

COMMENT

The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry

Sarah Elizabeth Leeper*

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* Candidate for J.D., J. Rueben Clark Law School, Brigham Young University, 2000. During Summer 1999, Sarah Leeper was a legal intern to Commissioner Susan Ness at the Federal Communications Commission (FCC).

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I. INTRODUCTION

The mass consolidation of the radio industry is a result of two recent developments: the enactment of the Telecommunications Act of 1996 (Telecom Act)¹ and the use of the 1992 Merger Guidelines² by federal antitrust enforcement agencies. This Comment explores current merger policy and its effect on the radio industry to determine whether consolidation continues to serve the public interest. The unique characteristics of radio as a scarce spectrum and forum of public expression raise concern as to whether a traditional antitrust analysis provides sufficient guidelines for regulation. Although there are numerous factors acting on the radio industry and it may be too early to determine the outcome of the current merger treatment, this Comment primarily examines the merger analysis employed by the federal antitrust enforcement agencies.

First, this Comment addresses the various roles of federal agencies in reviewing radio mergers and policy considerations underlying agency decisions. Second, this Comment examines economic and noneconomic factors of the 1992 Merger Guidelines used by the antitrust enforcement agencies. Third, this Comment discusses implications of the consolidation for the radio industry, including economic benefits and effects on diversity.

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

2. U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992). The Department of Justice (DOJ) previously issued Merger Guidelines in 1968, 1982, and 1984. The DOJ revised these Guidelines in 1997.

Finally, in light of the fact that consolidation adversely effects the radio industry, this Comment notes forthcoming deregulation in the radio industry.

Amidst the record-breaking wave of mergers that has taken place during the Clinton administration, federal agencies have been faced with the task of reviewing a staggering number of proposed mergers.³ The underlying movement pushing deregulation forward is well expressed by Vice President Gore's statement regarding mergers in the communication industry:

"Competition is always better than monopoly. But monopoly power must never be confused with competition. Two enemies of competition are monopoly power and unwise government regulation. We must remember, after all, that the goal we seek is real competition. Not the illusion of competition; not the distant prospect of competition."⁴

In this line of thinking, Congress made a major overhaul of the regulation of the telecommunications market and the Telecom Act became law on February 8, 1996.⁵ The Telecom Act's most significant effects in mass media occurred in the radio industry with the elimination of nationwide ownership restrictions and the liberalization of local ownership caps under sections 202(a) and 202(b)(1).⁶

II. AGENCY REGULATION OF RADIO CONSOLIDATION

A. Consolidation of the Radio Industry

Beginning in 1985, the Federal Communications Commission (FCC) relaxed radio ownership limits to increase competition and diversity in the radio industry.⁷ These effects have been even more dramatic with the

3. The DOJ was notified of 2816 proposed mergers in fiscal year 1995, compared to 1846 proposed mergers in fiscal year 1993. See DOJ, *Opening Markets and Protecting Competition for America's Businesses and Consumers: Goals and Achievements of the Antitrust Division*, 1996 WL 149352, *20 (1996).

4. *Antitrust Issue in Telecommunications Legislation: Hearing on S. 652 Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, 104th Cong. 22 (1995) (prepared statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice, quoting Al Gore at the Federal-State-Local Telecommunications Summit).

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

6. See Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecomm. Act of 1996, *Order*, 11 F.C.C.R. 12,368, paras. 1-3, 2 Comm. Reg. (P & F) 376 (1996); Telecommunications Act of 1996, Pub. L. No. 104-104 sec. 202(a), *modifying*, 47 C.F.R. § 73.3555 (1996).

7. See Revision of Radio Rules and Policies, *Report and Order (Proceeding Terminated)*, 7 F.C.C.R. 2755, para. 3, 70 Rad. Reg.2d (P & F) 903 (1992) [hereinafter

Telecom Act,⁸ where the radio industry has experienced tremendous consolidation and the number of radio station owners has dropped significantly. The number of radio station owners has declined 11.7%; whereas the number of radio outlets has dropped 2.5%.⁹ The decline in radio station owners is the result of a vast amount of trading.¹⁰ In 1996 alone, 2066 radio station transactions were made, comprising about 20% of the total number of stations.¹¹ In 1996, \$2.84 billion were spent in radio transactions and in 1997 another \$2.46 billion were spent.¹² Although 1998 radio transactions have decreased, they continue to represent a healthy revenue of roughly \$1.6 billion, a slight decrease from dollars spent in 1996 and 1997.¹³

Three years after the Telecom Act, industry participants expect that the radio consolidation boom will shortly come to an end.¹⁴ Others project that if consolidation continues it will involve mostly smaller markets.¹⁵ In

Policies Report and Order]; Amendment of Section 73.3555, *Report and Order*, 100 F.C.C.2d 17, para. 22, 56 Rad. Reg.2d (P & F) 859 (1984). The 1985 Ownership Rules relaxed the old ownership rules and the Duopoly Rule to allow an individual to own up to 12 AM stations and 12 FM stations in a single market. See *Policies Report and Order*, 7 F.C.C.R. 2755, para. 36-37, 70 Rad. Reg.2d (P & F) 903; Revision of Radio Rules and Policies, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 71 Rad. Reg.2d (P & F) 227 (1992), *partial reconsideration*, 76 Rad. Reg.2d (P & F) 698 (1994) (loosening ownership rules in 1992 and again in 1994 to 20 AM stations and 20 FM stations).

8. See Implementation of Sections 202(a) and 202(b)(1), *Order*, 11 F.C.C.R. 12,368, paras. 1-3, 2 Comm. Reg. (P & F) 376 (1996); Telecommunications Act, sec. 202(a), 110 Stat. 56, *modifying*, 47 C.F.R. § 73.3555 (1996). In response to congressional direction, the FCC revised its rules. Sections 202(A) and 202(B)(1) relax the ownership rules so that in a radio market with 45 or more commercial radio stations, an entity is allowed to own, operate, or control eight or less radio stations but five can not be in the same service. In a radio market with 30 to 44 commercial radio stations, an entity is allowed to own, operate, or control seven or less radio stations but not more than four in the same service. In a radio market with 14 or fewer commercial radio stations, an entity is allowed to own, operate, or control five or less, but not more than three in the same service; subject to the limitation that no entity will be allowed to own, operate, or control more than 50% of the stations in these markets. See *id.*

9. See Bill McConnell, *FCC Moving, Cautiously, on Ownership*, BRDCST. & CABLE, Nov. 16, 1998, at 27.

10. See 1998 Biennial Regulatory Review—Review of the Comm'n's Brdcast. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Inquiry*, 13 F.C.C.R. 11,276 (1998).

11. See *id.* at para. 2.

12. See Sara Brown, *Living Large in 1997: TV, Radio Post Records for Multiples, Broker Involvement*, BRDCST. & CABLE, Feb. 2, 1998, at 34.

13. See Elizabeth A. Rathbun, *Going, Going, Gone . . . Slowdown in Radio Consolidation Offset by Broadcasting Megadeals*, BRDCST. & CABLE, Feb. 15, 1999, at 33.

14. See *id.* (quoting Brian Cobb of Media Venture Partners).

15. See Angela Y. Hardin, *Two Local Radio Vets May Team up*, CRAIN'S CLEVELAND BUS., Sept. 7, 1998, at 2.

1998, the market experienced an overall decrease in FM station transaction revenues; although there was a sixty-five percent increase in the sale of AM stations. Despite the slow down in radio mega mergers, the recent merger of Jacor Communications and Clear Channel Communications, a \$4.4 billion merger, was the biggest media deal of 1998.¹⁶

B. Shared Responsibilities

Since nearly its inception, the FCC has been charged with regulating radio in the “public convenience, interest, or necessity.”¹⁷ “Public interest” has been interpreted to mean promoting competition and diversity.¹⁸ Further, the FCC has a special duty to protect localism and diversity against undue economic concentration in small communities.¹⁹ Under the Clayton Act of the antitrust laws, the federal government has jurisdiction to challenge mergers that may substantially lessen competition.²⁰ Title II of the Hart-Scott-Rodino Act grants federal antitrust enforcement agencies investigative authority.²¹ The sale of a radio station often requires antitrust clearance from the FCC, the Department of Justice (DOJ), and the Federal Trade Commission (FTC).

The FCC’s approval is merely permissive and does not compel the parties to complete a merger.²² The grant of a proposed merger application does not prejudice the approval necessary from any other agency. Section 601(b)(1) of the Telecom Act expressly indicates that it will in no way modify, impair, or supersede current antitrust laws.²³ As stated in the Joint Explanatory Statement of a Conference Committee:

Mergers between these kinds of companies [cable companies and Bell operating companies (BOC)] should not be allowed to go through without a thorough antitrust review By returning review of

16. See Rathbun, *supra* note 13, at 34.

17. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.); see *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 383 (1969) (concluding that serving the public interest demands presenting diverse and controversial points of view); *National Brdcast. Co. v. United States*, 319 U.S. 190, 226 (1943) (concluding that government licensing did not violate the First Amendment because “radio inherently is not available to all”).

18. See *Policies Report and Order*, 7 F.C.C.R. 2755, paras. 22-23, 70 Rad. Reg.2d (P & F) 903.

19. See 47 CFR 73.3555 (1998).

20. See 15 U.S.C. § 18 (Supp. II 1996). Section 7 of the Clayton Act was enacted in 1914.

21. See *id.*

22. See, e.g., Application of WWOR-TV, Inc. for Transfer of Control of Station WWOR-TV, Channel 9 Secaucus, N.J., *Memorandum Opinion and Order*, 6 F.C.C.R. 193, para. 26, 68 Rad. Reg. (P & F) 1282 (1990).

23. See 47 U.S.C. § 601(b)(1) (1996).

mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill—to get both agencies back to their proper roles and to end government by consent decree. . . . The repeal would not effect the [FCC]’s ability to conduct any review of a merger for Communications Act purposes, e.g., transfer of licenses. Rather,²⁴ it would simply end the [FCC]’s ability to confer antitrust immunity.

The FCC and federal antitrust enforcement agencies wear complementary hats. The DOJ and the FTC analyze media transactions under section 7 of the Clayton Act to ensure that a merger is procompetitive and challenges those which “may substantially lessen competition.”²⁵ The FCC ensures that a transaction meets the public interest standard by promoting competition and diversity. Although antitrust enforcement agencies primarily address economic factors, these agencies also consider noneconomic factors.

1. The Federal Communications Commission

The FCC satisfies its charge of ensuring competition and promoting diversity by allowing the marketplace to be its guide, only intervening when there is a failure in the marketplace.²⁶ The FCC regulation of the marketplace consists of structural and behavioral regulation.²⁷ The FCC, in justifying its position that the market should dictate radio prices, provided three reasons for determining that the market is the best means of producing diversity in entertainment formats.²⁸ First, competition among broadcasters had produced a “bewildering array of diversity”²⁹ in entertainment formats. Second, the market will provide the most accurate indicator of listener’s desires for diversity. Finally, the market responds

24. H.R. CONF. REP. NO. 104-458, at 201 (1996).

25. 15 U.S.C. § 18 (1994); *see also* 15 U.S.C. § 45 (Supp. I 1995). The FTC has exclusive authority to investigate and condemn unfair methods of competition under the Federal Trade Commission Act.

26. *See* Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAULL. REV. 1009, 1031-33 (1996).

27. *See id.* at 1013-18.

28. *See* Application of RKO General, Inc. to GTH-101, Inc., *Decision*, 1 F.C.C.R. 1081, 61 Rad. Reg.2d (P & F) 1069 (1986), *clarified and stay denied*, 2 F.C.C.R. 113, (1987); *see also* Amendment of Section 73.3597 of the Commission’s Rules (Applications for Voluntary Assignments or Transfers of Control), 52 Rad. Reg.2d (P & F) 1081, para. 23 (1982), *reconsidered in part*, 99 F.C.C.2d 971, 57 Rad. Reg.2d (P & F) 1149 (1985) (finding that “the public interest is usually best served by allowing station sales transactions to be regulated by marketplace forces”).

29. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 590 (1981) (citing Development of Policy Regarding Changes in the Entertainment Formats of Brdcast. Stations, 60 F.C.C.2d 858, para. 16, 37 Rad. Reg.2d (P & F) 1679 (1976); *reconsideration denied*, 66 F.C.C.2d 78, 41 Rad. Reg.2d (P & F) 543 (1977)).

more quickly to accommodate for changing public tastes.³⁰ Although the FCC takes a different approach than antitrust enforcement agencies, end results are remarkably similar.³¹

2. The Antitrust Enforcement Agencies: The Department of Justice and the Federal Trade Commission

a. *The Dynamics of Antitrust Policy: The Warren Court to the Rehnquist Court*

The policy underlying antitrust law has historically been connected with social policy.³² The enactment of the Clayton Act in 1914 was largely in response to the fear of antidemocratic political pressures during the post-Nazi period. The Warren Court sought to implement congressional intent to protect small businesses and preserve democratic institutions.³³ These decisions favored small entrepreneurs and protected their access to the market.³⁴

A marked shift occurred during the Burger Court when the Supreme Court adopted a purely economic analysis, originating from the Chicago school of thought.³⁵ This primarily economic approach was adopted by federal antitrust enforcement agencies during the Reagan administration to foster economic efficiency from the viewpoint of the consumer.³⁶ During this time period, both the DOJ and the FTC evidenced a remarkable unwillingness to challenge prospective mergers, especially compared to previous administrations.³⁷ The introduction of three sets of guidelines addressing horizontal mergers within a period of three years represents the dynamic nature of antitrust law during the Reagan administration.³⁸

30. *See id.*

31. *See* Competitive Impact Statement at n.1, *United States v. American Radio Sys. Corp.*, No. Civ.A 1-97CV00405, July 25, 1997 (the FCC analysis is based on overlapping principal community contours).

32. *See* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 167 (1996).

33. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *United States v. Von's Grocery Co.*, 384 U.S. 270, 274-75 (1966).

34. *See* E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 2 (3d ed. 1994).

35. *See id.* at 5 (explaining that the central concern of the Chicago school of thought is economic efficiency, and in response to antitrust economists and lawyers, the courts adopted an exclusively economic approach to antitrust law).

36. *See* Thomas J. Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 353, 353 (1985).

37. *See id.* at 362.

38. *See id.* at 366. The three guidelines include: the 1982 DOJ Merger Guidelines, 47 Fed. Reg. 28,493 (1982); the 1982 FTC Policy Statement Regarding Horizontal Mergers, 2

b. *The Role of Antitrust Laws in Merger Analysis*

Prior to the enactment of the Telecom Act, the FCC's restrictions were far more limiting than those imposed by the antitrust laws. As a result, the radio industry posed very few concerns to antitrust enforcement agencies. However, with the relaxation of radio ownership rules both the DOJ and the FTC play an increasingly active role in the outcome of media mergers. Using the 1992 Merger Guidelines³⁹ as a vehicle to prevent anticompetitive mergers, the DOJ and FTC consider primarily economic factors, although noneconomic factors sometimes impact the agencies' decision. The DOJ and FTC have authority to bring a civil action for preliminary or permanent injunctive relief and make a settlement or consent decree, including divestiture.⁴⁰

Antitrust enforcement agencies premise their actions on the idea that "most mergers and other business alliances foster efficiency and thus bring increased benefits to consumers and businesses."⁴¹ The sheer number of Hart-Scott-Rodino filings in 1996—a premerger notification requirement for transactions meeting a threshold amount—illustrates the increasing importance of antitrust enforcement agency regulation. In 1996, the DOJ looked at fifty cases and brought five out of 150 Hart-Scott-Rodino filings.⁴² According to Robert Pitofsky, Chairman of the FTC, reportable mergers in 1996 alone have increased by roughly one hundred percent.⁴³

As the number of mergers requiring agency review increases, the antitrust enforcement agencies play a crucial role in regulating the radio industry. However, the delineation of the agencies' duties is increasingly blurred and complex and it is unclear who will account for the changes that are occurring in the radio industry. Although the antitrust enforcement agencies share authority to investigate and challenge transactions that lead to unfair and anticompetitive behavior,⁴⁴ it is unclear whether they alone provide sufficient regulation. In order to answer the question of whether

Trade Reg. Rep. (CCH) para. 4,516 (June 14, 1982); and the 1984 Justice Department Merger Guidelines, 49 Fed. Reg. 26,823 (1985). *See id.*

39. U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, § 1.51(a) (1992).

40. Federal antitrust enforcement agencies have authority to bring a civil action under section 15 of the Clayton Act, 15 U.S.C. §§ 21(b), 25, 45(b), 53(b) (1994).

41. *The Antitrust Enforcement Agencies: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 9 (1997) (statement of Hon. Joel Klein, Acting Assistant Attorney General, Antitrust Division, DOJ).

42. *See* Joel Klein, *Roundtable Conference with Enforcement Officials*, 65 ANTITRUST L.J. 929, 935 (1997) [hereinafter *Roundtable Conference*].

43. *See id.* at 932 (statement of James R. Loftis).

44. *See* Judy Whalley, *The Merger Review Process: A Step-by-Step Guide to Federal Merger Review*, 1995 A.B.A. SEC. ANTITRUST L. REP. 20-46.

current agency review is adequate, it is necessary to examine current merger policy used in agency regulation.

III. THE MERGER GUIDELINES AND RECENT DEVELOPMENTS IN ANTITRUST LAW

The current merger policy is well defined by the Revised 1992 Horizontal Merger Guidelines (1997 Merger Guidelines).⁴⁵ The 1997 Merger Guidelines, established by the DOJ and the FTC, are premised on the idea that “efficiencies generated through merger can enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”⁴⁶ The federal antitrust enforcement agencies’ primary role—to assess the impact of proposed mergers—is accomplished by a variety of investigatory activities, such as interviewing members of local businesses and advertisers.⁴⁷ The federal antitrust regulatory agencies use the 1992 Merger Guidelines as a framework for analysis and a court challenging an agency decision is by no means bound by the 1992 Merger Guidelines.⁴⁸ Nonetheless, an overview of the 1997 and 1992 Merger Guidelines and their application to the radio industry is useful to discuss one of the implications of consolidation in the radio industry. For clarity, the following discussion on factors of merger analysis is divided into two major parts, economic factors and noneconomic factors.

A. *Economic Factors*

The Guidelines⁴⁹ enumerate market share and nonmarket share factors that they will consider: market concentration, market conditions, the acquiring firm’s entry advantage, market share of the acquired firm, and efficiencies.⁵⁰ An analysis of market share involves defining the market and calculating market concentration. Nonmarket share factors enumerated in the Guidelines address the potential adverse competitive effects of a merger.⁵¹ These factors include the lessening of competition through

45. See U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).

46. See *id.* § 4. The agencies issued the 1997 Revisions to the Horizontal Merger Guidelines, which are substantially similar to the 1992 version. See *id.* § 4.0.

47. The “federal antitrust enforcement agencies” hereinafter will denote the DOJ and the FTC. Because of the similarity in roles played by the DOJ and FTC, this Comment does not attempt to distinguish or compare the regulation of these two agencies.

48. See U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).

49. This refers to both the 1992 and 1997 Merger Guidelines.

50. See WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 5.04[3] (1998).

51. See *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991-92 (D.C. Cir. 1990) (finding that in merger analysis barriers to entry have become as important of a factor as

unilateral effects and the lessening of competition through coordinated interaction. The 1992 Merger Guidelines also address ease of entry, efficiencies, and failures, which will subsequently be discussed.⁵²

1. Market Share Factors

a. Market Definition

The first step to analyzing the competitive impact of a proposed merger is to define the market, which will then be used to determine the concentration within the market. In the radio industry, defining the relevant market for purposes of the postmerger market concentration has been controversial.⁵³ In 1996, an attorney with Foley & Lardner correctly predicted that the key issues of merger analysis would turn on the definitions of markets.⁵⁴ Members of the radio industry continue to debate the definition of a market for purposes of federal antitrust regulation. In fact, some industry participants posit that the future of regulation may turn on definitional issues of product market and geographic market.

1. Product Market

Thus far, the DOJ has maintained that radio is a single product market, despite arguments from the industry that the product market should be expanded to include other forms of media.⁵⁵ Since the market is used to define concentration, expanding a market to include other forms of medium would allow an individual to own more radio stations within a market before concentration levels would trigger the antitrust laws. Members of the industry argue that the market definition should be expanded since radio makes up only seven percent of the total advertising dollars spent.⁵⁶ In addition, radio is one among several forms of media that are demographic specific (i.e. TV, cable, newspaper, newspaper inserts,

market concentration); *cf.* *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (finding that market concentration alone in merger analysis is presumptive of illegality).

52. *See* U.S. DOJ and FTC, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552, §§ 3.0–5.0 (1992).

53. *See* Revision of Radio Rules and Policies, *Order*, 9 F.C.C.R. 5262 (1994) (distinguishing between radio programming production markets and radio programming distribution markets).

54. *See* Robert A. Burka, *New Radio Limits Raise Antitrust Concerns*, BRDCST. & CABLE, Apr. 29, 1996, at 23 (asserting that market definition would turn on whether a market would be defined by Arbitron measurements of listenership or ratings).

55. *See* Joel Klein, DOJ Analysis of Radio Mergers, Address at ANA Hotel (Feb. 19, 1997), available at 1997 WL 70922.

56. *See* *United States v. Jacor Comm., Inc.*, 61 Fed. Reg. 67,345 (DOJ 1996) (commenting on proposed final judgment).

magazines, penny savers, and specialty publications).⁵⁷

However, the DOJ continues to use radio advertising revenues as a single market. In a telecommunications seminar, Constance K. Robinson, Director of the Antitrust Division of the DOJ, explained the agency's rationale by citing to a Citicasters filing with the FCC:

[R]adio and television compete in distinctly different markets. The peak audience for radio is during the morning drive time while the peak viewing audience for television is during evening prime time. The demographics of the audience [are] also different, with radio stations tending to be much more focused in the demographic appeal.⁵⁸

The mere fact that radio advertising revenue continues to grow despite the increasing availability of other media indicates that radio is a unique medium for advertisers. In a recent competitive impact statement (an analysis submitted to a court to explain why the agency is challenging a particular merger), the DOJ enumerated several reasons for characterizing the radio market as a single market (the arguments specifically address the Cincinnati market but are widely applicable).⁵⁹ First, the DOJ noted that radio is a less-expensive and far more efficient means to reach a target audience with time-sensitive information.⁶⁰ The DOJ also mentioned that an increase in advertising prices would be difficult to circumvent since radio stations can and often do charge different prices to advertisers based on their capability to find alternative forms of media.⁶¹ In a 1998 competitive impact statement, the DOJ used a similar rationale to enforce its position that radio comprises a single market and also reasoned that radio time may offer promotional opportunities to advertisers that they cannot exploit as effectively in another media.⁶² In addition, a DOJ investigation revealed that radio stations perceive other radio stations to be their primary competition and therefore constitute a line of commerce for antitrust purposes.⁶³ Investigations further indicated that when advertisers used a

57. *See id.* at 67,347.

58. Constance K. Robinson, *Trends in Antitrust Merger Enforcement in the Wake of Globalization and the Telecomms. Act of 1996*, Address at the Second Annual Seattle Telecommunication Seminar (Mar. 20, 1997), in 1997 WL 129300 (quoting Citicasters) [hereinafter *Robinson Speech*].

59. *See United States v. Jacor Comm., Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,671 (S.D. Ohio Dec. 31, 1996).

60. *See id.* at 78,737-38.

61. *See id.* at 78,738.

62. *See United States v. CBS Corp.*, 63 Fed. Reg. 18,036 (DOJ 1998) (listing the proposed final judgment and Competitive Impact Statement).

63. *See United States v. Chancellor Media Co.*, 63 Fed. Reg. 17,446, 17,451 (DOJ 1998) (listing the proposed final judgment and Competitive Impact Statement) (acknowledging that "pressure from other [radio] stations keep [sic] us from selling new business at the rates we want to get").

“media mix” (i.e. television or newspaper), the advertisers considered the use of radio as being a complement rather than a substitute to radio.⁶⁴

2. Geographic Market

Defining the geographic market has been less controversial than defining the product market. Few have contested the method used to determine the market. Simply stated, the geographic market is determined by looking at the options available to a consumer.⁶⁵ For example, a consumer residing in San Diego would not travel to Los Angeles to go grocery shopping despite the fact that the consumer could listen to a Los Angeles radio station commercial. In a 1997 competitive impact statement regarding Westinghouse Electric Corp.’s acquisition of Infinity Broadcasting, the DOJ explained its reasoning behind defining the relevant geographic market of the Boston, Massachusetts and the Philadelphia, Pennsylvania Metro Survey Areas (MSA).⁶⁶ According to the DOJ, the relevant market consisted of a section of the country where, if advertisers were faced with a small increase in advertising, they would not buy enough advertising outside of the MSA to compensate for the significant nontransitory increase in advertising prices.

b. Market Concentration

Market concentration, the number and size of the firms in the market, is measured by the Herfindal-Hirschman Index (HHI), a standard economic measurement of industry concentration that represents the sum of the square of the market shares of all industry participants. Under the 1992 Merger Guidelines, a market is usually considered to be unconcentrated if the HHI is below one thousand points. A market may be considered concentrated if the HHI is between one thousand and 1800, and a market will considered to be concentrated if the HHI is in excess of 1800 points. Based on these three categories of market concentration, enforcement agencies may challenge postmerger market levels that are sufficiently concentrated (over one thousand points) under section 1.51 of the 1992 Merger Guidelines. In the radio industry, the antitrust enforcement agencies have challenged radio mergers according to this scheme, usually an equivalent of forty percent of the market.⁶⁷

64. *See id.*

65. *See* Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805 (1990).

66. *See* United States v. Westinghouse Elec. Corp., 1997-1 Trade Cas. (CCH) ¶ 79, 304 (D.D.C. Mar. 10, 1997).

67. *See* United States v. CBS Corp., 63 Fed. Reg. 18,036 (DOJ 1998) (listing the

It should be noted that the 1992 Merger Guidelines do not take into account a trend in the market for consolidation. Although the Warren Court always considered a trend in the market toward concentration in a negative light,⁶⁸ courts no longer view such a trend negatively because a trend toward concentration may sometimes reflect the market moving toward economies of scale.⁶⁹

2. Nonmarket Factors in Merger Analysis

Under section 2 of the 1992 Merger Guidelines, the antitrust enforcement agencies place increasing emphasis on nonmarket share factors in considering the potential adverse competitive effects of a merger.⁷⁰ These factors include the lessening of competition through unilateral effects and the lessening of competition through coordinated interaction. The 1992 Merger Guidelines also address ease of entry, efficiencies, and failures, which will subsequently be discussed.⁷¹

a. Unilateral Effects

In the radio industry, the enforcement agencies are primarily concerned about unilateral effects or a merged-firm's ability to raise prices. A firm's ability to raise prices depends on consumer preference for a particular product and the substitutability of the product. The following excerpt from a document submitted to the DOJ by parties of a proposed merger illustrates the monopolistic dangers involved in a merger:⁷²

I have already put in a [twenty percent] rate increase for 6[A.M.]–7[P.M.] time periods, which agencies typically purchase. . . . Many buyers work [station 1] against [station 2] [the two stations recently merged] to get the lowest rate possible, combined stations' cooperation to get some of our long-term, low dollar contracts raised to a higher rate.⁷³

proposed final judgment and Competitive Impact Statement); 1998 Biennial Regulatory Review—Review of the Comm'n's Brdcast. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, *Order*, 13 F.C.C.R. 9366 (1998) (providing a description of 1997 Merger Guidelines calculation of HHI).

68. See generally *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

69. See SULLIVAN & HOVENKAMP, *supra* note 34, at 71.

70. See *United States v. Baker Hughes Co.*, 908 F.2d 981, 991-92 (D.C. Cir. 1990) (holding that barriers to entry have become as important as market concentration in merger analysis); cf. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (finding that market concentration alone in merger analysis is presumptive of illegality).

71. See U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, §§ 3-5 (1992) for treatment of ease, efficiencies, and failure.

72. See Burka, *supra* note 54, at 23.

73. U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, § 2.21

An agency investigation revealed that the parties to the proposed merger were capable of raising prices due to the lack of substitutability of a differentiated product. Merged firms that offer differentiated products with high substitutability may compete with each other locally and benefit from nonuniform competition.⁷⁴ Firms may claim a product differentiation, where in reality they are selling two products that are very close substitutes for each other. This problem is particularly worrisome in the radio industry where radio stations are not really finding market niches in their format but are merely developing marketing techniques. The problem of product differentiation raises concerns for lack of innovation. The radio industry is particularly vulnerable to the effects of product differentiation and consumer preference.⁷⁵

The agencies will consider the degree to which competition is eliminated, which may be justified if a merger has ameliorative effects on a radio station, such as improving its ratings. However, raising ratings is difficult especially where ratings are consistent over a lengthy period of time. It is especially unlikely that a postmerger station will knock off competition when the acquired firm is unknown by listeners. The potential for reformatting should be taken into consideration, although it is unlikely for a station to change its format since most stations have invested time, money, and effort to develop its format, audience, and advertising base.⁷⁶

There is some concern that industry consolidation already makes it possible for firms to exercise monopoly power. New conglomerates hungry for revenue to compensate for the expensive consolidation process are exploring ways—possibly illegal—to increase profits through joint marketing airplay, promotions, and concerts.⁷⁷ Recent promotional arrangements between radio stations and record companies that tie airplay of an artist's song to a marketing campaign raise antitrust concerns.⁷⁸ Senator Paul Wellstone, a Democrat from Minnesota, expressed concern about these promotional arrangements: “[T]hese are the kinds of things that occur when there is no real competition. Of all the dangers that go with the increasing concentration of power in this country, the most dangerous is

(1992).

74. *See id.*

75. *See* Ilene Knable Gotts, *Competitive Analysis of Communications and Entertainment Mergers*, 1014 PLI/CORP. 55 (1997) (citing *Jacor Gets Antitrust Clearance for Citicasters Acquisition*, ASSOCIATED PRESS, Aug. 4, 1996, available at 1996 WL 4434442). The DOJ looked specifically at a merger's effect on a market niche.

76. *See Robinson Speech*, *supra* note 58.

77. *See* Chuck Philips & Michael A. Hiltzik, *[Two] Officials Urge FCC to Prove Possible Payola*, L.A. TIMES, Jan. 14, 1999, at C1, C7.

78. *See id.*

what is happening in the telecommunications industry.”⁷⁹

b. Coordinated Action

A concern of second importance is the increased ability for players to coordinate their prices in a highly concentrated market. The ability to form an agreement among competitors often leads to price collusion. Robinson summarized the DOJ’s view: “[A]t present, we’ve not challenged any radio mergers on a collusion theory, but that does not necessarily mean that we would not bring such a case in the future.”⁸⁰ Enforcement agencies, however, are concerned about the postconvergence market structure.⁸¹ Another concern involves the likelihood of collusion to set prices. A “small number of rivals makes it easier and cheaper to coordinate product differentiation strategies, to avoid costly innovation, and to share the market.”⁸² Dangers of tacit collusion increase as the concentration among competitors increases, augmenting a firm’s capability to form an oligopoly.

c. Entry, Failure, and Efficiencies

Factors—such as ease of entry, imminent failure of a merging firm, or efficiency-enhancing potential—will be considered in a merger analysis. A merger that does not prevent the timely, likely, and sufficient entry of potential competitors is considered to deter anticompetitive effects.⁸³ The issue of entry is rarely addressed in radio mergers because the majority of radio mergers “can be characterized as market extensions of a geographic or product nature rather than as combinations of actual horizontal competitors.”⁸⁴ A market extension occurs when a firm extends the same product to a different geographic market. A product extension results when a merger occurs between firms selling different but closely related products. In addition, the possibility of new entry is limited because scarcity of spectrum limits the entry of new competitors.⁸⁵

A larger company may also be justified in acquiring a failing company under the 1992 Merger Guidelines. The 1997 Revised Merger Guidelines may take into account an efficiency defense as long as the

79. *Id.*

80. *Robinson Speech*, *supra* note 58.

81. See Robert Lewis, *A Critical Analysis of the AT&T-McCaw Merger*, 3 MEDIA L. & POL’Y 4 (1994).

82. *Id.* at 9.

83. See U.S. DOJ and FTC, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552, § 3.0 (1992).

84. Gotts, *supra* note 75, at 61.

85. See *United States v. Jacor Comm. Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,671 (S.D. Ohio Dec. 31, 1996).

efficiencies outweigh the competitive risks and there are no other ways to achieve the efficiencies through less competitive means.⁸⁶ The agency will “consider efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.”⁸⁷ Use of the efficiency defense has been limited by at least one court to firms who could guarantee that the savings would be “passed on to the consuming public.”⁸⁸

The 1992 Merger Guidelines recognize that an efficiency defense unrelated to the production or distribution of a product may be difficult to prove. Nevertheless, this has not prevented the DOJ from taking noneconomic factors into consideration. Some of the efficiencies that have been considered in recent mergers include: reducing marginal cost of production, research and development—which is less susceptible to verification, procurement, management, or capital cost—and improved infrastructures or the common strengths of two companies.

To some extent, the enforcement agencies’ willingness to recognize the efficiency defense in radio transactions is still unclear, although agency action so far seems to consider efficiencies. A recent example is the enforcement agencies’ hesitancy to respond to a complaint regarding Cumulus, a small market buyer. Cumulus recently acquired six FM and four AM news radio stations.⁸⁹ According to Cumulus Executive Chairman Richard W. Weening, “The inefficient mom-and-pop stations we acquire have significantly underdeveloped operating profits margins.”⁹⁰ One of Cumulus’s competitors filed a complaint with the DOJ that it declined to pursue.⁹¹

The efficiency defense is one of many economic factors used in

86. See U.S. DOJ and FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, § 4 (1992 & revised 1997).

87. *Id.*

88. *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (rejecting efficiency defense since there was no guarantee that benefits would be passed along to consumers); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1223-24 (11th Cir. 1991) (discussing defendant’s assertion that the efficiency defense “must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and hence, consumers”).

89. See *Milwaukee-based Cumulus Media Buys [Ten] Radio Stations*, KNIGHT-RIDDER TRIB. BUS. NEWS, Jan. 26, 1999, available at 1999 WL 1034019; *The Daily Telecom Market Wrap-up*, Federal Filings Newswire, Jan. 28, 1999, available in Westlaw, ALLNEWSPLUS Library.

90. Rich Kirchen, *Cumulus Likes Small Towns in a Big Way*, BRDCST. & CABLE, Nov. 2, 1998, at 33.

91. See *id.* at 34.

agency review and is indicative of an economic-dominated approach adopted by the agencies. A summary of agency market share factors and nonmarket share factors raises the successive question of whether noneconomic factors have any effect on agency regulation of mergers.

B. Noneconomic Factors

The convergence of media poses the greatest threat to the marketplace of ideas since radio is a primary source for both time-sensitive news and the transfer of social ideas. Indeed, Joel Klein has recognized the DOJ's limited role in broadcast mergers and noted that diversity of ownership is "outside the scope of our powers."⁹² Pitofsky commented before the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights:

It has become common for antitrust economists, academics and lawyers to argue that the antitrust laws should be interpreted exclusively to serve economic goals—I believe this is wrong. Concern about concentrated economic power should be given added weight where the merger (or a wave of mergers) concerns companies involved in the communication of ideas. In those industries there is more at stake than high prices or low quality to consumers—there is a more fundamental issue of avoiding centralized control over access to the marketplace of ideas.⁹³

Despite the concern that the antitrust laws ignore noneconomic factors, the DOJ does review mergers on a case-by-case analysis, often taking into account noneconomic factors.⁹⁴ Some noneconomic factors considered in recent mergers include, but are not limited to, radio formats of stations to be acquired, audience characteristics, and the number of stations involved.⁹⁵ The DOJ's review of Jacor's acquisition of Citicasters, Inc. addressed the radio format of the two firms and whether the acquisition would affect the market niche.⁹⁶ The DOJ also addressed the size of the station's audience and whether characteristics of its audience have a high correlation to the target audience of the advertisers.⁹⁷

Further, a court reviewing a proposed consent judgment has a duty to ensure that the "government has not breached its duty to the public in

92. *Mass Media*, COMM. DAILY, July 2, 1998, at 7 (citing Joel Klein speaking at Media Institute lunch in Washington).

93. Kirk Victor, *Merger Man*, NAT'L L.J., Jan. 20, 1996, at 121 (quoting Pitofsky's testimony before the Senate Judiciary Subcommittee).

94. See *Mass Media*, *supra* note 92, at 7 (citing Joel Klein).

95. See Richard E. Wiley, *Competition, Consolidation Convergence and Challenge Development in Communications Law*, PRAC. L. INST., at 55-56 (1998).

96. See Gotts, *supra* note 75, at 68.

97. See *United States v. Jacor Comm. Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,671 (S.D. Ohio Dec. 31, 1996).

consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ‘*within the reaches of the public interest.*’⁹⁸ This limited role of the court suggests that the ultimate duty of ensuring that mergers are in the best interest of the public lies with the federal antitrust enforcement agencies. Although the antitrust enforcement agencies do consider some noneconomic factors, it is questionable whether these agencies are capable of ensuring that mergers meet the public interest when the primary focus of the Merger Guidelines is the economic well being of the market.

IV. THE IMPLICATIONS OF A CONSOLIDATED RADIO MARKET

Amidst the mass consolidation of the radio industry, economists and federal agencies debate the impact of structural changes on the market. Proponents of the consolidation argue that bigger companies create efficiencies and that these resulting efficiencies are passed on to the consumer. Many, including antitrust enforcement agencies, argue for minimal intervention and assert that the marketplace will provide the most efficient guide. However, this idea has been widely disputed.⁹⁹ Notwithstanding this unresolved question of how much regulation is good, it appears that through economies of scale and scope, bigger businesses do in fact create benefits that lead to greater profits and revenue.

A. *Current Status of the Radio Industry*

1. The Benefits of Consolidation

a. *Economies of Scale*

The Chicago school, or efficiency theory, suggests that larger firms achieve greater product efficiency through economies of scale. In addition, firms are able to expand and become large when they are innovative and do better than their competitors.¹⁰⁰ As early as the 1980s, the FCC recognized possible efficiencies from relaxing radio ownership rules and consequently relaxed national radio ownership restrictions from seven AM’s and seven FM’s to twelve each.¹⁰¹ In relaxing the radio duopoly rule, the FCC

98. *United States v. AT&T Corp.*, 552 F. Supp. 131, 151 (D.C. Cir. 1982) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (emphasis added)).

99. See Lewis, *supra* note 81, at 11 n.11.

100. See SULLIVAN & HOVENKAMP, *supra* note 34, at 5.

101. See Amendment of Section 73.3555 of the Comm’n’s Rules Relating to Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Report and Order (Proceeding Terminated)*, 100 F.C.C.2d 17, 56 Rad. Reg.2d (P & F) 859 (1984).

recognized potential economies of scales:

By artificially denying stations efficiencies that could be realized through consolidation of facilities, managerial and clerical staffs, sales, bookkeeping, promotion, production, news[,] and other aspects of station operation, the local ownership restrictions increase the costs of doing business at a time when cost-savings may well be critical to survival.¹⁰²

The FCC continues to recognize the possibility of resulting synergies created from combining assets of two small less efficient firms to form a large, more efficient firm.¹⁰³ Proponents of deregulation argue that these efficiencies resulting from consolidation are passed on to the consumer.

The profit potential of giant media corporations is especially evident as the globalization of communications takes place.¹⁰⁴ Media giants are able to take advantage of lower costs outside of the United States. Horizontal integration provides distinct cost savings. For example, Viacom's purchase of Paramount in 1994 provided an estimated \$105 million in cost savings from the joint use of personnel, facilities, and content resources.¹⁰⁵ In addition, media giants are able to engage in cross-selling, cross-promotion, and privileged access.¹⁰⁶

A sampling of the post-1996 radio industry shows that the radio industry is no different than other media in this respect. Tremendous profits have in fact been made as a result of deregulation. Robert F.X. Sillerman, Chairman of SFX Broadcasting, noted that consolidation helps them spread overhead costs around and that even adding a second station can cut costs the first year.¹⁰⁷ Adding extra stations helps operators cut overhead and boost cashflow, the usual indicia of efficiency in an industry. Extra stations also mean more outlets for syndicated radio blockbusters such as Howard Stern—which make up almost a third of total revenues. Radio companies also benefit from widespread distribution of “top-forty” shows and sports programming that can be purchased at the national level. Infinity doubled its cash flow between 1993 and 1995, while its total revenues rose by fifty-nine percent.¹⁰⁸

102. *Policies Report and Order*, 7 F.C.C.R. 2755, para. 37, 70 Rad. Reg.2d (P & F) 903.

103. *See 1996 Telecom Act Hearing Before the Subcomm. on Antitrust, Bus. Rights, and Comp. of the Comm. on the Judiciary U.S. Senate*, 105th Cong. 18 (1997) (statement of Reed Hundt, Chairman of the FCC).

104. *See* EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA: THE NEW MISSIONARIES OF GLOBAL CAPITALISM* 52 (1997).

105. *See id.* at 53.

106. *See id.* at 54.

107. *See* Ronald Grover, *A Blare of Radio Mergers: Telecom Reform Sets off a Frenzy of Station Buying*, *BUS. WK.*, Mar. 4, 1996, at 49.

108. *See America's Radio Business: Empires of the Air*, *ECONOMIST*, June 29, 1996, at

b. *Economies of Scope*

Economies of scope are created when a firm is able to create new and innovative products because of efficiencies created by its expanded production.¹⁰⁹ In some cases, consolidation has allowed stations to expand and innovate new formats through economies of scope. For example, an owner of multiple stations may have an advantage over a single-station owner to expand its product merely because of the station's structural capacity. According to Salt Lake Jacor Vice President/General Manager Thomas E. Sly, owning seven radio stations has enabled a "creative services team" to share ideas and improve its creative efforts, whereas before someone writing for spots may run out of ideas.¹¹⁰

Large media corporations often view diversity as a way to expand their product and are arguably more capable of producing diverse programs since they have the means to finance start-up programs. Clear Channel's recent consolidation of two of the nation's largest Spanish-language stations, Tichenor Media Systems and Heftel Broadcasting Corp., has allowed the Spanish market to reach an unprecedented size. McHenry T. Tichenor, Jr., president of Tichenor, stated "Spanish-language broadcasters haven't had any luck getting together on their own. . . . 'We've all tried to get together and we haven't been able to. . . . It took Clear Channel to break the logjam.'"¹¹¹ A single owner of multiple stations within a market would more likely have the economic means to capture the profits within a format outside of the hit market.¹¹²

Larger companies often have the deep pockets necessary to sponsor edge-programs that provoke litigation and government censorship. Mel Karmazin, President of CBS's Infinity Broadcasting, paid \$1.72 million to the FCC to settle complaints against "Shock-Jock" Howard Stern.¹¹³ Large players, such as Infinity, can arguably be seen as keeping the government in check with First Amendment rights, whereas smaller players may be

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109. See Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 532 (1996).

110. Interview with Thomas E. Sly, Salt Lake Jacor Vice President/General Manager in Salt Lake City, Utah (Mar. 2, 1999).

111. Elizabeth A. Rathbun, *Clear Channel Creates Hispanic Powerhouse*, BRDCST. & CABLE, July 15, 1996, at 30.

112. See Peter Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 212-17 (1952) (stating that monopoly ownership produces greater diversity in the radio programming context).

113. See Donna Petrozzello & Elizabeth A. Rathbun, *Infinity President Mel Karmazin: \$200 Million Man*, BRDCST. & CABLE, June 24, 1996, at 8.

restrained economically.¹¹⁴

2. Consolidation at the Expense of Diversity

Despite the healthy revenues generated as a result of deregulation in the radio industry, other voices cry out against deregulation and further relaxation of radio ownership rules where content diversity is at stake. The ability to operate at economies of scope and scale excludes others, reduces competition, and pressures competitors to become bigger and follow the same exclusionary practices.¹¹⁵ Critics of deregulation argue that “excessive concentrations of capital in media businesses are crushing diversity and suppressing expression nationally and even globally.”¹¹⁶

Although the antitrust laws were designed to protect competition and not competitors, consolidation has eliminated smaller, less efficient players—a category under which minority broadcasters typically fall. The fact that “individuals today are more or less excluded from ownership in broadcasting, except for the very wealthiest,” affects the marketplace of ideas, whether good or bad.¹¹⁷ According to one viewpoint, in an industry dominated by a few large, predatory players such as Rupert Murdoch bring about a “mutilation of the community’s thinking process.”¹¹⁸ Some critics argue that consolidation has allowed soulless companies to turn radio into “format-in-a-can.”¹¹⁹ However, Cumulus, the nation’s first “small-market-only radio” conglomerate may prove otherwise.¹²⁰

Cumulus, recently becoming the ninth largest radio company in the nation by acquiring stations in small markets, hires local on-air staff in many markets to avoid killing the small-market tradition.¹²¹ Vice Chairman Lewis W. Dickey Jr. commented: “This isn’t a slash-and-burn strategy. . . .

114. See Sagittarius Brdcast. Corp., *Order*, 10 F.C.C.R. 12,245, para. 5, 78 Rad. Reg.2d (P & F) 1561 (1995). The Infinity settlement for \$1,715,000, the largest amount ever contributed to the U.S. Treasury by a broadcast station, provided that Infinity issue a policy statement directing all on-air personnel to comply with 18 U.S.C. § 1464, prohibition against indecent speech, and establish a program to educate on-air personnel regarding FCC indecency actions. See *id.*

115. See HERMAN & MCCHESENEY, *supra* note 104, at 54.

116. *Mergers and Competition in the Telecommunications Industry: Hearing Before the Comm. of the Judiciary U.S. Senate*, 104th Cong. 72 (1996) (statement of Peter W. Huber).

117. Brenner, *supra* note 26, at 1032.

118. Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy—A Review Essay of Lucas Powe’s American Broadcasting and the First Amendment*, 56 GEO. WASH. L. REV. 187, 216 (1987).

119. Michael Bertin, *The LBJ-S Merger Raises Two Schools of Thought* (visited Feb. 17, 1999) <<http://www.weeklywire.com/ww/austin-music>>.

120. See Kirchen, *supra* note 90, at 33.

121. See *id.*

We like to think we're doing better radio in these markets."¹²² Despite the fact that larger media companies are able to increase efficiencies through economies of scope and scale, the number of minorities and women participating in the industry has not increased. Larry Irving, head of the National Telecommunications and Information Administration (NTIA) stated that: "The same trend of consolidation in the industry at large is playing itself out among minority owners."¹²³ As evidence of this trend, there are seventeen states that have a complete absence of minority owners in any commercial broadcast outlets.¹²⁴ Commissioner Susan Ness commented that "[a]ntagonistic' sources can only be truly antagonistic (in the best sense of the word) if they are separately owned and genuinely compete in the marketplace of ideas. We should not confuse 'multiple' choices with 'independent' choices."¹²⁵

Even before the enactment of the 1996 Act, the FCC has expressed grave concern for the small number of women and minorities participating in the operation and ownership of radio stations.¹²⁶ Although the FCC continues to explore such alternatives to remove barriers to entry for women and minorities, it is unclear how successful these efforts to promote diversity can be. One such proposition is the allocation of low-power FM (LPFM) and microradio stations to women and minorities.¹²⁷

B. *The FCC and Future Deregulation: The One-to-a-Market Rule*

The FCC has yet to decide whether it will loosen its one-to-a-market rule, which prohibits the common ownership of TV and radio stations, with the exception of the top twenty-five markets (providing that there are thirty independent broadcast stations). It is predicted that in the next couple of years the FCC will broaden the exception to include common ownership of TV and radio stations in the top fifty markets. It is unclear at this point how FCC Chairman William Kennard will reconcile his hesitancy to further relax ownership rules with industry pressure to relax the one-to-a-market rule. Kennard's concern stems from the recent consolidation and its effects

122. *Id.* at 34.

123. Bill McConnell, *Few and Far Between*, BRDCST. & CABLE, Oct. 5, 1998, at 28 (quoting Larry Irving, head of NTIA, Commerce Dept.).

124. *See id.*

125. 1998 Biennial Review—Review of Comm'n's Brcdst. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Inquiry*, Part 73 NPRM (P & F), FCC 98-37, at 73-8031 (1998).

126. *See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Part 73 NPRM (P & F), FCC 94-323, at 73-7647 (1995).

127. *See Creation of a Low Power Radio Service*, Part 73 NPRM (P & F), FCC 99-6, at 73-8177.

on broadcast diversity. “The pace of consolidation has proceeded faster than most people anticipated when the act was signed. . . . We must make sure whatever we do does not compromise our country’s long-standing principles of diversity and competition in the broadcast industry.”¹²⁸ Kennard plans to tighten rules that define ownership to include local marketing agreements (LMAs) in the measurement of a company’s ownership. LMAs allow a station to circumvent the duopoly rule in that the station renders control over another station without actually owning it.

In addition to the waiver allowed in the top twenty-five markets, the FCC also grants temporary, conditional waivers to the one-to-a-market rule in two other situations—where the proposed consolidation involves a failing station or on a case-by-case basis. Under the case-by-case waiver analysis, the FCC determines whether a waiver serves the public interest based on the following: (1) the potential public service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties a station may be having; and (5) the competition and diversity of the postmerger market.¹²⁹ In a request for transfer of control involving the merger of American Radio Systems (ARS) and CBS, the FCC refined the analysis of the public service benefits to include, but not limited to, benefits of joint operations, use of cost savings to provide enhanced programming and a wide range of programming, and other public interest benefits. CBS showed that as a result of joint ownership of radio and TV, it would be able to increase the scope and depth of its coverage of news. The approval of the waiver and merger only allowed CBS and ARS common ownership of both TV and radio stations provided that it divest itself of an FM station in accordance with the DOJ settlement. The ARS and CBS merger indicates an ability on the part of the FCC to narrowly tailor a remedy through its use of the waiver; however, such an approach tends to produce inconsistent rules and is a less attractive alternative for regulatory purposes.

V. CONCLUSION

It is unclear what the full implications of radio deregulation are at this point. At first blush, it appears that the radio industry has benefited greatly from recent deregulation. Consolidation has generated and will continue to generate rich profits for the beneficiaries of big business. Although the antitrust laws appear to have sufficiently protected advertisers from unfair

128. McConnell, *supra* note 9, at 27.

129. See Amendment of Section 73.3555 of the Comm’n’s Brdcst. Multiple Ownership Rules, *Memorandum Opinion and Order*, 4 F.C.C.R. 6489, para. 2, 66 Rad. Reg.2d (P & F) 115 (1989).

prices by promoting competition, the jury is still out on whether listeners have received a better product. In addition, the antitrust laws do not protect less efficient competitors and certain groups representing diverse and valuable viewpoints face the grave reality of being eliminated from the industry. The antitrust laws do not account for distortions in the marketplace, such as the disadvantaged position of women and minorities as competitors, and these groups have no advocate in the world of big business.

The Merger Guidelines, balancing efficiencies and anticompetitive behavior, will inevitably allow the marketplace to weed out inefficient competitors. However, allowing the marketplace to dictate what voices are available to the public is not a sufficient regulatory mechanism when small business owners, minorities, and women are and continue to be underrepresented in the industry. Radio, as the marketplace of ideas, will not serve the public interest if it fails to provide a full spectrum of diverse voices.

It is clear that the FCC's role in regulating mergers has diminished and the meaning of "public interest" is becoming increasingly nebulous as various forms of media become available to the public. At the same time, antitrust enforcement agencies do not appear to be changing course and it is questionable whether the federal antitrust enforcement agencies should take more aggressive regulatory action.

The fact that society places increasing emphasis on autonomy and individual thinking is perhaps reflective of the fact that individuals continue to play a smaller role in a larger world of corporatism. Although the ultimate effects of consolidation are unclear, the threat of mass media becoming a revenue-driven industry void of diversity may become a reality. Losing diverse voices in media—a traditional foothold for the individualist—will be detrimental to our basic concepts of freedom of expression.