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*1 WHEN IS TIME BROKERAGE A TRANSFER OF CONTROL? THE FCC'S
REGULATION OF
LOCAL MARKETING AGREEMENTS AND THE NEED FOR RULEMAKING

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*3 Introduction

A time brokerage agreement [FN1] is a contract involving the sale by a broadcast licensee [FN2] of "discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it." [FN3] Today, [FN4] the parties to a time brokerage agreement are usually the owner of an unprofitable radio or television station (the "brokered" station) and the owner of a stronger, more profitable station (the "brokering" station, [FN5] which is usually a prospective purchaser of the weaker station). [FN6] After a time brokerage agreement is executed, the two stations will frequently share programming, *4 advertising sales forces and other facilities, thereby reducing station expenses and enabling the weaker station to cut its overhead and survive. [FN7] As of early 1995, about three dozen time brokerage agreements involve television stations [FN8] and approximately 300 involve radio stations. [FN9]

The Federal Communications Commission (the "FCC" or the "Commission") has reviewed time brokerage agreements to ensure that such agreements do not violate s 310(d) of the Communications Act of 1934. [FN10] This statute provides that no license or construction permit may be "transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission" [FN11] Thus, a time brokerage agreement which gives brokers "too much" control over a station violates s 310(d) by transferring control over the brokered station without prior FCC permission. The FCC has upheld the majority of time brokerage agreements it has reviewed; [FN12] however, the FCC occasionally has held that timebrokerage *5 agreements or their implementation violated s 310(d) by giving brokers an inordinate amount of control [FN13] over the brokeredstation.*6

Because of the efficiencies resulting from time brokerage, [FN14] the survival and financial prosperity of hundreds of broadcast stations hinges on the FCC's treatment of time brokerage. But rather than drafting clear rules governing time brokerage, the FCC makes "determinations

regarding a licensee's retention of control of its time brokered station . . . on a case-by-case basis." [FN15] The FCC's decisions, however, have been inconsistent at times. For example, it is not clear whether the FCC supports or opposes time brokerage agreements which give the broker an option to purchase the brokered station. [FN16] Even those FCC cases which do not contradict other FCC cases do not provide attorneys with much guidance, since the FCC usually cites several factors to support its decision without explaining which factors are crucial to the determination. [FN17] For example, in a letter to Bruce E. Rosenblum, Esquire, [FN18] the FCC listed several contract provisions which supported its decision that a licensee had abdicated control of station finances to a broker, without explaining which provisions were most important. [FN19] Since the FCC's decisions are so narrowly drawn, broadcasters have been forced *7 to draft and implement time brokerage agreements without knowing where the FCC stands on many issues.

The purpose of this Article is twofold. First, by surveying FCC case law regarding time brokerage, this Article may make it easier for attorneys to draft contracts that will survive FCC scrutiny. Specifically, this Article discusses FCC precedent regarding the broker's appropriate roles in the finances, personnel, and programming of the brokered station, as well as the broker's involvement in other matters that cannot easily be placed in one of these categories. Second, this Article proposes that the FCC promulgate rules regarding time brokerage. Such rules should specifically list at least some of the factors which the FCC would consider in time brokerage cases interpreting s 310(d).

Part I of this Article discusses the history of the FCC, the procedural context of recent time brokerage cases, and the gradual liberalization of FCC time brokerage policy. Part II analyzes FCC case law in detail and describes the factors the FCC has relied upon in deciding whether to uphold or reject time brokerage agreements. Part III contends that the FCC should adopt a rule governing time brokerage, because continued FCC reliance on adjudication does not give broadcasters or their attorneys sufficient guidance to comply with the law, and no longer serves the FCC's original rationale for case-by-case adjudication. Finally, part IV summarizes FCC case law and highlights those areas that should be addressed by a new rule.

I. Background

A. The Procedural Context

In 1934, Congress enacted the Communications Act [FN20] which created the Federal Communications Commission. [FN21] Since 1934,*8 the FCC has regulated radio and television stations, [FN22] as well as numerous other industries. [FN23] The FCC's regulatory authority over broadcasters encompasses a wide variety of matters, including the right to license radio and television stations, [FN24] the right to veto assignment of stations, [FN25] and the right to issue declaratory rulings. [FN26] The FCC has delegated much of its authority to its bureaus, including its Mass Media Bureau (the "Bureau"). FCC regulations require the Bureau to administer policies relating to the regulation and development of radio and television services. [FN27] For example, the Bureau initially reviews applications for radio and television licenses, applications for license renewal, and applications for the sale of stations. [FN28] Parties disadvantaged by Bureau rulings may appeal them to the full Commission. [FN29]

Where a broadcast application presents a substantial and material question of fact, the FCC will designate the application for a hearing. [FN30] Such hearings are generally conducted before an

administrative law judge ("ALJ") rather than the Bureau. [FN31] ALJs' decisions are reviewed by a Review Board, [FN32] and the Review Board's decisions *9 may be reviewed by the Commission. [FN33]

The Bureau and its branches [FN34] have usually addressed time brokerage in the following contexts:

1. Evaluation of an application to assign a station license to a time broker. In such situations, a third party (usually another broadcaster) objected to a station sale on the ground that the broker had already assumed premature control of the station through the time brokerage agreement. [FN35]
2. Requests for a declaratory ruling by the parties to a time brokerage agreement. [FN36]
3. Attempts to fine licensees for transferring control of a station to a broker without FCC authorization. [FN37]

B. The Rise of Time Brokerage

Time brokerage agreements have existed for decades; in fact, *10 brokered foreign language programs were common in large markets even before passage of the 1934 Communications Act. [FN38]

Time brokerage was traditionally used to provide specialized programming, including foreign language programming. [FN39] Under such agreements, time brokers typically provided only a few hours of specialized programming per week. [FN40] Despite the limited extent of time brokerage, the FCC had occasionally "expressed concern that extensive time brokering might constitute an improper delegation of control by the licensee to the broker." [FN41]

In 1945, the Commission adopted the first rule pertaining to time brokerage. The Commission did not limit the amount of time that could be sold to time brokers, but required radio licensees to file time brokerage agreements with the Commission. [FN42]

In 1980, the FCC issued a policy statement regarding time brokerage which stated that "time brokerage has the potential to notably increase available program alternatives. Accordingly, we have decided to encourage time brokerage." [FN43] Specifically, the FCC *11 asserted that it would consider, at the licensee's request, a time broker's affirmative action efforts [FN44] and whether brokers could establish lower political advertising rates for brokered licensees if there were "significant differences in available audience levels" [FN45] between brokered and non-brokered programming. [FN46] However, the FCC did not address the question of when a broker's influence over a station was sufficient to constitute a transfer of control to the broker under s 310(d) of the Communications Act, [FN47] which prohibits a licensee from transferring control of a broadcast station without FCC permission. [FN48]

Shortly thereafter, another FCC policy change unintentionally caused time brokerage to mushroom. During the 1980s, the FCC adopted a number of policies which significantly increased the number of commercial radio frequencies on both AM and FM radio. [FN49] In the Clear Channel [FN50] proceeding, the FCC reduced some stations' protection from interference in order to create spectrum space for smaller stations. [FN51] For example, the FCC limited the service range of the 25 strongest AM stations in order to make room for about 100 additional AM stations. [FN52] In another proceeding, the FCC *12 added over 700 new FM channels throughout the United States. [FN53] As a result of the growth of the number of stations, by 1991 "more than half of all commercial radio stations were operating in the red." [FN54]

In order to save their stations, many licensees entered into time brokerage agreements which dramatically differed from the time brokerage agreements of the 1950s and 1960s. Instead of giving a broker a few hours a week, many 1990s agreements allowed the broker to "purchase 100% of the available broadcast time from the other station for a flat monthly fee, and act as the programmer and sales representative for that station." [FN55] While 1960s time brokers were often small ethnic broadcasters, 1990s time brokers often have been prospective purchasers, and many 1990s agreements have given the broker an option to purchase the brokered station. [FN56] Time brokerage arguably has saved weak television and radio stations by allowing them to jointly operate facilities with other stations and thereby reduce expenses. [FN57]

Before 1989, "it was widely assumed that the type of agreement . . . which provided for the brokering of a substantial portion of a station's time, would violate section 310(d) of the Communications Act and attendant FCC policies." [FN58] In 1989, however, the FCC repealed its prohibition against "one station brokering time on another station in the same market." [FN59] Shortly thereafter, the FCC staff *13 began to approve "modern" LMAs. [FN60] For example, in Russo, [FN61] the Bureau upheld a time brokerage agreement involving competing stations even though the agreement provided that the broker would program 20 hours per day of programming and have an option to purchase the brokered station. [FN62] The Bureau found that the licensee had retained control of its station because, among other factors, it had "(1) 'retained its management personnel, including its General Manager, Business Manager, Traffic Director, Executive Secretary, and Chief Engineer' . . . (2) retained, by written contract, full authority over programming and personnel . . . and (3) retained control over station financing, leaving the broker merely the ordinary 'profit of advertising revenues over brokerage fee.' " [FN63] The FCC also noted that the LMA provided that the brokered licensee would have full authority over the station, including the right to reject or preempt programming and advertisements and the right to supervise all personnel through its General Manager and Chief Engineer. [FN64]

After Russo, brokered licensees have been able to obtain nearly all of their programming from time brokers. [FN65] Not surprisingly, over the past five years, the FCC has approved more time brokerage agreements [FN66] than it has rejected. [FN67]

*14 The FCC, however, has declined to adopt any broad rules governing time brokerage on the ground that the question of whether a licensee has "lost control" over a station is one that is most appropriately addressed on a case-by-case basis. [FN68] Under this "case-by-case" inquiry, the FCC will typically address the extent of the broker's control over the brokered station's finances, personnel, and programming. [FN69] If the broker rather than the brokered licensee controls station finances, personnel or programming, the licensee has violated s 310(d) by transferring control of its station without FCC permission. [FN70]

II. The FCC's Likes and Dislikes

In order to comply with s 310(d) of the Communications Act, a licensee must retain ultimate control over station personnel, programming and finances. [FN71] However, a licensee may delegate day-to-day control over all three areas, as long as the licensee continues to set policies guiding station operations. [FN72] Although contract terms may be relevant, provisions that "purport to retain control in the licensee, *15 if not actually exercised, will not ensure protection where the FCC believes that the totality of the circumstances indicate that there has been an unauthorized transfer of control." [FN73]

Part II.A surveys FCC case law defining licensee control of station finances. As a rule, a licensee controls station finances if it is responsible for most station expenses. [FN74] Conversely, a licensee has abdicated control if the broker pays for usual station expenses such as insurance, utilities, taxes [FN75] and FCC fines. [FN76] FCC case law is somewhat more ambiguous as to other finance-related issues, such as joint sales arrangements [FN77] and option contracts. [FN78]

Part II.B addresses the question of when a brokered licensee controls station personnel. Generally, a licensee controls station personnel if a time brokerage agreement so provides [FN79] and where the licensee has a significant role in the hiring and compensation of station personnel. [FN80] By contrast, the FCC has found generally that licensees who terminate all their employees after entering into an *16 LMA have abdicated control over station personnel. [FN81]

Part II.C confronts the question of when a brokered licensee controls station programming. At a minimum, the licensee must air announcements identifying its station, maintain its own main studio, maintain its own file for public inspection, cover local community issues or ensure that the broker does, and comply with the FCC's political programming rules or ensure the broker's compliance. [FN82] A time brokerage agreement is also more likely to obtain FCC approval if it gives the licensee the right to monitor programming [FN83] and the right to preempt programs at will. [FN84]

Finally, Part II.D covers miscellaneous station management issues that cannot easily be placed into the previously addressed categories, such as contract provisions giving the broker veto power over station sales, restricting the brokered licensee's right to terminate a time brokerage agreement, and assessing liquidated damages for breach of contract. [FN85]

A. Finances

1. Generally

A time brokerage agreement should explicitly state that a licensee is responsible for most station expenses, and the parties to the agreement should honor such provisions. [FN86] For example, in *Rosenberg*, [FN87] the Bureau upheld an LMA where [FN88] the licensee apparently "*17 ha[d] control over all [of the station's operating costs] . . . with the exception of those costs associated with program production and delivery of the programming supplied by [the broker]." [FN89] By contrast, in *In the Matter of Liability of CanXus Broadcasting Corporation* [FN90] the Bureau rejected a time brokerage agreement which "provided for a substantial assumption of financial control by [the broker] over advertising revenues, business expenses, contractual obligations, and salaries." [FN91] The Bureau did not, however, specifically explain why the agreement gave the broker "substantial" control. Thus, it is unclear how much broker control over finances is "too much."

Although the Bureau's decisions have not been particularly clear, it appears that in order to preclude FCC application of *CanXus*, the drafters of a time brokerage agreement should include both *18 general provisions that a licensee is responsible for station expenses, and more specific clauses that support those provisions.

2. Paying the Licensee's Bills

A general provision that the licensee is responsible for station expenses, although persuasive, is not dispositive if more specific provisions prove that the broker dominates station finances. For instance, in *Rosenblum*, [FN92] the parties to a time brokerage agreement requested a declaratory ruling regarding the agreement's validity. The agreement provided that the licensee would be responsible for all costs of station operation. [FN93] Nevertheless, the Bureau found that, for a wide variety of reasons, the agreement vested the broker with an inordinate amount of control over station finances. [FN94] Specifically, the Bureau pointed out that the agreement required the broker, rather than the licensee, to pay for the station's insurance, utilities, and taxes. [FN95] Although the agreement required the licensee to produce its own programming, the same agreement required the broker to provide the production facilities, air talent, and engineering personnel for such programming. [FN96] The agreement also required the broker to reimburse the licensee for charges made by such organizations as ASCAP and BMI, [FN97] and for engineering costs incurred in applying to the FCC for a construction permit modification. [FN98] The agreement further provided that the broker must construct, purchase, install, and retain ownership of new station equipment and facilities. [FN99] For example, the agreement required the broker to build a studio and studio-transmitter link for the licensee. *19 [FN100] Although the licensee was to pay the general manager's salary, the station's FCC fines, and its FCC filing fees, [FN101] these factors were outweighed by the contract provisions which gave the broker control over the station's other finances.

Rosenblum stands for the proposition that qualifying language about control will not save a time brokerage agreement where the agreement contains numerous provisions shifting financial responsibility to a broker. [FN102]

In *Rosenblum*, the Bureau found that a wide variety of contractual provisions, considered as a whole, precluded a finding that the licensee had retained control of its station. However, the Bureau did not state that any one of the provisions was specifically forbidden. In contrast, the Review Board did exactly that in *Fresno* where the licensee of a brokered station had applied, along with several competing applicants, for a new station. The *Fresno* time brokerage agreement provided that the broker would have to pay any forfeiture assessed by the FCC for violations of FCC rules arising from the broker's programming. [FN103] The Review Board described this provision as "an abdication the FCC specifically forbade in its [policy statement] . . . as plainly inconsistent with bedrock licensee accountability." [FN104] Based on the forfeiture provision, as well as the licensee's failure to retain contractual control over station personnel and to engage in any systematic oversight over programming, the Review Board deemed the licensee unqualified to own another broadcast facility. [FN105]

The Review Board's absolute prohibition on a broker's payment of forfeitures has not been explicitly adopted by the full Commission or the Bureau, and may never be. In *Fresno*, the Review Board stated that the broker's payment of FCC forfeitures was "an abdication *20 the FCC specifically forbade" [FN106] in its 1980 policy statement. In fact, the policy statement merely states that "licensees are held ultimately responsible for the behavior of their independent producers" [FN107] -- a significantly less conclusive statement. Nevertheless, a licensee would be acting imprudently if it allowed the broker to pay FCC forfeitures. [FN108]

3. Joint Sales Arrangements

In *Huberman*, [FN109] the parties to a time brokerage agreement requested the FCC to issue a

declaratory ruling approving the agreement. The agreement in question provided that the broker could sell advertising in combination for its own station and for the licensee's station. [FN110] The Bureau found that as the Commission had eliminated its prohibition on joint sales practices several years earlier, there was no reason to suspect that the joint sales arrangement would give the broker control over station operations. [FN111] In contrast, the ALJ in Carta found that a licensee's willingness to allow the broker's principals [FN112] to negotiate a joint sales effort involving the brokered station and another radio station was evidence that the licensee had allowed the broker to assume control over station operations. [FN113] However, the ALJ did not explain why such negotiations were so incriminating.

Although neither Huberman nor Carta explained the difference between a broker/licensee joint sales effort and a broker/third party/licensee joint sales effort in which the licensee takes no part in negotiations, the difference between the two situations appears obvious: in the first case, the licensee negotiates the joint sales effort *21 on its own behalf, while in the second case, the licensee allows the broker to negotiate for the licensee.

In sum, the FCC does not object to joint sales agreements negotiated between a broker and a licensee, but does object to joint sales agreements negotiated by a broker for the licensee.

Although the FCC has not explained its reasoning, the latter arrangement may not pass scrutiny because in a broker/licensee/third party situation, the licensee has essentially delegated its right to negotiate contracts to the broker.

4. Options to Purchase A Station

In Russo, the Bureau upheld a time brokerage agreement despite the fact that the broker acquired an option to purchase the station for \$14.5 million. Under the option agreement, the broker was required to exercise the option within seven months or pay an "option fee" of \$2 million.

[FN114] The Bureau explained that the potential \$2 million option fee was permissible because it did not represent a present investment of working capital in the station. [FN115]

By contrast, in Larson a broker and a licensee entered into a time brokerage agreement which was accompanied by "an 'Option Agreement' for the purchase and sale of the station for \$65,000 . . . [T]his option was assigned by [the broker to a third party] . . . which subsequently exercised it to initiate the assignment of license application later filed with the Commission." [FN116] The Bureau found that this time brokerage agreement constituted an unauthorized transfer of control, and set forth a number of "facts leading to this conclusion." [FN117] One of these facts was the option agreement mentioned above. [FN118] The Bureau, however, made no effort to explain how the option agreement evidenced the broker's control of the brokered station, nor did it make any effort to distinguish Russo regarding this issue. Because the Bureau's discussion of the*22 Larson facts was quite lengthy, [FN119] the Bureau may have intended to mention the option contract simply as background rather than as a material factor supporting its decision.

However, in Carta, an ALJ condemned an option contract far more explicitly. In the course of a decision finding that a licensee had unlawfully transferred control of its station to a broker, the ALJ stated that:

[a]nother factor of some significance is [the licensee's owner's] . . . option agreement with [the broker]. Under the agreement executed in 1985, [the broker] . . . was given the option to purchase 15% of [licensee] . . . stock at the end of any annual term of the Time Brokerage Contract. If [the broker] . . . had remained current in its payments to [the licensee] . . . it would have had the right

to buy all of [the licensee's] . . . stock in 1991. [[[The licensee's owner] is still willing to sell stock to [the broker] . . . and he expressed a desire to sell the station. In fact, [the licensee's owner] . . . and his daughter have established a trust account to satisfy the IRS that parts of the money received from [the broker] . . . were for the purchase of stock. A licensee's continued willingness to 'trade control of cash' is relevant to determining whether a transfer of control has taken place. [FN120]

Thus, FCC rulings involving option contracts have been inconsistent. In Larson, Carta, and Russo, an option agreement gave the broker an option to purchase the brokered station from the licensee. Yet the FCC disapproved of the option contract in the first two cases, but not in the third. There is no obvious factual distinction between the option contracts in the three cases; thus, the FCC's vacillation between support of, and opposition to, option contracts is extremely difficult to explain.

*23 There are at least two possible explanations of the case law. If the Larson decision mentioned the option contract as mere background information (as opposed to evidence of broker control), Russo indicates that the Bureau does not oppose option contracts, and that the Bureau simply disagrees with the Carta ALJ. By contrast, if the Bureau intended to condemn option contracts in Larson, Larson and Russo may well be irreconcilable, in which case the law is completely unclear. The Bureau may have changed its position on option contracts, or may have simply failed to notice the inconsistency between its decisions.

5. Structuring the Transaction

In Paramount Stations Group of Kerrville, Inc., [FN121] a broker originally entered into an option agreement which gave it the right to buy a television station itself. [FN122] The broker did not immediately buy the station since it owned another station in the same market (and, therefore, was barred from owning another station under FCC rules). [FN123] After learning that the FCC would not change its ownership rules in the foreseeable future, the broker solicited another broadcaster to buy the same station. [FN124] The buyer assumed the option contract, exercised its right to buy the station, and entered into a time brokerage agreement with the broker. [FN125] The licensee of a competing station challenged the transaction. [FN126] Specifically, the competitor reasoned that since the broker negotiated the option and sales contracts, solicited the buyer to assume those contracts, and unilaterally drafted the time brokerage agreement, the broker rather than the buyer controlled the station. [FN127] The Bureau, however, upheld the transaction for three reasons. First, the buyer was an experienced broadcaster. Thus, the facts did *24 not "resemble those [facts] in the line of cases where the nominal owners, neophytes in the field of broadcasting, are alleged to have yielded their de jure control to experienced broadcasters assuming purportedly passive roles." [FN128] Second, "to find that a third party's solicitation of a proposed licensee's participation in a given transaction is demonstrative of control would unduly inhibit the workings of the marketplace" [FN129] by prohibiting prospective buyers from assigning their rights to anyone outside "the limited universe of parties who themselves initiate such contacts." [FN130] Third, the broker's involvement in the station's sale was irrelevant because the buyer was free to reject the broker's proposal, and the assignee of a contract always steps into the position of the assignor. [FN131] Paramount, thus, stands for the proposition that the broker can structure the sale of a station or an accompanying time brokerage agreement by soliciting the buyer and drafting relevant

agreements, at least where the buyer is an experienced broadcaster and can freely reject the broker's terms. However, Paramount also implies that such active broker involvement may be inappropriate where the *25 buyer is a neophyte in the broadcasting industry.

B. Personnel

1. Generally

As noted above, the distribution of power over personnel matters is among "the principal indicia of control." [FN132] Applying this rule, the Bureau has upheld a time brokerage agreement where the licensee "will have broad discretion to make and effect all of the station's staffing and personnel decisions and will be responsible for the station's daily expenses." [FN133] In addition, the Bureau has upheld a time brokerage agreement which provided that "whenever on the Station's premises, all personnel shall be subject to the supervision and the direction of the [licensee's] General Manager and/or Chief Engineer." [FN134] It follows that a time brokerage agreement should provide that the licensee retains substantial power over personnel decisions to help ensure FCC approval.

2. Payroll

In *Silva*, [FN135] a broadcaster sought to assign its construction permit to its time broker, and a competitor [FN136] objected on the grounds that the broker already controlled the station. [FN137] The Bureau disagreed, since "all payments made to the employees were drawn from [the station's] account," [FN138] including those made to employees hired by the broker. However, the licensee need not pay all employment-related expenses. For example, in *Paramount* the Bureau found that the licensee had not abdicated control over station personnel even *26 though the LMA allowed the broker to pay the "costs associated with personnel used in the sale of commercial advertising time and the production of [the broker's] programming." [FN139] In sum, the broker can pay personnel expenses closely related to the broker's own programming, but should not be responsible for all payroll expenses. The FCC, therefore, appears to have drawn a common-sense line: expenses related solely to the broker's programs should be borne by the broker, just as any program producer would pay its own expenses before selling programs to a station. However, most other expenses should be paid by the licensee.

3. Hiring

The FCC has been more likely to approve time brokerage agreements where licensees, as opposed to brokers, hire or approve the hiring of major station personnel. For example, the Bureau approved a time brokerage agreement where "all employees and equipment utilized by [the broker] in its operation of [the station] were hired or acquired with [the licensee's] 'approval.'" [FN140] The Bureau approved less intrusive time brokerage agreements in the *Rosenberg* case, which held that the licensee retained control of a station because, inter alia, the three employees vital to the operation of the station "remained in [[[the licensee's] employ," [FN141] and in *Bryant*, where the Bureau found that the licensee's "station manager and chief engineer maintain[ed] control of station operations." [FN142] Similarly, in *Silva*, the Bureau found that a

licensee retained control over its station because when the broker was contacted "regarding *27 an interference complaint, it was actually [the licensee's] engineer, Roger Bennett, who resolved the problem." [FN143]

The full Commission recently held that a broker may send employees to a station in order to implement an LMA. In WGPR, Inc., [FN144] a broker sent an executive to the brokered station to "superintend [its] rights and obligations under the local marketing agreement." [FN145] The full Commission nevertheless found that the licensee controlled its own personnel since it retained all of its own employees, including key employees such as its general manager. [FN146] In contrast, the Bureau rejected a time brokerage agreement where the licensee "terminated virtually all of its staff" [FN147] after entering into a time brokerage agreement. In Carta, the licensee retained three part-time employees after entering into a time brokerage agreement, but an ALJ nevertheless found that the licensee had abdicated control because the employees were not present at the station for most of the week, and major station employees such as the general manager, sales manager, and program director were part of the broker's staff. [FN148] In sum, a licensee will probably be able to establish that it controls station personnel if it hires major station employees and approves the broker's employees, or if the licensee's employees resolve major station problems. By contrast, a time brokerage agreement is less likely to survive Commission scrutiny if the licensee terminates most of its full-time staff after entering into a time brokerage agreement.

4. Employee Sharing

The FCC has held that regardless of whether it is a party to a time brokerage agreement, a licensee must "maintain a 'meaningful management*28 and staff presence' at its main studio." [FN149] For example, in the case of Jones Eastern of the Outer Banks, Inc., [FN150] the FCC held that a licensee violated the "main studio" rule because its main studio was "staffed by only a full-time office worker who took telephone calls and . . . [a] business manager and the general manager [who] spent four and two unspecified hours per week, respectively, at the studio." [FN151] In the same case, the FCC stated that the licensee would have had a "meaningful managerial presence" [FN152] at the studio if at least one management employee had "report[ed] to work at the main studio on a daily basis." [FN153] Management employees include presidents, corporate officers, general managers, station managers, program directors, sales managers, news directors, personnel managers, facilities managers, production managers, research directors, controllers, promotion directors, and chief accountants. [FN154] A chief engineer is "managerial" if he or she has managerial duties other than serving as an engineer.

Brokered stations may have difficulty following the "meaningful managerial presence" rule because brokered licensees are frequently caught between time brokerage agreements prohibiting them from airing a significant amount of programming and FCC rules requiring them to have at least one full-time manager at the station. For example, if a licensee airs only one hour of programming per week, its needs will be minimal, and its owner may plausibly believe that hiring multiple employees would be a waste of money. [FN155]

*29 In Birdsill, a licensee tried to resolve this dilemma by sharing employees with the broker. The licensee asked the Bureau "whether a brokered licensee may share staff with a brokering licensee with which it shares a main studio." [FN156] The Bureau stated that the two licensees could share staff so long as the brokered licensee's employees were at the station during normal

business hours and continued to perform station functions during those hours. [FN157] However, the Bureau added that the licensee and the broker could not share management employees. [FN158]

For example, in WGPR a licensee made available to the broker "its employees engaged in sales, traffic and collection functions." [FN159] The full Commission nevertheless found that the licensee controlled station personnel because: (1) the employees in question were compensated by the licensee; and (2) the licensee also retained a general manager and a full-time employee to assist the general manager. [FN160] Thus, a licensee's full-time employees must be compensated by the licensee rather than by the broker.

In sum, a brokered licensee's right to share employees with a broker is not absolute. A licensee may allow its staff to perform some work on the broker's behalf. However, the licensee must retain its key management employees, and must continue to compensate *30 those employees.

C. Programming

1. Some Basic Requirements

The Bureau has repeatedly set forth the following requirements for licensees of brokered stations:

- a. The licensee must air announcements identifying the station.
- b. The licensee must maintain its own main studio.
- c. The licensee must maintain its own file for public inspection.
- d. The licensee must cover local community issues or ensure that the broker does.
- e. The licensee must continue to comply with the FCC's political programming rules, and ensure that the broker does so as well. [FN161]

The Bureau has repeatedly stated that the licensee "must" obey these requirements. [FN162] The Bureau has usually made these statements in the context in dicta within declaratory rulings, rather than in adjudications holding that the licensee violated Commission rules. For example, in Huberman the Bureau approved a time brokerage agreement, but warned the parties that "[t]he licensee must oversee, and take ultimate responsibility for, the broker's advertising and programming practices with respect to [the Commission's political programming rules]."

[FN163] Similarly, in Monahan the Bureau stated that the time brokerage agreements at issue "appear to comply with the Commission's time brokerage policy" [FN164] but "remind[ed] [the brokered licensee] that it must continue to air its own station identifications, maintain its own studio within its principal community contour, and maintain its own public inspection *31 file, including the obligation to cover local community issues." [FN165] The Bureau added that the brokered licensee must "remain responsive to the needs of its community of license" [FN166] and "oversee, and take ultimate responsibility for, the broker's advertising and programming practices with respect to [political programming]." [FN167] Thus, it appears that a licensee's main studio, community service, and political broadcasting obligations are requirements which licensees must obey, rather than mere factors which the FCC weighs in determining whether a licensee has retained control of its station.

2. General Contract Language

The FCC is more likely to approve a time brokerage agreement if it contains general language

that lays out the licensee's responsibility for programming. [FN168] However, such language is not always dispositive. In *Carta*, a time brokerage agreement provided that the licensee "reserves the right to determine, select, supervise and control program content." [FN169] However, the ALJ found that the broker "decide[d] the content, topics and scheduling of programs." [FN170] For example, one of the broker's employees "determine[d] what topics will be covered in public affairs programming." [FN171] Moreover, the licensee made little effort to monitor the broker's programming, allowed the broker to provide less than 15 minutes *32 of public affairs programming per week, [FN172] failed to monitor compliance with a wide variety of FCC regulations, [FN173] "ha[d] no idea of what is being broadcast over [the station]" [FN174] and "could care less." [FN175] Based on these factors, the ALJ found that "whereas the time brokerage contract nominally reserved in [the licensee] the right to select, direct, and control the programming of [the station], the practice made utterly hollow the contract provision." [FN176] Thus, a licensee will not prove that it controls a station merely by placing a general assurance that it controls programming in a time brokerage agreement. Instead, the licensee should actually control programming by avoiding the *Carta* licensee's missteps. For example, a careful licensee should ascertain the broker's plans regarding public affairs programming, or give the broker detailed advice about compliance with FCC regulations. [FN177] In sum, contract provisions stating that the licensee controls programming are not sufficient to establish licensee control.

3. Other Laws and FCC Regulations

A licensee's failure to comply with laws and FCC regulations other than s 310(d) [FN178] may be used to support a finding that a licensee has unlawfully transferred control of a station to its brokers. For example, in *Cosmopolitan*, the full Commission revoked a radio station's license because the licensee had relinquished all control over the station's programming to various time brokers. [FN179] The Commission explained that the licensee's failure to supervise its *33 brokers caused numerous violations of Commission rules, including, but not limited to, the promotion of a lottery, false and misleading advertisements, improper logging, failure to meet filing requirements, and inadequate record keeping. [FN180] The Commission stated that these violations were evidence of the licensee's loss of control over station operations [FN181] and were so egregious that they justified denial of the licensee's renewal application. [FN182] On the other hand, a time brokerage agreement is more likely to be approved if it explicitly provides that a licensee retains responsibility for compliance with FCC rules. [FN183] In fact, the Commission's rules require time brokerage agreements to certify that the licensee "maintains ultimate control over the station's facilities." [FN184] However, such qualifying language is not dispositive, and the FCC will look behind the terminology of a time brokerage agreement to see if the broker has in fact taken control of a station. [FN185]

4. Preemption

Numerous cases have upheld time brokerage agreements because, among other factors, the licensee reserved the right to preempt programs at will. For example, in *Piney Creek* a time brokerage agreement provided that the licensee could delete or preempt a broker's programs: "(1) to ensure the transmission of [the licensee's] public service programming; (2) when [the licensee] believes the brokered programming to be contrary to the local interest; [and] (3) to substitute

programming which, in [the licensee's] opinion is of greater local or national importance." [FN186] The Bureau did not discuss the preemption agreement in detail or explain whether this provision *34 was ideal. However, the Bureau did list the preemption agreement as one of several factors supporting its conclusion that the agreement "does not raise concerns about [the licensee's] management of [the station]." [FN187] Although the Bureau did not fully explain the basis for its ruling in Piney Creek, that case indicates that a licensee is more likely to be found to control station programming if it can preempt the brokers' programs based on vague concepts such as "greater local or national importance" or "local interest".

Similarly, in Rosenberg, the brokered licensee asserted that a time brokerage agreement did not violate s 310(d) because "it retain[ed] the right to refuse or preempt programs as it s[aw] fit."

[FN188] After citing this argument and several others raised by the licensee, the Bureau stated without elaboration that "no substantial and material question of fact has been presented that Capitol, the licensee, has not retained ultimate control over the operation of [[its stations]."

[FN189] Both Rosenberg and Piney Creek appear to stand for the proposition that a licensee is more likely to obtain FCC approval of a time brokerage agreement if the agreement gives the licensee absolute power to preempt the broker's programming.

The FCC has also approved licensee preemption of brokers' advertisements. In one case, the Bureau approved a time brokerage agreement because, inter alia, it gave the licensee the power to reject advertisements. [FN190] In another case, the Bureau held that a licensee "*35 exercised adequate controls on the brokers. Thus, it . . . limited the amount of advertising that could be broadcast." [FN191] It therefore appears that to increase the likelihood of Commission approval, a time brokerage agreement should give the licensee as much discretion as possible to preempt or limit a broker's programming and advertising.

Even where preemption provisions in agreements approved by the FCC have appeared to limit the licensee's preemption rights, they have been so broadly drawn (e.g. by allowing licensees to preempt programs of "less importance" than other programs) as to give the licensee nearly absolute discretion to preempt. [FN192] Thus, drafters of time brokerage agreements would be well-advised to give licensees absolute preemption powers. Such provisions are supported not only by FCC case law but by common sense: if a licensee cannot preempt the broker's programs, it can hardly be said to control station programming. [FN193]

5. Program Review and Monitoring

In order to decide which programs to preempt, a licensee may wish to make some effort to review programs before they are aired. For example, in Bryant the Bureau approved a time brokerage agreement in part because the licensee reviewed all programs in advance. [FN194] Similarly, in Paramount the Bureau favorably cited an LMA provision stating that the broker "is obligated under the agreement to give [the licensee] at least 24 hours notice of substantial and material changes in programming." [FN195]

At a minimum, the licensee should make some effort to monitor programs*36 after they are broadcast, lest it suffer the fate of the Carta licensee. In Carta an ALJ found that a licensee had transferred control of its station to a time broker where the licensee had "no idea" [FN196] what was broadcast over the station and "could care less." [FN197] The ALJ admitted that the time brokerage agreement gave the licensee the right to control program content, but found that this right was not dispositive where the licensee had never exercised it. [FN198] Consequently, a

provision in a time brokerage agreement providing that the licensee will supervise station content is no substitute for actual monitoring of station content.

6. 24 Hour Brokerage

Some time brokerage agreements allow brokers to program all of a station's programming, thus eliminating a licensee's opportunity to air its own programs. [FN199] Based on Rosenberg and American Music Radio, it could be argued that the FCC disfavors such agreements. In Rosenberg, the Bureau approved a time brokerage agreement because, among other factors, the licensee "reserve[d] six hours of programming for itself." [FN200] Correspondingly, in American Music Radio, [FN201] the full Commission noted that "[f]urther supporting the conclusion that the licensee retained control over programming in this case was the fact that under the agreement, [the licensee] had reserved to itself one hour of programming each Sunday morning." [FN202] These determinations appear to indicate, at first glance, that the FCC condemns 24-hour time brokerage agreements. However, this is not the whole story.

The FCC's 1980 Policy Statement states that "the amount of time*37 brokerage is not really the issue. Instead it is the degree to which the licensee abdicated its responsibilities to the time brokers." [FN203] In Huberman, the Bureau approved a 24-hour time brokerage agreement and stated that "in removing time brokering agreements from the purview of the cross-interest policy, the Commission [did not] set limits on the amount of time a brokered station could sell . . . a station that airs brokered programming 24 hours per day, as proposed in this agreement, must nevertheless remain responsive to the needs of its community of license." [FN204] Thus, both the full Commission and the Bureau have suggested that 24-hour agreements are permissible if other FCC requirements are met.

The FCC's two lines of cases can almost certainly be reconciled. Both cases allowing 24-hour brokerage and those endorsing less extensive [FN205] brokerage are consistent with the propositions that less extensive agreements are preferable, but 24-hour time brokerage agreements are acceptable if the licensee has otherwise maintained control of a station. [FN206] Nevertheless, the FCC could serve broadcasters' needs by clarifying this issue.

7. Licensees, Brokers and Networks

Three cases have addressed the proper scope of the relationships between licensees, brokers and broadcast networks. The recent WGPR case involved a licensee and a time broker who happened to be a national television network (CBS). In WGPR, CBS entered into a time brokerage agreement with a local television station, the brokered station's licensee then applied to sell the station to CBS, and a local group objected on the ground that the licensee *38 had already transferred control of station programming to CBS. [FN207] The application's opponent reasoned that CBS controlled station programming because the station canceled numerous local programs and substituted CBS programs, and the licensee's letters to local program producers stated, among other things, that CBS rather than the licensee might cancel local programs. [FN208] The full Commission nevertheless found that the evidence "merely demonstrate [[d] threshold programming decisions rendered by CBS in programming the station, clearly the proper domain of the broker in a local marketing arrangement." [FN209] In support of this conclusion, the Commission noted that the letters in question were signed by the licensee's own employees and

instructed the programmers to contact the licensee's employees about technical problems. [FN210] Thus, the letters "appear to represent [the licensee's] ratification of CBS's programming plans, as well as to evidence [its] intention to retain the long-time station program director in a supervisory capacity." [FN211]

In WGPR, the Commission implied that the network/affiliate relationship between a broker and a licensee alone does not constitute an unauthorized transfer of control. However, the Commission's emphasis on the details of the letters suggests that WGPR might have been decided differently if the licensee had terminated its program director or allowed the network to directly contact programmers.

Although the licensee can enter into an LMA with a network, it cannot allow a non-network to take over all dealings between a brokered station and a network. For example, in Larson, the Bureau found that a station had violated s 310(d) where (among other relevant factors) the licensee had virtually no dealings with thenational *39 radio network that produced programs used by the station. [FN212] Similarly, in Carta an ALJ found that a licensee abdicated control of its station by allowing the broker to enter into network affiliation agreements that listed the broker as the brokered station's licensee. [FN213]

In sum, a licensee can enter into a time brokerage agreement with a national network, but the licensee/network relationship will be governed by the same restrictions applicable to other time brokerage agreements. Moreover, a network affiliate which has entered into a time brokerage agreement should continue to have some relationship with the network.

D. Other Station Management Issues

As noted above, [FN214] the FCC has held that a time brokerage agreement is not an unlawful abdication of control unless "the brokered station had or would abdicate ultimate control in the areas of finances, personnel matters, and programming." [FN215] However, the FCC's time brokerage cases have addressed a wide variety of issues which do not fit comfortably into any of these categories.

1. Restraints on Alienation

In Piney Creek, the Bureau generally approved of an assignment application which contained a time brokerage agreement, but conditioned its approval of the application on the deletion of a sentence within the agreement which stated:

Specifically, the Agreement shall not terminate upon the sale of the Station to a successor licensee or upon a transfer of control of Licensee, but shall be assigned to or assumed by any subsequent owner of the Station, subject to prior consent of Broker. [FN216]

The Bureau explained that under that sentence, the station could only be sold to buyers who were willing to assume the time brokerage *40 agreement. [FN217] The Bureau found that such provisions impeded the right of the licensee to sell its station, and thereby transferred control of the station. [FN218] By conditioning the grant of an otherwise innocuous application on the deletion of the time brokerage agreement's restraints on alienation, Piney Creek arguably prohibits contract terms which require future licensees to assume a time brokerage agreement and that make such an assumption subject to the broker's consent. However, conversations with private attorneys who have spoken with Bureau staff suggest that it is not entirely clear whether

the Bureau is internally divided over Piney Creek, [FN219] or whether the FCC will follow Piney Creek in future cases. [FN220] If the Bureau is internally divided over Piney Creek, future FCC decisions may overrule Piney Creek or interpret it narrowly.

2. Termination Provisions

FCC case law is equivocal regarding provisions in time brokerage agreements which restrict the licensee's right to terminate such agreements. On the one hand, in *Rosenblum*, the Bureau rejected a time brokerage agreement which allowed the broker to terminate the agreement, but which gave the licensee no reciprocal right. [FN221] The Bureau stated that the licensee "must be able to determine, in its sole discretion, whether at any point in the life of the agreement, the programming [the broker] provides no longer serves the public interest." [FN222] Similarly, in *Larson* the Bureau found that a broker controlled the brokered station where an LMA provided that the licensee could not terminate the agreement without repurchasing station assets from the broker. [FN223]

*41 Thus, *Rosenblum* and *Larson* imply that the licensee must be allowed to terminate a time brokerage agreement at will because control of programming necessarily requires that the licensee should be able to decide when to stop airing a broker's programs. [FN224]

However, a recent FCC decision has muddled the law regarding termination clauses in time brokerage agreements. In *American Music Radio*, an LMA contained two restrictions on the licensee's right to terminate the agreement. First, the LMA provided that each party to the agreement had to give the other party 90 days' notice before terminating the agreement. [FN225] The FCC found that this provision did not invalidate the LMA because the agreement gave the licensee "the right, which shall not be unreasonably invoked, to terminate this Agreement at any time for reasons of compelling public interest" [FN226] and it "contain[ed] an exception to the requirement to give such prior notice if such provision were otherwise contrary to law." [FN227] The Commission's decision did not explain, however, when a termination restriction would be "otherwise contrary to law," nor did it explain when the right to terminate would be "unreasonably invoked."

The *American Music Radio* agreement's second restriction on termination was a requirement that "if the termination is contested, any dispute is to be resolved by arbitration." [FN228] The FCC explained that such a requirement was "designed merely to ensure the reasonableness, and thus, the good faith, of any decision by the licensee to terminate the time brokerage agreement on public interest grounds." [FN229] The FCC did not explain when a termination decision would be "reasonable." Because of the vague language of the agreement at issue, the *American Music Radio* decision is a recipe for continued confusion.

*42 The FCC has also stated that a time brokerage agreement might be unreasonable if "a licensee agrees to an excessive liquidated damages clause." [FN230] However, the Bureau has construed "excessiveness" narrowly. In *Paramount*, a time brokerage agreement provided that "the party terminating the agreement must . . . pay the other party one million dollars." [FN231] The Bureau nevertheless upheld the agreement for two reasons. First, \$1 million was only "three percent of the purchase price of the station." [FN232] Second, the damages were not due until six months after termination. [FN233] It therefore appears that the excessiveness of a clause depends on the size of the transaction and the timing of the payment of the damages.

In sum, it appears that a time brokerage agreement should give a licensee the right to terminate

the agreement at will, but may contain some type of liquidated damages clause. The Commission has not yet explained when a liquidated damages provision is so "excessive" as to invalidate a time brokerage agreement.

3. Term Length

The FCC has repeatedly stated that "unreasonably long terms in [time brokerage] agreements may call into question a licensee's control of its station." [FN234] The only case directly applying this rule, *Paramount*, upheld a time brokerage agreement because "the original provision setting a term of five years and two additional five-year renewals . . . [was] reformed by the parties to the agreement in accordance with a ten-year limitation we require of all television brokerage arrangements." [FN235] But in *Rosenblum*, the FCC rejected a time brokerage agreement which included a 40-year equipment lease with a broker because such a provision, "as opposed to an arrangement with a disinterested party, suggests that [the licensee] would play, at most, a minor role in the construction of its own station." *43 [FN236] Thus, the FCC has set a 10-year time limit for television time brokerage agreements, but has not adopted a "bright line" approach in cases involving radio stations. Because the *Paramount* decision did not explain the basis for the 10-year time limit, it is unclear why the FCC has created a "bright line" rule for television LMAs, but not for radio LMAs.

4. FCC Forms

The ALJ in *Carta* noted that the broker's "general manager filed an annual employment report with the Commission listing both [broker and licensee] employees. [The licensee] on the other hand, did not file an ownership report or an employment report for 1987." [FN237] Although this factor alone was not outcome-determinative, the ALJ cited it as evidence that the broker "has acted as if it is in full control of [the brokered station]." [FN238] By contrast, in *Paramount* the Bureau approved a time brokerage agreement where the would-be licensee's FCC forms were prepared and prosecuted by its own attorney. [FN239] It can be inferred that the Bureau is more likely to approve a time brokerage agreement where the licensee (or its own attorney) prepares the brokered station's FCC forms, and less likely to approve such an agreement if the broker or its employees files FCC reports on the brokered station's behalf.

5. Some Irrelevant Factors

In addition to using various factors to support its acceptance or rejection of time brokerage agreements, the FCC has also occasionally stated that certain factors are irrelevant to whether a broker controlled a station. [FN240] For example, in *Piney Creek*, the Bureau stated that a prior attempt by the broker's owner to enter into a time *44 brokerage agreement with the licensee was "irrelevant to the consideration of this application." [FN241] Similarly, in *Paramount*, the Bureau held that the buyer's submission of a draft time brokerage agreement to FCC staff was merely "an attempt to prepare an agreement in compliance with Commission rules and policies, and not an attempt to insert provisions advantageous to itself." [FN242] Thus, the "Buyer's lack of participation at that stage is not evidence of [the broker's] control over Buyer." [FN243] In sum, the FCC will not rely upon the broker's past attempts to enter into time brokerage

agreements or the buyer's submission of draft agreements to the FCC staff in determining whether a broker controls a brokered station.

E. Television and Time Brokerage

On June 1, 1995, the Bureau issued a "Public Notice" which imposed special restrictions on applications proposing that television stations be operated under time brokerage agreements. The Public Notice provided that the Bureau would decline to process such applications if:

1. The broker proposed to finance the acquisition of the station by the licensee, either in whole or in part, and to hold an option to purchase the station in the future. Thus, broker financing alone is not dispositive. [FN244]
2. The broker proposed financing station acquisition, but not to hold an option, and the loan was dependent on the time brokerage agreement. "In other words, a default or termination of the [agreement] cannot trigger acceleration of repayment of the loan. Additionally, the broker may not attempt to acquire control of the station *45 through the loan agreement." [FN245]
3. The broker held an option, but no loan, and the option term was not "of an appropriate duration" [FN246] or the option agreement involved "upfront payments of all, or substantially all, of the station's value." [FN247]

It is unclear whether the Bureau will apply these guidelines in contexts outside the processing of applications, for example when renewing licenses. Nevertheless, the "Public Notice" makes it clear that the Bureau will scrutinize television time brokerage agreements closely if the broker has an option to purchase the brokered station or if the broker finances the licensee's acquisition of the brokered station. Such agreements are clearly inadvisable if they run afoul of the restrictions set forth in the "Public Notice."

III. The Case for Rulemaking

To this point, the FCC has addressed the question of when a broker controls a brokered station on a case-by-case basis, rather than enacting general rules governing the issue. However, the FCC's policy of case-by-case adjudication currently inconveniences attorneys and broadcasters. Consequently, the enactment of a rule governing time brokerage would improve upon the status quo as the arguments supporting case-by-case adjudication are no longer persuasive.

A. The Case Against the Status Quo

In its time brokerage cases, the FCC has addressed a wide variety of issues. However, its decisions have left attorneys and broadcasters with little guidance, for three reasons.

First, the FCC's decisions have occasionally been inconsistent. For example, the Bureau appeared to endorse LMA provisions giving *46 the broker an option to buy the brokered station in Russo, [FN248] but appeared to oppose such provisions in Larson. [FN249] Similarly, in Rosenberg the Bureau approved a time brokerage agreement because the licensee reserved programming time for itself, [FN250] even though the full Commission had stated earlier that "the amount of time brokerage is not really the issue." [FN251]

Second, even uncontradicted Bureau decisions may not be good law. For instance, in Rosenblum the Bureau held that time brokerage agreements should allow licensees to terminate such

agreements at will, and rejected an agreement which limited a licensee's termination rights. [FN252] However, it appears that the Bureau has recently advised attorneys that it may allow brokers to partially restrict licensees' termination rights. [FN253] So long as the Commission fails to issue general rules, even attorneys who diligently seek to comply with the Bureau's past rulings may be surprised by its future rulings.

Third, even where the Bureau's past rulings are unchallenged, such rulings provide inadequate guidance. Frequently, Bureau decisions regarding time brokerage cite a large number of factors, without indicating which factors are the most important. For example, in *Larson*, where the broker had unlawfully delegated control, [FN254] the Bureau stated that "[t]he facts leading to this conclusion are as follows" [FN255] and listed a dozen relevant factors without explaining their importance. [FN256] Admittedly, the Bureau did make some *47 effort to organize its decision by dividing its discussion into four paragraphs: (1) a paragraph describing the agreement, which noted that under the agreement, the broker selected almost all of the station's programming, sold all the station's commercial time, bought the station's equipment from the licensee and then leased it back to the licensee for a nominal amount, could terminate the agreement more easily than could the licensee, [FN257] paid the licensee a monthly brokerage fee, and had an option to buy the station; [FN258] (2) a paragraph concerning programming, which pointed out that the broker rather than the licensee made payments to a nationwide radio network and the broker's employees dealt with the network; (3) a paragraph regarding personnel which noted, among other things, that after the agreement was executed all four of the licensee's employees were placed on the broker's payroll, three were later terminated, and the fourth was only a part-time employee; [FN259] and (4) a paragraph discussing finances which pointed out that after the agreement was executed all of the station's operation expenses were paid by the broker. [FN260]

No attorney or broadcaster who reviewed *Larson* could guess with certainty which of these factors were important, which were of minor significance, and which were merely part of the factual context of the Bureau's decision. Thus, *Larson* is hopelessly confusing. [FN261]

*48 In sum, attorneys and broadcasters need guidance from the FCC in order to draft time brokerage agreements which do not violate s 310(d). To date, the FCC has not provided such guidance; even when the FCC's decisions are wholly consistent, they are often too poorly drafted to be reliable precedent.

B. The Advantages of Rulemaking

The FCC has an alternative to continued chaos: rulemaking. The Administrative Procedure Act defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." [FN262] Administrative agencies nearly always use rules to announce principles of general applicability. [FN263] Under the Administrative Procedure Act, an agency can promulgate new rules only after it has given the public notice of the proposed rule, and has provided the public with the opportunity to submit comments about the proposal. [FN264]

The FCC could dispel public confusion about time brokerage by issuing a rule setting forth the factors which it would scrutinize most closely in determining whether a time brokerage agreement unlawfully transferred control of a station to a broker. Such a rule need not set forth

all relevant factors. Instead, the FCC could set forth a nonexclusive list of factors which it deems to be especially relevant to the question of control. The promulgation of a time brokerage rule would have five advantages over continued FCC reliance on case-by-case adjudication.

First, and most importantly, a time brokerage rule would be fairer than adjudication because it would provide parties with advance *49 notice as to what conduct would be permissible.

[FN265] The FCC's adjudicative decisions are often so narrowly written that attorneys cannot tell which factors automatically invalidate a time brokerage agreement and which are of marginal relevance. For example, in *Larson* the Bureau listed a dozen factors to be among the facts "leading to [its] conclusion," [FN266] without clearly stating which factors were significant and which were.

Second, rulemaking proceedings are fairer and usually yield higher quality decisions than adjudication. [FN267] When an agency requests public comment on a proposed rule, it may receive comments from dozens of sources. [FN268] For example, in 1992 the FCC issued a Notice of Proposed Rulemaking [FN269] regarding its television broadcasting regulations. In response to this Notice, the FCC received 34 sets of comments and 17 sets of reply comments. [FN270] The comments addressed a wide variety of issues. Some commentators addressed the issue of whether the FCC should limit the number of stations one licensee can own throughout the nation, others addressed the issue of whether licensees should be able to own two television stations in the same city, while others addressed the question of whether time brokerage agreements should be treated differently in the television and radio industries. [FN271] After receiving these comments, the FCC decided to issue a Further Notice of Proposed Rulemaking so that commenters could reconsider their positions *50 and persons who did not comment in the first proceeding could take positions in view of the growth of video technology and the FCC's reregulation of cable television. [FN272] By contrast, when an agency announces a "rule" in the process of deciding a specific dispute, it has before it only the evidence that a small number of parties are willing or able to provide. [FN273]

Third, because a rulemaking proceeding addresses future fact patterns as well as existing contracts, commenters will have an incentive to discuss the possible impact of alternative rules on a wide variety of possible circumstances. [FN274] By contrast, comments in adjudicative proceedings tend to focus on the effect of a decision on the parties themselves. [FN275]

Fourth, a rulemaking proceeding might eliminate the need to relitigate recurring issues, [FN276] thereby saving time for attorneys, broadcasters and the Commission. Under the current policy of case-by-case adjudication, the Commission frequently has been forced to address the same issue in a wide variety of contexts. For example, in *Russo*, the Bureau upheld a time brokerage agreement notwithstanding an option for the broker to purchase the station for \$2 million because the option fee did not represent a present investment of working capital in the brokered station. [FN277] By contrast, in *Carta* an ALJ characterized an option agreement between the licensee and the broker as a "factor of some significance" [FN278] which supported his finding that a brokered licensee had transferred control of its station to a broker. Thus, Commission case law on this issue may be internally inconsistent. If the Commission began a rulemaking proceeding, it might be forced to clarify its views on heavily litigated issues such as the appropriate treatment of option contracts and 24-hour time brokerage. [FN279]

*51 Fifth, a rulemaking proceeding is especially appropriate where, as in the time brokerage context, most agency decisions are made by subordinate bodies such as the Bureau. This is so because even if Bureau case law were clear, attorneys would still be uncertain about the ultimate

precedential force of the law because the Bureau's decisions can be overruled by the Commission. Similarly, decisions by the Bureau's branches and divisions, even if otherwise clear, also can be overruled by the Bureau. In contrast a rule, by definition, is issued by the full Commission and cannot be altered without public notice.

An FCC rulemaking proceeding would make time brokerage law more predictable, would yield more intelligent results than adjudication due to the increased quantity and quality of industry input, might eliminate and clarify apparent inconsistencies within FCC case law, and would establish the views of the full FCC as opposed to those of the Bureau or of one of the Bureau's branches.

C. The (Former) Advantages of the Status Quo

In 1992, the FCC decided to address time brokerage on a case-by-case basis rather than by promulgating time brokerage rules. When the FCC made this decision, [FN280] a rulemaking proceeding would have been inappropriate because the FCC did not have enough experience with time brokerage to create a broadly applicable rule. However, this argument is no longer tenable for two reasons. First, the various bureaus, divisions, and branches of the FCC have addressed over a dozen time brokerage cases in the last five years. [FN281] As a result, the FCC now has enough experience with time brokerage to draw some preliminary conclusions. Second, the FCC has evaluated so many time brokerage agreements that inconsistencies have developed in the case law.

In response to the contentions above, it can be argued that broadcasters who desire legal advice can always ask for a declaratory ruling. However, the process of obtaining a formal written opinion is significantly more time consuming than reading a Commission *52 rule. [FN282] Furthermore, the FCC has the discretion to decline to issue a declaratory ruling. [FN283]

At a minimum, the FCC's rulemaking proceeding should address the issues discussed above, and should explicitly overrule any Bureau or Review Board decisions inconsistent with the FCC's views. The content of any possible rule is less important than its clarity. Attorneys must be able to predict the validity of a time brokerage agreement in order to draft valid agreements and give their clients valid advice about such agreements. For the same reason, broadcasters who hope to enter into such agreements need clearer rules. Additionally, broadcasters that are already parties to time brokerage agreements need to know how to implement such agreements without unwittingly transferring control of stations to brokers.

D. Another Alternative to Adjudication

Even if rulemaking is preferable to adjudication, it will not eliminate all complexities in time brokerage law, for two reasons. First, any rule, like any statute, will itself contain ambiguities, because no rule-drafter can foresee all possible issues that might arise under the rule. [FN284] Second, rulemaking is arguably slower than adjudication, because federal agencies may not enact rules without giving the public notice and an opportunity to comment. [FN285]

The FCC could try to avoid these problems by promulgating a policy*53 statement. [FN286] Policy statements differ from rules in two ways: First, the Administrative Procedure Act specifically exempts policy statements from the "notice and comment" requirement. [FN287] Second, policy statements, unlike rules, are not judicially enforceable. [FN288] It could be

argued that a policy statement would be more efficient than a full-fledged rule, because the absence of a "notice and comment" requirement would allow the FCC to enact a policy statement quickly.

These advantages of policy statements are outweighed by two disadvantages. First, a rule may be less ambiguous than a policy statement, because public comments may force the FCC to reconsider and clarify its position. [FN289] Second, a policy statement may provide less guidance to broadcasters and lawyers than a rule precisely because it is not legally binding, and therefore might be ignored by the FCC. [FN290]

Thus, an FCC policy statement on time brokerage would probably be issued more quickly than an FCC rule, but would probably be even more ambiguous because of the absence of public comment and the nonbinding nature of policy statements.

Conclusion: Final Suggestions for Broadcasters and for the FCC

The FCC's time brokerage decisions guide licensees by explicitly stating what licensees must or must not do, and mentioning a particular^{*54} practice, or its absence, as one of numerous factors supporting a decision that an LMA either does or does not violate s 310(d).

The FCC has mandated that a licensee may delegate day-to-day operations to a broker, but that it must set policies guiding operations in three areas: station finances, personnel matters, and programming. [FN291] Indeed, some time brokerage agreements must explicitly certify that the licensee controls decision making in these areas. [FN292]

The FCC has been reluctant to mandate any specific contractual terms regarding finances. However, a time brokerage agreement will usually be approved if the licensee is responsible for most station expenses, and will usually be rejected if the broker is responsible for most station expenses. [FN293] A licensee may also negotiate joint sales efforts with the broker, [FN294] but should not allow the broker to negotiate such an arrangement with a third party on the licensee's behalf. [FN295] A broker may structure the brokered licensee's purchase of a station, at least under certain circumstances. [FN296]

A licensee must follow one personnel-related rule -- the Commission's "main studio" rule. [FN297] This rule, as interpreted by the Commission, requires the licensee to maintain its own main studio, and to retain at least one full-time management employee and one full-time staff employee at the station during normal business hours. ^{*55} [FN298] A brokered licensee may run afoul of this rule if it allows its studio to be staffed solely by the broker's employees, but may share staff with the broker as long as the licensee's own employees perform station functions during normal business hours. [FN299] The Commission has also suggested that time brokerage agreements are more likely to win Commission approval if the licensee pays most payroll-related expenses, [FN300] or hires or approves the hiring of station employees. [FN301] By contrast, a time brokerage agreement will rarely meet with Commission approval if the broker discharges most of the licensee's employees or switches them onto the broker's own payroll. [FN302]

The Commission has been far more willing to set forth specific requirements regarding broker control of licensee programming than to create specific rules regarding personnel and finances. For example, the Commission has stated explicitly that a brokered licensee must air announcements identifying the brokered station, maintain its own file for public inspection, ensure that local community issues are covered, and ensure that the station complies with FCC political programming rules. [FN303] In addition, the FCC is more likely to approve a time brokerage agreement if the agreement gives licensees broad preemption rights [FN304] and imposes responsibility for compliance with FCC rules upon the licensee, [FN305] or if ^{*56} the

licensee monitors the broker's programming [FN306] and station/network relations. [FN307] In addition, the FCC has addressed a variety of issues that are not related to station finances, personnel and programming, but that are nevertheless relevant to the question of whether a licensee has abdicated control over a station to a broker. [FN308]

However, the FCC has not explained how it balances these factors, nor has it made any systematic effort to explain which factors are especially important. As a result, licensees, brokers, and attorneys cannot accurately predict which provisions belong in an LMA and which can be safely scuttled.

The FCC has created additional confusion by sending conflicting signals on a number of issues, including:

1. whether a licensee must always pay FCC fines arising out of a broker's violation of FCC rules; [FN309]

2. whether the FCC is more likely to reject an LMA if the broker has an option to purchase the brokered station; [FN310]

3. whether the FCC is more likely to reject an LMA if the broker provides all of the brokered station's programming; [FN311]

*57 4. whether an LMA can provide that the licensee may only sell the brokered station to buyers who are willing to assume the agreement; [FN312] and

5. when an LMA can restrict the licensee's right to terminate the agreement. [FN313]

Because the law contains numerous ambiguities, the FCC should begin a rulemaking proceeding to outline which factors it will consider in determining whether a licensee controls a brokered station. Further, the rulemaking proceeding should illuminate which of those factors are significant. Admittedly, the relationship between a licensee and its broker involves so many variables that no rule could possibly cover all possible cases, but a new FCC rule could at least dispel some of the confusion.

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[FN1]. Time brokerage agreements are also known as, inter alia, "local marketing agreements," ("LMAs"), and "time brokerage arrangements." See, e.g., Petition for Issuance of Interpretive Ruling Concerning FCC Form 395- B, Broadcast Annual Employment Report, 9 F.C.C.R. 2535, 2535 & n.1 (1994); Letter from Barbara A. Kreisman, Chief, Video Services Division, to Paramount Stations Group of Kerrville, Inc. & KRRT, Inc., No. 1800E1-AL, slip op. at 9 (M. Med. Bur. June 6, 1995). Throughout this Article, the terms "time brokerage agreement" and "LMA" will be used interchangeably, as the two terms seem to be the most frequently used in common discourse.

[FN2]. See 47 U.S.C. s 153(c) (1988 & Supp. V 1993) (defining "licensee" as "the holder of a ... station license granted or continued in force under authority of this chapter."); William B. Ray, FCC: The Ups and Downs of Radio-TV Regulation xvii (1st ed. 1990) ("[e]veryone who transmits any sound or image by radio or television must first obtain a license from the FCC").

[FN3]. 47 C.F.R. s 73.3555(a)(3)(iv)(1994).

[FN4]. Before the 1980s, time brokerage "involved a limited amount of a licensee's broadcast week, often split among several different brokers." Stephen F. Sewell, *The Federal Communications Commission and Time Brokerage: A Regulatory Change of Course*, 3 *CommLaw Conspectus* 89, 98 (1995). In fact, until 1989 a broker could not, under FCC policy, be the licensee of another station in the same market as the brokered station. *Id.* at 93-94 (citing *In re Reexamination of the Commission's Cross-Interest Policy*, 4 F.C.C.R. 2208 (1989)). By contrast, today's time brokers usually supply programs to a station for most of a broadcast week, and are frequently contemplating a purchase of the brokered station. *Id.* at 97-98 (survey of time brokerage contracts recently filed with FCC shows that broker usually provides programming for majority of broadcast day); *id.* at 97 (in 13 of 20 randomly surveyed brokerage contracts, broker either planned to buy brokered station, had option to purchase brokered station, or had right of first refusal).

[FN5]. See David M. Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 *CommLaw Conspectus* 21, 23 (1994) (using terms "brokered station" and "brokering station").

[FN6]. See Julie A. Zier, *FCC Says Radio LMAs, Duopolies On The Rise*, *Broadcasting & Cable*, Oct. 24, 1994, at 15, 15 (noting that the majority of LMAs are part of broader station purchase agreements).

[FN7]. See Hunsaker, *supra* note 5, at 23-25 (pointing out efficiencies caused by time brokerage, such as reduced expenses due to joint operation); Steve McClellan, *Making Most of Duopolies*, *Broadcasting & Cable*, Apr. 17, 1995 at 50, 51 (discussing an LMA which allowed station to combine two stations' 10- member sales teams into one 14-member team that sold advertising for both stations); Steve McClellan & Dave Tobenkin, *Broadcasters Battle Over LMAs*, *Broadcasting & Cable*, Feb. 6, 1995, at 8, 8 (describing how one television station increased ratings because of "on-air promotion blitz" from competitor which was brokering station).

[FN8]. Steve McClellan, *As LMAs Grow, So Do Concerns*, *Broadcasting & Cable*, June 5, 1995, at 8, 8.

[FN9]. Zier, *supra* note 6, at 15.

[FN10]. 47 U.S.C. s 310(d) (1988 & Supp. V 1993). In this Article, the term "FCC" or "Commission" generally refers to the Commission as a whole (including its bureaus, the Review Board, and administrative law judges) while the term "full Commission" refers only to the Commission itself.

[FN11]. *Id.*

[FN12]. See, e.g., *In re American Music Radio*, No. BALCT-930210ED, 1995 FCC LEXIS 5460 (July 31, 1995); *In re WGPR, Inc.*, 10 F.C.C.R. 8140 (F.C.C. 1995) (discussing validity of LMA

in particular detail); Paramount, No. 1800E1-AL, slip op.; Letter from Barbara A. Kreisman, Chief, Video Services Division, to Piney Creek Broadcasting Corp. & Lewis Broadcasting Corp., No. BALCT-940429KE, slip op. at 4 (M. Med. Bur. Feb. 7, 1995); Letter from Larry D. Eads, Chief, Audio Services Div., to William L. Silva, Esq., 9 F.C.C.R. 6155 (M. Med. Bur. 1994) (discussing control issue in two paragraphs); Letter from Larry D. Eads, Chief, Audio Services Div., to Marvin Rosenberg, Esq., 8 F.C.C.R. 5568 (M. Med. Bur. 1993); In re Bryant Communications, Inc., 6 F.C.C.R. 6121 (M. Med. Bur. 1991); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Gisela Huberman, Esq., 6 F.C.C.R. 5397 (M. Med. Bur. 1991); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Brian M. Madden, Esq., 6 F.C.C.R. 1871 (M. Med. Bur. 1991); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Peter D. O'Connell, Esq., 6 F.C.C.R. 1869 (M. Med. Bur. 1991); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to J. Dominic Monahan, Esq., 6 F.C.C.R. 1867 (1991); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Roy R. Russo, Esq., 5 F.C.C.R. 7586 (M. Med. Bur. 1990); Letter from Edythe Wise, Chief, Complaints & Investigations Branch, Enforcement Div., to Joseph A. Belisle, Esq., 5 F.C.C.R. 7585 (M. Med. Bur. 1990); In re Broadcast Communications, Inc., 93 F.C.C.2d 1162 (Rev. Bd. 1983) (unusually brief discussion), *aff'd* in relevant part, 97 F.C.C.2d 61 (1984), *aff'd*, 759 F.2d 959 (D.C. Cir.), cert. denied, 474 U.S. 946 (1985); see also Letter from Edythe Wise, Chief, Complaints & Investigations Branch, Enforcement Div., to Michael R. Birdsill, 7 F.C.C.R. 7891 (1992) (discussing related issue of whether staff sharing between brokered and brokering stations violated FCC's "main studio rule," which, among other things, requires both stations to have full-time management employee).

[FN13]. See, e.g., Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Bruce E. Rosenblum, Esq., No. 8210-AJZ, slip op. at 2 (M. Med. Bur. 1995); see also Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Robert W. Larson, FM Broadcasters of Douglas County, 10 F.C.C.R. 8254 (M. Med. Bur. 1995) (fining licensee where FCC's Mass Media Bureau found unauthorized transfer of control); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Patrick Markham, President, Brooke Communications, Inc., 10 F.C.C.R. 8249 (M. Med. Bur. 1995) (fining broker in Larson); In re CanXus Broadcasting Corp., 8 F.C.C.R. 4323 (M. Med. Bur. 1993) (rejecting time brokerage agreement); In re Fresno FM Ltd. Partnership, 6 F.C.C.R. 1570 (Rev. Bd. 1991) *aff'g* In re Carta Corp., 4 F.C.C.R. 7973 (ALJ 1989) (disqualifying broadcaster who was party to time brokerage agreement).

Also worth noting are several cases in which a licensee's transfer of control to a programmer was so egregious that the FCC (and in some cases, the parties themselves) described the arrangement as a "lease" rather than a "time brokerage agreement." See Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Weston Properties XVIII Ltd. Partnership, 8 F.C.C.R. 1783, 1785 (1993) (describing "Management Agreement" as invalid "lease" where manager "collected all the revenues, paid all the expenses, selected all the programming, and hired the employees, if any"); In re Benito Rish, 7 F.C.C.R. 6036 (1992), *aff'd* with reduced fine, 10 F.C.C.R. 2861 (F.C.C. 1995) (agreement violated s 310(d) where parties termed it a "lease," and licensee merely a landlord who contacted lessee's president only to collect rental payments); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Salem Broadcasting, Inc., 6 F.C.C.R. 4172, 4173 (M. Med. Bur. 1991) (invalidating contract labeled "Lease and Option Agreement" because licensee "that relegates its role to that of a lessor, retaining merely the right to choose a general format and a lessee to run the station, violates section 310(d)") (citation omitted); see also Memorandum,

Brian M. Madden, LMAs and FCC Enforcement: Can You Find The Line Before It's Too Late? at 2, 4 (Sept. 1995) [hereinafter "Memorandum"] (memorandum distributed at National Association of Broadcasters Radio Show describing "lease" cases in context of discussion of time brokerage).

Finally, some older cases have held that licensees failed to adequately monitor brokers who broadcast foreign language programming. See, e.g., *In re Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558, reconsideration denied, 61 F.C.C.2d 257 (F.C.C. 1976), rev'd in part on other grounds, 581 F.2d 917 (D.C. Cir. 1978), on remand, 79 F.C.C.2d 16 (F.C.C. 1980); *In re Notification to Sierra Madre Broadcasting Co.*, 47 F.C.C.2d 424 (F.C.C. 1974); *In re Trans America Broadcasting Corp.*, 33 F.C.C.2d 606 (F.C.C. 1970). However, most of the "foreign language" cases involve narrow issues which are inapplicable to other time brokerage agreements, and are accordingly beyond the scope of this Article.

[FN14]. See Hunsaker, *supra* note 5, at 23; see also *supra* note 7 and accompanying text.

[FN15]. *In re Revision of Radio Rules and Policies*, 7 F.C.C.R. 6387, 6401 (1994).

[FN16]. See *infra* part II.A.4.

[FN17]. See, e.g., Larson, 10 F.C.C.R. at 8255-56 (citing several factors); Rosenblum, No. 8210-AJZ, slip op. at 3-4 (listing factors relevant to broker's control of station finances).

[FN18]. Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Bruce E. Rosenblum, Esq., No. 8210-AJZ, slip op. (M. Med. Bur. 1995).

[FN19]. *Id.* at 3-4.

[FN20]. 47 U.S.C. s 151 et seq. (1988 & Supp. V 1993).

[FN21]. See 47 U.S.C. s 151 (creating FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio"); see also Erwin G. Krasnow, et al., *The Politics of Broadcast Regulation* 10-15 (3d ed. 1982) (describing government's pre-1934 attempts to regulate radio).

[FN22]. See 47 U.S.C. s 301 (1988 & Supp. V 1993) (portion of Communications Act governing broadcasting); Krasnow et. al., *supra* note 21, at 176-82 (describing early FCC regulation of television).

[FN23]. See, e.g., 47 U.S.C. s 11 (1988 & Supp. V 1993) (describing FCC power over telegraph industry); ss 201-226 (1988 & Supp. V 1993) (governing FCC regulation of common carriers); ss 531-559 (1988 & Supp. V 1993) (governing FCC regulation of cable television); s 721(c) (1988 & Supp. V 1993) (describing FCC regulation of satellites).

[FN24]. 47 U.S.C. ss 307-309 (1988 & Supp. V 1993).

[FN25]. 47 C.F.R. s 73.3540(a) (1994).

[FN26]. 47 C.F.R. s 1.2 (1994).

[FN27]. 47 C.F.R. s 0.61 (1994).

[FN28]. 47 C.F.R. s 0.61(a) and (c).

[FN29]. 47 C.F.R. s 0.283(b)(3)(1994) (providing that Commission handles applications for review of Bureau decisions).

[FN30]. 47 C.F.R. ss 73.3591(a), 73.3593 (1994).

[FN31]. See 47 C.F.R. s 0.151 (1994) (providing that administrative law judges will conduct all adjudicatory cases designated for hearing unless the FCC decides to hold hearing en banc).

[FN32]. 47 C.F.R. s 0.361(a) (1994). It should be noted, however, that the Commission recently abolished the Review Board, effective March 29, 1996. See *In re Elimination of the Review Board*, F.C.C. 96-4 (F.C.C. Jan. 23, 1996). After March 1996, the ALJ decisions will be appealed directly to the Commission. See *id.*

[FN33]. See 47 C.F.R. s 1.115(b)(5) (1994) (listing grounds for review of Review Board decision).

[FN34]. Assignment applications are typically addressed by the chief of the Bureau's Audio Services or Video Services Division. See, e.g., *Paramount*, No. 1800E1-AL, slip op. at 14; *Silva*, 9 F.C.C.R. at 6160; *Rosenberg*, 8 F.C.C.R. at 5571; *Bryant*, 6 F.C.C.R. at 6125. By contrast, requests for declaratory rulings and fines are typically addressed by the Bureau Chief. See, e.g., *Larson*, 10 F.C.C.R. at 8257; *Rosenblum*, No. 8210-AJ, slip op. at 5; *CanXus*, 8 F.C.C.R. at 4324; *Huberman*, 6 F.C.C.R. at 5398; *Madden*, 6 F.C.C.R. at 1872; *O'Connell*, 6 F.C.C.R. at 1870; *Monahan*, 6 F.C.C.R. at 1868. But cf. *Birdsill*, 7 F.C.C.R. at 7891 (request for declaratory ruling delegated to Bureau's Complaints and Investigations Branch); *Belisle*, 5 F.C.C.R. at 7585 (same).

ALJs and the Review Board have resolved few recent time brokerage cases, because time brokerage cases tend to involve legal rather than factual controversies. But see *Fresno FM Ltd. Partnership*, 6 F.C.C.R. at 1573 (Review Board decision on time brokerage).

[FN35]. See *Silva*, 9 F.C.C.R. at 6156-58 (rejecting claim that time broker proposed assignee of station had prematurely assumed control over station through time brokerage); *Rosenberg*, 8 F.C.C.R. at 5569-70 (same); *Bryant*, 6 F.C.C.R. at 6122-23 (same). In all three cases, the objecting party was a broadcaster. In *WGPR*, the full Commission rejected a similar argument made by a minority-owned corporation complaining about the sale of a minority-owned station to CBS (which had previously entered into an LMA with the seller). *WGPR*, 10 F.C.C.R. at 8140.

[FN36]. See, e.g., *Rosenblum*, No. 8210-AJZ, slip op. at 1; *Huberman*, 6 F.C.C.R. at 5397;

Madden, 6 F.C.C.R. at 1871; O'Connell, 6 F.C.C.R. at 1869; Monahan, 6 F.C.C.R. at 1867.

[FN37]. See Larson, 10 F.C.C.R. at 8256; CanXus, 8 F.C.C.R. at 4323.

[FN38]. In re Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming, 82 F.C.C.2d 107, 108 (1980).

[FN39]. Id. at 108-10.

[FN40]. Id.

[FN41]. Id. at 108 (citing In re Filing of Agreements Involving the Sale of Broadcast Time for Resale, 33 F.C.C.2d 653 (1972)); see also Sierra, 47 F.C.C.2d at 428 (licensee exercised inadequate control over foreign language time broker); Trans America, 33 F.C.C.2d at 617 (licensee's control over foreign language programs "was informal and inconsistent at best. At its worst it was non-existent."); Sewell, supra note 4, at 90-92 (describing numerous other pre-1980 FCC adjudications). Such delegations would be "improper" because s 310(d) of the Communications Act prohibits licensees from transferring control over a station without prior FCC approval. See 47 U.S.C. s 310(d) (1988).

[FN42]. See Sewell, supra note 4, at 91 (citations omitted). FCC rules still require radio licensees to file certain time brokerage agreements with the Commission. See Revision, 7 F.C.C.R. at 6402 (retaining requirement for "time brokerage agreement that would result in the arrangement being counted in determining the brokering licensee's compliance with local and national multiple ownership rules" and providing that all time brokerage agreements involving radio stations must be kept in station files and made available for public inspection). Brokerage agreements involving television stations need not be filed with the FCC, but must be kept in station files and made available for FCC inspection. See 47 C.F.R. s 73.3613(e).

[FN43]. In re Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming, 82 F.C.C.2d 107, 108.

[FN44]. Id. at 115.

[FN45]. Id. at 117. The FCC, however, did not state how much smaller a program's audience must be in order to be "significantly" smaller for purposes of political advertising rules.

[FN46]. Id. at 116-17. 47 U.S.C. s 315 requires licensees to offer advertising rates to all political candidates at the lowest charge for similar commercial time. 47 U.S.C. s 315(b) (1988 & Supp. V 1993). Under prior law, the broker's charges were considered in determining the licensee's "lowest unit charge." Id. at s 315(b)(1). Thus, a brokered licensee, would be required to match the broker's charges to comply with s 315. As a result, before the policy statement was issued "licensees [were] therefore likely to restrict the rates at which time brokers [could] sell political time ... [and] candidates for public office tend[ed] to shy away from brokered programs where the advertising rate they must pay [could] be out of line with the often limited audience to which

the program is directed." Petition for Issuance of Policy Statement, 82 F.C.C.R. at 116.

[FN47]. 47 U.S.C. s 310(d).

[FN48]. Id.

[FN49]. See Hunsaker, *supra* note 5, at 21-22.

[FN50]. *In re Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C.2d 1345 (1980).

[FN51]. Id. at 1347.

[FN52]. Id. at 1346-47.

[FN53]. Hunsaker, *supra* note 5, at 22 (citing *In re Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 F.C.C.2d 152 (1983)).

[FN54]. Id. (citing *In re Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755, reconsideration granted in part, 7 F.C.C.R. 6387 (1992)).

[FN55]. Id. at 23; see also *In re Petition for Issuance of Interpretive Ruling Concerning FCC Form 395-B, Broadcast Annual Employment Report*, 9 F.C.C.R. 2535, 2536 (1994)(while pre-1980 time brokerage agreements "involved the brokerage by non-licensees of short, discrete periods of broadcast time," more recent agreements usually involve "large blocks of time or the entire programming schedule of a station to be brokered").

[FN56]. Hunsaker, *supra* note 5, at 23.

[FN57]. Id. at 25 (noting "sizeable savings that could stem from joint operation of same-market radio facilities").

[FN58]. Id. at 23.

[FN59]. Sewell, *supra* note 4, at 93-94 (citing *In re Reexamination of the Commission's Cross-Interest Policy*, 4 F.C.C.R. 2208, 2214). The rationale for this prohibition was that such time brokerage agreements created a "potential for diminution of competition arising from [a broadcaster] owning and programming one station and making programming decisions at an independently-owned station." *Cross Interest Policy*, 4 F.C.C.R. at 2209. The FCC decided that this rationale no longer made sense due to "[t]he substantial increase in media outlets, and the corresponding increase in diversity and competition," *id.* at 2214, and the likelihood that "[c] ompetitive conditions [will] require a station that decides to broker its time to another to remain alert to the needs of its audience or risk losing some of that audience to a competitor." *Id.*

[FN60]. See Sewell, *supra* note 4, at 94-95 (describing major cases).

[FN61]. Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Roy R. Russo, Esq. 5 F.C.C.R. 7586 (1990).

[FN62]. *Id.* at 7586-87. Although the Bureau approved two reciprocal agreements, much of its opinion referred to the agreement in which the allegedly "controlling" licensee was the broker and the allegedly "controlled" licensee was brokered. *Id.*

[FN63]. Fresno, 6 F.C.C.R. at 1572 (citations omitted) (describing, and partially quoting, Russo, 5 F.C.C.R. at 7588).

[FN64]. Russo, 5 F.C.C.R. at 7587.

[FN65]. See Sewell, *supra* note 4, at 98.

[FN66]. See *supra* note 12 (listing cases in which FCC approved time brokerage agreements).

[FN67]. See *supra* note 13 (listing cases in which FCC has disapproved of time brokerage agreements).

[FN68]. Revision I, 7 F.C.C.R. at 6401 (1992). This author notes, however, that the FCC has adopted general rules governing the impact of time brokerage agreements upon FCC ownership restrictions. See, e.g., *In re Revision of Radio Rules and Policies: Second Memorandum Opinion and Order*, 9 F.C.C.R. 7183, 7191-93 (1994) [hereinafter Revision III] (addressing validity of time brokerage agreements between licensees of two stations in same market under FCC rules limiting the number of stations a person or entity may own). Time brokerage agreements between stations in the same market must certify in writing that the licensee of the brokered station "maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming." 47 C.F.R. s 73.3555(a)(2)(ii) (1994).

[FN69]. WGPR, 10 F.C.C.R. at 8141.

[FN70]. See 47 U.S.C. s 310(d)(requiring FCC consent for transfer of control over station); Rosenberg, 8 F.C.C.R. at 5570 (to comply with s 310(d), a licensee "must retain ultimate responsibility over all station matters involving personnel, programming and finances") (citations omitted).

[FN71]. Rosenberg, 8 F.C.C.R. at 5570. In fact, time brokerage agreements between licensees of nearby radio stations, in which brokers own 15% or more of the brokered station's time, must explicitly provide that the brokered licensee "maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming." 47 C.F.R. s 73.3555(a)(2)(ii).

[FN72]. See WGPR, 10 F.C.C.R. at 8142.

[FN73]. Memorandum, *supra* note 13, at 2; see also Fresno, 6 F.C.C.R. at 1572 (contractual

assertion of licensee control over programming outweighed by licensee's failure to effectively implement provision).

[FN74]. See, e.g., Rosenberg, 8 F.C.C.R. at 5570 (upholding LMA where licensee paid all station costs except for those associated with production and delivery of programs supplied by broker).

[FN75]. See Rosenblum, No. 8210-AJZ, slip op. at 3-4 (holding that broker controlled station where the broker paid insurance, utilities, and numerous other station expenses).

[FN76]. See Fresno, 6 F.C.C.R. at 1572.

[FN77]. See Huberman, 6 F.C.C.R. at 5397-98 (upholding LMA involving joint sales arrangement); Carta, 4 F.C.C.R. at 7983 (holding that brokered licensee abdicated control over station where broker's principals negotiated joint sales effort between brokered station and third station).

[FN78]. See Russo, 5 F.C.C.R. at 7586-87 (upholding LMA where broker had option to purchase station); Larson, 10 F.C.C.R. at 8255 (unfavorably noting that broker had option to purchase brokered station).

[FN79]. See, e.g., Russo, 5 F.C.C.R. at 7587 (upholding LMA providing that all personnel shall be subject to supervision and direction of station's General Manager and/or Chief Engineer).

[FN80]. See, e.g., Paramount, No. 1800E1-AL, slip op. at 9 (upholding LMA where broker is responsible for costs associated with personnel used in the sale of advertising time and the production of broker's programming, but licensee pays salaries and related costs for other station personnel); Silva, 9 F.C.C.R. at 6158 (upholding LMA where all employees hired with licensee's approval).

[FN81]. See, e.g., Larson, 10 F.C.C.R. at 8255 (rejecting LMA where licensee's employees switched onto broker's payroll, and most were later terminated); Carta, 4 F.C.C.R. at 7982 (holding that broker controlled station where licensee retained no full-time employees).

[FN82]. See Bryant, 6 F.C.C.R. at 6123 (listing rules regarding LMAs); Huberman, 6 F.C.C.R. at 5398 (licensee must oversee broker's political programming practices); Monahan, 6 F.C.C.R. at 1867-68 (licensee must continue to air own station identifications, maintain its own main studio, and maintain its own public inspection file).

[FN83]. See Paramount, No. 1800E1-AL, slip op. at 8 (favorably citing LMA provision requiring broker to give licensee notice of programming changes).

[FN84]. See Piney Creek, No. BALCT-940929KE, slip op. at 3; Rosenberg, 8 F.C.C.R. at 5570.

[FN85]. See *infra* part II.D. (discussing these and other factors).

[FN86]. See Piney Creek, No. BALCT-940429KE, slip op. at 3 (upholding LMA which provided that licensee would be "responsible for the station's daily expenses").

[FN87]. Letter from Larry D. Eads, Chief, Audio Services Div., to Marvin Rosenberg, Esq., 8 F.C.C.R. 5568 (M. Med. Bur. 1993).

[FN88]. Almost all of the decisions discussed below rely on more than one factor to support the FCC's approval or rejection of a time brokerage agreement. For example, in Rosenberg the Bureau relied not only on the licensee's control over its finances, but also on the licensee's contentions that (1) the three employees vital to the operation of the station were employees of the licensee rather than the broker, (2) the licensee retained the right to preempt programs and (3) the licensee reserved six hours of programming for itself. See Rosenberg, 8 F.C.C.R. at 5570. It follows that an LMA could contain some of the factors that ordinarily support approval of time brokerage agreements, but nevertheless be rejected by the FCC because these factors were outweighed by others which indicate that the licensee had abdicated control over its station. This Article only analyzes factors which the FCC appears to have relied upon in endorsing or rejecting a time brokerage agreement. Accordingly, LMA provisions cited in the "discussion" section of a decision will usually be analyzed below, while LMA provisions which are merely cited at the start of a decision will not be analyzed, as there is no reason to believe that the FCC relied upon such provisions in its decision-making process.

[FN89]. Rosenberg, 8 F.C.C.R. at 5570; see also American Music Radio, 1995 FCC LEXIS 5460 at *7 (upholding LMA where licensee responsible for "payment of utilities, maintenance, insurance and repair expenses, and equipment rental"); Bryant, 6 F.C.C.R. at 6123 (upholding LMA where licensee's "finances are separate from [those of broker]"); Russo, 5 F.C.C.R. at 7587 (upholding time brokerage agreement because, inter alia, broker's financial control limited to "the financial arrangement characteristic of time brokerage arrangements -- a profit of advertising revenues over brokerage fee").

[FN90]. 8 F.C.C.R. 4323 (M. Med. Bur. 1993).

[FN91]. Id.

[FN92]. No. 8210-AJZ, slip op. (1995); see also supra note 13.

[FN93]. Rosenblum, No. 8210-AJZ, slip op. at 3.

[FN94]. Id. at 2-3.

[FN95]. Id. at 3.

[FN96]. Id.

[FN97]. ASCAP and BMI sell "blanket licenses" to broadcasters. Such licenses allow the broadcasters to use millions of copyrighted musical compositions. See Broadcast Music, Inc. v.

CBS, 441 U.S. 1, 4-5 (1979) (describing organizations and their functions). If ASCAP and BMI did not exist, individual copyright owners (i.e. musicians) would have to negotiate with broadcasters themselves and try to individually detect unauthorized performances of their work. Id.

[FN98]. Rosenblum, No. 8210-AJZ, slip op. at 3-4.

[FN99]. Id. at 4.

[FN100]. Id.

[FN101]. Id.

[FN102]. Cf. Memorandum, supra note 13, at 6 (even if broker reimburses licensee for expenses, licensee should make initial payments).

[FN103]. Fresno, 6 F.C.C.R. at 1572.

[FN104]. Id. (citation omitted).

[FN105]. Id.

[FN106]. Id. (citation omitted).

[FN107]. Petition for Issuance of Policy Statement, 82 F.C.C.2d at 113.

[FN108]. See Memorandum, supra note 13, at 8 (making similar point).

[FN109]. Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Gisela Huberman, Esq., 6 F.C.C.R. 5397 (M. Med. Bur. 1991).

[FN110]. Id.

[FN111]. Id.

[FN112]. The negotiations in question were apparently conducted by Elias DeAlba, who owned, in 1987, 40% of the broker. See Carta, 4 F.C.C.R. at 7977-78. Furthermore, in 1988 DeAlba discussed "a joint sales effort between [[[the broker] ... and Station KXEX(AM), Fresno." Id. at 7983.

[FN113]. Carta, 4 F.C.C.R. at 7983; see also id. at 7980.

[FN114]. Russo, 5 F.C.C.R. at 7586.

[FN115]. Id. at 7587; see also Piney Creek, No. BALCT-940429KE, slip op. at 3 (holding that

option to buy "does not raise an issue of de facto control").

[FN116]. Larson, 10 F.C.C.R. at 8255.

[FN117]. Id.

[FN118]. Id.

[FN119]. Id. at 8254-56 (discussion of facts relevant to control, programming and finances took three pages and mentioned numerous factors).

[FN120]. Carta, 4 F.C.C.R. at 7983 (citation omitted).

[FN121]. No. 1800E1-AL, slip. op. (M. Med. Bur. June 6, 1995).

[FN122]. Id. at 2.

[FN123]. Id. (noting that "existing rules" barred broker from owning two stations in same market); see also 47 C.F.R. s73.3555(b) (providing that no party shall be licensed to operate two television broadcast stations in same market).

[FN124]. Paramount, No. 1800E1-AL, slip op. at 2-3.

[FN125]. See id.

[FN126]. Id. at 1 (objections to agreements filed by San Antonio licensees).

[FN127]. Id. at 5.

[FN128]. Id. at 6 (citations omitted). The Bureau cited three cases, none of which involved time brokerage. In *In re Evergreen Broadcasting Co.*, 6 F.C.C.R. 5599 (1991), the FCC chose among numerous applicants for a new radio station. The FCC refused to credit one applicant's claim that it should be awarded a construction permit because its stockholders were "integrated" (i.e. planned to participate in the management of the station) because several non-stockholders "will be in a position to exercise significant, continuing control over the applicant." Id. at 5601. This conclusion was based upon numerous factors, including the non-stockholders' "longstanding relationship with the nominal owners (i.e. as husbands and close friends), their extensive broadcast experience, their original interest in applying for the station, and their intention to resign their managerial jobs [at other stations] ... should [the applicant] prevail." Id. at 5601-02 (emphasis added). The other two cases cited in *Paramount* also involved the question of integration credit. See *In re Royce Int'l Broadcasting*, 5 F.C.C.R. 7063, 7064 (1990) (denying integration credit to applicant's general partner because she was dominated by limited partner, an experienced broadcaster); *In re Applications of Metroplex Communications, Inc.*, 5 F.C.C.R. 5610, 5611-12 (1990)(applicant's "organization was a sham designed to artificially enhance [its] integration [claim]...It is not credible that a group of experienced owners (including those with

past broadcast ownership) would grant exclusive control of their station to a virtual stranger with no broadcast experience").

[FN129]. Paramount, No. 1800E1-AL, slip op. at 6.

[FN130]. Id.

[FN131]. Id. at 6-7.

[FN132]. Russo, 5 F.C.C.R. at 7586.

[FN133]. Piney Creek, No. BALCT-940429KE, slip op. at 3.

[FN134]. Russo, 5 F.C.C.R. at 7587 (quoting Time Brokerage Agreement for Radio Station WXDJ-FM, s 11; Time Brokerage Agreement for Radio Station WAQI-FM (now WRTO), s 11).

[FN135]. Letter from Larry D. Eads, Chief, Audio Services Div., to William L. Silva, Esq., (M. Med. Bur. 1994). 9 F.C.C.R. 6155.

[FN136]. See id. (noting that objection to assignment filed by licensee of radio station in same city as brokered station).

[FN137]. Id. at 6156.

[FN138]. Id. at 6158. In Silva, as in other cases, the Bureau noted that the station's incumbent owner also controlled station programming and could terminate the LMA at will. Id.

[FN139]. Paramount, No. 1800E1-AL, slip op. at 9. However, the licensee was otherwise "responsible for the salaries, taxes, insurance and related costs for all the station personnel." Id.

[FN140]. Silva, 9 F.C.C.R. at 6158.

[FN141]. Rosenberg, 8 F.C.C.R. at 5570; see also American Music Radio, 1995 FCC Lexis 5460 at *13 (upholding LMA where licensee's general partner was station's general manager even after LMA executed); Paramount, No. 1800E1-AL, slip op. at 9 (approving time brokerage agreement which required licensee to " 'provide and be responsible' for station personnel necessary for the broadcast transmission of programs and 'other aspects of Station operation,' including, at minimum, the station's general manager and another employee"); Russo, 5 F.C.C.R. at 7587 (upholding time brokerage agreement where broker's principals were not involved in station management).

[FN142]. Bryant, 6 F.C.C.R. at 6123.

[FN143]. Silva, 9 F.C.C.R. at 6158.

[FN144]. In re WGPR, Inc., 10 F.C.C.R. 8140 (F.C.C. 1995).

[FN145]. Id. at 8143.

[FN146]. Id.

[FN147]. CanXus, 8 F.C.C.R. at 4323; see also Larson, 10 F.C.C.R. at 8255 (rejecting LMA where licensee's employees switched from licensee payroll to broker payroll, and were later either terminated or forced into part-time employment); Memorandum, supra note 13, at 9 (broker should not hire and fire licensee's employees).

[FN148]. Carta, 4 F.C.C.R. at 7982.

[FN149]. Petition for Reconstruction and/or Clarification of Jones Eastern of the Outer Banks, Inc., 7 F.C.C.R. 6800, 6800 (1992), denying reconsideration of 6 F.C.C.R. 3615 (1991); see also 47 C.F.R. s 73.1125(a) (1994) (requiring licensees to maintain main studio near city of license).

[FN150]. Jones, 7 F.C.C.R. at 6801-02.

[FN151]. Id.; see also Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Salem Broadcasting, Inc., 6 F.C.C.R. 4172 (1991) (station violated main studio rule where only managerial employee was part-time).

[FN152]. Jones, 7 F.C.C.R. at 6801.

[FN153]. Id. at 6802.

[FN154]. Id. at 6801-02.

[FN155]. The case of In re Maines Broadcasting, Inc., 8 F.C.C.R. 5501 (1993) is somewhat analogous to situations involving time brokerage. In Maines, the licensee's main studio had only one employee, not because of a time brokerage agreement, but because most of its employees were at another studio (which was too far from the station's city of license to be turned into the main studio under the main studio rule). The licensee asked the FCC for a waiver of the main studio rule on the grounds that, among other things, "the current personnel cost of maintaining the [main] studio with one staff member is nearly \$10,000 per year, and thus is a substantial burden for a station with monthly revenues of \$6,000-7,500." Id. The FCC rejected the waiver application, holding that waivers of the main studio rule should be granted only where studio sites near the city of license are unavailable. Id. at 5502.

Although Maines is not on point, it illustrates the fiscal difficulties stations can suffer if they duplicate operations -- in the Maines case by having two studios, in a typical LMA situation by having "broker employees" and "licensee employees."

[FN156]. Birdsill, 7 F.C.C.R. at 7891.

[FN157]. *Id.* (citation omitted). The Bureau has also made it clear that a licensee's employees' duties should include supervising the broker's employees when they are at the licensee's station. See *Paramount*, No. 1800E1-AL, slip op. at 9.

[FN158]. *Birdsill*, 7 F.C.C.R. at 7891.

[FN159]. *WGPR*, 10 F.C.C.R. at 8143.

[FN160]. *Id.*

[FN161]. See *Bryant*, 6 F.C.C.R. at 6123 (listing rules); see also *Huberman*, 6 F.C.C.R. at 5398; *Monahan*, 6 F.C.C.R. at 1867-68; *Fresno*, 6 F.C.C.R. at 1572 (describing licensee's political broadcasting obligations as "non-delegable responsibilities"); Memorandum, *supra* note 13, at 8 (if licensee violates above-mentioned rules, its chances of renewal may be reduced).

[FN162]. See, e.g., *Huberman*, 6 F.C.C.R. at 5398; *Monahan*, 6 F.C.C.R. at 1867.

[FN163]. *Huberman*, 6 F.C.C.R. at 5398.

[FN164]. *Monahan*, 6 F.C.C.R. at 1867.

[FN165]. *Id.*

[FN166]. *Id.* The Bureau's statements that licensees must cover community issues could be interpreted to mean that the licensee itself, rather than the broker, must carry public affairs programming. Because the Bureau has approved 24-hour time brokerage agreements, this interpretation of Bureau precedent is probably incorrect. See *Huberman*, 6 F.C.C.R. at 5397 (approving 24-hour time brokerage agreement). Thus, it appears that the broker must monitor the broker's community service.

[FN167]. *Monahan*, 6 F.C.C.R. at 1867-68.

[FN168]. See, e.g., *American Music Radio*, 1995 FCC LEXIS 5460 at *15 (approving contract "replete with provisions reserving ultimate control over broadcasting content" to licensee); *WGPR*, 10 F.C.C.R. at 8142 (approving LMA providing that licensee "holds ultimate control" over programs); *Piney Creek*, No. BALCT-940429KE, slip op. at 3 (approving LMA which stated that licensee would have "sole responsibility" for ascertaining community needs and providing public affairs programming).

[FN169]. *Carta*, 4 F.C.C.R. at 7978.

[FN170]. *Id.*

[FN171]. *Id.*

[FN172]. Id.

[FN173]. Id. at 7979 (noting that licensee had no procedures to ensure that broker complied with political programming rules, sponsorship identification rules, lottery rules, payola/plugola rules, or prohibition on false advertising).

[FN174]. Id. at 7983.

[FN175]. Id.

[FN176]. Fresno, 6 F.C.C.R. at 1571 (Review Board decision describing ALJ decision); see also Carta, 4 F.C.C.R. at 7983 (although licensee "reserves the right to determine, select, supervise and control program content.... [it] has never exercised any such right").

[FN177]. See Carta, 4 F.C.C.R. at 7978-79 (criticizing licensee for failing to control programming).

[FN178]. 47 U.S.C. s 310(d) (1988).

[FN179]. *Cosmopolitan*, 59 F.C.C.2d at 560.

[FN180]. Id.; see also Memorandum, *supra* note 13, at 8 ("a pattern of relatively minor violations could result in a finding that the licensee had failed to exercise adequate control").

[FN181]. *Cosmopolitan*, 59 F.C.C.2d at 563-64.

[FN182]. Id. at 564.

[FN183]. See *Piney Creek*, No. BALCT-940429KE, slip op. at 3-4; Russo, 5 F.C.C.R. at 7587.

[FN184]. 47 C.F.R. s73.3555(a)(2)(ii) (1994).

[FN185]. See, e.g., *Rosenblum*, No. 8210-AJ, slip op. at 4 (finding that licensee had abdicated control despite LMA language stating that licensee retained control).

[FN186]. *Piney Creek*, No. BALCT-940429KE, slip op. at 3.

[FN187]. Id.

[FN188]. *Rosenberg*, 8 F.C.C.R. at 5570; see also *American Music Radio*, 1995 FCC LEXIS 5460 at *14 (upholding LMA where licensee reserved right "to preempt programming when circumstances warrant"); *WGPR*, 10 F.C.C.R. at 8142 (upholding LMA giving licensee broad preemption rights); *Paramount*, No. 1800EI-AL, slip op. at 8 (upholding agreement providing that licensee could preempt broker's public programs in order to substitute programs "of greater local or national public importance"); Russo, 5 F.C.C.R. at 7587 (finding that licensee retained

control over programming because time brokerage agreement provided that "licensee may suspend or cancel any programs that the licensee or its general manager determine are not in compliance with the standards set forth by the respective stations"); Bryant, 6 F.C.C.R. at 6123 (approving time brokerage agreement providing that licensee "receives all programming in advance and can preempt, suspend or cancel any programming").

[FN189]. Rosenberg, 8 F.C.C.R. at 5570.

[FN190]. See Russo, 5 F.C.C.R. at 7587; see also WGPR, 10 F.C.C.R. at 8142 (upholding LMA allowing deletion of commercials which did not comply with FCC rules or other laws).

[FN191]. Broadcast Communications, 93 F.C.C.2d at 1168 (citation omitted).

[FN192]. See, e.g., Piney Creek, No. BALCT-940429KE, slip op. at 3.

[FN193]. This author notes that most attorneys and broadcasters seem to agree with this proposition, because nearly all time brokerage agreements contain preemption provisions. See Sewell, *supra* note 4, at 97 (of 20 randomly selected time brokerage agreements, all "grant the licensee the right to reject a program provided by the broker or to substitute programming the licensee believes has greater local or national interest").

[FN194]. See Bryant, 6 F.C.C.R. at 6123.

[FN195]. Paramount, No. 1800EI-AL, slip op. at 8.

[FN196]. Carta, 4 F.C.C.R. at 7983.

[FN197]. *Id.*

[FN198]. *Id.* (citation to record omitted).

[FN199]. See, e.g., Huberman, 6 F.C.C.R. at 5397.

[FN200]. Rosenberg, 8 F.C.C.R. at 5570.

[FN201]. *In re American Music Radio*, No. BAL-930210ED, 1995 FCC LEXIS 5460 (July 31 1995).

[FN202]. *Id.* at *14; see also Larson, 10 F.C.C.R. at 8255 (rejecting time brokerage agreement where all but one of brokered station's programs were selected by broker); Bryant, 6 F.C.C.R. at 6123 (upholding time brokerage agreement where parties entered into time brokerage agreement, yet licensee continued to "produce or purchase programs for the periods not brokered").

[FN203]. Policy Statement, 82 F.C.C.2d at 114.

[FN204]. Huberman, 6 F.C.C.R. at 5397. Cf. Paramount, No. 1800EI-AL, slip op. at 9 (approving time brokerage agreement allowing broker to program 162 hours per week out of a possible 168 because agreement otherwise gave licensee "ample rights to exercise control").

[FN205]. This author notes that the majority of time brokerage agreements reserve some (but very little) time for licensee programming. One survey of 20 randomly selected time brokerage agreements found that 14 reserved between one-half and four hours per week for the licensee, while 6 reserved no time at all for licensee programming. See Sewell, *supra* note 4, at 97-98.

[FN206]. See, e.g., Huberman, 6 F.C.C.R. at 5398.

[FN207]. See WGPR, 10 F.C.C.R. at 8140.

[FN208]. *Id.* at 8142. Other letters to program producers stated that CBS was dedicating certain airtime to religious programming, and congratulated programmers for remaining with the "WGPR-CBS ... broadcast line-up." *Id.*

[FN209]. *Id.* (citing Russo, 5 F.C.C.R. at 7587).

[FN210]. *Id.*

[FN211]. *Id.*

[FN212]. See Larson, 10 F.C.C.R. at 8255 (where the Bureau noted that the broker negotiated with the network to buy its programs, and paid the network for those programs).

[FN213]. See Carta, 4 F.C.C.R. at 7983.

[FN214]. See *supra* text accompanying note 69.

[FN215]. Huberman, 6 F.C.C.R. at 5397.

[FN216]. Piney Creek, No. BALCT-940429KE, slip op. at 4.

[FN217]. *Id.* at 4-5.

[FN218]. *Id.*

[FN219]. The Piney Creek decision was authored not by the head of the Bureau as a whole, but by the chief of its Video Services Division. *Id.* at 5.

[FN220]. See FCBA Seminar -- Communications Industry Ownership Rules -- Security Interests, LMAs, Time Brokerage, and Tax Certifications (May 4, 1995) (audiotape available from Federal Communications Bar Association) (some attorneys suggested that Bureau may be internally divided over Piney Creek).

[FN221]. See Rosenblum, No. 8210-AJ, slip op. at 4.

[FN222]. Id.

[FN223]. See Larson, 10 F.C.C.R. at 8255; see also Silva, 9 F.C.C.R. at 6158 (upholding LMA where licensee could terminate whenever it "believes that continuation of the Agreement would be contrary to the public interest").

[FN224]. See Rosenblum, No. 8210-AJ, slip op. at 4 (restrictions on termination improper because a licensee "must be able to determine, in its sole discretion, whether ... the programming [the broker] provides no longer serves the public interest").

[FN225]. American Music Radio, 1995 FCC Lexis 5460 at *9.

[FN226]. Id. at *18.

[FN227]. Id.

[FN228]. Id.

[FN229]. Id. at *19 n.10.

[FN230]. Revision II, 7 F.C.C.R. at 6402.

[FN231]. Paramount, No. 1800EI-AL, slip op. at 10.

[FN232]. Id.

[FN233]. Id.

[FN234]. Revision III, 9 F.C.C.R. at 7193 (citing Revision II, 7 F.C.C.R. at 6402).

[FN235]. Paramount, No. 1800EI-AL, slip op. at 10.

[FN236]. Rosenblum, No. 8210-AJ, slip op. at 3.

[FN237]. See Carta, 4 F.C.C.R. at 7983; see also Larson, 10 F.C.C.R. 8255 (rejecting LMA where broker prepared FCC forms).

[FN238]. Carta, 4 F.C.C.R. at 7983. The ALJ's discussion of the broker's control over the brokered station included thirteen paragraphs of discussion. Id. at 7982-84. Thus, the broker's misuse of FCC forms was just one of numerous factors supporting the ALJ's ultimate decision that the licensee had abdicated control of its station. Id. at 7982; see also Memorandum, supra note 14, at 6 (licensee responsible for all filing obligations).

[FN239]. See *Paramount*, No. 1800EI-AL, slip op. at 7.

[FN240]. See *infra* notes 242-44 and accompanying text.

[FN241]. *Piney Creek*, No. BALCT-940429KE, slip op. at 4; see also *Huberman*, 6 F.C.C.R. at 5397 (contour overlap between stations owned by parties to agreement not dispositive).

[FN242]. *Paramount*, No. 1800EI-AL, slip op. at 7.

[FN243]. *Id.*

[FN244]. See FCC Public Notice, *Processing of Applications Governing Local Marketing Agreements*, 1995 FCC LEXIS 3593 at *1 (M. Med. Bur. June 1, 1995); see also *Paramount*, No. 1800EI-AL, slip op. at 11 (upholding time brokerage agreement where broker lent buyer 1/3 of station's purchase price).

[FN245]. Public Notice, 1995 FCC LEXIS 3593 at *2; see also *Paramount*, No. 1800EI-AL, slip op. at 11-12 (upholding time brokerage agreement where neither broker nor other lender made loans dependent on continuation of agreement).

[FN246]. Public Notice, 1995 FCC LEXIS 3593 at *2-3.

[FN247]. *Id.* at *3.

[FN248]. See *Russo*, 5 F.C.C.R. at 7586.

[FN249]. See *Larson*, 10 F.C.C.R. at 8254; see also *supra* notes 114-19 and accompanying text (describing both *Russo* and *Larson*, among other relevant cases, in greater detail).

[FN250]. See *Rosenberg*, 8 F.C.C.R. at 5570.

[FN251]. Policy Statement, 82 F.C.C.2d at 114; see also discussion *supra* part III.C.6 and accompanying text (describing and seeking to reconcile relevant cases).

[FN252]. See *Rosenblum*, No. 8210-AJ, slip op. at 4.

[FN253]. See *FCBA Seminar*, *supra* note 220. See also *supra* notes 25-29 and accompanying text (suggesting that termination rights need not be absolute).

[FN254]. *Larson*, 10 F.C.C.R. at 8255.

[FN255]. *Id.*

[FN256]. *Id.* The *Larson* decision is hardly unique. See, e.g., *Rosenblum*, No. 8210-AJ, slip op. at 3-4 (listing several contract provisions to support finding that licensee abdicated control of

station finances, and listing numerous other factors to support broader conclusion that broker unlawfully controlled station).

[FN257]. Specifically, the agreement provided that either party could terminate the agreement upon one year's notice, but that the licensee's cancellation would be effective only if, at the option of the broker, the licensee repurchased station assets from the broker at fair market value. Larson, 10 F.C.C.R. at 8255.

[FN258]. Id.

[FN259]. Id. The Bureau added that the broker's employees prepared the station's FCC forms and answered the station's telephone. Id.

[FN260]. Id.

[FN261]. Because the Bureau stated that the broker's control of the station began on January 18, 1991 (the date of the agreement), id., it could be argued that all indicia of control which began after January 18 were irrelevant to the Bureau's decision. These indicia include the broker's relations with a national radio network, the broker's termination of station employees and use of its own employees to fill out FCC forms and answer telephones, and the broker's payment of operating expenses. Id. However, these facts were intermingled with the events of January 18, in paragraphs immediately preceded by the statement "[t]he facts leading to this conclusion are as follows." Id. Thus, it is by no means clear that the Bureau meant to ignore post-January 18 facts. Even if it did, the Bureau lists numerous January 18 events (e.g. various terms of the agreement, the switch of numerous employees to the licensee's payroll) without weighing or explaining their importance. See id.

[FN262]. 5 U.S.C. s 551(4) (1994).

[FN263]. See 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* s 6.1, at 226-27 (3d ed. 1994).

[FN264]. 5 U.S.C. s553(b)-(c) (1994).

[FN265]. See 1 Davis & Pierce , *supra* note 263, s 6.7, at 265. This section provides in pertinent part:

Legislative rules provide affected parties with clearer advance notice of permissible and impermissible conduct; they avoid the widely disparate temporal impact of "rules" announced and applied through adjudicatory decision making; and they allow all potentially affected members of the public an opportunity to participate in the process of determining the rules that affect them. Id.

[FN266]. Larson, 10 F.C.C.R. at 8255.

[FN267]. 1 Davis & Pierce , *supra* note 263, s 6.7, at 261.

[FN268]. See, e.g., Revision II, 7 F.C.C.R. at 6404-05 (listing 46 separate sets of comments in rulemaking proceeding).

[FN269]. In re Review of the Commission's Regulations Governing Television Broadcasting, FCC No. 92-209, 7 F.C.C.R. 4111 (F.C.C. 1992).

[FN270]. Further Notice of Proposed Rulemaking, FCC No. 94-322, Appendix A, Pike & Fischer Radio Regulation, FCC Rules: Current Service 53:399, 428 (1995).

[FN271]. Id. at 53:401.

[FN272]. Id. at 53:401-02.

[FN273]. 1 Davis & Pierce , supra note 263, s 6.7, at 261-62.

[FN274]. Id. at 262.

[FN275]. Id.

[FN276]. Id. at 263.

[FN277]. See Russo, 5 F.C.C.R. at 7587.

[FN278]. Carta, 4 F.C.C.R. at 7983.

[FN279]. See discussion supra part II.A.4, III.C.6 (describing seemingly inconsistent FCC decisions on these issues).

[FN280]. See supra note 69 and accompanying text.

[FN281]. See supra notes 13-14.

[FN282]. For example, in Madden the Commission released a letter thirteen days after issuing it. See Madden, 6 F.C.C.R. at 1871. The letter in Madden did not state when the parties requested a declaratory ruling from the Commission. Thus, it is possible that the parties waited weeks or months for a ruling. Id.

[FN283]. See 47 C.F.R. s 1.2 (1994) (stating that FCC "may" issue declaratory ruling to remove uncertainty).

[FN284]. For example, one publishing house has published a six-volume digest devoted primarily to FCC and judicial interpretations of FCC rules. See Pike & Fischer, Radio Regulation, Second Series, Digest (1995) (Volume 1 devoted primarily to interpretations of Communications Act, while other volumes devoted primarily to interpretations of FCC regulations).

[FN285]. See 5 U.S.C. s553(c); supra notes 268-72 and accompanying text (describing extensive "notice and comment" procedures related to FCC television broadcasting regulations).

[FN286]. Indeed, the FCC has already discussed time brokerage in one policy statement. See supra notes 43-48 and accompanying text; In re Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming, 82 F.C.C.2d 107 (1980).

[FN287]. See 1 Davis & Pierce , supra note 263, s 6.2 at 228, (citing 5 U.S.C. s 553(b)).

[FN288]. Id. (citing Rinaldi v. United States, 434 U.S. 22 (1977)). In addition, a policy statement is not judicially reviewable if it has no "binding effect on members of the public." 1 Davis & Pierce , supra note 263, s 6.2 at 229. On the other hand, if a policy statement is binding on the public, it is a rule for procedural purposes and is subject to "notice and comment" requirements. See United States Tel. Assoc. v. F.C.C., 28 F.3d 1232, 1234 (D.C. Cir. 1994).

[FN289]. See supra notes 267-73 and accompanying text (suggesting that extensive public comments may make rulemaking fairer than adjudication).

[FN290]. See United States Tel. Assoc., 28 F.3d at 1234 (pointing out that true policy statement allows agency to ignore statement in its discretion) (citations omitted).

[FN291]. See WGPR, 10 F.C.C.R. at 8141-48.

[FN292]. 47 C.F.R. s 73.3555(a)(2)(ii) (requiring certification where broker and licensee own nearby stations, and where broker programs over 15% of brokered station's time).

[FN293]. See Rosenblum, No. 8210-AJ, slip op. at 3 (rejecting LMA where broker responsible for typical station expenses such as equipment, engineering costs, insurance, utilities and taxes, paid ASCAP and BMI fees itself); CanXus, 8 F.C.C.R. at 4323 (disapproving agreement where broker had "substantial" control over advertising revenues and business expenses); Rosenberg, 8 F.C.C.R. at 5570 (upholding LMA where licensee responsible for most station expenses); Memorandum, supra note 13, at 5.

[FN294]. See Huberman, 6 F.C.C.R. at 5397.

[FN295]. See Carta, 4 F.C.C.R. at 7983; see also Memorandum, supra note 13, at 5 (broker may not hold "himself out as the owner of the station in dealings with others").

[FN296]. See Paramount, No. 1800EI-AL, slip op. at 6-7 (broker may structure station sale, at least where buyer is an experienced broadcaster and can reject seller's terms).

[FN297]. 47 C.F.R. s 73.1125(a).

[FN298]. See Jones, 7 F.C.C.R. at 6801-02 (1992), denying reconsideration of 6 F.C.C.R. 3615 (1991) (enunciating rule outside LMA context); Memorandum, supra note 13, at 6 (management

employee should have authority over station's programming, report to studio daily, and work out of studio).

[FN299]. See *Birdsill*, 7 F.C.C.R. at 7891; cf. Memorandum, supra note 13, at 7 (staff employee should be knowledgeable about "station's public inspection file and other essential matters, such as how to contact the engineer in case of an emergency").

[FN300]. See *Silva*, 9 F.C.C.R. at 6158.

[FN301]. *Id.* Even if most station employees are the broker's employees, a licensee would be well-advised to at least ensure that its own managerial employees retain some power over station operations. See *WGPR*, 10 F.C.C.R. at 8140 (although broker sent executive to brokered station, licensee retained control of personnel because it retained its own employees); *Bryant*, 6 F.C.C.R. at 6123 (approving LMA where licensee's "station manager and chief engineer maintain[ed] control of station operations").

[FN302]. See *Larson*, 10 F.C.C.R. at 8254; *CanXus*, 8 F.C.C.R. at 4323- 24.

[FN303]. See *Bryant*, 6 F.C.C.R. at 6123; *Huberman*, 6 F.C.C.R. at 5398.

[FN304]. See *Rosenberg*, 8 F.C.C.R. at 5570; *Russo*, 5 F.C.C.R. at 7587.

[FN305]. See *Piney Creek*, No. BALCT-940429KE, slip op. at 3; Memorandum, supra note 13, at 7 (licensee should establish program policies related to FCC rules).

[FN306]. See *Bryant*, 6 F.C.C.R. at 6123 (favorably noting that licensee reviewed all programs in advance); *Carta*, 4 F.C.C.R. at 7983 (finding that licensee had transferred control of brokered station where licensee "could care less" about programming); Memorandum, supra note 13, at 7 (licensee may wish to monitor programming by participating in broker's program planning sessions, keeping log of public service programming, and keeping record of own input regarding programming).

[FN307]. See *Larson*, 10 F.C.C.R. at 8254 (rejecting LMA where responsibility for network/station relations wholly delegated to broker).

[FN308]. See, e.g., *Rosenblum*, No. 8210-AJ, slip op. (rejecting LMA because, among other factors, broker chose call sign, LMA did not give licensee right to terminate and LMA included 40-year equipment lease from broker); *Paramount*, No. 1800EI-AL, slip op. at 10 (television LMAs limited to ten years); *Revision II*, 7 F.C.C.R. at 6402 (suggesting that LMA might be unreasonable if liquidated damages "excessive"); *Carta*, 4 F.C.C.R. at 7983 (broker's filing of FCC forms supported finding that broker controlled station).

[FN309]. See supra notes 103-08 and accompanying text.

[FN310]. See discussion supra part II.A.4.

[FN311]. See discussion supra part II.C.6.

[FN312]. See discussion supra part II.D.1.

[FN313]. See discussion supra part II.D.2.