

advertisers in the geographic area in which concentration is occurring, but they are included in the market because of the happenstance of the size, shape, or location of one or more of the principal community contours of the radio stations involved.

180. The contour-overlap methodology also makes it difficult to measure concentration levels in local radio markets accurately. As currently implemented, the methodology does *not* examine the number of radio station owners in a market; it only considers how many radio station signals cross the market boundary created by the principal community contours of commonly owned stations with mutually overlapping contours. Those signals may be owned by only one other party; indeed, because of the numerator-denominator inconsistency, those radio stations may be owned by the same party. The current methodology simply does not take ownership into account, which makes an accurate measure of local radio concentration difficult to achieve.

181. Consistency suffers as well. Under the contour-overlap methodology, every combination operates in a radio market that is unique to that combination. Thus, there is no common metric that the Commission can use to compare the effect of two different combinations on competition. In fact, the Commission cannot even rationally evaluate the effect that adding a new radio station to an existing combination would have on competition because the relevant radio markets before and after the acquisition may be completely different, depending on the vagaries of the contour overlaps.

182. The Commission does not agree that it must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.

183. In short, the Commission's experience with the contour-overlap system leads it to believe that it is ineffective as a means to measure competition in local radio markets, and that a different method of defining the market will more effectively serve its goals. The Commission sees scant evidence in the record to lead it to a different conclusion. Some commenters correctly note that any methodology the Commission develops may create anomalous situations in certain instances. But the Commission cannot

agree that its inability to achieve perfection in every instance justifies maintaining the current system. The Commission concludes that its methodology for defining radio markets and counting market participants must be changed.

184. *Statutory Authority.* Before explaining our modified market definition and counting methodologies, the Commission addresses arguments that it lacks the statutory authority to revise those methodologies in a way that would prohibit radio station combinations that are permissible under the current framework. After reviewing the relevant statutory provisions, the Commission finds that argument to be without merit. The Communications Act grants us the authority to "[m]ake such rules and regulations, .not inconsistent with law, as may be necessary to carry out the provisions of" the Act. 47 U.S.C. 303(r). The Commission is also authorized to "make such rules and regulations * * * not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." *Id.* section 154(i). The Supreme Court has held that these broad grants of rulemaking power authorize us to adopt rules to ensure that broadcast station ownership is consistent with the public interest. The Commission finds nothing in the 1996 Act or its legislative history that diminishes that authority. To the contrary, section 202(b) contemplated that the Commission would exercise our rulemaking authority to make the revisions to the rule that Congress required, and section 202(h) contemplates that it will exercise our rulemaking authority to repeal or modify ownership rules that it determines are no longer in the public interest. The Commission accordingly finds that it has the authority to revise the local radio ownership rule in a manner that serves the public interest.

185. Some commenters nevertheless argue that the 1996 Act restricts how the Commission may define the "public interest." The Commission finds that argument flawed. In *Fox Television*, 280 F.3d at 1043, the court held, in the context of the national television ownership cap, that the numbers Congress selected "determined only the starting point" for analysis and instructed us not "to defer to the Congress's choice" of numbers in our analysis. Thus, even if Congress believed in 1996 that section 202(b) set the appropriate radio station ownership levels, *Fox* holds that the Commission retain the authority—indeed, the obligation—to determine ourselves whether a change in the rules would serve the public interest.

186. The Commission recognizes that the section 202(h) presumption requires it to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it. It would be a substantial leap, however, to read this presumption as having the additional effect of limiting the types of changes that we may conclude are in the public interest. The Commission sees no basis for such a view. Had Congress intended to curtail the Commission's regulatory powers so drastically, it would have done so in more express terms.

187. Invocation of the ratification, or reenactment, doctrine does not alter the analysis. The Commission finds nothing in the 1996 Act or in its legislative history that evidences a congressional intent to adopt the market definition and counting methodologies that the Commission adopted in 1992. Even if the ratification doctrine could be invoked, moreover, that would not "preclude [an] agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute." *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986). The ratification doctrine "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change," but permits changes "through exercise by the administrative agency of its continuing rule-making power." *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941). Because Congress has left the Commission's general rulemaking powers intact, the ratification doctrine—even if properly invoked—would not bar us from exercising those powers to change the method used to define local radio markets and count radio stations for purposes of the local radio ownership rule.

188. *Geography-Based Radio Markets.* The Commission concludes that a local radio market that is objectively determined, *i.e.* that is independent of the radio stations involved in a particular transaction, presents the most rational basis for defining radio markets. As explained below, the Commission will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. The Commission also establishes a methodology for counting the number of radio stations that participate in a radio market. The Commission initiates below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and adopts a modified contour-overlap