

December 7, 2000

In the Matter of Definition of Radio Markets, Notice of Proposed Rulemaking

Separate Statement of Commissioner Harold W. Furchtgott-Roth

I concur in this rulemaking for the limited aim of rationalizing our arguably arbitrary and capricious methodology of counting radio stations for purposes of section 202(b)(1). *Cf.* Joint Statement of Commissioners Ness and Tristani, *KBYB(FM), El Dorado, Arkansas*, 13 FCC Rcd 15685 (1998) (explaining that it makes no sense to count stations as in the relevant market for the denominator but not the numerator of the 202(b) calculation). My purpose is not, as this Notice of Proposed Rulemaking unfortunately suggests, to change our definition of “markets” in order to cut back on the concentration levels that Congress expressly set in the 1996 Telecommunications Act.

Nor is the NPRM correct in its suggestion that Congress could not have known or understood the accepted administrative meaning of that term, and thus the actual import of its revision of the radio limits, when it changed the radio market limits in the Communications Act. To the contrary, “it is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, ‘the congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)); *see also* *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 436-437 (1986); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978).

Based on this narrow understanding of purpose – *viz.*, to eliminate what seems to be an irrational counting methodology, not to change the definition of a “market” for results-oriented, counter-statutory purposes – I concur in this rulemaking. I take no position, however, as to how to resolve the numerator-denominator inconsistency, and I look forward to reviewing the comments on this matter.