

The FCC's Main Studio Rule: Achieving Little for Localism at a Great Cost to Broadcasters

David M. Silverman*

David N. Tobenkin**

I.	INTRODUCTION	471
II.	HISTORY AND PURPOSE OF THE MAIN STUDIO RULE	474
	A. <i>Localism and the Communications Act</i>	474
	B. <i>Origin of the Rule</i>	479
	C. <i>Purpose of the Rule</i>	481
III.	THE CHANGING CONTENT, INTERPRETATION, AND ENFORCEMENT OF THE RULE	482
	A. <i>The Combination of the Television and Radio Rules</i>	483
	B. <i>Challenges to the Program Origination Requirements and Questioning of the Geographical Component of the Rule</i>	484

* David Silverman is a partner in the Washington, D.C. office of Cole, Raywid & Braverman, L.L.P., specializing in broadcast, intellectual property, and Internet law and policy. Readers may contact him directly via e-mail at dsilverman@crblaw.com.

** David Tobenkin is an associate in the Washington, D.C. office of Cole, Raywid & Braverman, L.L.P., specializing in communications law. Readers may contact him directly via e-mail at dtobenkin@crblaw.com.

The Authors would like to thank Michael F. Wagner of the Federal Communications Commission and Paul J. Feldman, Susan A. Marshall, and Frank R. Jazzo of Fletcher, Heald & Hildreth, P.L.C. for reviewing, and offering valuable suggestions incorporated into, this Article.

470	<i>FEDERAL COMMUNICATIONS LAW JOURNAL</i>	[Vol. 53]
	<i>C. Elimination of the Programming Origination Requirement and Relaxation of the Main Studio Location Rule</i>	485
	<i>D. Enforcement by the FCC</i>	487
	<i>E. Further Relaxation of the Geographical Location Requirement for the Main Studio: the 1998 Report and Order</i>	489
IV.	ANALYSIS OF THE CURRENT VERSION OF THE RULE.....	492
	<i>A. Reasons Why the Rule Is Highly Problematic</i>	492
	1. It Serves no Discernable Purpose	492
	2. The Rule Is Vague	494
	3. The Rule Allows Gamesmanship by Competitors	494
	4. The Rule Is Costly and Burdensome for Broadcasters and the Commission	495
	<i>B. What Should Be Done to the Rule</i>	496
	1. Leave the Rule in its Existing Form.....	496
	2. Reform the Rule.....	497
	3. Eliminate the Rule	499
	a. Marketplace Solutions	502
	b. Other Rules	502
V.	CONCLUSION	504
	APPENDIX A: A PRACTICAL GUIDE TO COMPLIANCE WITH THE COMMISSION'S CURRENT MAIN STUDIO RULE.....	505
	<i>A. Main Studio Location</i>	505
	<i>B. Main Studio Staffing</i>	506
	1. Full-time Manager:	506
	2. "Full-time" Staff Member:	506
	<i>C. Equipment</i>	507
	<i>D. Permissible Sharing of Main Studios, Studio Equipment and Personnel</i>	507

The old adage, “a moving target is harder to hit,” should not apply to government regulation. Unluckily, Jones Eastern has learned the hard way that the vagaries of imprecision apply to many things in life, including in this case the main studio rule.¹

I. INTRODUCTION

Localism, the communications law policy that requires spectrum licensees to serve the needs of local communities, represents a bedrock concept in the Communications Act of 1934² (“1934 Act”) and the Federal Communications Commission’s (“FCC” or “Commission”) jurisprudence. Realizing vague, if noble, aims through concrete rules is fraught with peril, however, especially when technology and industry practices undergo radical changes over time. The Commission’s sixty-year-old main studio rule³ illustrates this point. Five years after Commissioner Quello’s 1995 dissent in *Jones Eastern*, the main studio rule, which requires all television and radio stations to establish vaguely defined “main studios” that are adequately staffed and equipped, remains a regulatory moving target. Broadcasters often find that compliance with the main studio rule requires an absurd elevation of form over substance, raising legitimate questions about the continued need and rationale for the rule.

Versions of the rule date back to at least 1939.⁴ The rule appears to have been established to advance Congress’s goal of preventing concentration of radio licenses in larger markets.⁵ The Commission’s later goals included encouragement of station interaction with, and reflection of, their communities of license, especially through the creation of local programming.⁶ Changes in public interactions with stations, production of

1. See Letter Liability of Jones Eastern of the Outer Banks, Inc., *Memorandum Opinion and Order*, 10 F.C.C.R. 3759, 3761, 77 Rad. Reg.2d (P & F) 1270 (1995) [hereinafter *1995 Jones Eastern Memorandum Opinion and Order*] (Quello, Comm’r, dissenting).

2. 47 U.S.C. § 151 *et seq.*, amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

3. 47 C.F.R. § 73.1125 (2000).

4. FCC Rules Governing Standard Broad. Stations, 4 Fed. Reg. 2715 (June 30, 1939) (47 C.F.R. §§ 3.12, 3.30, 3.31 (1939) (repealed)).

5. See Radio Act of 1927, Pub. L. No. 69-632, ch. 169, § 9, 44 Stat. 1166 (1927).

6. See Amendment of § 3.613 of the Comm’n’s Rules and Regulations, *Memorandum Opinion and Order*, 43 F.C.C. 888, 890 (1952); Section 3.606 of the Comm’n’s Rules and Regulations, Amendment of the Comm’n’s Rules, Regulations and Eng’g Standards Concerning the Television Broad. Serv., Utilization of Frequencies in the Band 470-890 mcs for Television Broad., *Sixth Report and Order*, 41 F.C.C. 148, 167 (1952) [hereinafter *Amendment of Section 3.606 Sixth Report and Order*]; Promulgation of Rules and Regulations Concerning the Origination Points of Programs of Standard and FM Broad. Stations, *Report and Order*, 43 F.C.C. 570, 1 Rad. Reg. (P & F) 91:465 (1950) [hereinafter *1950 Radio Report and Order*]; Origination Point of Programs by Standard and FM Broad.

programming, and growing evidence of higher costs imposed upon stations, however, led to criticism of the rule by broadcasters and the Commission itself.⁷ After granting an increasing number of waivers, in 1987 the Commission significantly revamped the rule by eliminating the program origination element and expanding the area in which the main studio could be located.⁸

The *1987 Report and Order* and the *Clarification Order* issued a year later,⁹ however, failed to clarify staffing and equipment requirements under the rule.¹⁰ The Commission subsequently attempted to clarify these issues in a series of enforcement orders, though many questions remained unanswered even after these decisions.¹¹ In light of continued criticism of the rule, the Commission examined the issue anew in a 1997 rulemaking.¹² The Commission ignored the urgings of many broadcasters to eliminate the rule.¹³ Instead, the Commission merely relaxed the geographical limitations on location of the main studio.¹⁴

The current FCC rule requires television and radio broadcasters to

Stations, 13 Fed. Reg. 1129 (Mar. 2, 1948); Rules Governing Standard and High-Frequency Broad. Stations, 11 Fed. Reg. 33, 33-34 (Jan. 1, 1946).

7. See, e.g., Arizona Comms. Corp., *Memorandum Opinion and Order*, 25 F.C.C.2d 837, 20 Rad. Reg.2d (P & F) 445 (1970), *recon. denied*, 27 F.C.C.2d 283, 20 Rad. Reg.2d (P & F) 1270 (1971); Report on the Status of the AM Broad. Rules, RM-5532, Mass Media Bureau (Apr. 3, 1986); Amendment of Sections 73.1125 and 73.1130 of the Comm'n's Rules, the Main Studio and Program Orientation Rules for Radio and Television Stations, *Report and Order*, 2 F.C.C.R. 3215, paras. 8, 10, 62 Rad. Reg.2d (P & F) 1582 (1987) [hereinafter *1987 Report and Order*].

8. *1987 Report and Order*, *supra* note 7.

9. Amendment of Sections 73.1125 and 73.1130 of the Comm'n's Rules, *Memorandum Opinion and Order*, 3 F.C.C.R. 5024, 65 Rad. Reg.2d (P & F) 119 (1988) [hereinafter *1988 Clarification Order*].

10. See discussion in Application for Review of Jones Eastern of the Outer Banks, Inc., *Memorandum Opinion and Order*, 6 F.C.C.R. 3615, para. 9, 69 Rad. Reg.2d (P & F) 18 (1991) [hereinafter *1991 Jones Eastern Memorandum Opinion and Order*].

11. *Id.*; Pet. for Recons. and/or Clarification of Jones Eastern of the Outer Banks, Inc., *Memorandum Opinion and Order*, 7 F.C.C.R. 6800, 71 Rad. Reg.2d (P & F) 912 (1992) [hereinafter *Jones Eastern Clarification Order*].

12. Review of the Comm'n's Rules Regarding the Main Studio and Local Pub. Inspection Files of Broad. Television and Radio Stations, *Notice of Proposed Rulemaking*, 12 F.C.C.R. 6993, 13 Comm. Reg. (P & F) 2005 (1997) [hereinafter *1997 Notice of Proposed Rulemaking*]; FCC Radio Broad. Servs., Rules Applicable to All Broad. Stations, 47 C.F.R. §§ 73.1125, 73.3526-27 (2000).

13. Review of the Comm'n's Rules Regarding the Main Studio and Local Pub. Inspection Files of Broad. Television and Radio Stations, *Report and Order*, 13 F.C.C.R. 15,691, para. 14, 13 Comm. Reg. (P & F) 123 (1998) [hereinafter *1998 Report and Order*], *revised in part on recons.*, *Memorandum Opinion and Order*, 14 F.C.C.R. 11,113, 15 Comm. Reg. (P & F) 1158 (1999).

14. *Id.* paras. 7-17.

maintain main studio facilities within specified geographical areas.¹⁵ The main studio must be capable of originating and transmitting local programming, and must be staffed with a full-time manager and at least one other full-time employee or the equivalents.¹⁶ In the words of the Commission's Mass Media Bureau Chief, Roy Stewart, the main studio is "[e]ssentially. . . the principal local point of contact between the licensee and the community or communities served by the station."¹⁷ While superficially straightforward, the rule's precise requirements remain unclear in numerous respects.

Confusion generated by the rule's lack of clarity has contributed to misunderstandings among broadcasters and Commission staff. The Commission has found at least ten broadcasters to be in violation of the rule since its latest reformulation, setting a base fine of \$7,000 for willful or repeated violations of the rule.¹⁸ At least one fine in recent years has been as high as \$20,000.¹⁹ In addition, compliance with other Commission rules and policies, such as the Suburban Community Policy²⁰ and the public inspection file rule,²¹ are related to the main studio rule. Enforcement of the rule continues to demand considerable Commission attention, primarily because of the rule's lack of clarity.

This Article examines the rule's evolution and its current problematic state, and analyzes whether its modification or elimination would conserve the resources of both broadcasters and the Commission, without any

15. *Id.*

16. *Jones Eastern Clarification Order*, *supra* note 11; *1991 Jones Eastern Memorandum Opinion and Order*, *supra* note 10.

17. *See* Letter from Roy J. Stewart, Mass Media Bureau Chief, FCC, to J. Christopher Williams, President, Queen of Peace Radio, Inc. (Oct. 27, 1999), 14 F.C.C.R. 17,885, 17,887 (1999) (notice of apparent liability for a forfeiture).

18. *See* Comm'n's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate Forfeiture Guidelines, *Report and Order*, 12 F.C.C.R. 17,087, para. 2, 8 Comm. Reg. (P & F) 1314 (1997). In addition, multiple penalties can be assessed for continuing violations. *See, e.g.*, Liability of Masada, Ltd. Licensee, Station KBAC-FM Las Vegas, New Mexico, for a Forfeiture, *Memorandum Opinion and Order*, 9 F.C.C.R. 1572, para. 3 (1994) [hereinafter *Masada Order*].

19. *Masada Order*, *supra* note 18, para. 4.

20. Under this presumption governing analysis of broadcast license applicants, "the Commission will presume that an applicant intends to serve its designated community of license, where the applicant (1) provides city grade service to the designated community; (2) locates its main studio in compliance with 47 C.F.R. § 73.1125; and (3) proposes programming that will serve the designated community." Application of WBBK Broad., Inc. to Modify Facilities Including Channel Classification and Transmitting Location, *Memorandum Opinion and Order*, 15 F.C.C.R. 5906, para. 4 (2000) (emphasis added).

21. *See* Local Pub. Inspection File of Commercial Stations, 47 C.F.R. § 73.3526 (2000); Local Pub. Inspection File of Noncommercial Educ. Stations, *id.* § 73.3527. Both of these rules require licensees to locate their local public inspection files at the main studios. *Id.* §§ 73.3526(b), 73.3527(b).

detrimental impact on the public interest. Specifically, Part II of this Article examines the history and purpose of the rule. Part III examines the changing content, interpretation, and enforcement of the rule, including the Commission's apparent failure to seriously consider widespread calls for the rule's elimination in the most recent rulemaking. Part IV examines whether the rule should be changed or eliminated, and concludes that the rule has become an anachronism that no longer furthers its original aims. The rule exists today primarily as a vague and burdensome bureaucratic technicality that serves as a trap to unwary broadcasters. This Article concludes that the main studio rule should be abolished or, alternatively, recast in a more limited and precise form. As a service to broadcasters attempting to comply with the rule, an Appendix briefly summarizes the current state of the rule²² and what broadcasters must do to comply with it.

II. HISTORY AND PURPOSE OF THE MAIN STUDIO RULE

A. *Localism and the Communications Act*

Localism is a core value of the 1934 Act. The FCC has a duty under the 1934 Act to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."²³ This language incorporates similar language from section 9 of the Radio Act of 1927,²⁴ which was passed in response to congressional concern regarding the concentration of many radio licensees within small geographic areas around major cities,²⁵ leaving the more remote and less populous communities without radio service.

In order to achieve a more geographically diverse distribution of licenses, the Commission issued its "Table of Allotments," which established formulas for the allocation of local television and commercial FM radio broadcast frequencies throughout the United States.²⁶ The

22. This summary was current as of January 2001 and may not reflect subsequent changes to the rule.

23. 47 U.S.C. § 307(b) (1994).

24. Pub. L. No. 69-632, ch. 169, § 9, 44 Stat. 1162 (1927).

25. See Suburban Cmty. Policy, the *Berwick Doctrine* and the De Facto Reallocation Policy, *Report and Order*, 93 F.C.C.2d 436, para. 2, 53 Rad. Reg.2d (P & F) 681 (1983) [hereinafter *Suburban Cmty. Report and Order*] (stating that section 9 was established "[t]o dilute this concentration of radio stations in and around large cities.>").

26. *Amendment of Section 3.606 Sixth Report and Order*, *supra* note 6, para. 13. "In contrast, AM radio frequencies [were] allocated on a demand basis, with an applicant requesting the desired community and providing engineering exhibits to show the absence of harmful interference to existing stations." *Suburban Cmty. Report and Order*, *supra* note 25, para. 5.

Commission's implementing rules essentially represented:

an assumption by the FCC that the public interest standard could best be met by allocation of television frequencies in a way that provided every community with its own locally oriented and controlled television broadcast station. Early in its history of broadcast regulation, the Commission assumed that local broadcast stations would be the electronic version of the community newspaper. The perception was that[,] like the local newspaper, the local broadcast station would significantly contribute to local participatory democracy and would operate "as a kind of latter-day Mark Twain, who understands the needs and concerns of his community in an imaginative and sensitive way."²⁷

The Commission has more recently described the need for local stations to "serve their communities by providing programming (e.g., news, weather, and public affairs) to meet the needs and interests of those communities."²⁸

To achieve these goals, Congress and the Commission passed laws, rules, and policies in a number of areas to further broadcast localism. The rules included: 1) limiting the power of networks over local affiliates,²⁹ 2) limiting ownership of multiple radio or television stations, both within a market and nationwide,³⁰ 3) requiring nonduplication protection for locally received network and sports programming,³¹ 4) requiring non-entertainment programming and barring excessive commercialization,³² 5) requiring formal ascertainment procedures and the keeping of program logs,³³ and 6)

27. Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM. L.J. 1, 11-12 (1991) (internal citations omitted).

28. Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, *Report and Order*, 14 F.C.C.R. 2654, para. 11, 14 Comm. Reg. (P & F) 1193 (1999).

29. *See* 47 C.F.R. § 73.658(g) (2000).

30. *Id.* § 73.3555(a)(3). The overlap "duopoly" rule prohibited ownership of cognizable interests in television stations with overlapping Grade-B contours. *Id.* The radio-television cross ownership rule prohibited a party from holding cognizable ownership interests in a radio station and a television station located in the same market. *See id.* § 73.3555(c). The Commission first imposed a national ownership limit for television broadcast stations in the 1940s by imposing numerical caps on the number of stations that could be commonly owned to no more than three stations nationwide. *See* Rules and Regulations Governing Commercial Broad. Stations, 6 Fed. Reg. 2284, 2284-85 (May 6, 1941).

31. Network Nonduplication Rule, 47 C.F.R. § 76.92 (providing that, upon the request of a local station that has the exclusive right to distribute a network program, a cable operator generally may not carry a duplicating network program broadcast by a distant station). *See also* Syndicated Program Exclusivity Rule, 47 C.F.R. § 76.151 (providing a similar right for syndicated programming).

32. *See* Rep. and Statement of Policy Res: Comm'n *en banc* Programing [sic] Inquiry, 44 F.C.C. 2303 (1960) (describing policy against excessive commercialization).

33. *See* Primer on Ascertainment of Cmty. Problems by Broad. Applicants, *Report and Order*, 27 F.C.C.2d 650, 21 Rad. Reg.2d (P & F) 1507 (1971), *overruled by* Revision of

requiring cable television carriage of local broadcast stations.³⁴

The Commission's policy of localism has engendered enormous criticism, including from a former Commissioner who claimed that "[l]ocalism is the most sacred cow of communications regulatory policy. More sacrifices have been laid at the alter (sic) of this beast than at that of any other in the history of communications regulation."³⁵ Asserted harms of the policy include "inefficient allocation of television channels and corresponding loss of viewing choices; constraints on competition in video delivery services; and wasted administrative energies."³⁶

The D.C. Circuit also has challenged the Commission's application of its localism policy. In its 1993 *Bechtel v. FCC* decision, the D.C. Circuit overturned a Commission policy that gave broadcast license applicants a significant comparative advantage through an "integration credit" if they proposed to have an owner-manager working locally at the station.³⁷ The decision was unusually interventionist for the D.C. Circuit, which found that even after granting the Commission substantial expert agency deference, the policy was arbitrary and capricious.³⁸ The D.C. Circuit found the credit unlawful, because the Commission had not imposed an obligation on successful applicants to adhere to integration proposals, had failed to support the claimed public interest advantage of integration, and had emphasized integration to the exclusion of other factors that could affect a station's performance—notably spectrum efficiency, broadcast experience, and local residence.³⁹ The court's ruling noted the difficulty of determining exactly what measures would achieve localism. It observed, for example, that although licensee awareness of and responsiveness to community needs was the stated goal of integration, "[a]n applicant whose proposed owner-manager knows nothing about . . . the community but promises to work a 40-hour week" would prevail over a proposal to employ an experienced life-long resident of the community as station manager.⁴⁰

The impetus for reexamining the Commission's localism rules has increased as the assumption of scarcity of programming outlets has

Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 56 Rad. Reg.2d (P & F) 1005 (1984).

34. See 47 C.F.R. § 76.55 *et. seq.* (describing cable operators' signal carriage obligations).

35. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 938 (1998).

36. *Id.* at 938-39 (citations omitted).

37. 10 F.3d 875 (D.C. Cir. 1993).

38. *Id.* at 887.

39. *Id.* at 882-85.

40. *Id.* at 882.

attracted increasing skepticism.⁴¹ The Commission itself, writing in its 1992 *Notice of Proposed Rulemaking* regarding television broadcast regulation, recognized the proliferation of new media forms, commenting that the television industry “has experienced an enormous expansion in the number of video outlets available to most viewers and in the alternative sources of video programming.”⁴² Furthermore, the range of viewing media, such as cable, VCRs, satellite dishes, and Multichannel Multipoint Distribution Service (“MMDS”) meant that “the sources of video entertainment available to U.S. consumers have greatly proliferated.”⁴³ Such developments led the Commission to conclude that “[r]egulations adopted before the advent of such competition may reduce the ability of broadcasters to respond competitively and to continue offering services that advance the public interest.”⁴⁴ These comments, of course, were made before the Internet revolution had even commenced.

Over the years, the Commission and Congress have indeed eased many of the regulations aimed at promoting localism.⁴⁵ For example, the Commission eliminated requirements that stations engage in formal community needs ascertainment to determine issues of concern to their communities and that they keep logs of all programming;⁴⁶ and that they present predetermined percentages of news and public affairs programming;⁴⁷ and that stations in operation be attended by licensed radio

41. Robinson, *supra* note 35, at 909-10 (“Whatever credibility the scarcity rationale may once have enjoyed, it no longer enjoys it. Today, the scarcity argument for broadcast regulation is widely scorned.”) (citing Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1106 (1993) (discussing the general disparagement of the scarcity rationale by economists, political scientists, and lawyers)).

42. Review of the Comm’n’s Regulations Governing Television Broad., *Notice of Proposed Rulemaking*, 7 F.C.C.R. 4111, para. 3, 77 Rad. Reg.2d (P & F) 460 (1992).

43. *Id.* para. 4.

44. *Id.* para. 7.

45. The Commission has, for example, eased national ownership caps and local market multiple ownership restrictions. See *infra* notes 114-16 and accompanying text. It has also eliminated formal ascertainment proceedings. See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 F.C.C.2d 1076, para. 2, 56 Rad. Reg.2d (P & F) 1005 (1984) [hereinafter *1984 Television Deregulation Order*], *recons. denied*, 104 F.C.C.2d 358, 60 Rad. Reg.2d (P & F) 526 (1986), *rev’d in part*, ACT v. FCC, 821 F.2d 741 (D.C. Cir. 1987). The Commission has eased the dual network rule to allow a television broadcast station to affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such networks are composed of: [] two or more persons or entities that were “networks” on the date the Telecommunications Act of 1996 (“1996 Act”) was enacted. 47 C.F.R. § 73.658(g) (2000).

46. *1984 Television Deregulation Order*, *supra* note 45, paras. 15-29.

47. See Comments of ABC, Inc. on 1997 *Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1892000001 (citing Deregulation of Radio, *Report*

operators.⁴⁸ On the whole, localism is viewed by many observers as a policy in decline.⁴⁹

The Commission has repeatedly insisted, however, that localism remains a vital component of its jurisprudence. In April 2000, for example, the Commission adopted new procedures for evaluating competing applicants for noncommercial educational broadcast channels that contain a localism component.⁵⁰ In response to the D.C. Circuit's *Bechtel* decision, the Commission emphasized the particular history and importance of localism with respect to noncommercial educational broadcasting, rather than to broadcasting as a whole.⁵¹ By implication, the Commission appears to acknowledge that rules implementing localism in a commercial context would require greater scrutiny.

In fairness, however, the D.C. Circuit did not reject the Commission's localism policy, but rather the means used to achieve it. The court noted that familiarity with the community may be a valid criterion in awarding licenses.⁵² At least one later decision has reaffirmed this stance. For example, in its 1997 decision in *Orion Communications, Ltd. v. FCC*,⁵³ the D.C. Circuit characterized the FCC's *Bechtel* decision as "failing to advance [the] *valid goal* of 'picking owners who are aware of and

and Order, 84 F.C.C.2d 968, 49 Rad. Reg.2d (P & F) 1 (1981)).

48. See Amendment of Pts. 73 and 74 of the Comm'n's Rules to Permit Unattended Operation of Broad. Stations and to Update Broad. Stations Transmitter Control and Monitoring Requirements, *Report and Order*, 10 F.C.C.R. 11,479, 78 Rad. Reg.2d (P & F) 1737 (1995). This *Report and Order* led to the curious result that a personal, physical presence at a station's main studio is required, even though no engineering presence is required. *Id.* para. 12. Similarly, the Commission requires compliance with the rule by stations operating pursuant to local marketing agreements that otherwise permit broadcast licensees to delegate aspects of station operations to other stations. See *Siete Grande Television, Inc., Letter*, 11 F.C.C.R. 21,154, 5 Comm. Reg. (P & F) 938 (1996).

49. See Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2118 (1997) (book review) (stating that "[t]he Commission has not undertaken any major review or attempt to enforce its 'localism' policy during the 1990s; communications lawyers who represent broadcasters in license renewal proceedings know that a perfunctory effort at meeting the Commission's localism requirement will be satisfactory.").

50. Reexamination of the Comparative Standards for Noncommercial Educational Applicants, *Report and Order*, 15 F.C.C.R. 7386, 31 Comm. Reg. (P & F) 301 (2000) [hereinafter *NEA Report and Order*]. See also Paul J. Feldman, *The FCC and Regulation of Broadcast Indecency: Is There a National Broadcast Standard in the Audience?*, 41 FED. COMM. L.J. 369, 396-97 (1989) (noting the resiliency of the Commission's dedication to localism as a whole, "at least on paper," despite the trend toward deregulating broadcasting).

51. *NEA Report and Order*, *supra* note 50, paras. 43-48. See *id.* para. 48 ("Given the special, long-recognized, significance of localism to noncommercial educational broadcasting, we will award points for localism.").

52. *Bechtel v. FCC*, 10 F.3d 875, 885 (D.C. Cir. 1993).

53. *Orion Comms., Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997).

responsive to their communities' special needs.'"⁵⁴ The court then proceeded to reverse the award of a broadcast license for interim operating authority after concluding, *inter alia*, that the Commission had failed to explain why the chosen applicant (who had no particular commitment to localism) would better serve the public interest than a losing applicant who had used a programming producer with local experience, demonstrated dedication to the local community, and planned to produce locally oriented programming.⁵⁵ Although these decisions concern the concept of broadcast localism, the D.C. Circuit has not had occasion to examine the main studio rule in depth.⁵⁶

Thus, both the Commission and the D.C. Circuit appear to recognize the continuing validity of localism, but scrutinize the Commission's means of achieving it with particular vigor. This Article does not seek to challenge the Commission's localism policy. Rather, it examines whether the Commission's main studio rule significantly furthers the goals of this policy, especially when balanced against the burdens it imposes.

B. *Origin of the Rule*

As noted above, the main studio rule found its genesis in the early efforts of Congress to prevent concentration of licensees within a small geographic area around major cities in favor of a diverse geographic distribution of licenses.⁵⁷ Unlike later and less clear iterations of the rule, an early version of the rule in 1939 clearly defined "main studios" and where radio stations were required to locate them:

§ 3.12. *Main studio.*

The term "main studio" means, as to any station, the studio from which the majority of its local programs originate, and/or from which a majority of its station announcements are made of programs originating at remote points.⁵⁸

...

54. *Id.* at 180 (emphasis added) (quoting *Bechtel*, 10 F.3d at 882).

55. *Id.*

56. It appears that only three D.C. Circuit (or any court) decisions have substantively involved the rule at all, and none have involved direct challenges to its underlying validity. *Cent. Fla. Enters., Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982) (affirming the Commission's renewal of a television broadcaster's license despite its finding that the licensee had violated the main studio rule); *Cent. Fla. Enters., Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978) (an earlier decision involving the same facts); *Brown Telecasters, Inc. v. FCC*, 289 F.2d 868 (D.C. Cir. 1961) (rejecting a television construction permit applicant's contention that the Commission's waiver of the main studio rule's location component was unsupported because it was premised upon erroneous facts).

57. *Suburban Cmty. Report and Order*, *supra* note 25, para 2.

58. 4 Fed. Reg. 2715 (June 30, 1939) (formerly 47 C.F.R. § 312 (repealed)).

§ 3.30. *Station location.*

(a) Each standard broadcast station shall be considered located in the state and city where the main studio is located.

(b) The transmitter of each standard broadcast station shall be so located that primary service is delivered to the city in which the main studio is located, in accordance with the “Standards of Good Engineering Practice,” prescribed by the Commission.⁵⁹

...

§ 3.31. *Authority to move main studio.*

The licensee of a standard broadcast station shall not move its main studio outside the borders of the city, State, district, Territory, or possession in which it is located without first making written application to the Commission for authority to so move, and securing written permission for such removal. A licensee need not obtain permission to move the main studio from one location to another within a city or town, but shall promptly notify the Commission of any such change in location.⁶⁰

This version of the rule was intended to require stations to locate themselves in the area where they putatively served listeners. The rule also established program origination as the core concept for determining the location of the main studio. A version of the rule aimed at television broadcast stations appears to have originated in 1946 as three rules detailing main studio requirements for different types of stations:

§ 3.603(c). *Community stations.* The main studio of a community station shall be located in the city or town served and the transmitter shall be located as near the center of the city as practicable.

...

§ 3.604(c). *Metropolitan stations.*

The main studio for metropolitan stations shall be located in the city or metropolitan district with which the station is associated and the transmitter should be located so as to provide the maximum service to the city or metropolitan district served.

...

§ 3.605(c). *Rural stations.*

The main studio of rural stations shall be located within the 500 uv/m contour.⁶¹

As a consequence of changes wrought by the Commission’s *Sixth Report and Order* amending television channel allotments, the FCC later replaced

59. *Id.* at 2716 (formerly 47 C.F.R. § 330 (repealed)).

60. *Id.* (formerly 47 C.F.R. § 331 (repealed)).

61. *See* Rules Governing Standard High-Frequency Broad. Stations, 11 Fed. Reg. 33, 34 (Jan. 1, 1946); *see also* Amendment of § 3.613 of the Comm’n’s Rules and Regulations, *Memorandum Opinion and Order*, 43 F.C.C. 888, 890 (1952) [hereinafter *1952 Television Memorandum Opinion and Order*].

these three rules with a single rule, section 3.613.⁶² This new rule slightly liberalized the earlier rules by making it possible, upon a showing of hardship, for television stations to locate their main studios outside the principal communities to be served.⁶³

The Commission soon discovered that the devil was in the details. By 1948, the FCC found that radio stations were circumventing the rule by producing many local announcements.⁶⁴

Under the Commission's present rules and regulations defining the term "main studio" it is possible for a broadcast station to originate most of its local programs from a place other than the city in which their [sic] main studio is located by the device of broadcasting a majority of its station announcements from a studio in the city for which the station is licensed. In the Commission's opinion in determining the location of a station consideration should be given to the place where programs originate and not station announcements.⁶⁵

A *Report and Order* amending the radio main studio rule was enacted in 1950 in a form that would largely guide the radio rule (and the later combined radio and television rule) for the next thirty-seven years.⁶⁶ The changed rule mandated that non-network stations originate a majority of their non-network programs from the main studio, and that network stations originate at least two-thirds of non-network programs or a majority of all programs, whichever was less, from their main studios.⁶⁷ The Commission also allowed radio stations to maintain main studios in the city or town, or at transmitter locations situated outside the political limits of the city or town that the station was licensed to serve.⁶⁸

C. Purpose of the Rule

The *1950 Radio Report and Order* marked a dramatic shift in the rule. For the first time, the Commission gave an extended explanation of the purpose of the rule and some indication of how it intended to achieve that purpose. The new rule, as well as comments in the *Radio Report and Order*, made clear that generating local programming was key to promoting localism and determining whether stations aimed to serve particular communities.⁶⁹ The rule defined radio transmission service as:

62. *Amendment of Section 3.606 Sixth Report and Order*, *supra* note 6.

63. *1952 Television Memorandum Opinion and Order*, *supra* note 61, at 890.

64. *Origination Point of Programs by Standard and FM Broad. Stations*, *Notice of Proposed Rulemaking*, 13 Fed. Reg. 1129 (Mar. 2, 1948).

65. *Id.*

66. *1950 Radio Report and Order*, *supra* note 6.

67. *Id.* at 572.

68. *Id.*

69. *Id.*

the opportunity which a [broadcast] station provides for the development and expression of local interests, ideas, and talents and for the production of [broadcast] programs of special interest to a particular community. . . . A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium for local self expression unless it provides a reasonably accessible studio for the origination of local programs.

The Commission appears to have reasoned that locally originated programming would result in locally oriented programming, thereby serving the public interest.⁷¹

The *1952 Television Memorandum Opinion and Order* appeared to provide additional, nonprogramming goals for television main studios that the Commission would later apply to both services. The *Order* clarified that the requirement of a local main studio facility was to encourage station interaction with the community.

The accessibility of the broadcast station's main studio may well determine in large part the extent to which the station (1) can participate and be an integral part of community activities and (2) can enable members of the public to participate in live programs and present complaints or suggestions to the station.⁷²

Together, the 1950 radio and 1952 television Orders appear to define five early core objectives for the rule: 1) assurance that stations provide service to everyone, not just to those who live in major metropolitan areas; 2) generation of locally oriented programming; 3) use of local residents in the production of programming; 4) encouragement of station participation in community activities; and 5) facilitation of community residents' complaints or suggestions to station personnel.

III. THE CHANGING CONTENT, INTERPRETATION, AND ENFORCEMENT OF THE RULE

In the days when most programming originated in a single physical studio, before the advent of remote equipment and satellite programming, and before relaxation of the multiple ownership rules, the main studio rules for television and radio did not create an unreasonable burden on broadcasters. Yet, even in these early days of the rule, many questions remained. It was still unclear, for example, whether the main studio requirement actually would result in the creation of significant local programming or staff interaction, much less what comprised "local programming." As the rule entered its third decade in the 1970s, cracks in

70. *Id.* at 571.

71. Congress ordered the Commission to exercise its spectrum licensing (and derivative powers) if the "public interest, convenience, and necessity would be served thereby." 47 U.S.C. § 307(c) (Supp. V 1999).

72. *1952 Television Memorandum Opinion and Order*, *supra* note 61, at 890.

the assumptions underlying the rule and doubts regarding its effectiveness began to surface.

A. *The Combination of the Television and Radio Rules*

As noted earlier, similar main studio rules had long existed for television and radio.⁷³ The Commission, in a 1971 rulemaking, modified its rules, *inter alia*, to require Commission approval for the reallocation of FM main studios to or between points outside the communities of license.⁷⁴ This change conformed the FM main studio standard to that for television stations.⁷⁵ Confusion remained, however, about what the rules required. The 1952 *Television Memorandum Opinion and Order* resulted from the petition of a broadcaster claiming that section 3.613 did not define the term “main studio,” and provided no method for determining the geographic limits of the “principal community to be served.”⁷⁶ The D.C. Circuit noted: “The rule prescribing the location of the [television] ‘main’ studio, unlike the analogous rules governing radio stations, contains no definition of ‘main’ studio and there is little clarifying precedent.”⁷⁷

In 1979, the television and radio rules were consolidated into the present sections 73.1125 (station main studio location) and 73.1130 (station program origination, subsequently eliminated),⁷⁸ treating all stations the same.⁷⁹ The Commission eliminated the requirement that radio stations affiliated with networks either originate two-thirds of their non-network programs or a majority of all programs from the main studio.⁸⁰ Instead, all stations were required to originate more than fifty percent of their non-network programs from their main studios or other points in their communities.⁸¹ A significant, and perhaps unintended, effect of the changed program origination requirement, however, was to undermine the definition of the main studio. Whereas the rule had previously defined the main studio as the location where most non-network programming was produced, the new rule left unclear whether a studio where only some local programming

73. See *supra* notes 57-68 and accompanying text.

74. Amendment of Pts. 1 and 73 of the Comm’n’s Rules and Regs. Pertaining to the Main Studio, *Report and Order*, 27 F.C.C.2d 851, para. 2, 21 Rad. Reg.2d. (P & F) 1501 (1971).

75. *Id.*

76. 1952 *Television Memorandum Opinion and Order*, *supra* note 61, at 888.

77. *Cent. Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 45 (D.C. Cir. 1978) (internal citation omitted).

78. See discussion *supra* notes 68-74; see also 47 C.F.R. § 73.1125 (2000).

79. Regulations and Rules Oversight of the AM, FM, and TV Broad. Rules, 44 Fed. Reg. 69,933 (Dec. 5, 1979).

80. *Id.*

81. See 1987 *Report and Order*, *supra* note 7, app. C.

was produced could still qualify as a main studio.

B. Challenges to the Program Origination Requirements and Questioning of the Geographical Component of the Rule

Gradually, broadcasters began to push for exemptions to the program origination rule, contending that it unduly constrained their operations. The Commission responded with a series of waivers that provided relief from the rule in certain circumstances. In *Arizona Communications Corp.*,⁸² for example, the Commission allowed a radio station to exclude recorded music programs from the “majority programming” computation under section 73.1130.⁸³ The FCC extended this policy to television in *Pappas Telecasting of the Carolinas*.⁸⁴

Broadcasters also began to chafe under the geographic limitations of the rule, and the Commission faced widespread noncompliance with the main studio location component of the rule. In 1984, for example, the Audio Services Division was forced to issue a general warning to permittees that failure to properly locate main studios could prompt Commission denial of program test authority.⁸⁵

In 1986, the Mass Media Bureau provided support for attacks on both the main studio location and programming origination components of the rule in its *Report on the Status of the AM Broadcast Rules*.⁸⁶ The report recommended review of the main studio location requirement in light of changes in station production methods and the actual means of contact between stations and their communities.⁸⁷ The report also recommended elimination of the origination rule as applied to AM stations, and prompted the Arizona Justice Committee to file a petition (later granted by the Commission) for a rulemaking to reexamine the rule.⁸⁸

82. Application of Arizona Comms. Corp., Radio Station KXTC (FM), *Memorandum Opinion and Order*, 25 F.C.C.2d 837, 20 Rad. Reg.2d (P & F) 445 (1970).

83. See *1987 Report and Order*, *supra* note 7, para. 8.

84. *Memorandum Opinion and Order*, 104 F.C.C.2d 865, para. 11, 60 Rad. Reg.2d (P & F) 1394 (1986).

85. Reiteration of Policy Regarding Enforcement of Main Studio Rule, *Public Notice*, 55 Rad. Reg.2d (P & F) 1178 (1984).

86. Report on the Status of AM Broad. Rules, RM 5532, Mass Media Bureau (Apr. 3, 1986); Review of Technical Assignment Criteria for the AM Broad. Serv., *Notice of Inquiry*, 2 F.C.C.R. 5014, para. 2, 67 Rad. Reg.2d (P & F) 1618 (1987).

87. See *1987 Report and Order*, *supra* note 7, para. 10.

88. Amendment of Sections 73.1125 and 73.1130 of the Comm'n's Rules, the Main Studio and Program Origination Rules for Radio and Television Broad., *Notice of Proposed Rulemaking*, 1 F.C.C.R. 536, para. 1 (1986) [hereinafter *1986 Notice of Proposed Rulemaking*].

C. Elimination of the Programming Origination Requirement and Relaxation of the Main Studio Location Rule

In the rulemaking that followed, commenters nearly unanimously supported a liberalization of the geographic component of the rule.⁸⁹ A majority of the station commenters said, “[C]ommunity residents generally contact[ed] the station[s] by letter or telephone, and rarely, if ever, visit[ed] the main studio.”⁹⁰ Commenters also noted that station management and staff often initiated contact between the station and the public, and that modern transportation facilities allowed residents who wished to visit the station to do so conveniently over longer distances.⁹¹

The Commission suggested that the program origination requirement was highly flawed and should be scrapped:

[T]he development of technical advances in the production and transmission of programming has severely eroded the role of a main studio and, by extension, the non-network program source rule. When the rule requiring that more than 50 percent of all non-network programming originate from the main studio was adopted, most, if not all, of the non-network programming broadcast necessarily originated in the station’s main studio. However, radio and television stations now make extensive use of portable recording and transmission equipment, and can in essence bring a “studio” to any location in or out of its [sic] service area. Consequently, programs are originated now at the main studio only in the most technical sense; for example, the Mass Media Bureau points out that in the case of AM radio, origination at the main studio largely consists of playing tapes previously recorded at remote locations.⁹²

Moreover, the Commission noted that the fundamental premise of the programming origination aspect of the rule was suspect under the Commission’s developing deregulatory jurisprudence for programming content:

Because we have found that prescription of the amounts or types of issue-responsive programming licenses present is contrary to the public interest, it makes little sense as a policy matter to retain rules which mandate *where* a percentage of that programming must originate.⁹³

The resulting *1987 Report and Order* eliminated the program origination requirement and allowed broadcasters to locate their main studios outside

89. *1987 Report and Order*, *supra* note 7, para. 14.

90. *Id.* para. 17.

91. *Id.*

92. *1986 Notice of Proposed Rulemaking*, *supra* note 88, para. 8 (internal citation omitted).

93. *Id.* para. 11.

their communities of license, “at any point within the station’s principal community contour.”⁹⁴

The Commission stressed that it was not abolishing the main studio rule, and attempted to explain the rationale for its retention:

Exposure to daily community activities and other local media of communications helps stations identify community needs and interests, which is necessary to operate in today’s competitive marketplace and to meet our community service requirements. In addition, the studio will continue to be accessible to community residents participating in those local programs that, at the broadcaster’s option, are produced at the studio.⁹⁵

The *1987 Report and Order*, however, left broadcasters unclear regarding what exactly remained of the rule, and some petitioned for clarification by the Commission. In the *1988 Clarification Order*,⁹⁶ the Commission provided its most elaborate explanation to date of what is required to comply with the main studio rule:

A station must maintain a main studio which has the capability adequately to meet its function, as discussed above, of serving the needs and interests of the residents of the station’s community of license. To fulfill this function, a station must equip the main studio with production and transmission facilities that meet applicable standards, maintain continuous program transmission capability, and maintain a meaningful management and staff presence. Maintenance of production and transmission facilities and program transmission capability will allow broadcasters to continue, at their option, and as the marketplace demands, to produce local programs at the studio. A meaningful management and staff presence will help expose stations to community activities, help them identify community needs and interests and thereby meet their community service requirements. The term “main studio” continues to designate a broadcast station’s only studio when no auxiliary studio is maintained. If a licensee has two or more studios that meet the applicable criteria, it may select one (within its community contour) to designate as its main studio.⁹⁷

Thus, under the *1987 Report and Order* and *1988 Clarification Order*, main studios had to be *capable* of originating and transmitting programming even though they were not required to actually originate any programming. The “applicable standards” required for production and transmission facilities, however, were not specified. The *1988 Clarification Order* also made clear that the main studio rule included a staffing requirement, although the precise parameters of a “meaningful

94. *1987 Report and Order*, *supra* note 7, para. 4.

95. *Id.* para. 36.

96. *1988 Clarification Order*, *supra* note 9.

97. *Id.* para. 24 (internal citations omitted).

management and staff presence” likewise were not stated. The Orders also left unclear what interaction with the community, if any, was expected from station management and staff.

D. Enforcement by the FCC

Broadcasters continued to wrestle with the precise obligations of the rule as they attempted to comply. A series of Commission enforcement actions against stations resulted in additional clarification.

In *Jones Eastern of the Outer Banks, Inc.*, the Commission held that the 1988 Clarification Order’s staffing requirement included “at a minimum, [a] . . . full-time managerial and full-time staff personnel.”⁹⁸ The Commission found that a single full-time office manager who received calls, and a business manager and a general manager who spent four and two hours per week at the main studio respectively, did not satisfy the managerial component of the 1987 Report and Order’s staffing requirement.⁹⁹ In a clarification of that decision issued a year later, the Commission further elaborated that qualifying main studio management personnel must report to work at the main studio on a daily basis, spend a substantial amount of time there, and use the studio as a “home base.”¹⁰⁰ The Commission also shed some light on the types of officers who would constitute “meaningful managerial presence” by listing acceptable categories of employees: “President or other corporate officer, general manager, station manager, program director, sales manager, chief engineer with managerial duties, news director, personnel manager, facilities manager, operations manager, production manager, promotion director, research director, controller, and chief accountant.”¹⁰¹ The underlying common criteria of these types of employees appears to be that they are “authorized to make typical managerial decisions pertaining to facilities, equipment, programming, sales and emergency procedures.”¹⁰²

In subsequent decisions regarding main studio management, the

98. 1991 *Jones Eastern Memorandum Opinion and Order*, *supra* note 10, para. 9. The Commission clarified, however, “This is not to say that the same staff person and manager must be assigned full-time to the main studio. Rather, there must be management and staff presence on a full-time basis during normal business hours to be considered ‘meaningful.’” *Id.* para. 9 n.2.

99. *Id.* para. 9. “[W]e believe that a meaningful presence means more than one full-time clerical person, together with occasional oversight from two management personnel who apparently have no specific work schedule in Columbia but instead, work at the studio at irregular intervals, aggregating six hours per week.” *Id.*

100. *Jones Eastern Clarification Order*, *supra* note 11, para. 11.

101. *Id.*

102. *Id.* para. 10.

Commission has found situations where a station was “unable to describe its official’s management duties or demonstrate that he was authorized to make typical management decisions,”¹⁰³ and where three managers reported to the studio on an “intermittent basis,”¹⁰⁴ to be inadequate. Also, in subsequent decisions, the Commission has found main studio staffing violations in situations in which there were regular, lengthy periods during which the main studio was without staff (where no staff other than a manager had regular hours at the station),¹⁰⁵ and where there were “no licensee personnel at the station’s main studio during certain business hours.”¹⁰⁶

The question remained whether employees could be shared with other businesses. In the *Jones Eastern Clarification Order*, the Commission stated that sharing of staff is permissible under some circumstances:

To the extent that the staff person may fully perform its station functions with time to spare, and coverage of the main studio permits, that person may also take on responsibilities for another business, as long as the main studio remains attended during business hours.¹⁰⁷

Equipment requirements and any other defining characteristics of a “main studio” remained sketchy. The *1988 Clarification Order* stated that stations had to “equip the main studio with production and transmission facilities that meet applicable standards[and] maintain continuous program transmission capability.”¹⁰⁸ Beyond that, however, the Commission has never explained what type of programming origination and transmission equipment is required.

When the Commission relaxed the main studio location rule, it simultaneously tightened the standards for waiver of the rule. Under the *1987 Report and Order*, stations were required to show that there were no suitable studio locations within their principal communities’ contours before the Commission would consider granting waivers of the rule.¹⁰⁹

103. Application of Gerard A. Turro for Renewal of License for FM Translator Stations, *Decision*, 15 F.C.C.R. 14,649, para. 62 n.12 (2000) [hereinafter *Turro Decision*] (citing KQQK, Inc., *Letter*, 10 F.C.C.R. 132 (1994)).

104. Am. Broad. Educ. Found., *Forfeiture Order*, 15 F.C.C.R. 8630, para. 2 (2000).

105. *Id.*

106. Queen of Peace Radio, Inc., *Forfeiture Order*, 15 F.C.C.R. 1934 (2000).

107. *Jones Eastern Clarification Order*, *supra* note 11, para. 11. *See also* Liability of W-Air, Inc., *Memorandum Opinion and Order*, 11 F.C.C.R. 9434, para. 5 (1996) (holding that a licensee complied with the full-time staff presence requirement of the main studio rule where it had employed a book store owner who shared a common entrance with the station, greeted visitors, and attended to the business of the main studio during normal business hours).

108. *1988 Clarification Order*, *supra* note 9, para. 24.

109. Maines Broad., Inc. WMRX (FM), *Memorandum Opinion and Order*, 8 F.C.C.R. 5501, para. 8, 73 Rad. Reg.2d (P & F) 895 (1993).

Thus, in *Maines Broadcasting, Inc.*, a radio station licensee with FM and AM stations in two different communities, twenty miles apart, was denied a waiver request to collocate its main studio facilities at a single station's premises, despite a showing of potentially large cost savings.¹¹⁰ The Commission held that enabling stations to realize financial efficiencies is not sufficient for a waiver of the rule.¹¹¹ Occasionally, the FCC grants such petitions upon a showing of extreme hardship,¹¹² especially when requested by noncommercial educational licensees.¹¹³

E. Further Relaxation of the Geographical Location Requirement for the Main Studio: the 1998 Report and Order

The impetus for the most recent change to the main studio rule came from changes to the local radio station ownership rules in the early and mid-1990s. The Commission's 1992 revision of its radio ownership rules¹¹⁴ and the subsequent Telecommunications Act of 1996 ("1996 Act")¹¹⁵ led to a significant easing of the ownership limitations on radio and television stations, allowing ownership of as many as eight radio stations within a single market.¹¹⁶ These changes transformed the main studio rule into a

110. *Id.* paras. 2-3.

111. *Id.* para. 9.

112. See S'holders of CBS Corp., and Viacom, *Memorandum Opinion and Order*, 15 F.C.C.R. 8230, para. 40, 20 Comm. Reg.2d (P & F) 451 (2000) ("[A]pplicants have demonstrated that the Escanaba market is extremely limited in size, that no other television station is licensed to that community and that maintenance of a main studio in Escanaba is not economically viable.").

113. See, e.g., Letter from Roy J. Stewart, Mass Media Bureau, FCC, to Amelia L. Brown, Haley, Bader & Potts Regarding WMKV (FM) (Feb. 9, 1996) (on file with Authors). The 1998 *Memorandum Opinion and Order* also recognized and formalized the practice of granting "satellite" waivers to noncommercial educational FM stations that were part of state or regional broadcasting networks. See 1988 *Clarification Order*, *supra* note 9, para. 30; Letter from Linda Blair, Mass Media Bureau, FCC, to Todd M. Stansbury, Wiley, Rein & Fielding Regarding KJAC (FM) (Oct. 16, 1998) (on file with Authors); Letter from Linda Blair, Mass Media Bureau, FCC, to James McDermott, President, Lake Area Educ. Broad. Found. (Nov. 13, 2000) (on file with Authors).

114. Revision of Radio Rules and Policies, *Second Memorandum Opinion and Order*, 7 F.C.C.R. 2755, 70 Rad. Reg.2d (P & F) 903 (1992), *recons. granted in part, Report and Order*, 7 F.C.C.R. 6387, 71 Rad. Reg.2d (P & F) 227 (1992), *further recons., First Reconsideration Order*, 9 F.C.C.R. 7183, 76 Rad. Reg.2d (P & F) 698 (1994).

115. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. (codified at scattered sections of 47 U.S.C.).

116. Implementation of Sections 202(c)(1) and 202(e) of the Telecomms. Act of 1996 (Nat'l Broad. Television Ownership and Dual Network Operations), *Order*, 11 F.C.C.R. 12,374 (1996) (eliminating the numerical limit on the number of broadcast television stations a person or entity could own nationwide, and increasing the audience reach cap on such ownership from twenty-five percent to thirty-five percent of television households); see also 47 C.F.R. §73.3555(a)(1) (2000); Implementation of Sections 202(a) and 202(b)(1)

significant impediment to owners of large groups of stations seeking increased station administration efficiency by eliminating redundant facilities. Broadcasters argued that they should be allowed to operate from one centrally located studio/office complex, and petitioned for a rulemaking to ease the rule's geographic component.

In 1996, Apex Associates and four other broadcasters petitioned for a rulemaking to amend the rule.¹¹⁷ The petition noted that maintaining a main studio within the principal community contour does not ensure that the studio will be accessible to the community, especially with stations whose contours have radii that extend thirty to forty miles.¹¹⁸ The Apex petition also contended that the then-current version of the rule discriminated in favor of higher power stations, which enjoyed larger areas than lower power stations in which they could locate their main studios.¹¹⁹

The Commission commenced a rulemaking limited to the geographic component of the rule.¹²⁰ The resulting rule combined a signal contour and a mileage standard.¹²¹ The new geographic component adopted by the Commission allowed a station to locate its main studio at any location within either: 1) the principal community contour of any station in any service licensed to the community of license or 2) twenty-five miles from the reference coordinates of the center of its community of license, whichever is farther.¹²² Thus, in comparison with the earlier geographic

of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 61 Fed. Reg. 10,689 (Mar. 15, 1996); (implementing new radio ownership limits in 1996 Act by eliminating all restrictions on the number of AM and FM radio stations that can be owned nationally by any one entity, and allowing common ownership of greater numbers of stations within a single market). The Commission has subsequently eased its *television* duopoly rule limiting ownership of two stations in the same local market. Review of the Comm'n's Regulations Governing Television Broad.; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 F.C.C.R. 12,903, paras. 2-8, 17 Comm. Reg. (P & F) 1 (1999).

117. Pet. for Rulemaking of Apex Assoc. et al., Review of the Comm'n's Rules Regarding the Main Studio and Local Pub. Inspection Files of Broad. Television and Radio Stations, MM Docket No. 97-138 (1996) [hereinafter *Apex Petition*] (on file with the FEDERAL COMMUNICATIONS LAW JOURNAL).

118. *Id.* at 3.

119. *Id.* at 7.

120. See 1997 Notice of Proposed Rulemaking, *supra* note 12.

121. See 47 C.F.R. § 73.1125(a); 1998 *Report and Order*, *supra* note 13.

122. A third prong of the rule allows location of the main studio within the community of license. This does not expand the permitted location of the main studio, however, given that the geographic community of license area always lies within a station's principal community contour. The rule differs somewhat for Class-A television station applicants and licensees. They are required to locate main studios within the station's Grade-B contour. 47 C.F.R. § 73.1125(c) ("Each Class A television station shall maintain a main studio at the site used by the station as of November 29, 1999[,] or a location within the station's Grade B contour."); Establishment of a Class A Television Serv., *Report and Order*, 15 F.C.C.R. 6355, para. 25, 20 Comm. Reg. (P & F) 154 (2000).

requirement that forced stations to maintain main studios within their principal community signal contours, the new rule expanded the geographic location of the rule by allowing stations to use the contours formed by the most powerful stations licensed to the communities.¹²³

Many broadcasters participating in the proceeding pressed for elimination of the main studio rule.¹²⁴ Many explicitly termed the Commission's proposals inadequate.¹²⁵ Even Apex noted in its petition that the required main studios served "no useful purpose . . . since they are not used for the origination or production of programming, and they are rarely

123. *1998 Report and Order*, *supra* note 13, para. 7 (expressing the hope that the new rule would establish a "clear, bright line" test that would reduce the number of waiver requests).

124. Comments of KHWY, Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 1 (Aug. 8, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1891570001 ("The Commission should rescind the [main studio] rule."); Comments of Harold Hallikainen on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 1 (Aug. 5, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1890300001 ("Should the Commission decide that the changes in the broadcasting industry and FCC policies . . . make relaxation of the main studio rule desirable, I would suggest elimination of the rule instead of establishing some arbitrary limit on main studio location."); Comments of Albritton Comm. Co. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1892610001 ("The Commission should eliminate the useless Main Studio Rule."); Comments of ABC, Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 3 (Aug. 8, 1997), *supra* note 47 ("The Main Studio Rule Should Be Repealed."); Comments of Capstar Broad. Partners, Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 7, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1889050001 ("Repeal of the Main Studio Rule is the Wisest Course"); Comments of Jacor Comm., Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1892120001 ("The Commission should thus eliminate the main studio rule."); Comments of InterMart Broad. Corp. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1889660001 ("As an alternative to its proposals in the *NPRM*, InterMart suggests the Commission consider the total elimination of the main studio rule."); Comments of Odyssey Comms., Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1891670001 ("The Commission should eliminate the obsolete main studio rule."). The Commission may have been swayed in part by the recommendation of the National Association of Broadcasters ("NAB") that the rule should be modified rather than eliminated. *See* Comments of NAB on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1892000001.

125. *See* Comments of ABC, Inc., *supra* note 47, at 2 ("In our view, however, none of the proposals for further relaxing the main studio rule will satisfy the Commission's goals. The proposed alternative formulations are either too restrictive or so vague that they will be difficult to interpret and enforce.").

. . . visited by public officials or the public.”¹²⁶ The Commission’s *1998 Report and Order* summarily dismissed these comments as beyond the scope of the proceeding, given that the original petitions for rulemaking requested that the rule be modified, not eliminated.¹²⁷

IV. ANALYSIS OF THE CURRENT VERSION OF THE RULE

A. *Reasons Why the Rule Is Highly Problematic*

1. It Serves No Discernable Purpose

The Commission’s current main studio rule is illogical. At present, the rule requires the existence of a physical main studio of supposed convenience to community residents that nonetheless may be located dozens of miles away from residents.¹²⁸ The studio that must be maintained is a barebones (though unspecified) one with no clear purpose; there is no requirement that a station originate programming from it, nor any right of members of the public to do so.

Successive modifications of the rule have reduced it nearly to the point of being a nullity. As the *1997 Notice of Proposed Rulemaking* recognized, maintaining a main studio within the principal community contour does not ensure that the studio will be physically accessible to the community of license, especially with stations whose contours have radii that extend thirty to forty miles. The FCC’s former rule allowed a television or Class-C FM station to locate its main studio as far as seventy or eighty miles from its community of license. The *1998 Report and Order* relaxed the rule even further to theoretically allow *all* stations to locate their main studios that far from the communities of license. The Commission’s only explanation was that “relaxation of the main studio location requirement takes into account the evidence in the record that more people use remote rather than face-to-face means of communication

126. *Apex Petition*, *supra* note 117, at 18. Later commenters expressed similar sentiments. Comments of InterMart Broad. Corp. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 4 (Aug. 8, 1997), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1889660001 (“[In fourteen years of broadcast station construction and operation, radio station principals] cannot remember ever having a member of the public visit their stations with a demand for ‘access.’”); Comments of Dick Broad. Co., Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 3 (Aug. 6, 1997), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1888790001 (“As far as we know, neither [of commenter’s] ‘main studio[s]’ has any visitors.”).

127. *1998 Report and Order*, *supra* note 13, para. 14.

128. High-power stations have principal community contours with as much as a forty-four-mile radius. *1998 Report and Order*, *supra* note 13, para. 10.

for routine contact with their local stations, and that permitting stations greater flexibility in locating their main studios should not unduly burden the public.”¹²⁹ The end result for many markets is that the rule no longer serves its intended purpose of making the main studio accessible to local residents.¹³⁰

While the rule was originally intended to encourage the production of local programming, it no longer contains any program origination requirement, and many stations no longer use main studios to create local programming. In addition, the notion that a studio is the most efficient manner of encouraging production of local programming has little support. As many commenters noted in the 1997 rulemaking, the proliferation of high-quality portable audio and videocassette recorders, which can be delivered to remote locations, means that main studios may no longer be the most practical way to encourage coverage of local events.¹³¹ Main studios are essentially a point of contact no longer relevant given today’s production realities.

At its core, the rule is obsolete because it is premised upon two invalid hypotheses: 1) that geographic proximity of main studio facilities to communities of license will result in physical interaction of staffs and communities, and 2) that the existence of main studios will result in the creation of local programming. Comments from the broadcasting industry, the Commission, and the D.C. Circuit suggest that these hypotheses are wrong.

129. *Id.* para. 8.

130. Ironically, the solution Apex proposed at least attempted to remedy this problem by requiring the main studio to be “reasonably accessible to residents of the station’s community of license,” and either leaving it to the discretion of the licensee to determine “reasonably accessible” or, in the alternative, to define “reasonably accessible” as “within 30 minutes normal driving time” from the community of license. *1997 Notice of Proposed Rulemaking*, *supra* note 12, para. 12. (internal quotations omitted) The Commission (and many commenting broadcasters) rejected this suggestion as “lack[ing in] clarity . . . While relaxing the rule, they would appear to create a significant amount of uncertainty for the public and licensees regarding the appropriate location of a station’s main studio.” *Id.*

131. *See* Comments of Odyssey Comms., Inc., *supra* note 124, at 4; Comments of KHWY, Inc., *supra* note 124, at 7 (“By using modern mobile equipment, KHWY is even more attuned to the communities it serves and better able to originate local programming than if it had a main studio in each of its licensed communities.”); Comments of Sinclair Telecable, Inc. on *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 5 (July 30, 1997), available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1883270001 (“[I]n many instances a station’s main studio is not used to originate programming. Instead, the programming for the commonly owned stations is either originated or received via satellite at the central studio location, and then delivered to each station’s transmitter from that location.”).

2. The Rule Is Vague

As highlighted in a series of main studio decisions, it is difficult to understand the precise nature of the employee, managerial, and equipment requirements of the rule. Since elimination of the program origination requirement, the Commission has been unable to clearly articulate the functions of the main studio. More recent policy decisions related to the rule, such as staffing and equipment requirements, are not even part of the rule, and are only summarily described in a few Commission adjudications. Successive Commission decisions have operated to encourage broadcasters to determine the least they can do to comply with the rule, and thereby reduce the cost of compliance with a rule that makes little sense in today's environment of group ownership and satellite programming.

3. The Rule Allows Gamesmanship by Competitors

Under the current version of the rule, a competitor may send an employee to a competing station to inquire about its main studio and build a case of noncompliance against the station. This strategy appears to have spurred several enforcement actions.¹³² The Commission has recognized that competitors can serve as effective enforcement agents.¹³³ Assistance in rule enforcement is taken to an illogical extreme, however, when it is used by broadcasters solely to trip up one another. The main studio rule provides fertile ground for such gamesmanship. For example, broadcasters must maintain continuous program transmission ability from the main studio to the transmitter. Given the lack of an origination requirement, this is similar to requiring a car to start upon ignition after having been allowed to stand unused for years. Strategic misuse of Commission rules as an offensive weapon by competitors has already served as part of the rationale for the Commission's abolition of one set of localism policies.¹³⁴

132. See, e.g., Pappas Telecasting of the Carolinas, *Memorandum Opinion and Order*, 104 F.C.C.2d 865, paras. 1, 3, 60 Rad. Reg.2d (P & F) 1394 (1986), (dismissing a rival broadcaster's allegations of main studio violation by Pappas as "without merit").

133. See, e.g., Qwest Comms. Int'l, Inc. and U S West, Inc., *Memorandum Opinion and Order*, 15 F.C.C.R. 5376, para. 29, 19 Comm. Reg. (P & F) 1010 (2000) (asking competitors to bring misconduct by the applicants to the attention of the Commission's Enforcement Bureau).

134. *Suburban Cmty. Report and Order*, *supra* note 25, para. 30 ("We believe the [Suburban Community] policies may be used to stem the establishment of competing stations. In practice, the policies are frequently invoked by stations in large communities against the establishment of new or improved service in smaller communities.").

4. The Rule Is Costly and Burdensome for Broadcasters and the Commission

The costs of maintaining main studio facilities can be significant. In cases where main studio staff and equipment cannot be collocated with existing facilities, the burden looms especially large. In 1997, ABC estimated that the annual cost of maintaining two main studios would total \$160,000, including rent, salaries, electricity, phone service, and water bills.¹³⁵ Even in cases where facilities can be collocated, the cost of a full-time manager can be significant. As many commenters have noted, these are funds that might otherwise be used by a broadcaster to sponsor new public services or to “reach out to its community in more productive ways.”¹³⁶

In cases where compliance is held inadequate, forfeitures are significant,¹³⁷ the station involved is stigmatized, and there may be additional costs for retaining counsel to combat such assessments. Even in the absence of enforcement actions and fines, understanding the rule and its related requirements has often forced broadcasters to incur significant legal fees. In many cases, the solution may be overcompliance—guessing where the Commission stands on a given component of the rule and adopting a more conservative approach to ensure compliance. Inevitably, all of these costs impact smaller stations to the greatest degree.¹³⁸

135. Comments of ABC, Inc., *supra* note 47, at 5. Odyssey Communications estimated the cost of maintaining a single main studio at \$75,000 per year. Comments of Odyssey Communications, Inc., *supra* note 124, at 5; Comments of Hardy & Carey on the 1997 *Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 2 (Aug. 8, 1997), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1889290001 (estimating costs of maintaining a single main studio total up to \$100,000 per year).

136. Comments of KHWY, Inc., *supra* note 124, at 3.

137. Forfeiture amounts for main studio violations in the 1970s and 1980s generally ranged from \$5,000 to \$10,000. 1995 *Jones Eastern Memorandum Opinion and Order*, *supra* note 1, para. 7. In 1989, Congress amended section 503(b) of the 1934 Act to increase the dollar amounts of the Commission’s forfeiture authority. As a result, the Commission assessed greater amounts, including \$12,000 to Jones Eastern of the Outer Banks. *Id.* para. 9. The FCC also assessed \$20,000 in *Masada Order*, *supra* note 18, para. 4. In 1997, the Commission adopted a set standard of \$7,000 per violation. Comm’n’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 F.C.C.R. 17,087, app. A, sec. I, 8 Comm. Reg. (P & F) 1314 (1997). A \$12,000 forfeiture recently was assessed against KXOJ, Inc., for willful and repeated violation of the rule. Liability of KXOJ, Inc., *Memorandum Opinion and Order and Forfeiture Order*, 15 F.C.C.R. 21,812, para. 9 (1999).

138. The Commission noted a similar effect in the case of the repealed *Suburban Community* policy. See *Suburban Cmty. Report and Order*, *supra* note 25, para. 30. “The test for overcoming these policies is a rugged one involving high expenditures for lawyers and engineers who participate in hearings with a resulting delay in the authorization of new service in the smaller community. This tends, ironically, to benefit stations in the larger,

The rule also seems to comprise exactly the type of hollow regulation that the Commission itself has recognized¹³⁹ as contrary to both Congress's intent in passing the 1996 Act¹⁴⁰ and recent Commission actions aimed at reducing regulatory burdens and costs upon broadcasters.¹⁴¹ For example, the rule imposes burdens on brokered stations that otherwise have been allowed to consolidate operations with brokering stations to realize cost savings.¹⁴² The rule is also burdensome and costly for the Commission to administer. The FCC must use its scarce administrative time to enforce and entertain waivers to the rule. The vague nature of the rule leads to lengthy factfinding, factual analysis, and legal analysis at each level of review, with frequent reversals.¹⁴³

B. What Could Be Done to the Rule

Three options exist for dealing with the rule. It can be left as is, modified, or eliminated. These strategies are examined in turn below.

1. Leave the Rule in Its Existing Form

The Commission could maintain the rule in its existing form, but there is little to suggest that the rule will become more clear or more rational with time. Alternatively, the Commission could continue to tinker

metropolitan markets by delaying or frustrating the establishment or improvement of competing stations in nearby smaller markets." *Id.* (internal citations omitted).

139. See *1998 Report and Order*, *supra* note 13, para. 8. ("There is longstanding congressional and Commission policy in favor of reducing regulatory burdens consistent with the public interest wherever appropriate.")

140. S. CONF. REP. 104-230, at 1 (1996) (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework"); see also S. CONF. REP. 96-878, at 1 (1980) (purpose of Regulatory Flexibility Act is "to encourage Federal agencies to utilize innovative administrative procedures in dealing with individuals, small businesses, small organizations, and small governmental bodies that would otherwise be unnecessarily adversely affected by Federal regulations").

141. See, e.g., Implementation of Section 203 of the Telecommunications Act of 1996 (Broadcast License Terms), *Report and Order*, 12 F.C.C.R. 1720, 6 Comm. Reg. (P & F) 23 (1997) (extending broadcast terms to eight years, consistent with policy of reducing regulatory burdens).

142. See *Siete Grande Television, Inc., Letter*, 11 F.C.C.R. 21,154, 21,159, 5 Comm. Reg. (P & F) 938 (1996). "The Commission has repeatedly approved time brokerage arrangements where the brokered station retains only the minimum amount of required staff, two full-time employees, one of whom must be a manager." *Id.*

143. In addition to the procedural difficulties in the *Jones Eastern* case, at least two main studio decisions have subsequently been reversed on appeal. See *Queen of Peace Radio, Inc., Forfeiture Order*, 15 F.C.C.R. 1934 (2000) (in which a full Commission dismissed forfeiture assessment against station, reversing an enforcement bureau order denying reconsideration of the forfeiture assessment); *Turro Decision*, *supra* note 103 (upholding an administrative law judge's reversal of a Mass Media Bureau finding of a serious main studio violation and dismissing Mass Media Bureau calls for impositions of forfeitures).

with enforcement of the rule through adjudications, as it has in cases elaborating upon the staffing and equipment requirements of the rule.¹⁴⁴ Like many rules whose underlying rationales have eroded, the main studio rule has become a hodge-podge of convoluted decisions turning on narrow rulings based upon unique facts. Neither leaving the rule as is nor addressing it indirectly through case law appears to be a viable approach to resolving its problems.

2. Reform the Rule

The Commission could streamline the rule to avoid confusion, while adhering to the most defensible objectives of the rule. Possible changes that might allow achievement of its remaining objectives are analyzed below.

A clear, though rarely stated, objective of the rule is to ensure that members of the community can interact in person with a supervisory or influential employee of the station. The problem with the existing rule is that its manner of achieving this objective is inefficient. In particular, the main studio rule's language and contents remain centered around a program origination function that has been abolished. A much more efficient strategy might be to require station executives to hold meetings in the community to address any areas of concern, including local programming issues, on a regular basis,¹⁴⁵ with additional meetings available upon request by members of the public.¹⁴⁶ Many stations, for example, operate as satellite repeaters of programming that originates from remote locations, and act primarily to fill in coverage holes in the network chain.¹⁴⁷ Commission rules have been liberalized to allow the monitoring of these stations by dial-up telephone lines.¹⁴⁸ Requiring such stations to establish meaningful contact with their communities through such meetings

144. See *supra* notes 98-108 and accompanying text.

145. Some commenters in the 1997 *Notice of Proposed Rulemaking* noted that this was already occurring. Comments of ABC, Inc., *supra* note 47, at 6. "Stations with studios outside their communities of license already have executive, programming, news and/or community affairs personnel out in the communities virtually every day." *Id.*

146. *Id.* at 18.

147. Comments of Thomas G. Osenkowsky on 1997 *Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 1 (June 30, 1997), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1861380001.

148. The Commission has already exempted low-power radio service providers from the rule. Creation of Low Power Radio Serv., *Report and Order*, 15 F.C.C.R. 2205, para. 185, 19 Comm. Reg. (P & F) 597 (2000). "We believe these requirements would place an undue burden on such small noncommercial educational stations. In addition, we believe that the nature of this service will ensure that LPMF stations are responsive to their communities." *Id.* On the other hand, the rule was recently imposed upon Class-A television licensees. Establishment of a Class A Television Service, *Report and Order*, 15 F.C.C.R. 6355, para. 20, 20 Comm. Reg. (P & F) 154 (2000).

would likely do far more to serve the interests of the local communities than the present hollow main studio rule (and related decisions') requirements.

Many forms of communication with stations need not be in person. Many members of the public would undoubtedly prefer interacting with station personnel on the telephone, rather than in person. Anecdotal evidence provided in the *1997 Notice of Proposed Rulemaking* supports this conclusion.¹⁴⁹ Community members are becoming far more accustomed to dealing with institutions through electronic means. An example is the growth in popularity of automated teller machines, which perform important and detailed interactions without the intervention of employees. Toward this end, the existing local (or toll-free) telephone line component of the rule could be enhanced by a requirement that a station employee return calls within a reasonable amount of time, and be prepared to answer a set list of key questions about the station.¹⁵⁰ For emergencies, there could be an emergency line. The employment status or location of these personnel should be irrelevant. Professionalism, response time, and the ability to respond to questions should be the factors that matter.

A related physical location issue is the ability of the public to view the public inspection file. Ensuring accessibility to the public inspection file is a valid objective.¹⁵¹ The availability of this file at an office within the current main studio rule geographic guidelines would serve this purpose. Those reviewing the file would be able to receive basic information about its contents from a person at this office during regular business hours, and have more detailed questions answered within a reasonable amount of time by telephone or in person. There seems to be no reason, however, why this file must be collocated with a barebones, unused production and transmission facility, as is the case for many studios under the current

149. See Comments of ABC, Inc., *supra* note 47, at 6 (“[L]isteners and community representatives rarely stop by at the stations to voice their views.”); Comments of Sinclair Telecable, Inc., *supra* note 131, at 3 (“[I]t has been Sinclair’s experience that requests to review a station’s public file are very infrequent.”).

150. See Comments of KHWY, Inc., *supra* note 124, at 5 (noting that one of the commenter’s stations with a permanent waiver from the main studio rule nonetheless maintained an official “station representative” and a toll-free number for the convenience of residents in interacting with the station).

151. Though even here the burden imposed upon broadcasters balanced with the generally sparse usage by the public. See Joint Comments of Noncommercial Educ. Licensees on the *1997 Notice of Proposed Rulemaking*, MM Docket No. 97-138, at 3 (Aug. 8, 1997), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1889560001 (“In all, the [twenty-one] NCE Licensees (cumulatively) recall less than a dozen instances where a member of the general public inspected *any* station public inspection files in the last decade.”).

rule.¹⁵² Moreover, the Commission's current consideration of a rule that would require broadcasters to post all public inspection files on Internet sites, and possibly require creation of Web sites by broadcasters that currently have none, should be kept in mind when evaluating whether the public inspection file availability requirement can and should be divorced from the main studio rule.¹⁵³

The current informal staffing requirements should be eliminated as wasteful and inefficient. They should be joined in the trash bin by the studio equipment requirements, which serve no function in light of the elimination of local program origination requirements. At the very least, the rule should be amended to describe the minimum staffing requirements effectively adopted in *Jones Eastern*, as well as the minimum equipment requirements.¹⁵⁴ As one commenter has noted, "It is quite likely that a licensee relying upon the plain meaning of the rule could be found in violation of it."¹⁵⁵

Of course, modification would not be without problems. First, additional rules would place additional burdens upon broadcasters already facing substantial regulatory requirements. Moreover, the Commission could find itself again confronting frequent petitions for waivers of the revised rule. Modification of the rule might also extend the current, costly, case-specific nature of evaluating station compliance with the rule. Finally, establishing a minimum goal could actually impede local public service efforts by causing stations to automatically adopt this minimal level, in lieu of more elaborate efforts that might otherwise be appropriate for individual markets. In other words, any rule could serve as a ceiling, as well as a floor, for local public service efforts.

3. Eliminate the Rule

An obvious solution to the problem of an obsolete rule is to eliminate it. There is no statutory provision in the 1934 Act requiring broadcasters to establish main studios. In 1987, the Commission eliminated the most

152. See Comments of Odyssey Comms., Inc., *supra* note 124, at 3.

153. Standardized and Enhanced Disclosure Requirements for Television Broad. Licensee Pub. Interest Obligations, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 19,816, para. 31 (2000).

154. The local public inspection file rule, for example, is better drafted and more detailed in its provisions. It explains the required contents of the file, 47 C.F.R. § 73.3526(e) (2000), the location of the file, *id.* § 73.3526(b), and the manner in which the file is to be made accessible to the public for viewing and duplication, *id.* § 73.3526(c). Its provisions are reasonable, for example, allowing stations seven days to fulfill file viewers' copy requests. *Id.* § 73.3526(c).

155. Comments of Harold Hallikainen, *supra* note 124, at 2.

substantive component of the rule—mandating local programming origination.

In its most recent main studio rulemaking, the Commission mentioned, in passing, the widespread call for the rule's abolition:

As an initial matter, some commenters suggest that we delete the main studio requirement altogether. We continue to believe that the main studio requirement is necessary to ensure that broadcast stations are reasonably accessible to the communities they serve, which . . . provides important public interest benefits.¹⁵⁶

This is, at best, a questionable approach to examining a clearly problematic rule. In fact, eleven of sixty commenters suggested deleting the geographic location portion of the rule.¹⁵⁷ This is tantamount to elimination of the rule itself. It is difficult to understand why the Commission did not give more serious consideration to eliminating the rule, particularly given that some commenters noted that rationales for retention of the rule given in the *1987 Report and Order* had been eroded by subsequent technological changes.¹⁵⁸

Some analysis should have been given to the continuing validity of the rule. The Administrative Procedure Act requires agency "consideration of the relevant matter presented" by commenters in the course of notice and comment rulemakings, generally interpreted by the D.C. Circuit as a duty to respond to "significant comments."¹⁵⁹ While the initial scope of the rulemaking was limited to consideration of the geographic components of the rule, a logical and necessary prerequisite to modification of a rule is a determination that the rule itself continues to be valid. A facile repetition of

156. *1998 Report and Order*, *supra* note 13, para. 14 (internal citations omitted); "Some commenters also argue that we should repeal the requirement that stations maintain program origination capability in their main studios. . . . This too is an issue that was not raised in the [*Notice of Proposed Rulemaking*] and is therefore beyond the scope of this proceeding." *Id.* para. 14 n.38.

157. *Id.* para. 6.

158. *See, e.g.*, Comments of Jacor Comms., Inc., *supra* note 124, at 5 ("During the past ten years [since the *1987 Report and Order*], advancing technology, such as electronic mail and increasingly accessible facsimile machines, has only made it easier for a broadcast station to maintain a dialogue with the many communities it serves without requiring individual members of those communities to travel to some station-operated facility.") In addition, commenters in another Commission proceeding had suggested abolition of the rule. *See* Amendment of Pts. 73 and 74 of the Comm'n's Rules to Permit Unattended Operation of Broad. Stations and to Update Broad. Stations Transmitter Control and Monitoring Requirements, *Report and Order*, 10 F.C.C.R. 11,479, para. 44, 78 Rad. Reg.2d (P & F) 1737 (1995).

159. 5 U.S.C. § 553(c) (1994). *See* *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) ("Notice and comment rulemaking procedures obligate the FCC to respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.'") (quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977))).

past justifications is inadequate; a fresh examination of the matter should have been conducted.

Distilling past Commission pronouncements, the current main studio rule is intended to serve five goals: 1) avoiding station concentration in larger communities; 2) permitting community access to station personnel and the public inspection file for the purposes of making suggestions or complaints and to allow review of the station's record; 3) encouraging station involvement in community activities; 4) encouraging station production of programming with local content; and 5) encouraging station use of local community members in local programming. The original rationale of the rule, avoiding concentration of stations seeking to serve larger communities, appears to have diminished over time with the dramatic increase of new broadcasting outlets and media forms, and the liberalization of local station ownership restriction. The programming goals of the rule can be removed from the list of Commission objectives, given the FCC's elimination of program origination requirements and a dearth of evidence that local programming has resulted from, or been influenced by, the continued existence of the main studio rule.¹⁶⁰

The final two objectives, ensuring community access to station personnel and the public inspection file and facilitating station involvement in community activities, are probably the most salient remaining objectives of the rule. As the D.C. Circuit has noted, broad Commission generalizations about predicted effects of informally adopted policies must be supported by evidence.¹⁶¹ As described earlier, there are clearly more narrowly tailored ways of achieving these objectives without the existence of a main studio. In today's world, telephone and the Internet provide more realistic means of communication between a station and its viewers or listeners.

160. See 1987 Report and Order, *supra* note 7. Furthermore, to the extent that providing local information is still a goal of the Commission, there are more efficient means for stations to do so than through main studios (where such studios differ from principal production facilities or where production facilities do not otherwise exist). Information may, for example, be supplied to existing television broadcasts produced elsewhere.

161. See, e.g., *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

The Commission's uncertainty about the practical effects of its integration policy is not limited to the question of how long integration persists. Despite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it. As a result, the Commission ultimately rests its defense of the integration criterion on the deference that we owe to its 'predictive judgments' . . . There comes a time when reliance on unverified predictions begins to look a bit threadbare.

Id.

a. *Marketplace Solutions*

As one commenter noted, the current main studio rule is not in keeping with Commission precedent allowing broadcasters greater freedom in the method of achieving service to their communities of license.¹⁶² The Commission in its *1986 Notice of Proposed Rulemaking* noted:

market incentives assure generally that licensees will present programming responsive to their communities, and that revision or deletion of these policies would eliminate unnecessary costs and burdens on both licensees and the Commission. We stated that elimination and revision of these policies would provide broadcasters "with increased freedom and flexibility in meeting the changing needs of their communities."¹⁶³

Ironically, the community newspaper model, which served as the model for the Commission's broadcasting frequency allocation policies, provides a good illustration of marketplace response to the needs of local community demands in the absence of regulation.¹⁶⁴ Newspapers have achieved local community service in the absence of location requirements for their facilities.

Looking at the newspaper industry, no rules require a newspaper to maintain an office in a particular community if they [sic] want circulation in that community. Newspapers often maintain offices in smaller communities to sell advertising and support local reporters. These larger papers then have local editions which are the same as the larger community paper plus a local insert (with appropriate news and advertising). Could such a market approach achieve adequate (or perhaps better) service to the various communities than the main studio rule?¹⁶⁵

Marketplace solutions represent the general direction of Commission jurisprudence and are preferable to the main studio rule, which does little to achieve its localism goals.

b. *Other Rules*

Other Commission rules safeguard the main studio rule objectives. The existence and convenient location of the public inspection file is governed by separate Commission rules.¹⁶⁶ One rule requires, *inter alia*,

162. See Comments of ABC, Inc., *supra* note 47, at 8-9.

163. See *1986 Notice of Proposed Rulemaking*, *supra* note 88, para. 10 (1986) (quoting The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 104 F.C.C.2d 357, para. 2, 60 Rad. Reg.2d (P & F) 526 (1986).

164. See discussion *supra* note 27.

165. Harold Hallikainen, *Main Studio Rule—The History*, RADIO WORLD, Oct. 15, 1997, available at <http://www.broadcast.net/~hhallika/insite/insite95.html>.

166. 47 C.F.R. §§ 73.3526(b), 73.3527(b) (2000). A reform of the main studio rule will

that commercial stations place in their public inspection files every quarter a list of programs dealing with community issues.¹⁶⁷ In addition, the Commission's license renewal application process includes pre-filing and post-filing announcements and procedures whereby community members who believe that a station has not adequately addressed the needs of the community during its license term can challenge the licensee's right to renewal.¹⁶⁸ General service to the community is also a factor considered in station license renewals,¹⁶⁹ and, as previously noted, Internet accessibility requirements that may be imposed upon broadcasters can further safeguard such access.¹⁷⁰

If a valid local programming objective for the rule still exists, a better approach to achieving this objective may be a periodic market-by-market analysis of local programming. A lack of significant local programming in any of the markets may trigger a need for further review in that market. In addition, other types of spectrum allocation are clearly aimed at ensuring this objective, such as the Commission's designation of certain frequencies as noncommercial educational broadcast channels.¹⁷¹

In its retention of the rule, the Commission appears to have ignored one of the criteria of section 307(b) of the 1934 Act, which calls for "fair, efficient, and equitable distribution" of broadcast service among the states and communities.¹⁷² A rule that does not advance the aims for which it was passed, and subsumes the resources broadcasters have available to serve the public, is inefficient and contrary to the intent of the 1934 Act. Marketplace

also necessitate a reform of these rules, given that this file must be maintained in the main studio location. *See supra* notes 151-53. As some commenters in the 1997 Rulemaking noted, however, where main studios differ from primary business location and/or production centers, duplicate public inspection files are often created at the latter because this is the primary point of contact of most listeners or viewers with the station. *See, e.g.*, Comments of Albritton Comm. Co., *supra* note 124, at 5.

167. 47 C.F.R. §§ 73.3526(e)(11)(i), 73.3526(e)(12).

168. *Id.* §§ 73.3580(d)(4), 73.3584, 73.3587.

169. *See* NBC [Renewal of License of Station WNBC (TV)], *Memorandum Opinion and Order and Notice of Apparent Liability*, 14 F.C.C.R. 9026, para. 19 (1999) ("The basic renewal standard consists of an obligation that a licensee address community issues with responsive programming."); Advanced Television Sys. and Their Impact upon the Existing Television Broad. Serv., *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 F.C.C.R. 10,540, para. 33 n.36, 7 Comm. Reg. (P & F) 2065 (1995).

170. *See supra* note 153 and accompanying text.

171. *See* 47 U.S.C. § 396(a)(5) (1994); *see also* Reexamination of the Comparative Standards for Noncommercial Educ. Applicants, *Report and Order*, 15 F.C.C.R. 7386, para. 15, 31 Comm. Reg. (P & F) 301 (2000) ("Public broadcasting holds a special place in meeting the informational, cultural, and educational needs of the nation. Neither a lottery nor a first to file approach is the optimal way to select applicants who will provide 'diversity and excellence' in educational broadcasting to the public.").

172. 47 U.S.C. § 307(b) (1994) (emphasis added).

factors and other Commission rules designed to foster localism would ensure that elimination of the main studio rule would not preclude achievement of the Commission's legitimate purposes for the rule.

In summary, modification of the rule offers a possible solution to the Commission's goal of encouraging localism. Given the nebulous nature of localism objectives, however, a more fluid balancing approach that combines elimination of the existing rule with reliance on marketplace mechanisms and more global evaluations of a station's local public service record, such as upon renewal, would likely better serve the Commission's localism aims and preserve its finite enforcement resources.

V. CONCLUSION

Underlying premises for Commission rules must be regularly reexamined. Where they no longer exist, maintaining rules based upon such premises will yield inherently flawed and inconsistent rules. The main studio rule is a good example. A changing marketplace has led to varied Commission interpretations of the rule that have, in turn, rendered it internally inconsistent and incapable of achieving its intended purpose of safeguarding localism. The Commission appears to have paid insufficient attention to calls for elimination of the rule in the most recent main studio rulemaking. As many commenters noted, alternative means for ensuring broadcasting localism exist. Elimination of the main studio rule would conserve scarce enforcement resources, eliminate an obsolete rule, and remove an expensive compliance trap for smaller and less sophisticated broadcasters. A continually moving regulatory target has no place in the Commission's jurisprudence.

APPENDIX A:
A PRACTICAL GUIDE TO COMPLIANCE WITH THE COMMISSION'S
CURRENT MAIN STUDIO RULE¹⁷³

A broadcaster attempting to navigate the main studio rule may well feel as though he or she is attempting to decipher tea leaves. To provide a minimum standard of conduct that should facilitate compliance with the rule, a brief analysis of the rule's various components is provided below:

A. *Main Studio Location*

The rule requires that the main studio be located within: 1) the station's community of license;¹⁷⁴ 2) the principal community ("city grade") contour (5.0 mV/m for AM, 3.16 mV/m for FM, and city grade for television) of any station, in any service (AM, FM or Television) licensed to the same community;¹⁷⁵ or 3) twenty-five miles of the reference coordinates of the center of the community of license (generally, the main post office, but these coordinates are shown in the *Index to the National Atlas* published by the Department of the Interior).¹⁷⁶ The station's local public inspection file must be kept at the main studio,¹⁷⁷ and access to this file must be provided at any time during regular business hours.¹⁷⁸ One case hinted that the Commission might also require some degree of publicity regarding this facility, such as signage at the location or creation of a general awareness in the community regarding its existence and location.¹⁷⁹ Permission must also be sought to relocate the main studio outside of the locations specified in section 73.1125(a) of the rule.¹⁸⁰

173. Please note that this summary was current as of January 2001 and may not reflect subsequent changes to the rule.

174. 47 C.F.R. § 73.1125(a)(1) (2000). An exception to this three-pronged requirement is the treatment of Class-A television applicants and licensees. They are required to locate main studios within the stations' Grade-B contours. *Id.* § 73.1125(c) ("Each Class A television station shall maintain a main studio at the site used by the station as of November 29, 1999 or a location within the station's Grade B contour.").

175. *Id.* § 73.1125(a)(2).

176. *Id.* § 73.1125(a)(3).

177. *Id.* § 73.3526(b).

178. *Id.* § 73.3526(c).

179. *Turro Decision*, *supra* note 103, para. 57 (rejecting allegations by a competitor that a station's main studio was "not readily accessible to the public.").

180. *Id.* § 73.1125(d).

B. Main Studio Staffing

1. Full-Time Manager:

The Commission requires that both a full-time management-level officer and a full-time staff member, or the equivalent, be located at the main studio. The managerial employee must be based there (not in two different station locations), and spend a “substantial” amount of time there each day during normal business hours. He or she should also have managerial authority for certain aspects of station operations, such as sales, promotions, operations, news, production, accounting, or research. This function should be one of some importance to the station, and one that the manager is qualified to perform from that location.¹⁸¹ For example, while the Commission has said generally that a facilities manager could qualify as a “meaningful manager” for the purpose of complying with the rule, a station with no such facilities at its main studio location might well have the validity of such a position challenged by the Commission or competitors in the market. The manager should actually perform his or her designated activities on at least a periodic basis, and a record of such activities should be kept through memoranda or the like. While the Commission has said very little regarding the compensation that this individual should receive, it would be advisable to provide compensation in line with his or her duties.

2. “Full-Time” Staff Member:

This individual should be the point of contact for callers and visitors, directing them to the main studio and public file, or to the station manager if necessary. This person must be compensated by, and perform duties for, the station. This individual should be at the main studio location at all times during normal business hours, however, and should not leave the telephone or main studio unattended during those hours, unless the manager or someone else is present and available to communicate with the public. The Commission has also noted with approval other substantive station duties assumed by persons deemed main studio staff people.¹⁸² These have

181. *Turro Decision*, *supra* note 103, para. 61 (noting, with approval, the main studio manager’s actions of placing the station back on the air if its service had been interrupted, recruiting employees hired by others, supervising the staff member, arranging for public affairs programming and emergency announcements to be broadcast over the station, and representing the station in the community through membership in civic organizations).

182. *Id.* (noting duties such as handling listener requests and complaints, distributing mail, bringing important matters to the attention of the main studio manager, and ensuring that public service announcements of local interest were broadcast in connection with preparation of a public service announcement bulletin board).

included, for example, “dealing with listeners [sic] requests and complaints, distributing the mail and bringing important items to the attention of [supervisors], and seeing to it that PSAs of local interest were broadcast in connection with [the] preparation of a PSA bulletin board.”¹⁸³ This obligation can be satisfied by an employee shared with another employer or by two or more part-time employees who together staff the main studio during normal business hours.

C. *Equipment*

The main studio must have equipment capable of originating broadcast-quality local programming and transmitting it to the broadcast location. At a minimum, the production equipment should include a microphone, as well as some other basic equipment, such as a control board and a tape machine.¹⁸⁴ The transmission equipment must allow the manager or staff member person to send programming to the transmitter at will. (While the main studio must be capable of originating and transmitting such programming to the transmitter at any time, there is no requirement that it actually do so.) Finally, a local or toll-free telephone number from the community of license must be provided.¹⁸⁵ This number could connect callers to the main studio or to another station location.

D. *Permissible Sharing of Main Studios, Studio Equipment and Personnel*

The Commission allowed the sharing of a manager and an employee by two stations with main studios in different parts of the *same building* where duties at one studio left “more than adequate time to perform their duties” for the other station.¹⁸⁶ Commission precedent established that the management-level staff member should not also work for another station,¹⁸⁷ though a recent Commission decision¹⁸⁸ appears to suggest that this might be allowed in some circumstances. In any event, the station’s main studio should be the manager’s home base.

183. *Id.*

184. *Id.* para. 41.

185. See 47 C.F.R. § 73.1125(e) (“Each AM, FM, TV and Class A TV broadcast station shall maintain a local telephone number in its community of license or a toll-free number.”).

186. *Turro Decision*, *supra* note 103, para. 43.

187. See Letter from Edythe Wise, Mass Media Bureau, FCC, to Michael R. Birdsill, *Letter*, 7 F.C.C.R. 7891 (1992).

188. *Turro Decision*, *supra* note 103, para. 62.

