SPECTRUM WARS: THE RISE OF CHRISTIAN FM RADIO

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I. INTRODUCTION TO BROADCAST LICENSING

National Public Radio (NPR), college radio, and religious broadcasters are in competition for noncommercial FM frequencies between 88.1 and 91.9 megahertz. While there is competition for other parts of the radio spectrum, this article focuses on noncommercial FM frequencies. Ownership and acquisition of broadcast stations is subject to the regulation of the Federal Communication Commission (FCC). Radio licenses to broadcast are granted for a maximum period of eight years. Before 1996, when a renewal application was pending, other applicants could file for the frequency in question.[788] This is no longer the case so long as the licensee has served the public interest, convenience, and necessity without any serious rule violations or patterns of abuse. Thus acquiring a broadcast license is a de facto permanent grant. A petition to deny a license renewal may be filed with the FCC, which would require hearings if a "substantial and material question of fact" is raised.[789] This change in license renewal policy creates a *spectrum war* when an initial application is pending. This article will highlight additional issues in spectrum wars.

The FCC has a detailed license classification system. The FM classifications, the subject of this article, are, in order of increasing power and antenna height for commercial stations: Class A, B1, C3, B, C2, D1, C0, and C. The Federal Communications Act prohibits the assignment or the transfer of broadcast licenses without prior FCC approval.[790] In considering a broadcast license assignment or transfer, the FCC considers, among other factors: compliance with rules limiting common ownership of media properties, the *character* of the licensee and those persons holding *attributable* interest, and compliance with other FCC policies.

First, a station purchase agreement is executed. Then an application is filed for FCC consent to assign the license or transfer control, depending upon whether an asset purchase or stock acquisition is involved. Next, the FCC publishes a notice that an application has been accepted for filing. Then, there is a thirty-day statutory public notice period in which third parties may file formal petitions to deny the proposed transaction. If there are no petitions filed and no other regulatory questions arise, the FCC staff may grant the application by delegated authority within a ten- to thirty-day period. Although the parties may close the transaction after the application is granted, the grant itself is not a *final order*.[791]

Public notice of an FCC staff application grant typically occurs within seven days of the filing of the application grant. For thirty days following this public notice, interested parties may petition for staff reconsideration or a full FCC review. For forty days after the public notice date, the FCC

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[788] 47 C.F.R. § 73.3580 (2005).
[789] 47 C.F.R. § 1.945 (2005).
[790] 47 C.F.R. § 73.3540 (2005).
[791] 47 C.F.R. § 1.13 (2005).

may review and reconsider the grant. Any judicial review of FCC action is obtained by petition before the Court of Appeals for the District of Columbia Circuit within thirty days of the public notice date.[792] Application to the FCC and the Federal Circuit shape the outcome of many spectrum wars.

If there are no third party petitions or FCC actions, then the grant becomes a final order at the end of the fortieth day following the public notice of the grant. When a grant becomes a final order, the grant is no longer subject to administrative or judicial review although a grant could be set aside due to fraud on the agency by the applicant. In any event the FCC will not grant an assignment or transfer if any application for license renewal is pending.

FCC licensee corporation ownership rules restrict a non-U.S. resident shareholder to one fifth of its capital stock; in the case of a corporate shareholder, the restriction of non-U.S. ownership is one fourth of the ownership of the corporate shareholder.[793] In addition, concentration rules restrict the common ownership, operation, or control of radio broadcast stations serving the same local markets. The current FCC limits are: 1) in a market with 45 or more operating commercial radio stations, an entity may own up to eight commercial radio stations, not more than five of which are in the same service (FM or AM); 2) in a market with between 30 and 44 (inclusive) operating commercial radio stations, an entity may own up to seven commercial radio stations, not more than four of which are in the same service; 3) in a market with between 15 and 29 (inclusive) operating commercial radio stations, an entity may own up to six commercial radio stations, not more than four of which are in the same service; 4) in a market with 14 or fewer operating commercial radio stations, an entity may own up to five commercial radio stations, not more than three of which are in the same service, except that an entity may not own more than 50% of the stations in such a market.[794]

On June 2, 2003, the FCC modified its definition of the term *market* for purposes of its local radio multiple ownership rules. Except for small radio markets, the FCC replaced the signal contour method of defining local radio markets with the use of Arbitron-defined *geographic markets*. Where Arbitron has not delineated *geographic markets*, the FCC indicated that it would conduct rulemaking to establish *defined markets*. The modified market definition rule was appealed to the U.S. Court of Appeals for the Third Circuit.[795] The court upheld an FCC approach that uses Arbitron ratings rather than signal strength so that a *market* is defined by competition for advertising revenue. Proposed Congressional action is generally supportive of this approach.

The FCC proposed to grandfather currently owned, operated or controlled clusters of radio stations which otherwise would not comply with the modified definition. The FCC will prohibit the sale to one entity of an intact grandfathered cluster of radio stations unless the entity meets the FCC definition of *small business*. These rules do not generally restrict the national owner or operation of stations.

Cross-media rules limit the ownership of broadcast and newspaper outlets serving the same local market.[796] A purchaser of debt or equity in a company has acquired an *attributable interest* in the company, which may restrict the purchaser's ability to purchase interests in other companies. Ownership interests are attributed to persons or entities that hold more than 33% of the total asset value (both debt and equity) of a company and either are *major program suppliers* of the company or hold attributable interests in media in the same market generally.

Officers and directors of corporations and persons or entities that directly or indirectly may vote 5% or more of the corporation's stock (excluding passive investors) have attributable interests in

[792] *Id.*
[793] 47 C.F.R. § 20.5 (2005).
[794] 47 C.F.R. § 73.3555 (2005).
[795] Prometheus Radio Project v. FCC, 373 F.3d 372 (3rd Cir. 2003).
[796] *Supra* note 7.

media. The interest of a general partner is attributable, as well as that of a limited partner who is materially involved in media-related partnership activities.[797]

There is a broad statutory mandate to serve the "public interest."[798] The FCC has gradually relaxed or eliminated many of the formal procedures it had developed in the past to promote the broadcasting of programming that responded to community needs. Licensees nevertheless are generally required to present programming responsive to community problems, needs and interests and maintain records documenting such responsiveness.[799] Listener complaints concerning station programming may be filed at any time but are only considered by the FCC when evaluating the licensee's renewal application.

In addition, stations must pay regulatory and application fees and follow FCC rules regulating: 1) political advertising; 2) the broadcasting of obscene, indecent, or profane programming; 3) sponsorship identification; 4) technical operations (including limits on radio frequency radiation); 5) and equal employment opportunity rules. Also, rules regulate the broadcasting of contests and lotteries.[800] Regulations are enforced by a variety of sanctions including fines, shortened license renewals, or even the denial of license renewal or license revocation. Congress has increased these fines and penalties.

A number of stations enter into time brokerage agreements commonly called *local marketing agreements* or LMAs. These agreements have a variety of forms such as independently owned stations functioning cooperatively with regard to programming, advertising sales, and other matters. They are subject to antitrust regulations and FCC rules that include a requirement that each licensee maintain independent control over programming and station operations. The FCC holds that these agreements do not violate the statutes as long as the licensee, being substantially programmed by another entity, maintains complete responsibility for, and control over, operations of its broadcast station and otherwise complies with the rules.[801]

A station that brokers substantial time on another station in its market or engages in an LMA with a station in its market will be considered to have an attributable interest in the brokered station. Thus a station may not enter into an LMA that allows it to program more than 15% of the weekly broadcast time on another local station that it could not own under the ownership rules. The rules also prohibit simulcasting more than 25% of its programming on another station in the same broadcast service where the two stations serve in substantially the same broadcast area regardless of whether there is common ownership or an LMA.

On June 2, 2003, the FCC modified its rules regarding radio "joint sales agreements"[802] under which separately owned and licensed stations agree to function cooperatively in terms of advertising sales. The ownership concentration changes are discussed elsewhere in this article. There are attributable interest issues in these situations. Additionally, on March 10, 2003, the FCC's new equal employment opportunity (EEO) rules became effective.[803] Stations must demonstrate non-discriminatory recruiting for all full-time positions, participate in employment outreach activities, and keep recruiting and hiring records. EEO reports must be submitted to the FCC; the FCC makes the reports available to the public. Failure to comply with the EEO rules may result in fines, shortened license renewal, and other sanctions. FCC EEO standards allow the utilization of part-time employees by religious broadcasters to staff a station with individuals of a particular religious belief. This is a factor of the spectrum war.

II. THE FAIRNESS DOCTRINE

[797] *Id*.
[798] 47 C.F.R. § 1.62 (2005).
[799] 47 C.F.R. § 73.621 (2005).
[800] 47 C.F.R. § 73.1211 (2005).
[801] *Supra* note 7.
[802] *Id*.
[803] 47 C.F.R. § 73.3612 (2005).

Today, stations enjoy broad freedom in religious and public policy broadcasting because of the end of the fairness doctrine in 1987. This is a major factor shaping "spectrum wars" and for this reason deserves special attention. Prior to the creation of the Federal Radio Commission in 1927, "the allocation of frequencies was left entirely to the private sector and the result was chaos."[804] "Herbert Hoover commented in 1924 that he thought broadcasting was 'probably the only industry of the United States that is unanimously in favor of having itself regulated.'"[805] Public safety comments appeared in Congressional reports:

> [C]alls of distress from vessels imperiled on the sea go unheeded or are drowned out in the etheric bedlam produced by numerous stations all trying to compete at once…It is not putting the case too strongly to state that the situation is intolerable, and is continually growing worse.[806]

As a result of the Federal Radio Act of 1927,[807] the predecessor agency of the Federal Communication Commission was established. The Commission allocated broadcast frequencies "among competing [broadcasters] in a manner responsive to the public 'convenience, interest, or necessity.'"[808]

The Federal Communication Commission's 1940 decision in *Mayflower Broadcasting Corp*.[809] (hereinafter referred to as *Mayflower*) was understood to prohibit editorializing by all commercial broadcasters. The predecessor decision to *Mayflower* was *Great Lakes Broadcasting Co*.[810] which stated that, "in so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies…to all discussions of issues of importance to the public."[811] In 1946 the FCC published a document entitled "Public Service Responsibility of Broadcasters," commonly called the "Blue Book." It stated that regarding controversial issues "the carrying of such programs in reasonable sufficiency and during good listening hours is a factor to be considered in any finding of public interest."

In 1949, the FCC issued a Report on Editorializing[812] to address issues raised in the Blue Book concerning fairness obligations. Most commentators consider this the first concrete statement of the Fairness Doctrine. The fairness doctrine consisted of two obligations: "to devote a reasonable percentage of time to the coverage of controversial issues of public importance," and "to afford reasonable opportunity for the presentation of contrasting points of view."[813] From 1959 until 1981, the FCC "consistently interpreted the 1959 amendment to section 315 as codifying the fairness doctrine and, therefore, treated the fairness doctrine as part of the Communications Act."[814] In 1967, the political editorial rule required that broadcasting editorials for or against a candidate for public office obligated the station to notify the opposing candidate within 24 hours and allow a reply, and the personal attack rule[815] required that if the character or integrity of

[804] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969).
[805] H.R. REP. NO. 101-247, 101st Cong., pt. 4, at 552 (1989) (citing G. Head, Broadcasting in America: A Survey of Television and Radio, 126).
[806] H.R. REP. NO. 101-247, 101st Cong., pt. 4, at 552 (quoting S. Rep. No. 659, 61st Cong., 2d Sess. 4 (1910).
[807] Radio Act of 1927, 44 Slat. 1162 (1927) (codified as amended in scattered sections of 47 U.S.C.).
[808] Red Lion, 395 U.S. at 377.
[809] 8 F.C.C. 333 (1940).
[810] 3 F.R.C. Ann. Rep. 32 (1929).
[811] 3 F.R.C. Ann. Rep. at 34 (1929).
[812] *In re* Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).
[813] 1974 Fairness Report, 48 F.C.C. 2d at 7 (15).
[814] Arkansas AFL–CIO v F.C.C. 47 U.S.C. § 315.
[815] 47 C.F.R. § 73.123.

individuals or groups were impugned while discussing a controversial issue, the station had to notify these persons within one week and offer reasonable time for a response.

In 1969, the Supreme Court held the fairness doctrine to be constitutional in *Red Lion Broadcasting Co. v. FCC*[816] (hereinafter referred to as *Red Lion*). *Red Lion* also articulated the scarcity theory that holds that since there is a scarcity of available frequencies, when the government grants a broadcast license it has an obligation to regulate broadcasting content to allow the public to hear these excluded voices.[817] Of course, what voices were actually excluded by the grant of a particular license could never be accurately articulated. On the audience side, the court in the Pacificia case[818] stated the theory that unsupervised children could be protected from hearing broadcast content that, while not obscene, was indecent.

Overall, the fairness doctrine was also justified under the theory that the public owned the airways.[819] Interestingly enough, the Congressional record surrounding the 1927 Radio Act states otherwise. "The Government does not own the frequencies, as we call them, or the use of frequencies. It only possesses the right to regulate the apparatus…we might declare that we own all the channels, but we do not."[820] Additionally, broadcasting was called a privilege[821] and was seen as a powerful medium.[822]

The FCC began requesting that Congress act to repeal the fairness doctrine in 1981 as part of the Reagan administration policy of deregulation.[823] In 1983, the FCC issued the Fairness Report declaring that the fairness doctrine did not serve the public interest and violated free speech.[824] Mark Fowler, chair of the FCC stated:

> I have made the advancement of First Amendment rights an uppermost objective of my chairmanship…Today's report is an indictment of a misguided government policy…Today's order is a statement by this commission that we should reverse course, and head ballistically toward liberty of the press for radio and television.[825]

The Commission at the time of the 1985 Report apparently believed that fairness had been codified by the 1959 Amendment to 47 U.S.C. § 315 and furthermore that it lacked the authority to declare the doctrine unconstitutional.[826] In 1986, the United States Court of Appeals for the District of Columbia Circuit held that the fairness doctrine was not codified[827] even though the Supreme Court had commented in *Red Lion* that the 1959 amendment "ratified the FCC's implication of a fairness doctrine."[828] The 1989 District of Columbia Circuit decision in *Syracuse Peace Council v. FCC* (hereinafter referred to as *Syracuse Peace Council*) discussed the fairness doctrine at

[816] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 at 400-401 (1969).
[817] *Red Lion*, 395 U.S. at 390.
[818] FCC v. Pacificia Foundation, 438 U.S. 726 (1978).
[819] *See* Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 783 (1972).
[820] 68 CONG. REC. 2870, 2872 (remarks of Senator Dill (1927)).
[821] *See, e.g.*, Illinois Citizens Comm. For Broadcasting v. FCC, 515 F. 2d 397, 402 (D.C. Cir. 1974).
[822] *See, e.g.*, Telecommunications Research and Action Center v. FCC, 801 F. 2d 501, 507-508 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct., 3196 (1987).
[823] *See*, FCC News Release Report No. 3068 (Sept. 17, 1981).
[824] 1985 Report, 102 F.C.C. 2d 145.
[825] 1985 Report, 102 F.C.C. 2d at 252.
[826] *See, In re* Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C. 2d 27, 28 (1970).
[827] Telecommunications Research and Action Center v. FCC, 801 F. 2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).
[828] 395. U.S. at 385.

length.[829] Footnote five of this decision provided a roadmap for attacking the constitutionality of the fairness doctrine based upon FCC findings of the "chilling effect."[830]

In 1987, the D.C. Circuit remanded to the FCC a case involving a fairness doctrine violation with instructions that the FCC "consider the constitutional issues raised…or, alternatively, consider whether enforcement of the doctrine was contrary to public policy."[831] This decision allowed the Commission to replace the doctrine, which it did. The remanded case, *Syracuse Peace Council*, [832] employed the following logic. The FCC stated that the constitutional issue was whether enforcing the fairness doctrine:

> (1) [C]hills speech and results in the net reduction of the presentation of controversial issues of public importance and (2) excessively infringes on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objectives.[833]

Members of Congress, concerned that the FCC would repeal the fairness doctrine, instructed the FCC to submit to Congress a report concerning possible alternatives.[834] In response, the FCC issued both the Syracuse Peace Council decision and the Fairness Alternatives Report on August 4, 1987.[835] Responding to concerns, the Commission stated, "we can no longer justifiably delay our response to WTVH's [constitutional] claims. Any further delay in deference to Congress' continuing interest in fairness legislation would be inconsistent with our adjudicatory responsibilities…and proper administrative procedure."[836] Earlier in 1987, President Regan had vetoed legislation codifying the fairness doctrine.[837] Perhaps in an attempt to soothe Congress, the FCC stated that it "may still impose certain conditions of licensees in furtherance of its public interest obligation," and that "nothing in this decision…is intended to call into question the public interest standard under the Communications Act."[838] While holding the fairness doctrine unconstitutional, the Commission indicated that the requirement that broadcasters cover controversial issues of public importance, the responsive programming obligation, was not eliminated.[839] However, the Commission had previously stated that it would not fault a broadcaster for failing to address specific issues in its programming.[840] In fact, seldom has a radio licensee been denied renewal for issues relating to programming.[841] Apparently only one broadcaster, a small Christian station, was ever denied renewal under the fairness doctrine.[842] This fact makes Christian broadcasters particularly sensitive to any attempt to regulate broadcast content.

Numerous efforts to revive the fairness doctrine have been unsuccessful, including, most recently, the proposed Fairness and Accountability in Broadcasting Act.[843] "In January 2005, Representative Louise Slaughter (D-NY) introduced legislation calling on broadcasters to provide

[829] Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir., 1989).
[830] 867 F.2d at 656 at note 5.
[831] Meredith Corp. v. FCC, 809 F.2d 863 at 865 (D.C. Cir. 1987).
[832] 2 F.C.C. Rcd. 5043 (1987).
[833] Syracuse Peace Council v. FCC, 867 F. 2d 654, 682 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (Starr, J., Concurring). Syracuse Peace Council, 2 F.C.C. Rcd. at 5051.
[834] H.R. REP. NO. 101-247, pt. 4 at 549; 132 CONG. REC. H 10619 (daily ed. Oct. 15, 1986).
[835] Alternatives Report, 2 F.C.C. Rcd. 5272 (1987).
[836] Syracuse Peace Council 2 F.C.C. Rcd. at note 46.
[837] 133 CONG. REC. S 18879 (act passed by both houses).
[838] Syracuse Peace Council, 2 FCC Rcd. at 5055.
[839] Syracuse Peace Council, 2 FCC Rcd. at 5048.
[840] *In re* Patsy Mink, 59 F.C.C. 2d 987 (1976).
[841] *See, e.g., In re* WMJX, 85 F.C.C. 2d 231 (1981) (renewal was denied due to deceptive contest announcement and broadcasting false news items).
[842] *In re* Brandy-wine Main-line Radio, 24 F.C.C. 2d 19 (1970).
[843] *See*, http://www.fairnessdoctrine.com (last visited Sept. 25, 2005).

balance and diversity in their news coverage. H.R. 501, or the Fairness and Accountability in Broadcasting Act (the FAB Act), would reinstate the fairness doctrine to ensure that broadcasters 'afford reasonable opportunity for the discussion of conflicting views on issues of public importance.'"[844]

This legislation would require all licensees "to cover issues of importance to their local communities in a fair manner taking into account the diverse interest and viewpoints in the local community."[845] Furthermore, "the period of license for all broadcast stations shall be reduced from eight years to four years" with the requirement of "two public hearings each year in each community of license" with reports to the FCC and annual reports to Congress by the FCC.[846] This legislation is unlikely to be enacted. Representative Slaughter links FAB to the recent payola allegations and media consolidation. "Media consolidation is the most critical issue facing the American people today: whether to allow a handful of people to determine what information we receive and influence the decisions we make,"[847] according to Representative Maurice Hinchey (D-NY). Media concentration rules will be discussed in Section IV of this article.

Prior Congressional attempts to revive the fairness doctrine by legislation were vetoed by President Regan in 1987, threatened with veto in 1989 by President Bush, and not supported by President Clinton in 1993.[848] This probably resulted from the political concerns of the moment. Today "big media," conservatives, and Christian radio oppose the return of the fairness doctrine. Repeal of the fairness doctrine opened the door for Christian broadcasting without concern about content balance.

III. ATTACK AND EDITORIAL RULES

The Prime Time Access Rule was created by the FCC in 1970 and prohibited network-affiliated television stations in the top fifty television markets from broadcasting more than three hours of network programs during four prime time hours.[849] This rule was repealed by the FCC in 1995 citing the diversity present in current UHF and cable television.[850] Christian broadcasting was strengthened in 2000 with the repeal of the political editorial rule and the personal attack rule. D.C. Circuit action was significant in this repeal.

In 1999, the D.C. Circuit reviewed an FCC order that upheld the personal attack and political editorial rules.[851] The FCC in 1983 had issued a Notice of Proposed Rulemaking to repeal or modify these rules[852] in response to a petition for rulemaking filed by the National Association of Broadcasters.[853] After years of inaction by the FCC, the Association filed a petition for mandamus with the D.C. Circuit to compel the FCC to act. When the FCC sought comments on the record, the D.C. Circuit denied the petition without prejudice.[854] When the FCC ultimately produced a deadlocked vote, the D.C. Circuit ruled that this deadlock was a final agency action and ordered

[844] *Id.*
[845] *Id.*
[846] *Id.*
[847] http://www.slaughter.house.gov (last visited Sept. 25, 2005).
[848] *Id.*
[849] *See In re* Review of the Prime Time Access Rule, Sec. 73.658(k) of the Commissions Rules, 11 F.C.C.R. § 556, PP 1-4, 64-86 (1995).
[850] *In re* Review of the Prime Time Access Rule, Sec. 73.658(k) of the Commissions Rules, 11 F.C.C.R. § 556 at PP 76-80 (1995).
[851] Radio-Television News Directors Association v. FCC, 184 F.3d 872 (D.C. Cir. 1999).
[852] Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28, 295 (proposed June 21, 1983) (to be codified at 47 C.F.R. pt. 73).
[853] *Supra* note 64, at 877.
[854] *Id.*

any FCC commissioner who voted against repeal or modification to provide a statement justifying this vote.[855]

The D.C. Circuit decided that the joint statement of the commissioner's opposition to repeal of the rules[856] was entitled to deference because it left settled agency rules in effect.[857] However, the D.C. Circuit also placed the burden of persuasion upon the FCC because it "initiated a rulemaking premised on the conclusion that the rules may not be in the public interest and then rejected its own proposal to abrogate the rules."[858] The D.C. Circuit found that the Joint Statement "fails to present an adequate basis upon which to affirm retention of the rules and dispel concerns previously raised by the FCC itself."[859] The court remanded to the FCC for a more detailed explanation.[860] After this remand, when the case appeared before the D.C. Circuit for the second time, the court issued a writ of mandamus ordering the FCC to immediately repeal the personal attack and political editorial rules.[861] The FCC repealed the personal attack and political editorial rules on October 26, 2000.[862] The repeal of these rules removed the last elements of the fairness doctrine and opened the door for Christian radio as we know it today.

The question remains whether states might enact similar rules as part of their election regulation system. On July 6, 2002, Wisconsin by legislation required the State Board of Elections to promulgate rules requiring all public television stations to provide some free airtime to state office candidates.[863] A federal district court declined to review this legislation on ripeness grounds in 2002.[864] Arguably, this legislation is preempted by federal legislation that exempts public broadcasters from similar political access requirements.[865] Additionally, there are broad federal public policies regulating the broadcast media. For example, federal law prohibits noncommercial stations from selling airtime for programming that supports or opposes political candidates.[866]

IV. OWNERSHIP CONCENTRATION

Over time, the trend has been to relax market ownership restrictions. This favors well-financed groups including Christian radio groups, another spectrum wars factor. For example, in 1970, the FCC enacted a radio/TV cross ownership restriction that prohibited a broadcaster from owning a radio station and a television station in the same market, commonly called the one-to-a-market rule.[867] It was designed to encourage competition and diversity. As new broadcasting outlets developed, there was less need to foster competition.[868] Next came the realization that the greater number of outlets did not necessarily provide diversity.[869]

[855] *In re* Radio-Television News Directors Association, NO. 97-1528, 1998 U.S. App. LEXIS 13041 (D.C. Cir. May 22, 1998).
[856] Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, 13 F.C.C.R. 21, 901 (1998).
[857] *Supra* note 64, at 880.
[858] *Id.* at 881.
[859] *Id.*
[860] *Id.* at 888.
[861] Radio-Television News Directors Association v. FCC, 229 F.3d 269 (D.C. Cir. 2000).
[862] Repeal or Modification of the Personal Attack and Political Editorial Rules, 65 Fed. Reg. 66, 643 (Nov. 7, 2000) (Codified at 47 C.F.R. pt. 73, 76).
[863] Wis. Stat. Ann. 11. 21 (17).
[864] Wisconsin Realtors Assn. v. Ponto, 233 F.Supp.2d 1078 (D. Wis., 2002).
[865] *See* 47 U.S.C. 312 (a) (7), 315 (a) (2005).
[866] 47 U.S.C. § 399b (a)-(b) (2005).
[867] *In re* Amendment of Sections 73.35 Relation to Multiple Ownership, 22 F.C.C. 2d 306 (1970).
[868] *In re* Amendment of Section 73.3555 of the Communication Broadcast Multiple Ownership Rules, Second Report and Order, 4 FCC Rcd. 1741, ¶ 19 (1989).
[869] *Id.*

Subsequently, the FCC announced that it would consider waivers of the one-to-a-market rule.[870] Waivers would be favored if the proposed combination occurred in a top twenty-five market and thirty separate broadcast licensees remained after the combination, or if the waiver request concerned a failed station. A *failed station* was defined as one not operating for four months or involved in bankruptcy.[871] This failed station possibility opened the door for many radio corporations, including Christian, to expand in major markets. The factors the Commission would consider in granting waivers were: "the types of facilities involved, the potential benefits of the combination, the number of stations already owned by the applicant, the financial difficulties of the station(s), and the nature of the market in light of…diversity and competition."[872]

Congress, in 1996, directed the FCC to relax broadcast ownership restrictions.[873] In the Telecommunications Act of 1996, the FCC was directed to review ownership rules every two years to determine if they remained "necessary in the public interest as a result of competition," and to review or modify them as necessary.[874] Rule changes did have to be "necessary and in the public interest."[875]

In *Sinclair Broadcast Group v. FCC*, the D.C. Circuit found the local ownership rule "arbitrary and capricious."[876] While not ordering the change of ownership rules, the court did require a clearer justification for keeping them unchanged.[877] In response to this decision, the FCC promulgated a new set of rules in June 2003. This article only considers radio and not the entire range of media ownership changes. The FCC changed the percentage of U.S. households that any media firm may reach from 35 to 45 percent.[878] This is calculated by adding the number of households where the firm owns a station, regardless of ratings. Thus, the FCC percentage share is generally larger than the equivalent market share. In addition, cross-media limits were altered to the following: in markets with four to eight television stations, a single firm may own (a) a daily newspaper, one TV station, and up to half of the radio station ownership limit for that market, (b) a daily newspaper and up to the radio station ownership limit, or (c) two TV stations and up to the radio station ownership limit.[879] In promulgating the new rules, the FCC acknowledged that the prior ownership rules "could not be justified on competition and diversity grounds,"[880] particularly in light of competition from cable and satellite TV.

The Third Circuit reviewed the media ownership rules in a decision dated June 24, 2004 (*Prometheus Radio Project*).[881] While affirming the power of the FCC to regulate media ownership, the Court stated that "the Commission has not sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets."[882] With regard to the cross-ownership of media, the Court concluded that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast, cross-ownership was no longer in the public interest."[883] In essence, newspaper/broadcast combinations can promote localism because "the Project for Excellence in Journalism [found] that newspaper-owned stations 'were more likely to do stories focusing on

[870] Memorandum Opinion and Order, 4 FCC Rcd. 6489, ¶ 26 (189).
[871] *Id.* ¶ 86.
[872] *Id.* ¶ 90.
[873] 47 U.S.C. § 151 (2005).
[874] 47 U.S.C. § 202(c)(1) (2005).
[875] *See*, Fox Television Station, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002).
[876] Sinclair Broadcast Group v. FCC, 284 F.3d 148, 169 (D.C. Cir. 2002).
[877] Sinclair Broadcast Group v. FCC, 284 F.3d 148,164-165 (D.C. Cir. 2002).
[878] Review of the Commission's Broadcast Ownership Rules and Other Rules, 18 F.C.C. R. 13620, 13803 (2003).
[879] *Id.*
[880] *Id.* at 13938.
[881] Prometheus Radio Project v. FCC, 373 F. 3d 372 (3d Cir. 2004).
[882] *Id.* at 374.
[883] *Id.* at 392.

important community issues and to provide a wide mix of opinions, and were less likely to do celebrity and human interest features.'"[884] In like manner, a blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity since the Commission found that "commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice."[885] "Secondly, the Commission found that diverse viewpoints from other media sources in local markets (such as cable and the Internet) compensation for viewpoints lost to newspaper/broadcast consolidations."[886]

The Court determined that regulating cross-media ownership does not violate the Fifth Amendment due to "the Supreme Court's decision . . . that endorsed the constitutionality of the 1975 newspaper/television cross-ownership ban."[887] In like manner, the First Amendment did not prohibit this type of regulation. The Prometheus Radio Project decision was not reviewed by the U.S. Supreme Court.[888] The Third Circuit decision was critical of the FCC's 3-2 decision for failing to adequately explain how the public interest would be served by increasing the ownership cap. This decision, disallowing an increase in ownership of local stations that reached up to 45 percent of the national television audience, will apparently allow the FCC to revisit this issue with a clean slate.

V. NONCOMMERCIAL LICENSEES

Section 307(c) of the 1934 Communications Act directed the FCC to study proposals to allocate a percentage of radio frequencies to non-profit entities.[889] When the Commission reported to Congress a recommendation against these proposals, it was not implemented. When FM radio and television was developed in 1949, the Commission held hearings concerning noncommercial frequencies.[890] The focus of these early developments was on educational broadcasting. Religious broadcasting was not a factor.

In 1951, the FCC stated that "the need for non-commercial educational television stations is based upon the important contributions which noncommercial educational television stations can make in educating the people both in school–at all levels–and also the adult public [as well as the] high quality type of programming which would be available on such stations-programming of an entirely different character from that available on most commercial stations."[891] In 1952, the FCC set aside the lower twenty channels of the FM band to be restricted to non-profit educational use.[892] The Commission stated that "the public interest will clearly be served if these stations are used to contribute significantly to the educational purpose of the nation."[893]

With the deregulation of the 1980s, the FCC eliminated the need for broadcasters, both commercial and noncommercial, to survey the local community to determine "the problems and needs" of that community and design programming to meet these needs.[894] Previously, Congress had enacted the Public Broadcasting Act of 1967[895] with an objective to "improve the service of

[884] *Id.*
[885] *Id.*
[886] *Id.* at 393.
[887] 373 F.3d at 393.
[888] FCC v. Prometheus Radio Project et al., No. 04-1168, *cert. denied* (U.S.) June 13, 2005.
[889] *See* Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C. 2d 240, 241 (1978).
[890] *See* Amendment of Section 3.606 of the Rules, 41 F.C.C. 148, § 159 (1952).
[891] Television Broadcast Service, 16 Fed. Reg. 3072, 3079 (1951) (to be codified at 47 C.R.F. pt. 3) (proposed April 7, 1951).
[892] 41 F.C.C. at 164.
[893] *Id.* at 160.
[894] *See* Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076, 1116 (1984).
[895] 47 U.S.C. § 396(2)(6) (2005).

educational broadcasting stations by providing a mechanism whereby programs of high quality, responsive to the cultural and educational needs of the people, can be made available."[896] This created the Corporation of Public Broadcasting (CPB) which in turn subsequently created the Public Broadcasting Service and National Public Radio. Congressional appropriations are used to fund a variety of programming on these stations.

Noncommercial radio giants have emerged in recent years with their own ideas of what constitutes public interest. When Michael Powell became an FCC Commissioner, he declared that *public interest* was too vague and announced that he would make decisions in this area based upon five questions: 1) Does the FCC have authority to regulate broadcasting? 2) Should the FCC nonetheless leave broadcast regulation to Congress or look to Congress for more specific instructions on how to regulate? 3) Should another state or federal agency regulate broadcasting? 4) Should the FCC address broadcast regulation at all? 5) Would action by the FCC be constitutional?[897] As Chairman of the FCC, Powell continued the deregulation trend. Today, competition with other broadcasters is seen as sufficient to make stations responsive to community concerns and the public interest. While in theory broadcasters are still required to air programming addressing issues of concern to the local community and maintain public files on this programming, there is little if any enforcement.

VI. CHRISTIAN BROADCASTERS

In recent years, there has been a spectrum war between public broadcasters and Christian broadcasters for noncommercial FM frequencies between 88.1 and 91.9 megahertz. One approach has been for Christian broadcasters to obtain full-power licenses that overpower NPR translator stations, literally blowing them off the air. There are currently more religious broadcasters than NPR radio stations according to Arbitron ratings. In 2005, of 13,838 radio stations in the U.S., 2,014 are religious stations.[898]

Christian Broadcasters have some internal divisions as the 2001 split between the National Religious Broadcasters and the National Association of Broadcasters indicates differing viewpoints.[899] This may have been related to the National Religious Broadcasters' concern over broad issues concerning the National Council of Churches relationship to the National Association of Evangelicals. Evangelical Christian broadcasters are creating their own faith-based news programming.[900] All of this is related to the debate concerning the influence of those who vote based upon their core values, the so-called *values voters*.

The National Religious Broadcasters was created in 1944 and has lobbied Congress ever since to create policies that favor religious programming and news. In 2000, its power was demonstrated when the FCC withdrew guidelines that would have prevented religious broadcasters from taking over frequencies reserved for educational programming.[901] On December 30, 2000, the FCC voted 3-2 to require religious groups operating under a nonprofit educational television license to use all their broadcast time on "educational, instructional or cultural needs of the community."[902] In 1945, twenty percent of the FM band was set aside "to serve the educational and cultural broadcast needs of the entire community to which they are assigned." In a TV license transfer from a PBS outlet in

[896] S. Rep. No. 90-222, at 1773 (1967).
[897] Commissioner Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment*, Address Before the American Bar Association 17th Annual Legal Forum on Communications Law 2 (April 5, 1998), available at http://www.fcc.gov/Speeches/Powell/spmt.p 806.html (last visited Sept. 25, 2005).
[898] Arbitron Radio Today, 2005 cited in the HOUSTON CHRONICLE, Sept. 24, 2005, Religion p. 1.
[899] http://www.christianitytoday.com/ct/2001/107/43.0.html (last visited Sept. 13, 2005).
[900] Mariah Blake, *Stations of the Cross: How Evangelical Christians are Creating an Alternative Universe of Faith-Based News*, COLUMBIA JOURNALISM REVIEW; May/June 2005, Vol. 44 Issue 1, 32-39.
[901] http://www.atheists.org/flash.line/fcc2.htm (last visited Oct. 8, 2005).
[902] WQED I, 15 F.C.C. Rcd. at 66 (2000).

Pittsburg, Pennsylvania, to a religious broadcaster, Cornerstone Television, the Commission wrote that "the Commission, however, has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary."[903]

The Commission wrote in its opinion:

> We have now been faced squarely with the difficult balance between maintaining the educational nature of the reserved allocations [of frequencies] and the First Amendment rights of broadcasters on this band…First, with respect to the overall weekly program schedule, more than half of the hours of programming aired on a reserved channel must primarily serve an educational, instructional or cultural purpose in the station's community of license. Second . . . , a program must have as its primary purpose service to the educational, instructional or cultural needs of the community. We 'will defer to the judgment of the broadcasters unless' the broadcaster's categorization appears to be arbitrary or unreasonable.[904]

Two FCC Commissioners, Powell and Furchtgott-Toth, argued in a separate written opinion that "quantification of the 'educational' obligation of noncommercial licensees suggests a greater federal intrusion into the programming judgment of noncommercial licensees that is, to our thinking, unwarranted and may be unconstitutional . . ."[905] Considerable protest by the religious broadcasting community greeted this decision.[906] Within a month, the FCC vacated the guideline portion of this decision.[907] Commissioner Tristani wrote in dissent: "this supposedly independent agency has capitulated to an organized campaign of distortion and demagoguery."[908] She asserted that the majority simply wanted the entire issue to go away. Clearly vague standards that "defer to the editorial judgment of the licensee unless such judgment is arbitrary or unreasonable"[909] favor Christian broadcasters operating on the educational frequencies as nonprofit corporations.

The U.S. House of Representatives passed the Noncommercial Broadcast Freedom of Expression Act,[910] which would have prohibited the FCC from placing any content requirements on NCETV licensees. It mandated that the FCC "shall not establish, expand, or otherwise modify requirements relating to the service obligations of noncommercial educational radio or television stations except by means of agency rulemaking . . ."[911] The Senate did not vote on the bill prior to adjournment in December 2000 and it died.

In recent elections, religious broadcasters have been active in *get out the vote* campaigns even if not endorsing a specific candidate. Consequently, some commentators have written that Christian broadcasters report news according to their Biblical perspective.[912] "Evangelical news looks and sounds much like its secular counterpart, but it 'hones' in on issues of concern to believers and filters events through a conservative lens."[913] The Terri Schiavo case is an example of media attention focused by Christian broadcasting. Christian broadcasting also devotes considerable attention to Israel with theological overtones. William Martin of Rice University has written

[903] *Id.* at 67.
[904] *Id.*
[905] *Id.* at 72.
[906] *See, e.g.*, *Pulling God's License*, AM. ENTERTAINMENT, March 1, 2000.
[907] WQED II, 15 F.C.C. Rcd. 2 (2000).
[908] *Id.* at 3.
[909] *Id.* at 1.
[910] H.R. 4201, 106th Cong. Sec. 1 (2000).
[911] 106th Cong. Sec. 4 (2000).
[912] Mariah Blake, *Stations of the Cross: How Evangelical Christians are Creating an Alternative Universe of Faith-Based News*. COLUMBIA JOURNALISM REVIEW, May/June 2005, Vol. 44 Issue 1, p. 32-39, 8p, 1c.
[913] *Id.* at 33.

concerning the Christian right's foreign policy stands.[914] They are frequently linked to the "New Right." The yearly meetings of the Council for National Policy bring a variety of religious, political, and religious media leaders.[915] Without going into a detailed discussion of these issues, a public policy question involves the nonprofit status of these organizations and the political influence they increasingly yield. This has produced conflict between the religious and political right.

VII. CONCLUSION

There are inherent dangers in Christian broadcasters' access to the public. Most of Christian broadcasting is dependent upon contributions rather than advertising. If anything interrupts these contributions, the industry could be in trouble. In addition, with consolidations and limited spectrum, there is some question about future growth prospects. Any growth of new media may undercut audience market share.

As Christian FM faces challenges, so does public FM. By July 2005, NPR reached an estimated 26.1 million listeners each week.[916] The U.S. House proposed $100 million in budget cuts to the Corporation for Public Broadcasting (CPB), which would have reduced listeners of rural NPR stations, perhaps the very ones that Christian broadcasters are purchasing. While the 1995 attempt to zero out the public broadcasting budget failed in the U.S. House of Representatives, this result could occur in the future. The end of public funding would favor those private interests best able to raise private money.

It appears that there will be future Congressional action to deregulate the media and that the deregulatory trend will be continued by the FCC. This trend is evidenced by the 1987 repeal of the fairness doctrine, the 1995 repeal of the prime-time access rule, the 2000 repeal of the personal attack rule, and the political editorializing rules. How long this trend will continue remains to be seen. To what extent do broad public interest requirements accompany the use of the broadcast spectrum? The spectrum wars will reflect the political power of competing interests.

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[914] William Martin, *The Christian Right and American Foreign Policy*, FOREIGN POLICY, Spring 1999, 66-80.
[915] *Id.* at 69.
[916] Martin Miller, *As Congress Debates Funding, It's Full Stream Ahead for NPR*, LOS ANGELES TIMES, July 16, 2005, part E, 14.