANV-LP in its amendment. Presumably, had the decision been otherwise, the CSAR Augusta county data would still not have been considered unless it had been available at the time of filing.¹⁴⁶

IV. CONCLUSION

After more than a year's experience with the re-

¹⁴⁰ Letter from Larry D. Eads, Chief, Audio Services Division, FCC, to John S. Logan, Esq. 5 (Nov. 30, 1993) (1800B3-JB/LLS) [hereinafter Letter from Larry D. Eads to John S. Logan].

¹⁴¹ *Id.* at 5-6.

¹⁴² *Id.* at 6.

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 7-8.

¹⁴⁶ Such a ruling would appear to be mandated by both *Franklin Communications MO&O*, *supra* note 74, and *Patterson Brothers*, *supra* note 115.

laxed duopoly rules for radio, certain inferences can be drawn about how the rules are being applied, and whether they are having any impact on the radio industry.

A. Effect of the FCC Rulings

From the four case studies analyzed above, several conclusions can be drawn. The first conclusion is that almost all of the consolidations under the rules are taking place in "large" markets, as that term is defined under the rules. One suspects that the Commission had little idea of what the impact would be of its definition of "small" versus "large" markets. In the *Reconsideration Order*, the Commission retreated from the primary use of Arbitron-defined markets and made the contour-overlap method applicable in all cases as a means of defining the relevant radio market.¹⁴⁷ As a result, the boundaries of the market usually were expanded to encompass areas well outside the Arbitron metro market. This was true in each of the four case studies analyzed, and made a critical difference in the Staunton-Waynesboro case.

Except in extremely remote areas, or where unusual geographical features exist,¹⁴⁸ there are very few small markets. Almost all markets have fifteen or more principal community signals overlapping, and what is more surprising, markets that were thought to be "small" in terms of population, may have as many as thirty or more such signals. Quite apart from competing media, such as television, cable, print, and compact disks, radio broadcasters are discovering how "over-radioed" their markets really are.

The mismatch of the radio contour overlap method with the Arbitron MSA method for defining large markets, however, can preclude some combinations which might otherwise be permissible. But for the fact that Arbitron discontinued rating the Staunton-Waynesboro market as a separate MSA, the duopoly proposed by WANV-LP would not have been permitted. Similarly, the duopoly proposed by Clear Channel was found acceptable only because of the fortuitous drop in the Richmond MSA combined

audience share for the particular quarter in which the application was filed. What may be regarded by some as anomalous results will continue to occur in large market cases because of this two-step definition.

A second conclusion that can be drawn is that the staff and the Commission intend to adhere to a "bright line" rule with respect to audience ratings. Both the Charleston, West Virginia, and Richmond, Virginia cases demonstrate how the fates and fortunes of radio stations change from season to season with respect to audience ratings. What may be permissible in the first quarter of 1994 may not be permissible if the same application is filed in the second quarter. Yet the Commission, for the sake of administrative expediency and in fairness to applicants attempting to comply with the new rules, has refused to take the volatile nature of audience ratings into account in administering the rule. Despite paying lip service in the rule to the fact that anomalous situations can occur justifying the use of alternative data, including trends data, the Commission has thus far refused to accept any alternative means of assessing audience share in large radio markets. One suspects that the burden upon an applicant or objector seeking to submit alternative data will be so great that the rule effectively may be read to exclude the use of any such data, despite the Commission's specific acknowledgement of, and provision for, its use in the new rules.¹⁴⁹

B. Impact on the Industry

With more than eighteen months since the adoption of the new duopoly rules, some information on their impact on the radio industry is now emerging. Most of the information that has been collected thus far, however, is anecdotal, and sometimes inconsistent. In its *Report and Order*, the Commission directed the Mass Media Bureau to prepare an annual report to assess the effect of the revised rules on the radio industry including their impact on competition, diversity and minority ownership.¹⁵⁰ As a result of more pressing business, including the implementation of the new cable television legislation,¹⁵¹ release

vening mountainous terrain between the two cities that limits the possible overlap of signals to those of high-powered stations.

¹⁴⁷ NOTE following 47 C.F.R. § 73.3555(a)(1)(ii) (1993); see also *Radio Rules and Policies Reconsideration Order*, supra note 45, paras. 52, 55.

¹⁴⁸ *Radio Rules and Policies Report and Order*, supra note 5, para. 68.

¹⁵¹ Cable Television Consumer Protection and Competition

¹⁴⁷ *Radio Rules and Policies Reconsideration Order*, supra note 45, para. 39.

¹⁴⁸ For example, Arbitron has designated Roanoke-Lynchburg, Virginia, as a single radio market (#97). *BROADCASTING AND CABLE YEARBOOK*, 1993, B-584. Yet, a number of the radio stations licensed to Lynchburg do not place a principal community contour over Roanoke, nor do their contours overlap with those of a number of Roanoke stations. The reason is inter-

of the Bureau's first annual report, originally scheduled for the end of 1993, has been rescheduled twice.¹⁵² Release of the report is not expected earlier than the end of June 1994.¹⁵³

Of the data presently available on radio mergers, consolidations, and joint ventures, most of it has not been collected by the FCC, but by the industry trade press.¹⁵⁴ *Radio Business Report* ("RBR"), a weekly newsletter focusing on radio economics, has prepared a series of reports on the subject of radio duopolies. As of November 22, 1993, RBR found that a total of 1,393 commercial radio stations—14% of the nation's 9,916 commercial radio stations—were involved in duopoly combinations and/or local marketing agreement arrangements.¹⁵⁵ The largest number of stations (380), as well as the largest increase between September and November, 1993 (74), were in the top fifty radio markets.¹⁵⁶

Some of the information tends to suggest that at least some stations are benefitting from the new rules. A November 22, 1993 article in *Broadcasting & Cable* magazine, for example, reported that revenues in the San Antonio market, where a significant amount of duopoly restructuring had taken place, were 20% ahead of 1992 levels.¹⁵⁷ Four owners, Clear Channel Communications, Tichenor Media, NewCity Communications and Rusk Corp., which together held six stations in 1991, now own fifteen stations out of a total of thirty-one stations in the market. Whereas in 1991, the four top owners' six stations had a 34.7% share and earned 55% of the

market revenues, by the third quarter of 1993, the combined audience share of the fifteen stations was 62.1% and an estimated 77.9% of the market revenue.¹⁵⁸

A more comprehensive study was undertaken by Jim Duncan, publisher of *American Radio*, who studied 147 markets surveyed by Arbitron in the fall of 1993. One hundred and seventeen of those 147 markets had one or more duopolies in place, with the fastest increase in duopolies in markets numbered 25 to 75.¹⁵⁹ Of greatest significance was the fact that in all markets studied the percentage of market revenues controlled by duopolies exceeded the percentage of 12+ AQH audience shares. For example, the three markets where Duncan found that duopolies controlled the greatest shares of audience, Richmond, Virginia,¹⁶⁰ Albuquerque, New Mexico,¹⁶¹ and Rochester, New York,¹⁶² also had a much larger percentage of the radio advertising revenues in those markets.¹⁶³

The above analysis suggests that those stations which have taken advantage of the Commission's relaxed local ownership rules have been strengthened economically as a result, and the Commission's stated goal would appear to be on the way to being realized. Without further analysis of the players, however, it cannot be concluded that the radio industry as a whole is benefitting by the new policy. Is the policy benefitting only the large group owners, as Commissioner Barrett warned in his partial dissent to the *Report and Order*?¹⁶⁴ Is the disparity between

Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹⁵² See *Duopoly Takes Back Seat to Cable at FCC*, BROADCASTING & CABLE, Nov. 8, 1993, at 41.

¹⁵³ Telephone interview with Stewart Bedell, Assistant Chief, Audio Services Division, Mass Media Bureau, FCC (Mar. 8, 1994).

¹⁵⁴ The Mass Media Bureau staff advises that approximately 600 applications for approval of proposed duopolies have been filed as of March 1, 1994. Of these, all but 140 have been acted on. *Id.* Mr. Bedell indicated that the Bureau would be relying extensively on data collected by private industry in the preparation of its own report. *Id.*

¹⁵⁵ *Duopoly Special Report, Part 1*, RADIO BUS. REP., Nov. 29, 1993, at 8.

¹⁵⁶ *Id.* In a follow-up report the following week, *Radio Business Report* listed all of the duopoly-LMA combinations in each of the top fifty markets. *Duopoly Special, Part 2*, RADIO BUS. REP., Dec. 6, 1993, at 8-9. A list of the duopoly and LMA deals in the next fifty markets (Nos. 51-100) was published the following week in Part 3: *Duopoly Special, Part 3*, RADIO BUS. REP., Dec. 13, 1993, at 8-9.

¹⁵⁷ *Consolidation Comes to San Antonio*, BROADCASTING & CABLE, Nov. 22, 1993, at 35.

¹⁵⁸ *Id.*; See *Duopolies Growing in Revenue Share*, BROADCASTING & CABLE, Mar. 21, 1994, at 48.

¹⁵⁹ *Special Report: Duncan on Duopoly*, RADIO BUS. REP., Feb. 21, 1994, at 6. Duncan pointed out that these were the same markets that had experienced the greatest proliferation of new or "moved-in" FM channels. *Id.*

¹⁶⁰ Four duopolies composed of 12 stations had 68.7% of the audience. *Duopoly Special, Part 3*, supra note 156, at 8; *Special Report: Duncan on Duopoly*, supra note 159, at 6.

¹⁶¹ Four duopolies involving 14 stations had 62.1% of the audience. *Duopoly Special, Part 3*, supra note 156, at 8; *Special Report: Duncan on Duopoly*, supra note 159, at 6.

¹⁶² Five duopolies comprised of 16 stations had 59.1% of the audience. *Duopoly Special, Part 3*, supra note 156, at 8; *Special Report: Duncan on Duopoly*, supra note 159, at 6.

¹⁶³ The four duopolies in the Richmond, Virginia metro controlled 83.5% of the revenues; The Rochester, New York duopolies controlled 79.9% of the revenues; and the Albuquerque duopolies controlled 79.2% of the revenues. *Special Report: Duncan on Duopoly*, supra note 159, at 6.

¹⁶⁴ *Radio Rules and Policies Report and Order*, supra note 5, at 70, Rad. Reg. 2d at 928 (Comm'r Barrett dissenting in part and concurring in part). Attached to Commissioner Barrett's opinion was an appendix illustrating how, under the Commission's initial local ownership rule changes, six or seven group owners could own all of the stations in the top 10 markets without exceeding the 25% audience share limits. *Id.* App. 5, 6.

rich and poor stations only increasing, not decreasing?

Views on the impact of the duopoly rules are not consistent either as to the nature of the impact or whether they are beneficial or detrimental to the industry as a whole. Interviews with persons in the industry as reported in the trade press have been mixed. Some persons interviewed believed that duopolies were primarily responsible for enhanced revenue growth: the economies of scale of combined operations, they said, helped those stations bring more revenue to the bottom line. Others contended that revenue growth was more a factor of improved economic conditions in the market generally, or pointed to the fact that gains in cash flow were most often achieved by reduction in the labor force of a combined operation, particularly of upper level management positions.¹⁶⁵

Most observers have agreed that a new combination created under the duopoly rules almost always is accompanied by cost-cutting and trimming of expenses to make the operation more efficient. One group owner's experience is that the positions of general manager, chief engineer, promotions director and business manager are most often consolidated when a duopoly is formed.¹⁶⁶ Obviously, savings also can come from operating out of one building rather than two, having consolidated payrolls, and splitting other general and administrative costs.¹⁶⁷ Less frequent is the consolidation of the sales departments or sales managers of newly-combined stations. The president of NewCity Communications, which has duopolies or LMAs in four of its six markets, observes that even though each salesperson had fewer accounts, they are representing three or four stations instead of one or two, and can spend more time with that account, and make a higher sale as a result.

Consolidation, and its attendant cost-cutting mea-

asures by necessity has brought with it an overall reduction in employment in the industry, but its impact on the industry, except perhaps in very specific job categories, has not yet been established.¹⁶⁸ Moreover, there is thus far no evidence to suggest that there is a corresponding decline in the quality of broadcast service, or even any decline at all. According to one general manager who was "duopolized," the people who are being cut are most often those who do not have the best creativity or skills: "It works out well for the good employees. It's the 'B' players and the 'C' players who are going to get shuffled down. . . . The effect will be positive for the industry."¹⁶⁹ In addition, the economic strengthening brought about by consolidation may be increasing both program "diversity" as well as quality.¹⁷⁰

C. Future Trends in Duopolization

It is always risky to venture predictions about the future impact of a regulatory scheme or any piece of legislation; however, based upon the data collected thus far, certain trends can be foreseen.

First, we can expect consolidations to continue over the next two years, at a gradually declining pace. These consolidations will take place mostly in the top 75 markets, but spreading downward to Markets 100-150. As pointed out by Duncan, radio markets 25 through 75 were hardest hit during the 1980s with the proliferation of new and moved-in FM channels,¹⁷¹ and thus, may continue to experience the greatest amount of duopolization.

Second, local marketing agreements will continue to be utilized in at least three different ways. Some licensees will use the LMA as an initial stage before consolidation, for the time period between completion of contract negotiations and consummation of

certain job categories in radio continued to show a decline. For example, the number of stations employing chief engineers declined from 84% in 1992 to 78.1% in 1993, and the percentage employing news directors dropped from 72.3% to 66.7%. Viles, *supra* note 165, at 76.

¹⁶⁹ *Id.* (quoting Bill Sherard, former general manager of WCPT (AM)-WCXR (FM) in the Washington, D.C. market).

¹⁷⁰ As pointed out by Dick Ferguson, President of NewCity Communications: "We've created diversity — more choices for the listeners. These [NewCity's recently consolidated] stations could not be operating at these quality levels if it hadn't been for duopoly. And don't forget, both Birmingham and San Antonio were in bankruptcy before we stepped in." *Reports from the Trenches*, *supra* note 166, at 9.

¹⁷¹ *Special Report: Duncan on Duopoly*, *supra* note 159, at 6.

¹⁶⁵ *Id.*; see also, Peter Viles, *For Some, Duopoly Means a Pink Slip*, BROADCASTING & CABLE, Nov. 15, 1993, at 74.

¹⁶⁶ *Reports from the Trenches*, Interview with Ed Christian, President and CEO of Saga Communications, RADIO BUS. REP., Nov. 29, 1993, at 9.

¹⁶⁷ *Id.* Christian stressed however, that Saga had to guard against unreasonable expectations of cost expectations. 40% to 50% was found to be highly inflated. Experience taught that a 20% savings in operating costs was a more realistic expectation. *Id.*

¹⁶⁸ FCC radio industry employment figures are not yet available for 1993, but the trend has been downward since 1989. This trend cannot be blamed on duopolies, however, since the rule only went into effect on September 16, 1992. However, while national advertising statistics point to a significant (8%-9%) increase in radio revenues, statistics for the same period for

the deal after FCC approval has been obtained.¹⁷² LMAs also will be used by those licensees who cannot acquire a second station outright, either because of the 25% audience share cap,¹⁷³ or because of the one-to-a-market rule,¹⁷⁴ might still operate a second radio station in the market through a local marketing agreement without being in violation of 47 C.F.R. § 73.3555(c) or (d). Finally non-programming LMA's (e.g., joint sales agreements, joint sales and operating agreements where the licensee continues to program its station) will be used by those operators to "lock-in" a future acquisition now prohibited under the rules, in anticipation that the FCC will further relax the multiple ownership rules to permit "triopolies" of AM and FM stations—at least in larger markets—as it originally had done in the initial *Report and Order*.¹⁷⁵

Third, duopolization will likely be used most by two types of groups: "national" group owners, who will use duopolies to establish a competitive presence in various major (top 25) markets throughout the country as part of an overall national strategy,¹⁷⁶ and "regional" group owners, who use duopolies to build a regional chain of stations in smaller

markets.¹⁷⁷

Fourth, while continued consolidation will also bring about more competitive combinations, the ability of a single owner to "dominate" a market may actually become more difficult. As pointed out by Duncan, in only 14 of the 147 markets surveyed did a single duopoly owner control more than 25% of the audience.¹⁷⁸ While this is partly due to the fact that all duopolies are relatively "new," and thus have had insufficient time to build greater audience shares, it is also true that in most radio markets there is more than one duopoly, and the increased competition between them keeps one or the other from becoming overly dominant.¹⁷⁹

Finally, as the rules and policies governing duopolies become more clear, there will be fewer "wars" fought at the FCC between competitors, and more fought "in the trenches," as recombined groups seek to improve their competitive position in the marketplace. The public can only benefit from these newer "duopoly wars," and one would hope that the FCC will conclude that the more ephemeral *public interest* will also be served.

¹⁷² *Duopoly Special Report, Part 1, supra* note 155, at 8.

¹⁷³ In adopting the LMA attribution policy in the new rules, the Commission did not require the termination of existing local marketing agreements which were not in compliance. Thus, Bristol Broadcasting Company, Inc., the petitioner in the Charleston, West Virginia case, had a grandfathered LMA with another station in the market which could not be converted to the high audience share enjoyed by Bristol. *See supra* note 78 and accompanying text.

¹⁷⁴ Although section 73.3555 counts time brokered stations as "owned" by the time brokering station for purposes of compliance with the national and local radio ownership rules, they are not counted as an attributable interest with respect to compliance with the newspaper or one-to-a-market rule.

¹⁷⁵ *Radio Rules and Policies Report and Order, supra* note 5, para. 40. As of this writing, there appears to be some movement in Congress and the Commission for reexamining the broadcast multiple ownership rules, in light of expansive plans for the "Information Superhighway." *Radio Ownership Restrictions May Be Relaxed*, SMALL MARKET RADIO NEWSLETTER, Mar. 17, 1994, at 1; *see also Relaxed Radio, TV Ownership Limits in the Cards; House, Senate May Direct FCC Rule Review*, RADIO BUS. REP., Mar. 7, 1994, at 4.

¹⁷⁶ Infinity Broadcasting Corporation is the most successful example of a "national" group duopolist. It has duopoly combinations in the following top 10 markets: New York (#1), Los Angeles (#2), Chicago (#3), Washington, D.C. (#7), and Boston (#9). *Duopoly Special, Part 2, supra* note 156, at 8.

¹⁷⁷ Virginia Network, Inc. is a good example of a group in the process of building a strong regional network, with a seven station combination of owned and time-brokered stations in the Roanoke-Lynchburg market (#97). *Duopoly Special, Part 3, supra* note 156, at 9. Similarly, West Virginia Radio Corporation has supplemented its West Virginia news and sports radio network with duopolies in Morgantown-Clarksburg and Charleston, West Virginia. *Id.*; *see also* discussion of the Charleston, West Virginia case, *supra* notes 74-103 and accompanying text.

¹⁷⁸ *Special Report: Duncan on Duopoly, supra* note 159, at 6. However, Duncan found that in 51 markets a single duopoly controlled more than 25% of the revenue. *Id.* One suspects that if the kind of revenue were analyzed, the majority would be revenue from regional and national advertising, and not local advertising. National advertisers tend to buy exclusively on the basis of audience share (cost per point), whereas local advertisers are more interested in targeting their product or service to particular audiences, to merchandising, and ultimately to "results"—whether the ad campaign brings in customers and puts more dollars in the cash register.

¹⁷⁹ A minimum of two, and typically four, duopolies exist in each of the top 50 markets. *Duopoly Special, Part 2, supra* note 156, at 8-9. At present, there are 20 singleton duopolies in markets 50-100, *Duopoly Special, Part 3, supra* note 156, at 8-9. However, that number is likely to diminish in the near future, since greater duopoly activity is now occurring in these markets.

