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THE FCC'S MULTIPLE OWNERSHIP RULES AND NATIONAL CONCENTRATION IN THE COMMERCIAL RADIO INDUSTRY *

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INTRODUCTION

> The [Federal Communication] Commission has traditionally accorded this rule the highest station among its several multiple ownership regulations. The "seven station" rule is the ultimate multiple ownership regulation, with all other proscriptions and exemptions occurring within the constraints it imposes. Since the adoption of the "seven station" rule in 1953, the Commission has never seen fit to waive this regulation, demonstrating the regard held for the rule's integrity.[1]

From the moment the FCC first imposed an arbitrary upper limit on the number of broadcasting stations that one business entity could own,[2] the Commission's multiple ownership regulation has been a source of controversy.[3] Some authorities argue that the rule is too lenient and a more stringent national concentration standard ought to be imposed.[4] Others contend the Rule is, at best, concerned with the wrong kind of ownership concentration,[5] and at worst, arbitrary and capricious.[6] Regardless of the point of

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1. Further Notice of Proposed Rule Making in Docket No. 20548, 63 F.C.C. 2d 832, 834 (1977).

2. An upper limit of six FM stations to a customer was imposed in 1940. *See* 5 Fed. Reg. 2384 (1940). This was followed by imposing an upper limit of three on prospective television owners. *See* 6 Fed. Reg. 2284 (1941). The television limit was increased to five in 1944. *See* 9 Fed. Reg. 5442 (1944). No formal rules existed for AM stations until the Commission promulgated the 7-7-7 Rule (7-7-5 at the time). *See* Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953). Prior to this an informal upper limit of seven AM stations existed as a result of the FCC's refusal to allow CBS to purchase full interest in an eighth standard broadcast station, KQW, in San Jose. *See* Sherwood B. Brunton, 11 F.C.C. 407 (1946).

3. *See* Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COM. B.J. 1, 8 (1974) for a brief discussion of NBC's initial problems with the FCC's numeric limits on television. *See also* Editorial, BROADCASTING Aug. 10, 1981 at 98. The most extensive and expensive objection to the Seven Station Rule was lodged by Storer Broadcasting Co. (originally called the Fort Industry Co.). Storer's challenge was turned back, however, by a nearly unanimous Supreme Court decision favoring the FCC. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

4. *See* FCC Network Study Memorandum, *Multiple Ownership and Television*, 1 J. OF BROADCASTING 250, 261 (1957); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, NETWORK BROADCASTING, H.R. REPORT NO. 1297, 85th Cong., 2d Sess. 659-60 (1958). These provide the FCC Network Study Staff's call for a long run FCC goal of one station per licensee. *See also* H.R. REP. NO. 607, 85th Cong., 1st Sess. 141 (1957).

5. *See* Trask, *The Palace of Humbug—A Study of FCC Policies Relating to Group Ownership of Television Stations*, 22 FED. COM. B.J. 185, 210 (1968). *See* Rosse, Dertouzous, Robinson and Wildman, *Economic Issues in Mass Communication Industries*, 1 FEDERAL TRADE COMMISSION PRO-

view, however, one thing is clear, the FCC has broad and substantial discretion in fashioning ownership regulations.[7]

The result of this extensive discretionary power is that the Commission's ownership decisions are, in most instances, upheld by the courts.[8] Consequently, interested parties must influence Commission ownership policy at its inception if they feel strongly about an issue.[9] Failure to persuade the FCC that a particular view ought to be the "reasonable" view adopted by the Commission, leaves two options: 1) pressure Congress to amend the Communications Act,[10] or 2) wait until the political climate at the Commission becomes more favorable to the interest asserted.

As to the second strategy, the FCC's original Multiple Ownership Proceeding[11] provides a classic example. Ten parties (all broadcasters) filed comments on September 27, 1948.[12] The comments almost uniformly opposed the imposition of arbitrary numeric limits on station ownership by the Commission.[13] The Commission ignored the arguments and instituted the Seven Station Rule.[14] Today, after nearly three decades of waiting, a deregulatory climate exists at the FCC.[15] Commission Chairman, Mark Fowler, recently suggested that it might be a good idea for the FCC to consider the possibility of permitting groups to own more than seven AM radio stations, seven FM radio stations, and seven television stations [TV].[16]

This article will focus on the radio portion of the policy question raised

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CEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 40, 188 (1978) [hereinafter cited as Rosse].

6. *See* Brief for Respondent at 25-26, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Brief for Respondent]; Comments of National Broadcasting Co. Pursuant to the Federal Communications Commission Multiple Ownership Proceedings in Docket No. 8967 at 18, 20 (Sept. 27, 1948); Comments of the Trans-American Television Corporation On Proposal to Amend the Multiple Ownership Rules in Docket No. 8967 at 27, 43-44 (Sept. 27, 1948).

7. *See* NBC v. United States, 319 U.S. 192 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

8. According to Powe, FCC Determinations of Networking Issues in Multiple Ownership Proceedings, 3 *Federal Communications Commission Network Inquiry Special Staff* 1, 19 (1980), "[w]hatever may be the outer limit of the Commission's authority, there is no indication in the three cases that the Commission has approached it." *Cf.* United States v. Midwest Video Corp., 406 U.S. 649 (1972).

9. Subsequent court review will be totally unsuccessful unless the Commission has utilized an "unreasonable" means of promoting diversity of mass communications sources. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978); Powe, *supra* note 8 at 19.

10. 47 U.S.C. §§ 151-744 (1976 & Supp. III 1979).

11. The reference here is to the FCC's initiation of formal rulemaking, Notice of Proposed Rule Making, 13 Fed. Reg. 5060 (1948).

12. Review of Original FCC Docket No. 8967 (Aug. 6, 1981) (available in National Archives, Suitland, Md.).

13. *Id.*

14. Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953). The industry's arguments although largely ineffective did cause the Commission to increase the number of FM stations that one party could own (from six to seven) and ultimately got the television station limit raised to seven (only five of which could be VHF) in a subsequent proceeding; *see* Report and Order in Docket No. 10822, 43 F.C.C. 2797 (1954).

15. The FCC has moved recently to deregulate cable television, some aspects of radio, and license renewal procedures for radio and TV.

16. *FCC OK's Westinghouse-Teleprompter*, BROADCASTING Aug. 3, 1981 at 29-30.

by Mr. Fowler's suggestion.[17] The issue of whether the FCC's Seven Station Rule should be retained to control national concentration in radio will be addressed. First, a brief history of the Seven Station Rule will be provided. Next, the FCC's rationale for promulgating the Rule will be discussed, and the status of radio group ownership with respect to national concentration issues will be described. The next section will contain a list of policy alternatives which FCC policymakers can consider. The alternatives will be critically evaluated, including the author's policy recommendations and conclusions.

I. History of the Seven Station Rule

The first formal rule promulgated by the FCC limiting the number of commercial stations that could be owned by one entity restricted FM station-ownership to six stations.[18] This 1940 rule was instituted at a time when there were fewer than fifty FM stations on the air.[19] Shortly thereafter (April 30, 1941), the FCC issued a rule which limited national television ownership to three stations.[20] This TV limit was later increased to five in May 1944 as a partial response to an NBC petition requesting that the upper limit be set at seven television stations.[21]

No formal maximum limit on AM station ownership was imposed by the Commission prior to its decision in Docket 8967.[22] However, the FCC's decision in *Sherwood B. Brunton*[23] made clear the Commission's opinion that full ownership of more than seven AM stations nationally is not in the public interest, at least with respect to a powerful national radio network.

On August 19, 1948, the FCC issued a *Notice of Proposed Rule Making* which recommended that a financial entity be limited to ownership of seven AM stations, six FM stations, and five television stations.[24] The rule making was completed on November 27, 1953, when the Commission issued a *Report and Order* limiting ownership to seven AM stations, seven FM stations, and five TVs.[25] The final modification to the FCC-established arbitrary upper

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17. Much of the discussion is applicable to a discussion of national concentration in the television industry. However, the obvious differences between these two industries (7,937 licensed commercial radio stations on the air versus 763 TV stations) suggests that they ought to be separated analytically.

18. 5 Fed. Reg. 2384 (1940). According to Howard, *supra* note 3, at 8, the FM standard was contained in Rule 3.228 (now codified at 47 C.F.R. § 73.240 (1981)).

19. Comments of Trans-American Television, *supra* note 6, at 3.

20. 6 Fed. Reg. 2284 (1941). According to Howard, *supra* note 3, at 8, the TV standard was originally issued as Rule 4.77 in 1940 and was applicable to experimental television stations. Rule 4.77 was replaced by Rule 4.226 (now codified at 47 C.F.R. § 73.636 (1981)) when the FCC allowed experimental stations to switch to commercial operation in 1941.

21. 9 Fed. Reg. 5442 (1942). According to Powe, *supra* note 8, at 28, there were only five commercial television stations in operation when NBC made its request.

22. Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953).

23. 11 F.C.C. 407, 412-13 (1946). At the time, CBS already had controlling interest in seven AM stations, six of which were 50,000 watt clear channel stations. Since KQW in San Jose was also a 50,000 watt clear channel station, the FCC's decision in this case would not necessarily have prevented a less powerful entity with a less powerful station lineup from obtaining an eighth station.

24. *See supra* note 11.

25. *See supra* note 22. The Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953) also dealt with the extent of ownership interest which would activate imposition of the promulgated

limits on national station ownership took place in September 1954, when the Commission increased the television limit to seven (provided that only five were VHFs).[26]

II. THE FCC'S RATIONALE FOR THE SEVEN STATION RULE

The Seven Station Rule was established at a time when the communications industry was experiencing rapid change. The television industry was just becoming a meaningful nationwide force.[27] Conversely, the radio industry was on the verge of losing most of its national influence.[28] Larger broadcast interests were uniformly opposed to the rule's limitations.[29] Very little was heard or written concerning the position taken by smaller broadcasters,[30] and Congressional sentiment was mixed.[31]

In light of the countervailing forces present in the regulatory environment, the FCC attempted to effect a "reasonable" compromise with respect to the Seven Station proceeding.[32] The policy objective underlying the Commission's decision was to maximize nationwide broadcast competition (the number of different owners) while minimizing industry disruption.[33]

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limits. Although these limits were set at a low level (one percent), they are outside the concern of this article. The rules as promulgated and as subsequently modified can be found in 47 C.F.R. §§ 73.35 (AM), 73.240 (FM), and 73.636 (TV) (1981).

26. Report and Order in Docket No. 10822, 43 F.C.C. 2797 (1954). This does not suggest that the FCC has been inactive with respect to its concern over concentration of broadcast media. Numerous proceedings have dealt with issues concerning regional and local media concentration. However, with the exception of the FCC's attempt to institute a Top 50 Ownership Rule, 45 F.C.C.2d 1851 (1964) and in Notice of Proposed Rule Making in Docket No. 16068 (June 21, 1965), no formal action has been taken with respect to the Seven Station Rule.

27. The FCC's issuance of its Sixth Report and Order in Docket No. 8736, 41 F.C.C. 148 (1952), ended the freeze on new TV station construction effective July 1, 1952. Howard, *supra* note 3, at 9, indicates that the Seven Station Rule was promulgated at a time of great activity in the expansion of broadcasting. According to Sterling, *Television and Radio Broadcasting*, WHO OWNS THE MEDIA? 80 (1979), 108 television stations were on the air when the freeze was lifted. By 1956 there were 441 television stations in operation.

28. *See* E. BARNOUW, THE GOLDEN WEB 288-90 (1968) for a discussion of television's impact on radio ratings. As of December 1953 there were 2,495 licensed AM stations on the air and 537 licensed FM stations. These totals represent growth rates of 35% and 171% respectively from 1948 when the FCC first proposed the Seven Station Rule.

29. *See supra* note 6.

30. The only evidence in Docket No. 8967 suggesting that small broadcasters might have favored the Rule was a letter from E. B. Craney of Pacific Northwest Broadcasters. Docket No. 8967, 5 (Aug. 31, 1948). In Craney's view two Class 1A's in the hands of one individual tends toward monopoly; one Class 1A in the hands of a national network tends toward monopoly; and that if the FCC planned a limitation with respect to the number of stations the best way is to license one station to each applicant.

31. *See Senator Johnson Blasts FCC Seven-TV-Limit Proposal*, BROADCASTING Jan. 18, 1954 at 31. *See also* 93 CONG. REC. 5586, in which Senator White suggests that concentration of control limitations should be decided by Congress rather than the FCC. Section 19 of S. 1333 (1948) provided that no persons under common control shall own or control stations in the same broadcast band which serves more than 25% of the population. This wording was dropped by the time the bill was reported out of committee on June 9, 1948.

32. This author's operational definition of a "reasonable" compromise is that all of the parties interested in the outcome get something, but none get everything they wanted. This approach normally results in a decision which will be upheld on appeal.

33. This objective is not explicitly stated in the Commission's decision in Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953). The clearest support for this view is contained in Brief for Petitioners at 41-42, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Brief for Petitioners]. The policy objective which the FCC followed in this

The FCC's reasons for promulgating arbitrary numeric limitations fall into two categories: 1) fulfillment of agency responsibilities as outlined by statute and interpreted by case law, and 2) specific reasons for choosing the numeric limitations contained in the Order.[34]

A. *Fulfillment of Agency Responsibilities*

The Seven Station Rule was "designed to implement the Congressional policy against monopoly."[35]

> One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcast system on a free competitive basis. *See Federal Communications Commission v. Sanders Brothers*, 309 U.S. 470 (1940). This Commission has consistently adhered to the principle of "diversification" in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any one person or persons under common control. It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees.[36]

The FCC was careful to explain that it was not attempting to enforce the antitrust laws through the Seven Station Rule.[37] Rather, it stressed that "the fundamental purpose [of the rules] is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[38]

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decision is consistent with the theory of FCC behavior forwarded by R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 120-21 (1973). They contend that "[g]iven the information available to them, the commissioners attempt through their decisions to maximize some objective function, including the welfare of the commissioners as individuals and of groups affected by their decisions, and the survival and growth of the regulatory agency." *Id.*

34. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953).

35. *Id.* at 291. The Commission pointed to sections 311 and 313 of the Communications Act for specific authorization. *Id.* at 290.

36. *Id.* at 291. Further support for the FCC's position is provided in FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940). Congress was gravely concerned that, absent an assertion of governmental control, "the public interest might be subordinated to monopolistic domination in the broadcasting field." *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945). Competition in the presentation of viewpoints, no less than competition in the economic sense, is vital, for "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Id.*

37. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 290 (1953). The Communications Act of 1934 does not empower the Commission to enforce the antitrust laws. Every time the Commission has dealt with communication ownership issues, the affected industry bases part of its case on this fact. However, from Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950) to the present (*see supra* cases cited in note 7), the courts have made it abundantly clear that the FCC's powers in this area go far beyond those contained in the antitrust laws.

38. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 290, 291 (1953).

B. United States v. Storer Broadcasting Co.

The *Report and Order* in Docket 8967 provided the general philosophy underlying the FCC's Seven Station Rule. However, additional insight into the FCC's rationale for promulgating the Rule was provided when Storer Broadcasting challenged the Seven Station Rule in court.[39] The brief filed on behalf of the Commission in the United States Supreme Court[40] presented a number of additional arguments in support of the contention that the Seven Station Rule was "reasonable." The Commission advanced the traditional rationale for regulation of broadcasting—scarcity of available channels[41]—to support the need for an upper limit on the number of stations that any one entity could own.[42] Another familiar theme—the media power rationale for regulation—was also used to justify the rules.

> Moreover, since the formation of public opinion is important on the national, as well as on the local level, effective diversification cannot be achieved merely by assuring that there will be some competition in each region. To permit the growth of large chains, however, the component stations might happen to be distributed, would be to invite a creeping trend to uniformity.[43]

The Commission further argued that the Rule would protect small, independent broadcasters from the bargaining advantages possessed by chain broadcasters,[44] and that the Commission's primary statutory rationale for promulgating the Rule was to assure "the larger and more effective use of radio."[45] Additional reasons cited by the FCC for upholding the Seven Station Rule were that the rules rests on the informed judgment of years of agency experience[46] and is eminently reasonable,[47] that a trend toward heavy concentration is antithetical to the maximum utilization of radio facilities and contrary to the public interest,[48] and that promulgation of a multiple ownership rule is a fairer, more efficient procedure than an *ad hoc* approach to the issue.[49]

C. *Why the Commission Chose A Limit of Seven*

The vagueness of the record presenting the FCC's rationale for selecting specific numeric limitations on ownership is in sharp contrast to the specific-

39. *See* United States v. Storer Broadcasting Co., 220 F.2d 204 (D.C. Cir. 1955), *aff'd*, 351 U.S. 192 (1956).

40. Brief for Petitioners, *supra* note 33 at 12.

41. *See* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 103 (1975).

42. *See* Brief for Petitioners, *supra* note 33, at 12.

43. *Id.* at 13.

44. *Id.* This view provides a fuller understanding of what the FCC meant by preventing "any undue concentration of economic power contrary to the public interest." *See* Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953).

45. 47 U.S.C. § 303(g). This section also was used to support the FCC's Chain Broadcasting Regulations in NBC v. United States, 319 U.S. 190, 216 (1943).

46. *See* Brief for Petitioners, *supra* note 33, at 14.

47. *Id.* The FCC made it clear in this portion of its brief that Storer had the burden of demonstrating that the Seven Station Rule was unreasonable, and that Storer had failed to do so.

48. *Id.* at 35.

49. *Id.* at 36-37.

ity of the regulatory philosophy portions just discussed. The FCC selected the number seven in the case of AM stations "in order that present holdings of such stations be not unduly disrupted."[50] In addition, the seven station limit "is consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved" within that framework.[51] In the case of FM stations, the number seven was selected because "[i]t is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth."[52] Finally, the number five was continued in effect for television because the Commission indicated that "based on extensive experience with the problems of multiple ownership, [the limitations] have proven practicable and desirable."[53]

III. THE STATUS OF GROUP OWNERSHIP IN RADIO

Past studies of broadcast group ownership have primarily focused on television, with little research of radio. Because radio group ownership has received so little attention, this section will briefly review past empirical attempts to identify the impact that group ownership has had on various measures of television performance, and the economic reasons for being engaged in radio group ownership. Summary data regarding the extent of radio group ownership over time will be presented.

A. *Review of TV Studies*

A number of studies have been conducted that partially assess the impact of television group ownership on station performance. The results of the studies are not conclusive when applied to group ownership in radio. However, because they provide the only empirical evidence available with respect to group-owned broadcast station behavior, a review is in order.

The evidence regarding group ownership in television suggests that it has had minimal impact on station profitability[54] or station rates.[55] Such

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50. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 295 (1953).

51. *Id.* at 295. Cohn, *Proceedings of the Symposium on Media Concentration*, 1 FTC 203 (1978), indicates that the number seven was selected while he was at the Commission in the early 1940's on the theory that anyone who controlled more than one percent of the AM stations on the air would be a monopolist. *See also Magic Number*, BROADCASTING Aug. 31, 1981 at 16. The FCC's chief staff architect of the Seven Station Rule, Arthur Scheiner, disagrees with Cohn. He states that the Seven Station Rule limits "were not intended to represent any given percentage of existing stations." *See Ownership Background*, BROADCASTING Sept. 14, 1981 at 23.

52. Report and Order in Docket No. 8967, 18 F.C.C. 288, 295 (1953).

53. *Id.* at 294.

54. P. CHERINGTON, L. HIRSCH, & R. BRANDWEIN, TELEVISION STATION OWNERSHIP: A CASE STUDY OF FEDERAL AGENCY REGULATION (1970); Boyer & Wirth, *The Economics of Regulation by Policy Directive: FCC Public Interest Requirements*, 21 Q. REV. OF ECON. AND BUS. 77, 90 (1981); Levin, *Competition, Diversity, and the Television Group Ownership Rule*, 70 COLUM. L. REV. 791, 799, 810 (1970). The Boyer and Wirth study suggests that group owners, as compared with nongroup owners, behave in a way which indicates they believe FCC license renewal criteria are relatively insensitive to the quantities of public interest programming. Since this should lead group-owned stations to offer slightly less public interest programming than stations without such ownership ties, it should also lead to somewhat larger profits for group-owned TV stations, other things being equal. *See also* Bortz, Wirth, & Pottle, *The Economics of Television Station Operation in 100-Plus Markets* 94 (Feb. 1981) (for National Association of Broadcasters).

ownership had a mixed impact on the quantity of public interest programming that was broadcast,[56] and a positive impact on market level income and revenue.[57] The empirical case against group ownership in the more highly concentrated television industry is not a persuasive one.[58] In radio, anticompetitive behavior resulting from group ownership is even less likely to occur due to the much larger number of operating stations.[59] In conclusion, the empirical evidence suggests that at current levels group ownership in television (and by analogy, radio) has not resulted in anticompetitive station behavior.[60]

B. *The Economics of Radio Group Ownership*

Entrepreneurs who purchase and operate multiple radio stations would have an economic incentive to do so if group ownership resulted in economies of scale from reduced costs of purchasing, selling, investing, production, and/or management;[61] if radio station ownership were highly profitable;[62] or if group ownership in radio provided significantly greater market power relative to nongroup-owned stations.[63]

Based on the present levels of radio group ownership, an entrepreneur could expect the economies of scale to be quite small.[64] This is partially due to the fact that radio program costs are considerably lower than are televi-

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55. Both P. CHERINGTON, L. HIRSCH, & R. BRANDWEIN, *supra* note 54, and Wirth & Wollert, The Effects of Market Structure on Television News Pricing (Aug. 1981) (paper presented at Annual Convention of Association for Educators in Journalism) support this notion.

56. *See* Boyer & Wirth, *supra* note 54, at 90; Litman, *Public Interest Programming and the Carroll Doctrine: A Re-Examination*, 23 J. OF BROADCASTING 51, 58 (1979), for evidence suggesting that group-owned TV stations offer somewhat less public interest programming than do non-group owned TV stations. Evidence supporting the opposite view can be found in Wirth & Wollert, *Public Interest Programming: Taxation by Regulation*, 23 J. OF BROADCASTING 319, 324 (1979); Wirth & Wollert, *Public Interest Programming: FCC Standards and Station Performance*, 55 JOURNALISM Q. 554, 560 (1978).

57. Levin, *Research Memorandum on the Economic and Programming Effects of Newspaper Ownership of Television Stations*, Supplementary Comments in Docket No. 18110 (May 1974).

58. *See Media Concentration: Hearing before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business*, 96th Cong., 2d Sess., 426 (1980) (Part 1) (statement of John F. Lyons) [hereinafter cited as *Media Concentration*].

59. *Id.* at 417.

60. *Id.* On the other hand, depending on one's political perspective, the evidence that group ownership has very little effect on station performance could be used to demonstrate that allowing group ownership does not result in positive social benefits. This could then be used to argue that because there are no public interest advantages to be derived from group ownership, there is no reason to allow it. Clearly, the party who has the burden of proof in the above situation will lose.

61. *Id.* at 425-26. *See also* C. FERGUSON & J. GOULD, MICROECONOMIC THEORY 208-09 (1975).

62. *See Media Concentration*, *supra* note 58, at 425.

63. *Id.* at 424. Possession of such market power would allow a group owner to behave anticompetitively by engaging in a scheme of predatory pricing to drive competitors out of individual markets. Group ownership would have to result in excess profits, for the group as a whole, for this to occur. This would allow a group owner to subsidize predatory (intentionally lower) prices in one market with excess profits from another. *Id.*

64. It is possible that significant economies could be achieved by owning a larger number of stations than is presently allowed. With all of the recent movement to expand the number of national radio networks particularly via satellite distribution, there might be a cost-based incentive for radio networks to expand their ownership of stations if the seven station limit is lifted.

sion program costs.[65] Although no evidence exists in this area, it is arguable that some economies should occur with respect to sales and investment for group-owned stations. However, these economies could not be expected to result in much higher returns on investment.[66]

In addition, profitability will not provide much incentive to operate multiple radio stations since the evidence suggests that radio stations in general are only earning normal economic profits.[67] In 1979 the average radio station which reported to the FCC earned gross revenues of $424,421, which resulted in earnings before taxes of only $30,160.[68] Consequently, the average radio station had a 1979 pretax profit margin of only 7.1%.[69] The FCC's figures also indicated that approximately forty percent of the radio stations from which the Commission received financial data were losing money in 1979.

Finally, it does not appear likely that group-owned radio stations in general possess much market power.[70] No evidence exists which would indicate that radio station groups have ever used market power to engage in predatory pricing.[71] Inasmuch as the average radio station in this country faces tremendous competition, not only from other radio stations, but also from television stations and daily newspapers, a market power incentive to form radio groups does not appear to exist.[72]

C. *The Extent of Radio Group Ownership*

Group ownership in radio can be analyzed as an increasing trend, or conversely, as limited and level growth. Table 1 indicates that both the number of group-owned radio stations and the percentage of all stations which are group-owned have increased over time. For example, in 1953 when the Seven Station Rule was promulgated, 423 of the 3,032 licensed commercial radio stations on the air were group-owned. In 1980, 2,124 of the 7,839 commercial stations on the air were group-owned. During this twenty-seven-year period, the percentage of stations that are owned in groups of three or more rose from 14% to 27.1%, which is an average annual

65. *See Media Concentration*, *supra* note 58, at 438.

66. *Id.* at 427.

67. B. OWEN, *supra* note 41, at 122, suggests that radio is the most competitive form of mass media other than magazines. Radio is considered to be monopolistically competitive. Monopolistically competitive firms do not earn long run economic (excess) profits. *See also* Martin, *Competition in the Broadcasting Industry: A Status Report* 38-44 (June 1981) (report prepared for National Association of Broadcasters).

68. FEDERAL COMMUNICATIONS COMMISSION, *1979 Radio Revenue Data*.

69. Radio stations had a much better year in 1978 when the average station earned a pretax profit margin of 11.6%. However, investors looking for high-yield investment opportunities would not be likely to invest in the average commercial radio station. This is not to say that there are not stations which earn much higher returns than average. It appears, however, that a profit-based rationale for the formation of radio groups is not very strong.

70. *See supra* note 67.

71. *See Media Concentration*, *supra* note 58, at 424-25.

72. The economics of the radio industry are considerably different from those of the television industry. The costs of owning and operating a radio station are much lower than those of a television station. This fact coupled with the much larger number of frequencies available in radio has resulted in extensive competition for radio broadcasters in all but the smallest markets. *Id.* at 417.

increase in group-owned radio stations of .49%.[73]

TABLE 1[74]

RADIO GROUP OWNERSHIP: 1929-1980

Year	Total No. of AMs	Total No. of FMs	No. of Group Owners	No. of Group-Owned Stations	Avg. No. of Stations Owned/Group	Percent of Stations Under Group Ownership
1929	600	—	12	20	1.7	3.3%
1939	764	—	39	109	2.8	14.3%
1951	2,295	558	63	253	4.0	8.9%
1953*	2,495	537	88	423	4.8	14.0%
1960*	3,483	732	185	765	4.1	18.1%
1970*	4,304	2,145	250	1,432	5.7	22.2%
1978*	4,498	3,010	324	1,906	5.9	25.4%
1980*	4,572	3,267	360	2,124	5.9	27.1%

*Only groups which owned three or more radio stations are included for these years because this is the *BROADCASTING YEARBOOK* definition of radio group ownership.

Another way to assess the extent of radio group ownership is to identify the average number of stations controlled per group entity over time. The data provided in Table 1 reveals a positive trend which has been level since 1970. Specifically, the number of radio stations controlled by the average group owner in 1953 was 4.8. By 1980 this figure had risen to 5.9 stations.[75] Because the FCC's Seven Station Rule allows for ownership of up to fourteen radio stations, the 1980 figure indicates that the average group owner controls only 42.1% of the legally permissible number of radio stations.

A final method by which to examine radio group ownership trends is to identify how many entities control various combinations of AM and FM stations. Tables 2 through 5 provide insight into the mix of AM-FM group ownership combinations over time. Only three entities control the maximum number of radio stations allowed under the Seven Station Rule. This has been true since at least 1970 (Table 3). Forty-six of the 360 group entities in 1980 controlled ten or more stations (Table 5). The larger groups controlled a total of 531 radio stations or 6.8% of all the commercial radio stations on the air.[76]

73. If the number of radio stations on the air remained fixed at the 1980 level, and group ownership continued to increase at this pace, it would take 149 years for all of the commercial radio stations in the United States to come under some form of group control.

74. The sources for Table 1 are: C. STERLING & T. HAIGHT, THE MASS MEDIA Table 260c (1978); BROADCASTING (various dates); BROADCASTING YEARBOOK (various dates); *Media Concentration: Hearing before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business*, 96th Cong., 2d Sess. 418 (1980) (Part 1) (statement of John F. Lyons) [hereinafter cited as *Media Concentration Hearing*].

75. An increase in the average number of stations controlled by each group is understandable. In 1953 there was not much interest in owning FM stations due to low profitability. Consequently, radio broadcasters interested in making a profit were able to own only seven potentially profitable AM stations. As more people started listening to FM stations, owners became more interested in owning FMs. A group owner could then own 14 stations potentially capable of earning a profit. This fact alone could cause the increase evidenced in Table 1.

76. In 1978, 36 entities owned 10 or more stations. This represented 409 stations or 5.4% of all the stations in operation. *See Media Concentration supra* note 58, at 419.

The data provided relative to radio group ownership suggest that the radio industry is essentially unconcentrated at the national level. Nearly seventy-three percent of this country's radio stations are individually owned, thus competition at the national level would appear to be more than adequate.[77]

TABLE 2[78]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1953

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				29	15	10	3	2	59	0
	1			0	5	5	1	1	0	12	12
of	2		0	0	4	2	0	0	0	6	12
	3	0	0	0	2	0	0	1	1	4	12
FM	4	0	0	0	0	0	1	1	0	2	8
	5	0	0	0	0	0	2	0	1	3	15
Stations	6	1	0	0	0	0	0	0	1	2	12
	7	0	0	0	0	0	0	0	0	0	0
	Total	1	0	0	40	22	14	6	5	88	71
	# AM	0	0	0	120	88	70	36	38*	352	

*CBS owned nine AMs and J. Elroy McCaw controlled eight prior to the FCC's adoption of the Seven Station Rule.

77. The extent of national radio concentration that exists has undoubtedly been influenced by the FCC's Seven Station Rule. At present, no one entity can own more than .18% of the operational commercial radio stations. Some upward movement in radio's concentration picture would probably take place if the Commission increased the number of stations that could be owned by any one entity. Whether such increases in group ownership would result in anticompetitive behavior or the potential for such activity on either the information or the advertising side of the national media market is of course germane to the policy question being explored in this article.

78. Table 2 was derived from BROADCASTING YEARBOOK (1954). Figures in the main body of the table represent the number of entities owning that combination of AM and FM radio stations. For instance, in 1953 there were 29 entities which owned three AMs and zero FMs. Total rows and columns give the number of entities owning a certain number of AM or FM stations. In 1953, there were 40 entities which owned three AMs and between zero and seven FMs. Adding these columns or rows gives the total number of entities owning three or more radio stations in that year. In 1953 there were 88 such entities. Rows marked AM and columns marked FM give the number of AM or FM stations owned by those entities. The total represents the number of multiply-owned stations.

TABLE 3[79]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1970

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				29	14	2	6	7	51	0
	1			15	23	14	4	5	1	62	62
of	2		5	19	18	10	4	2	2	60	120
	3	1	0	0	15	9	5	6	4	40	120
FM	4	0	0	0	1	4	4	4	1	14	56
	5	1	0	0	0	1	6	2	2	12	60
Stations	6	1	0	0	0	2	0	3	2	8	60
	7	0	0	0	0	0	0	0	3	3	21
	Total	3	5	34	86	54	25	28	15	250	487
	# AM	0	5	68	258	216	125	168	105	945	

TABLE 4[80]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1978

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				10	4	2	1	0	17	0
	1			50	17	7	2	0	0	76	76
of	2		16	28	25	13	3	2	2	89	178
	3	1	4	7	30	19	3	2	1	67	201
FM	4	0	1	0	3	15	10	4	0	33	132
	5	2	0	0	4	1	6	4	0	17	85
Stations	6	3	0	1	0	0	4	6	2	16	96
	7	0	0	0	1	1	2	2	3	9	63
	Total	6	21	86	90	60	32	21	8	324	831
	# AM	0	21	172	270	240	160	156	56	1075	

79. The source of Table 3 was *Media Concentration Hearings, supra* note 74, at 418.
80. Table 4 was derived from *Media Concentration Hearings, supra* note 74, at 418.

TABLE 5[81]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1980

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				12	4	1	1	0	18	0
	1			47	18	5	2	1	0	73	73
of	2		18	42	23	12	3	2	0	100	200
	3	3	4	14	25	18	2	2	0	68	204
FM	4	0	0	7	6	22	8	5	1	49	196
	5	2	1	1	5	2	7	6	2	26	130
Stations	6	0	1	0	0	0	0	9	3	13	78
	7	0	0	0	1	2	2	5	3	13	91
	Total	5	24	111	90	65	25	31	9	360	972
	# AM	0	26	222	270	260	125	186	63	1152	

IV. ARGUMENTS FOR RETENTION OF THE SEVEN STATION RULE

The past position of the FCC regarding the promulgation and retention of the Seven Station Rule has already been discussed in detail. The arguments posed by other proponents of retention or expansion of the present rule will be summarized in the remainder of this section.

A. *Position of the United States Supreme Court*

The Supreme Court's decision in *United States v. Storer Broadcasting Co.*[82] upheld the Commission's statutory authority to establish the Seven Station Rule.

> Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. . . . It is but a rule that announces the Commission's attitude on public protection against such concentration. . . . The growing complexity of our economy induced the Congress to place regulation of businesses-like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole.[83]

However, the Court did not attempt to evaluate the merits of the specific station limitations selected by the Commission.[84]

81. The source for Table 5 was BROADCASTING/CABLE YEARBOOK (1981).
82. 351 U.S. 192 (1956).
83. *Id.* at 203.
84. Typically, the courts do not engage in such evaluation. Instead, the courts review Commission decisions to determine if they are "reasonable." If such decisions are deemed to be reasonable, they will be upheld. The party appealing a Commission decision has the burden of demonstrating the unreasonableness of the decision. In this situation, the courts (particularly the Supreme Court) normally defer to the expertise of the Commission in deciding what is reasonable. *See generally*, Gray v. Powell, 314 U.S. 402 (1941).

B. *Position of Congress*

Congress has been fearful of "monopoly" in the communications industry from the industry's inception.[85] Past sentiment appears to have fallen on the side of tightening the multiple ownership rules rather than liberalizing them.[86]

Senator Magnuson, for example, stated he was afraid that if Congress failed to act or if the FCC did not institute anti-monopoly ownership rules, the radio industry would become concentrated in a manner similar to the newspaper industry.

> I think it is wise that this Congress do what it can to prevent in the future any such thing . . . [a]lthough now in most communities where there are six stations there are probably six owners, as competition continues and some stations get bad, one man will start to buy them up. There are two or three people in the country starting to buy up radio stations, and then pretty soon we will get into the same monopolistic situation in a geographical area that now exists in the newspaper field.[87]

Nine years later Senator Bricker proposed to abolish the FCC's Seven Station Rule, not because he was opposed to the principles underlying the FCC's regulation but because he argued it was desirable to substitute "for such sterile abstraction, a realistic and workable public interest criterion of maximum coverage or service to 25% of the country's population."[88]

The argument that the rule should be made more stringent was expressed by Emanuel Celler, Chairman of the Antitrust Subcommittee of the House Judiciary Committee, who said that the FCC may have sanctioned excessive concentration in the broadcasting industry.[89]

> Multiple ownership of broadcasting stations by a single interest . . . leads to concentration, militates against the national objective of diversity of program sources, and lends itself to anticompetitive abuses. Network affiliation agreements examined by the Antitrust Subcommittee reveal that multiple-station owners often derive substantial advantages over sole-station owners in compensation and other terms, making it difficult for sole-station owners to compete effectively with owners of several stations.[90]

Ultimately, Congressman Celler's Committee failed to recommend any

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85. *See supra* note 36. *See also* Warner, *Monopoly and Monopolistic Practices and the Communications Act of 1934*, 6 FED. COMM. B.J. 26, 26-35, 55-60 (1941).

86. The majority of Congressional sentiment that was expressed in hearings during the 1940's and 1950's suggests too much concentration existed in the communications industry under the Seven Station Rule. The primary Congressional proposal to "make a better mousetrap" was to restrict ownership to coverage of 25% of the U.S. population. *See* Sen. Bricker's proposal in S. 3859, 84th Cong., 2d Sess., 102 CONG. REC. 8210 (1956); Sen. White's proposal in S. 1333, 80th Cong., 1st Sess., 93 CONG. REC. 5586 (1947).

87. *Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess., 327 (1947) [hereinafter cited as *Hearings on S. 1333*].

88. *Bricker Lowers the Boom on CBS, NBC "Domination"*, BROADCASTING Apr. 30, 1956 at 29. Sen. Bricker's bill, S. 3859, *supra* note 86, never became law.

89. *See* Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 L. & CONTEMP. PROB. 539, 549 (1957). Celler stated that the Seven Station Rule was contrary to antitrust principles because it sanctioned excessive concentration in the broadcast industry.

90. *Id.* at 561.

changes in the FCC's Multiple Ownership Rules, but the Committee indicated that the Commission should give "antitrust and other factors emphatic consideration" in any multiple ownership rule changes.[91] Chairman Celler concluded that "if anything, [the Seven Station Rule should] be rendered more stringent; it should not be relaxed."[92]

C. *Position of the Justice Department*

The United States Department of Justice has generally supported retention of the Seven Station Rule. One of its earliest pronouncements concerning the rule was made by Victor Hansen, Chief of the Antitrust Division in 1956. Hansen stated that an eradication of the numerical limitation may increase the trend toward concentration, which he considered undesirable in either networks or single individuals.

> The Commission deplored the trend toward concentration of ownership and control of radio stations. The same trend has been observed with respect to television. Ownership of a large number of [television] stations by a single interest raises real antitrust problems. Such owners would be in a position to [capitalize] on mass purchasing power and by combining their outlets in single-station markets with their outlets in multiple-station markets. We have received complaints that these tactics have already been employed by multistation owners who obtain preferences in network affiliations over single-station owners. . . . [T]he multiple-ownership rule should be, if anything, tightened, not relaxed.[93]

The Antitrust Division's support for the Seven Station Rule is understandable because the rule establishes limits on ownership, thus alleviating nationwide concerns about "bigness." Donald Baker, formerly with the Antitrust Division of the United States Department of Justice, has indicated that the antitrust laws "have to be brought to bear on actual market situations" to be effective.[94] Even though the Seven Station Rule could not be enforced under the antitrust laws, Baker suggests that it is an appropriate rule because "in special circumstances [it is desirable] to have some *other* public policies that are concerned with bigness without regard to proof of economic effect."[95]

D. *FCC's Network Broadcasting Study*

One of the most controversial reports to come out in the 1950's was the FCC's study of network broadcasting,[96] which was supervised by Dean Ros-

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91. *See* REPORT ON THE TELEVISION BROADCASTING INDUSTRY, ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 85th Cong., 1st Sess. 141 (1957).

92. *See* Celler, *supra* note 89, at 561.

93. *Hearings on Television Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 4122-23 (1956).

94. Baker, *Uses and Abuses of Antitrust Principles in Dealing with Media Concentration Questions*, PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION, 2 FEDERAL TRADE COMMISSION 649, 651 (1978).

95. *Id.* (emphasis in original).

96. *Network Broadcasting*, REPORT OF THE NETWORK STUDY STAFF OF THE NETWORK STUDY COMMITTEE, FEDERAL COMMUNICATIONS COMMISSION (1957).

coe Barrow, director of the FCC Study Staff. The study's conclusions were not favorable to multiple ownership in television.[97]

> The trend in multiple ownership indicates that in the future there will be substantial problems of undue concentration of control, in the absence of limitations imposed by the Commission . . . as multiple ownership increases, single-station ownership decreases. The single-station owner is at a bargaining disadvantage and may not be able to compete effectively with multiple owners. . . . It is possible that the broadcasting industry will become a multiple-unit industry and the character of a television station as a community institution will be lost. . . .[98]

The network study staff argued that strict limits on multiple ownership substantially lessened the opportunity for a multiple-station TV licensee to impose potentially illegal tie-in arrangements. Examples of such arrangements include a multiple-station licensee who 1) refuses to sell time on one of his stations to a national spot advertiser unless time is sold for all of his stations; 2) refuses to clear some of his stations for a network program unless the national advertiser purchases times on all of his stations; or 3) refuses to purchase film from a syndicator for all or several of his stations unless given a highly favorable pricing arrangement.[99] Obviously, Dean Barrow's position is that multiple ownership leads to anticompetitive behavior in the television industry and that it runs counter to the FCC's notions of local station ownership and operation.[100] In 1957, when the Report was released, Dean Barrow argued that the best course for the Commission to take was further limitation, rather than relaxation, of the existing rules.[101]

The report did not deal specifically with radio group ownership, since the network study was directed toward television. Dean Barrow's study did indicate, however, that "[t]he Congress and the Commission have historically placed major dependence upon competition as a regulator of radio broadcasting, [and] the kind of competition that has developed appears to be healthy."[102]

E. *Position of Small Broadcasters*

The position of small radio broadcasters regarding the FCC's Seven Station Rule is unclear due to lack of available information. The best evidence suggesting that small, independent broadcast licensees favor the Rule is derived from a National Association of Broadcasters (NAB) inter-office memo.[103] The memo indicated that NAB had not become involved in the FCC's multiple ownership hearings in Docket 8967 "because of the obvious conflict in interest between those who are in a position to own a number of stations and those who are not—in other words, large interests vs. small

97. *Id.* at 553-99.
98. *Id.* at 554.
99. *Id.* at 565-68.
100. *Id.* at 592.
101. *Id.* at 584-85.
102. *Id.* at 606.
103. National Association of Broadcasters Inter-Office Memo from Don Petty to Judge Miller and A. D. Willard (Jan. 19, 1949).

interests."[104]

Other evidence suggesting that smaller broadcasters favor some type of ownership limitation is shown by testimony of Edmund Craney, a small market broadcaster with stations in Spokane, Washington, Portland, Oregon, and in Butte, Helena, and Bozeman, Montana.[105] Craney stated that although he was against a simplistic numeric limitation on station ownership,[106] he was in favor of the congressionally suggested twenty-five percent of population limitation of ownership solution to the concentration problem.[107] He testified that his biggest fear was that in the absence of an upper limit on ownership, all of the broadcasting stations in the country would eventually come under government control.[108] "It is better to try something than to sit still and do nothing. I do not have to tell you gentlemen that if we in the industry remain blind, we will wake up one day facing an irresistible clamor for Government ownership or operation."[109]

V. Arguments Against Retention of the Seven Station Rule

The most extensive arguments against retention of the Seven Station Rule were presented by Storer Broadcasting Company in its court challenge of the Rule.[110] Other parties opposed to the FCC Rule include the national commercial broadcasting networks, group broadcasters, and minority opinion at the FCC.

A. *Position of Storer Broadcasting*

Storer's general rationale for opposing the Seven Station Rule was based on three grounds: "[T]he Commission failed completely 1) to make any basic or ultimate factual findings or determinations, 2) to make any attempt at rational conclusions based upon any factual considerations or 3) to state clearly the basis or reasons for establishment of the numerical limits."[111]

Storer contended that because Congress has never enacted any special antimonopoly legislation applicable to broadcasting, the Seven Station Rule was invalid.[112] Storer also suggested that the Rule violated the antitrust laws because it "prevents a merger between two entities without regard to the facts concerning the actual or potential effect of such acquisition on competition."[113] Storer argued that the Rule could not be sustained because it ignored the substantial differences between various broadcasting stations

104. *Id.*
105. *See Hearings on S. 1333, supra* note 87, at 542.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).
111. *See* Brief for Respondent, *supra* note 6, at 36.
112. *Id.* at 22-25.
113. *Id.* at 23-24. Storer contended that the FCC had to evaluate: 1) the purpose of an acquisition, 2) the existence, number, activity, and strength of competitors in the market effected by the acquisition, and 3) the size and location of the interest proposed to be acquired. *See* United States v. Columbia Steel Co. 334 U.S. 495, 527-28 (1948).

with respect to geographical location, power, frequency, population served, hours of operation, pattern of coverage, and protection from interference by other stations.[114] Storer also attacked the Seven Station Rule as being arbitrary and capricious because it precludes consideration of whether a small increase in nationwide station ownership by a single entity could be in the public interest.[115]

The Rule was challenged as bearing no relation to the Commission's goal of diversification of program and service viewpoints because the rule applies to stations serving wholly different areas.[116] Storer supported its position by pointing out that the Rule can exclude a multiple owner from operating a station in areas where there are more facilities than qualified applicants, and where a multiple owner could bring an additional viewpoint.[117]

In summary, Storer argued that the Seven Station Rule was promulgated for administrative convenience and expedience,[118] rather than to further the Congressional policy against monopoly or to advance the Commission's principles of diversification.[119] The broadcast group indicated that the FCC failed to demonstrate that the numbers chosen bore "any rational relationship to 'concentration of control' of broadcasting 'contrary to the public interest, convenience or necessity.' "[120] Storer also contended that the Commission had conducted no studies and had no experience to support its inflexible numeric standard.[121] Finally, Storer argued that the right to obtain a hearing to waive the Seven Station Rule is "essentially nugatory" because the applicant is faced with the nearly impossible task of stating reasons why the arguably illogical rule does not apply to that multiple owner.[122]

B. *Position of the Networks*

Only two national networks filed comments in the FCC proceedings to establish the Rule—Columbia Broadcasting System (CBS) and National Broadcasting System (NBC). However, some insight into the position of other national networks is available from the 1947 Hearings on S. 1333.[123]

It appears that the position taken by CBS during the Commission's pro-

114. *See* Brief for Respondent, *supra* note 6, at 24-25.

115. *Id.* at 25.

116. *Id.* at 27.

117. *Id.* at 28.

118. *Id.*

119. *Id.* at 33.

120. *Id.* Storer also contended that it is highly doubtful that the FCC could establish rational arbitrary numeric limits on ownership since the Congress, the courts, and those agencies charged with enforcing the antitrust laws have not found any generally applicable test of what constitutes undue concentration in any situation. *See* Supplemental Brief for Respondent at 11, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Supplemental Brief].

121. *See* Brief for Respondent, *supra* note 6, at 33-34.

122. *See* Supplemental Brief, *supra* note 120, at 19. Storer added that to obtain a waiver of the Seven Station Rule, an applicant would have to assert negative reasons. This would be difficult, however, because the Commission refused to air its affirmative reasons for promulgating the Rule.

123. *See Hearings on S. 1333, supra* note 87.

mulgation of the Rule was one of resignation. Such resignation is apparent in a letter from CBS President Frank Stanton, in which he requested the national ownership limit be set at eight AM stations, eight FM stations, and eight TV stations.[124] Although Stanton also forwarded CBS's opposition to the proposed rules,[125] CBS must have decided that the FCC was committed to promulgating an arbitrary numeric limit on station ownership, regardless of the industry's opposition. Consequently, the letter was a pragmatic, conciliatory approach to attempt to obtain a higher arbitrary standard than the one proposed by the Commission.[126]

NBC on the other hand, argued that no rules were needed.[127] NBC stated that concentration of control questions should be decided on the facts of each case, and that fixing a limit on ownership without regard to such facts would be arbitrary.[128] NBC contended the FCC had no evidence that mere accumulation of station licenses beyond a set figure resulted in a stifling of competition or even a tendency in that direction.[129] In 1947, NBC's position was stated succinctly by its President Niles Trammel:

> I cannot see any need or justification for a limit on the ownership of broadcast stations, either by Commission action or by statute. The opportunity to serve the public should not be limited by arbitrary restriction. The present radio law does not establish any limitation on the ownership of stations beyond the requirements of the antitrust laws. During all the years since the establishment of broadcasting there has been no undue concentration of ownership.[130]

Two additional networks apparently opposed the Seven Station Rule even though they failed to file comments during the Commission proceedings. Mark Woods, President of the American Broadcasting Company (ABC), indicated his company preferred an *ad hoc* approach to ownership limits.

> Therefore, if it is control of thought that is feared, or control of political opinion, it cannot be eliminated in my opinion on any arithmetical basis. My recommendation is that no limit as to the number of stations be specified in the act and that the Commission

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124. Letter of Frank Stanton, President of CBS, in Docket No. 8967 at 6-8 (Sept. 24, 1948).

125. *Id.*

126. CBS's real position regarding the Seven Station Rule would appear to be very close to the position it took with respect to S. 1333. Dr. Stanton testified that:

> There is no other field . . . that I know of in which the Government has set a fixed ceiling on the size of an enterprise. Even the Public Utility Holding Company Act, providing specific antitrust legislation in the utility field, does not set arbitrary limits in terms of units, size or population. In the newspaper and magazine field there has been no attempt by Congress or any Government agency to restrict growth by an arbitrary standard. It is difficult to understand why broadcasting should be singled out for special legislation of this unique type . . . I think that the normal antitrust provisions should prevail if there is monopoly.

Hearings on S. 1333, supra note 87, at 327.

127. *See* Comments of National Broadcasting Company in Docket No. 8967 at 18-25 (Sept. 27, 1948).

128. *Id.* at 20. NBC suggested there was no reasonable basis for the assertion that the control of 5, 10, or 20 stations would automatically create an undue concentration of control.

129. *Id.*

130. *See Hearings on S. 1333, supra* note 87, at 426.

> fix no limit which would prevent it from deciding each application on its own merits in the public interest.[131]

A different approach was advanced by the Mutual Broadcasting System to legislatively limit the Commission's power to deal with concentration of control issues in broadcasting.

> Instead of the indefinite provision on multiple-ownership in the White Bill or the arbitrary standard presently enforced by the Commission, I should prefer to have Congress confer, in some appropriately limited fashion, the power upon the Commission to consider the question of the tendency toward monopolization in connection with applications by multiple-station owners for authorization to erect additional stations or to acquire existing stations.[132]

The national networks appear to have been unanimously opposed to the promulgation of the Seven Station Rule.[133] In addition, the networks supported an *ad hoc* approach for dealing with concentration of ownership issues in broadcasting, in contrast to the arbitrary Rule approach.

C. *Position of Group Broadcasters*

The most extensive comments available in the FCC Rule proceedings were filed by Trans-American Television Corporation, Salt Lake City Broadcasting Co., Universal Broadcasting Co., and KMMJ, Inc.[134] These broadcasters were opposed to the Seven Station Rule because they argued that it would cause denial of applications in situations where the evil with which the Commission was concerned, concentration of control, did not in fact exist.[135] Consequently, they also favored a case-by-case approach in dealing with concentration of control issues.[136] The Rule was challenged as unnecessary because "the day may not be far removed when there is no longer a real scarcity of broadcasting facilities."[137] Finally, the four broadcast groups argued that the proposed Rule was arbitrary and capricious because it failed to consider many relevant concentration of control factors, such as geographical location and population served.[138]

Another broadcaster position was expressed by J.N. Bailey, Executive Director of FM Association:[139]

> [W]e feel that the Commission should promulgate no ironclad rule, but rather should handle FM station distribution in the manner in which AM stations are licensed. An occasion might arise whereby one large corporation operating stations profitably in six metropoli-

131. *Id.* at 281.
132. *Id.* at 358.
133. This position is based on the contention that CBS's true position was revealed in its testimony regarding S. 1333 in 1947.
134. *See* Statement on Proposal to Amend the Multiple Ownership Rules in Docket No. 8967 at 27-45 (Sept. 27, 1948).
135. *Id.* at 31. It was suggested that such uncalled for denials rendered the Rule unreasonable and an improper exercise of Commission discretion and power.
136. *Id.* at 34.
137. *Id.* at 29.
138. *Id.* at 44.
139. *See Hearings on S. 1333, supra* note 87, at 202-10.

> tan markets, could give service to some smaller unprofitable market or two, whereas such small markets could not support an independent station.[140]

Mr. Bailey's association obviously favored utilization of a case-by-case approach in dealing with multiple ownership in specific market areas.

Finally, growth-oriented group broadcasters opposed the Seven Station Rule as a limitation of their long-term investment opportunities in the broadcasting industry.

D. *Minority FCC Positions*

Although the majority FCC sentiment at the time the Seven Station Rule was established favored the Rule, various Commissioners expressed reservations concerning the adoption of arbitrary numeric limits. Commissioner Doerfer indicated that:

> I am constrained to record my misgivings about linking a numerical evaluation of stations with "undue concentration of ownership" as an unfailing guide as to what is in the public interest. . . .
>
> I have grave doubts as to the wisdom of picking a "number" without more reliable and persuasive evidence that the number chosen will in all cases mark the upper limits of what will safeguard the public interest. . . .[141]

Doerfer concluded that there was not much more than "intuition" as the Commission's basis for the present rule.[142]

Commissioner Jett explained he was philosophically opposed to imposition of arbitrary national ownership limits because no concentration existed, and regional concentration potentially presented a much worse problem than did national concentration. In addition, he argued that station power, dial position, and geography created large audience coverage discrepancies among radio stations.[143]

> I am opposed to any restriction which specifies a particular ceiling for the reasons given above, and in particular, the fact that engineering considerations may make it desirable to permit more stations to be owned in certain power and frequency categories than in the lower portion of the band.[144]

Another Commissioner who expressed doubts regarding the Commission's ability to establish a workable "rule of thumb" was Chairman Charles Denny. He indicated he did not have any formula, but did not agree that the present draft of S. 1333 contained the correct formula. Denny concluded he did not know whether such a formula could be devised.[145] As early as

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140. *Id.* at 208.

141. *See* Report and Order in Docket No. 10822, 43 F.C.C. 2797, 2804 (1954). Commissioner Doerfer actually concurred with the FCC's decision to allow entrepreneurs to own two additional TV stations (more than the five station limit) as long as both were UHFs. However, he obviously was less than enthusiastic in that support.

142. *Id.*

143. *See Hearings on S. 1333*, *supra* note 87, at 65.

144. *Id.* at 66.

145. *Id.* at 45.

June 1947, Chairman Denny indicated that the Commission's national ownership rules were open to question.

> I do not think we have by any means devised a perfect rule when we say that one person shall not own more than six FM stations and shall not own more than five television stations. It is a tentative rule at the moment. Anyone who comes in and shows good reasons for changing it, up or down, will be given consideration.[146]

Finally, although Commissioner Hennock favored the Seven Station Rule, she expressed the opinion that regional concentration of ownership "may often have a more deleterious effect on competition . . . than the ownership in excess of the permitted maximum scattered throughout the United States."[147]

E. *Recent Considerations*

As technology has allowed for an ever increasing number of radio channels, the scarcity premise, on which traditional government regulation has rested, is becoming less tenable.[148] Recent FCC actions have been directed toward an almost total deregulation of the cable industry.[149] In addition, the FCC has proposed to allow for the development of direct broadcast satellite services[150] and movement into the low power TV area.[151] The Commission's actions are aimed at minimizing the "scarcity" of communication channels receivable in the average American home.

The future of the FCC's Seven Station and Duopoly Rules (limitation on ownership within a market) in such a changing environment has been questioned by the NAB.

> [The Satellite Television Corp.] asks the Commission to give it something no other broadcaster is permitted to have—multiple broadcast channels in every market in the country. [NAB] has strongly urged that all ownership restrictions be removed from broadcast television, cable and [satellite] TV. If this is done, then NAB believes that [Direct Broadcast Satellite] operators should also be free of such restrictions.[152]

The NAB argues that as long as the Commission applies the multiple ownership rules to current, terrestrial broadcasters, the rules must apply evenhandedly to all broadcasters. The Commission's need for any type of regulation

146. *Id.* at 70.

147. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 299 (1953).

148. *See* B. OWEN, *supra* note 41, at 106-07. Owen suggests that the spectrum is not in "scarce supply" to any greater extent than steel, plastic, or pencils.

149. *See generally* Order in Docket No. 21284, 67 F.C.C.2d 262 (1978). Additionally, great expansion in the area of cable radio is likely to occur within the next five to ten years.

150. *See* Memorandum Opinion and Order in General Docket No. 80-603, 88 F.C.C.2d 1 (1981). *See also* Notice of Proposed Policy Statement and Rulemaking in General Docket No. 80-603, FCC 81-181, 46 Fed. Reg. 30124 (1981) (to be codified in 47 CFR §§ 2, 23, 94) [hereinafter cited as *DBS Notice*].

151. *See* Inquiry Into the Future of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System, 45 Fed. Reg. 69,178 (1980) (to be codified in 47 CFR § 73).

152. *See* National Association of Broadcasters' Petition to Deny, In re Application of Satellite Television Corporation in General Docket No. 80-603 at 64-65 (July 16, 1981).

in radio has been greatly decreased by the great expansion of other competitive outlets.[153]

The divergent views that have been expressed concerning the Seven Station Rule illustrate the need to formulate policy alternatives that should be considered by the Commission in determining the future of the Rule. The following section is this author's outline of seven policy alternatives. The alternatives will then be discussed and analyzed, with the conclusion that Alternative 3 should be adopted.

VI. POLICY ALTERNATIVES

The policy alternatives available to the Commission in dealing with the Seven Station Rule are:

1. Leave the standard as is, limiting national ownership to seven AM stations and seven FM stations.
2. Modify the standard to allow for the ownership of fourteen radio stations on a nationwide basis without regard to station type (AM, FM).
3. Modify the standard to allow one entity to own the same percentage of stations nationally in 1982 as they were allowed to do when the Rule was promulgated in 1953. This would allow for the ownership of thirty-six radio stations nationally regardless of station type.[154]
4. Modify the standard to allow one entity to own the same percentage of radio stations nationally as television stations. Adoption of this approach would allow for ownership of seventy-two radio stations on a national basis.[155]
5. Eliminate all arbitrary standards (Seven Station Rule) with respect to national concentration in the radio broadcast industry. This would allow an *ad hoc* determination as to whether an expanding radio station group's newest purchase is in the public interest.
6. Utilize the merger guidelines provided by the Justice Department to determine when a radio station merger would not be in the public interest.[156]
7. Limit national radio station ownership with a population standard similar to the ones proposed by Senators White and Bricker that establishes a constraint on a single entity's owner-

153. *See generally* Comments of the National Association of Broadcasters, In the Matter of Deregulation of Radio in Docket No. 79-219 at 17, 21, 22, 30, 31 (Mar. 25, 1980); Reply Comments of the National Association of Broadcasters, In the Matter of Deregulation of Radio in Docket No. 79-219 at 28, 56, 57 (June 25, 1980) [hereinafter cited as Reply Comments].

154. In 1953, there were 3,032 licensed radio station in operation. Since one entity could own 14 of these stations (seven AMs and seven FMs), one entrepreneur could have legally controlled .46% of all commercial radio stations nationally. BROADCASTING, Dec. 1953. Today (1982) there are 7,937 licensed radio stations in operation. Control of .46% of all commercial radio stations in operation in 1982 translates into 36 stations nationwide.

155. One entity is allowed to control seven TV stations nationally. Today there are 763 licensed commercial television stations in operation. Consequently, one entrepreneur can own .917% of the operational commercial TV stations. If radio entrepreneurs were allowed to control .917% of the commercial radio stations in operation, they would be allowed to own 72 stations nationwide.

156. *See infra* note 160.

ship by the percentage of United States population that the stations' signals can reach. The upper limit proposed by White and Bricker was twenty-five percent.

VII. Policy Recommendations and Conclusions

This paper has focused on whether the Seven Station Rule still represents a valid approach to regulating the radio industry. In this author's opinion, the Seven Station Rule as it now stands (Alternative 1) needs to be modified to minimize unnecessary FCC intrusion into the investment decisions of radio broadcasters. As the Circuit Court of the District of Columbia indicated in *Churchill Tabernacle v. FCC*,[157] "the Commission should go no further than is reasonably necessary to correct the evil. . . ."[158] The dilemma is to determine where to draw the line between "necessary" and "unnecessary" FCC action. The policy concern behind FCC action is with national concentration in the radio broadcasting industry, and therefore, "necessary" FCC action would promote competition. However, the great increase in the number of operating stations, and therefore competition, since 1953 when the Seven Station Rule was promulgated, suggests that concerns about "monopoly" and "diversification" in the radio industry must be considerably less significant today.[159] The FCC recently recognized these great changes in the radio industry and instituted some deregulation.

> As we stated in the *Notice, it is our concern that regulation should be kept relevant to technology and an industry that has been characterized from its beginning by rapid and dynamic change*. In less than fifty years, broadcast radio has grown from an infancy of 583 stations in 1934 to a maturity of nearly 9000 [commercial and noncommercial] stations today. . . . [P]olicies that may have been necessary in the early days of radio may not be necessary in an environment where thousands of licensees offer diverse sorts of programming and appeal to all manner of segmented audiences. *We believe, therefore, that the Commission is justified in reviewing its regulations in the face of such fundamental changes as have occurred since the dawn of radio regulation in this country*. Indeed, failure to do so could constitute less than adequate performance of our regulatory mission.[160]

Evaluation of the FCC's rationale for establishing the Seven Station Rule in light of changed conditions suggests that the Rule limits national ownership of radio stations far beyond anything envisioned in the antitrust laws.[161] The Rule may in fact have resulted in less diversity of viewpoints at the national level than would have been present under a less restrictive stan-

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157. 160 F.2d 244 (D.C. Cir. 1947).

158. *Id.* at 248.

159. *See* Loevinger, *Media Concentration: Myth and Reality*, 24 ANTITRUST BULL. 479, 484-93 (1979); *Media Concentration, supra* note 58, at 417-19, 426; *see also supra* Tables 1 through 5.

160. *See* Deregulation of Radio, 46 Fed. Reg. 13,888 (1981) (to be codified in 47 C.F.R. §§ 0, 73) [hereinafter cited as Deregulation of Radio] (emphasis added).

161. Baker, *supra* note 94, at 653, indicates that the Seven Station Rule goes further to promote diversity of control than "antitrust would dictate, or could dictate." The best information regarding the Justice Department's definition of what constitutes an anticompetitive merger is found in Department of Justice Merger Guidelines 2 TRADE REG. REP. (CCH) ¶ 4430 (1968).

dard.[162] This argument is based on the premise that the economies of scale that are present in group-ownership situations will allow diversity in radio station programs. It is economically more feasible for a group owner to offer less profitable radio programs with smaller audiences than an owner of a single radio station. Some increase in the present fourteen station limit on radio ownership would arguably not create a negative impact on competition or diversity in the current radio industry.[163] However, that increase must be reasonable. Alternative 3, which retains the same national percentage as existed when the Rule was promulgated, appears to be a reasonable increase.

The large increase in radio station competitors on a national basis renders most of the other arguments forwarded by the Commission for the Rule moot. Specifically, it is difficult to understand how one could characterize AM and FM radio frequencies as particularly "scarce" in today's market environment.[164] Similarly, the media power rationale for regulating radio is not as strong an argument today as it was in 1953 due to the substantial increase in the number of radio stations.[165]

In addition, the argument that the Seven Station Rule (Alternative 1) is needed to protect small broadcasters from the bargaining advantages possessed by station groups appears to be weak in view of the changes in the radio industry. This argument is concerned with the fear that ownership of more than fourteen radio stations nationally will confer an excessive amount of market power on a group owner.[166] Ownership of more than fourteen stations in geographically dispersed markets throughout the United States could not be expected to confer excessive amounts of market power on a

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In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

[If the] shares of the four largest firms amount to less than approximately 75%, mergers are challenged along the following lines:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

Id.

162. This is suggested by Parkman, *An Economic Analysis of the FCC's Multiple Ownership Rules*, 31 AD. L. REV. 205, 217-20 (1979).

163. *See Media Concentration, supra* note 58, at 417-19, 426; Rosse, *supra* note 5, at 188. The primary issues regarding concentration are with respect to national competition. The FCC has rules in place to deal with regional concentration and with local competition. Additionally, even if the Commission set its ownership limits too high in this area, the public interest of preventing monopolies and undue concentration would still be protected by the antitrust laws.

164. *See* B. OWEN, *supra* note 41, at 106-07; Loevinger, *supra* note 159.

165. *See* Deregulation of Radio, *supra* note 160, at 13,893; *Media Concentration, supra* note 58, at 417-19, 426.

166. *See supra* note 67.

radio station group.[167] Inasmuch as the average radio station in this country faces tremendous competition not only from other radio stations but also from television stations, daily newspapers, cable television, and radio station groups that are considerably larger than those presently allowed could not be expected to either possess or exercise market power in the national media market.[168]

The FCC's final substantive rationale for the Seven Station Rule (Alternative 1), that utilization of an arbitrary upper limit on ownership is a fairer, more efficient procedure than an *ad hoc* approach, is arguably the primary intent behind the Commission's promulgation of the Rule.[169] The regulatory efficiency of establishing an arbitrary upper limit on national radio station ownership with which to evaluate prospective licensees cannot be disputed.[170] On the other hand, the fairness of the procedure depends on where the limit is set.[171] The substantial increase in the number of radio stations nationally would suggest that conditions have changed such that the present arbitrary limits can be safely liberalized.[172]

The rationale provided by other parties in support of some type of fixed upper limit on national ownership of radio stations does not differ substantially from those provided by the FCC. Congress, the Justice Department, and Dean Barrow all express the fear that failure to limit the number of broadcasting stations that can be controlled by one entity nationally will lead to concentration of control, which runs counter to the public interest, convenience, and necessity.[173] These concerns are unfounded in light of the substantial increase and changes in the American commercial radio industry.[174]

The opponents of the Seven Station Rule argue that the Rule is arbitrary because: 1) it ignores all of the facts relevant to determining if ownership of more than fourteen radio stations nationally is in the public interest,[175] and 2) the Rule was promulgated for administrative convenience and expedience rather than to promote competition and diversification.[176] Both contentions have merit. However, dealing with national concentration

167. *Id. See also Media Concentration, supra* note 58 at 417, 424-25; *supra* note 72 and accompanying text.

168. *See supra* note 72; Loevinger, *supra* note 159; Reply Comments, *supra* note 153, at 28, 56, 57. Also note the relatively low profitability experienced by the average radio station in *supra* notes 68 and 69 and accompanying text.

169. *See* Brief for Petitioners, *supra* note 33, at 36-37.

170. Clearly defined limits of this sort save large amounts of time and money for both the FCC and for broadcasters. Conversely, a case-by-case approach would necessarily involve the Commission in lengthy hearings whenever this issue is raised.

171. Setting a limit which is too low leads to an unnecessary restriction on entrepreneurs. If no "evil" would occur under a higher limit, society is being protected from an imaginary negative force. Conversely, if the limit is too liberal, anticompetitive practices might result. The antitrust laws set the line for the average business in this country with respect to national concentration. *See* Baker, *supra* note 94, at 653; Deregulation of Radio, *supra* note 160.

172. *See* Deregulation of Radio, *supra* note 160.

173. *See* the comments made by these parties, *supra* notes 86-93.

174. *See Network Broadcasting, supra* note 96, at 606; authorities cited *supra* note 167; and Martin, *supra* note 67.

175. *See* Brief for Respondent, *supra* note 6, at 23-25.

176. *See supra* note 122 and accompanying text.

issues on a case-by-case basis could be an expensive and time-consuming process.[177] Setting an upper limit on the number of radio stations that can be controlled by one entity may be the most efficient method of dealing with national concentration of ownership.[178] However, the manner in which the Commission set the upper limit on ownership was totally arbitrary.[179] At a minimum, the Commission should have been more explicit with respect to how it arrived at the upper limits selected.[180] Failure to do so has made obtaining a waiver of the Rule functionally impossible.[181] Consequently, the best approach would be to establish realistic and fair national ownership limits that can be waived upon proper showing.[182] Alternative 3 offers a realistic and fair national ownership limit, while retaining the efficiency of having a maximum limit on ownership.

Policy alternatives 1, 2, 4, 5, 6, and 7, outlined above, should be rejected for a variety of reasons. Policy Alternatives 1 and 2 are rejected as being unnecessarily restrictive with respect to private investment decisions. As previously discussed, failure to make some modification in the Seven Station Rule based on the extensive changes that have taken place in the radio industry would not be in the public interest.[183] Policy Alternative 4 is rejected only because it would allow for too large an increase in national radio station ownership without prior Commission experience.[184] After the Commission has had some experience with expanded national radio station ownership it will be in a better position to evaluate whether further general expansion would be consistent with the public interest.[185] Adoption of policy Alternatives 5 and 6, outlined above, would be very desirable. The Commission could not be accused of abrogating its duty regarding national concentration issues by taking a traditional antitrust approach to the problem.[186] However, adoption of this approach would create a high degree of uncertainty among broadcasters and at the Commission. Such antitrust considerations should certainly become relevant if, and when, a broadcast group petitions

177. It is difficult to estimate the costs of this type of litigation for both the Commission and the private parties involved. *See* Changes in the Entertainment Formats of Broadcast Stations, 37 R.R. 2d 1679, 1686-87 (1976), for the Commission's estimate of the costs involved in the proceedings of Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974).

178. *See* Brief for Petitioners, *supra* note 33, at 36-37.

179. *See* the exchange between Wayne Coy, then Chairman of the FCC and Paul O'Bryan in Oral Arguments in Docket No. 8967, 182 (Jan. 17, 1949).

180. *See* Supplemental Brief, *supra* note 120, at 11. *See also supra* notes 50-53 and accompanying text.

181. The fear expressed by Storer in its Supplemental Brief, *supra* note 120, at 19, turned out to be well founded since the Commission has never waived the Seven Station Rule. *See* Further Notice of Proposed Rule Making in Docket No. 20548, 63 F.C.C.2d 832, 834 (1977).

182. *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

183. *Id.* *See supra* notes 67 and 159.

184. The Commission's lack of experience in increased radio ownership is apparent from the fact that the Seven Station Rule has remained intact since 1953.

185. The slower expansion envisioned in the thirty-six-station approach is more consistent with the operational definition of "reasonable" provided for in *supra* note 32, than the seventy-two-station approach.

186. *See generally* Celler, *supra* note 89; Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927 (1968); and Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 DUKE L.J. 282.

the FCC to waive its national ownership rule.[187] However, administrative efficiency considerations weigh heavily against the adoption of a case-by-case approach, and thus, these alternatives are rejected.[188] Finally, limiting national ownership by utilization of the percentage of population approach suggested in Policy Alternative 7, above, would be very difficult to administer.[189] The most bizarre problem that could occur under a population approach is that a station group that was within the population guideline when it was formed could result in a violation of the rule if extensive growth occurred in the markets covered by the group.

FCC adoption of policy Alternative 3, as outlined above, would represent a realistic and fair solution to the problem at hand. This approach is compelling for two reasons. First, the radio industry is extremely competitive both nationally and locally. Allowing one entrepreneur to own the same percentage of the nearly 8,000 operating commercial radio stations as was allowed in 1953 cannot possibly create unlawful concentration in the national media market.[190] Second, this approach will maintain an efficient method for dealing with national media concentration issues.[191]

Additionally, it is recommended that the FCC not view this new standard as unwaivable.[192] The selection of any numeric national ownership standard is necessarily arbitrary.[193] Failure to waive what is admittedly an arbitrary standard is the ultimate in administrative inflexibility, particularly in a dynamic marketplace.[194]

In sum, the FCC must reexamine its Seven Station Rule. As the Supreme Court opinion in *Storer Broadcasting* noted: "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."[195] Circumstances have clearly changed in the radio industry. Increasing the upper limit on national radio station ownership from fourteen to thirty-six, as outlined in Alternative 3 above, would be consistent with the radio deregulation already instituted by the Commission.[196] The time has finally come for the FCC to modify its "ultimate multiple ownership regulation."[197]

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187. The guidelines provided in *supra* note 161, would undoubtedly become relevant to any petition to waive the Commission's national ownership rule.

188. *See supra* note 177.

189. *See* the comments of FCC Chairman Denny in *Hearings on S. 1333, supra* note 87, at 62-65, and the comments of Commissioner Jett at 65-66.

190. *See supra* notes 67-69, and 159.

191. *See* Brief for Petitioners, *supra* note 33, at 36-37.

192. *See* Supplemental Brief *supra* note 120, at 19; United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

193. *See supra* notes 178 and 179 and accompanying text.

194. *See supra* note 160 and accompanying text.

195. 351 U.S. 192, 205 (1956).

196. *See* Deregulation of Radio, *supra* note 160.

197. *See* Further Notice of Proposed Rule Making in Docket No. 20548, 63 F.C.C.2d 832, 834 (1977).