

THE USE OF SOCIAL SCIENCE EVIDENCE BY  
THE FEDERAL COMMUNICATIONS  
COMMISSION IN THE CONSTRUCTION AND  
ENFORCEMENT OF MEDIA OWNERSHIP POLICY

By

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The Federal Communications Commission's rules governing media ownership, traditionally implemented under a trustee model, have changed radically as the result of deregulatory moves in the 1980's and a change to a regulatory implementation based on economic competition in the mid 1990's. Under the statutory obligation of § 202 to review ownership rules, the FCC has acted outside of the guidelines of the rulemaking procedures of the Administrative Procedure Act, and the Third Circuit Court of Appeals has remanded a pair of FCC decisions to the agency for lack of supporting evidence. A significant part of the evidence issue lies in the reality that at the heart of the regulation of media ownership is an empirically unexplored relationship between the diversity of content and ownership. The belief that each owner represents one viewpoint has been used by the FCC as a proxy measurement when assessing the changes on the quantity and quality of the informational content being provided to local audiences by broadcasters.

This dissertation explores the history of the ownership-diversity relationship, beginning with the FCC's 1975 ban on Newspaper-Broadcast Cross-Ownership, and tracks the development of media ownership policy through the changes to the broadcast industry which began after the passage of the 1996 Telecommunications Act. 1039 individual decisions on media ownership were analyzed for evidence that the agency had assessed the effects of ownership on viewpoint diversity. This analysis demonstrates that there is a minimal amount evidence of which exists to support the central theory at the heart of the FCC's media ownership policy. After discussing the evidence the FCC continues to collect as part of the ongoing 2010 Quadraennial review, the author concludes that the lack of supporting evidence is not a new problem, nor has the agency taken the necessary steps to evaluate the effects of policy implementation.

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Chris Terry...April 2012

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# Introduction

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## Introduction

In November of 2009, the Federal Communications Commission held a series of workshops as a preface to the Commission's statutorily mandated quadrennial review of its media ownership rules.<sup>1</sup> The purpose of these workshops was to allow members of the FCC's Media Bureau staff to hear testimony from and ask questions of a variety of interested parties to the forthcoming proceeding.<sup>2</sup> Underlying the Media Bureau staff's questions was the issue of what evidence the agency would need to collect and examine during the statutorily mandated rule review process set to begin in early 2010.<sup>3</sup>

The issue of empirical evidence (or rather the lack of it) in the FCC's rulemaking process dealing with the limits on ownership of media outlets is a multi-pronged problem for the agency. Even setting aside the traditional administrative agency requirements for evidence to support rational decisions made when implementing policy, embedded within the 1996 Telecommunications Act was §202(h) a provision which requires the agency to remove or modify rules that are no longer necessary to promote competition or in the public interest.<sup>4</sup> Faced with this mandate, and the requirement to review the existing rules every four years,<sup>5</sup> the Commission has found itself in a serious quandary over how to handle media ownership as the

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<sup>1</sup> Media Bureau Announces Agenda and Participants for Initial Media Ownership Workshops and Seeks Comment on Structuring of the 2010 Media Ownership Review Proceeding, MB Docket No. 09-182. See Public Notice DA-09-2209A1, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-2209A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2209A1.pdf), last accessed July 1, 2011.

<sup>2</sup> In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2010 Notice of Inquiry, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-92A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf), last accessed July 1, 2011. {Hereafter: 2010 Notice Of Inquiry}

<sup>4</sup> § 202(h) of the 1996 Telecommunications Act. *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) {Hereafter §202(h)}

<sup>5</sup> § 202 (h) originally required a review of media ownership rules every two years, the first of which was commenced in 1998. Congress extended this process to four years in legislation passed which expanded the national television ownership limit to 39% of the national television audience in January 2004. Under the new four year guideline, the FCC conducted a quadrennial review in 2006 and launched a second in 2010. *Id.*

agency's policy decisions have suffered significant setbacks when its rulemaking processes have come under judicial review.

In 2011, the agency faces a continuing requirement to review its media ownership rules, and remands issued by the Third Circuit Court of Appeals in reviews of two different media ownership proceedings. Evidence will continue to play a central role in agency decision-making on media ownership, and to illuminate the challenges the Commission faces now and in the future, this dissertation will examine the history, implementation, rationale and supporting evidence of the FCC's media ownership policy decisions between 1996 and 2010.

### **Radio: The Poster Child for Media Ownership Policy Since 1996**

Media-ownership policy in the United States has been described as a debate “mired in a conceptual bog.”<sup>6</sup> On one side, the control of media outlets by “corporate media” is portrayed as a threat to democracy, while on the other the media corporations cite the benefits of economy of scale and argue that such benefits allow companies to better serve audiences. While the issue is not quite as black and white as either side would have you believe, the debate over media ownership is a debate about the level of citizen access to information.

Critics of the modern media environment, like Robert McChesney, suggest that the result of favoring a commercial media system design has left the state of modern journalism, especially broadcast journalism, in deplorable condition.<sup>7</sup> He argues that audiences are fed a steady diet of content that is lacking in information about policy and other hard news.<sup>8</sup> McChesney proposes that the commercial media worked long and hard to perpetuate a cyclical myth that it alone is positioned to provide the caliber of journalism a democracy requires for informed self

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<sup>6</sup> David Pritchard, Christopher Terry & Paul R. Brewer, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 *Comm. L. & Pol'y* 1 (2008).

<sup>7</sup> Robert McChesney, *The Problem of the Media: U.S. Communication Politics in the 21st Century*, (2004).

<sup>8</sup> *Id.*

government so the best policy option is to unleash the market to provide content that people want. One of the most significant problems with this policy choice, McChesney argues, is the lack of resources dedicated to the creation of informational media content. He asserts the “...existing commercial system has lost interest in journalism, or has lost much incentive to produce it and what it does produce tends to have serious problems, owing to commercial pressures.”<sup>9</sup>

Media ownership has been, remains, and will continue to be an important democratic issue. The relationship between control of media outlets and the sources of and the diversity of information that citizens have access to is an important one to understand, even in the age of the internet. Broadcasting still plays an important central role in the every day media use of Americans. The use of broadcast media remains at high levels. In a Pew Study cited heavily by the FCC in the early stages of the 2010 proceeding,<sup>10</sup> nearly 78% of Americans are getting news on a daily basis from a local broadcast television station.<sup>11</sup> Weekly radio audiences have remained largely static, with approximately 236 million citizens, roughly 78% of all American men, women and children using a broadcast radio station at least once in a week.<sup>12</sup> Even in the face of the digital communications revolution, a large quantity of the informational content on the web is simply repackaged and redistributed from existing media, including “the dinosaurs” of newspapers, radio and broadcast television.<sup>13</sup> Broadcast radio has played a central role in the regulatory debate between media corporation economics and citizen access to information.

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<sup>9</sup> Id. at 7.

<sup>10</sup> 2010 Notice of Inquiry supra note 3 at 3, Footnote 9, citing Pew Research Center For People and the Press, Key News Audiences Now Blend Online and Traditional Sources: Audience Segments in a Changing News Environment, (2008), available at <http://people-press.org/report/444/news-media> (“Pew People and the Press”), last accessed July 1, 2011.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Mark Leccese, Online Information Sources of Political Blogs, 86 *Journalism and Mass Comm Q.* 578 (2009).

Radio became the primary focus of this thesis in large part to the central role it has played in the debate over the FCC's media ownership policies. The broadcast radio industry in the United States changed dramatically after the 1996 Telecommunications Act was implemented. Prior to 1996, the ownership of radio stations was regulated according to a numerical formula that counted the number of stations under common ownership, nationwide. Beginning in 1984, the FCC began to expand the regulatory limits on broadcast station ownership by raising the national limits on ownership. At the time of the rule change, a single company was able to own seven AM, seven FM and seven television stations (known as the "Rule of Sevens").<sup>14</sup> The new rules authorized the ownership of twelve stations in each service.<sup>15</sup> Another ownership limit increase followed in 1992, allowing a single company to own up to eighteen stations in each band, both AM and FM.<sup>16</sup> Two years later, in 1994, the FCC revised the national ownership ceiling again, and authorized the common ownership of up to 20 stations in each of the radio bands.<sup>17</sup>

The passage of the 1996 Telecommunications Act lifted the national restrictions on radio station ownership. The number of licensed radio stations in a designated market area (DMA) now determined the local limits on ownership.<sup>18</sup> In the largest markets, a company could own as many as eight stations in a single market, with no more than five in either the AM or FM band.<sup>19</sup>

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<sup>14</sup> Rules and Regulations Relating to Multiple Ownership, 18 F.C.C 288 (1953).

<sup>15</sup> The rule of sevens stated that a broadcaster could own seven AM, seven FM and seven television stations, the "rule of twelves" increased the number of stations to 12 in each category. Multiple Ownership, 100 F.C.C.2d 17, 56, R.R.2d 859 (1984).

<sup>16</sup> Broadcast Multiple Ownership Rules, 47 C.F.R. § 73.555 (1992).

<sup>17</sup> Radio Ownership Rules, 9 F.C.C.7183, 76 (1994).

<sup>18</sup> Telecommunications Act of 1996, Sec 202, b. 1.

<sup>19</sup> Id.

With the implementation of the new regulatory limits, a tidal wave of consolidation in the ownership of commercial radio stations began.<sup>20</sup> At one point, Clear Channel Communications owned over 1300 commercial radio stations nationwide.<sup>21</sup> As more radio stations became commonly owned, many stations changed program formats to reduce the internal format overlap between formerly competitive stations. The radio station format changes that followed the passage of the 1996 Telecommunications Act were cited by the FCC as a positive benefit of media ownership consolidation even as contemporary assessments of the ongoing format changes were demonstrating a reduction in diversity of viewpoints.<sup>22</sup> The contradiction between the economic benefits of ownership consolidation and a corresponding reduction in viewpoint diversity are illustrative of the competing policy goals within the FCC's media ownership policy.

### **Three Regulatory Goals: Competition-Localism-Diversity**

Part of the FCC's challenge in finding evidence to support agency rulemaking decisions on media ownership stems from the Commission's attempts to regulate media for three policy objectives Competition, Localism and Diversity simultaneously. Favoring the first through the

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<sup>20</sup> Between March of 1996 and March of 2003, the number of owners of radio stations declined by 35%. "This decline is primarily due to mergers between existing owners." FCC Media Bureau, Review of the Radio Industry, 2003, [www.fcc.gov/ownership/materials/already-released/review090003.pdf](http://www.fcc.gov/ownership/materials/already-released/review090003.pdf). last accessed July 1, 2011.

<sup>21</sup> Clear Channel owned 1346 stations after consolidating with AM/FM Inc., but the company was forced to make some divestitures of properties in markets where the company had exceeded the local limits on station ownership. Currently the company owns just over 1200 stations nationwide and provides programming content to over 5000 stations through its programming syndicator, Premiere Radio Networks. [www.clearchannel.com](http://www.clearchannel.com) (Last accessed July 1, 2011).

<sup>22</sup> As the FCC abandoned the enforcement of the Fairness Doctrine, the modern talk radio programming format began to develop on AM radio. As FM radio became associated with a stronger signal with additional frequency bandwidth, radio music formats gravitated to the FM band because of the increases in sound quality. Informational stations, such as all-news stations began to assume dial positions on the AM band. The early success of the Rush Limbaugh program increased the commitment of many AM stations to a "Talk" or "News-Talk" format. Other conservative radio talk shows were launched in the wake of the Limbaugh program, and the conservative talk radio format was born. See: Thomas Hazlett and David Sosa, Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Post Deregulation Radio Market," J. Legal Stud. 68 (1997).

implementation of numerical structural limits on broadcast station ownership,<sup>23</sup> while paying lip service to the second through a seemingly endless rulemaking proceeding,<sup>24</sup> in a vain effort to ensure the third which the FCC repeatedly claims to be the most important,<sup>25</sup> the Commission has struggled to find evidence to support the decisions it has made regarding the media ownership rules, most notably during the release of new regulations developed during the agency's 2002 Biennial Review.<sup>26</sup>

Beginning with the implementation of the 1996 Telecommunications Act, the FCC formally adopted a new regulatory philosophy based on a marketplace model. This new competition based philosophy came with significant changes to how the FCC implemented policy decisions, including decisions about the agency's media ownership rules.

As part of this new approach to regulation, the commission also adopted competition as a proxy measurement for the other goals of the agency's media ownership policy. As a proxy which can be assessed using economic measurements, the concept of competition has come to play a central role in achieving the other policy objectives, as the FCC believes that robust competition in economic terms will create incentives that enhance both localism and diversity, and that these incentives can serve to measure how well these goals are being met. "The

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<sup>23</sup> See Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 F.C.C.R. 18503 (2002). {Hereafter 2002 Biennial Review NPRM}

<sup>24</sup> The FCC created a localism task force in 2003, to provide guidance to agency decisions on the localism policy objective. The task force has taken only limited actions in the eight years since its inception, and has taken no formal action since April of 2008. See Generally: [http://transition.fcc.gov/localism/Localism\\_Fact\\_Sheet.pdf](http://transition.fcc.gov/localism/Localism_Fact_Sheet.pdf), last accessed July 1, 2011.

<sup>25</sup> Viewpoint Diversity has been described by the FCC as the "touchstone" objective of its diversity policies. Despite this favored position, the FCC has done almost nothing to assess the effect of the implementation of its structural ownership policies on the availability of "diverse and antagonistic" viewpoints within media content. See 2002 Biennial Review NPRM, supra note 23 at 18518.

<sup>26</sup> Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 02-277, 18 F.C.C.R (2003) {Hereafter: 2002 Biennial Review Order}

Commission has found that competition among broadcast outlets is likely to benefit consumers by making available programming that meets consumers' preferences."<sup>27</sup>

Competition based proxies have included advertising markets "Historically the Commission has relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets."<sup>28</sup> In such cases, the FCC has asked whether it is safe to continue to assume that a competitive advertising market reflects sufficient content variety, "If the advertising market is found to be competitive, can we then infer that the menu of content broadcasters provide is doing a good job of attracting the demographic groups in which advertisers are interested?"<sup>29</sup>

In terms of policy implementation, competition is created through the FCC's limits on ownership of broadcast radio and television stations. Limits on ownership, or "Outlet Diversity" rely on economic incentives inherent in competition for audience share to increase the diversity of programming. Under the premise of Outlet Diversity, diverse ownership should lead to diverse content. More simply, more ownership diversity should result in more content diversity, including a diversity of content between competing informational formatted radio stations. Although the Outlet Diversity policy is designed to encourage diverse ownership, even as broadcast stations have been added, the FCC's structural regulation approach since 1996 has resulted in a 39% reduction in radio station owners and a 33% reduction in television station owners overall. Therefore, despite a continuing reliance on competition as a centerpiece of the implementation of media ownership policy, FCC policies have reduced the number of competitors in the marketplace.

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<sup>27</sup> 2010 Notice Of Inquiry, *supra* note 3 at paragraph 34.

<sup>28</sup> *Id.* at paragraph 40.

<sup>29</sup> *Id.*

## Localism

The second goal of the FCC's media ownership policy is localism. In basic terms, the FCC believes the centerpiece of the localism goal, "is the communication between broadcasters and the members of the public that they are licensed to serve."<sup>30</sup>

In practical terms, localism reflects the production and airing of local news and public affairs programming by licensed broadcast stations. While the FCC efforts on enhancing localism could be described as anemic, the agency has argued that a significant policy goal is achieved "by providing viewers and listeners greater access to locally responsive programming including, but not limited to, local news and public affairs matter."<sup>31</sup>

Historically, "the concept of localism has been a cornerstone of broadcast regulation for decades...and is reflected in and supported by a number of current Commission policies and rules."<sup>32</sup> Despite the cornerstone position in broadcast regulation, recent FCC assessments of localism have demonstrated that the implementation of the FCC's media ownership rules has negatively impacted the agency's localism objectives. In January 2008, the agency released a report on its localism proceedings:

In written comments and testimony received during six related field hearings, many other commenters have raised serious concerns that broadcasters' efforts, as a general matter, fall far short from what they should be. Specifically, the record indicates that many stations do not engage in the necessary public dialogue as to community needs and interests and that members of the public are not fully aware of the local issue-responsive programming that their local stations have aired.<sup>33</sup>

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<sup>30</sup> In the Matter of Broadcast Localism, Report on Broadcast Localism and Proposed Rulemaking, 23 F.C.C.R. 1324 (2008).

<sup>31</sup> Id. at 1326.

<sup>32</sup> Id. at 1327.

<sup>33</sup> Id. at 1325.

At the same time that the FCC's competition objectives have led to significant reductions in the number of competitors, the agency's efforts on localism are not meeting the Commission's stated goals.

## **Diversity**

At the heart of the FCC's media ownership policy goals is the elusive objective of diversity. While diversity has remained a difficult concept to define, the use of a competition based regulatory philosophy has put economic efficiency against citizen access to information. This conflict is caused in large part by the FCC itself through the implementation of the agency's Outlet Diversity Policy.<sup>34</sup> Defined as "the control of media outlets by a variety of independent owners," The FCC uses limits on ownership as a proxy for measuring the diversity of media content.<sup>35</sup>

Despite relying heavily on regulatory philosophy which promotes economic competition, and a policy which favors quantitative assessments of diversity through proxy measurements, the FCC has at least recognized that access to a wide range of "diverse and antagonistic" viewpoints,<sup>36</sup> or viewpoint diversity is the most important type.

One of the major obstacles to understanding the Commission's interest in viewpoint diversity is the multiple uses of the concept by the agency. The FCC uses the term "viewpoint diversity" to describe a policy objective, a methodological approach to assessing media regulation and to describe the larger democratic or societal goals which the Supreme Court has relied on when supporting the agency's content regulations.

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<sup>34</sup> Federal Communications Commission, Further Notice of Proposed Rulemaking, 10 F.C.C 3524, 3549 (1995).

<sup>35</sup> Id.

<sup>36</sup> Id.

As a policy objective, viewpoint diversity is the stated central policy objective of the FCC's media ownership policies. In this usage, viewpoint diversity represents the "touchstone" objective of the diversity prong of the FCC's Competition, Localism and Diversity trinity of policy objectives. Like localism and competition, the Commission attempts to achieve viewpoint diversity through the use of its structural ownership regulations.

As a methodological approach, the FCC has stated that a measurement of the diversity of viewpoints in media content would provide the agency with data on the effects of the media ownership policies in place since 1996. Despite this stated position, the agency has refused to develop evidence which uses viewpoint diversity as a methodological approach, fearing that such an analysis would be both inherently subjective as well as present potential first amendment regulatory problems.

In legal terminology, the concept of viewpoint diversity is central to the marketplace of ideas concept. The airing of "diverse and antagonistic" viewpoints contributes to the democratic process by allowing citizens to access a range of ideas. Historically, the Supreme Court has relied on the metaphor when upholding FCC's content regulations,<sup>37</sup> such as the Fairness Doctrine, and its corollary rules, the Personal Attack and Political Editorial rules.<sup>38</sup>

In practical terms, the FCC believes that informational programming content, like news and public affairs, is the best indicators of programming which is likely to contain a diversity of viewpoints. Despite the widespread use of the marketplace of ideas metaphor by policymakers and the central role of viewpoint diversity as objective to the FCC's media ownership policy, the agency remains reluctant to conduct an assessment of the viewpoint diversity being made

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<sup>37</sup> National Broadcasting Co., Inc v United States, 319 U.S. 190 (1941). Red Lion Broadcasting Co. v Federal Communications Commission, 395 U.S. 367 (1969).

<sup>38</sup> Fairness Doctrine: Federal Communications Commission, Report on Editorializing by Broadcast Licensees 13 FCC 1246 1949. Personal Attack Rule, 47 C.F.R. § 73.123 (1967), Political Editorial Rule, 47 C.F.R. § 73.123(c) (1967).

available. This reluctance to evaluate the policy outcomes has created a large evidentiary obstacle for the FCC as the agency continues to evaluate its media ownership rules.

## **FCC, Rulemaking and Evidence**

Under section 202(h) of the Telecommunications Act, the FCC must periodically review its media ownership rules. As a result, biennial agency reviews were launched in 1998, 2000 and 2002. At the completion of the 2002 Biennial review in June of 2003, the FCC proposed replacing numerical limits on broadcast station ownership with the Diversity Index.<sup>39</sup> The DI was a quantitative system based on anti-trust measurements for calculating the level of concentration created by cross-media ownership. The changes gave rise to a diverse coalition of citizen groups ranging from the Sierra Club to the National Rifle Association publicly opposing the agency's new media ownership rules,<sup>40</sup> and as nearly a million public comments were filed with the FCC,<sup>41</sup> the Commission faced judicial review of the agency's findings of the 2002 Biennial Review in the Third Circuit Court of Appeals in *Prometheus Radio Project v FCC*.<sup>42</sup>

Upholding parts,<sup>43</sup> but remanding large sections of the FCC's June 2003, decision to the Commission for further review and clarification,<sup>44</sup> the Third Circuit ruled that the Diversity Index was arbitrary and capricious, and not supported by either evidence in the record or basic

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<sup>39</sup> The Diversity Index was a new method for calculating media ownership concentration that was based on anti-trust methodology. The Diversity Index was found to be arbitrary and capricious by the Third Circuit and then remanded to the Commission in the *Prometheus Radio Project* decision in 2004, and then abandoned by the Commission during the 2006 review proceeding. *Prometheus Radio Project v FCC*, 373 F.3d 372 (3d Cir. 2004), {Hereafter: *Prometheus I*}.

<sup>40</sup> "Lawmakers Criticized on Media Ownership," by David Weina, National Public Radio, June 2, 2003. For NPR's coverage of the media ownership debate in 2003 and in 2007, including access to archived audio, see generally: <http://www.npr.org/news/specials/fcc/>, last accessed July 1, 2011.

<sup>41</sup> Copies of the comments are available from <http://fjallfoss.fcc.gov/ecfs/>, last accessed July 1, 2011.

<sup>42</sup> *Prometheus I*.

<sup>43</sup> *Id.* at 384.

<sup>44</sup> *Id.*

logic.<sup>45</sup> Retaining the jurisdiction in judicial reviews of future FCC media ownership decisions, the Third Circuit remanded the Diversity Index and the related changes back to the Commission with a suggestion that agency attempt to generate some evidence to support future rulemaking decisions regarding its media ownership regulations.<sup>46</sup>

Given the “hard-look” standard<sup>47</sup> which applies in the legal review of administrative rulemaking,<sup>48</sup> the deference typically given to an administrative agency’s expertise by the courts, and the lack of evidence in the form of a review of the effects of the implementation of its structural regulatory scheme, the *Prometheus* remand in 2004 (and now a second remand issued by the Third Circuit in *Prometheus II* issued on July 7, 2011)<sup>49</sup> has effectively cut off any changes to the regulatory scheme dealing with media ownership other than by an act of Congress. If the FCC’s rulemaking decision for media ownership policy in the agency’s 2010 Quadrennial Review is to withstand judicial scrutiny, the issues of evidence raised in both *Prometheus* decisions will need to be specifically addressed in the agency’s decision.

Unfortunately for the FCC, the returns in the 2010 Quadrennial Review are shaping up as a double-barreled combination of more of the same and evidence which undermines the last fifteen plus years of policy implementation.<sup>50</sup> On the first point, one research study that the FCC funded which requested information on the quantity of news production continued to use proxy measurements, in this case, radio station format, in place of actually measuring the availability of

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<sup>45</sup> Id. at 382.

<sup>46</sup> Id. at 428.

<sup>47</sup> Under the Hard Look Doctrine, a reviewing court is required to determine if an administrative agency has taken a “hard look” at the relevant evidence, considered policy alternatives and has acted rationally. The Doctrine exists to emphasize the rulemaking process, and to ensure an agency has developed an evidentiary record that reflects the factual and analytical basis for a decision. See Harold Leventhal, *Environmental Decision Making and the Role of the Courts*, 12 U. Pa. L. Rev. 509 (1974).

<sup>48</sup> See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). and E. Gellhorn & R. Levin, *Administrative Law and Process*, 2006.

<sup>49</sup> *Prometheus Radio Project v. FCC*, 3rd Cir, July 7, 2011 {Hereafter *Prometheus II*}

<sup>50</sup> The FCC’s 2010 studies, peer reviews and revisions are available online: <http://www.fcc.gov/encyclopedia/2010-media-ownership-studies>, last accessed September, 1, 2011.

news in markets.<sup>51</sup> In another study designed and funded to develop a theoretical model for the measurement of viewpoint diversity, the study authors concluded that for the FCC to meet its diversity objectives, the agency may need to consider rolling back some of the changes by reimposing more stringent media ownership limits.<sup>52</sup> These findings reflect evidence generated by the FCC in earlier review proceedings, including some which the agency “lost,”<sup>53</sup> which suggest, despite the FCC’s ongoing reliance on a regulatory implementation based on competition, that current media ownership policy is yielding neither the proposed benefits of competition nor the diversity of content sought by the agency the agency.

## Entrenchment

In *The Creation of the Media*, a study of the development of the system of mass media in the United States, Paul Starr proposes a thesis of constitutive choices.<sup>54</sup> Starr asserts that at a basic level, constitutive choices are decisions about how things are built and how things work.<sup>55</sup> He suggests that constitutive choices related to mass media come in three areas. The first are the laws and societal norms dealing with freedom of expression, access to information, privacy and

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<sup>51</sup> Joel Waldfoegel, “Station Ownership and the Provision and Consumption of Radio News” available online: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-307471A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307471A1.pdf), last accessed July 1, 2011.

<sup>52</sup> Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie, *A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied*, available online: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-307486A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307486A1.pdf), last accessed July 1, 2011.

<sup>53</sup> In 2006 it was revealed that a set of working studies developed as part of the 2002 Biennial Review by the FCC’s media bureau had been completed but had never been released to the public. These studies, conducted before the release of the 2003 ownership review, contained data that suggested that the FCC’s policies were not generating the desired results. FCC Chairman Kevin Martin ordered the studies released after their existence was leaked to members of Congress. One study demonstrated that local ownership of media outlets quantitatively increased news production, including local on-location news, a finding that was inconvenient for the FCC’s decision making at the time. See Federal Communications Commission, 2004, “Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News,” <http://transition.fcc.gov/ownership/2006-materials.html>, last accessed July 1, 2011.

<sup>54</sup> Paul Starr, *The Creation of the Media*, (2004).

<sup>55</sup> *Id.* at 1-3.

intellectual property.<sup>56</sup> The second area of constitutive choices deal with the design of a country's communication media and networks, as well as, its larger industrial organization.<sup>57</sup> The third area of choices includes the support for and the acceptance of education, research and innovation each of which play a role in how technology is deployed.<sup>58</sup>

Starr suggests the choices of the past will bias and inform the decision making of the future, a process he refers to as entrenchment.<sup>59</sup> As policy inertia and developmental choices become institutionalized, the constitutive choices about the design of a communication system, and by extension, the policy choices involved in implementing that system, successfully entrench themselves.<sup>60</sup> Therefore, to understand the structure of the contemporary mass media in America, we must examine the constitutive choices that were made in the past.

By examining the development of the electronic mass media in the United States, we can see that two interrelated constitutive choices have entrenched themselves. The first is a reliance on what Hugh Slotten refers to as a Technocratic Values when implementing the technical designs of an electronic communication system.<sup>61</sup> Congress's preference to leave the decision making about the design of radio to the scientists, who could be dispassionate about the decision making station allocations, broadcasting would be a licensed media system, with stations given a charter to operate in the "public interest, convenience and necessity" rather than as common carriers system accessible to all.

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<sup>56</sup> Id. at 4-5.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id. at 5-7.

<sup>60</sup> Id.

<sup>61</sup> Hugh R. Slotten, Radio and Television Regulation: Broadcast Technology in the United States, 1920-1960. (2000).

The second major constitutive choice, which is directly related to first, is the ongoing decision to favor a commercially controlled media system.<sup>62</sup> As America's early press system changed from one where newspapers existed primarily due to a political party's patronage to a more contemporary model where information became a commodity and was disseminated in part to generate a profit, an important shift occurred which up-ended the traditional model of libertarian press theory. American media became a for-profit enterprise, and as radio was coming of age, the constitutive choice favoring a commercial system was reflected in the regulatory decision making of the age. Issues of spectrum scarcity, government licensing and station control were put to use to entrench a commercial broadcast model as AM radio was developed in the late 1920's and early 1930's.<sup>63</sup> When faced with similar decisions during the television station license freeze between 1948-1954, the FCC relied on an entrenched decision for a system of broadcast stations under commercial control.

The entrenchment of the decision to favor a commercial system can even be seen reflected in the contemporary debates over net neutrality and the internet.<sup>64</sup> As internet service providers begin to integrate both vertically and horizontally with content producers, and bandwidth and spectrum scarcity issues begin to reappear,<sup>65</sup> we are certainly poised for another round of constitutive choices about the design of our communication system. As the agency faces future rule reviews and attempts to respond to the requirement of judicial remands, an understanding of the current regulatory environment as well as a honest assessment of the

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<sup>62</sup> Starr, *supra* note 54 at 16.

<sup>63</sup> Robert McChesney, *Telecommunications, Mass Media, and Democracy: The Battle for the Control of U.S. Broadcasting, 1928-1935*, (1993).

<sup>64</sup> The dominant commercial control of internet service providers has created a situation where private entities can control access to information. The efforts of the FCC to enforce net neutrality provisions on ISPs has been done, in part to ensure that all information has a equal chance to reach users. See <http://www.fcc.gov/blog/new-rules-open-internet>, last accessed July 1, 2011.

<sup>65</sup> Obtaining or reclaiming the necessary spectrum for the FCC's National Broadband Plan has been the chief obstacle to its implementation. At the launch of the plan, the FCC had approximately 50 Mhz of spectrum available, but the plan's design required almost 300 Mhz. <http://www.fcc.gov/broadband>, last accessed July 1, 2011.

Commission's policy decisions has become even more important than ever. The FCC's entrenched decision to continue to use competition as both the centerpiece of its regulatory strategy and as a proxy to achieve its other policy goals has been the cause of much of the debate over media ownership policy. To change course, the agency may need to go back and examine the entire policy implementation.

### **This Dissertation**

The ability to understand the design and operation of our communication system is critical to understanding the role that system can play in our democracy. While new media outlets have appeared to make the information landscape limitless for those people who have access to them,<sup>66</sup> the reality is that most new media systems are really new delivery systems for old media content. More of the same, such as news produced for one station, but carried on two or more, does not increase diversity. The modern media environment may provide a variety of ways to access information, but what is lacking from the policy process is an assessment of the diversity of the information and viewpoints which are available.<sup>67</sup>

There is no question that in the overall modern media environment, substantial viewpoint diversity exists, but the problem for regulators is to guarantee public access to this diversity.<sup>68</sup> Beginning in the 1980's the FCC began to argue that direct regulation of broadcast content could be replaced by the workings of a free marketplace. The FCC, under the leadership of Chairman

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<sup>66</sup> The launch of the 2010 proceeding relied heavily on the Pew study of media usage. In terms of the internet, usage of the medium for access to online news is between 31 and 37% of users. See Pew Study at note 10 and 2010 Notice of Inquiry, *supra* note 3.

<sup>67</sup> J.Y. Kim, Empirical Testing on an Unasked Question in Turner v. FCC: Do Must-Carry Rules Enhance Diversity? 21 Comm. & L. 55 (1999)

<sup>68</sup> Access to media of different types will be a significant issue when dealing with regulatory issues for new media outlets. Broadcasting, as an over the air service which requires minimal equipment is, and will remain, much more accessible than new media, even in areas with reliable hookups. The Pew Study cited heavily in the 2010 NOI (See note 39) indicates that as much of a third of U.S. population lacks access to reliable broadband service.

Mark Fowler, argued that in place of content controls, marketplace competition would lead to diversity in programming content.<sup>69</sup> These ideas launched a period of deregulation of broadcasters, and led to the passage of the 1996 Telecommunications Act.

But does the marketplace really work as predicted? What evidence has the FCC relied on to try to rationally justify the continued implementation of its marketplace policy, and by extension, how well have economic theory and marketplace mechanisms worked in creating access to viewpoint diversity? These questions are incredibly relevant, as media, especially broadcasters, play a critical gatekeeping role for information in our society. Content, regardless of how diverse, is useless unless citizens have access to it.

In this thesis I will argue that the FCC has failed to engage in any sort of meaningful policy evaluation that measures the viewpoint diversity available. While failing to do any sort of meaningful evaluation of its media ownership policy and going so far as to ignore evidence which demonstrated the policy was having the absolute opposite effect of its intent,<sup>70</sup> the FCC permitted a massive wave of consolidation in media ownership using theoretical benefits, such as economy of scale, where the benefits of mergers went to the companies involved and not to the public.<sup>71</sup> The FCC approved mergers without logically applying the effects of the change, such as the massive reductions in staff and increases in the sharing of content between co-owned stations, to viewpoint diversity. In fact, the FCC championed the purported benefits of economy of scale in media mergers until the mergers grew so large as to raise issues of oligarchical control

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<sup>69</sup> Mark S. Fowler and David L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982).

<sup>70</sup> See Federal Communications Commission, 2004, "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News," and Federal Communications Commission, "Review of the Radio Industry, 2003" online at <http://transition.fcc.gov/ownership/2006-materials.html>, last accessed July 1, 2011

<sup>71</sup> Traditionally the concept of economy of scale relates to "the saving in cost of production that is due to mass production." In terms of media ownership, economy of scale allows for the reduction of the cost of production through the sharing of facilities, staff and even content. <http://wordnetweb.princeton.edu/perl/webwn?s=economy%20of%20scale>, last accessed July 1, 2011

in local advertising markets. The FCC considered mergers that gave the top two competitors in a media market control of up to 99.5% of advertising in that market.<sup>72</sup> Then the agency again changed its approach, stating that numerical limits on station ownership were the best way to ensure viewpoint diversity.<sup>73</sup> And in what might be described as the ultimately craven move by the FCC, the agency justified its change in approach by recycling nearly forgotten rhetoric about protecting the public interest in ensuring access to diverse and antagonistic viewpoints.<sup>74</sup>

Viewpoint diversity is an important concept in both democratic and regulatory terms. Obviously, in terms of democracy, access to a range of viewpoints is critical to making sure citizens can, if they so choose, inform themselves and be active in our governmental processes. In basic terms, increasing viewpoint diversity is just a regulatory mechanism for encouraging the creation and dissemination of more speech. More speech is, and has been, both a traditional and legitimate goal within our society, but exists as a goal that is difficult to quantify or assess, especially when the FCC continues to rely on economic indicators as proxies for an actual measurement of the quantity and quality of access to information.<sup>75</sup>

In terms of the regulation of media, the concept of viewpoint diversity and the rights of citizens to receive information has played a central role in the justification and judicial approval of the FCC's broadcast regulation since its creation in 1934. Even as the public trustee model of regulation was abandoned in favor of deregulation and later, competition as regulatory

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<sup>72</sup> The FCC did not approve this merger straight out, but designated it for a hearing. See FCC 02-166, In The Matter of The Applications of Mountain Wireless, Inc. Assignor And Clear Channel Broadcasting Licenses, Inc., Assignee For Consent to Assignment of Licenses of WSKW(AM) and WHQO(FM), Skowhegan, Maine, 17 F.C.C.R. 13914 (2002).

<sup>73</sup> The Commission stated that the numerical limits approach is designed to promote competition by assuring that a sufficient number of rivals are actively engaged in competition for listening audiences. FCC03-127, 2002 Biennial Review Report and Order, 18 F.C.C.R. 13620 (2003) at 13716.

<sup>74</sup> Id. at 13642.

<sup>75</sup> "Our challenge is to adapt our rules to ensure that they promote these values in the new marketplace and into the future." See: 2010 Notice Of Inquiry, supra note 3 at paragraph 1.

philosophies, the FCC continued to insist, at least in rhetorical terms, that viewpoint diversity was a central policy objective.<sup>76</sup>

Thus constitutive choices we make about our media system now will also be reflected in the communication systems of the future. The change from the traditional regulatory model where broadcasters acted as public trustees of the airwaves, and stations had obligations to serve local audiences to a regulatory model based on marketplace mechanisms, was a change in constitutive choice. The time has come to assess the outcomes of that choice. The development of solid empirical evidence which explores the relationship between media ownership and the type of informational content which is available to people is long overdue in the policy arena. More important, however, is honestly assessing our communication system, and the impact of constitutive choices in regulation we have about the ability of citizens to access information.

Chapter One explores a regulatory paradox which exists between content regulation and structural regulation. Although the FCC now relies on structural regulations to create viewpoint diversity, historically the Commission also relied on a second approach which put the Commission at the center of a regulatory implementation that included content requirements. As the Commission abandoned content regulations that were designed to increase citizen access to information, the agency continued to regulate media content for indecency and children's programming. The chapter explores the relationship between content and structural regulations and proposes that some of the FCC's problems are self created by the agency's refusal to develop evidence based on actual media content.

Chapter Two examines the use of expert evidence and testimony by both the trial courts and administrative agencies, the legal challenges administrative agencies face when using evidence in a rulemaking proceeding, and the standards of evidence required by the

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<sup>76</sup> 2002 Biennial Review NPRM supra note 23.

Administrative Procedure Act as interpreted by the courts. The FCC continues to struggle as it attempts to collect and develop evidence to support its rulemaking decisions on media ownership and this chapter concludes with a discussion of how the requirements for evidence brought about by §202(H), a small provision in the 1996 Telecommunications Act, have further complicated the FCC's struggle with evidence.

Chapter Three examines the statutory mandate of the Telecommunications Act, including how the legislation relieved the agency of its traditional role as the regulatory expert by requiring the Commission to apply limits on media ownership established by Congress. This chapter looks at the actions taken by the FCC between 1996 and 2010 in terms of media ownership policy, the legal setbacks the FCC has endured when its decisions have come under judicial review, and assesses the agency's regulatory actions in terms of the change to a model based on competition.

Chapter Four builds on the timeline in Chapter Three, and examines the evidence used by the FCC to support its media ownership decisions since 1984. After examining the records for 1,039 license transfer, comparative ownership and other adjudications dealing with the ownership of broadcast stations, comments entered into the rulemaking record, and evidence developed by the Commission as part of the reviews conducted in 2002, 2006 and 2010, the chapter demonstrates that the FCC's problem with finding empirical evidence to support its rulemaking decisions is not new.

Chapter Five looks at the FCC's attempts to generate empirical evidence as part of the 2010 review. Although the agency solicited bids for research in the summer of 2010, the FCC waited until very late in the year to make its funding decisions. Chapter Five discusses the findings and methodology from one of the FCC's funded studies and reports the data from a study which was proposed and conducted in response to the Commission's initial request. In

comparing the designs and results of the two studies, this chapter discusses how the type of research sought by the FCC provides little actual data to meaningfully address the questions about the diversity of viewpoints available, or even the questions the Commission was asking at the time.

Chapter Six summarizes the findings of the thesis and their implications. It concludes there has been an absence of anything resembling the type of evidence which would have meaningfully informed the FCC's policy on media ownership. After proposing some solutions the chapter provides suggestions for future research in this area.

# Chapter 1

## A Paradox in Regulatory Implementation

## Chapter 1: The Paradox in Regulatory Intent

The regulation of broadcasters by the Federal Communications Commission has historically taken two major methodological approaches. The first, a structural regulation regime,<sup>77</sup> controls the ownership and allocation of broadcast stations, while the second approach, a behavioral regime,<sup>78</sup> regulates the content of licensed broadcasters. This two-pronged regulatory approach to broadcasting has resulted in a complicated history of policy making and legal decisions. The theories at the core of each approach, while designed to meet a common objective of diversity, have led to the implementation of policies designed to achieve substantially different, sometimes even directly opposing, regulatory goals. This chapter explores the history, implementation and criticism of these two regulatory approaches to address what has ultimately resulted in the paradox of content regulations withstanding judicial review while structural regulations, designed to be content neutral, are overturned by reviewing courts.

The tension between structural and behavioral regulatory approaches extends into a complicated debate about the relationship between media ownership and media content. At a basic level, one may ask the question; does media ownership affect media content and in what ways? Unfortunately, a solid answer to this question has been lacking from the policy makers and empirical data that explores the relationship between content and ownership is in short supply.<sup>79</sup>

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<sup>77</sup> As stated in the introduction chapter, the primary implementation of structural ownership policy is accomplished through numeric limits on ownership. Numeric limits on media ownership have existed since the beginning of the regulation of broadcasters. The major change in this area since the passage of the 1996 Telecommunications Act has been the numeric level of ownership the current regulations allow.

<sup>78</sup> Christopher Yoo, The Rise and Fall of the Technology Specific Approach to the 1<sup>st</sup> Amendment, 91 Geo. L.J. 245(2003).

<sup>79</sup> See Rob Frieden, Academic Research and its Limited Impact on Telecommunications Policy, 2 Int J Com 421, (2008). and Benjamin M Compaine, The Impact of Ownership on Content: Does it Matter?, Cardozo Arts & Ent. L.J. 775 (1995).

An analysis of the actual media content being produced by different media organizations would logically be the first place to explore the relationship between media ownership and viewpoint diversity,<sup>80</sup> but the academic and legal literature which does exist primarily uses two approaches, neither of which directly addresses content.<sup>81</sup> The first is an empirical approach which examines the concentration of media outlets, relying on an analysis based on competitive and/or antitrust concerns. The second line of inquiry examines the social and political aspects of media by asking questions which provide answers that are often more conceptual than empirical like what role should media play in society or what consequences follow when and if the media fail to provide a diversity of viewpoints?<sup>82</sup>

## **Content Regulation**

The inception of content controls can be traced to the decision to license broadcasters. Rather than award ownership of a spectrum allocation to licensees, ownership of the spectrum was retained by government on behalf of citizens. Spectrum was considered a “scarce” public resource and the Commission was forced to make comparative decisions regarding who would be given a broadcast license.<sup>83</sup> As a result, the licenses issued by the FRC and the FCC required that broadcasters operate in, and by extension produce content that served, the public interest,

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<sup>80</sup> There is an excellent discussion of the need for and problems with collecting media content for an analysis in Stephen Lacy & Daniel Riffe, The Impact of Competition and Group Ownership on Radio News. 71 Journalism Q 583 (1994).

<sup>81</sup> Ronald Rice, Central Concepts in Media Ownership Research and Regulation, Chapter 1 in Media Ownership: Research and Regulation, (2008).

<sup>82</sup> The FCC favors evidence of the first approach using statistical measurements or applications of anti-trust measurements. Commenters in the FCC’s rulemaking, biennial, and quadrennial reviews have contributed significant volumes of material that follows the second track. See generally: Gregory S. Crawford, Evan Kwerel & Jonathon Levy, Economics at the FCC 2007-2008, 33 Rev Ind Organ 187 (2008). and Jeffery Lane Blevins & Duncan Brown, Concerns about the Disproportionate Use of Economic Research in the FCC’s Media Ownership Studies from 2002-2007, 54 J of Broad & Electronic Media 60, (2010).

<sup>83</sup> Robert McChesney, Telecommunications, Mass Media, and Democracy: The Battle for the Control of U.S. Broadcasting, 1928-1935. (1993).

convenience and necessity.<sup>84</sup> In a few cases poor public service by broadcasters led to license revocations based on broadcaster content.<sup>85</sup>

For nearly fifty years, broadcasting was regulated using this public trustee model.<sup>86</sup> Relying on the idea that licensees were trustees of a limited public resource, the Commission used both structural and behavioral (content) methodologies to regulate broadcasters. Under this regime, structural regulations were tight, with low quantitative limits on the ownership of broadcast stations. In addition, the Commission implemented controls on broadcast content including regulations dealing with editorial content.<sup>87</sup> The decision to implement regulatory control over content was supported by the FCC on the basis of spectrum scarcity.<sup>88</sup>

Historically the regulation of broadcast content has occurred primarily in two related ways. The first is restrictions of certain types of content, like indecency, while the second is a set of regulations designed to compel certain types of speech. Together these content based restrictions form a “behavioral” regulatory regime.<sup>89</sup>

Early enforcement actions based on content focused the behavior of broadcasters. The FCC, attempting to regulate in the public interest, revoked some licenses for objectionable

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<sup>84</sup> This language was contained in both the Radio act of 1927 and The Communication Act of 1934. Providing some guidelines specifying what this standard actually requires of broadcasters might have been an important first step in the regulatory process. Instead, the Commission has adjudicated cases on an ad-hoc basis instead. Increases in the quality and quantity of informational programming was a public interest goal of FCC Chairman James L. Fly in the late 1930's. James Lawrence Fly, Regulation of Radio Broadcasting in the Public Interest, 218 *Annals of the Am. Academy of Pol. & Social Sci.* 102 (1941).

<sup>85</sup> See *KFKB Broadcasting Association v. Federal Radio Commission*, 47 F.2d 670 (D.C. Cir 1931)

<sup>86</sup> Alan B. Albarran & Kenneth D. Loomis, Regulatory Changes and Impacts on Media Management in the United States: A Look at Early Research, 6 *Intl J. Media Mgmt* 131 (2004).

<sup>87</sup> *Federal Communications Commission, In The Matter of the Mayflower Broadcasting Corporation and The Yankee Network, Inc. (WAAB)* 8 FCC 333, 338 (1941).

<sup>88</sup> Lucas Powe has argued that the Commission's reliance on scarcity as a justification for regulation was a mechanism for protection of the agency. Physical scarcity cannot be resolved, not matter how many technological advances occur, therefore scarcity provides the FCC with a self protectionist basis for regulation. Lucas Powe Jr., American Broadcasting and the First Amendment, (1987).

<sup>89</sup> See Yoo supra note 2.

broadcast content,<sup>90</sup> and refused to grant additional time and power for other broadcasters, citing the need to use the limited number stations to serve the widest possible audiences.<sup>91</sup> The early cases were administrative adjudications, but eventually the Commission would provide formal content guidelines.<sup>92</sup>

The Communications Act of 1934 included the provisions of Section 315, more commonly referred to as the "equal time" or "equal opportunities" requirement. Under §315, broadcast stations are required to treat legal qualified candidates for the same political race in an even-handed fashion. Traditionally the provisions included air-time provided to a candidate without charge which required the broadcaster to make equal time available to the opposing candidate, if that candidate requests it within seven days of the use by the first candidate. After the bona fide news exception was included, equal air-time did not cover a candidate's on-air appearance included as part of a news or news interview programs or on-the-spot coverage of a news event. In contemporary times, the equal time provisions primarily cover candidate access when purchasing advertising time. When a broadcaster sells time to one candidate, the broadcaster must also give the other candidate equal opportunities to buy the same amount of time in programs reaching roughly the same size audience.

## **Fairness**

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<sup>90</sup> KFKB was owned by surgeon John Brinkley, who used his station to suggest medical cures, such as the implementation of slivers of goat testicles into a man's testicles to rejuvenate sexual activity. Listeners had to use a special pharmacy to receive Brinkley's miracle cures. When his license renewal was denied by the FRC, he challenged on first amendment grounds, saying that the FCC was censoring him. The D.C. Circuit of Court of Appeals disagreed with this argument and stated that the FRC could consider past programming when making renewal decisions. *KFKB Broadcasting Association v. Federal Radio Commission*, 47 F.2d 670 (D.C. Cir 1931).

<sup>91</sup> *Federal Radio Commission, Great Lakes Broadcasting Co.*, 3 F.R.C. 36 (1929).

<sup>92</sup> The FCC has provided guidelines for indecency, and during the period in which the Fairness Doctrine was in effect, provided multiple policy statements clarifying its positions.

The Commission's regulatory concerns about broadcaster fairness go back to the oversight of the predecessor body, the Federal Radio Commission.<sup>93</sup> These regulations are founded on the principle of spectrum scarcity, and the associated ideas that the limited number amount of stations allows the Government to impose some affirmative content obligations on broadcasters.

At a theoretical level, this regulatory philosophy was implemented to meet a central objective, increasing the diversity of ideas that listeners/viewers can be exposed to. A diversity of content, especially within informational programming, is the most central to the marketplace of ideas metaphor,<sup>94</sup> and as a result, the Supreme Court, relying on the scarcity principle has supported regulations of this type. Rejecting *NBC's* challenge to the FCC's regulations dealing with network radio programming, the Supreme Court stated that not only did the Commission retain the authority to regulate broadcast content, it was obligated to do so.<sup>95</sup>

“...we are asked to regard the Commission as a kind of traffic officer...but the act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.”<sup>96</sup>

The *NBC* decision strengthened the Commission's ability to rely on the scarcity principle as a legal basis for content regulations. The FCC began to adopt policies it believed served the public interest to promote the right of listeners to access to a diversity of ideas.<sup>97</sup>

The FCC's battle with the control of editorial broadcast content began with the “Mayflower Doctrine” in 1941.<sup>98</sup> In March of 1939, a startup broadcast company, the Mayflower

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<sup>93</sup> Federal Radio Commission, Interpretation of the Public Interest, Statement by the Commission on August 23, Relative to Public Interest, Convenience or Necessity, 2 FRC Ann. Rep. 166 (1928).

<sup>94</sup> Phillip Napoli, *Deconstructing the Diversity Principle*, 49 J. Comm. 7 (1999).

<sup>95</sup> National Broadcasting Co., Inc v United States, 319 U.S., 190 (1943).

<sup>96</sup> Id. at 216.

<sup>97</sup> Although the court provided a legal basis to the idea that rights of listeners, this idea was once proposed by the chairman of the FCC, James L. Fly. Fly was a strong advocate for the discussion of controversial issues, stating his belief broadcasters had an affirmative duty to provide information to the public. See: James Lawrence Fly, *supra* note 8.

Broadcasting Corporation, filed a request for a radio license for the frequency 1410 AM in the city of Boston, Massachusetts. At the time, both the radio station, WAAB, and the frequency were already under operation by the Yankee Network, although the station license was approaching the date for renewal. The FCC, as was its practice at the time to deal with competing applications, scheduled a hearing to determine which organization would have rights to the license. During the hearing in November of 1939, the Mayflower Corporation tried to press its case for the station license on two grounds. First, the Mayflower group argued that Yankee already operated another radio station in Boston, WNAC. More importantly, the Mayflower group claimed that the Yankee Network had used the station, WAAB, to editorialize. Specifically, Mayflower contended that Yankee had used WAAB to attack several candidates for public office on the air during 1937 and 1938. The Mayflower group argued that not only had Yankee broadcast editorials on WAAB, but had also done so on WNAC, the other station operated by Yankee in Boston. This, Mayflower argued, showed a trend of institutional bias during broadcasts that originated from Yankee. The Mayflower group demonstrated that both of the stations shared a news and production staff, and were located in the same building. Mayflower contended that all of the facts led to the conclusion that WAAB was operating to further the interests of the station's owners and therefore was not serving the public interest. Based on the claim that Yankee was failing to serve the public interest, Mayflower petitioned the Commission to revoke Yankee's license to WAAB and award the station and the frequency to the Mayflower group. After the financing of the Mayflower Group was exposed as questionable,

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<sup>98</sup> The decision in the Mayflower hearing, a comparative license case, was interpreted by other radio stations as the implementation of a ban of on-air editorializing by broadcasters. The Commission stated in the Mayflower decision that, "...the broadcaster cannot be an advocate," and that a, "...licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively, and without bias. The public interest—not the private—is paramount." Federal Communications Commission, In The Matter of the Mayflower Broadcasting Corporation and The Yankee Network, Inc. (WAAB) 8 FCC 333 (1941).

the Commission allowed Yankee to remain the licensee, but stated in the Mayflower decision that, "...the broadcaster cannot be an advocate."<sup>99</sup> The editorials resulted in the FCC declaring Yankee to have held, "...a serious misconception of its duties and functions under the law."<sup>100</sup> The Commission also stated that a, "...licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively, and without bias. The public interest—not the private—is paramount."<sup>101</sup> The decision in the Mayflower case was interpreted by other radio stations as a ban of on-air editorializing by broadcasters and was a significant regulatory development that led to the implementation of the Fairness Doctrine in 1949.

The Fairness Doctrine consisted of two regulatory "prongs."<sup>102</sup> The first stated that a broadcast licensee had a duty to cover issues of public importance. The second prong mandated that a licensee who has presented one side of a controversial issue of public importance must present contrasting views.<sup>103</sup>

Although the Commission stated a belief that the first prong of the doctrine was more important,<sup>104</sup> the second prong has been the object of consistent criticism. Criticisms have ranged from legitimate concerns that the Fairness Doctrine constituted an unconstitutional compulsion of speech<sup>105</sup> to inaccurate portrayals of the application of the Fairness Doctrine in the media.<sup>106</sup>

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<sup>99</sup> Id. at 336.

<sup>100</sup> Id at 337.

<sup>101</sup> Id. at 338.

<sup>102</sup> Federal Communications Commission, Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

<sup>103</sup> Id.

<sup>104</sup> In 1974 the Commission released a policy statement which elaborated on the two prongs of the Fairness Doctrine stressing the agency's position that broadcaster attention to the first prong was more important. "...the broadcaster must devote a reasonable percentage of time to the coverage of public issues; and ...his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view." In refusing to issue a set of strict guidelines for the handling of Fairness complaints, the Commission stated that it would "...rely heavily on the reasonable, good faith, judgements of our licensees." See: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, 48 FCC 2d 1 24 (1974).

<sup>105</sup> In the 1985 Fairness Report, the NAB data used by Commission demonstrated some problems for broadcasters including 60 instances where the concerns about fairness obligations inhibited broadcaster coverage of certain

In 1967, the Fairness Doctrine was modified with the addition of two rules, the Personal Attack and Political Editorial rules.<sup>107</sup> The Political Editorial rule required broadcasters who editorialized against or otherwise made an attack against a candidate for office to provide that candidate with a tape or transcript of the attack and allow for a response.<sup>108</sup> Similarly, the Personal Attack rule required broadcasters:

In case of an “attack” on the “honesty, character, integrity, or like personal qualities of a person or group” during the discussion of an issue of public importance the broadcaster is required to give notice not later than one week after the attack, to provide a tape or transcript, or some other summary of the attack, and then offer to provide time for a response.<sup>109</sup>

The Fairness Doctrine’s constitutionality was tested in *Red Lion Broadcasting Co. v. FCC*.<sup>110</sup> The case involved a personal attack aired on radio station WGCB, owned by Red Lion, and a challenge of the regulations by the Radio Television News Directors Association.<sup>111</sup> Fred Cook, an author, was attacked on-air by Reverend Billy James Hargis on the “Christian Crusade” program. Cook, upon hearing the segment, demanded time to respond, which he refused to pay for. In the case, Red Lion argued that the Fairness Doctrine, and its corollaries, the personal attack and political editorial rules, abridged its first amendment rights of free speech and press. Red Lion asserted that its license gave the company the right to decide what content it wished to

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issues. Federal Communications Commission, *Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, 102 FCC 2d 143. (1985). {Hereafter: 1985 Fairness Report}

<sup>106</sup> The Fairness Doctrine has remained a sort of “media regulation boogeyman” since the repeal of the provision by the Commission in the late 1980’s. After the election of President Barack Obama in 2008, conservative talk radio was predicting a return of the Fairness Doctrine. In May, 2011, House Republicans wrote to FCC Chairman Julius Genachowski and asked him to finally remove the regulation permanently. <http://thehill.com/blogs/hillicon-valley/technology/164029-house-republicans-tell-fcc-to-take-fairness-doctrine-off-the-books>, last accessed July 1, 2011.

<sup>107</sup> Personal Attack Rule, 47 C.F.R. § 73.123 (1967), Political Editorial Rule, 47 C.F.R. § 73.123(c) (1967).

<sup>108</sup> Personal Attack Rule, *supra* note 31.

<sup>109</sup> Political Editorial Rule, *supra* note 31.

<sup>110</sup> *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

<sup>111</sup> *Id.*

air. The court disagreed with *Red Lion*'s argument, holding instead that the free speech rights of broadcasters were secondary to the rights of listeners to hear diverse and antagonistic viewpoints.

“It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”<sup>112</sup>

Relying on the scarcity doctrine rationale articulated in *NBC*,<sup>113</sup> the court rejected arguments that the recent increases in the number of broadcast stations had somehow rendered the scarcity doctrine obsolete.<sup>114</sup> The unanimous decision held that the Fairness Doctrine was not an abridgment of freedom of speech because it acted to multiply the voices heard by the public:

“...Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.”<sup>115</sup>

For a time after *Red Lion*, the FCC was committed to the enforcement of the Fairness Doctrine. After Mark Fowler became chairman of the FCC, however, the agency released the 1985 Fairness Report.<sup>116</sup> The 1985 report instituted the FCC's new belief that the Fairness Doctrine was actually counterproductive in terms of promoting viewpoint diversity.<sup>117</sup> The position adopted by the Commission included the belief that the Fairness Doctrine was tantamount to government interference of broadcast content,<sup>118</sup> and that the requirements of the Fairness Doctrine were restricting journalists in radio and television newsrooms unnecessarily

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<sup>112</sup> Id. at 371.

<sup>113</sup> *NBC*, supra note 19.

<sup>114</sup> *Red Lion v FCC*, supra note 34.

<sup>115</sup> Id. at 397.

<sup>116</sup> 1985 Fairness Report, supra note 29.

<sup>117</sup> Id. at 166-167.

<sup>118</sup> Id.

because the response requirements were actually impeding the discussion of important public issues.<sup>119</sup>

The report also undermined the scarcity principle defense of the Fairness Doctrine as the Commission argued that since the *Red Lion* decision, there had been a 48 percent increase in the number of radio stations and a 44 percent increase in the number of television outlets.<sup>120</sup> The FCC cited the increased availability of television pointing out that 96 percent of American homes could now receive 5 or more stations and that the major networks' share of the television audience had dropped substantially.<sup>121</sup>

Despite the conclusion that the Fairness Doctrine was counterproductive, the Commission deferred action until Congress could review the report and the FCC continued to enforce the Fairness Doctrine for two more years.<sup>122</sup> Further, the Commission stated that it was unsure if the Fairness Doctrine had been codified in §315 of the Communications Act when the act was amended in 1959.<sup>123</sup> The adoption of the 1985 Fairness Report played an important factor in the three court cases that led to a repeal of the Fairness Doctrine.

The first of the three cases was the result of a fairness complaint filed against WTVH, the Meredith Corporation's station in Syracuse, New York.<sup>124</sup> After a fairness complaint was filed in response to advertisements promoting an investment in a nuclear power plant, FCC ruled that the Meredith Corporation had violated the Fairness Doctrine by not allowing time for a response.<sup>125</sup> In the decision, the Commission refused to consider the Meredith Corporation's contention that

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<sup>119</sup> *Id.*, at 176

<sup>120</sup> *Id.* at 203, 205.

<sup>121</sup> *Id.* at 206.

<sup>122</sup> The Commission repealed the Fairness Doctrine in 1987, two years after the 1985 Fairness Report, believing itself to be bound under the Communication Act to continue enforcing the doctrine. Although the regulation continued to remain in place between 1985-1987, the FCC had largely abandoned any actual enforcement of the doctrine after the remand in the Meredith decision.

<sup>123</sup> The 1934 Communications Act, 47 U.S.C § 315.

<sup>124</sup> *Meredith Corporation v FCC*, 809 F.2d 863 (D.C. Cir. 1987). [Hereafter Meredith]

<sup>125</sup> *Id.* at 864-865.

the Fairness Doctrine was unconstitutional.<sup>126</sup> Upon judicial review, Meredith challenged the agency ruling that the company had violated the Fairness Doctrine. While the D.C. Circuit Court of Appeals agreed with the agency's ruling on the interpretation of the doctrine, the decision in the case remanded the constitutional issue back to the Commission for further consideration.<sup>127</sup>

Before the FCC dealt with the remand in the *Meredith* decision, the agency's refusal to mandate fairness obligations for teletext service came up for legal review.<sup>128</sup> At the time of the case, teletext was a new technology that made use of the vertical blanking pulse incorporated into broadcast television signals.<sup>129</sup>

In 1981, the Commission had started to explore the use of teletext.<sup>130</sup> In the review, a notice of proposed rule making, the Commission proposed treating teletext as an ancillary service.<sup>131</sup> If implemented, this proceeding would have kept teletext from falling under existing service guidelines or standards, including the Fairness Doctrine.<sup>132</sup> Two years later the Commission declared in an order that teletext would not be subject to the political broadcast requirements of sections 312 and 315.<sup>133</sup> As part of the larger analysis in the order, the Commission stated that the Fairness Doctrine was a Commission created policy, rather than a legislative mandate, and in the process, the agency adopted a new position, opposing the codification of the Fairness Doctrine in a 1959 amendment to the Communication Act.<sup>134</sup>

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<sup>126</sup> Id. at 866.

<sup>127</sup> Id. at 876.

<sup>128</sup> *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, (1986). [Hereafter TRAC]

<sup>129</sup> Although literally "text," teletext as reviewed in this case was transmitted in the vertical blanking pulse on the frequency of an existing television signal. Id. at 503-504.

<sup>130</sup> Federal Communications Commission, Notice of Proposed Rulemaking, 46 Fed. Reg. 60, 851 (1981).

<sup>131</sup> Id. at 852-853.

<sup>132</sup> "...stations [would]...not be required to observe service guidelines or other performance standards." Id. at 853.

<sup>133</sup> The Commission determined that section 315 would not apply stating, "a use," as defined under 315 required a "personal appearance...by voice or picture..." and that teletext, received in the forms of lines of text, was not "inherently...a medium where a candidate [could] make a personal appearance." 53 Rad. Reg. 2d 1323.

<sup>134</sup> NPRM, supra note 55 at 853-854.

Additionally, the Commission struggled with what standards, print or broadcast, to apply to the regulation of teletext.<sup>135</sup> Although teletext was transmitted as part of a broadcast signal, the service itself was composed of “text” rather than the audio visual material traditionally associated with radio and television. As text, the Commission believed that placing teletext under the guidelines of the Fairness Doctrine would be constitutionally suspect.<sup>136</sup>

The Media Access Project and the Telecommunications Research and Action Center brought suit to force reconsideration by the Commission, arguing that teletext was meant for the general public and fell under the definition of broadcasting in the Communications Act.<sup>137</sup> Additionally, MAP and TRAC argued that the Fairness Doctrine was ratified by Congress as part of the 1959 amendments and therefore the Commission was obligated to apply Fairness Doctrine standards to teletext broadcasts.<sup>138</sup>

In response the FCC countered on two points.<sup>139</sup> First the Commission articulated a belief that the fairness doctrine had an immediacy component built in which was triggered when an issue was covered.<sup>140</sup> Additionally it restated the constitutional issue, that as text, teletext was closer to print media than broadcast, raising the level of Constitutional scrutiny of possible content regulations.<sup>141</sup>

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<sup>135</sup> Id. at 854.

<sup>136</sup> Despite the upholding of access requirements for broadcast media, the court took a decidedly different approach to the regulation of print. While broadcasters remained under a rational basis review, regulations dealing with content of newspapers and other traditional print media were held to be subject to the strict scrutiny review standard. In this proceeding, the Commission relied heavily on the precedent that print media was not subject to right of reply access requirements like broadcasters. see *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974).

<sup>137</sup> TRAC, *supra* note 53.

<sup>138</sup> Id. at 505.

<sup>139</sup> Although the Commission argued against applying the fairness doctrine to teletext primarily on these two contentions, the FCC also suggested that subjecting teletext to additional content regulations might impede the growth of the new media form. Id. at 506, 508-509.

<sup>140</sup> Id., at 510.

<sup>141</sup> Id. at 508-509.

The court disagreed with the second contention of the Commission, and held that the teletext transmission was indeed a “broadcast.” As a broadcast, the scarcity principle would apply and made the content of teletext regulable under the precedent set by *Red Lion*.<sup>142</sup>

Although applied in the decision, the court took a decidedly hostile view of the *Red Lion* precedent.<sup>143</sup> The D.C. Circuit agreed that physical spectrum was scarce, but was hostile to the idea that the realities of the spectrum somehow justified content regulation of broadcasters, when similar regulation would not or could not be applied to traditional print media.<sup>144</sup> Additionally, the Court agreed with the Commission’s position that the Fairness Doctrine was not codified by the language of the 1959 amendments and therefore the Commission had acted within its mandate when deciding that the public interest would be better served by not applying the doctrine to for teletext transmissions.<sup>145</sup>

Following the *TRAC* decision, the events of the earlier *Meredith* case returned to the Commission for reconsideration.<sup>146</sup> Based on the findings of the 1985 Fairness Report and the *TRAC* decision, the Commission overturned its earlier ruling that Meredith was in violation of the Fairness Doctrine.<sup>147</sup> After this decision by the Commission, one of the original parties to the fairness complaint against Meredith brought suit against the agency to compel the enforcement of the Fairness Doctrine.<sup>148</sup>

Based upon the earlier *TRAC* decision, the court held that the Fairness Doctrine was not statutorily mandated. The FCC had authority, based on the finding that the doctrine no longer

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<sup>142</sup> Id. at 502, 518.

<sup>143</sup> Id. at 520.

<sup>144</sup> Id.

<sup>145</sup> “We do not believe that the language adopted in 1959 made the fairness doctrine a binding statutory obligation; rather it ratified the Commission’s longstanding position that the public interest standard authorizes the fairness doctrine.” Id.

<sup>146</sup> *Syracuse Peace Council v. FCC*, 867 F 2d. 654 (1989).

<sup>147</sup> Id. at 660.

<sup>148</sup> Id. at 656.

served the public interest, to reject the enforcement without being arbitrary or capricious.<sup>149</sup>

Although the court recognized and agreed with the Commission's contention that the policy and constitutional issues were hard to separate, the court held that the Commission acted properly under its authority in refusing to enforce the Fairness Doctrine.<sup>150</sup>

After the *Syracuse* Decision, the FCC's non-enforcement of the Fairness Doctrine left the corollary rules in a state of limbo. In August of 1997, the FCC released a public notice which stated "after extensive discussion and consideration of various alternatives, a majority of the Commission is unable at this time to agree upon any resolution to the issues presented in this docket."<sup>151</sup>

The agency's non-action ultimately led to challenge to the rules brought by the Radio Television News Directors Association.<sup>152</sup> A panel of the D.C. Circuit Court of Appeals then gave the FCC until September 29, 2000 to defend the rule.<sup>153</sup> No Commission action was taken until on October 4th, 2000, when in the middle of a highly contested presidential election, the FCC launched a social experiment on the effect of the repeal of these rules releasing a public notice with the title: "FCC suspends Political Editorial and Personal Attack Rules for 60 Days; Asks Parties to Submit Evidence on Effect of Suspension."<sup>154</sup>

The agency argued that the election season would offer an incredible opportunity to study the effects on content, if the rules were not in place.<sup>155</sup> The FCC never had a chance to generate

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<sup>149</sup> Id. at 669.

<sup>150</sup> "...the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference... The Commission's implementation of the public interest standard, when based on a rational weighing of competing policies is not to be set aside by the Court of Appeals, for the "weighing of policies under the 'public interest standard is a task that Congress has delegated to the Commission in the first instance." Id. at 660.

<sup>151</sup> Public Notice, 12 FCCR 11956 (1997).

<sup>152</sup> Radio-Television News Directors. Association v. FCC, 184 F.3d 872 (D.C. Cir. 1999)

<sup>153</sup> Id. at 889.

<sup>154</sup> FCC 00-360, In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 FCCR 19973 (2000).

<sup>155</sup> Id. at paragraphs 10-14.

the evidence as the D.C. Circuit Court of Appeals ordered the Commission to repeal immediately its Personal Attack and Political Editorial Rules.<sup>156</sup> The order effectively overruled the FCC's decision to suspend the rules for 60 days in order to collect evidence and public comment on the rules. The decision did offer the agency the opportunity to initiate a new rule making proceeding to study and decide the matter, if it wished to do so. The FCC was reluctant to do so, and in August of 2011, after significant pressure from Congress, the FCC finally removed the Fairness Doctrine from the agency's regulations permanently.<sup>157</sup>

### **Indecency and Children's Television**

The FCC's traditional regulation of the broadcast media includes a long standing desire to promote diverse and antagonistic viewpoints. Despite this stated policy goal, recently the Commission has been reluctant to include any regulatory schemes that involve making judgments about content.<sup>158</sup> In a Notice of Proposed Rule Making issued in 2002, the Commission stated the concern that any regulations that encouraged judgments about content would be inherently subjective, and thus problematic under the First Amendment.<sup>159</sup>

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<sup>156</sup> "The court is now confronted with the October 4th Order. Clearly, the Order is not responsive to the court's remand. The Commission still has not provided adequate justification for the rules, and in its Order provides no assurance that it will do so. The suspension of the rules for 60 days simply has the effect of further postponing a final decision by the Commission. Incredibly, the Order reinstates the rules before the Commission will have received any of the updated information that the Commission states it requires in order to evaluate the rules." *Radio Television News Directors Association v FCC*, 229 F. 3d 269 (2000).

<sup>157</sup> The Fairness Doctrine was one of 83 existing media regulations repealed by the FCC. See Press Release dated August 22, 2011, "Fairness Doctrine" and other obsolete provisions among those deleted; Actions consistent with Chairman Genachowski's regulatory reform agenda and commitment to act in accordance with recent Executive Order to improve regulation and regulatory review," [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0822/DOC-309224A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0822/DOC-309224A1.pdf), last accessed October 1, 2011.

<sup>158</sup> Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 02-277, 18 FCCR 18503 (2003) {Hereafter: 2002 Biennial Review Order}

<sup>159</sup> *Id.* at 18537.

Despite the concerns over subjective judgments about political or editorial content, the FCC has issued guidelines that cover the broadcast of indecent content. A provision on indecency was included as part of the 1927 Radio Act. "No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."<sup>160</sup> This provision was included in 1934 Communications Act, and then later transferred into Title 18, Section 1464, of the U.S. Code.

The regulations which restrict or control the airing of indecent or obscene content rely heavily on the idea that broadcasting is intrusive, pervasive and may have secondary effects that Government has an interest to control.<sup>161</sup> Lucas Powe suggests that these fears of the effects of exposing minors to graphic sexual (or violent) content are a legacy of broadcast history.<sup>162</sup> Where print media had long standing traditions providing political content, radio is the "lineal descendant of operators of music halls and peep shows."<sup>163</sup> Powe's discussion appears valid, as the societal objective of keeping sexual content away from children has provided the FCC with a legal justification to restrict and control certain types of speech.<sup>164</sup>

The Commission issued the first fine for the broadcast of indecent material in 1970 when it punished WUHY-FM, an educational radio station, for airing a profanity-laced interview with guitarist Jerry Garcia of the Grateful Dead.<sup>165</sup> In 1978, the Supreme Court ruled on the constitutionality of indecency regulation in *Federal Communications Commission v. Pacifica Foundation*.<sup>166</sup> The case began after a Pacifica station in New York played a recording of a

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<sup>160</sup> § 29, Radio Act of 1927, Pub. L. No. 632, 69th Congress.

<sup>161</sup> This justification for a content restriction was at the heart of the Pacifica decision which dealt with indecency enforcement and is now being used as a justification for proposed content guidelines dealing with violence. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). {Hereafter: *FCC v Pacifica*}

<sup>162</sup> Powe Jr., supra note 12.

<sup>163</sup> Id.

<sup>164</sup> *FCC v Pacifica*, supra note 85.

<sup>165</sup> *In the Matter of WUHY-FM, Eastern Educational Radio*, 24 FCC 2d 408 (1970).

<sup>166</sup> *FCC v. Pacifica*, supra note 85.

twelve minute monologue from comedian George Carlin.<sup>167</sup> The “Filthy Words” recording was a monologue, laden with profanity, proposed seven words that could not be spoken on-air by broadcasters. The afternoon broadcast was heard by a parent driving with his teenage son. Although the station broadcast a warning about the content of the discussion prior to airing the monologue, the father and son apparently did not hear the disclaimer. The parent filed the only complaint regarding the broadcast.<sup>168</sup>

The primary issue before the Supreme Court in *Pacifica* was whether or not the FCC had the power to regulate the broadcast of indecent speech that was not obscene.<sup>169</sup> The Supreme Court ruled that the FCC had such a power, because the agency was not trying to suppress indecent speech, but to keep such speech away from children.<sup>170</sup> In the decision, the Court recognized the rights of a listener to receive material, but found that restrictions on the time of day indecent material could be aired to be valid, due to the concern about the direct availability, or pervasiveness, of broadcast content.<sup>171</sup>

“The result turns instead on the unique characteristics of the broadcast media combined with society’s right to protect its children from speech generally agreed to be inappropriate for their years, and with the interests of the unwilling adults in not being assaulted by such offensive speech in their homes.”<sup>172</sup>

After Janet Jackson’s infamous “wardrobe malfunction” during the broadcast of the NFL Superbowl in 2004,<sup>173</sup> indecency enforcement temporarily became a headline grabbing

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<sup>167</sup> The “Filthy Words” recording was a discussion of seven words a person could not say on-air during a broadcast. The monologue, which was laden with profanity, proposed seven such words. *Id.* at 726-727.

<sup>168</sup> The seven words in the Carlin monologue were shit, piss, fuck, cunt, cocksucker, motherfucker and tits. After proposing these seven words, Carlin launched into a discussion of the ways shit and fuck could be used within sentences. The father and son heard the broadcast but missed the disclaimer warning listeners about the upcoming content. *Id.* at 727.

<sup>169</sup> *Id.* at 730.

<sup>170</sup> *Id.* at 728.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> During the live broadcast of the 2004 NFL Superbowl, pop singer Justin Timberlake accidentally removed a piece of singer Janet Jackson’s outfit during a sexually suggestive dance routine during the half-time show. Although Jackson’s nipple was covered, and her breast was only visible for 19/32 of a second, the FCC received

regulatory mechanism for the the Federal Communications Commission. Despite the attention periodically given to the issue,<sup>174</sup> historically the FCC has demonstrated a limited enforcement of its indecency guidelines, issuing a total of 92 fines between 1970 and 2004.<sup>175</sup>

The FCC's regulatory focus on children and content extends past indecency, however. The agency also requires broadcast television stations to provide programming each week targeted at children. In 1990, Congress enacted the Children's Television Act (CTA) to increase the amount of educational and informational programming available on television.<sup>176</sup>

The media landscape that affects children is changing rapidly. Electronic media has assumed an increasingly integral role in the lives of children and, as a result of a number of technological innovations, children today can access the same content sources from a variety of media platforms, many of which are portable. This increasingly complex media environment carries both risks and opportunities for the nation's children, and can pose a challenge to parents and caretakers seeking to monitor what children are watching and hearing.<sup>177</sup>

In addition to limits on the amount of time broadcasters may devote to advertising during children's programs,<sup>178</sup> the CTA requires broadcast television stations to serve the educational and informational needs of children by airing at least three hours per week of "core

nearly 542,000 complaints about the broadcast. Video of the halftime show is available online at: <http://www.youtube.com/watch?v=npF1lkKEM9o>, last accessed August 1, 2011. Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, 19 FCCR 19230 (2004).

<sup>174</sup> In a study of 36 fines issued by the FCC for the enforcement of indecency between 1989-1997, evidence suggested that external pressure by interest groups on the agency and Congress was likely responsible for the Commission's fluctuating commitment to indecency enforcement. "In terms of the FCC's enforcement of indecency, one could argue that the fact that the Commission has issued only five indecency fines since 1995 is an indication that broadcasters may have gotten the message that indecency will not be tolerated. However...the reason behind less indecency fines may very well be that the FCC has shifted gears and is moving away from its tough enforcement of indecency, at least until religious groups and concerned citizens begin to apply pressure once again." Milagros Rivera Sanchez and Michelle Ballard, A Decade of Indecency Enforcement: A Study of How the Federal Communications Commission Assesses Indecency Fines (1987-1997), 75 J and Mass Comm Q 143 (1998).

<sup>175</sup> Frank Ahrens, FCC Indecency Fines, 1970-2004, Washington Post, November 11, 2005.

<sup>176</sup> Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996.

<sup>177</sup> Children's Television Guidelines, <http://www.fcc.gov/guides/childrens-educational-television>, last accessed October 1, 2011.

<sup>178</sup> The FCC's rules limit the amount of commercial matter which may be aired in certain children's television programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.. These limits are prorated for programs that are shorter than one hour in duration. The programming at issue for the commercial time limits is programming originally produced and aired primarily for an audience of children 12 years old and younger. Id.

programming."<sup>179</sup> The FCC defines Core Programming as “specifically designed to serve the educational and informational needs of children ages 16 and under.” To meet the "core programming" definition, a program must also be: a regularly scheduled weekly program, at least 30 minutes in length, aired between the hours of 7:00 a.m. and 10:00 p.m.<sup>180</sup>

This relatively open-ended definition of content that can comply with the Core Programming requirement has been problematic in relationship to the stated goals of the policy. Assessments of the content actually being used to meet the obligation have demonstrated that local broadcasters have used cartoons, syndicated teen orientated sitcoms as well as hunting and fishing shows.<sup>181</sup>

## **Structural Regulations**

Structural regulations have been used as a regulatory instrument since the inception of the Federal Radio Commission (FRC), the predecessor to the Federal Communications Commission. Created by Congress as part of the Radio Act of 1927, the agency was tasked with assigning licenses to broadcasters. In broadcasting’s early days, the lack of regulation led to a chaotic marketplace in which the radio waves were clogged with interference by broadcasters who were operating without oversight or allocation of frequency.<sup>182</sup> As a result of public outcry, and the need to control spectrum usage, the Federal Radio Commission adopted the use of licenses, which allocated frequency and transmission power to broadcasters.<sup>183</sup>

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<sup>179</sup> Id.

<sup>180</sup> Id.

<sup>181</sup> GAO Report, Children's Television Act: FCC Could Improve Efforts to Oversee Enforcement and Provide Public Information, GAO-11-659, Issued July 14, 2011, <http://www.gao.gov/new.items/d11659.pdf>, last accessed October 1, 2011.

<sup>182</sup> See Generally, Chapter 1 in Hugh R Slotten, Radio and Television Regulation, Broadcast Technology in the United States, 1920-1960 (2000).

<sup>183</sup> Id.

During the 1980's, as the FCC adopted a marketplace based model of regulation, content regulation became a secondary regulatory mechanism to promote content diversity, before being almost entirely abandoned. Since 1996, the agency has come to rely almost entirely on a structural based approach in order to achieve its diversity goals.

The change to the competition regulatory philosophy was the outgrowth of the Commission's deregulatory moves beginning in the 1980's.<sup>184</sup> At the time, the FCC began to argue that economic competition would be a better way to ensure viewpoint diversity than content based controls.<sup>185</sup> Proponents, including FCC Chairman Mark Fowler, of a more economic approach to media regulation argued that broadcasting was a business like any other, producing products for sale in an economic market against competitors.<sup>186</sup> As such, regulations limiting the size of these companies should also be modified, as the tight limits on horizontal and vertical ownership of stations restricted a broadcast company's ability to make use of the economies of scale. The Commission and its proponents argued that maximizing profits is a, "...valid, desirable, motivating and socially beneficial goal."<sup>187</sup>

Proponents of the competition based approach implemented through a structural regulation regime also believe there is a benefit in the approach that goes beyond the economic aspects of the regulation, namely that a reliance on structural regulation provides the FCC with a mechanism to implement a system of content neutral regulation that will still create diversity in media content.<sup>188</sup> In the modern media environment, where the same content is subject to different regulatory standards depending on which type of media carries it, a universally applied

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<sup>184</sup> Albarran & Loomis, *supra* note 10.

<sup>185</sup> Mark S. Fowler & David L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207 (1982).

<sup>186</sup> "The Commission, as much as possible, should rely on market forces rather than its judgments on program service or other licensee decisions to determine where the public interest lies in broadcasting." *Id.* at 235.

<sup>187</sup> Rice, *supra* note 5.

<sup>188</sup> Craig R. Smith, *The Campaign to Repeal the Fairness Doctrine*, 2 *Rhetoric & Public Affairs* 481, (1999).

level of constitutional review could provide some sense of regulatory certainty of the FCC's ability to regulate the content of broadcasters. Historically, broadcasting has been treated differently than other types of media by regulators and the courts. The courts have traditionally judged First Amendment challenges the content regulation of over-the-air broadcasters by using a rational basis standard of review.<sup>189</sup> The addition of new media types and cross-media convergence has further complicated the regulatory issue, as cable regulations,<sup>190</sup> internet and print media, are reviewed under strict scrutiny.<sup>191</sup> The adoption of a content-neutral structural regulations would bring broadcasters more into line with other types of media.<sup>192</sup>

Proponents of the structural regime argue that by relying on the marketplace to create content diversity, the Commission would no longer have to involve itself in constitutionally questionable policies which compel or restrict speech based on its content, generating a two-fold benefit for the creation of diversity.<sup>193</sup> First, by removing the burdens of compliance with content regulations from broadcasters, broadcasters become free to experiment with new formats and programming types.<sup>194</sup> Proponents continue to suggest that regulations such as the Fairness Doctrine essentially required broadcasters to provide similar coverage and viewpoints on issues, a process which actually homogenized content by restricting viewpoint diversity in media

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<sup>189</sup> Courts employ multiple standards of review when assessing whether state action violates constitutionally protected interests. Traditionally, state action against print media content has been reviewed under strict scrutiny requiring a compelling government interest and narrow tailoring. See *Near v. Minnesota*, 283 U.S. 697 (1931). Broadcasting regulations have been traditionally been reviewed under a less protective standard of rational basis. Rational basis review is frequently applied in administrative law, and has remained the standard when reviewing broadcast cases. See *NBC v. United States*, 310 U.S. 190 (1943)

<sup>190</sup> *Turner Broadcasting v. Federal Communications Commission*, 512 U.S. 622 (1994).

<sup>191</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>192</sup> By bringing broadcasting into line with other types of media, one also increases the ability of broadcasters to compete in the new media markets. Thomas G Krattenmaker & Lucas Powe Jr, *Regulating Broadcast Programming*, (1994).

<sup>193</sup> Thomas Hazlett and David Sosa, *Was the Fairness Doctrine a "Chilling Effect"?* Evidence from the Post Deregulation Radio Market, *J. Legal Stud.* 68 (1997).

<sup>194</sup> "Sensible regulatory policy... would take as its goal the promotion of well-functioning markets in broadcast programming, not the creation of cookie cutter stations... the FCC should laud, not seek to retard, the development of specialty stations, the broadcast of material that shocks the cultural norm, the evolution of efficient format types and national networks...." Krattenmaker and Powe, *supra* note 116 at 280

content.<sup>195</sup> Therefore a regulatory environment which removes these obligations is likely to produce additional increases in the diversity of programming options available as stations which no longer are forced to weigh concerns over response and access are likely to expand the content beyond types typically to be considered “safe.”<sup>196</sup>

A second benefit of a content neutral regulatory policy removes the need for the Commission to adjudicate fairness or access complaints, so the FCC may rededicate the staff and financial resources set aside to enforce regulations and focus on the important technological aspects of its regulatory mandates.<sup>197</sup> Krattenmaker and Powe propose that, even if one sets aside the constitutional questions about content regulation by the government, the practical costs associated with the adjudication of complaints under the Fairness Doctrine never produced gains which outweighed the costs spent on the complaint enforcement.<sup>198</sup> Additionally, a stronger focus of FCC regulatory efforts on technical issues, like spectrum allocation, might provide the Commission with opportunities to increase the number of owners to broadcasting or facilitate and increase in access to new media outlets, thus further enhancing the diversity of sources available to consumers.<sup>199</sup>

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<sup>195</sup> Opponents of content regulation argue that any restriction on content in some way creates a chilling effect on potential speech. Fears of indecency enforcement action may result in some programs with borderline content not being aired, while content carried to meet obligations of the Fairness Doctrine may force a broadcaster to carry speech it does not agree with. Therefore a broadcaster becomes less likely to carry the content in the first place. *Id.*

<sup>196</sup> Proponents of removing content controls never seem to provide an explanation as to what is preventing these programming choices from being made under the current regulatory system, or to provide any evidence that such positive changes occurred in a post Fairness Doctrine era. *Id.*

<sup>197</sup> While some have argued that the Commission confine itself to technical regulation only, the reality is that the Commission’s regulatory mandate requires a consideration of content. Technical decision making has factored into the FCC’s process, but content based questions have also factored into this. The allocations of radio and television stations were based on the decision to ensure the widest possible dispersion of broadcast signals to provide transmission coverage the largest number of people possible. Even under the contemporary delegation of the Telecommunications Act, the “public interest” standard still applies. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004). {Hereafter Prometheus 2004}

<sup>198</sup> Powe Jr. *Supra* note 12.

<sup>199</sup> Adopted from Krattenmaker and Powe’s four principles of regulation in Chapter 11 of Regulating Broadcast Programming, Krattenmaker and Powe, *supra* note 116 at 316-323.

As a direct result of changes in regulatory philosophy that moved the FCC towards a deregulatory and later competitive ideology, the Commission began a process which, in addition to repealing some content based regulations, raised the limits on the number of stations a single company could own. Eventually, the Commission adopted its Outlet Diversity Policy as the primary tool for the regulation of broadcasters.<sup>200</sup>

Defined by the FCC as “The control of media outlets by a variety of independent owners,”<sup>201</sup> *Outlet Diversity* is the policy name given by the FCC to the numeric ownership limits the agency enforces for common ownership of broadcast stations. The logic of the FCC’s Outlet Diversity policy relies on the idea that licensing a diverse set of station owners will stimulate the competition for audiences that will create diversity of programming content.<sup>202</sup> The FCC retains a longstanding belief that each individual owner in a media market will provide one viewpoint, and that competition, both internal (from commonly owned stations) and external (from competitors) will result in an increase in content diversity which meets the stated policy goal of a diversity of viewpoints. As commercial entities, media outlets generate income by selling audiences to advertisers, therefore, external competition limits a station’s audience in situations where competing media organizations provide similar or identical formats.<sup>203</sup> When competing media outlets are providing similar programming, and thus splitting the potential audience for that programming choice between them, theoretically an economic incentive is

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<sup>200</sup> “The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions... [D]iversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational-basis review.” Further Notice of Proposed Rulemaking, 10 F.C.C 3524, 3549 (1995) and 2002 Biennial Review Order, *supra* note 84.

<sup>201</sup> *Id.*

<sup>202</sup> The FCC “...has historically used voice-count tests as a means of promoting diversity.” *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

<sup>203</sup> John Dimmick & Daniel G. McDonald, Network Radio Oligopoly 1926-1956: Rivalrous Imitation and Program Diversity, 4 J. Media Econ 197, (2001).

created to provide alternative programming options to competitors. This incentive to create new programming options will therefore result in content diversity.

If external competition between media organizations theoretically produces content diversity, what about the internal competition between commonly owned media outlets? The theory of a relationship between internal competition and diversity relies on Peter Steiner's 1952 proposition that a monopoly firm in media could provide more diversity than competing firms.<sup>204</sup> The FCC has adopted this theory as part of the support for the current reliance on a structural regulatory scheme, arguing that as more media outlets are consolidated into common ownership, an economic incentive is created for a media organization to provide a more diverse set of programming, rather than to provide multiple programming formats that compete for audience with other commonly owned stations.<sup>205</sup>

Competition for audience then, according to theory, creates content diversity through economic incentive, as desirable programming content will be produced by competitors seeking to generate audiences.<sup>206</sup> An audience makes choices, and by keeping marketplace mechanisms in place, you provide the freedom for these consumers to "shop" for the content they want.<sup>207</sup>

The FCC's reliance on marketplace/economic approach of structural regulation is not without critics. Some have pointed out that the current regulatory scheme results in a system

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<sup>204</sup> Peter Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 2 Q J Econ 194, (1952).

<sup>205</sup> Berry and Waldfogel's work suggested that an increase in the diversity of radio formats following the passage of the 1996 Telecommunications Act was evidence of positive effects of ownership concentration. Relying on format names, rather than a direct examination of the content of the stations, the conclusions they reach are suspect. Radio Format names are often marketing tools, and although stations may carry very similar programming, they may have different "formats." Steven T. Berry & Joel Waldfogel, Mergers Station Entry, and Programming Variety in Radio Broadcasting, NBER Working Paper 7080, available online, <http://www.nber.org/papers/w7080> (1999).

<sup>206</sup> Id.

<sup>207</sup> Id.

where the focus on profits ends up short changing the needs of smaller groups.<sup>208</sup> As advertising, based on audience size, is the engine of broadcaster profit, the incentive is not to create diverse programming targeting different groups, but rather to provide content designed to attract larger groups, preferably those with demographic attraction to potential advertisers.<sup>209</sup>

Unfortunately for the FCC, among the critics of its structural regulation policies are the federal courts. The central criticism has been the Commission's inability to produce rational empirical evidence supporting licensing and ownership decisions. In *Lamprecht v. FCC*,<sup>210</sup> the court threw out the Commission's gender licensing policy which was designed to increase ownership diversity by awarding an enhancement to license applications made by females in cases of competing applications.<sup>211</sup> At the heart of the decision was the FCC's failure to provide empirical evidence that female licensees provide content which is substantially different than male licensees.<sup>212</sup> In *Schurz Communications v. FCC*,<sup>213</sup> the Commission was criticized for failing to provide any evidence that an increase in source diversity led to increases in program

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<sup>208</sup> Christopher Sterling, in *Media Ownership; Research and Regulation*, supra note 5. See also Phillip Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*, 43 *J. Broad. & Elec. Media* 565 (1999).

<sup>209</sup> Not all audiences are equal. Some demographic groups are targeted with multiple forms of similar programming content in order to deliver as large a portion of the group to advertisers as possible. This process, which is common in local clusters of co-owned radio stations, seriously undermines the rationale for relying on an economic approach to content selection by broadcasters. Some examples exist of locally co-owned stations airing nearly identical music formats, thus providing "a choice" that still is focused on delivering specific demographic groups to advertisers.

<sup>210</sup> *Lamprecht v FCC*, 958 F.2d 382 (D.C. Cir. 1992).

<sup>211</sup> In order to achieve a "diffusion of the control of media of mass communications" the FCC awarded what it referred to as a "quantitative integration credits" for a variety of factors including education, experience and local involvement. *Id.*

<sup>212</sup> In 1982, Jerome Lamprecht was involved in a comparative licensing hearing against Barbara Marmet for a Middletown, Maryland, radio station. During the process, and ALJ awarded an additional enhancement to Marmet for her gender which gave her a higher composite score than Lamprecht. On appeal, then Judge Clarence Thomas wrote a majority opinion which argued that the promotion of viewpoint diversity was an "important government objective" but the FCC's gender policy was not related to the goal of programming diversity. Thomas's opinion relied heavily on the empirical data from a Congressional Research Study which demonstrated that stations owned by women only program women's programming in one third of cases and that women owners were no more likely than men to carry minority programming. *Id.*

<sup>213</sup> *Schurz Communications v FCC*, 982 F.2d 1057 (7th Cir. 1992).

diversity. In *Sinclair v. FCC*, the court stated that the FCC's desire to maintain eight local voices was unsupported and not rational.<sup>214</sup>

Nevertheless, in June, 2003, in response to the requirement of a quadrennial review of the media ownership rules, the Commission, without a period of public comment or review, released a revised set of rules that relaxed media ownership limits.<sup>215</sup> At the heart of this order, which would have allowed substantial additional concentration of media ownership, was the FCC's new Diversity Index.<sup>216</sup> The Diversity Index was based on the Herfindahl–Hirschman Index (HHI) measurements used in anti-trust inquiries and included a new ranking system for different types of media.<sup>217</sup> The Commission's stated goal was to assure that at least six competitors - newspapers, radio, television and internet sites - would exist in each market.<sup>218</sup>

Following a large public response against the new ownership limits, a legal challenge to the order occurred in *Prometheus Radio Project v. FCC*.<sup>219</sup> Although the Third Circuit Court of Appeals stated that its, "...deference to the Commission's judgment is highest when assessing the rationality of the agency's rulemaking procedures..."<sup>220</sup> the majority took a dim view of the FCC's new Diversity Index and the relaxed ownership limits the Diversity Index could mathematically justify. Because the Commission had failed to provide any evidence to support

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<sup>214</sup> *Sinclair v. FCC*, supra note 126..

<sup>215</sup> Under the Administrative Procedure Act, formal rulemaking proceedings call for a period of public comment and review. The Commission's failure to engage in this step during the process and the high number public comments criticizing the decision which followed the release of the FCC's Diversity Index played a part in the majority's opinion in the first *Prometheus* remand. *Prometheus* 2004, supra note 121.

<sup>216</sup> 2002 Biennial Review Order, supra note 84.

<sup>217</sup> *Id.*

<sup>218</sup> A summary of the changes and an example of how the Diversity Index would be applied to "Anytown, USA" is available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.doc), last accessed July 1, 2011.

<sup>219</sup> *Prometheus Radio Project* is a "not-for-profit association dedicated to the democratization of the airwaves through the proliferation of non-commercial, community based, micropower stations," more info on the group is available [http://prometheusradio.org/about\\_us](http://prometheusradio.org/about_us), last accessed October 1, 2011.

<sup>220</sup> Cases involving administrative law decisions theoretically grant deference to the agency's expertise in rule making, examining instead whether or not the weight of evidence supports the rationale of the decision. *Id.* On the deference standard applied by courts reviewing an agency decision, see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

its decision-making,<sup>221</sup> the court remanded to the FCC the assumption that different media sources were, and could be counted as, equal.<sup>222</sup> The court also held that the FCC had failed to demonstrate that alternative media, such as internet sites, provided substitutability for traditional broadcasters or other traditional media, pointing out that an internet site created by an existing media outlet did not enhance diversity.<sup>223</sup>

The remand in the *Prometheus* decision remains at the center of the FCC's media ownership rule review.<sup>224</sup> Importantly for the entire structural regulation regime, the *Prometheus* decision made clear that in order for the Commission to modify its regulations in any significant way, whether in favor on increasing concentration or some types of rollbacks, the FCC must generate evidence that at least rationally supports the agency's rulemaking decision.<sup>225</sup> Yet, since the Commission continues to be reluctant to engage in content based research which could provide some evidence of diversity, changes to the structural regulation regime seem unlikely, at least in the short term.<sup>226</sup>

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<sup>221</sup> *Prometheus* 2004 supra note 121.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 455.

<sup>224</sup> The mandates of the original *Prometheus* remand are among the considerations of the FCC's 2010 Quadrennial Review. In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2010 Notice of Inquiry, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-92A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf), last accessed July 1, 2011. {Hereafter: 2010 NOI} A second remand, handed down by the Third Circuit on July 7, 2011, actually compels the FCC to consider evidence issues in the context of the ongoing proceeding. *Prometheus Radio Project v FCC*, 3rd Cir, July 7, 2011 {Hereafter *Prometheus* 2011}

<sup>225</sup> This has been an ongoing problem for the Commission when dealing with legal challenges to structural regulation. Given the substantial evidence test, which allows a reviewing court to overturn an agency decision which is unsupported based on the whole proceeding record and the court's traditional deference to administrative agencies in the rulemaking process, (under *Chevron*) one must ask why the Commission continues the process of failing to generate any evidence to support its decision making. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.

<sup>226</sup> The Commission has stated a belief that any analysis of content it conducts will be subjective. It has used this position to support the ongoing decision to not produce evidence. Given this, it seems that most likely source for this type of data will be from the regulated industry and from academics. Lee Bollinger suggests that relying on evidence from the regulated industry results in a process where self serving evidence becomes the rationale for policy. As the FCC has failed to even produce evidence which favors the industry position, it should consider commissioning some outside research. A policy evaluation in this area is past overdue. See Lee Bollinger, *Images of a Free Press*, (1991); 2002 Biennial Review Order, supra note 84.

## Content vs Structural Regulation

Despite the FCC's refusal to implement content regulations designed to enhance viewpoint diversity, the Supreme Court stated in both the *NBC* and *Red Lion* decisions that a content regulation can act as a mechanism to increase the quantity of speech.<sup>227</sup> Some have argued that this reliance on government to protect the systems of free expression, a neo-liberal position,<sup>228</sup> acts to balance out the resources groups and individuals can use to promote ideas in the public sphere.<sup>229</sup> Government, rather than suppressing speech, provides opportunities to enhance citizen access to diverse and antagonistic viewpoints.

Jerome Barron extended this line of reasoning, arguing that although we cherish the principle of free expression, as a society, we have not sufficiently enhanced the opportunities to use those rights.<sup>230</sup> He has suggested that government has a role to play in mandating access, and specifically a right of reply, to not just broadcasters, but the media as a whole. By not mandating some access and reply rights in the media, the government allows media owners to drown out alternative views much the way a sound truck would do if used in public place.

Krattenmaker and Powe agree that government policies should foster diversity, but they argue that relying on government places the government in an unacceptable position of editorial

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<sup>227</sup> Lee Bollinger has suggested that despite this confusion, this area of law is no less coherent than other issues, including libel, which deal with the First Amendment. Bollinger, *supra* note 150.

<sup>228</sup> Helle also proposes that neo-liberals adopt some skepticism regarding the reliance on government to foster diversity. Steven Helle, *Whither the Public's Right (Not) to Know? Milton, Malls and Multicultural Speech*, 1991 U. Ill. L. Rev. 1077 (1991).

<sup>229</sup> See Thomas Emerson, *System of Freedom of Expression*, (1970) and Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism*, (1992).

<sup>230</sup> Jerome Barron, *Public Access to Print Media, A Right of Access and Reply*, 80 Harv. Law Rev 1641 (1967).

control.<sup>231</sup> They believe that government can, and even should, subsidize speech, but that significant problems lie in the application of this theory.<sup>232</sup> How does one decide what access is mandated, and how to enforce it? Granting access rights will require broadcast outlets to replace some programming that would have otherwise aired.<sup>233</sup> Because the entire process is political, classifying programs becomes constitutionally problematic.<sup>234</sup> Additionally, simply requiring broadcasters to air a certain amount of a type of programming content has proved to be ineffective.<sup>235</sup> Time requirements that leave the discretion over what kind of programming should be run in the hands of the licensee, such as the current FCC policy regarding children's television, fail to assure this programming is of a quality that meets the objectives of the regulation.<sup>236</sup>

Paradoxically though, the courts have been far more likely to uphold the FCC's direct regulation of content than its structural ownership rules.<sup>237</sup> Content neutral structural regulations have been routinely rejected for a lack of supporting evidence<sup>238</sup>; while directed regulation of content has been upheld as a legitimate mechanism for the enhancement of diversity of ideas.<sup>239</sup> One has to ask why this paradox exists?

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<sup>231</sup> Krattenmaker and Powe, supra note 116.

<sup>232</sup> Id. at 320-321.

<sup>233</sup> Id. at 321-323.

<sup>234</sup> Id. at 318-319.

<sup>235</sup> The FCC's Children's Television rules have been criticized for a loose definition of what constitutes programming that can count towards the 3 hour per week obligation. MM Docket No. 00-167, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-1716A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-1716A1.pdf), last accessed July 1, 2011.

<sup>236</sup> The policy question is front and center in this contention. When one sets aside the iron-triangles and other protectionist mechanisms, policy makers and evaluators, at least in theory, argue that policy should meet its objectives. Stella Theodoulou & Chris Kofinis, *The Art of the Game, Understanding American Public Policy Making*, (2004) and Frank Baumgartner & Bryan Jones, *Agendas and Instability in American Politics*, (1993).

<sup>237</sup> Compare the decision in *Red Lion* with *Tornillio v Miami Herald*. Both were access cases based on a legal obligation which provided for a right of response. In *Red Lion*, a broadcasting case, the regulation was upheld, but in *Tornillio*, a print case, the statute was not. Although decided earlier the court ignores the *Red Lion* decision in its *Tornillio* decision. *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974).

<sup>238</sup> See: *Prometheus 2004*, supra note 121

<sup>239</sup> See *Red Lion v FCC* supra note 34, *NBC v U.S* supra note 37.

The answer may be illustrated by the debate which occurred over one structural regulation the FCC implemented and that the courts upheld on review. In 1975, the FCC concluded a long running review of the newspaper-broadcast cross-ownership rules, and implemented a ban on future local cross-ownerships of broadcasting stations by newspaper interests.<sup>240</sup> Although the regulation facially dealt with ownership issues, the FCC's goal was intended to ensure viewpoint diversity within commonly owned media properties.<sup>241</sup> When the rule was challenged on jurisdictional grounds in court, the court ruled that the FCC had acted rationally in crafting and implementing the rule because the ownership regulation was designed to increase the diversity of viewpoints.<sup>242</sup>

The newspaper broadcast cross-ownership decision provides an historical example of a situation where the FCC's rationale for structural regulation was based not on economics but on diversity grounds, including the goal of increasing viewpoint diversity through a diversity of ownership, a structural regulation survived judicial review.<sup>243</sup> The stated interest in protecting viewpoint diversity was considered more important than the economic concerns associated with the decision.<sup>244</sup>

Broadcast content regulations, whether they restrict speech or compel it, implicate larger societal issues and goals, whether it be protecting children from indecent material or increasing citizen access to diverse viewpoints. The modern implementation of structural regulations relies

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<sup>240</sup> Docket 18110, In the Matter of Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C 2d 1046 (1975).

<sup>241</sup> *Id.*

<sup>242</sup> *National Citizens Committee for Broadcasting v FCC*, 436 U.S. 775 (1978).

<sup>243</sup> There is a double paradox in this decision. While the rationale for the decision is upheld, in policy terms, the Commission may have it wrong on this issue. Despite the concerns over concentration, at least two studies exist which indicate that local newspaper/broadcast cross ownerships actually increase viewpoint diversity overall when compared to competing media properties. David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed Comm L J 31, (2001) and David Pritchard, Christopher Terry, & Paul R. Brewer, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross- Ownership Policy*. 13 Comm. L. & Pol'y 1 (2008).

<sup>244</sup> *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775 (1978).

on a simple counting methodology of ownership concentration, and thus is simply a debate about numbers or acceptable degrees of concentration. A reliance on simple quantitative measurements fails to directly confront what structural regulations are actually intended to do, provide the FCC with a regulatory device to meet the stated policy goal of viewpoint diversity.

When the Commission began the process of deregulation, its rationale was that content controls were no longer necessary to ensure citizen access to diverse media content.<sup>245</sup> At the time it was believed that changes in structural regulations would increase the economic incentives to diversify programming while still preventing the problems of monopoly through traditional anti-trust regulation.<sup>246</sup> Because a marketplace approach was expected to create content diversity, it was argued that a continued reliance on scarcity as a guiding regulatory principle was not only outdated, but also no longer necessary.<sup>247</sup> The Commission cited the fact that many new broadcasting stations and other forms of new media had come on-line since the legal decisions which had supported content restrictions based on scarcity.<sup>248</sup>

While the logic may appear rational, it fails to account for an important factor, namely the behavior of broadcasters. Relying on regulatory mechanisms that control on anti-trust grounds does not assure that broadcasters are providing content options that increase actually create diversity.<sup>249</sup> Advocates of the marketplace approach, relying on structural regulation, have applied the economic model incorrectly to broadcasting. The opponents of content regulation

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<sup>245</sup> JW Beresford, *The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FCC Staff Paper, 2003. <http://transition.fcc.gov/ownership/materials/already-released/scarcity030005.pdf>, last accessed July 1, 2011.

<sup>246</sup> *Id.* see also Fowler & Brenner, *supra* note 109.

<sup>247</sup> Beresford, *supra* note 169.

<sup>248</sup> *Id.*

<sup>249</sup> Krattenmaker and Powe suggest that complaints about fairness were usually problems associated with journalistic ethics. Journalistic ethics as an extension of broadcaster behavior, absent content controls, does not provide a check and balance to correct this type of market failure. The behavior of media organizations is an important factor, and examples exist where media coverage has been slanted in ways that directly advance the interests of the organization. Krattenmaker and Powe, *supra* note 116 at 253-55.

who argue that the marketplace is a better mechanism for creating diversity incorrectly assume that broadcast content is the product. Yet in broadcasting, content is only a means for delivering the actual product, which is audience. Listeners and viewers consume media content, but audience is the product broadcasters are attempting to sell in the economic marketplace. In broadcasting, content is a tool for commodity production.

Audiences, rather than content, are the products media organizations produce and the demographics of audiences determine their value. Although size of an audience is always an important factor in determining the value of a program's audience, other factors, such as the disposable income of certain demographic groups, increase that audience's value to advertisers. Because larger and more attractive demographic groups offer broadcasters a higher return, it is logical that they would compete for these audiences with similar types of targeted content.<sup>250</sup> Programming which targets less desirable demographic groups is therefore less likely to be produced.<sup>251</sup>

Like any other business, broadcasters also can benefit from the economic incentives to increase efficiency of production. As Spence and Owen point out, the costs of producing certain types of programming exceed the revenues that programming will generate.<sup>252</sup> This situation produces a circular effect. Although informational content such as news or public affairs programs can be produced cheaply, the bland nature of the programming results in audiences not exposing themselves to such content, which in turn, also reduces the incentives to produce it.<sup>253</sup>

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<sup>250</sup> Albarran & Loomis, *supra* note 10.

<sup>251</sup> See Rice, *supra* note 5 and Sterling, *supra* note 132.

<sup>252</sup> Michael Spence and Bruce Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q. J. Econ. 103 (1977).

<sup>253</sup> Phillip Napoli proposes that providing diversity is worthless without exposure. Content, especially informational content is a necessity, but consumption of the content is also required. Napoli, *supra* note 18, and Phillip Napoli, *Exposure Diversity Reconsidered*, 1 J Information Poly 246 (2011).

This situation is complicated by the reality that media ownership, especially of broadcast stations, has been substantially consolidated since the passage of the 1996 Telecommunications Act.<sup>254</sup> With increasing horizontal and vertical ownership of broadcast stations and content producers, the ability to cheaply produce content also extends to using identical content across multiple media platforms, further reducing the overall diversity of programming.

McChesney argues these effects are logical outgrowths of relying on a free market based philosophy for the regulation of media.<sup>255</sup> He proposes that the marketplace rationale, which should be supportive of a free marketplace of ideas, has been corrupted into supporting a free market, not of ideas, but economics.<sup>256</sup> This process has resulted in the debate over media ownership being more about issues of competition and efficiency than about issues of content diversity and access.<sup>257</sup>

Among its primary justifications for additional deregulations the Commission has asserted that more competition will increase the quality and quantity of choices for consumers.<sup>258</sup> But the FCC has failed to conduct a meaningful evaluation of the effects of this policy, leaving open the question of whether or not this is actually occurring.<sup>259</sup>

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<sup>254</sup> The radio ownership limits contained in the 1996 Telecommunications Act removed nationwide limits, instating a market specific formula that based limits on local station ownership on the number of radio stations in a media market. In the largest radio markets a single company can own up to eight radio stations. This problem is increased with vertical and horizontal integration of media companies. Much has been made of Clear Channel's ownership of over 1200 radio stations (about 9% of the commercial stations in the US) although few people (essentially, myself) have pointed out that a Clear Channel media production subsidiary is currently providing content to more than 5000 radio stations. Therefore content originating from Clear Channel airs on thousands of stations the company does not own. <http://www.premiereradio.com/pages/corporate/about.html>, last accessed July 1, 2011.

<sup>255</sup> Robert W. McChesney, *The Problem of the Media: U.S Communication Politics in the 21<sup>st</sup> Century*, 2004.

<sup>256</sup> Id.

<sup>257</sup> Id. See Also Robert McChesney, *Media and Politics in the United States Today*, presentation May 2, 2005. Available at <http://www.uctv.tv/search-details.aspx?showID=9492&subject=pet> last accessed October 1, 2011.

<sup>258</sup> Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 17 FCCR 18503 (2002).

<sup>259</sup> While the empirical data examining media ownership and media content is limited, one study proposed that the conventional wisdom that competition maximizes diversity is without empirical support. There is empirical support that the increase in the concentration in broadcast ownership has diminished the diversity of local newscasts. PJ Alexander, BM Cunningham - *Media Diversity And Localism: Meaning And Metrics* available at <http://transition.fcc.gov/ownership/materials/already-released/mediadiversity120003.pdf>, last accessed July 1, 2011.

Even in the absence of evidence, the logic of the outlet diversity policy is suspect. The Commission believes in the equation, one owner = one viewpoint.<sup>260</sup> Yet when implementing media ownership policies, the Commission has allowed for substantial consolidation of ownership, which has substantially reduced the quantity of owners overall. By the Commission's own logic, the regulatory policy implementation in place reduces the level of viewpoint diversity available.

And yet, despite the focus on structural regulation, the policy objective remains the production and distribution of viewpoint diversity.<sup>261</sup> If the current model that focuses on structural regulation is failing to produce diversity, one must ask what the remedy is. Although overwhelming factual support for an administrative decision is not necessary to change regulatory policy,<sup>262</sup> the remand in each of the *Prometheus* cases will make any changes to the current regulatory structure difficult to implement without an act of Congress.<sup>263</sup> While the Commission was itself successful in implementing some changes to the ownership limits in 1992 and 1994,<sup>264</sup> the primary source of the structural ownership limits for broadcasters currently in place is Congress. In a process which began with the creation of the FRC to license broadcasters, through the 1996 Telecommunications Act, Congress has been the driving force in policy changes to the structural regulation of broadcasters. This process has continued, and is demonstrated by the small expansion in the national ownership limits on television stations

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<sup>260</sup> 2002 Review, *supra* note 182.

<sup>261</sup> *Id.* at 18518.

<sup>262</sup> *Syracuse Peace Council v FCC*, 867 F.2d. 654 (D.C. Cir 1989).

<sup>263</sup> The FCC has been unable to support structural rules as it has failed to produce any evidence that its policies are having the desired affects. The 2004 *Prometheus* remand does raise one important question: assuming the FCC can produce evidence to support a change in structural policy, will the court accept the FCC's demonstration that diversity is sufficient to allow such rules to be implemented?

<sup>264</sup> In 1992, the FCC relaxed limits on radio ownership, allowing a company to own up to 18 stations in each band, AM or FM, nationwide. The 1994 rules further relaxed the national limits of radio ownership to 40 stations, 20 in each of the AM and FM bands. Broadcast Multiple Ownership Rules, 47 C.F.R. § 73.555 (1992), Radio Ownership Rules, 9 FCC 7183 (1994).

which was passed to accommodate an existing ownership situation after the stay of the FCC's 2003 ownership limits in the *Prometheus* decision.<sup>265</sup>

Congress has created the policies, but the FCC is required to implement and evaluate them. Any policy implemented by the Commission must be measured against the public interest standard. Although Fowler and Brennan once famously declared, "The public's interests define the public interest,"<sup>266</sup> this reduces the debate over content to a question of what most viewers want as opposed to what viewers need. Proponents of the marketplace model suggest that broadcast and other media outlets provide programming options that people want. The Supreme Court has supported the position that the public's interest lies in access to diverse and antagonistic viewpoints.

While many of the contradictions surrounding broadcast regulation may be explained by pointing out that the FCC has done a poor job when enforcing regulations or evaluating policy,<sup>267</sup> the issue may even be simpler. Broadcasters produce content. Therefore any regulation of media, through structural limits or otherwise, in some way implicates content. Thus, regardless of the impulse to use either type of regulation, the regulatory paradox, broadcast content is regulated, cannot be avoided.

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<sup>265</sup> After the stay in the *Prometheus* decision, Congress passed an expansion in the national television ownership limits from 35 to 39% to accommodate an existing ownership situation. Additionally, this act of Congress removed jurisdiction over the television limits from the FCC's statutory delegation. Consolidated Appropriations Act, Pub. L. No. 108-199, tit. VI, § 629, 118 Stat. 3, 99-100 (2004).

<sup>266</sup> Fowler & Brenner *supra* note 109 at 242.

<sup>267</sup> The ongoing and problematic history of FCC decisions includes policy decisions which have resulted in an irrational and inconsistent enforcement of indecency, and the Commission's ongoing tip toe around applying content guidelines that would increase the likelihood that they would meet the stated policy objectives. This situation does provide some support to the idea of keeping the government out of this process, but market failures in this area can only be corrected through a change in licensee behavior (not likely) or government action (not necessarily an attractive option).

# Chapter 2:

## Evidence, Agencies and Expertise

## Chapter 2: Evidence, Agencies and Expertise

This chapter explores the relationship between administrative agencies evidence and the judicial review of agency decisions, and concludes with a section with how these standards apply to the FCC when the agency engages in rulemaking or reviews dealing with media ownership. The FCC's continuing mandate to review its media ownership rules, and the requirement to do so under the provisions of section 202(h) of the 1996 Telecommunications, has brought the issue of docket evidence and testimony to the front of the policy process.<sup>268</sup>

Administrative agencies are created by a legislature, Congress for the purposes of this chapter, to develop and implement policy within their expertise. Agencies are also delegated the responsibility for implementation and enforcement of statutes.<sup>269</sup> These quasi-legislative and quasi-judicial powers are granted through statute. The implementation of laws by an administrative agency is accomplished primarily through rulemaking.<sup>270</sup> Rulemaking is a process by which an administrative agency interprets the statute or responsibilities delegated to it, and ultimately creates the the rules and policies implementing the statute.

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<sup>268</sup> The issue of evidence in FCC rulemaking proceedings is not a new one, but since the 1996 Telecommunications Act changed the evidentiary standards for the agency, the problem has actually undergone a fundamental change. In modern times the FCC has acted on policy without sufficient evidence, but at one point, critics of the FCC's policy making on program evaluation standards argued, "that the Commission often substitutes the act of evaluating and studying a problem or policy for the act of actually dealing with a problem or making policy." See: Five Determiners of Regulatory Policy, Chapter 2 in Erwin G. Krasnow & Lawrence D. Longley, The Politics of Broadcast Regulation, (1978) at 30-31.

<sup>269</sup> Administrative Procedure Act, § 551.

<sup>270</sup> APA § 553

Expert testimony, advice or evidence can enter a rulemaking proceeding at several points. The first, often overlooked in discussions of policy, comes when the Congress gathers information that is used to develop legislation and inform the delegation of responsibility to the agency.<sup>271</sup> Congress, in many proceedings, holds hearings about potential legislation that include testimony and other documentation from witnesses. In some cases, these witnesses will provide legislative bodies with scientific, technical or other “expert” research data and the testimony may include experts from the agency which will eventually implement the statute.

Once a formal statutory delegation of authority is made, an agency interprets the legislative delegation.<sup>272</sup> Following interpretation of the statute, the agency launches a rulemaking proceeding. As part of this process, the agency will explain why it has interpreted the statute the way it has. During the early stages of the proceeding the agency will solicit comments, information and research data about the proposed regulation.<sup>273</sup> The proceeding is open to input from any interested parties, including the public.<sup>274</sup> Expert testimony may enter the proceeding through data or testimony submitted to the proceeding, but also through responses to other information in the record, as various parties to a rulemaking proceeding comment on the data and information filed by others.

Expert witnesses thus play a part in informing the decision-making process by the agency. While the actual influence any one expert has on a proceeding depends largely on the nature of the rules the agency is promulgating as a whole, the importance of expert witnesses and the data they provide to an agency during a rulemaking proceeding cannot be understated.

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<sup>271</sup> This step is typically overlooked in discussions of expert testimony.

<sup>272</sup> See Generally: Cass R. Sunstein, The Second Bill of Rights, (2004.)

<sup>273</sup> APA § 556

<sup>274</sup> APA § 557(c)

Theoretically, administrative agencies themselves are experts, which allows an agency to make informed and rational decisions based on the record assembled in a rulemaking proceeding. When courts conduct judicial review of agency decisions, they give deference to an agency and its expertise,<sup>275</sup> but judicial review of an agency regulation also ensures that a promulgated regulation is supported by the rulemaking record.<sup>276</sup> The failure of an agency to provide a record of the regulatory proceeding, which has considered all the evidence brought before it and explains the agency's rulemaking rationale, essentially ensures that the regulation will not survive a judicial review, and will be remanded to the agency for clarification.

The requirement of a complete and rational rulemaking record has been the basis for many of the legal decisions dealing with administrative procedure. And while complete factual support is not necessary to support an agency's decision making process,<sup>277</sup> judicial review of agency decision making has long relied on the idea that an agency must at least act rationally. A rationally based decision in a rulemaking inquiry is likely to withstand judicial review when it has a number of relevant characteristics. First, an agency's failure to provide any basis upon which its decisions were made rendered any such decisions invalid.<sup>278</sup> Second, effective judicial review of agency decision making requires a complete record which contains not only the agency's interpretation of the statute it is implementing, but also fully explains the agency's reasoning.<sup>279</sup> Third, the failure of an agency to produce a full record, and allow comments on the interpretation of the statute and the data the agency relied on when promulgating a regulation undermined the rationality of the decision by an agency.<sup>280</sup> Fourth, the record of a rulemaking

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<sup>275</sup> The current standards for deference are established by the 4 parts of the Chevron Test. *Chevron, Inc. v. NRDC*, 467 U.S. 837 (1984). {Hereafter: Chevron}.

<sup>276</sup> APA § 706

<sup>277</sup> *Syracuse Peace Council v. FCC*, 867 F.2d 654 (DC Cir 1989)

<sup>278</sup> *SEC v. Chenery Corp.* 318 U.S. 80 (1943).

<sup>279</sup> *U.S. v. Nova Scotia Food Products Corp.* 568 F.2d 240 (2<sup>nd</sup> Cir. 1977)

<sup>280</sup> *Weyerhaeuser Co v. Castle* 590 F.2d 1011 (D.C. Cir 1978).

proceeding must contain the information and other materials the agency relied upon to ensure that the decision was not arbitrary.<sup>281</sup> Fifth, to ensure a rational review of the agency decision making required the court to examine the technical evidence, much of which was in dispute, to determine what information was used and what was discarded by the agency. And finally, when an agency modifies existing rules, the agency is required to provide a reasonable analysis in support of the decision.<sup>282</sup>

While rulemaking serves as the quasi-legislative function of administrative agencies, administrative agencies also have quasi-judicial powers to enforce regulations. Just as in rulemaking proceedings, a complete record, including a rational explanation for the administrative law judge's decision is required in an adjudication. In 1924, in *U.S. v. Abilene*, the Supreme Court stated that administrative enforcement orders must be supported by evidence legally introduced and then considered by the agency.<sup>283</sup>

Parties involved in adjudication may offer evidence or witnesses as part of the hearing process. Guiding this process are the administrative rules of procedure contained within the Administrative Procedure Act.<sup>284</sup> The APA provides the structure under which administrative agencies engage in rulemaking and administrative judicial review. The APA specifies that "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding constitutes the exclusive record for decision."<sup>285</sup> Unlike rulemaking, where the inclusion of expert testimony may originate with any interested parties, adjudications are essentially closed to anyone outside of the affected parties. As a result, expert testimony or evidence presented in adjudication will likely be directed at one party's claims or challenge.

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<sup>281</sup> *Home Box Office Inc. v. FCC*, 434 U.S. 988 (1977).

<sup>282</sup> *Motor Vehicle Manufacturers' Association v. State Farm*, 463 U.S. 29 (1983).

<sup>283</sup> *U.S. v. Abilene & Southern Ry.* 265 U.S. 274 (1924).

<sup>284</sup> Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237 (1949).

<sup>285</sup> APA § 556(e).

Despite the trial-like proceeding of adjudications, written evidence often takes the place of oral testimony by experts.<sup>286</sup> Similar to rulemaking proceedings, where the agency commissioners and staff have some expertise in the area, an ALJ's evaluation of expert evidence entered into an adjudication is based on the expert's qualifications, the methodology and data employed, and the conclusions the expert draws.<sup>287</sup> An ALJ, operates as a fact finder, and may choose to disbelieve the testimony of expert witnesses and based on the ALJ's own expertise when assessing evidence in the record.<sup>288</sup>

In both adjudication and rulemaking proceedings, policy can be established, but because rules apply to all parties, rulemaking is generally the preferred method for establishing policy. Regardless of the type of proceeding, evidence and comments must be dealt with, and the rationale for the agency's or ALJ's decisions about expert and other testimony must be presented and supported in the record.

Two major controls circumscribe how agencies deal with expert testimony the APA and the need to withstand judicial review. As discussed before, rulemaking proceedings are typically open to any interested parties who wish to comment or submit data. In terms of adjudication "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence."<sup>289</sup> Since the ALJ is likely to have some expertise related to the issue at hand in an adjudication, he or she is in an informed position to make such determinations about the testimony in the record.

The scope of review of agency action is specified in §706 of the APA which states that, "a reviewing court shall decide all relevant questions of law, interpret constitutional and statutory

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<sup>286</sup> See Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Process*, (2006).

<sup>287</sup> *Id.* at 262-263.

<sup>288</sup> If the credibility of witnesses (as opposed to their evidence) is an issue, the decision maker must see and hear all the witnesses. See *Asbury Park v. Department of Civil Service*, 111 A2d 625 N.J. (1955).

<sup>289</sup> APA § 556(d).

provisions and determine the meaning of applicability of the terms of an agency action.” Under § 706, a reviewing court will set aside agency actions it determines to be arbitrary and capricious.<sup>290</sup>

When reviewing agency action, the court applies the Supreme Court’s *Chevron* test to determine the legislative intent of a statute to determine what deference the court owes the agency and its expertise.<sup>291</sup> Under the first step of *Chevron*, the court examines the controlling statute and if the meaning is unambiguous, that meaning is determinative.<sup>292</sup> Under step two of the *Chevron* test, if a statute’s meaning is ambiguous, the court must uphold any reasonable interpretation of the statute by the agency, thus giving deference to the agency and its expertise.<sup>293</sup> Traditionally a reviewing court would give less deference to an agency’s legal conclusions than to an agency’s factual or discretionary determinations as a result of the agency’s expertise. More recently, judicial reviews of agency action focus primarily on whether the agency followed proper procedure and take a “hard look” examination of the agency’s factual reasoning in the record.<sup>294</sup>

Judicial review of agency action in formal proceedings is conducted under APA § 706 (2) (E) which codifies the substantial evidence test. Under the substantial evidence test, courts will

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<sup>290</sup> In deciding whether agency action was arbitrary and capricious, a court will ask: Did the agency consider all of the relevant factors, and not rely on irrelevant factors? Was the decision unreasonable or a clear error of judgment? Were procedural requirements met? APA § 706.

<sup>291</sup> *Chevron*, supra note 8.

<sup>292</sup> “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”. *Id.* at 842-843.

<sup>293</sup> “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Id.* at 843 citing *Morton v. Ruiz*, 415 U.S. 199, 231, (1974).

<sup>294</sup> In some cases agencies have tried to limit the necessary factual basis for a decision by interpreting a statute in a way that makes the evidentiary requirements lower. *Gellhorn & Levin*, supra note 19 at 101.

uphold the agency's decision where the evidence reasonably supports the agency's stated conclusions. In doing so, the court, is required to look at the whole record, including the evidence that supports and opposes the agency's decision as well as any decision by the ALJ.<sup>295</sup> In *Consolidated Edison v. NLRB*, the Supreme Court held that the burden of substantial evidence has been met when an agency has relied on, "...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>296</sup>

William West characterizes the two guiding principles for modern administrative action as responsiveness and rationality.<sup>297</sup> Responsiveness makes the policy making process more open, and thus more democratic. Rationality assures a reasonable approach to meeting the stated objectives, and ensures that in the process consideration is given to the relevant factors, including expert testimony, regardless of their source.<sup>298</sup>

By extension, the guiding principles from the APA for administrative agencies when reviewing evidence include openness (responsiveness) and transparency (rationality). In terms of rulemaking, an agency must make available (publish) critical data or scientific methodology to allow interested parties to respond or comment on the data. Additionally, the agency must respond to comments that are critical of the factual basis of a proposed rule and the methodology on which it is based, if the comments meet the threshold of materiality.

## **Expert Testimony in the Court Room**

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<sup>295</sup> *Universal Camera v. NLRB*, 340 U.S. 474 (1951).

<sup>296</sup> *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 at 229 (1938).

<sup>297</sup> William F. West, "Structuring Administrative Discretion: The Pursuit of Rationality and Responsiveness," 28 *Am. J. Pol. Sci.* 340 (1984).

<sup>298</sup> West cites cost-benefit analysis by agencies as an example where rationality and responsiveness are incorporated together. *Id.*

While administrative rulemaking proceedings and the decisions made by an agency rely on principles of openness and consideration of expert testimony (pro or con) as a part of the record, the rules regarding the admission of expert testimony in civil and criminal proceedings are much tighter and under the control of the trial judge.

The admission of expert testimony in the courtroom was once guided by the *Frye* decision.<sup>299</sup> In *Frye*, which dealt with polygraph evidence, the D.C Circuit Court of Appeals articulated the principle that to be admissible, expert evidence and testimony had to be interpreted by the court as "generally accepted" by the scientific community associated with it.

The admission of expert testimony in civil court proceedings is now guided by rule 702 of the Federal Rules of Evidence which originally stated, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."<sup>300</sup> After the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>301</sup> Rule 702 was modified to include additional provisions which state that a witness may testify if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.<sup>302</sup>

The *Daubert* decision provides some guidelines to judges for reviewing potential expert testimony. Specifically a trial judge must determine if, "...an expert's testimony both rests on a

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<sup>299</sup> The Frye rule of evidence, "...the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. U. S.*, 293 F. 1013 (D.C. Cir. 1923).

<sup>300</sup> Rule 702, (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937.).

<sup>301</sup> The *Daubert* case arose from a civil suit against Merrell Dow Pharmaceuticals over birth defects allegedly caused by the drug Bendectin. See *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993) at 2795-2798. {Hereafter: *Daubert*}.

<sup>302</sup> Rule 702, see <http://www.law.cornell.edu/rules/fre/ACRule702.htm> , last accessed October 1, 2011.

reliable foundation and is relevant to the task at hand.”<sup>303</sup> Is the evidence based on a testable scientific theory? Has the theory or technique has been peer reviewed? Does the technique have a known error rate and is there general acceptance of the underlying science of the evidence?<sup>304</sup>

One of the major criticisms of *Daubert* is that the decision places trial judges into the role of a gatekeeper of expert evidence, even though judges are not scientists and may lack the qualifications to make informed assessments of scientific or technical data and expert testimony. Yet the judge will ultimately decide what evidence the trier of fact, in most civil cases a lay jury, will get to hear and consider. This problem is compounded by the fact that in a civil action, the plaintiff bears the burden of proof. In cases, such as personal injury claims, the testimony of expert witnesses may represent a large part of the case the plaintiff wishes to pursue in front of a jury. If the judge excludes the plaintiff’s experts, the defendants are often successful in having the lawsuit dismissed through summary judgment.

The so-called *Daubert* trilogy includes two other cases *Kumho Tires* and *Joiner*. The *Kumho Tires* decision expanded the gatekeeper role to include all scientific and technical information entered under Rule 702.<sup>305</sup> *Joiner* specified that the standard of review for appellate courts when reviewing trial judge decisions regarding expert testimony should be “abuse of discretion.”<sup>306</sup> *Joiner* further encourages trial judges to examine studies and testimony individually when making assessments about expert testimony.<sup>307</sup>

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<sup>303</sup> *Daubert*, supra note 34 at 2799.

<sup>304</sup> *Id.* at 2799-81.

<sup>305</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

<sup>306</sup> *General Electric v. Joiner*, 522 U.S. 136 (1997).

<sup>307</sup> *Id.*

Attorneys and trial judges indicate that the *Daubert* trilogy has affected how they deal with the admission of expert testimony.<sup>308</sup> Data suggests that *Daubert* has increased the exclusion of expert testimony by trial judges.<sup>309</sup> In one study, judges cited relevance as the most common reason for the exclusion of an expert's testimony.<sup>310</sup>

In terms of expert testimony, attorneys and judges both cite the advocacy of experts for the side that hired them and the expense of doing so as two major problems with the use of expert testimony.<sup>311</sup> In some cases, the expense attached to hiring an expert has made attorneys reluctant to pursue a tort action where this type of testimony will be central to their case.

The *Daubert* decision was directed in part at preventing the admission of what the Manhattan Institute for Policy Research's Peter Huber has labeled, "junk science."<sup>312</sup> In describing junk science, Huber states, "Junk science is the mirror image of real science, the same form but none of the substance."<sup>313</sup>

University of Miami Professor of Law and Professor of Philosophy Susan Haack suggests that Huber's ideas of junk science landed in timely fashion in the middle of an ongoing debate over tort actions.<sup>314</sup> To industries defending against a variety of torts, the idea that plaintiff attorneys would use junk science was a powerful one facilitated by changes to the federal rules of evidence and the *Daubert* decision as well as Huber's coining of the junk science label. The

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<sup>308</sup> See Carol Krafka, Megan Dunn, Molly Treadway Johnson, Joe Cecil & Dean Miletich, Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials, 8 *Psychology, Pub Pol & L.* 309 (2002).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> Peter Huber, Galileo's Revenge: Junk Science in the Courtroom, (1991).

<sup>313</sup> *Id.*

<sup>314</sup> Susan Haack, Defending Science, Within Reason, Between Scientism and Cynicism, (2007).

idea and the label of “junk science” has since been adopted by groups and industries who advocated for “sound science.”<sup>315</sup>

A large part of the debate surrounding Daubert and the possible application of its standards to administrative agencies can be tied directly to a debate over junk science. Huber’s terminology was quickly adopted by the “sound science” movement. While the debate over junk science would appear logical based on the language, the “junk science polemic is part of a broader social problem discourse accompanied by substantial interest group funding, media sensitivity and political and legal lobbying.”<sup>316</sup> Therefore, “sound science” has become an Orwellian label given to opponents of regulation and tort cases while “junk science” is used to denigrate scientific and technical evidence that the proponents of “sound science” do not agree with. Wendy Wagner argues that the battle for control over what is science has replaced the battle over policy and that “examinations show that most disagreements over “fact” are actually disputes over policy.”<sup>317</sup> David Michaels proposes that the primary reason for this development is that it is easier to win a battle over scientific certainty than it is to win in a policy dispute, especially for industries involved in the release of toxic substances or who must control exposure of workers or the public to hazardous materials.<sup>318</sup>

Sheila Jasanoff suggests that the adversarial political culture of the U.S. was fertile ground for a battle over scientific findings.<sup>319</sup> “In an environment that polarizes lay as well as expert participants, scientific claims align themselves along the cleavages created by political and social interests....The...nature of these analyses made them a potent resource for political

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<sup>315</sup> Id. at 233-235.

<sup>316</sup> Gary Edmond & David Mercer, *Expertise in Regulation and Law* (2004) at page 225.

<sup>317</sup> Wendy Wagner, *The Perils of Relying on Interested Parties to Evaluate Scientific Quality* 95 Am. J. Public Health 99, (2005).

<sup>318</sup> Michaels, *supra* note 14.

<sup>319</sup> Sheila Jasanoff, *Cross National Differences in Policy Implementation*, 15 Evaluation Rev. 103 (1991).

actors who sought to capture the authority of science in furtherance of their immediate policy objectives.”<sup>320</sup>

## Sound Science

The advocates of “sound science” have expanded their argument from the courtroom to the administrative realm. One of the goals of the sound science movement was to increase the reliability of science in an administrative setting by encouraging a *Daubert*-like standard for admissibility of evidence in rulemaking proceedings.<sup>321</sup>

Proponents of applying *Daubert* standards in regulation argue that agencies have too much discretion and although agencies promulgate regulations using the best available evidence, such decision-making is often incomplete.<sup>322</sup> By applying *Daubert* principles to administrative decision making, proponents argue that a reviewing court could then treat an administrative agency and the evidence on which it relied when making a rulemaking decision like any other testifying expert, thus allowing, “... a reviewing court, to bring structure, validity and reliability to the agency decision making process.”<sup>323</sup> It has also been argued that an application of *Daubert* in the regulatory area would correct a perceived problem that policy decisions (e.g.. regulatory

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<sup>320</sup> Id.

<sup>321</sup> Paul S. Miller and Bert W Rein, “Gatekeeping” Agency Reliance on Scientific and Technical Materials After *Daubert*: Ensuring Relevance and Reliability in the Administrative Process, 17 *Touro L. Rev* 297 (2000)., Andrew Trask, *Daubert* and the EPA: An Evidentiary Approach to Reviewing Agency Determinations of Risk, U. Chi. Legal F. 569 (1997).

<sup>322</sup> D. Hiep Troung, *Daubert* and Judicial Review: How Does an Administrative Agency Distinguish Valid Science from Junk Science? 33 *Akron L Rev* 366 (2000).

<sup>323</sup> Id.

decisions dealing with pollution or exposure limits to hazardous materials) are being based on scientific information that supports preconceived agendas.<sup>324</sup>

There are several issues raised by opponents of the possible application of *Daubert* standards to regulatory decision making. First, opponents of an application of *Daubert* in the regulatory process suggest that scientific inquiry is not as exact as *Daubert* portrays it.<sup>325</sup> In trial law, information is used to make a determination of fact in the terminal inquiry of a single legal action. Expert testimony is therefore submitted as part of a larger narrative created by a party to an individual case.<sup>326</sup>

In *Daubert*, Justice Blackmun stated, “There are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revisions. Law on the other hand must resolve disputes finally and quickly.”<sup>327</sup> In science, information becomes part of an ongoing inquiry of understanding. There is little “proof” in scientific inquiry, only evidence that is based on existing knowledge and /or observation that supports or refutes a theory. This is at odds with a court system that is designed to seek and reach finality in a dispute between parties. In most cases, absent some misapplication of the law, courts will not revisit such specific decisions in the same way the scientific community might revisit or revise a theory. California Institute of Technology Professor of Physics David Goodstein has proposed, “The presentation of scientific evidence in a court of law is kind of a shotgun marriage between the two disciplines....The *Daubert* decision is an attempt...to regulate that encounter.”<sup>328</sup>

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<sup>324</sup> See the discussion and quotations from Dr Margaret Maxey, in David Michaels, Doubt is Their Product, How Industry’s Assault on Science Threatens Your Health, (2008) at 58.

<sup>325</sup> Id.

<sup>326</sup> Chapter 8: Judging Facts in Edmond & Mercer, supra note 49, (2004).

<sup>327</sup> *Daubert*, supra note 34.

<sup>328</sup> David Goodstein, How Science Works, Reference Manual on Scientific Evidence, 2nd Ed. Federal Judicial Center, (2000) at 67-82.

This concept of science as ideas subject to ongoing revision as new evidence becomes available more closely resembles the use of evidence in the regulatory arena than in the courtroom. Agencies examine evidence, including expert testimony, as part of an ongoing inquiry that considers the evidence available, and unlike the terminal decision of fact that occurs in a courtroom, administrative agencies that uncover new evidence may change policies or regulations to incorporate it, assuming the agency follows procedure and supplies an adequate explanation for the change.<sup>329</sup>

Ronald Melnick suggests that the openness principle of administrative law is more in line with traditional scientific inquiry, and suggests that the trier of fact, be it an agency, an ALJ or a jury, should have access to as much information as possible.<sup>330</sup> The limiting processes inherent in *Daubert* or a regulatory equivalent which removes reliable data from consideration, “...results in unreasonable barriers for juries and regulatory agencies to make appropriate decisions.”<sup>331</sup>

In defense of a precautionary principle to regulation, which errs on the side of “safety” by regulatory agencies, Michaels suggests that, “...our regulatory programs will not be effective if absolute proof is required before we act; the best available evidence must be sufficient.”<sup>332</sup>

The application of scientific principles aside, the real concern of most opponents of applying *Daubert* to regulation must be placed in the context of how administrative agencies deal with scientific evidence. Scientists within administrative agencies deal with evidence using a

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<sup>329</sup> It bears mention that regulatory agencies have reacted to *Daubert* and its possible application to data produced in a regulatory environment. The EPA in an advisory pamphlet provided to scientists suggests, “While one may have highly defensible data, the communication of the evidence to the lay person is critical in making a convincing presentation.” <http://www.epa.gov/nerlesd1/gqc/pdf/QS%20in%20Courtroom.pdf> last accessed July 1, 2011.

<sup>330</sup> Ronald L Melnick, *A Daubert Motion; A Legal Strategy to Exclude Essential Scientific Evidence in Toxic Tort Litigation*, 95 Am. J. Public Health 30 (2005).

<sup>331</sup> Id.

<sup>332</sup> Michaels supports risk assessment by agencies like the EPA to protect the public. Michaels, *supra* note at 57 at 68-69.

weight of evidence standard.<sup>333</sup> Under an inquiry conducted using a weight of evidence standard, an agency is compelled to consider all the relevant evidence in a proceeding and develop a reasonable approach that implements policy by weighing the strength of evidence for a policy implementation against other policy options. A weight of evidence approach to the assessment of scientific data allows for a consistent and transparent evaluation which allows for a judicial review of the agency's findings of facts.<sup>334</sup>

*Daubert* allows for challenges to expert testimony. The decision in *Joiner* encourages judges to evaluate each piece of evidence or expert testimony independently. If *Daubert* and *Joiner* were applied to evidence in an administrative proceeding, theoretically the opponents of a proposed regulation could challenge the methodology or conclusions of individual studies or the scientific basis on which the agency launched the rulemaking proceeding. In rulemaking proceedings interested parties can already submit comments on data in an effort to undermine the strength of evidence in the proceeding. However, if a *Daubert* process were applied to rulemaking decisions in place of the existing open comment and evidence system, the weight of evidence in a record could be altered as individual studies are removed from the evidence in the proceeding.<sup>335</sup> Michaels suggests that in an effort to change the balance of evidence in a rulemaking proceeding, regulated industries are already generating their own research in an effort to counter the scientific evidence on which rulemaking decisions and risk assessments are based.<sup>336</sup>

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<sup>333</sup> David Michaels, *Scientific Evidence and Public Policy*, 95 Am. J. Public Health 7 (2005).

<sup>334</sup> Sheldon Krimsky is a Professor of Urban and Environmental Policy and Planning, Tufts University. Sheldon Krimsky, *The Weight of Scientific Evidence in Policy and Law*, 95 Am. J. Public Health 129 (2005).

<sup>335</sup> See Wendy Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act.*, 12 J.L. & Pol'y 589 (2003).

<sup>336</sup> "In virtually every instance in which a federal regulatory agency proposes protecting the public's health by reducing allowable exposure to a toxic product, the regulated industry hires scientists to dispute the science on which the proposal is based." Michaels, *supra* note 57 at 190.

Hoppin and Clapp suggest that industries interested in specific regulatory outcomes have adopted a strategy of promoting inappropriate criteria for the assessment of evidence as a way to delay, oppose or avoid regulation.<sup>337</sup> Forcing evidence to withstand unrealistic standards limits the amount of evidence policy makers can rely on. Krimsky suggests, “A legal process that rejects WOE or restricts its utilization seems to be at odds with current practices in regulatory science, where knowledge...is pursued through a triangulation of evidentiary streams.”<sup>338</sup> Neff and Goldman argue that the “sound science” label has been used by interested parties who are opposed to regulation to describe not only the evidence, but also to describe the approach of basing policy on very stringent evidence. As a result, proponents of the sound science movement seek to raise the standards for the admission of evidence to a level that will undermine regulatory policy. Allowing individual challenges to research or expert testimony in a rulemaking proceeding will encourage parties opposed to regulation to target data until the weight of evidence favors their position.<sup>339</sup>

Claire Kelly suggests that applying *Daubert* to regulatory decision making would foster skepticism of agency expertise, and give opponents of regulation a rhetorical weapon to oppose policymaking.<sup>340</sup> Kelly proposes that the *Chevron* decision, which set the modern standard for judicial deference to agency decision making, was an effort to improve the functioning of administrative agencies by providing a standard for deference that accounts for the agency’s

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<sup>337</sup> Polly J. Hoppin is with the Environmental Health Initiative of the Lowell Center for Sustainable Production at the School of Health and Environment, University of Massachusetts, Lowell, Mass. Richard Clapp is with the Department of Environmental Health, Boston University School of Public Health, Boston, Mass. Polly J Hoppin & Richard Clapp, Science and Regulation: Current Impasse and Future Solutions, 95 Am. J. Public Health 8 (2005).

<sup>338</sup> Krimsky, *supra* note 67.

<sup>339</sup> Roni A. Neff was employed by the Department of Health Policy and Management and Lynn R. Goldman works within the Department of Environmental Health Sciences at the Johns Hopkins Bloomberg School of Public Health, in Baltimore, Maryland. Roni Neff & Lynn R Goldman, Regulatory Parallels to Daubert: Stakeholder Influence, “Sound Science” and the Delayed Adoption of Health Protective Standards. 95 Am J Public Health 81 (2005).

<sup>340</sup> Claire R. Kelly, is a Professor of Law at the Brooklyn Law School. Claire R. Kelly, The Dangers of Daubert Creep in the Regulatory Realm, 14 J.L & Pol’y 165, (2006).

expertise.<sup>341</sup> *Chevron* set the parameters for the role of the judiciary in reviewing agency decisions. If *Daubert* is applied to agency decision making, Kelly believes the balance between administrative decision making and judicial review that was carefully crafted by *Chevron* will again shift the balance between the courts and the administrative agencies. Courts will then be in a position to determine policy overriding an agency's expertise. If such a shift in power occurs, Kelly argues that practical result will be the undermining of the value of administrative agencies and their expertise in designing policy implementation.<sup>342</sup>

The suggestion that efforts are being made to bring *Daubert* into the regulatory realm are supported by the passage of the Information Quality Act, created as part of a two-sentence rider in a 2001 spending bill.<sup>343</sup> The IQA exempts some private science from exclusion in the record, and applies only to federally funded research. Section B of the act requires that federal agencies, "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency."<sup>344</sup> Among the criticisms of the IQA is the ability of interested parties to challenge evidence or research in an administrative record on an individual basis in the same way that *Daubert* challenges occur in the courtroom.<sup>345</sup> The direct effect is again tied to the weight of evidence standard. Wagner proposes that the IQA imposes a screening process for scientific data that resembles *Daubert*, going as far as to point out that petitions filed under the IQA to challenge docket evidence, like *Daubert* motions, request a

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<sup>341</sup> Id.

<sup>342</sup> Id.

<sup>343</sup> Wagner aggressively attacks the evidence review principles within the IQA as a dangerous first step towards the application of *Daubert* into administrative agencies. Wagner, *supra* note 76.

<sup>344</sup> Sometimes referred to as the "Data Quality Act," the IQA is contained in § 515 of the Consolidated Appropriations Act, Pub.L 106-554, (2001).

<sup>345</sup> Wagner, *supra* note 76.

remedy that, “often involves the complete exclusion or withdrawal of the challenged information.”<sup>346</sup>

Much of the concern over the application of *Daubert* in a regulatory setting stems from the suspicion that is the intent of industry to use *Daubert* as a tool to undermine agency evidence gathering in an effort to delay or oppose agency health related regulations.<sup>347</sup> These concerns are a logical outgrowth of the *Daubert* case which itself was a civil suit against Merrell Dow Pharmaceuticals over birth defects allegedly caused by the drug Bendectin. “The predictable consequence of “Daubertizing” judicial review of regulatory agencies will be an overall reduction in the protections that government provides to those who are at risk.”<sup>348</sup> Yet, the differences between administrative and civil procedure, or more specifically, the differences in the rules and procedures for handling evidence can illuminate some of the debate over applying a *Daubert* standard to evidence in an administrative proceeding.

Regulatory or enforcement actions by administrative agencies are not bound by the Federal Rules of Evidence. Expert testimony, scientific, technical, or in cases of agencies that use it, social science data does undergo a *Daubert* like review. Agency rulemaking is a (theoretically) open process in which the public and experts, partisan or otherwise, may participate. Judicial review of agency action had been based on giving some deference to the agency’s expertise in a particular area even prior to the *Chevron* decision.<sup>349</sup> An agency’s

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<sup>346</sup> Id. at 592.

<sup>347</sup> This concern is directed towards the creation and implementation of regulations dealing with exposure to hazardous or toxic materials, control pollution or other emissions. See [www.defendingscience.org](http://www.defendingscience.org), last accessed June 2nd, 2011.

<sup>348</sup> Thomas O. McGarity, *Daubert and the Proper Role for Courts in Health, Safety and the Environment*, 95 Am. J. Public Health 92 (2005).

<sup>349</sup> Prior to *Chevron*, expertise was cited as one reason for reviewing judges to give deference to an agency’s decision making under *Skidmore*, a standard traditionally referred to as “weak deference.” *Skidmore v. Swift & Co.* 323 U.S. 134 (1944).

expertise is the primary reason that agencies are given quasi-legislative responsibilities through delegation to implement policy.

*Daubert* has been described as decidedly pro-defendant, because it has increased the obstacles for plaintiffs to get their experts in front of a jury.<sup>350</sup> Although administrative adjudication is much more trial-like than a rulemaking proceeding, administrative law judges are typically more open to the admission of expert testimony than civil courts. The APA already allows ALJ's, whose expertise allows them to make informed judgments about conflicts in data and expert testimony, to disregard evidence or testimony that is irrelevant or is based on poor methodology without the need for *Daubert* like challenges.<sup>351</sup>

Many administrative agencies are inherently political, since agency heads are political appointees. Agencies therefore are susceptible to the influences and pressures of outside groups including standing policy networks and interest group lobbies. Issue-specific groups, with ready-made responses for policy “windows” will continue to attempt to influence the regulatory agenda. Applying a *Daubert* standard in the administrative realm would likely increase the influence of these organizations on regulation.<sup>352</sup> While the concern over undue influence is valid, the procedures of administrative law provide a check and balance. Not least of all are the requirements of administrative decision making for openness and transparency in order to survive judicial review.

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<sup>350</sup> Edward K Cheng & Albert Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va.L.Rev (2005).

<sup>351</sup> APA § 554

<sup>352</sup> While it could be argued that a *Daubert* standard might limit the ability of these interested parties to get evidence into the record, such an argument misses the larger problem. The interested parties do not have to get more evidence into the record, rather they could use *Daubert* challenges to remove the specific testimony or evidence which supports the policy decision by the agency. In doing so, the interested parties get what they ultimately want, a delay in the implementation of new regulations. In terms of the FCC and media ownership, challenges that removed even small amounts of expert evidence from the record, a record with a shortage of evidence already, would likely paralyze the agency's ability to implement policy, or as required by §202(h) support existing policy.

Attorneys and trial judges complain about the tendency of experts to become advocates for the side that hires them.<sup>353</sup> A similar problem is likely to manifest itself in the administrative arena, as industries and other groups opposed to regulation put forth their own experts or evidence, and as Michaels and others point out, this is already occurring.<sup>354</sup> Ironically, *Daubert* itself provides a solution to these concerns. On remand of *Daubert*, Judge Alex Kozinski of the Ninth Circuit added to the consideration of expert testimony whether the research the expert was relying on was conducted in order to testify in the trial. Kozinski suggests that unless scientific inquiry is conducted independent of litigation, evidence presented should be considered suspect.<sup>355</sup> Although such a standard might be harder to apply to evidence generated as part of a rulemaking proceeding, where evidence may have been generated in response to the inquiry proposed by the agency, the Kozinski standard could provide both trial judges and ALJ's with a common guideline to consider when reviewing expert testimony.

Justice Steven Breyer, prior to his appointment to the Supreme Court, suggested that, "Familiarity with individual cases helps agencies determine proper policy and the ability to make policy in individual adjudicatory proceedings gives the agencies flexibility. ....To remove [an] agency's power...and place it in a court may simply prevent agencies from implementing coordinating policies, without curing the problem that makes the decision making in these cases so difficult."<sup>356</sup>

Judicial review of agency decision making is a check and balance that uses a reasonableness test to assure agency action is not arbitrary or irrational. Findings of fact by an

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<sup>353</sup> Krafka et al, supra note 41.

<sup>354</sup> Michaels, supra note 14.

<sup>355</sup> "That the testimony proffered by an expert is based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions he expresses were 'derived by the scientific method.'" *Daubert II*, 43 F 3d at 1317.

<sup>356</sup> Steven Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation and Regulation and Its Reform. (1993).

agency are conclusive and binding on a reviewing court when supported by substantial evidence.<sup>357</sup> As Justice Scalia has suggested, administrative agencies, through their expertise, handle regulatory issues, including the use of evidence in a rulemaking proceeding, better than courts of general jurisdiction.<sup>358</sup>

## Evidence and the FCC

When applying the current discussion to the FCC's use of evidence in the media ownership proceedings since 1996, four elements need to be considered. First, the Commission's actions during the rulemaking process in the 2002 media ownership review must be considered suspect on multiple levels.<sup>359</sup> The FCC failed to follow basic APA procedural requirements when the Commission first failed to produce a full record, as required under the *Weyerhaesuer* precedent<sup>360</sup> and again when agency withheld the rules from public comment until the final order was released.<sup>361</sup> Other than a single public hearing, the testimony and evidence collected by the agency prior to the release of the new rules in June of 2003 was done so largely out of the public's eye.<sup>362</sup>

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<sup>357</sup> *Scenic Hudson Preservation Conference v FPC* (II) 453 F.2d 463 2d. Cir (1971).

<sup>358</sup> "The cases accept that administrative interpretations, often refer to the "expertise" of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result." Anton Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 Duke L.J. 511 (1989).

<sup>359</sup> Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 02-277, 18 F.C.C.R (2003) {Hereafter: 2002 Biennial Review Order}

<sup>360</sup> See: *Prometheus Radio Project v FCC*, 373 F.3d 372 (3d Cir. 2004), and *Prometheus Radio Project v FCC*, 3rd Cir, July 7, 2011 and *Weyerhaesuer v Castle*, supra note 13.

<sup>361</sup> "As the Diversity Index's numerous flaws make apparent, the Commission's decision to withhold it from public scrutiny was not without prejudice. As the Commission reconsiders its Cross-Media Limits on remand, it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule." *Prometheus 2004*, supra note 93 at 409.

<sup>362</sup> A variety of citizen and interest groups began to organize opposition to the review process, and in April and May of 2003, public comments opposed to additional media ownership consolidation began to flood into the Commission. There is very little in the record, before the decision, in the order itself, or even in the ongoing record, to suggest the Commission considered the public comments in anyway. This sequence of events is explored in

Second, under *State Farm*, if an agency modifies rules, the agency is required to provide a reasonable basis for the decision to do so. An examination of the 2003 decision demonstrates an analysis, but hardly one that could be deemed reasonable, a point made strongly by the Third Circuit Court of Appeals, arguing that to accept the agency's decision would require the majority to "abandon both logic and reality."<sup>363</sup> The FCC's proposal to use the Diversity Index in place of existing media ownership limits was not supported by the record, nor was it logical. The majority in the 2004 *Prometheus Radio Project v. FCC* decision makes this point several times, but perhaps the best example is in the discussion of how the FCC's new index weighted media properties in New York City.

... in New York City, the Dutchess Community College television station and the stations owned by ABC each receive an equal 4.3% market share. Or compare the Dutchess Community College station's weighted share of 1.5% (4.3% times the 33.8% multiplier for television) to a mere 1.4% weighted, combined share assigned to the New York Times Company's co-owned daily newspaper and radio station... A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality.<sup>364</sup>

Third, reviewing courts have historically given the FCC more deference in ownership and content decisions when those decisions reflect a rational implementation of policy designed to enhance a diversity of viewpoints.<sup>365</sup> Since the 1940's, the Supreme Court has largely supported the FCC's jurisdiction over broadcast content on the principle that such policies can expand the diversity of content.<sup>366</sup> In *Prometheus*, however the dynamic had changed as the majority set

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Chapter 4. "Interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and consumer data to respond to the issues identified in the Commission's Notice. Notably, nearly two million people weighed in by letters, postcards, e-mails, and petitions to oppose further relaxation of the rules." *Prometheus* 2004, supra note 93 at 387.

<sup>363</sup> *Prometheus* 2004 at 406.

<sup>364</sup> *Id.*

<sup>365</sup> See Generally: *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775 (1978).

<sup>366</sup> *NBC v. United States*, 310 US 190 (1943) and *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

deference aside, and applied the “hard look” doctrine to the FCC’s use of evidence in the 2002 Biennial Review. The majority stated that the Commission’s suggestion that the internet was a “universe of information” did not remove the burden on the agency to explain the reasoning employed in determining that internet sites were substitutable for traditional media.

also provide To accept its “universe of information” characterization of the Internet’s viewpoint diversity, we would have to disregard the Commission’s professed intent to focus its consideration of viewpoint diversity on media outlets...But more importantly, media outlets have an entirely different character from individual or organizations’ websites and thus contribute to viewpoint diversity in an entirely different way. They provide an aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, etc.).<sup>367</sup>

Finally, why did the majority of the 3rd Circuit Court of Appeals not give the FCC heavy deference on policy implementation as Justice Scirica suggested was the correct approach in his dissenting opinion?<sup>368</sup> To answer this question, consider the statutory requirement of §202(h) of the 1996 Telecommunication Act, which requires the FCC “to determine whether any of such rules are necessary in the public interest as the result of competition”<sup>369</sup> and to “repeal or modify any regulation it determines to be no longer in the public interest.”<sup>370</sup>

These requirements for policy review framed the argument in favor of competition as a policy choice,<sup>371</sup> but they also statutorily require an agency to support existing regulations with a rulemaking record on an ongoing basis. This requirement, coupled with the FCC’s ongoing problems generating evidence, has severely undermined the agency’s role as the expert in the process.<sup>372</sup> If *Daubert* type standards for evidence review come into play with administrative agencies such as the FCC, and if what little evidence the agency is able to generate can be

<sup>367</sup> Prometheus 2004, supra note 93 at 455.

<sup>368</sup> Id. at 429.

<sup>369</sup> § 202(h) of the 1996 Telecommunications Act.

<sup>370</sup> Id.

<sup>371</sup> Sinclair v. FCC, 284 F.3d 148 (D.C. Cir. 2002). and Fox Television v FCC 280 F.3d. 1027, 1039, (D.C. Circuit 2002) modified on reh’g, 293 F.3d 537 (D.C. Cir. 2002).

<sup>372</sup> Angela J. Campbell, *Empirical Data and the DQA in the FCC’s Ownership Proceedings*, presentation, Georgetown University Law Center, [www.fordham.edu/images/undergraduate/communications/campbell.pdf](http://www.fordham.edu/images/undergraduate/communications/campbell.pdf), last accessed July 1, 2011

overwhelmed by junk evidence and challenged by interested parties, the situation will favor industry over the public in an industry which plays a critical informational role in our society.<sup>373</sup>

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<sup>373</sup> Importantly, this process has already started. In January 2005, the Office of Management and Budget (OMB) adopted peer review requirements for certain types of information. The rules became active in June, 2005 after their publishing in the Federal Register, and peer reviews were assigned to comments submitted to the FCC by outside parties beginning with the Commission's 2006 Quadrennial Media Ownership Review proceedings. To come into compliance with the new rules, Commission identified certain studies as "influential scientific information" as that term is defined by the OMB Guidelines and arranged for peer reviews of these studies to be conducted by "outside experts." See Office of Management and Budget Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (2005) and [http://transition.fcc.gov/mb/peer\\_review/reviews.html](http://transition.fcc.gov/mb/peer_review/reviews.html), last accessed July 1, 2011.

## Chapter 3:

# The 1996 Telecommunications Act, § 202(h) and Media Ownership Rulemaking: 1996- 2010

### **Chapter 3: The 1996 Telecommunications Act, § 202(h) and Media Ownership Rulemaking: 1996-2010**

On February 8, 1996, President Bill Clinton signed into the law the 1996 Telecommunications Act.<sup>374</sup> While the omnibus bill was largely designed to update the 1934 Communications Act,<sup>375</sup> provisions within the Telecommunications Act implemented significant changes in the legal, policy and social dynamics of media ownership.

In terms of legal changes, the Telecommunications Act implemented specific limits on media ownership mandated by Congress rather than limits created through rulemaking by the FCC.<sup>376</sup> Prior to 1996, the FCC had determined the limits on media ownership and made decisions on media cross-ownership prohibitions through rulemaking proceedings. While the FCC had been slowly raising the limits on media ownership, the changes brought about through rulemaking proceedings had been much smaller in scale. And the scale of the changes made by the Telecommunications Act to the top end limits on media ownership, including the move to allow the creation of large numbers of commonly owned and operated radio stations at the market level, literally changed the radio business from a local to a national one.<sup>377</sup>

Collectively, these changes represented the true beginnings of a new regulatory philosophy based on the idea of promoting and implementing media ownership regulation through a model based on economic competition. The move towards a competition based

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<sup>374</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>375</sup> 1934 Communications Act, 47 U.S.C § 151.

<sup>376</sup> Telecommunications Act, § 202 (b)

<sup>377</sup> Prior to the passage of the Telecommunication Act, a single owner was limited to 1 AM and 1 FM radio station per market, with a national limit of 20 AM and 20 FM stations. The limits specified by the Telecommunication Act did away with the national limit, and implemented a local ownership limit that was based on the size of a market. In the largest markets, the current rules allow ownership of up to eight radio stations in a single market.

regulatory model completed a process which began during Mark Fowler's deregulatory tenure as FCC chairman during the 1980's.

As the FCC embraced the idea of using competition as the centerpiece of the regulatory implementation for media ownership policy, abstract and undefined policy objectives, such as the requirement for licensees to operate in the public interest, became secondary to the economic interests of media organizations. No longer would abstract concepts complicate agency decision making, because measures of economic competition and the benefits of consolidation would be used as a proxy for determining the public interest. The idea that the "free market" could provide a solution to all problems became and remains the equivalent to a regulatory religion among some of the commissioners.<sup>378</sup> Among the zealous converts to this new religion was commissioner and later FCC chairman, Michael Powell, who, in the opinion which permitted the common ownership of more than 1,300 commercial radio stations during the merger of AM/FM and Clear Channel, stated:

"...I write...to reiterate my continuing concern about the manner in which my colleagues apply our public interest authority in cases such as this. The approach is unnecessarily complex, redundant and ill suited to meet the needs of the fast paced, innovation driven communications marketplace."<sup>379</sup>

While the changes to the regulatory philosophy created by the 1996 Telecommunications Act were significant, and the impact of those changes on how the Commission has handled

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<sup>378</sup> Chairman Mark Fowler was among the first converts to the free market religion at the FCC. "The marketplace approach emphasizes broadcaster discretion as a way to maximize listener welfare." See: Mark S. Fowler & David L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1984). For a modern interpretation of Fowler's ideas, see FCC 10-92, Statement of FCC Commissioner Robert McDowell, 2010 Notice of Inquiry, In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2010 Notice of Inquiry, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-92A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf), last accessed July 1, 2011.

<sup>379</sup> FCC 00-296, Statement of Commissioner Michael Powell in the AM/FM-Clear Channel Merger Approval Order, In the Matter of the Applications of Shareholders of AMFM, Inc.(Transferor) and Clear Channel Communications, Inc.(Transferee) For Consent to the Transfer of Control of AMFM Texas Licenses Limited Partnership, AMFM Radio Licenses, LLC, Capstar Texas Limited Partnership, WAXQ License Corp., WLTW License Corp., Cleveland Radio Licenses, LLC, and KLOL License Limited Partnership. Licensees of WTKE(FM), Andalusia, AL, et. al. 15 FCCR 16062 (2000).

media ownership policy should not be understated, more significant were the fundamental changes to the traditional policy making process including the Commission's use of evidence.

One of the most fundamental changes brought about by the Telecommunication Act in terms of media ownership policy was that Congress substituted its own judgment for the regulatory expertise of the FCC. The delegation by the Telecommunications Act included new, mandated guidelines for media ownership limits created by Congress.<sup>380</sup> No longer would the FCC, in its role as the expert agency, interpret a delegation, assess policy alternatives through the rulemaking process, and then implement policy. Limits on media ownership were now a set of guidelines based on the number of media outlets in a market, and this change in how media licenses could be allocated, largely reduced the FCC to the status of a regulatory errand boy whose primary duty was to approve mergers and transfer station operation licenses.

Another change ordered by Congress was a directive to the FCC to extend a broadcast license term from three to eight years.<sup>381</sup> This mandate was indicative of the Telecommunications Act's significant pro-business changes which were created not by the FCC, but by Congress.<sup>382</sup> A second provision in the legislation also changed the rules for competitive hearings for existing licenses, preventing a competitive application from even being filed during a license renewal process unless the commission has first determined that the station had not served the public interest or was guilty of a major infraction of existing rules.<sup>383</sup>

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<sup>380</sup> § 202, 1996 Telecommunications Act.

<sup>381</sup> § 203, 1996 Telecommunications Act.

<sup>382</sup> Lili Levi, *Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 Conn. L. Rev. 243 (1996).

<sup>383</sup> When these two provisions are combined—a longer license term and new limitations on the Commission's ability to review, and if necessary, revoke station licenses, the provision can only be seen as favoring the organizations which already hold licenses. In some cases, like Clear Channel, which agreed to settle outstanding complaints with the agency through consent decree. The company had to agree to provide annual training to its employees on the broadcast of indecent content and on issues of "Payola" and "Plugola." § 203, Telecommunications Act, 204, see also: <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=608>, last accessed July 1, 2011.

For radio, competition-based regulation and the consolidation of station ownership went hand in hand. Section 202(b)(1) of the 1996 Act provided the following ownership limitations.<sup>384</sup> In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

Likewise, the limits on broadcast television station ownership were also increased to allow for additional consolidation. The new rules included no cap on the total number of stations that a single company could own and operate, and extended the existing national cap on total audience an owner could reach from 25 percent to 35 percent.<sup>385</sup>

When Congress imposed these mandates, the process of rulemaking for media ownership was also changed. When beginning to implement the new limits, the FCC solicited no comments, and collected no evidence on the state of the media before the changes.<sup>386</sup> In place of launching a

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<sup>384</sup> § 202 (b) of the 1996 Telecommunications Act.

<sup>385</sup> § 202 (c) of the 1996 Telecommunications Act.

<sup>386</sup> “We are revising these rules without providing prior public notice and an opportunity for comment because the rules being modified are mandated by the applicable provisions of the Telecom Act. We find that notice and comment procedures are unnecessary, and that this action therefore falls within the “good cause” exception of the Administrative Procedure Act (“APA”). The rule changes adopted in this Order do not involve discretionary action on the part of the Commission. Rather, they simply implement provisions of the Telecom Act that direct the Commission to revise its rules according to specific terms set forth in the legislation.” In the matter of

rulemaking proceeding to interpret the delegation and to establish standards, the FCC chose to rely on the numerical limits specified by the statutory mandate and issued an order which incorporated the new ownership structures as written into the legislation.<sup>387</sup> Freed from the longstanding restrictions on joint ownership of broadcast stations, a massive wave of station transfers and ownership consolidation followed, resulting in significant changes to the media landscape.

While Congress's move to interject itself into the rulemaking process for media ownership represented a significant change from the traditional public-trustee based decision making previously employed in the regulation of broadcasters,<sup>388</sup> a more substantial change to the administrative process was brought about by the Telecommunications Act's requirement that the FCC to conduct a review of the agency's media ownership rules every two years.<sup>389</sup> Another provision, Section 202(h) of the Telecommunications Act specified that:

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.<sup>390</sup>

As a result, an FCC review of the media ownership rules was required every two years and this review included an evidence standard which required even existing rules to survive a review process roughly equivalent to rulemaking proceeding in order to be maintained. As the post-Telecommunications Act consolidation of media ownership began with policy

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Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 11 FCCR 12638 at 12371 (1996).

<sup>387</sup> Id.

<sup>388</sup> Under the public "trustee" model of broadcast regulations, licensee's were seen a "trustees" of the public interest. In return for the license, the licensee had certain obligations to fulfill, including to the dissemination of news and public affairs information. After deregulation, the public trustee concept was replaced by a more market-friendly regulatory approach.

<sup>389</sup> § 202(h) of the 1996 Telecommunication Act.

<sup>390</sup> Id.

implementation for which no evidence was collected,<sup>391</sup> and with the ongoing requirements of Section 202(h), it is not surprising that evidence has become a significant problem for the FCC. As the first major wave of ownership consolidation began, the FCC essentially rubber stamped applications for the first license transfers, justifying the decision to approve mergers first on the possible benefits that would be generated by the economy of scale. As the number of stations transferred under each group purchase began to increase, the primary test employed by the FCC required an assessment of how much of a market's advertising dollars, by percentage, the merger would bring under one group's control.<sup>392</sup>

## **The FCC's 1998 Biennial Review**

The agency launched the first of the mandated biennial reviews of its media ownership rules on March 12, 1998.<sup>393</sup> The review would examine seven ownership policies using the guidelines set by Section 202(h). Of the seven, the FCC examined four rules that not were not

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<sup>391</sup> In the matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 11 FCCR 12638 (1996) at 12371. {Hereafter: 1996 Order}.

<sup>392</sup> The development of this process and the FCC's change in rationale for approving mergers from the benefits of economy of scale, to advertising competition to numerical limits on ownership is explored in greater detail in the next chapter.

<sup>393</sup> The FCC had already begun the process of reviewing two ownership rules. The first, the Television Duopoly Rule prevented a party from owning, operating or controlling two or more broadcast television stations with overlapping "Grade B" signal contours, essentially preventing the ownership of more than one television station in a market. Additionally, the FCC launched a review of the "One-to-a-Market" Rule which had prohibited the common ownership of a television and a radio station in the same market. FCC 98-37 In the Matter of 1998 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 13 FCCR 11276 (1998). {Hereafter 1998 Review Inquiry}.

modified by the 1996 Telecommunications Act including the UHF Television Discount,<sup>394</sup> the Newspaper-Broadcast Cross-Ownership Rule,<sup>395</sup> Cable-Television Cross-Ownership Rule<sup>396</sup> and the Experimental Broadcast Station Multiple Ownership Rules.<sup>397</sup> Additionally the review examined three rules that the FCC had modified to meet the directives of the Telecommunication Act, namely the National Television Ownership Rule,<sup>398</sup> Local Radio Ownership Rules<sup>399</sup> and the Dual Network Rule.<sup>400</sup>

However, the most important decision made by the FCC as it launched the 1998 Biennial Review was to continue its standing approach to enforcement of the media ownership rules in the post-Telecommunication Act-era. While the rules were being reviewed, but before any changes were approved, the agency would continue to grant conditional waivers of the rules under review

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<sup>394</sup> The UHF Television Discount rule attributes 50% of television households in a local television market to the audience reach of a UHF television station for purposes of calculating whether a television station owner complies with the 35% national audience reach cap. 47 C.F.R. 73.3555(e)(2)(i).

<sup>395</sup> The Newspaper-Broadcast Cross-Ownership Rule prohibits common ownership of a broadcast station and daily newspaper in the same market. The rule was passed by the FCC in 1975. In the Matter of Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C 2d 1046 (1975).

<sup>396</sup> The Cable-Television Cross-Ownership Rule effectively prohibited the common ownership of a broadcast television station and cable system in the same market. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, Second Report and Order, in Docket No.14 18397, 23 F.C.C. 2d 816, 820 (1970).

<sup>397</sup> The Experimental Broadcast Station Multiple Ownership Rule limited the number of experimental broadcast stations that can be licensed to or controlled by a person. 47 C.F.R. § 74.101.

<sup>398</sup> The National Television Ownership Rule was revised by the 1996 Act to eliminate a numerical limit on the number of television stations a party could own nationally and increase the national audience reach cap of television station ownership from 25% to 35% of television households nationally. §202(c)(1) 1996 Telecommunications Act, 47 C.F.R 73.3555(e).

<sup>399</sup> The Local Radio Ownership Rules were revised in the 1996 Act to allow an organization ownership of up to 8 commercial radio stations in a market depending on the number of commercial radio stations in the market. These rules allow for combinations of up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM), in markets with 45 or more commercial radio stations; combinations of up to 7 commercial radio stations, not more than 4 of which are in the same service, in markets with between 30 and 44 commercial radio stations; combinations of up to 6 commercial radio stations, not more than 4 of which are in the same service, in markets with between 15 and 29 commercial radio stations; combinations of up to 5 commercial radio stations, not more than 3 of which are in the same service, if no party controls more than 50 per cent of the stations in the radio market, in radio markets with 14 or fewer commercial radio stations. 1996 Order, supra note 18.

<sup>400</sup> The Dual Network Rule permitted an entity to maintain two or more broadcast networks unless such dual or multiple networks are composed of (1) two or more of the four major networks (ABC, CBS, Fox, NBC), or (2) any of the four major networks and one of the two emerging networks (WBTV, UPN). 47 C.F.R. § 73.658(g).

to owners who sought them.<sup>401</sup> In other words, by continuing to grant waivers, the FCC was openly encouraging further ownership consolidation. As a result, for a two-year period while the 1998 review proceeding was occurring, the FCC was granting waivers, and therefore granting de-facto approval to ownership transfers and station mergers that exceeded the very limits the Commission was reviewing.

In August of 1999, the FCC concluded the first biennial review, implementing only a few changes.<sup>402</sup> Facing another review mandate almost immediately, the commission instead launched an agency-wide review of its regulations.<sup>403</sup> The Commission released a bureau by bureau report on recent actions and a staff report which analyzed existing rules. Rather than engage in an independent assessment of the media ownership regulations like the one it completed earlier in the year as part of the 1998 Biennial review, the FCC chose to use the 2000 proceeding to build a framework in order to “...form the basis for further action.”<sup>404</sup>

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<sup>401</sup> For example see Queen B’s request for waiver in DA 97-1067 at 14. “Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996... In such cases, the Commission declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding, (Second Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221 and 87-8, slip op. at 35). Similarly, we conclude that a permanent, unconditional waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding.” 12 FCCR 6614 (1997).

<sup>402</sup> The FCC made changes to just two rules and, “narrowed the geographic scope of the television duopoly rule from the Grade B contour approach to a “DMA” test. This new approach allows the common ownership of two television stations without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas (“DMAs”). Additionally, it allows the common ownership of two television stations in the same DMA if their Grade B contours do not overlap or if eight independently owned, full-power and operational television stations will remain post merger, and one of the stations is not among the top four ranked stations in the market based on audience share We also substantially relaxed the radio/television cross-ownership (“one-to-a-market”) rule to permit more such combinations, including allowing a party to own as many as one TV station and seven radio stations under certain circumstances. These actions were taken in fulfillment of our obligations under Section 202(h) of the Telecom Act and satisfy its requirements as to the subject rules.” FCC 00-191, In the Matter of 1998 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 15 FCCR 11058 (2000). {Hereafter 1998 Review Report}.

<sup>403</sup> While the review was of existing regulations agency wide, media ownership rules were reviewed by the Media Bureau Staff during the 2000 proceeding. 15 FCCR 21804 (2000).

<sup>404</sup> Id. at 21807.

## The FCC's 2000 Biennial Review

With the experience of the 1998 review fresh in its mind, and facing another review, the Commission hoped to build a working framework for future reviews under Section 202(h) most notably for the review scheduled to begin in 2002:

We will continue to take a proactive approach to reviewing, modifying, and repealing our rules, and believe that the 2002 regulatory review will benefit from and build upon prior biennial reviews. As competition increases, technology evolves, and laws change, it will be critical for us to modify and eliminate our rules, and improve our processes, to reflect these changes. Accordingly, we direct staff to continue its ongoing efforts to review Commission rules and suggest appropriate modifications and improvements.<sup>405</sup>

While the sections covering the Mass Media Bureau in the Commission's report discussed the ongoing proceedings and the actions taken in the 1998 proceeding, it was the FCC staff report where the majority of the work was done during the review process in 2000. The FCC engaged in a top to bottom review of existing agency regulations, and the Commission staff applied a five-part test to each rule in its analysis to determine whether to recommend either modification or elimination of a rule.

Staff's review considered (1) the purpose of the rule; (2) the advantages of the rule; (3) the disadvantages of the rule; (4) what impact competitive developments have had on the rule; and (5) whether to recommend modification or revocation of the rule. This analysis allowed the staff to make reasoned determinations about whether a rule should be changed or eliminated either because of competitive developments, or for other reasons.<sup>406</sup>

The staff report was designed to provide recommendations, but, importantly, it did not have the power of a rulemaking proceeding. In terms of media ownership, the staff report applied this five part test to eight separate rules: the local radio ownership rule, the local television

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<sup>405</sup> Id. at Paragraph 84

<sup>406</sup> Part two of the analysis includes consideration of how adroitly, precisely, and cost-effectively the rule addresses the problem at issue. Id. Part three includes consideration of whether the rule is over- or under-inclusive in its scope, and whether compliance imposes unnecessary costs. Id. 2000 Staff Report at paragraph 3, 15 FCCR 21089 (2000).

ownership rule, the radio television cross-ownership rule, the daily newspaper-broadcast cross-ownership rule, the national television multiple ownership rule, the dual network rule, the experimental broadcast station multiple ownership rule, and the cable television broadcast station cross-ownership rule.

The staff report reported on the FCC's plans to launch a rulemaking proceeding on the local radio ownership rule designed to more clearly define radio markets, and to stabilize the counting methodology used to determine ownership of radio stations.<sup>407</sup> The Mass Media Bureau stated that it would take no action on the local television ownership rule and the radio television cross-ownership rule, preferring to wait and examine the effects generated by the recent changes to the rules.<sup>408</sup>

In terms of the newspaper-broadcast cross-ownership prohibition, the staff report identified the Commission's recent determination that the rule was in the public interest and furthered an important goal in viewpoint diversity, but also identified an on-going rulemaking inquiry, launched in 1996, about the continued need for the rule.<sup>409</sup> Similar rulemaking inquiries were announced for the dual network and cable television cross ownership rules.<sup>410</sup>

As a result of the agency-wide review, the FCC proposed retaining, but modifying three of the media ownership rules, while eliminating a fourth.<sup>411</sup> Rulemaking inquiries were launched to deal with the dual network rule, the definition of local radio markets; and the newspaper/broadcast cross-ownership rule. The Commission also proposed to eliminate its restriction on multiple ownership of experimental broadcast stations.<sup>412</sup> Ultimately each of these

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<sup>407</sup> Id.

<sup>408</sup> Id. at paragraphs 18-19.

<sup>409</sup> Id. at paragraphs 20-22.

<sup>410</sup> Id.

<sup>411</sup> Id.

<sup>412</sup> Id.

individual proceedings would become elements of the 2002 Biennial Review launched to meet the agency's requirement under §202(h).

## **The FCC's 2002 Biennial Review**

The review of the existing media ownership rules in 2002 was a significant, perhaps even the most significant, regulatory move on media ownership since the changes brought about by the 1996 Telecommunications Act itself.<sup>413</sup> From the very beginning of the proceeding, it was obvious that the Commission was considering a complete overhaul of the previous thinking about the policy:

The regulatory structure best suited to promote the public interest is not static. Thus, the Commission's media ownership rules must be reassessed on an ongoing basis to ensure that they are grounded in the current realities of the media marketplace. It is only through this reevaluation that the Commission can be assured that its media ownership rules actually advance, rather than undermine, our policy goals. In this regard, we recognize that the marketplace has changed dramatically over the last few decades, with both greater competition and diversity, and increasing consolidation.<sup>414</sup>

Focusing the initial review of the existing media ownership rules, specifically the national television multiple ownership rule; the local television multiple ownership rule; and the radio-television cross-ownership rule, the Commission had two objectives which dominated the

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<sup>413</sup> It is arguable that some of the mergers, such as the AM/FM-Clear Channel merger were more significant as they demonstrated to the public what the media ownership rules could facilitate in terms of consolidation, and the corresponding effects on localism or public service. Clear Channel became the proverbial poster child for the negative aspects of ownership consolidation, including the January 2002 emergency situation caused by a chemical spill in Minot, North Dakota. Due to a fluke in radio market definition, Clear Channel actually controlled all but one of the local radio stations and the company had automated those stations, leaving only one person on duty in the facility. When the alert went out from public safety personnel, the local officials were unable to reach anyone at the station cluster to warn the local citizens about the danger. The company, in an effort to deflect criticism over the incident, eventually blamed local officials for a failure to operate the emergency alert equipment properly. During the later stages of the FCC's media ownership proceeding in 2002, Minot became a rallying point for a diverse coalition of groups opposed to additional consolidation. See Generally: *On Minot, N.D., Radio, a Single Corporate Voice*, Jennifer B. Lee, *New York Times*, March 29, 2003.

<sup>414</sup> 2002 NPRM, FCC 02-249, at Paragraph 4 Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 17 F.C.C.R. 18503 (2002). {Hereafter 2002 Biennial Review NPRM}

early phase of the proceeding. First was the section 202(h) mandate to engage in the review, a section of which incorporated the ongoing rulemaking proceedings launched after the 2000 review.<sup>415</sup> A second mandate was to answer a remand handed to the agency in *Fox Television v. FCC* by the US Court of Appeals in a challenge to the national television ownership rule.<sup>416</sup>

The *Fox Television* remand was significant in two ways. First, the D.C. Circuit stated that the FCC had provided neither evidence nor rational reasoning for the agency's decision to retain the existing limit of a 35% cap of national audience, a decision the FCC had made during both the 1998 and 2000 review proceedings.<sup>417</sup> The appeals court chastised the FCC for failing to provide factual evidence, and ruled that, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."<sup>418</sup> Significantly however, the panel did not rule on the meaning of section 202(h) of the Telecommunications Act "when it instructs the Commission first to determine whether a rule is 'necessary in the public interest' but then to 'repeal or modify' the rule if it is simply 'no longer in the public interest.'"<sup>419</sup>

The requirement for factual evidence led the FCC to request that commenters "buttress" their comments with empirical evidence.<sup>420</sup> The agency also made a decision to fund a series of studies on media ownership as part of its Media Ownership Working Group or (MOWG).<sup>421</sup> In conducting the review, each of the four rules under review would be put to the test with an eye on promoting the Commission's policy goals of competition, localism and diversity. Notably, the Notice of Proposed Rulemaking (NPRM) states that the interest in this proceeding would be the

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<sup>415</sup> Id.

<sup>416</sup> *Fox Television v FCC*, 280 F.3d. 1027, (2002) modified on reh'g, 293 F.3d 537 (2002).

<sup>417</sup> *Fox Television v FCC*, 280 at 1043.

<sup>418</sup> Id. at 1054.

<sup>419</sup> Id.

<sup>420</sup> 2002 NPRM, supra note 41.

<sup>421</sup> Id.

furthering of “one or more of the three public interest goals.”<sup>422</sup> This marked a change because in the past, the Commission had stated that the policy was designed to promote all three goals simultaneously.

Also of note was the Commission’s adoption of the standards from the *Sinclair v. FCC* decision,<sup>423</sup> in which the DC Circuit Court of Appeals, “...noted that ownership limits encourage diversity in the ownership of broadcast stations, which can in turn encourage a diversity of viewpoints in the material presented over the airwaves. The court added that diversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational basis review.”<sup>424</sup> Yet in the very next sentence of the NPRM, the FCC stretched the finding in *Sinclair* by including its own rationale which stated “the interests that government may promote through content neutral rules also include competition – both the promotion of competition and the prevention of anti-competitive practices and results.”<sup>425</sup>

A section of the 2002 NPRM was used to discuss four possible assessments of diversity: viewpoint, source, program and outlet diversity.<sup>426</sup> Viewpoint Diversity is a content-based measurement and policy.<sup>427</sup> While both Source and Program Diversity may examine programming content indirectly,<sup>428</sup> Viewpoint Diversity requires a direct analysis of the content itself. More importantly, viewpoint diversity, “... has been the touchstone of the Commission’s

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<sup>422</sup> Id. at Paragraph 29.

<sup>423</sup> *Sinclair* challenged the FCC’s “local ownership rule on three principal grounds: it contends that (1) limiting common ownership of television stations in a local market to those with eight independent voices is arbitrary and capricious, (2) failing to fully grandfather existing local marketing agreements violates § 202(g) of the 1996 Act, is impermissibly retroactive, and constitutes an unlawful taking of property in violation of the Fifth Amendment; and (3) the restrictions violate the First Amendment.” The majority decision found the FCC’s local ownership rule and the eight voices exception to be arbitrary and capricious, and remanded the rule to the Commission. See: *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

<sup>424</sup> 2002 NPRM, supra note 41 Paragraph 30, citing *Sinclair*, supra note 50.

<sup>425</sup> 2002 NPRM, supra note 41 at paragraph 30, not citing *Sinclair*, but stating its own “reasoning.”

<sup>426</sup> Id. at 18518-18522.

<sup>427</sup> Id. at 18518.

<sup>428</sup> Id.

ownership rules and policies. We remain fully committed to preserving citizens' access to a diversity of viewpoints through the media."<sup>429</sup> Yet, when dealing with viewpoint diversity as a measurement, the Commission again reiterated its ongoing concerns that any regulations that encouraged judgments about content would be inherently subjective, and thus problematic under the First Amendment.<sup>430</sup>

As far as proxies for viewpoint diversity, the NPRM discussed using Source Diversity, which counts the number of producers of content used by a broadcaster.<sup>431</sup> The Commission argued that diversity could be promoted through a "melting pot" of production and programming options that are made available through a series of independent content providers.<sup>432</sup> Additionally, the FCC suggested that Program Diversity, a measurement of programming formats, might be used as a second proxy.<sup>433</sup> To do so, would require the agency to make some assumptions about content of the broadcasts based on the "type" of programming. Measurement of program diversity by the FCC was accomplished on a program-by-program basis by assigning programs to various categories.

Viewpoint diversity, and to a lesser degree, program diversity, place the Commission into a position that requires some subjective judgments about content, something the agency is very reluctant to even attempt, and as such, the Commission has adopted a content neutral proxy-Outlet Diversity for the agency's entire diversity policy.<sup>434</sup> "Outlet Diversity" is enforced through limits on the number of broadcast and other media properties a single company may own. The logic of the FCC's Outlet Diversity policy is simple: diverse ownership will result in

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<sup>429</sup> Id.

<sup>430</sup> Id. at 18537.

<sup>431</sup> Id. at 18519

<sup>432</sup> Id. at 18520.

<sup>433</sup> Id.

<sup>434</sup> Id. at 18519

diversity in programming content.<sup>435</sup> The Commission believes that the competition, both internal (from commonly owned stations) and external (from competitors) will result in an increase in overall content diversity.<sup>436</sup>

The most interesting aspect of the NPRM issued in 2002, however, was the Commission's admission that it was now questioning whether viewpoint diversity, a longstanding policy objective, should retain a central position in policy. More specifically, the Commission sought comment on whether or not viewpoint diversity should be a primary goal, and whether or not the source or program diversity proxies could be used in place of viewpoint diversity:

Viewpoint diversity has been a central policy objective of the Commission's ownership rules. We seek comment on whether viewpoint diversity should continue to be a primary goal of the Commission's decision-making. The Commission has not viewed source and outlet diversity as policy goals in and of themselves, but as proxies for viewpoint diversity. Should the Commission continue to use source and outlet diversity as proxies to protect and advance viewpoint diversity?<sup>437</sup>

The stated goal of the Commission was to redefine the diversity goals of the media ownership policy.<sup>438</sup> Relying on a raw count of media outlets, including newspapers, broadcasters, cable and the internet, the Commission was interested in redefining its diversity goal in an environment that could, "...advance diversity without regulatory requirements."<sup>439</sup> To

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<sup>435</sup> "The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions... [D]iversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational-basis review." Id.

<sup>436</sup> Id.

<sup>437</sup> Id. at Paragraph 41.

<sup>438</sup> Id.

<sup>439</sup> Id. at paragraph 42

this end, the agency requested empirical evidence from commenters on media usage and substitution.<sup>440</sup>

As further indication that viewpoint diversity was becoming a secondary concern, the Commission also addressed the effects of consolidation on the advertising market. After noting “As the steward of the Communications Act, the Commission is charged with evaluating the potential benefits and harms to the viewing and listening public, not to advertisers,”<sup>441</sup> the Commission requested comments on whether its authority under the Communications Act justified basing media ownership limits on the advertising market. Additionally the agency requested commenters to submit empirical evidence dealing with effects of consolidation on the advertising market.<sup>442</sup>

On June 3, 2003, the FCC released an order in the proceeding.<sup>443</sup> Designed to conclude the 2002 review, the controversial decision would continue the cycle of the FCC’s ongoing problem with the development of empirical evidence, which in turn, set the stage for judicial review by the Third Circuit. The order modified the local television multiple ownership rule and now permitted a single party to own up to two television stations in markets with 17 or fewer television stations and up to three television stations in markets with 18 or more stations.<sup>444</sup> The

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<sup>440</sup> “In considering these questions, we are particularly interested in the actual experience of the media industry. Has consolidation in local markets led to less or greater diversity? Commenters are encouraged to submit empirical data and analysis demonstrating both the change (either decrease or increase) in diversity levels and the causal link, as opposed to mere correlation, between those changes and greater consolidation in local markets. Evidence comparing the levels of diversity in local communities with different levels of media concentration would be especially useful.” Id. at Paragraph 43

<sup>441</sup> Id. at paragraph 59.

<sup>442</sup> Id.

<sup>443</sup> FCC 03-127, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Cross-Ownership of Broadcast Stations and Newspapers Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definition of Radio Markets Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, Report and Order and Notice of Proposed Rulemaking, 18 FCCR 13621 (2003). {Hereafter: 2002 Biennial Review Order}.

<sup>444</sup> Id. at 674. See also Appendix H.

rule was also modified to prevent parties from acquiring a television station if the merger would cause it to own two of the top-four rated television stations in the market.<sup>445</sup>

The existing limits on local radio ownership, defined by the 1996 Telecommunication Act were retained, but the FCC made two significant changes to the way the size of a radio market was calculated.<sup>446</sup> First, the FCC adopted market definitions for radio as defined by Arbitron, the commercial agency that provides radio stations with audience ratings data.<sup>447</sup> Additionally, the Commission would now include local non-commercial stations when calculating the total number of stations in each market.<sup>448</sup>

The FCC retained the dual network rule, which prohibited a merger between any two of the top four broadcast television networks, but the agency revised the national television ownership rule, to permit a single party to own television stations reaching 45% (rather than 35%) of the national audience.<sup>449</sup> Two other existing media ownership rules, the newspaper-broadcast cross-ownership and the radio-television cross-ownership rule, were replaced with a single new measurement mechanism, the Diversity Index, a modified version of the Herfindahl-Hirschman Index (HHI), an anti-trust methodology traditionally applied by the Department of Justice and Federal Trade Commission when analyzing mergers.<sup>450</sup>

A market's HHI score is the sum of market shares squared, thus a highly

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<sup>445</sup> Id.

<sup>446</sup> Id.

<sup>447</sup> Previously, the FCC used a signal contour overlap methodology to define ownership parameters, a process which continued until the FCC adopted Arbitron Market definitions in 2003. In FCC 96-90, the FCC affirmed the signal contour policy, "define the relevant radio market as the area encompassed by the principal community contours (i.e., predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations)<sup>3</sup> of the mutually overlapping stations proposing to have common ownership. (2) The number of stations in the market will continue to be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations. (3) The stations that will be included within the market will continue to be: operating commercial full-power stations, including daytimers and foreign stations." 11 FCCR 12368 (1996).

<sup>448</sup> 2002 Biennial Review Order, *supra* note 71.

<sup>449</sup> Id. at Appendix H.

<sup>450</sup> Id. at paragraphs 450-471.

competitive market will have a lower HHI score than a concentrated one. The DOJ and FTC rate markets with HHI scores above 1800 as “highly concentrated,” and if a proposed merger would exceed this limit, the agencies hold that the merger will be harmful to the competition in that market.<sup>451</sup>

The central premise of the Diversity Index adopted the sum of market share-squared formula used by the HHI. In calculating concentration, the FCC determined that broadcast television, daily and weekly newspapers, radio, and internet sites are each relevant contributors to viewpoint diversity in local market. Based on the popularity of each media source as determined in MOWG usage survey, the Commission assigned each medium a relative weight: broadcast TV, 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, Cable Internet 2.3% and Internet through another type of connection, 10.2%.<sup>452</sup>

Using a baseline Diversity Index of 911,<sup>453</sup> the FCC demonstrated how those scores would change after six types of consolidation.<sup>454</sup> In smaller media markets, such as those with three or fewer television stations, the agency determined that each of the six scenarios resulted in a high increase to the average Diversity Index scores.<sup>455</sup> Therefore the FCC prohibited newspaper/television, newspaper/radio, and radio/television combinations in those markets. In markets which contained between four and eight television stations, the Commission determined that four of six the scenarios would be allowed, based on a moderate increase to the average

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<sup>451</sup> Id. at paragraph 79. see also *Prometheus Radio Project v FCC*, 373 F.3d 372 (3d Cir. 2004), {Hereafter: Prometheus 2004}.

<sup>452</sup> 2002 Biennial Review Order, supra note 71, at paragraphs 412, 415, and 427.

<sup>453</sup> Using the Diversity Index, the Commission determined that markets with five television stations had an average DI score of 911. Id. at Appendix D.

<sup>454</sup> The FCC’s other examples of additional consolidation “scenarios” were: (1) one television station and all of the radio station allowed to be commonly owned under the local radio rule; (2) one newspaper and all of the radio stations allowed to be commonly owned under the local radio rule; (3) one newspaper, one television station, and half of the number of radio stations allowed to be commonly owned under the local radio rule; (4) two television stations; (5) one newspaper and two television stations; and (6) one newspaper, two television stations, and all of the radio stations allowed under the local radio rule. Id.

<sup>455</sup> Id.

Diversity Index scores for those markets.<sup>456</sup> In the largest markets, defined by the FCC as those markets with nine or more broadcast television stations, each of the six test consolidation scenarios resulted in an acceptable increase to the average Diversity Index scores, so the Commission imposed no limits on cross-media ownership in those markets.<sup>457</sup>

The Diversity Index was a substantial change in procedure and policy, and as discussed in chapter one, was capable of mathematically generating some questionable merger assessments.<sup>458</sup> What was most important about the change, however, was the lack of basic procedure the agency engaged in when releasing the Diversity Index and making the other changes. None of the new limits, the DI, or the rationale for any of the changes was made public or put up for comments until the Commission issued the order implementing them on June 3, 2003.

Challenges and requests for stays of the rules were filed in multiple circuits by groups of both “citizen petitioners”<sup>459</sup> and “deregulatory petitioners,”<sup>460</sup> and the Judicial Panel on

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<sup>456</sup> Id.

<sup>457</sup> Id. at paragraph 466.

<sup>458</sup> Most notably is the example involving a college television station and the New York Times presented in Chapter 1. See Prometheus 2004, supra note 78 at 406.

<sup>459</sup> In the Prometheus Decision, the court assigned the various petitioners to two groups. The first was referred to as the “Citizen Petitioners.” “Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (“UCC”) (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised antideregulatory challenges to the national television ownership rule.” Prometheus 2004 at Footnote 1.

<sup>460</sup> The “Deregulatory Petitioners,” included: “Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor).” Id. at Footnote 2.

Multidistrict Litigation consolidated the petitions on August 19, 2003.<sup>461</sup> Unlike the *Sinclair* and *Fox* cases which went before the D.C. Circuit, the panel sent the case, *Prometheus Radio Project v. FCC*, to the Third Circuit Court of Appeals. Then after a hearing on September 3, 2003, the Third Circuit stayed implementation of the rules pending review, and denied a petition filed jointly by members of the deregulatory petitioners and the FCC to move the case to the D.C. Circuit.<sup>462</sup> While the rules were under stay, Congress again inserted itself in the process, and in January of 2004, passed an amendment to section 202(c) of the Telecommunications Act which raised the National Television Ownership (audience) Cap to 39%.<sup>463</sup> Congress also made two other changes of note. First, the biennial review obligation under 202(h) was extended to four years and the National Television Ownership Limit as it related to the 39% rule was “insulated” from review, by removing the FCC requirement to review the rule under the provisions of 202(h).<sup>464</sup> After an extension to adopt petitioner filings to address the Congressional changes, the Third Circuit heard eight hours of oral argument on February 11, 2004.

On June 24, 2004, the Third Circuit released a 2-1 decision, written by Judge Thomas L. Ambro. The ruling, while mixed, stayed and remanded most of the FCC’s 2003 order.<sup>465</sup> Among the primary reasons was the FCC’s arbitrary and capricious decision making process and the lack of supporting evidence in the record.

“Though we affirm much of the Commission’s Order, we have identified several provisions in which the Commission falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The Commission’s derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the Commission to justify or modify its approach to setting numerical limits.”<sup>466</sup>

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<sup>461</sup> Id. at 401.

<sup>462</sup> Id. at 390.

<sup>463</sup> Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

<sup>464</sup> Id. at 100.

<sup>465</sup> 2002 Biennial Review Order, *supra* note 71.

<sup>466</sup> *Prometheus 2004*, *supra* note 78 at 428.

The majority dissected the delegation of Telecommunications Act and the requirements of section 202(h), stating that the delegation required the FCC to monitor the effects of competition and make adjustments to its regulations. Relying on the language of the section, the majority noted that the language of the legislation omits “necessary” in the repeal or modify instruction which was significant as it set the stage for the review of the rules using a traditional view of the phrase “necessary in the public interest.”

So in interpreting the Commission’s obligation under § 202(h) to review its broadcast media ownership rules to determine whether they are “necessary in the public interest,” we adopt what the Commission termed “the plain public interest” standard under which “necessary” means “convenient,” “useful,” or “helpful,” not “essential” or “indispensable.”<sup>467</sup>

The majority was not ignorant of the intent and context in which the mandate of 202(h) was enacted, and while Judge Ambro’s decision described 202(h) as deregulatory in nature, the decision rejected the suggestion of the D.C. Circuit’s *Fox* and *Sinclair* decisions that the deregulatory nature of the provision was a “one way ratchet.”

We do not accept that the “repeal or modify in the public interest” instruction must therefore operate only as a one-way ratchet, i.e., the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both “modify” and the requirement that the Commission act “in the public interest.” What if the Commission reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise.<sup>468</sup>

In place of the “one way ratchet” the *Prometheus* majority interpreted 202(h) to be a requirement to periodically justify existing regulations, which absent the review provision, the FCC would not have an obligation to do so.<sup>469</sup> Additionally, when the FCC engaged in the

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<sup>467</sup> Id. at 394.

<sup>468</sup> Id.

<sup>469</sup> “§ 202(h) extends this requirement to the Commission’s decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language,

review of its rules, the agency was required to determine if rules remained useful in the public interest. Rules determined by the FCC to be no longer useful, must be repealed or modified. But after reviewing a rule, regardless of what the Commission determined to be the proper action either, "retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis."<sup>470</sup>

The court then reviewed the FCC decision in terms of a reasoned analysis. Applying the "hard look doctrine" to the FCC's order,<sup>471</sup> the majority overturned the Cross Media Limits and the Diversity Index. Stating that the agency's decision to replace cross-ownership rules with the cross-media limits was not flawed constitutionally or in violation of the mandate in 202(h), the court nevertheless found the failure of the FCC to provide a record which demonstrated a reasoned analysis made the decision unsupportable.

Ambro's decision turned then its attention to the battle over the relationship between viewpoint diversity and ownership. In terms of newspaper-broadcast cross-ownership, the Commission's order had relied heavily on the Spavins 2002 FCC Media Ownership Working Group study, and the finding that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations.<sup>472</sup> The FCC coupled the Spavins study with data from a Project in Excellence in Journalism study which stated that "newspaper-owned stations "were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human interest

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that Congress intended to curtail the Commission's rulemaking authority and to contravene "traditional administrative law principles." Id.

<sup>470</sup> Id. at 395.

<sup>471</sup> Under the "Hard Look Doctrine" must examine the available evidence and "provide a rational connection between the facts and the choices made." See: *Motor Vehicle Manufacturers' Association v State Farm*, 463 U.S. 29 (1983).

<sup>472</sup> Thomas Spavins, Loretta Dennison, Scott Roberts, & Jane Frenette, *Local News and Public Affairs Programming on Broadcast Television* (2002). <http://transition.fcc.gov/ownership/materials/already-released/measurement090002.pdf> last accessed July 1, 2011.

features.” When repealing the newspaper-broadcast cross-ownership ban, the agency had presented two rationales. First, a blanket ban was no longer necessary to ensure diversity, a contention the FCC supported by citing a second MOWG study finding that “Commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice.”<sup>473</sup> The FCC’s second rationale, related to the first, was that other media sources at the local level, including cable and the internet, made up for the loss of viewpoints when newspapers and broadcasts became commonly owned.

On the first rationale, while the court was skeptical of the agency’s decision, citing the criticism of the study methodology, specifically its narrow scope and lack of control group. Based on the conflicting evidence on the viewpoint/ownership relationship, the majority ruled that Commission had acted reasonably when concluding it lacked evidence of a uniform bias between cross-owned media properties. The majority supported the agency’s conclusion that the lack of evidence did not justify the FCC’s ban on Newspaper-Broadcast cross ownership.<sup>474</sup> On the second rationale, the court upheld the agency finding that the evidence in the record, specifically Joel Waldfogel’s 2002 MOWG study on media substitutability, that cable and the internet acted to supplement the diversity of viewpoints available in local markets.<sup>475</sup> Nevertheless, the majority ruled that the agency had not provided a reasonable rationale to explain its decision:

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<sup>473</sup> David Pritchard, Viewpoint Diversity in Cross-Owned Newspaper and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign. FCC Media Ownership Working Group Study no. 2. (2002). <http://transition.fcc.gov/ownership/materials/already-released/viewpoint090002.pdf>, last accessed October 1, 2011.

<sup>474</sup> The initial finding by the FCC could actually be described as evidentiary slight of hand. Relying on the discredited Pritchard 2002 MOWG Study, the FCC first used the findings of the study to cast doubt on the uniformity of viewpoint by a single owner. Then by applying the evidence standard of §202 (h), the agency said that because of the confusion over the validity of Pritchard’s data, it lacked evidence to uphold the ban on newspaper broadcast cross ownership. In simpler terms, in order to repeal a regulation, the FCC relied on data that was deemed questionable so that the agency would fail to provide the evidence necessary to uphold an existing regulation, in a situation where the agency could not supply evidence sufficient enough to justify the repeal.

<sup>475</sup> Although the Majority was skeptical of the weight assigned to these internet contributions to diversity by the Diversity Index. Prometheus 2004, supra note 78 at 397, 399.

The Commission's finding that a blanket prohibition on newspaper/broadcast cross-ownership is no longer in the public interest does not compel the conclusion that no regulation is necessary...As described above, the Commission found evidence to undermine the premise that ownership always influences viewpoint, but it did not find the opposite to be true. And while the Commission found that other media sources contributed to viewpoint diversity in local markets, it could not have found that the Internet and cable were complete substitutes for the viewpoints provided by newspapers and broadcast stations."<sup>476</sup>

The Third Circuit was also skeptical of the FCC's approach to regulating media ownership using the new Diversity Index. The court argued that the internet was given too much weight, that assigning outlets of the same type equal market shares was irrational given the drop off in ratings between the 4th and 5th rated stations, and that the application of the index to actual situations was inconsistently applied when developing cross-media limits.<sup>477</sup>

On the first point, the majority stated that the agency's assignment of an equal market shares to each broadcaster had resulted in a set of unrealistic assumptions about the relative contributions of media outlets to viewpoint diversity within local markets. The assigning of equal shares within a media form did not "jibe" with the Commission's decision to assign relative weights to each type of media, which in turn created a problematic rationale for the use of the HHI formula at the heart of the Diversity Index.<sup>478</sup> The DI was designed to facilitate a measurement of the actual loss of diversity caused by additional consolidation, a process that was designed to assess the changes to a market based on the "diversity importance" of the merging parties. The majority was also skeptical of the Commission's assignment of equal shares to media outlets that did not carry local news, stating that the result was generating, "an almost certainly...understated view of concentration."<sup>479</sup> Finally the majority was critical of the FCC

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<sup>476</sup> Id. at 399.

<sup>477</sup> "In the largest 150 markets, the fourth-ranked station trailed the third-ranked station by 34 in audience share and 26 in revenue share. Bear, Stearns & Co., Inc., Duopoly Relief Needed--4th Ranked Stations Significantly Trail 3rd Ranked Stations (2003). Prometheus 2004, at FN 50.

<sup>478</sup> Prometheus 2004, supra note 78, at 405.

<sup>479</sup> Id. at 406.

actual commitment to making, “the most conservative assumption possible” in regards to the effect of a merger on viewpoint diversity.<sup>480</sup>

The court supported the FCC’s decision to discount cable’s contribution, but ruled that the FCC should have also discounted the internet. The, “decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational. The Commission properly excluded cable because of serious doubts as to the extent that cable provided independent local news—the Commission’s recognized indicator of viewpoint diversity in local markets.”<sup>481</sup> Significantly, the local production of news factored heavily into the majority’s decision on the weight assigned to the internet. While the Commission used data from MOWG study 8 which stated that 18.8% of the survey respondents listed the internet as a source of local news, the survey did not provide data on what websites were being used for news.<sup>482</sup> The majority was skeptical that the websites being used were independent of existing media, such as the websites associated with local newspapers and broadcast stations:

There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an “independent” viewpoint and thus should not be considered as contributing diversity to local markets.<sup>483</sup>

On the local and independent production point, the majority was very critical of the decision of the FCC, stating the record was lacking basic evidence to support the agency’s premise of independent news websites that were producing local news.<sup>484</sup> Additionally, the

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<sup>480</sup> Id. at 403.

<sup>481</sup> “News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. . . . [and] the appropriate geographic market for viewpoint diversity is local.” Prometheus 2004, citing 2002 Biennial Review Order at 394.

<sup>482</sup> Joel Waldfogel, *Consumer Substitution Among Media*, (2002). <http://transition.fcc.gov/ownership/materials/already-released/consumer090002.pdf>, last accessed July 1, 2011.

<sup>483</sup> Prometheus 2004, *supra* note 78 at 403.

<sup>484</sup> Id. at 403-404.

websites the FCC was treating as contributors were actually providing news that was national in scope.

The Commission does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet. According to the record, most sources of local news on the Internet are the websites for newspapers and broadcast television stations....(62% of Internet users get local news from newspaper websites, 39% visit television station websites). And the examples the Commission does cite—the Drudge Report and Salon.com—have a national, not local, news focus.<sup>485</sup>

In the 2003 Order, the FCC had proposed that the internet was a “virtual universe of information sources.”<sup>486</sup> The FCC argued that a “universe” of diversity was available on the internet and was cited as a rationale by the agency for its decision to include the internet in the local diversity measurements. The court disagreed with this position, stating “to accept this rationale we would have to distort the Commission’s own premise that local news is an indicator of viewpoint diversity.”<sup>487</sup> The majority also recognized the realities of access to local cable news outlets and the internet despite the Commission’s attempts to justify the differences between the media forms, the FCC’s rationale was demonstrably false using the agency’s own evidence on internet penetration.

The Commission attempts to justify different treatment for cable and the Internet by suggesting that local cable news channels are only available in select markets, while the Internet is available everywhere. Not only is this distinction demonstrably false (as even the Commission acknowledged that almost 30% of Americans do not have Internet access,)...it is irrelevant. That the Internet is more available than local cable news channels does not mean that it is providing independent local news. On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable.<sup>488</sup>

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<sup>485</sup> Id. at 404.

<sup>486</sup> 2002 Biennial Review Order, supra note 71.

<sup>487</sup> Prometheus 2004, supra note 78 at 404.

<sup>488</sup> This is an incredibly important point. The Third Circuit handed the Commission a way out on trying to include new media outlets in its diversity calculations in future rule reviews. The Commission has, based on the lead into the 2010 proceeding, entirely ignored this part of the Prometheus decision. The Commission’s delegation in the 1996 Telecommunications Act covers the regulation of broadcasters, but not the internet. If the agency confined its review

On other points, the majority was also critical of the FCC’s lack of evidence, such as the Commission’s suggestion that jointly-owned stations will increase the amount of news they provide, a contention which was entirely unsupported with data in the record.<sup>489</sup> The majority was also skeptical of the FCC’s stated reluctance to look at actual media content and media usage as measurements of viewpoint diversity. In the process of discounting even the constitutional and data collection problems the FCC used to justify this decision, the majority pointed right at the data being cited by the agency to support its change to the Diversity Index. In MOWG study 8, the Commission was able to collect actual-use data by media type, where it avoided making a content distinguishing judgment by asking a survey question about where people went for local news.<sup>490</sup> Likewise critical of the data collection issue, the majority opinion suggests that not only are the FCC’s objections to the collection of data on media usage, “vague and unexplained; there is no suggestion that obtaining actual-use data for outlets within a media type would be prohibitively more onerous than obtaining the same data for the media types themselves.”<sup>491</sup> Therefore:

Because the Commission’s reasons for eschewing actual-use data in assigning market shares to outlets within a media type and assuming equal market shares are unrealistic and inconsistent with the Commission’s overall approach to the Diversity Index and its proffered rationale, we remand for the Commission’s additional consideration of this aspect of the Order.<sup>492</sup>

While the dissent was largely built around the idea that the majority owed the agency more deference on the implementation of the Diversity Index and the changes to the rules, the

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to media over which it has jurisdiction, the issues of how to treat new media, or the evidence needed to support the decision making which followed, would be eliminated. The FCC is actively *choosing* to make the evidence situation more complicated than it already is. Id. at 405.

<sup>489</sup> “The Commission needs to undergird its predictive judgment that stations can freely change the level of their news content with some evidence for that judgment to survive arbitrary and capricious review.” Id. at 406, citing Fox I, 280 F.3d, supra note 43, at 1051.

<sup>490</sup> Id. at 406.

<sup>491</sup> Id.

<sup>492</sup> Id.

majority did deal with the deference issue.<sup>493</sup> In fact, the majority was quite deferential, stating that the FCC was “entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets’ Diversity Index scores.”<sup>494</sup> The majority’s stated problem was not an issue of deference or delegation, but one of agency consistency.<sup>495</sup> The FCC’s cross-media limits, by design, allowed for some combinations where the increases for DI scores were higher than for other combinations which would not be permitted.<sup>496</sup> As before, the agency’s action on the Cross-Media Limits was declared to be “without doubt” arbitrary and capricious.<sup>497</sup>

The majority also addressed the FCC’s questionable procedure during the 2002 Ownership Review. Suggesting that the remand of the FCC’s cross-media limits was also justified as a method to give the agency a way to cure its “questionable notice.” While the agency had provided notice of a new ownership assessment metric, it did not publicly notice the diversity index itself. The Commission argued that the DI was formulated in response to comments, and that it did not need to seek additional comment on data formulated as a response to earlier comments.<sup>498</sup> The majority found this argument unpersuasive, even suggesting the FCC had acted with prejudice, pointing out that had the agency put the DI up for public comment, some of the inherent flaws of the methodology might have been discovered ahead of time:

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<sup>493</sup> Id. at 407-408.

<sup>494</sup> Id. at 408.

<sup>495</sup> Id.

<sup>496</sup> “Consider the mid-sized markets (four to eight stations), where the Commission found that a combination of a newspaper, a television station, and half the radio stations allowed under the local radio rule would increase the average Diversity Index scores in those markets by 408 (four stations), 393 (five), 340 (six), 247 (seven), and 314 (eight) points respectively. These permitted increases seem to belong on the other side of the Commission’s line. They are considerably higher than the Diversity Index score increases resulting from other combinations that the Commission permitted, such as the newspaper and television combination, 242 (four stations), 223 (five), 200 (six), 121 (seven), and 152 (eight). They are even higher than those resulting from the combination of a newspaper and television duopoly—376 (five stations), 357 (six), 242(seven), and 308 (eight)—which the Commission did not permit.” Id.

<sup>497</sup> “The Commission’s failure to provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious, and so provides further basis for remand of the Cross-Media Limits.” Id.

<sup>498</sup> Id. at 409.

As the Diversity Index's numerous flaws make apparent, the Commission's decision to withhold it from public scrutiny was not without prejudice. As the Commission reconsiders its Cross-Media Limits on remand, it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.<sup>499</sup>

In terms of radio, the majority upheld the FCC's decision to change market definitions from the signal overlap methodology, to using the geographical market definitions provided by Arbitron, the radio audience ratings company.<sup>500</sup> The FCC's decision to include non-commercial stations in the count of stations in each market was also upheld.<sup>501</sup> The majority did declare that the agency's decision to retain the existing limits, essentially the limits within the Telecommunications Act, was unsupported and arbitrary and capricious.<sup>502</sup> While generally supportive of the agency decision to use numeric limits in place of a case by case analysis, the majority declared the decision to retain the existing limits was not supported by a reasoned analysis of the information within the docket, citing both the 34% in reduction in owners identified by the Williams and Roberts MOWG study and the Comments of the Future of Music Coalition, which had provided examples of consolidated radio groups eliminating local news production.<sup>503</sup>

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<sup>499</sup> Id.

<sup>500</sup> The majority rejected the contention of the citizen petitioners that using Arbitron's market designations was a delegation of governmental power to a non-government agency. The ruling indicated that Arbitron will only provide a methodology for measuring market concentration, and cited the, "established specific safeguards to deter potential manipulation, including a two-year buffer period before any party can receive the benefit of either a change in Arbitron Metro market boundaries or the addition of more radio stations to the market." Prometheus 2004 citing 2002 Biennial Review Order at 278.

<sup>501</sup> Prometheus 2004, supra note 78 at 418.

<sup>502</sup> The remand on this point is notable among the others because the majority is not suggesting that ownership consolidation has gone, or is capable of going, too far, as was the underlying case against the cross-media limits and the Diversity Index. In fact, after the complicated discussion of the cross-media limits, the ruling is very simple. In the 1998 and 2000 reviews the Commission decided that the existing limits were in the public interest. In 2002 the agency did not provide evidence to support this conclusion, and thus the ruling remands the local radio ownership rule to the agency for additional evidence and rationale. Id. at 425.

<sup>503</sup> Id. at 426.

Finally, the court was also unpersuaded by the Commission's use of the economic literature, specifically the use of game theory literature, which had led the FCC to conclude that five equal sized competitors was a sufficiently competitive market:

The Commission's numerical limits cannot rationally be derived from a "five equal-sized competitor" premise. We thus remand for the Commission to develop numerical limits that are supported by a rational analysis.<sup>504</sup>

After the remand was issued by the Third Circuit, the FCC retreated to lick its wounds. A new FCC chairman, Kevin Martin, was appointed by President George W. Bush in March of 2005, and the media ownership process was set aside temporarily.<sup>505</sup> On June 21, 2006, the FCC began the first of the required quadrennial reviews under section 202(h) of the 1996 Telecommunications Act.

### **The FCC's 2006 Quadraennial Review**

At the very forefront of the proceeding launched in 2006, the Commission suggested that this review would be designed to answer the issues of the remands in the Prometheus decision, and took early steps to ensure that the procedural matters, including public access to the proceeding, would not be an issue when the agency's decision would again face judicial review in the Third Circuit.<sup>506</sup> To this end the Commission scheduled a series of six public hearings, and extended the comment period on the initial notice of proposed rulemaking to 120 days. The

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<sup>504</sup> Id.

<sup>505</sup> [www.fcc.gov/commissioners](http://www.fcc.gov/commissioners), last accessed July 1, 2011.

<sup>506</sup> FCC 06-93, Further Notice of Proposed Rulemaking, In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Cross-Ownership of Broadcast Stations and Newspapers Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definition of Radio Market, MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, 21 FCCR 8835 (2006). [Hereafter 2006 FNPRM]

Commission also announced that it had up to \$200,000 to develop a series of new evidentiary studies dealing with how people get news and information, competition within types of media and across media platforms, marketplace changes since the commission last reviewed its ownership rules, localism, minority participation in today's media environment, independent and diverse programming in today's media environment, and the impact of ownership on the production of children's and family-friendly programming. The FCC also made much of the information about the proceeding available online.<sup>507</sup>

However, not all of the information was released, a situation which resulted in a contentious Senate hearing for Kevin Martin on September 14, 2006.<sup>508</sup> Senator Barbara Boxer of California grilled the FCC Chairman over a report leaked to her "indirectly from someone within the FCC who believed the information should be made public."<sup>509</sup> The report,<sup>510</sup> was launched under the previous Chairman Michael Powell's tenure, after he tasked FCC Media Bureau staff to develop evidence on localism in broadcasting. The report, entitled "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News," analyzed 4,078 individual news stories broadcast during 1998. The broadcasts were originally gathered by the Pew Foundation's Project for Excellence in Journalism. Notably, the study demonstrated that the local ownership of television stations added almost five and half minutes of news to broadcasts including more than three minutes of on-location (i.e. local) news a finding that was in direct opposition to the FCC contention in 2003 that "commonly owned television stations are more likely to carry local news than other stations." After the Senate hearing, news reports also

<sup>507</sup> Id. See <http://transition.fcc.gov/ownership/2006-materials.html>, last accessed July 1, 2011.

<sup>508</sup> There is a video copy of the exchange between Senator Boxer and FCC Chairman Kevin Martin online at <http://www.youtube.com/watch?v=vT0AIJkO-aM>, last accessed July 1, 2011.

<sup>509</sup> "Media ownership study ordered destroyed: FCC draft suggested fewer owners would hurt local TV coverage," Associated Press, <http://www.msnbc.msn.com/id/14836500/> last accessed July 1, 2011.

<sup>510</sup> June 2004 draft of the report: Federal Communications Commission, *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News*, (2004). [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267448A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf), last accessed July 1, 2011.

surfaced that the Commission had ordered all copies of the draft study destroyed. To his credit, although he claimed not to have ever seen the report, Chairman Martin acted quickly, making the study available and entering it into the 2006 review docket.<sup>511</sup>

Five days later, a second unreleased draft study, which had been generated as part of the 2002 Review, also surfaced. This study, titled “Review of the Radio Industry,”<sup>512</sup> contained evidence that was even more damning of the policy implementation than the localism study. Examining the effects of consolidation on the radio industry between 1996 and March of 2003, the report reached five major conclusions, all of which would have been problematic for the FCC’s decision making in 2003. First, despite a nearly 6% increase in the number of radio stations overall, the number of owners had decreased by 35%, a change brought about almost entirely by mergers between existing owners.<sup>513</sup> Second, the largest group owner in 1996 had 65 radio stations which meant that the consolidation of ownership had been even more significant than the 35% reduction suggested.<sup>514</sup> In just seven years, the top two companies, Clear Channel and Cumulus Media, owned more than 1200 and just over 250 stations respectively.<sup>515</sup> Third, at the local level, the report marked a downward trend in the number of owners in Arbitron markets. Fourth, in terms of advertising competition, the data demonstrated that the top firm in each market controlled an average of 46 percent of the advertising, and that the top two firms controlled an average of 76 percent of the advertising market.<sup>516</sup> The report concluded that this level of control was at least partially responsible for an 87 percent increase in ad rates, despite

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<sup>511</sup> Letter from Kevin Martin to Barbara Boxer, September 15, 2006.

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267447A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267447A1.pdf), last accessed July 1, 2011.

<sup>512</sup> FCC Media Bureau, *Review of the Radio Industry, 2003*, available online, <http://transition.fcc.gov/ownership/2006-materials.html>, last accessed July 1, 2011.

<sup>513</sup> Id.

<sup>514</sup> Id.

<sup>515</sup> Id.

<sup>516</sup> Id.

falling ratings numbers.<sup>517</sup> Finally, in terms of the effect of consolidation on the format diversity available, the study suggested that while the numbers of formats had remained largely steady overall, in the larger markets, there was actually a slight reduction in the number of formats being offered.<sup>518</sup>

As before, Chairman Martin quickly made the report available, but it bears mention that each of the findings in these two “lost” studies should have provided the agency the evidence necessary to reach the opposite conclusions than it had reached during the 2002 Biennial Review. While the localism finding of the first of the lost studies is logical, the assessment of the effects of consolidation on the radio industry are damning of the policy decisions being made at the Commission during the lead up to the release of the FCC’s order in 2003.

Not surprisingly, facing the tough evidence and rationale obligations of the *Prometheus* Remand and the uncovering of evidence which demonstrated that the last ten years of policy decisions were having the opposite effect of their intent, when the FCC acted to conclude the 2006 Review in late 2007, the outcome was best described as modest. The FCC would retain the pre-2003 order versions of the radio/television cross-ownership rule, the local television ownership rule and the local radio ownership rule.<sup>519</sup> On November 13, 2007, Chairman Martin released a proposed change to only one rule, a partial repeal of the longstanding prohibition on

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<sup>517</sup> Id.

<sup>518</sup> Id.

<sup>519</sup> 2006 Biennial Review Order, FCC 07-216, Report and Order and Order on Reconsideration, In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Cross-Ownership of Broadcast Stations and Newspapers Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definition of Radio Markets Ways to Further Section 257 Mandate and To Build on Earlier Studies Public Interest Obligations of TV Broadcast Licensees MB Docket No. 06-121, MB Docket No. 02-27, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, MM Docket No. 99-360.

Newspaper-Broadcast Cross Ownership.<sup>520</sup> The change would allow newspaper-broadcast cross-ownerships in the top 20 media markets, as opposed to the 170 that would have been permitted under the 2003 Diversity Index.<sup>521</sup> The change also included a provision for the grandfathering of five existing newspaper-broadcast cross-ownerships.<sup>522</sup>

After a process that included the circulation of two different versions of the order less than 12 hours before a vote was taken in December of 2007,<sup>523</sup> the rule change was included in an order on February 4, 2008, and a month later, the FCC released one additional media ownership rule developed in a separate proceeding which was designed, at least nominally, to help increase ownership of media outlets by minorities and women.<sup>524</sup>

No longer allowed to favor minority applicants directly,<sup>525</sup> the agency relied on the Small Business Administration and created a class of applicants called “eligible entities.”<sup>526</sup> The proposal adopted financial standards created by the Small Business Administration (SBA) based

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<sup>520</sup> FCC Press Release, November 13, 2007. Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278113A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf), last accessed July 1, 2011.

<sup>521</sup> Id.

<sup>522</sup> Id.

<sup>523</sup> The procedural problems were central to the remand issued in the second *Prometheus Radio Project v FCC* decision issued July 7, 2011. From page 28 of the decision, “The hours before the final vote were a scramble. The 2008 Order was not circulated to the Commissioners until 9:44 p.m. the night before the vote. Even that draft had sections missing. The Commissioners received a new version of the NBCO rule at 1:57 a.m. on the day of the vote. At 11:12 a.m. that same morning, another version of the NBCO rule was circulated that contained revisions to the four-factor test that would be employed in every case. Nevertheless, later that same day the Commission, by a three to two vote, adopted the 2008 Order and the Diversity Order.” *Prometheus Radio Project v FCC II*, {Hereafter: *Prometheus 2011*}.

<sup>524</sup> Promoting Diversification of Ownership in the Broadcast Services, Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-217, (2007). [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-217A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.pdf) [Hereafter: *Minority Ownership Order*].

<sup>525</sup> See *Metro Broadcasting Inc v. FCC*, 497 U.S. 547, (1990).

<sup>526</sup> “The eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.” *Minority Ownership Order*, supra note 151 at paragraph 6.

on gross sales revenue for a radio or television company.<sup>527</sup> The Commission argued that an increase in the number of “small media owners” (owners who operate either a single or small group of stations) would result in an increase in the diversity of programming content, including programming content targeted at minorities.<sup>528</sup>

These decisions were also challenged and then reviewed by the Third Circuit Court of Appeals panel under the remand in the first *Prometheus* case. In July 2011, in the middle of the 2010 review process, the Circuit again remanded the agency decisions, again citing procedural and evidence problems with the FCC’s actions:

The Commission failed to meet the notice and comment requirements of the Administrative Procedure Act. We also remand those provisions of the Diversity Order that rely on the revenue-based "eligible entity" definition, and the FCC’s decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.<sup>529</sup>

The Third Circuit did uphold a few aspects of the 2007 Order. The majority upheld the agency’s decisions not to change the existing media ownership rules for local television, local radio, or radio-television cross-ownership. Rejecting an argument proposed by CBS and Clear Channel that media ownership rules were actually unconstitutional attempts by the FCC to regulate content,<sup>530</sup> the majority also agreed with the FCC and reaffirmed the belief that the media ownership rules served a substantial government interest as a method to promote diversity.

We agree with the FCC that the rules do not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity... In *NCCB*, the Court said that limiting common ownership was a reasonable means of promoting these interests. Therefore, as we did in *Prometheus I*, we hold that the —Commission’s continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either.<sup>531</sup>

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<sup>527</sup> Id.

<sup>528</sup> Id. at paragraph 7.

<sup>529</sup> *Prometheus 2011*, supra note 150.

<sup>530</sup> Id. at page 44.

<sup>531</sup> Id. at page 44, citing *National Citizens Committee for Broadcasting v FCC*, 436 U.S. 775 (1978).

Despite the relatively modest approach taken on media ownership by the FCC in 2007, the elements of the judicial review in *Prometheus II* were very reflective of the issues raised in the decision from *Prometheus I* decided in 2004. The majority in both cases was critical of the procedure undertaken, the rationales provided, the policy decision reached, and the evidence used to support those decisions.

On the procedural aspects, the irregular actions taken on the day of the vote were matched by questions about the FCC's second failure to make the public the changes prior to a vote.<sup>532</sup> During oral argument, the agency had argued that two questions in paragraph 32 of the Further Notice of Proposed Rulemaking (FNPR) counted as sufficient public notice of the changes.<sup>533</sup> The majority was notably skeptical of this defense, and suggested that the failure of the agency to provide adequate notice about how the new policy would work both individually and in conjunction with other media ownership rules was a "significant omission."<sup>534</sup>

In terms of evidence and rationale the majority was unconvinced about the FCC's actions on diversity and found the FCC's eligible entity designation arbitrary and capricious for the lack of a "sufficient analytical connection to the primary issue that Order intended to address."<sup>535</sup> Repeating a common theme of the two *Prometheus* decisions, the entire absence of data or evidence from the record to support the agency decision, the majority was extremely critical of the agency's failure in 2007 to meet the requirements of the remand on the ownership of stations by women and minorities that was issued in the first *Prometheus* decision.<sup>536</sup> Suggesting that the

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<sup>532</sup> Id. at pages 23-24.

<sup>533</sup> Id. at page 21.

<sup>534</sup> Id. at page 26

<sup>535</sup> Id. at page 52.

<sup>536</sup> The issue of minority and women ownership, while separated into different proceedings is relevant to the the discussion of media ownership policy. In terms of a policy choice, evidence exists that minority owners are more likely to produce content aimed at local minority groups, including informational content. Therefore achieving diversity, including increases in viewpoint diversity, can be accomplished by ensuring sufficient levels of media ownership by minorities and women. The number of minority owners is very low overall. In 2004-2005 of the

agency had “in large part punted” on the issue,<sup>537</sup> the ruling imposes a mandate that the remand be addressed before the 2010 Quadrennial Review is completed.

The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The Commission has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.<sup>538</sup>

The ruling also signaled the majority’s patience with the FCC over these issues has been strained. In footnote 42, the majority scolded the agency for failing to meet its obligations to develop evidence, and scoffed at the agency’s justification that the task was difficult.

Stating that the task is difficult in light of *Adarand* does not constitute considering proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor. We are encouraged that the FCC has taken steps in this direction and we anticipate that it will act with diligence to synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.<sup>539</sup>

The second *Prometheus* decision, much like the earlier *Prometheus* case, is illustrative, in a crystal clear fashion, of the FCC’s ongoing problem with the collection and development of evidence. As the agency continues to struggle, it is important to summarize the process which occurred from 1996 to 2010. The agency, pursuant to the Telecommunications Act, launched into a proceeding without collecting any evidence. Then faced with multiple reviews of its

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12,844 stations which filed FCC form 323 or 323-E, (the process by which the FCC collects data on minority owners) only 460 broadcast stations (3.6%) met the defined criteria for minority ownership. See <http://transition.fcc.gov/ownership/2006-data.html>, last accessed, July 1, 2011.

<sup>537</sup> “Despite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the Commission has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the Commission relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.” *Prometheus* 2011, supra note 150 at Page 52.

<sup>538</sup> Id.

<sup>539</sup> Id. See Footnote 42, page 53.

decision making, the agency failed to generate evidence which would support its decision making, ignored evidence which demonstrated that the policy implementation was failing to meet the stated objectives, and has proposed policies that even reviewing courts suggest “defy logic.”<sup>540</sup> The agency’s decision making on media ownership has endured four remands on judicial review, or more specifically, one for each of the reviews in which changes were proposed.<sup>541</sup> While faulty administrative procedure and poor policy design have each played a role in the failures of the FCC’s decision-making on media ownership, the evidence issues, specifically the lack of evidence, cannot be ignored.

The requirement of §202(h) means that the agency must generate evidence to support the retention or modification of existing rules. As the agency struggles to develop evidence in the quadrennial proceeding launched in 2010, the FCC appears to be paying lip service to the requirements of the *Prometheus* remands. In place of trying to figure out how to deal with different media types, a process which is consuming the agency, the FCC needs to take another look at the instructions the Third Circuit is giving the Commission. First, new media can be eliminated from any calculations of diversity.<sup>542</sup> Two, every decision must have evidence that is used to generate a rational result. Three, actual use and content based evidence are, despite the Commission’s concerns over them, acceptable in the context of supporting a decision based on diversity of viewpoint. Fourth, the mandate of §202(h), which the agency has long interpreted incorrectly as a requirement to regulate using “competition uber alles” as the guiding principle, actually requires the rules that are retained or changed by the FCC to serve the public interest.

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<sup>540</sup> *Prometheus* 2011, supra note 150.

<sup>541</sup> In 2002, the D.C. Circuit Court of Appeals remanded two decisions in *Sinclair*, supra note 50, and *Fox Television*, supra note 43. The Third Circuit has issued remands in both *Prometheus* 2004, supra note 78, and *Prometheus* 2011, supra note 150.

<sup>542</sup> “It was not unconstitutional for the FCC to decline to regulate ownership of non-broadcast media; we still —cannot [assume] that these media outlets contribute significantly to viewpoint diversity as sources of local news and information.” *Prometheus* 2004, supra note 79, at 400.

Most importantly, when these points are considered collectively, the majority in the Third Circuit has given the Commission the ability to correct the decision making failures of the past. These failures, which are complicating the regulatory process responsible for the societal objective of ensuring that citizens have access to information, and have led the agency to bury uncomfortable evaluations of media ownership policy, are solvable if the FCC will make the decision to consider tightening ownership limits, a decision that the Third Circuit has already signaled it would approve.<sup>543</sup>

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<sup>543</sup> Id. at 452.

## Chapter 4:

# Empirical Evidence of Viewpoint Diversity in the FCC Reviews of Media Ownership Regulation

#### **Chapter 4: Empirical Evidence of Viewpoint Diversity in the FCC Reviews of Media Ownership Regulation**

In terms of diversity policy, the FCC's decision to favor regulation of ownership structure relies on the idea that competition among media organizations will increase viewpoint diversity. The relationship between economics and diversity is therefore at the center of the debate over media ownership policy. The FCC has considered the use of economies of scale, content sharing and cross promotion of media held in joint operations,<sup>544</sup> all of which reduce operating costs on broadcasters, as beneficial to the public interest.

But what evidence exists to support the theory which is the centerpiece of the FCC's Outlet Diversity policy - that economic competition will create content diversity? The question of whether the Commission's Outlet Diversity policy is effective in promoting the stated viewpoint diversity policy goals of the FCC is not trivial. The airing of diverse and antagonistic viewpoints is a traditional value in a democratic state, and has been recognized by the courts as a

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<sup>544</sup> Cross promotion is an industry term used to describe the promotion of programming available on other commonly owned stations. Prior to the consolidation of ownership brought about by the 1996 Telecommunications Act, cross promotion was not a common practice among broadcasters, in part because there were fewer cross owned media properties, but also because ratings diaries require listeners and viewers to identify which programs and/or stations they use. It was a common belief among members of the industry that diary confusion could result from cross promoting other commonly owned stations.

legitimate policy goal as much for the people who air them as the people who are able to receive them.<sup>545</sup>

Gomery argues that a pure economic strategy is a poor choice for the regulation of media companies because there are cultural, social and political considerations beyond simple economics that require application in the regulation of a media company.<sup>546</sup> Similarly, Napoli has argued that the FCC finds itself in a unique regulatory position, because it engages in regulation of communications with both social and economic aspects, the goals of which many times are in conflict with one another.<sup>547</sup>

The FCC has stated that it, "...is not in position to conclude that ownership can never influence viewpoint,"<sup>548</sup> and a variety of evidence does exist that suggest there is a relationship between media ownership and the media content an organization produces. Studies with measurements of news quality and quantity have demonstrated that certain media ownership situations, including newspaper-broadcast cross-ownership, can increase overall viewpoint diversity.<sup>549</sup> Other data suggest that broadcast media outlets owned and operated by minorities are more likely than other owners to target specific audiences.<sup>550</sup> Some studies have

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<sup>545</sup> "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969) at 371.

<sup>546</sup> Douglas Gomery, *The FCC's Newspaper-Broadcast Cross-Ownership Rule: An Analysis*. (2002). available at: <http://www.epi.org/page/-/old/books/cross-ownership.pdf>, last accessed October 1, 2011.

<sup>547</sup> Phillip Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J Comm 151 (1999).

<sup>548</sup> 2002 Biennial Review Order, Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 02-277, 18 F.C.C.R (2003) {Hereafter: 2002 Biennial Review Order}

<sup>549</sup> Two large scale content analysis projects have examined the content diversity of newspaper-broadcast cross ownerships since 2000. David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed Comm L J 31, (2001) and David Pritchard, Christopher Terry, & Paul R. Brewer, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*. 13 Comm. L. & Pol'y 1 (2008).

<sup>550</sup> Laurie Mason, Christine M, Bachen, Stephanie L.Craft, *Support For FCC Minority Ownership Policy: How Broadcast Station Owner Race Or Ethnicity Affects News And Public Affairs Programming Diversity*. 6 Comm L. & Pol. 3 (2001).

demonstrated the use of biased information content to promote the economic and regulatory goals of a media corporation.<sup>551</sup>

Beyond viewpoint, studies have also demonstrated that the local ownership and operation of media outlets can increase the quantity of news and public affairs coverage. In one of the two ownership studies “lost” by the FCC,<sup>552</sup> a quantitative analysis demonstrated that in the local ownership increased the local news content, including the on-location reporting of local news, with the average increases approximately a third of a 30-minute newscast in running time compared to out of market ownership of the station.<sup>553</sup>

While quantitative increases in news and informational content has been seen as a positive indicator of increased viewpoint diversity by the FCC, more information does not always equal more diversity. Steven Berry and Joel Waldfogel studied the diversity of radio programming following the passage of the 1996 Telecommunications Act.<sup>554</sup> Using format as a measure of content diversity, the study found that ownership consolidation actually increased the number of formats in relationship to the number of stations.<sup>555</sup>

However, using format type as a quantitative measure of diversity fails to account for the actual content of the programming. Although the “title” of a station format may indicate one type of programming, often formats have deceptive names for the sake of market positioning. While the titles of two formats are different, the stations may actually carry very identical programming options, often an Adult Contemporary music format designed to target desirable demographics

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<sup>551</sup> Martin Gilens & Craig Hertzman, Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act, 62 J. of Pol. 369 (2000).

<sup>552</sup> FCC Media Bureau, Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News, <http://transition.fcc.gov/ownership/2006-materials.html>, last accessed July 1, 2011.

<sup>553</sup> Id.

<sup>554</sup> Steven T. Berry & Joel Waldfogel, Mergers Station Entry, and Programming Variety in Radio Broadcasting, NBER Working Paper 7080, available online, <http://www.nber.org/papers/w7080> (1999). Last accessed October 1, 2011.

<sup>555</sup> Id.

for advertisers. One examination of format diversity that looked at the definition of each format demonstrated that while the Top 50 U.S. radio markets have 31 named formats, the actual content of the formats provided only an average diversity of 19 formats per market. The commitment to information based formats in radio is also limited, with an average of 1.58 stations per market carrying an informational format. As a result, the radio stations that are formatted for news and public affairs programming become more important in terms of viewpoint diversity.<sup>556</sup>

Looking only at formats also fails to account for the slant or bias of the viewpoints aired by a station. Thomas Hazlett and David Sosa determined that the number of radio stations offering an informational format increased following the repeal of content based regulations.<sup>557</sup> However, despite an increase in the amount of content available, there was a measurable decrease in the diversity of viewpoints aired on informational stations.<sup>558</sup>

In radio, the larger number of stations (in comparison to broadcast television stations) in a market reduce each station's potential share of the audience. As a result, radio stations rely on niche programming. Niche radio formats are designed to attract specific demographic groups, usually based on age and gender, primarily so that sponsors can target the audience to which their products and services are most likely to appeal. John Dimmick and Daniel G. McDonald use the term "rivalrous imitation" to describe situations in which multiple broadcast operations

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<sup>556</sup> Id.

<sup>557</sup> As the FCC abandoned the enforcement of the Fairness Doctrine, modern talk programming began to develop on AM radio. As FM radio became associated with a stronger signal with additional frequency bandwidth, radio music formats gravitated to the FM band because of the increases in sound quality. Informational stations, such as all-news stations began to assume dial positions on the AM band. The early success of the Rush Limbaugh program increased the commitment of many AM stations to a Talk format. Other conservative radio talk shows were launched in the wake of the Limbaugh program, and the conservative Talk Radio format was born. Thomas Hazlett and David Sosa, Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Post Deregulation Radio Market, 26 J. Legal Stud. 35 (1997).

<sup>558</sup> Id. at 58.

offer similar programming to compete for shares of the same audience.<sup>559</sup> When stations engage in rivalrous imitation, a common result is less diversity in programming formats, as multiple media outlets target the most valuable demographic groups.<sup>560</sup>

One argument for continuing to raise the limits on media ownership is that as more media outlets are consolidated into common ownerships, an economic incentive is created for the ownership of a media organization to provide a more diverse set of programming, rather than to provide multiple programming formats that compete for audience with other commonly owned stations.<sup>561</sup> If internal programming competition between similar formats limits a station's audience share, then logically, external competition will also limit the station's audience share in situations where competing media organizations provide similar or identical formats. Therefore there is an inherent economic incentive to provide programming options different from a competitors, which in turn, should create viewpoint diversity.<sup>562</sup>

Testing the actual outcomes of the media ownership policy in terms of viewpoint is a difficult and time consuming process, and as a result, many empirical studies have bypassed the direct analysis of media content through the use of other research methods. Lacy and Riffe conducted a survey of the managers of 73 radio stations about the production of radio news.<sup>563</sup> The analysis of the data led the authors to conclude that radio stations owned as part of a larger group were not significantly different from stations within smaller ownership groups when

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<sup>559</sup> John Dimmick and Daniel G. McDonald, Network Radio Oligopoly 1926-1956: Rivalrous Imitation and Program Diversity, 26 J. Media Econ, 197 (2001).

<sup>560</sup> I have done content analysis research that demonstrates the rivalrous imitation effect between competing radio stations which broadcast a conservative talk radio format. See: Christopher Terry, "Milwaukee's Radio News Trinity: Clear Channel, Journal Communications and Wisconsin Public Radio and Coverage of the 2004 Election," Thesis (M.A. in Mass Communication)--University of Wisconsin--Milwaukee, 2005.

<sup>561</sup> Berry and Waldfogel, *supra* note 11.

<sup>562</sup> *Id.*

<sup>563</sup> Steven Lacy & Daniel Riffe, The Impact of Competition and Group Ownership on Radio News. 71 JQ. 583 (1994).

producing news. Importantly though, the authors discover the “recycling” of news packages as stations will run the same news stories multiple times. Although this finding would not be any sort of a “discovery” to anyone who has worked in a broadcast newsroom, the recognition of the institutional process leads the authors to conclude that a content analysis would tell them more than survey data about the content output of newsrooms.<sup>564</sup>

Other efforts to measure the effects of media ownership consolidation have included the use of ratings to determine the effect of ownership rules on the network/affiliate relationship and local programming.<sup>565</sup> Data on program type has been used to measure the quantity of locally produced news and public affairs content,<sup>566</sup> and content analysis has examined coverage of media ownership regulations and policies by media organizations.<sup>567</sup> Newspaper-broadcast cross-ownership is one of the few areas in which media ownership policy gets significant attention from both the policy and academic scholars. Hilliard and Picard argued that cross-ownership prohibitions act as a buffer against too much consolidation saying that news quantity and news quality are two different measures. “The nation has a quantitative diversity, but not a qualitative diversity in media. Where views are presented, they most often reflect those of the owners of the newspapers and television stations.”<sup>568</sup>

Likewise, Gomery has suggested that the prohibition on newspaper/broadcast cross-ownerships provides a necessary protection of the public’s interest and access to diverse

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<sup>564</sup> Id.

<sup>565</sup> M. Barrett, The FCC's Media Ownership Rules and the Implications for the Network-Affiliate Relation, 116 J Media Econ. 1009 (2001).

<sup>566</sup> John Busterna, Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data, 1 J Media Econ. 63 (1988).

<sup>567</sup> Gilens & Hertzman, *supra* note 8.

<sup>568</sup> R. L. Hilliard & R. Picard, Plurality, Diversity, and Prohibitions on Television-Newspaper Cross-Ownership, 2 J Media Econ. 5 (1989).

viewpoints, arguing the prohibition is especially important at the local level to ensure coverage of local elections and to allow access to minority voices.<sup>569</sup>

As a result of the 2002 Biennial Review, and the remand in the 2004 *Prometheus Radio Project v. FCC decision*<sup>570</sup> and the FCC's decision during the 2006 Quadrennial Review to modify the prohibition on newspaper broadcast cross ownership,<sup>571</sup> a variety of evidence has been produced about the policy. Three studies, all conducted since 2000, have explored whether common ownership of multiple local media properties results in a "single voice." In the first, Pritchard examined the election related content of three of the grandfathered newspaper-radio-television cross-ownerships.<sup>572</sup> This project was an ambitious content analysis that included election coverage found in television news, news and talk radio programming and daily newspapers. Election content dealing with the 2000 presidential campaign was collected and coded for "slant."<sup>573</sup> The results demonstrated that diversity existed across the commonly owned media properties despite heavily slanted content on individual properties, especially the radio stations.

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<sup>569</sup> Gomery supra note 3.

<sup>570</sup> *Prometheus Radio Project v FCC*, 373 F.3d 372 (3d Cir. 2004), {Hereafter: Prometheus 2004}

<sup>571</sup> 2006 Biennial Review Order, FCC 07-216, Report and Order and Order on Reconsideration, In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Cross-Ownership of Broadcast Stations and Newspapers Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definition of Radio Markets Ways to Further Section 257 Mandate and To Build on Earlier Studies Public Interest Obligations of TV Broadcast Licensees MB Docket No. 06-121, MB Docket No. 02-27, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, MM Docket No. 99-360. 23 FCCR 2010 (2008).

<sup>572</sup> David Pritchard, *A Tale of Three Cities: Diverse and Antagonistic' Information in Situations of Local Newspaper/Broadcast Cross-Ownership*. 54 Fed. Com. L. J. 31 (2001).

<sup>573</sup> Pritchard's design used a three pronged analysis for slanted coverage, calculating the overall slant, and conducted a comparison of the calculated scores between the cross-owned properties. This methodology was used in each of the two published Pritchard studies and the Pritchard MOWG study from 2002.

In another study, released as part of the FCC's media ownership studies during 2002, Pritchard examined the content of ten newspaper-television cross-ownerships.<sup>574</sup> In five of the ten cases the slant calculated for the television coverage was significantly different than the slant calculated for the cross-owned newspaper. With the other five cross-ownerships presenting slant that was comparable (not significantly different statistically) between the newspaper and television station, Pritchard concluded, "...the range of viewpoints in the campaign coverage of the cross-owned media under study tended to reflect the range of viewpoints discussed by the leading candidates for the presidency."<sup>575</sup>

During the 2004 campaign, Pritchard, Terry and Brewer designed a study to improve upon Pritchard's earlier research by adding a control group in Chicago.<sup>576</sup> Like the 2000 study, slant was tested for by using a three-pronged bias test of presidential election reporting and coverage. The results demonstrated that the diversity of viewpoints within grandfathered cross-ownerships in Chicago, Milwaukee, and Dayton was not less than across a radio station, television and newspaper that were each owned independently.<sup>577</sup>

Relying on the data from two of Pritchard's studies, and a study commissioned as part of the 2006 Quadrennial Review, the FCC determined that cross-ownership can enhance the diversity and quantity of news.<sup>578</sup> Jonathan Obar, in a series of publications examining the

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<sup>574</sup> David Pritchard, Viewpoint Diversity in Cross-Owned Newspaper and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign. FCC Media Ownership Working Group Study no. 2. (2002). <http://transition.fcc.gov/ownership/materials/already-released/viewpoint090002.pdf>, last accessed October 1, 2011.

<sup>575</sup> Id.

<sup>576</sup> Pritchard, Terry and Brewer, *supra* note 9.

<sup>577</sup> Id.

<sup>578</sup> Using sample of scheduled newscasts, newspaper broadcast cross ownerships provided 18 min (11%) more television news per day. Allen S. Hammond, Impact of Ownership Structure on TV Stations' News & Public Affairs, 2006 MOWG Study 4. Available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A9.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf), last accessed October 1, 2011.

reasoning and public participation in the FCC's the decision making process,<sup>579</sup> has concluded that in terms of newspaper-broadcast cross-ownership, the FCC has relied more on interested stakeholder comments.<sup>580</sup> Obar suggests that the Commission has acted against the weight of public comments opposing the decision, and that the agency not only lacks the necessary empirical evidence to support the policy decision, the agency has gone as far as to ignore empirical evidence that refutes the decision.<sup>581</sup>

The nature of the newspaper-broadcast cross-ownership debate is illustrative of the larger issues of ownership and the relationship to content diversity which confound the media ownership policy debate. The original prohibition on newspaper-broadcast cross-ownership was the result of a 1975 decision by the Federal Communications Commission in Docket no. 18110.<sup>582</sup> The proceeding was a seven-year long rulemaking inquiry into the multiple, local ownership of radio stations, television stations and newspapers. The FCC's balancing act between viewpoint diversity and media economics that was at the heart of the original decision remains at the center of the current debate over cross-ownership policy, and by extension, the larger issues of the relationship between media ownership and viewpoint diversity.

Whether newspaper-broadcast cross-ownerships were problematic was, and remains, a matter of long standing debate, Franklin Roosevelt sought to enforce a ban on radio station ownership by newspapers as early as 1941.<sup>583</sup> Former FCC Chairman James L. Fly raised

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<sup>579</sup> Jonathan Obar, Democracy or Technocracy? And Analysis of Public and Expert Participation in FCC Policymaking, Dissertation, Pennsylvania State University, 2010. See also, Jonathan Obar & Amit M. Sceijter, Inclusion or Illusion? An Analysis of the FCC's Public Hearings on Media Ownership 2006–2007, 54 J Broad & Electronic Media, (2010).

<sup>580</sup> Obar Dissertation, see note 36.

<sup>581</sup> Id.

<sup>582</sup> In the Matter of Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C 2d 1046 (1975). [Hereafter 1975 Order].

<sup>583</sup> Betty Winfield, FDR and the News Media (1990); Paul Starr, The Creation of Media, Political Origins of Mass Communications, (2004).

concerns about awarding broadcast licenses to newspaper interests on diversity grounds during the same time period.<sup>584</sup>

Advertising rates and advertiser access were key economic issues in the debate over cross ownerships. The proceeding in Docket 18110 began in 1968 as a response to a Justice Department inquiry into possible anti-trust issues for local newspaper/broadcast cross-ownership.<sup>585</sup> The Justice Department, in several filings, expressed concern that a cross ownership between newspapers and broadcasters could result in unchecked market power, and importantly in terms of anti-trust law, non-competitive rates for advertisers.<sup>586</sup>

The anti-trust concerns regarding advertising rates for local newspaper-broadcast ownership was not new in 1968, just five years earlier the House Judiciary Anti-trust Subcommittee had requested a report on newspaper-broadcast cross-ownership from the FCC. In 1963, as part of a set of hearings on newspaper anti-trust issues, the FCC produced a study that provided statistical and ownership data through 12 different measurements of “joint interests” of companies involved with newspaper-broadcast cross ownerships.<sup>587</sup>

The rulemaking inquiry in docket #18110 consisted of seventeen orders and solicitations for comments on the effects and nature of local common ownership of newspapers and broadcast facilities.<sup>588</sup> The final order, issued over seven years later, closed a proceeding that three FCC Chairmen presided over and 17 commissioners had taken part in. The docket closed containing

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<sup>584</sup> Joon-Mann Kang, Franklin D. Roosevelt and James L. Fly: *The Politics of Broadcast Regulation, 1941-1944*, 10 *J. Am. Culture* 23 (1987).

<sup>585</sup> 1975 Order supra note 39 at 1047-1051.

<sup>586</sup> In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Comments of the United States Justice Department, August 1, 1968. (Contained in FCC Docket #18110, Volume 1) and In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Supplemental Comments of the United States Department of Justice, May 5, 1971. (Contained in FCC Docket #18110, Volume 23) Items obtained at National Archives.

<sup>587</sup> The Association of Newspaper Publishers Association was also a party to the Committee hearings in 1963. Statistical material on newspaper-broadcast joint interests as of November 1962, Source: Personal papers of former FCC Chairman Newton Minow, archives, Wisconsin Historical Society.

<sup>588</sup> 1975 Order, supra note 39 at 1090-1095

245 public comments regarding the proceeding, and 33 research studies dealing with media ownership.<sup>589</sup>

The goals of the rulemaking inquiry were not clearly defined during the initial stages of the review, and from the outset, the Commission appeared to be attempting to balance the concerns about both economic competition and viewpoint diversity:

“The multiple ownership rules rest on two foundations: the twin goals of diversity of viewpoints and economic competition.”<sup>590</sup>

The FCC, relying on the docket filings from the Justice Department, identified inter-related economic problems that could be caused by local newspaper-broadcast cross-ownerships.<sup>591</sup> The Justice Department argued that allowing an organization to control both a broadcast facility and newspaper in a single market would give the organization excessive market power.<sup>592</sup> In small markets, a cross-ownership could mean a virtual monopoly on media.

No one has argued that anti-trust considerations are totally inapplicable to the media, rather than dispute centers on the importance of anti-trust considerations to the resolution of the public interest issues now before the Commission...Justice says there is too much concentration of ownership which in turn has caused a curtailment of the options open to advertisers. Throughout, the Justice filings proceed from economic premises having principally to do with economic competition for advertising. It is not that diversity of viewpoint is not dealt with; it is. Rather, it is a question of the orientation, of views expressed in competitive terms, views it feels the Commission is obliged to consider.<sup>593</sup>

The economic and anti-trust concerns of the Justice Department were largely responsible for launching the rulemaking inquiry and the FCC's stated position that the Commission retained the authority to regulate broadcast media ownership on economic issues. However rather than

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<sup>589</sup> Every page of the docket, stored at the National Archives in College Park, Maryland, was reviewed by the author as part of the background research for this project. A complete list of the studies and comments considered by the Commission is available in the 1975 Order, *supra* note 39 at 1092-1095.

<sup>590</sup> *Id.* Paragraph 99 at 1074.

<sup>591</sup> For an extensive discussion of the Justice Department's involvement in the rulemaking proceeding, see Lorna Veraldi, *Newspaper-Broadcast Cross-Ownership: Anti-trust Law and Regulatory Policy*, (1976).

<sup>592</sup> *Id.* See also the Justice Department filings in *supra* note 43.

<sup>593</sup> 1975 Order, *supra* note 39 Paragraph 42 at 1059

test this authority, the Commission developed the rationale for the ban on cross-ownership primarily by relying on the potential for a reduction in viewpoint diversity:

...we have analyzed the basic media ownership questions in terms of this agency's primary concern---diversity of ownership as a means of enhancing diversity of programming services to the public---rather than in terms of a strictly anti-trust approach.<sup>594</sup>

While the FCC argued that it maintained some delegated authority to regulate media ownership based on economic issues, relying on a viewpoint diversity rationale may have been the Commission's only option for actually implementing the cross-ownership ban. The FCC found itself without a formal statutory delegation of power, jurisdictional precedent to address the Justice Department's anti-trust concerns about the price of advertising, or the authority to regulate newspaper ownership independent instances of cross-ownership. Functionally, the FCC possessed only the regulatory power inherent in the licensing of broadcast facilities as a method to enforce the cross-ownership ban.

It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility...it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they antagonistically run.<sup>595</sup>

One glaring contradiction in the inquiry's final order was how the Commission considered radio stations as competitors within local markets. The FCC argued, in the face of evidence to the contrary, that radio as a medium could not be considered a competitor of newspapers or television stations. Radio, the FCC argued, failed to contribute significantly to the overall viewpoint diversity available to an audience in a local market.

Realistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least all in terms of being a source for news or being the medium turned to for a discussion of

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<sup>594</sup> Id. Paragraph 110 at 1079.

<sup>595</sup> Id. Paragraph 111 at 1079-1080.

matters of local concern. When the weight of a daily newspaper and the commonly owned television station (perhaps with a radio station or even an AM\_FM combination under common control) are combined, the radio station standing by itself cannot be considered as providing significant diversity or as constituting a meaningful competitor at all.<sup>596</sup>

Eliminating radio stations as a competitor changed the dynamics of media ownership in many markets, which made the FCC's decision appear more rational on grounds of viewpoint diversity. In markets that may have had as many as twenty or thirty different owners, eliminating radio stations from the considerations of overall viewpoint diversity, may have left even the largest markets with no more than five or six media outlets. A newspaper-broadcast cross-ownership would have reduced the overall ownership diversity substantially in these situations.

The exclusion of radio as a competitor for information seems suspect by both historical and contemporary standards.<sup>597</sup> In 1975, radio stations with a traditional "full-service" format were still commonplace across the AM dial. FM radio was still in its early stages, and the modern day news-talk radio format had yet to come of age.<sup>598</sup> The Commission provided no evidence to support its decision to declare radio a non-competitor for diversity enhancement.

Only one of the 33 studies in the docket actually addressed the major issue of commonly owned media properties speaking with a "single voice."<sup>599</sup> Filed as part of the National

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<sup>596</sup> Id.

<sup>597</sup> Data from the Pritchard study in 2000 and the Pritchard et. al. study from 2004 demonstrate that radio is the most diverse, in terms of viewpoints, of radio, television or newspapers operated as part of an existing cross ownership. Pritchard, and Pritchard, Terry and Brewer, supra note 6.

<sup>598</sup> The repeal of the Fairness Doctrine led to the growth of the talk format in radio, but open line public affairs programming did exist prior to the repeal of the Fairness Doctrine. See John Crittenden, Democratic Functions of the Open Mike Radio Forum 35 Public Opinion Q 200 (1971).

<sup>599</sup> The comments of the Cox Corporation contained an examination of the public issues and news coverage of the cross-owned properties in Dayton, Ohio in an appendix. This "study" appears to have been largely created from the Company's annual public issue filings with the FCC for the television and radio stations, and a cursory headline search of the local newspaper. The only study within the docket that dealt with common content across cross owned media was included as part of the multipart filings by the National Association of Broadcasters. Cox: In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Comments in Opposition to Proposed Rulemaking, Cox Broadcasting Company. May 18, 1971. (contained in FCC Docket #18110, Volume 22.) NAB: James Anderson, Broadcast Stations and Newspapers: the Problem of Information Control, Exhibit "E", In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM

Association of Broadcasters' comments, one content analysis used a keyword comparison to test for similar content across commonly owned media. The data suggested that there was very little common "word usage" between cross owned broadcast newscasts and newspaper stories.<sup>600</sup>

While the NAB and Hofstra University economist Dr. Harvey Levin sparred throughout the proceeding,<sup>601</sup> the largest source of the debate over radio's contributions to diversity originated from the FCC itself. Although the FCC considered radio stations non-competitors for viewpoint diversity, the Commission also recognized that in smaller markets, a radio station might very well be the most important source of news and information for local citizens:

“In the smaller non-television communities, radio stations play a truly vital part in local affairs and their efforts and importance can exceed the level reachable by television stations in larger markets.”<sup>602</sup>

The contradictions between the decision and the evidence in the docket went beyond the agency's dual view of radio's contributions to viewpoint diversity. As the proceeding continued, some media companies who held a cross-ownership filed comments discussing why their cross-ownership was not problematic in terms of viewpoint diversity. The Cox Corporation filed a

and Television Broadcast Stations, National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, August 18, 1971. (Contained in Volume 23).

<sup>600</sup> Anderson, Id.

<sup>601</sup> Both Dr. Levin and the NAB filed multiple comments in the docket, responding to claims by the other parties. Dr Levin 's initial contribution to the docket was a study that was heavily criticized on methodological grounds by the NAB. The Policy on Joint Ownership of Newspapers and Television Stations: Some Assumptions, Objectives and Effects, Reply Comments of Dr Harvey J Levin,. August 1971. ,Critique of the Harvey Levin Statement, “The Policy on Joint Ownership of Newspapers and Television Stations: Some Assumptions, Objectives and Effects” Jon G Udell, Aug 18, 1971. In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, August 18, 1971. Analysis of Dr. Harvey J. Levin's Clarifying Memorandum in FCC Docket No. 18110, John A Dimling, Feb 7, 1972. In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Supplementary Comments, Harvey J Levin, May 15, 1974.

<sup>602</sup> 1975 Order, supra note 39 Paragraph 116 at 1084.

study that examined the news coverage of local and national issues on their cross owned properties in Dayton, Ohio.<sup>603</sup>

The Journal Corporation, which owned two newspapers, two radio stations and a television station in Milwaukee, Wisconsin, at the time of the rulemaking inquiry, circulated an internal memo which discussed keeping up an appearance of operating their various properties separately.<sup>604</sup> Under the label of the call letters of its AM radio and television station, WTMJ, the company filed one comment in the docket stating that the local newspaper and broadcast production facilities were in two separate locations and utilized different personnel.<sup>605</sup> This “two buildings, no problem” argument convinced the Commission to grant waivers to some of the existing newspaper-broadcast cross ownerships, including those of the Journal Corporation in Milwaukee and Cox in Dayton, Ohio.

Many of the parties owning newspapers and broadcast stations in the same locality described how the entities—print and broadcast—were separately operated. We were told that separate editorial and reportorial staffs were utilized. Many pointed to a separate in sales staff and an emphasis on competition between media. We endorse such efforts to insure a maximum of diversity and competition possible under the circumstances of common ownership and we commend those conscientious owners for their efforts.<sup>606</sup>

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<sup>603</sup> The comments of the Cox Corporation contained an examination of the public issues and news coverage of the cross-owned properties in Dayton, Ohio in the appendix. This “study” appears to have been largely created from the Company’s annual public issue filings with the FCC for the television and radio stations, and a cursory headline search of the local newspaper. The only study within the docket that dealt with common content across cross owned media was included as part of the multipart filings by the National Association of Broadcasters. Cox: In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Comments in Opposition to Proposed Rulemaking, Cox Broadcasting Company. May 18, 1971. (contained in FCC Docket #18110, Volume 22.) NAB: James Anderson, Broadcast Stations and Newspapers: the Problem of Information Control, Exhibit “E”, In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, August 18, 1971. (Contained in Volume 23).

<sup>604</sup> Journal Corporation memo obtained from the Kordus Collection in the Journal archives at Golda Maier Library, University of Wisconsin, Milwaukee. Collection #205, Series 1, Box 1, Folder 12, accessed 3-22-2007.

<sup>605</sup> In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Comments of the Journal Company. May 13, 1971. (Contained in Volume 12 of FCC Docket #18110).

<sup>606</sup> 1975 Order, *supra* note 39 Paragraph 132 at 1089.

In the final order, only 16 of the more than 70 existing newspaper-broadcast cross-ownerships were ordered to divest part of their cross-ownerships.<sup>607</sup> Thirteen of the "grandfathered" combinations included a radio station, television station and a newspaper in a single market.<sup>608</sup>

While the original inquiry of the Justice Department provided the Commission with an opportunity to implement a restriction on ownership first proposed many years earlier, the Justice Department's inquiry also provided the beginning of the debate about the relationship between economic competition and viewpoint diversity that formed the backdrop for the proceeding. Unable to regulate newspaper ownership directly, and without jurisdiction to directly address anti-trust issues, the FCC relied on the principle of viewpoint diversity to extend the Commission's reach during a confused rulemaking proceeding.

Ultimately, the Commission relied on a viewpoint diversity rationale to implement policy in a proceeding that began as a debate over anti-trust issues. The Justice Department's concern with monopoly power in small media markets resulted in a dual standard for radio's contribution to viewpoint diversity which remained the Commission's position in the opening stages of the FCC's 2010 Quadrennial Review. Despite concerns over a lack of content diversity among commonly owned media properties, when implementing the ban the FCC considered the physical location of the broadcast studios in relation to the newspaper production facility an important criterion in determining which existing newspaper-broadcast cross ownerships would be "grandfathered" and given a waiver for the new regulation.<sup>609</sup>

In the newspaper-broadcast cross ownership proceeding, the Commission's belief that one owner results in one viewpoint, became the primary basis for the FCC's regulatory ban, and later

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<sup>607</sup> Id. at 1091-1095.

<sup>608</sup> Id.

<sup>609</sup> Id.

the core belief of the policy implementing the media ownership rules. Articulated by the FCC in 1975, the argument that commonly owned properties speak with a single voice is the heart of the Commission's modern day Outlet Diversity Policy, a one to one policy the FCC has illogically implemented by raising media ownership limits, attempting to repeal the newspaper-broadcast cross-ownership ban and eliminating minority ownership enhancement policies, in each case reducing both the diversity of and the number of media owners overall.

The one-owner-to-one-viewpoint theory was not supported by the docket in which it was created, and in 1984, a Rand-funded study of media ownership policy concluded that, "There is no connection between group ownership and the diversity of viewing fare provided by a station."<sup>610</sup> These two important findings which preceded the 1996 Telecommunications Act by 12 and 21 years respectively, offer evidence which undermine the fundamental ownership-viewpoint logic of the contemporary media ownership policy.

While the FCC continues to justify its media ownership policies on grounds of both viewpoint diversity and competition, modern analysis of the FCC's use of evidence in media ownership proceedings has demonstrated that as much as 74 percent of the evidence used during these proceedings has been based on economic literature, with only small amounts dedicated to issues involving political science and sociology.<sup>611</sup>

Relying on the premise that media ownership policy is designed to enhance viewpoint diversity, whether in the age of preventing consolidation (Scarcity Era) or promoting it (Competition Era), and to develop a larger understanding of what evidence the commission has used about the relationship between media ownership and viewpoints, I sought to develop a

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<sup>610</sup> Stanley M. Besen & Leland L. Johnson, Regulation of Media Ownership by the Federal Communications Commission: An Assessment, Rand Corporation Study R-3206-MF, (1984).

<sup>611</sup> Jeffery Lane Blevins & Duncan Brown, Concerns about the Disproportionate Use of Economic Research in the FCC's Media Ownership Studies from 2002-2007 54 J of Broad & Electronic Media 603 (2010).

record of the supporting evidence used in media ownership decisions between 1987-2009. To this end, I conducted an electronic search of the FCC Record, using the Code of Federal Regulations citation for the Commission's multiple ownership rules, "73.3335" as the search term.

The search generated hits for 1039 entries in the FCC Record in which an agency decision contained a citation of the Multiple Ownership Rules.<sup>612</sup> These entries range widely, but included items from rulemaking dockets dealing with media ownership, as well as adjudications dealing with license transfer decisions, market definitions, tables of station allocation, and comparative license proceedings.

Rather than rely on sampling of these decisions as Obar did when analyzing public comments in the 2006-7 decision,<sup>613</sup> I read each of the 1039 entries over a period of 11 months. Decisions which involved license transfers or rulemaking inquiries in which the FCC discusses the evidence it considered as part of the decision were flagged, and then the primary proceeding docket was searched electronically for filings or other evidence which incorporated a measurement of the possible effect of the transfer on the viewpoint diversity available in the market. In the 1039 records identified which contained a citation of the media ownership rules, outside of those which were part rulemaking process dealing with specific media ownership rules mandated by the 1996 Telecommunications Act, not one action by the FCC in 20 years included evidence which measured the effect of ownership on the availability of viewpoints or viewpoint diversity.

While continuing to support viewpoint diversity as a policy objective, the FCC's approvals of mergers in the wake of the 1996 Telecommunications Act used a variety of

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<sup>612</sup> The sample was also checked against the paper version of the FCC Record to assure the electronic search had identified the correct information.

<sup>613</sup> Jonathan Obar, Dissertation, *supra* note 36.

justifications. Initially the FCC adopted an older standard from a 1989 Order, and the agency used a five-part test for reviewing mergers and license transfers.<sup>614</sup> In order to make a public interest determination on the value of the merger, the FCC examined:

(1) the potential public benefits of joint operation of the facilities, such as economies of scale, cost savings, and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market, the light of the level of competition and diversity after the joint operation is implemented.<sup>615</sup>

Initially, the first of the five criteria was, by far, the most important in providing a rationale for license transfer approval. One of the first major transfers of radio licenses which followed the implementation of the new ownership limits within the 1996 Telecommunication Act was the transfer of 43 stations from Lowell Paxson to Clear Channel Metroplex.<sup>616</sup> When attempting to justify the approval of the merger, which at the time was the largest single transfer of licensed stations, Clear Channel cited the economic savings that would be made possible by the merger through the economies of scale generated by merging facilities in Mobile/Pensacola and in Jacksonville/Brunswick markets.<sup>617</sup> In addition savings on facilities, maintenance and

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<sup>614</sup> Second Report and Order, 4 FCCR 1753 (1989).

<sup>615</sup> *Id.*

<sup>616</sup> DA 97-2443 Memorandum Opinion and Order, 12 FCCR 19853 (1997).

<sup>617</sup> “In Mobile/Pensacola, Clear Channel intends to combine station facilities, which will allow for annual savings of \$215,163. Specifically, Clear Channel estimates savings of \$152,163 on rent (including savings of \$ 35,563 rent of tower space for WTKX(FM)), and additional annual savings of \$63,000 on maintenance and repairs, electricity, and the elimination of redundant production facilities. Additionally, Clear Channel estimates \$323,000 in savings on personnel and \$400,000 in savings that will result from cross-promotion. In Jacksonville/Brunswick, Clear Channel intends to move the radio stations' facilities, including the stations' towers, to existing sites it already owns. Clear Channel estimates that this consolidation will produce estimated total savings of \$263,000 annually. Further savings of \$78,000 in personnel costs will be achieved by combining programming personnel for two of the Jacksonville radio stations and by using WAWS-TV's public affairs director for the radio stations. Thus, Clear Channel anticipates total annual savings of \$341,000 from joint operation of the Jacksonville/Brunswick stations.”  
*Id.*

rent, Clear Channel proposed that redundant staff could be reduced in each market, generating additional savings.<sup>618</sup>

In the order approving this transfer of stations, the FCC cited these savings as a "potential public service benefit of joint ownership," allowing for the cross promotion of commonly owned stations. Relying solely on a filing by Clear Channel, the FCC claimed that the savings generated through economy of scale were significant, and would be, "translated into program service benefits, including additional and improved public service programming."<sup>619</sup> There was no evidence entered into the docket that such programming benefits were ever realized, nor any evidence that any sort of review of the results of this decision was ever undertaken.<sup>620</sup>

The Paxson-Clear Channel Merger was significant for the precedent that it developed for future license transfers. The FCC stated that the agency would consider and cite cost savings generated through economy of scale as justification for approving a transfer of licenses.

In multiple cases, the merger and license transfer appears to have been justified simply on the cost savings generated by the consolidation of operations. In Spokane, Washington, the FCC approved a waiver that allowed for a station transfer which consolidated five radio stations and a broadcast television station together in a single market citing proposed savings which included discounts on bulk purchases of office supplies.<sup>621</sup> Similarly, In El Paso, Texas, the creation of a television-AM-FM combination was approved citing savings of \$282,500 overall, including savings on accounting software, a receptionist and office supplies.<sup>622</sup> In addition to economic savings for joint operations, in various cases the Commission cited station support for

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<sup>618</sup> Id.

<sup>619</sup> Id.

<sup>620</sup> The lack of "follow-up" to ensure the public benefits were actually occurring is a significant indicator of the failure to evaluate the policy implementation. It is an entrenched procedure at the FCC during the proceedings, one that continues to plague the agency.

<sup>621</sup> DA 97-1067, Memorandum Opinion and Order, 12 FCCR 6614 (1997).

<sup>622</sup> DA 97-1147. 12 FCCR 6876 (1997).

scholarships,<sup>623</sup> internships,<sup>624</sup> existing support for community events,<sup>625</sup> an organization's long standing relationship with the United Negro College Fund<sup>626</sup> and the opportunity for the recruitment of women and minorities as additional benefits created by economy of scale.<sup>627</sup>

The hiring of women and minorities became the centerpiece of one case involving Cox.<sup>628</sup> Cox sought a waiver allowing the company to consolidate a newspaper, television and radio cluster in Orlando/Daytona Beach.<sup>629</sup> While proposing that the potential cross-ownership would allow for the hiring of additional women and minorities, Cox also cited the potential economic benefits of joint ownership, including reductions in redundant staff as part of its filing.<sup>630</sup> Market competitor (Press) filed an objection in the proceeding which asserted in part, "...that Cox's claimed savings related to personnel are contrary to Cox's other claims that it anticipates enhancing its ability to promote minority and female employment, as well as programming diversity."<sup>631</sup> Cox responded to the challenge by pointing out that the FCC had considered such savings as a benefit in past transfers, and that if the merger were approved, "its stations will be able to engage in joint efforts to recruit women and minorities in connection with any future employment opportunities."<sup>632</sup> Relying on the Cox response, the FCC disregarded the objection, and approved the merger.<sup>633</sup>

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<sup>623</sup> FCC 97-907, 12 FCC 4993 (1997).

<sup>624</sup> How stations benefiting from the employment of low wage or even unpaid interns generates a public benefit escapes me, even after fifteen years as a radio producer. Some examples of decisions in which internships were cited as a benefit include FCC 98-244, 13 FCCR 21126 (1998), FCC 98-260 13 FCCR 21564 (1998) and DA 98-970 13 FCCR 12366 (1998).

<sup>625</sup> FCC 98-970, 13 FCCR 12366 (1998).

<sup>626</sup> DA 98-1012, 13 FCCR 12340 (1998).

<sup>627</sup> DA 97-107, 12 FCCR 3930 (1997).

<sup>628</sup> Id. at 3931-3933.

<sup>629</sup> Id.

<sup>630</sup> Id.

<sup>631</sup> Id. at 3931.

<sup>632</sup> Id. at 3940-41.

<sup>633</sup> Id. at 3930-3931.

Aside from the logic which demonstrated the problematic relationship inherent in reducing staff while claiming to support hiring of minorities and women, a quandary to which the FCC found itself without an answer, the Press challenge is also significant on a second point. Part of the objection to the merger included a suggestion that part of Cox's plan for the joint operation was the sharing of content across multiple co-owned stations.<sup>634</sup> Press cited Cox's own filing which stated that some of the savings would result from the "common news feed" from its television station to all of its radio stations.<sup>635</sup> This feed would include the sharing of traffic and weather information, children's programming and consumer reports among the Cox broadcast stations in the market and Press argued that such actions would actually decrease programming diversity.<sup>636</sup> The FCC also rejected this argument, stating that the use of common facilities to gather news, traffic and weather information would be a public benefit.<sup>637</sup>

In basic terms, the FCC was setting a precedent which gave approval for the sharing of content between co-owned media outlets. In multiple cases, the FCC relied on this precedent and on the filings of the parties to suggest that the economies of scale generated by joint ownership would generate programming benefits. In these cases, the Commission argued that the mergers would increase public affairs and other informational programming.<sup>638</sup> No docket record contained evidence that an evaluation was conducted to determine if any of these benefits were ever realized.

At first, programming benefits generated by mergers were presented in vague terms by the FCC, but as the consolidation process continued, and accelerated by mid-1998, the data on

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<sup>634</sup> Id. at 3940.

<sup>635</sup> Id.

<sup>636</sup> Id.

<sup>637</sup> Id. at 3942-43.

<sup>638</sup> Examples include DA 97-1067 supra note 78, FCC 97-1147 supra note 79, DA 97-1979 supra note 81, FCC 98-260 supra note 81, and DA 98-1880 13 FCCR 21714 (1998).

what these programming benefits looked like became more specific. A few decisions, based on filings from the parties to the merger, suggested small increases in time dedicated to public affairs programming. In one example, involving a proposed radio-television cross-ownership, Sinclair promised an additional hour per week of “local non-entertainment programming geared to the needs and concerns of the St. Louis television market,” and the airing of “Take One, a weekly 30-minute, local children's program co-produced by several Sinclair television stations,” and a promise to “produce and contribute segments to this program that are directed to the interests of children in the St. Louis market.”<sup>639</sup>

In a proceeding which ultimately granted approval to a television duopoly in Savannah, Georgia, the public interest “offering”<sup>640</sup> was the production of, “separate weekly, half-hour television programs, to be broadcast on Sundays during the period of common ownership, that will feature members of the press interviewing civic and governmental leaders regarding issues of local concern.”<sup>641</sup> In another example, Cox suggested that allowing the company to pool resources from its news hub at WHIO in Dayton, Ohio with stations located in Piqua/Xenia would allow it to produce three new public affairs programs, all of which shared the title, “Miami Valley Reports.”<sup>642</sup>

Many program sharing arrangements included the joint production of informational programming, including the sharing of news, weather and traffic information across co-owned and operated stations. In the approval of two different Cox mergers,<sup>643</sup> the FCC proposed that the sharing of informational content, including news and weather forecasts between the co-owned radio and television stations, would increase the quantity of that content available to the

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<sup>639</sup> FCC 97-907 at note 80.

<sup>640</sup> FCC 97-105 12 FCC 3907 (1997).

<sup>641</sup> Id. Paragraph 11 at 3913.

<sup>642</sup> 98-1880 13 FCCR 21714 (1998).

<sup>643</sup> DA 97-107, supra note 84.

public.<sup>644</sup> In another case approving the Emmis AM-FM-Television cross-ownership in Terre Haute, Indiana,<sup>645</sup> the FCC cited the AM station's two hours of local public affairs programming, the simulcast of the 6 pm local television news, and the coverage of local high school, college and professional sports, and the FM station's use of local air talent, all of which were occurring prior to the merger, as public benefits of the transfer.<sup>646</sup> Likewise, in a multiple market merger, the FCC cited the sharing of resources and content between co-owned television and radio stations as a benefit, singling out the specific suggestion that the the radio stations in each market would carry new five-minute audio inserts produced by the television news department.<sup>647</sup>

In addition to news and weather, other programming changes were also flagged by the Commission as positive.<sup>648</sup> In one example CBS promised to carry a radio broadcast entitled a "Parents Guide to Children's Educational Programming" in four markets where it co-owned radio and television stations.<sup>649</sup> The poor financial condition of an AM station generated approval for a merger involving WSPZ-AM.<sup>650</sup> In another case, Clear Channel proposed that a merger would allow it to program a station which had operated as a translator.<sup>651</sup>

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<sup>644</sup> "Cox projects that in the area of programming, common ownership of WFTV and the radio stations will permit enhanced news coverage and public affairs programming at reduced costs. For example, WFTV would be in a position to simulcast major events such as town meetings, sporting events and political debates on one or more of the radio stations. Additionally, all stations would be able to share the product of radio and television news resources such as stringers, wire services and other news providers. Cox plans to use WFTV's weather services to broadcast weather reports on WWKA(FM), which Cox claims would save the radio station the expense of hiring its own meteorologist while at the same time greatly enhancing its coverage of weather problems in the Orlando area. Cox notes that WDBO has comprehensive facilities for tracking traffic and road conditions, which could be shared with other radio stations." *Id.* at 11.

<sup>645</sup> FCC 98-260, 13 FCCR 21564 (1998).

<sup>646</sup> *Id.* at 21569.

<sup>647</sup> FCC 98-970, 13 FCCR 12366 (1998).

<sup>648</sup> Note the language: Positive, not necessarily in the "public interest."

<sup>649</sup> DA 98-1012, 13 FCCR 12430 (1998).

<sup>650</sup> FCC 03-87, 18 FCCR 9142 (2003).

<sup>651</sup> DA 97-2139, 13 FCCR 7876 (1998).

One of the more creative proposals for enhanced programming arose from a merger involving WMVP, an AM radio station with a sports talk format.<sup>652</sup> Based on the filings of the parties, the FCC suggested that in addition to increased coverage of local sports, the merger could facilitate an increase in, “programming geared toward educating and informing the public on topics like drug use in sports, sportsmanship, and ethics in sports.”<sup>653</sup>

The potential savings generated by economies of scale and programming enhancements were significant factors in merger approvals, but as justifications, they eventually gave way to other devices. In a proceeding which allowed the merger of Clear Channel and Jacor, and the transfer of 234 stations, the final order contained no consideration of the economy of scale, or other public benefits.<sup>654</sup> The approval only included an assessment of the transfer in markets where Clear Channel already maintained stations.<sup>655</sup> The only requirement placed on the merger was the assignment of stations to a divestiture trust to comply with the local market limits.<sup>656</sup>

As media mergers continued to occur, the effect of the mergers on the local advertising market began to become an important aspect of cases during the FCC’s review. In August of 1998, the FCC began ““flagging” public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission’s public interest concerns.<sup>657</sup> Known as the “50/70 Rule,” the Commission announced that a new interim policy would result in a “hard look” at transfers or mergers which, “would result in one entity controlling 50 percent or more of the advertising revenues in the

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<sup>652</sup> DA 99-613, 14 FCCR 4528 (1999).

<sup>653</sup> Id. at 4531.

<sup>654</sup> DA 99-803, 14 FCCR 68706 (1999).

<sup>655</sup> Id. at 68711.

<sup>656</sup> Id.

<sup>657</sup> See 15 FCCR 16062 (2000).

relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.”<sup>658</sup>

The 50/70 Rule analysis figured prominently in many cases.<sup>659</sup> In the New Jersey, Nassau-Seashore merger,<sup>660</sup> the FCC gave approval to a merger of the station groups with the top two shares of the advertising sales which resulted in a station combination which controlled 63.8% of the market.<sup>661</sup> By the end of 2002, the FCC had scheduled hearings for markets where consolidation would allow Clear Channel and Cumulus to dominate more than 90% of a local advertising market.<sup>662</sup> Ultimately the Commission was dealing with mergers which would have resulted in the top two market competitors, Citadel and Clear Channel, a combined share of 99.5% of a local advertising market.<sup>663</sup>

After approval of mergers which resulted in two-owner domination of local advertising markets,<sup>664</sup> the FCC began to reject the effect on advertising markets as a measure of competition, stating that in the future when, “setting our local television and local radio ownership caps, we will rely, where possible, on measures other than shares of advertising markets in order to reflect the decreasing relevance of advertising market shares as a barometer of competition.”<sup>665</sup> At least nominally, the FCC returned to its roots for new justifications,

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<sup>658</sup> “For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct a public interest analysis,” including “an independent preliminary competitive analysis.” Local Radio Ownership NPRM, paragraphs 84-89, 16 FCCR at 19894 (2001).

<sup>659</sup> Some examples include, FCC 02-53 17 FCCR 5423 (2002), FCC 02-55 17 FCCR 5499 (2002), FCC 02-62 17 FCCR 5467 (2002), FCC 02-212 17 FCCR 14709 (2002), FCC 02-184 17 FCCR 12258 (2002), and FCC 02-236 17 FCCR 16985 (2002).

<sup>660</sup> FCC 02-145 17 FCCR 9001 (2002).

<sup>661</sup> Id. at 9011.

<sup>662</sup> FCC 02-165 17 FCCR 13896 (2002), FCC 02-167 17 FCCR 13931 (2002).

<sup>663</sup> FCC 02-166 17 FCCR 13914 (2002).

<sup>664</sup> While some of these transactions were designated for hearings before approval, and in some cases, such as FCC 02-165, denied at that stage, in FCC 03-88, the FCC approved a merger, sending WSPZ(AM) to Radio South. After the transaction, Clear Channel and Radio South combined for a 94.9% control of the advertising market in Tuscaloosa, Alabama. 18 FCCR 7909 (2003).

<sup>665</sup> See FCC 03-127, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

stating that its public interest inquiry had a different focus. “As our predecessor, the Federal Radio Commission put it, “[t]he emphasis must be first and foremost on the interest, the convenience, and the necessity of the . . . public, and not on the interest, convenience, or necessity of the individual broadcaster, or the advertiser.”<sup>666</sup>

However the rhetoric was much different than the actual actions undertaken by the Commission. In a dispute over the transfer of radio licenses in Ithaca, New York, the FCC rejected challenges to the transfer filed by three citizen groups.<sup>667</sup> All three groups were concerned that the local geography made the reception of some nearby signals difficult. Although Ithaca is part of a larger geographic market, if the merger was approved, ultimately one media company would be dominant in the local area.<sup>668</sup> As part of the changes made to defining markets, where the FCC adopted the market definition by Arbitron, the agency denied the citizen petitions without any assessment or regard of the potential changes to content diversity.<sup>669</sup>

Eventually the FCC began to argue that competition for listeners was of paramount concern in terms of a public interest analysis.<sup>670</sup> “Although competition in the radio advertising market and the radio program production market indirectly affects listeners by enabling radio broadcasters to compete fairly for advertising revenue and programming – critical inputs to broadcasters’ ability to provide service to the public – it is the state of competition in the

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Cross-Ownership of Broadcast Stations and Newspapers Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definition of Radio Markets Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, Report and Order and Notice of Proposed Rulemaking, 18 FCCR 13621 at 13647 (2003). [Hereafter 2003 Order]

<sup>666</sup> Id. at 13647-48.

<sup>667</sup> DA 05-1284, Letter: EAGLE II BROADCASTING CORP., SAGA COMMUNICATIONS OF NEW ENGLAND, LLC, FINGER LAKES ALLIANCE FOR INDEPENDENT MEDIA, MR. PAUL GLOVER RE: WTKO(AM), WQNY(FM), WHCU(AM), WYXL(FM), ITHACA, NY. 20 FCCR 8753 (2005). [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-05-1284A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-1284A1.pdf), last accessed July 1, 2011.

<sup>668</sup> Id. at 8754.

<sup>669</sup> Id.

<sup>670</sup> FCC 03-127, supra note 122 at 13641

listening market that most directly affects the public.”<sup>671</sup> As a result, the FCC began to argue in favor of the Outlet Diversity policy implementation, arguing that adopting a policy implemented through the enforcement of numerical limits was “designed to promote competition by assuring that a sufficient number of rivals are actively engaged in competition for listening audiences.”<sup>672</sup>

While audience measurements were included in assessments of station mergers, especially while the FCC was still concerned with the control of advertising markets, ratings figured into very few cases as a measurement or as justification for a decision. In one example, to protect a television station that was non-competitive in its market, the Commission denied a permanent waiver of a newspaper-television cross-ownership, but removed a stand alone condition that had previously been applied to a Tribune owned newspaper and television station operation in Miami.<sup>673</sup>

Assessments of the level of viewpoint diversity available in a market pre- and post-merger were absent from the license transfer decisions and merger dockets identified by the electronic search of the FCC Record. However, some assessments of diversity were included in rulemaking proceedings dealing with media ownership. Including the evidentiary studies funded by the FCC, a measure of viewpoint diversity factors into rulemaking dockets in the 2002 Biennial and 2006 Quadrennial reviews. In each proceeding, the data provides a measure of the common viewpoint of in cases of newspaper-broadcast cross-ownership.<sup>674</sup>

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<sup>671</sup> Id at 13716.

<sup>672</sup> Id. at Paragraph 246.

<sup>673</sup> DA 02-1928 17 FCCR 15526 (2002).

<sup>674</sup> Pritchard, 2002. Pritchard’s study was attacked for lack of control group. See Prometheus 2004 supra note 27. The second study, Jeffrey Milyo, 2006 MOWG Study 6, “The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News,” This study examines the effect of newspaper cross-ownership on television news coverage using issues covered by the organizations, and assigning to a political party to provide a measure of diversity. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A7.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf), last accessed July 1, 2011.

During the 2002 review of its ownership rules, the FCC developed the Media Ownership Working Group. The MOWG was created to develop research to inform the Commission on the current state of the media marketplace. In October 2002, the FCC released 12 studies commissioned by the MOWG. Six of the twelve studies were marketed by the FCC as consumer orientated. The first examined the number of media outlets available in ten markets in the years 1960, 1980, and 2000.<sup>675</sup> The authors concluded that between 1960 and 2000 the number of media outlets available to consumers had increased by 195%, and that the number of independent owners had increased by 139%.<sup>676</sup> A second study used a “variety of supply side and demand side econometric models”<sup>677</sup> to examine how different types of media act as substitutes for one another. The author concluded that in terms of news consumption, daily and weekly newspapers presented the clearest evidence of substitution of consumer choices in news outlets.<sup>678</sup> The third study, conducted by Nielsen Media Research, used a survey design to examine the media usage patterns by Americans.<sup>679</sup>

Two studies examined news production. One was the Pritchard study of common news slant across the commonly owned properties in a newspaper-broadcast cross-ownership, and represented the only study which measured the diversity of viewpoints available in media sources.<sup>680</sup> The second study on news production evaluated the quality and quantity of local news and public affairs programming for three ownership situations, specifically network owned and operated stations, network affiliate stations and affiliates that are co-owned with a newspaper

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<sup>675</sup> Scott Roberts, Jane Frenette, & Dione Stearns, A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000, Media Bureau, FCC, (2002) <http://transition.fcc.gov/ownership/materials/already-released/comparison090002.pdf>, last accessed July 1, 2011.

<sup>676</sup> Id.

<sup>677</sup> FCC News Release, FCC Releases Twelve Studies on Current Media Marketplace, Research Represents Critical First Step in FCC’s Fact Finding Mission, FCC October 1, 2002.

<sup>678</sup> Joel Waldfogel, Consumer Substitution Among Media, (2002). <http://transition.fcc.gov/ownership/materials/already-released/consumer090002.pdf>, last accessed July 1, 2011.

<sup>679</sup> Nielsen Media Research, Consumer Survey on Media Usage, MOWG Study (2002).

<sup>680</sup> David Pritchard, MOWG Study, *supra* note 31.

publisher.<sup>681</sup> Using program ratings as one quality measure, the authors found little difference between the different ownership structures, a result not surprising because the program ratings used for the measurement were for identical programs. Data developed using a second quality measure, the count of awards for news excellence and quantitative measurements of news production, both demonstrated that network owned and operated stations led the other ownership types, while newspaper-owned affiliates outperformed other affiliate stations.<sup>682</sup>

Another study examined the effect of the FCC's implementation and repeal of its financial interest and syndication rules on program diversity of network television.<sup>683</sup> The study's data supported a conclusion that the fin-syn rules did not increase program diversity, and suggested that one reason for this finding was that broadcast networks are influenced to a significant extent by the financial incentives associated with the ownership of programming.<sup>684</sup>

Market based studies represented the other half of the MOWG's contribution during the 2002 Biennial Review. The first of these studies examined the drop in broadcast television audience share, and suggested that broadcasters were facing increasing challenges in terms of advertising rates and program production costs.<sup>685</sup> A second study used data from 45 markets to examine the competition between newspapers, radio and television for local advertising

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<sup>681</sup> Thomas Spavins, Loretta Dennison, Scott Roberts, & Jane Frenette, Local News and Public Affairs Programming on Broadcast Television (2002). <http://transition.fcc.gov/ownership/materials/already-released/measurement090002.pdf> last accessed July 1, 2011.

<sup>682</sup> Id.

<sup>683</sup> Mara Einstein, Program Diversity and the Program Selection Process on Broadcast Network Television, MOWG Study, (2002). <http://transition.fcc.gov/ownership/materials/already-released/survivor090002.pdf>, last accessed July 1, 2011.

<sup>684</sup> Id.

<sup>685</sup> Jonathan Levy, Anne Levine, Marcelino Ford-Livene, Broadcast Television: Survivors in a Sea of Competition, OPP Working Paper, (2002). <http://transition.fcc.gov/ownership/materials/already-released/survivor090002.pdf>, last accessed July 1, 2011.

dollars.<sup>686</sup> The results indicated that overall, the competition for advertising dollars between media types was weak, with radio and newspapers the closest substitutes for one-another.<sup>687</sup>

The third market study was a review of the radio industry in 2002, focusing on the changes to the industry between 1996 and 2002.<sup>688</sup> The study demonstrated that during the six years since the passage and implementation of the Telecommunications Act, the average number of station owners in markets had decreased from 13.5 to 9.9, but that the number of formats remained virtually unchanged from an average of 10.1 in 1996 to 10.2 in 2002.<sup>689</sup> Additionally, the study demonstrated a 13.2% increase in the average advertising revenue received by the largest station owner in a market.<sup>690</sup>

A second marketplace study examining radio content used radio playlists to measure program diversity changes between 1996 and 2000.<sup>691</sup> The data demonstrated song diversity was stable between March 1996 and March 2001 and that playlists for stations within the same format had become more uniform.<sup>692</sup>

The remaining two studies were developed to measure advertising issues. The first concluded that most of the 68% increase in advertising rates between 1996 and 2001 was related to economic growth, but that increased ownership concentration was also a factor.<sup>693</sup> The final

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<sup>686</sup>C. Anthony Bush, On the Substitutability of Local Newspaper, Radio, and Broadcast Television Advertising in Local Business Sales, MOWG Study, (2002) <http://transition.fcc.gov/ownership/materials/already-released/substitutability090002.pdf>, last accessed July 1, 2011.

<sup>687</sup> Id.

<sup>688</sup> George Williams & Scott Roberts, Radio Industry Review 2002: Trends in Ownership, Format, and Finance, FCC Media Bureau, (2002). <http://transition.fcc.gov/ownership/materials/already-released/radioreview090002.pdf>, last accessed July 1, 2011.

<sup>689</sup> Id.

<sup>690</sup> Id.

<sup>691</sup> George Williams, Keith Brown, & Peter Alexander, Radio Market Structure and Music Diversity, FCC Media Bureau, (2002). <http://transition.fcc.gov/ownership/materials/already-released/radiomarket090002.pdf>, last accessed July 1, 2011.

<sup>692</sup> Id.

<sup>693</sup> Keith Brown & George Williams, Consolidation and Advertising Prices in Local Radio Markets, FCC Media Bureau, (2002). <http://transition.fcc.gov/ownership/materials/already-released/consolidation090002.pdf>, last accessed July 1, 2011.

MOWG study was created to develop a model for the examination of quantitative increases in advertising as television markets became more concentrated.<sup>694</sup> The authors concluded that increasing levels of ownership concentration were also likely to result in an increase in “non-programming” materials, including commercials.<sup>695</sup>

While the FCC’s 2002 MOWG research left most of the questions about the effect of media ownership consolidation on viewpoint diversity unanswered, public comments, including a collection of qualitative comments about the effect of the FCC’s media ownership policy, populate large volumes of the rulemaking dockets dealing with media ownership.<sup>696</sup> In the 2002 Biennial Review docket (FCC 02-277), comments in opposition to additional media consolidation or to major changes to the rules which could result in raising the ownership limits, came from a wide spectrum of the public. In one example, the Diocese of Orange proposed that the FCC’s rules had eroded local news and public affairs programming, and that the internet was not providing a meaningful solution or alternative to the loss of this programming.

The Diocese has long been concerned about the erosion of local news and public affairs programming caused by the FCC’s and Congress’ weakening of broadcast ownership limits, and the FCC’s elimination of broadcast rules which formerly had permitted the FCC and the community to monitor broadcasters to help ensure that broadcasters served their community of license with programs which meet community needs and interests. In particular, in this Diocese, religious programming, although wanted by the community, has all but disappeared, replaced by syndicated talk shows and infomercials...Neither cable nor the Internet (whether offered through cable or telephone companies) offer meaningful alternatives to the already scarce supply of truly local news and local public affairs programs on over the air television and radio.<sup>697</sup>

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<sup>694</sup> Brendan M. Cunningham & Peter J. Alexander, [A Theory of Broadcast Media Concentration and Commercial Advertising](http://transition.fcc.gov/ownership/materials/already-released/theory090002.pdf), FCC Media Bureau (2002). <http://transition.fcc.gov/ownership/materials/already-released/theory090002.pdf>, last accessed July 1, 2011.

<sup>695</sup> Id.

<sup>696</sup> One search of the Electronic Comment Filing Systems (ECFS) system for FCC 02-277 generated 2541 different entries, many of which were collections of hundreds of pages of individual comments. As the volume of comment material increased, and mass mailing, including form letters and emails became common in the proceedings, the FCC started collecting comments into groups of identical comments. Only one commenters name, or a designation of “numerous” would be entered into the docket entry, and the entry would include a cover sheet explaining how multiple identical comments had been filed. On the sheet, would be a handwritten number which explained how many of the identical comments had been received. For example: Comment in Docket 02-277 05-08-2003 Numerous 6515382247.pdf

<sup>697</sup> Diocese of Orange, Informal Comments, 01-317, 06-04-2003 Diocese of Orange 6514282997.pdf

A similar comment entered into the docket from the Diocese of Raleigh suggested that the consolidation of ownership of media outlets was not producing positive results in terms of the public interest and having a negative effect on the viewpoint diversity which was available.

It is the concern of this diocese that continued consolidation of broadcast properties by a few media companies is not benefiting the public, but on the contrary lessening the opportunity for divergent voices and opinion. When one company can purchase four, five, eight radio stations in one market, then in all likelihood, the news and public affairs departments will either be eliminated or consolidated into one decision making operation, which decides on philosophy and coverage for all stations. That is **NOT** serving the public good.<sup>698</sup>

Comments from citizens varied widely. A search of the items in the FCC's 2002 Biennial Ownership Review Docket generated material ranging from hand written letters to form emails to individual comments formatted to look like FCC documents.<sup>699</sup> In addition to a variety of post cards, in one case, a comment in opposition to additional media consolidation sent to the Commission was actually written on a sheet taken from a "to do" list pad.<sup>700</sup> While much of the material in the docket filed by citizens was of limited value in terms of evidence, many items contained information relevant to the questions being asked in the FCC's 2002 NPRM.

A John Shaw, who in his comments described himself as a "consumer of local news and information," suggested that while changes to the ownership rules had an effect on entertainment sports and national news programming, the more significant effects of the rule changes were on

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<sup>698</sup> Diocese of Raleigh, Informal Comments, MB Dkt. No. 02-277; MM Dkt. No. 01-235; MM Dkt. No. 01-317; MM Dkt. NO. 00-244 01-317 05-28-2003 Diocese of Raleigh 6514183466.pdf

<sup>699</sup> All comments were taken by searching the review dockets using the FCC's Electronic Comment Filing System. Items not filed electronically are scanned into the docket by Commission Staff. <http://transition.fcc.gov/cgb/ecfs/>, last accessed July 1, 2011. This data base contained an unbelievable quantity of information, and includes a comment filed by Josh Silver, to which committee member Dr. James Baughman was also signatory. 02-277 05-08-2003 Josh Silver 6514084631.pdf

<sup>700</sup> 02-277 12-24-2002 D. R. Haener 6514084787.pdf

local news and public affairs programming.<sup>701</sup> Shaw also challenged the FCC's contention that cable and internet sources would provide access to more local content.<sup>702</sup>

Criticism of the FCC's past decision making on media ownership and the lack of transparency during the 2002 Biennial Review process were common themes of public interest groups, the mass email campaigns, and the comments of individual citizens. Gregory Buck, a teacher from Indianapolis, suggested that permitting local television-newspaper cross ownership, "would lay the ground work for many communities having a thoughtless homogeneity of opinions."<sup>703</sup> As evidence of his larger concerns, Buck also pointed out the lack of news coverage of the FCC's ongoing review.<sup>704</sup>

Commenter Kimberly A. Stenly challenged the FCC's procedures in the review, noting that the Commission had issued a Notice of Proposed Rule Making for the Ownership Rule Review, but the agency had not actually proposed any actual rules in the notice.<sup>705</sup> Stenly suggested to the FCC that the agency make any potential rule changes and the empirical basis for the changes public as well as allow for a meaningful period of time for review and comment.<sup>706</sup>

One comment, filed by Americans for Radio Diversity, suggested that independent station operators were more logically orientated towards diversity, and that the FCC and larger media organizations were working side by side to generate evidence that supported a pre-conceived notion of additional expansions of the media ownership limits.

We can envision distributions of various size stations such that the ad market might not appear too concentrated but all stations wind up in the hands of a very few owners (probably distant national groups). The presence of independent station owners provides a truer degree of diversity, being more likely locally oriented and not constrained against presenting viewpoints antagonistic toward some portion of a wide

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<sup>701</sup> 01-317 01-02-2003 John A. Shaw (6513400263.pdf)

<sup>702</sup> Id.

<sup>703</sup> 01-235 01-02-2003 Gregory Buck 6513400444.pdf

<sup>704</sup> Id.

<sup>705</sup> 02-277 04-08-2003 Kimberly A. Stenley 6514147908.pdf

<sup>706</sup> Id.

ranging conglomerate owner. We are concerned that the Commission more rigorously examine concentration specifically to ensure such independents an opportunity to remain viable and not feel forced to sell out or reduce service. ARD regrets that it is unable to include with these comments the kind of specific empirical data the FCC expresses a desire for at various points in the NPRM. We suppose that the largest national radio groups may have the resources to produce data appearing to validate whatever conclusions they wish to promote.<sup>707</sup>

WEFT-FM, “a locally owned and operated independent radio station,” suggested that the other radio stations in the area, their competitors, were being turned into low service automation outlets run by absentee owners.

Our local media, specifically radio stations in our broadcast market, are already dominated by absentee owners who program from afar with little interactive capacity. The radio shows are too often pre-recorded, not allowing listener input. The radio news staffs locally could generously be called minimal and accountability to the community in any direct way other than through radio listener polls to determine advertising dollars is unacceptably low.<sup>708</sup>

A comment filed by Southern Broadcasting Companies, Inc, a small radio operation in non-rated Georgia markets, proposed that the rules needed to be maintained to allow the company to remain competitive, arguing that if the FCC changed the market rules, the stations would likely have to be sold to a larger competitor.<sup>709</sup> Southern feared a new set of market definitions, which would have put the company in competition with out-of-market stations. As an operator of small stations in a small markets, the delivery of local programming, including a heavy emphasis on local news and weather information was vital to the company’s ability to continue to operate, a model that the ownership of the stations said was only workable as a non-market station.<sup>710</sup>

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<sup>707</sup> 01-317 03-27-2002 Americans for Radio Diversity 6513084147.pdf

<sup>708</sup> Response by Prairie Air Incorporated, WEFT-FM Board of Directors, Dated January 31, 2003 01-317 02-03-2003 Prairie Air Incorporated, WEFT-FM Board of Directors 6513406565.pdf

<sup>709</sup> 01-317 05-28-2003 Southern Broadcasting Companies, Inc. 6514182630.pdf

<sup>710</sup> Id.

The Hispanic Telecommunications Network filed a comment which chastised both Congress and the FCC for causing an “erosion of local news and public affairs programming.”<sup>711</sup> Citing the changes in local programming in Texas, Hispanic charged that the FCC’s “elimination of broadcast rules which formerly had permitted the FCC and the community to monitor broadcasters to help ensure that broadcasters served their community of license with programs which meet community needs and interests”<sup>712</sup> had resulted in local programming being replaced on stations with “syndicated talk shows and infomercials.”<sup>713</sup>

Individual comments from broadcast employees were also critical of the changes to the industry which had occurred since 1996. In one example, Jay Messersmith, a 34-year veteran of broadcasting, suggested that the abandoning of the long standing principles of the public trustee model had negative impacts on the level of service stations and organization were dedicating to the public interest.<sup>714</sup> Citing voice-tracking,<sup>715</sup> lack of local staffing and plugola as three common practices of the post consolidation environment, he suggested that without changes to the rules, and consideration of how the dominant media companies were operating, the FCC would find itself dealing with serious consequences to the radio industry.<sup>716</sup>

Likewise, broadcast technician Thomas C. Smith, a 33-year veteran of the industry who stated that during his career he had worked in both public and commercial broadcasting, was critical of the effects of the changes to the ownership rules, and the apparent favoritism towards larger companies.

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<sup>711</sup> 01-317 06-02-2003 Hispanic Telecommunications Network, Inc. 6514287106.pdf

<sup>712</sup> Id.

<sup>713</sup> Id.

<sup>714</sup> 01-317 01-03-2003 Jay A. Messersmith 6513402117.pdf

<sup>715</sup> Voice tracking is the process of pre-recording the announcer breaks during music programming, and playing the breaks back, using automation, to make the station appear to have live talent. Technology has improved to the point that several stations which share music formats, but operate in different markets, can be voice-tracked simultaneously. Functionally, this means not only is the announcer not in the station at the time of the broadcast, he or she may not even be a member of a station’s local employees.

<sup>716</sup> Messersmith, at note 171.

In the last fifteen years we have discarded many ownership rules that stood for nearly forty-five to fifty years. Many of them were due for revision due to the increases in the number of stations from the time they were originally written. But, the Commission must be aware that because of the fact there is little or no available spectrum, it will be difficult to correct any errors by the unbridled loosening of ownership limits. Unlike other industries, broadcasting and the other wireless industries totally rely on government permission and regulation for the right to operate. Should the government allow one company to own 10-15% or more of all commercial radio stations. Should one's local radio listening and TV viewing be limited to that supplied by a handful of providers when just about everything else one buys is supplied by wider range of suppliers big and small. There is still room for the local hardware, garden, or furniture store even in the world of Walmarts and Home Depots. Broadcasting should be no different.<sup>717</sup>

Smith was also critical of the FCC's use of evidence, stating that as an individual he could not disprove the conclusions, but he remained skeptical of the development process involved in producing the research.

I am not going to address any of the studies that the Commission has released, due to the fact that as an individual, there is no way that I can prove or disprove the conclusions in the reports. I also feel that many of the writers of the studies may of been chosen because they may support preconceived views of the Chairman, Commissioner's or others in the Commission.<sup>718</sup>

MidWest Family, an operator of local radio station clusters, suggested that a strong commitment to covering local news and events had made their stations integral participants in the local communities. Even as an organization which had acquired radio stations under the limits specified by the 1996 Telecommunication Act, Mid-West was critical of the FCC's implementation of media ownership policy.

Prior competition with radio/newspaper combinations, demonstrates the truth behind the FCC' observation that it cannot be said that consolidation has enhanced competition or diversity, and, indeed, may be having the opposite effect. A rule change granting dominant monopoly publishers additional market power will simply enable them to hinder both competition and viewpoint diversity in sole pursuit of their own business interests to the detriment of the public interest.<sup>719</sup>

Additionally, MidWest's comments discussed the changes which had occurred in Madison, Wisconsin, although not in terms of the challenges of new competition, but in terms of the quantity of news being produced within the local radio market.

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<sup>717</sup> 01-317 01-02-2003 Thomas C Smith 6513400986.pdf

<sup>718</sup> Id.

<sup>719</sup> 01-235 12-03-2001 Mid-West Family Stations 6512974131.pdf

Indeed, the overall number of stations offering any substantial commitment to local news and public affairs programming is decreasing. Thirty years ago in Madison, Wisconsin, for example, there were three different commercial radio stations (each with a separate owner) that had fully-staffed news departments. Today, with far more stations, only three owners control most of commercial stations in the Madison market -- and only two of those stations have true local news departments.<sup>720</sup>

A number of citizens submitted comments which discussed changes to the media markets which had occurred in the wake of the Telecommunications Act. Individually, they provide little evidence, but taken collectively these comments spoke with a single voice. The results of media ownership consolidation were not providing the programming choices, local news, public service or diversity that citizens were seeking.

Livingston and Sarah Taylor's comment in opposition stated that as a result of the earlier ownership rule changes by the FCC, Clear Channel had taken over three of the four stations in their small market. After doing so, Clear Channel had changed the stations by bringing in content produced from outside the market, and in the process, had removed local airstaff including "a longtime announcer at one of the stations, who had become something of an institution in terms of public service programs."<sup>721</sup>

R. Morgan Burrow Jr's comment described the "menu" of radio options he found after moving to West Virginia. Burrow's comments included a discussion of both the local geographic problems inherent in signal reception, and the heavy use of automation or syndicated programming by local stations. Pointing out that "it doesn't take an expert to listen for evidence of this," Burrow was critical of the identical station identifications and program clocks of his local radio stations.<sup>722</sup>

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<sup>720</sup> Id.

<sup>721</sup> 02-277 03-03-2003 Livingston and Sarah Taylor 6514082605.pdf

<sup>722</sup> 02-277 05-13-2003 R. Morgan Burrow, Jr. 6514085831.pdf

Bill Willis, a North Carolina commenter, who was concerned about continued access to bluegrass and other traditional music formats, provided some discussion of station programming formats available.<sup>723</sup> After Willis “did a little research,” he determined that of the 20 programs in the state which featured traditional music, “all of these programs are hosted on locally-owned stations or public radio.” Willis, a musician himself, compared this finding with stations owned by national conglomerates, who, he argued, “operate by formula which targets mass markets at a national level and they have little interest in the preferences and culture of local markets.”<sup>724</sup>

Commenter John Oram criticized the level of diversity being created by the internal competition between two Clear Channel owned and operated news-talk stations in Sacramento, California.<sup>725</sup> Oram points out that the two talk stations KFBK and KTSE, both carry a variety of syndicated and local conservative hosts, “All the talk show personalities on these two Clear Channel Broadcasting stations have a consistent political agenda. Several of the radio stations’ personalities publicly ridicule opposing points on view.”<sup>726</sup>

Commenter Russell Blaine Joesphson discussed the changes to his favorite local stations after they were sold to Clear Channel, stating that the changes in ownership limits which occurred had “resulted in less diversity of broadcast choice in Northern Colorado, and less responsiveness from local broadcasters in serving the public interest.”<sup>727</sup> Lamenting the change in programming formats which had largely caused him to abandon radio, Joesphson argued that the changes were made in order to serve a more profitable market segment, to which he did not belong.<sup>728</sup>

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<sup>723</sup> 02-277 04-09-2003 Bill Willis 6514086823.pdf

<sup>724</sup> Id.

<sup>725</sup> 02-277 05-28-2003 John Oram 6514148297.pdf

<sup>726</sup> Id.

<sup>727</sup> 029277 05-27-2003, Russell Blaine Joesphson 6514147715.pdf

<sup>728</sup> Id.

In similar fashion, Anu Pugalia's comments describe changes to the Oklahoma City, Oklahoma, radio market, including a "consistent decline in the quality of programming" created by poor local news coverage, increases in the use of syndicated programming and the use of airstaff across multiple co-owned radio stations.<sup>729</sup>

The loss of locally produced content was the heart of the comment entered by Steve Morley. Concerned about what he was already seeing on stations in Hartford, Connecticut, Morley argued that since the passage of the 1996 Telecommunications Act and the automation of his local stations he had, "been 'enjoying' dumbed-down, lowest common denominator radio and TV programming."<sup>730</sup>

Radio-television cross-ownership and television duopoly were both at issue in the comments of San Francisco resident Tom Thorton.<sup>731</sup> Upset that radio station KFRC was carrying the same news produced for the local CBS television affiliate, two local Cox owned radio stations were carrying the same newscast and that the co-owned television stations KCRA and KQCA were sharing a newsroom, Thorton challenged the FCC's understanding of competition, arguing, "News organizations compete with each other to get the latest and greatest information to the public. This is a healthy competition that should not be limited by single ownership of a group of stations in the same market."<sup>732</sup>

Newspaper-Broadcast Cross Ownership was on the mind of Arizona commenter Christopher Gunty, who was concerned about Gannett's control of the Arizona Republic and local television station KPNX. He said that the combining of the two newsrooms had "not led to better use of resources and more diverse coverage of the area, but concerted efforts on the part of

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<sup>729</sup> 02-277 06-02-2003 Anu Pugalia 6514156489.pdf

<sup>730</sup> 02-277 05-30-2003 Steve Morley 6514286362.pdf

<sup>731</sup> 02-277 05-27-2003 Tom Thornton 6514147733.pdf

<sup>732</sup> Id.

the station and the newspaper to focus their resources on the same targets.”<sup>733</sup> Additionally Gunty was concerned about the ownership of eight Phoenix radio stations by Clear Channel, and the news presented on those stations which was produced in a single newsroom.<sup>734</sup>

Commenter Carter Crawford challenged the FCC’s policy implementation of media ownership stating that the existing rules were being applied illogically.<sup>735</sup> Arguing in favor of a market by a market analysis of mergers and against a blanket rule for all markets, Crawford was critical of the effects of the changes in the small television market where he lived.

Your goal is more localism, diversity of voices, and a free enterprise system which encourages competition, including new minority voices. I fail to see how any of the consolidation in broadcasting has achieved that. And certainly merging two very diverse news cultures like print and broadcast will create new problems with turf wars and quality. To date, in this small market we have experienced consolidation in radio. It has created two entities which control 90% of the stations, increased rates, and decreased local programming and news staff.<sup>736</sup>

The changes to public service and access was the theme of commenter Eileen Faucette’s contribution.<sup>737</sup> Faucette, who described herself as a PTA child advocate, detailed a series of events that occurred when her organization attempted to get a public service announcement on the air after the death of a young child in a bus-related accident. In the comment, Faucette is appalled over the fact that despite the extensive news media coverage of the child’s death, including multiple stories about the parent’s anguish, the local stations were unwilling to run any public service announcements about bus safety. While the local television and newspaper provided some limited coverage, local commercial radio stations, all of which were owned by one of three large corporations, refused the request. Faucette’s discussions with local station management were also fruitless, but for reasons she had not anticipated.

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<sup>733</sup> 02-277 05-16-2003 Christopher Gunty 6514087324.pdf

<sup>734</sup> Id.

<sup>735</sup> 02-277 05-16-2003 Carter Crawford 6514157191.pdf

<sup>736</sup> Id.

<sup>737</sup> 02-277 06-02-2003 Eileen Faucette 6514153810.pdf

Not a single local radio station director would agree to run the PSAs at all, much less to run them in drive time. All said such decisions are no longer a local matter and must be taken up with folks far away. All said this is due to format and priority changes dictated by their corporate owners. Further, they all concurred that co-marketing of large moneymaking events is their primary service and is sufficient to fulfill their required service commitment. And, that they are usually uninterested in public information campaigns, even on issues with no controversy.<sup>738</sup>

Commenter A. Michael Schaal's observation about the nature of radio programming in the post-consolidation era is perhaps one of the most enlightening comments about the effect of consolidation on the content of radio programming.

I bemoan the loss of local voice that has arisen due to corporate takeovers of small town newspapers and radio spectrum. It is truly an eerie and disorientating experience to fly into another town and find exactly the same radio formats, playlists, promos, etc. This adds to the 'vanillization' of America and results in a tremendous loss of diversity in culture and thought. It is likely to lead, in my opinion, to a growing sense of alienation and disassociation between people and the world at large.<sup>739</sup>

While these examples only touched on a tiny fraction of the material in the rulemaking dockets, one could argue that these public comments, and the many others like them, which include comments from citizens working in the media industry and describe actual market conditions or media content are substantially more informative than any other evidence in the record dealing with the relationship between ownership and diversity. Yet there is nothing to suggest the FCC considered any of this information from the docket in the decision making process which occurred during the 2002 review.<sup>740</sup>

This finding is consistent with the conclusion that the FCC has consistently relied on economic based evidence in rulemaking associated with media ownership.<sup>741</sup> The most common analysis performed by the Commission in the many license transfers which occurred after

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<sup>738</sup> Id.

<sup>739</sup> 02-277 06-02-2003 A. Michael Schaal 6514154778.pdf

<sup>740</sup> In retrospect, I realized it is difficult to cite the absence of an item. See: Nothing, "There is nothing and that says everything", @FCC, 1996-2010.

<sup>741</sup> Blevins & Brown, supra note 68.

implementation of the new ownership limits for radio in 1996 was a measure of the percentage of the advertising market that would be controlled by the licensee after the transfer. Until changing the policy to a straight count of media ownership based on existing rules, the analysis of advertising share was used by the FCC as a proxy for a healthy market operation, even as mergers were being approved that allowed a single organization's control of the advertising market to rise to over 70 percent.<sup>742</sup>

In practical terms this means that since the era of deregulation began, and during the entire period where competitive regulatory principles have provided the foundation of the agency's regulatory ideology, the FCC has used economic analysis to justify policy decisions that are supposedly designed to enhance viewpoint diversity. The agency relied only the smallest of fraction of evidence on that course of action, while ignoring large volumes of public comments and testimony opposed to the current implementation of policy.

In justifying mergers, the agency relied first on the benefits of economies of scale, many of which were created by reductions in air-staff, cross media promotion, and content sharing, including the sharing of informational and news content, which results in a reduction to the quantity of content produced locally. In cases where specific programming promises were made by the parties to the merger, there is no evidence the FCC ever conducted an evaluation to determine if such programming was beneficial, or if such programming was ever implemented at all.

As mergers grew larger and more frequent, and competitive concerns moved from the economy of scale to the health of advertising markets, a new proxy for the state of competition, the FCC changed rationales. Remaining loyal to a largely undefined competitive regulatory philosophy, and the related marketplace "protections" for the policy goals of localism and

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<sup>742</sup> FCC 02-145, supra note 117.

diversity, the FCC was seriously considering potential mergers which would have allowed the top two competitors in market up to 99.5% control of that advertising market.

Then the FCC changed directions again, concluding that numerical limits on media ownership were the best policy to assure its public interest goals. One owner became the proxy for one viewpoint, and even as this policy took hold, the Commission continued to reduce the number of media owners by approving mergers and granting waivers in anticipation of potential rule changes.<sup>743</sup>

Despite overwhelming public opposition to rule changes in both 2002 and 2006, as well as the setback in the first *Prometheus* decision, the agency continued its illogical and unsupported implementation of media ownership policy. What is truly troubling about the process is that despite the fact that the agency had almost completely ignored measurements of viewpoint diversity, the key to understanding the effect of the policy implementation on the policy goals, the FCC already had evidence funded by the Commission itself, which demonstrated that between 1996 and 2002, the peak years of media ownership consolidation, advertising rates were going up substantially,<sup>744</sup> increases in format and programming diversity were not occurring<sup>745</sup> and despite large increases in the number of media outlets available, the number of individual owners continued to grow smaller.<sup>746</sup> Each of these findings were in direct opposition to the theories on which the policy implementation was based.

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<sup>743</sup> Waiver examples: DA97-1979, 12 FCCR 13908 (1997) FCC 97-109 12 FCCR 3967 (1997), FCC 98-175 13 FCCR 21119 (1998).

<sup>744</sup> Brown & Williams, MOWG Study, *supra* note 150. See also, Williams & Roberts, Review, *supra* note 145.

<sup>745</sup> *Id.*

<sup>746</sup> *Id.*, see also Pew Research Center For People and the Press, [Key News Audiences Now Blend Online and Traditional Sources: Audience Segments in a Changing News Environment](http://people-press.org/report/444/news-media), (2008), available at <http://people-press.org/report/444/news-media> ("Pew People and the Press"), last accessed July 1, 2011.

As the FCC considers these issues again, and does so in an age of new media, it is worth taking a look at the evidence the Commission plans to collect as part of its 2010 Quadrennial Review, and that inquiry provides the basis for the case study discussed in the next chapter.

# Chapter 5:

## A Case Study in Evidence Gathering

Radio News Production, FCC Media Ownership Study

5 and a Three Market Data Solution

## Chapter 5: A Case Study in Evidence Gathering

As the 2010 Quadrennial Ownership Review moved forward, the Commission's desire to generate evidence took the form of a series of solicitations for bids on research studies.<sup>747</sup> The FCC proposed nine individual studies, while also requesting proposals for others.<sup>748</sup> This chapter looks at the FCC's 2010 Notice of Inquiry and the studies for which the FCC solicited bids. The chapter then reports the results of a study I had formally proposed to FCC in response to one of the original nine solicitations. The study was executed after the FCC aborted the initial bidding process on the studies the agency had proposed. The chapter compares the evidence of my study to the one which the FCC later commissioned, and concludes with a discussion of the value of the evidence the agency sought during this phase of the rulemaking process.

In 2010, the FCC's stated goal for the quadrennial review was to develop an understanding of that the current status of the media environment.<sup>749</sup> Relying on a marketplace based approach to develop a rational policy to regulate multiple forms of mass media, including some, such as the internet, over which the agency lacks proper jurisdiction,<sup>750</sup> the FCC restated a belief that the primary objective of viewpoint diversity was paramount.

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<sup>747</sup> DA 10-1084. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-10-1084A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-1084A1.doc), last accessed July 1, 2011. Hereafter {RFQ}.

<sup>748</sup> Id.

<sup>749</sup> FCC 10-92, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-92A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.doc), last accessed July 1, 2011. Hereafter {2010 Notice of Inquiry}

<sup>750</sup> The FCC's two pronged regulatory approach was undermined by two legal decisions dealing with the internet. In *Reno v ACLU*, contained within a decision about the regulation of indecency online, the Supreme Court ruled that scarcity was not an issue for the internet, and thus strict scrutiny applied to regulation of internet content. The decision resulted in providing the internet the more stringent first amendment protections given to newspapers. In terms of structural regulation, the FCC's delegation was contained in the 1996 Telecommunications Act and thus out of date. An attempt by the FCC to implement net neutrality guidelines that provided regulations controlling how internet service providers handled network traffic, was struck down by the DC Circuit in the *ComCast v FCC* decision as being beyond the delegated powers of the agency. See *Reno v ACLU*, 521 U.S. 844 (1997) and *ComCast v FCC* 600 F.3d 642 (2010).

While technologies and marketplace conditions change, the core values we seek to protect are the same; to foster a strong and independent broadcast media that provides Americans with multiple and diverse sources of news, public affairs and entertainment programming, helping to equip them to be informed participants in our democracy at the local and national levels.<sup>751</sup>

As for the influence of new media, and the relationship between broadcasters and internet-based media forms, the FCC stated that in the current environment, broadcasting remains an important source for information.<sup>752</sup> New media outlets have a role to play in any decision about ownership rules, importantly however, the agency stated that new media have been successful in increasing the amount of news and programming available but they have not yet supplanted traditional media.

The Internet has clearly not wholly supplanted traditional media, such as broadcast stations, newspapers and cable systems, but it has increased the quantity of news and programming available to consumers. Our review must take account of the Internet's role and significance.<sup>753</sup>

Among the other key points in the 2010 Notice of Inquiry (NOI) is the Commission's continued reliance on the ideas of competition as a tool for achieving the other two regulatory objectives of localism and diversity.<sup>754</sup> The Commission went as asking whether or not the market for advertising could be used as a successful proxy for consumer access to content.<sup>755</sup>

As for media, despite a decrease in the number of people reporting that they read a daily newspaper, or any influence that new media outlets may have in the contemporary environment, the FCC repeated a belief first articulated in 1975<sup>756</sup> that newspapers and television stations are the "most important and relevant outlets for news and information in local markets."<sup>757</sup>

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<sup>751</sup> 2010 Notice of Inquiry, *supra* note 3 at paragraph 1.

<sup>752</sup> *Id.* at Paragraphs 5-6.

<sup>753</sup> *Id.* at paragraph 11.

<sup>754</sup> "Historically the Commission has relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets." *Id.* at paragraph 40.

<sup>755</sup> "If the advertising market is found to be competitive, can we then infer that the menu of content broadcasters provide is doing a good job of attracting the demographic groups in which advertisers are interested?" *Id.*

<sup>756</sup> The belief that radio could not be considered an active competitor in the delivery of news and information when compared local television and a daily newspaper was articulated by the Commission in the 1975 order which banned local newspaper/broadcast cross ownership. See Docket 18110, In the Matter of Amendment of Sections 73.34,

Radio, despite the continuing development of news, news-talk and other informational formats, or the high ratings associated with this type of programming for both commercial and non-commercial radio stations, is considered as a third-tier contributor among traditional media by the Commission. While the agency may want to avoid discussions of radio's contributions or the effects of the previous ownership consolidation in the medium, radio should be considered an important player. The Pew study the FCC relies on so heavily in the NOI for a baseline understanding of the current media market, indicated that nearly 236 million Americans listened to radio in an average week, a number that has remained relatively stable as newspaper readership declines.<sup>758</sup> In terms of measuring the effects of ownership consolidation on competition, localism and viewpoint diversity, radio should be considered. Despite an increase of 945 radio stations between 1996 and 2010, commercial radio stations have seen a 39 percent reduction in the number of owners during the same time period.<sup>759</sup>

In spite of its second or third tier status as a contributor to viewpoint and information diversity, radio did factor into the studies initially requested by the FCC as part of the 2010 Review. In the Request for Quotations (RFQ) released in June 2010,<sup>760</sup> the development of a data set on radio programming was the primary objective of 2 of the 9 studies.<sup>761</sup>

## The Studies

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73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C 2d 1046 (1975).

<sup>757</sup> "The 2006 Quadraennial Review Order defines major media voices as full power commercial and noncommercial television stations and major newspapers, based on the conclusion that such entities are generally the most important and relevant outlets for news and information in local markets." 2010 NOI, supra note 3 at paragraph 23.

<sup>758</sup> "Approximately 236 million Americans listened to at least some radio in an average week in the fall of 2009, a number that has been basically static for the past five years, and news/talk/ information remains among the most popular formats." Id. at paragraph 46.

<sup>759</sup> Overall the total number of owners of radio stations decreased from 5,133 to 3,143 between 1996 and 2010 despite an increase in the number of stations on the air during the same time period. Id. at paragraph 4.

<sup>760</sup> RFQ, supra note 1.

<sup>761</sup> Id.

The intent of the nine studies initially proposed by the FCC was to 1) inform the Commission on the effects of the existing media ownership policies, 2) meet the evidence standards of Section 202(H) of the 1996 Telecommunications Act, and 3) provide evidence that will answer some of the questions raised by the majority in the *Prometheus Radio Project v. FCC case*, which stayed much of the Commission's media ownership decision in the 2002 review proceeding.<sup>762</sup>

The Statement of Work explains the Commission's request for empirical data consistent with the existing three-prong policy objectives of competition, localism and diversity:

We seek studies that specify a relevant performance metric with respect to one or more of our policy goals and then analyze the impact of differences in local market media ownership structure on the performance metric(s). We are primarily but not exclusively interested in empirical work. All studies will be made public and be subject to general public comment and formal peer review. Because the local television, local radio, and cross-ownership rules under consideration are defined with respect to local markets, we expect the studies to focus on local markets as the primary unit of analysis. Contractors may supplement market-level analysis with analysis at other levels, e.g., at the individual station level, provided that they specify a clear link to the relevant Commission rule or rules. By relating the quantity of radio news provided in local markets to media market ownership structure, the present study addresses the Commission's localism and diversity goals. To the extent that this study addresses listening to news and public affairs programming, it is relevant to the localism and diversity goals as well. Because both this study and the study entitled "Quantity of Demographically-targeted Content as a Function of Local Media Market Ownership Structure" involve analysis of radio station formats, bidders are invited but not required, to consider submitting separate proposals for performing these two studies.<sup>763</sup>

To develop data on the C-L-D policy objectives, each study solicited had a specific objective, in some cases tied to a specific type of medium, either radio (#5 and #7), television (#4) or the internet. (#6) Overall the Commission stated an interest in the development of empirical work, although, as was stated in paragraph two of the RFQ, such methods were not the exclusive focus.

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<sup>762</sup> Id.

<sup>763</sup> Statement of Work For Quantity of Radio News and Public Affairs Programming Provided and Audience for Radio News Programming as a Function of Local Market Structure, at Paragraph 2. See <https://www.fbo.gov/utills/view?id=fe7ef5a6fa20b80b617a58e5e0d8d47b>, last accessed July 1, 2011. Hereafter: {SOW-5}.

Each of the studies will define a relevant performance metric with respect to one or more of the three public interest goals of competition, localism, and diversity that the Commission seeks to promote through its media ownership rules. The studies will then examine how results vary across markets with differing ownership structures. The Commission's primary but not exclusive focus is on empirical work.<sup>764</sup>

Aside from the studies dealing with specific media types, one (#1) asked for data on a measure of media usage by platform within local market structure.<sup>765</sup> A second (#2) requested data to be developed a survey which tested consumer satisfaction with the current media environment.<sup>766</sup> Another (#3) solicited data on civic knowledge by market type and demographic group.<sup>767</sup>

The final two studies were interested in measures of viewpoint diversity. The first (#8)<sup>768</sup> asked for the development of empirical data on the relationship between market structure and viewpoint diversity, while the second (#9)<sup>769</sup> asked for a theoretical analysis of the effect a market's structure had on the range of viewpoint diversity supplied.<sup>770</sup>

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<sup>764</sup> RFQ, supra note 1.

<sup>765</sup> Study 1: Media usage as a function of local market structure. This study will analyze media usage (television viewing and radio listening) as a function of local market structure, taking account of the availability of other media platforms and holding constant other relevant factors. Id.

<sup>766</sup> Study 2: Consumer survey and consumer valuation of media as a function of local market structure. This study will examine, based on a consumer survey, the impact of local media market structure on consumer satisfaction with available broadcast radio and television service. The study will examine, to the extent feasible, overall satisfaction with the media environment, satisfaction with locally-oriented media content, including news, and satisfaction by demographic groups. The survey will gather information on how much time people spend with various media and how people get news and information. The survey may also collect information on certain measures of civic engagement or political participation. Id.

<sup>767</sup> Study 3: Civic knowledge/engagement as a function of local market structure. This study will examine civic knowledge and/or engagement with respect to local or regional events as a function of local market structure, for the overall population and also, to the extent feasible, by demographic group. Id.

<sup>768</sup> Study 8: Empirical analysis of the impact of local market structure on viewpoint diversity. This study will examine the impact of local market structure on viewpoint diversity. Id.

<sup>769</sup> Study 9: Theoretical analysis of the impact of local market structure on the range of viewpoints supplied. This study will develop and analyze a theoretical model of the impact of local market structure on media owners' incentives to shape the distribution of information under varying assumptions regarding owner incentives. Id.

<sup>770</sup> Importantly, the specific RFQ for study #9 was initially cancelled by the Commission shortly after the release of the solicitation.

The agency stated that the submitted studies and the associated collected data would be made available for public comment and undergoing a peer review.<sup>771</sup> Although the submission deadline for the bidding process was July 6, 2010,<sup>772</sup> and the Statement of Work mandated an October 31, 2010, deadline for the research to be completed,<sup>773</sup> the Commission did not make a decision on the bids until late in December of 2010, when it funded seven contracts.<sup>774</sup>

This case study was originally designed and submitted to the FCC in response to the questions posed by study number five, “Quantity of Radio News and Public Affairs Programming Provided and Audience for Radio News Programming as a Function of LocalMarket Structure.”<sup>775</sup> It is presented here to generate a comparison of evidence between the FCC’s chosen study which uses station “format” as a proxy measurement for content and this study which quantifies the actual distributed news content of radio stations in a variety of ownership structures, facing different competitive environments, in three different sized markets.

Study Number Five was solicited to develop empirical evidence to provide data on the quantity of news production and the audience size for local broadcast radio news. Additionally, the FCC was interested in the impact of local media market structure and its relationship to the quantity of radio news being produced. The study request suggests that a potential contractor assess the impact of local market structure on the quantity of news being produced, and that the

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<sup>771</sup> When the first five studies were released on June 15, 2011, the FCC also released a Protective Order of the Government Furnished Information, which required anyone who wanted access to the underlying data sets to agree to, “affirm that any written, electronic, or printed analyses or material that I create (or cause to be created) in the course of my review shall not reveal the information contained in the Data Sets.” see: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1056A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1056A1.doc), last accessed July 1, 2011.

<sup>772</sup> RFQ, supra note 1.

<sup>773</sup> SOW-5, supra note 17.

<sup>774</sup> After many unsuccessful attempts to track the FCC’s decision, including a Freedom of Information Act request (FCC FOIA Control #2010-558), and direct assistance from both Senator Russ Feingold’s and (later) Senator Ron Johnson’s offices, information on the awards was obtained in a phone interview and email exchange with FCC’s Bridget Gauer from the agency’s Office of Managing Director on March 23, 2011. Notably, when seeking information, on the study awards, her email stated that awards were made, but not necessarily announced, “I reviewed Fedbizopps myself in regard to Study 5 and see that this one fell through the cracks in regard to an award notice.” My response, “Thanks, I am sure it did.”

<sup>775</sup> Statement of Work, Specific Requirements, SOW-5, supra note 17.

availability of stations with “all news” or “news/talk” formats, provides “a useful if imperfect proxy for the availability and consumption of news from local stations.”<sup>776</sup>

The FCC’s request to use station format as a proxy for actual news content production made the selection of Joel Waldfogel’s proposed study design not only a logical choice, but also one that demonstrated a clear indicator of entrenchment of choice. Specifically, the choice reflects the FCC’s ongoing preference for an economist, using a accepted statistical design and regression methodology, developing a data set using proxy measurements for content.

No stranger to the debate over media ownership, Waldfogel had developed a study on media use substitution for the FCC’s Media Ownership Working Group (MOWG) which was included in the 2002 review,<sup>777</sup> as well as some research with the National Bureau Economic Research (NBER) using programming format as a proxy.<sup>778</sup> This earlier work included a study which conducted a quantitative count of named formats to examine the radio industry after passage of the Telecommunications Act in 1996 indicated that as station ownership consolidated, there was an increase in the number of formats, including music formats, in relationship to the number of stations.<sup>779</sup>

The use of format as a proxy demonstrates why the use of proxy measurements in the review process should be considered a suspect methodological approach. Setting aside the

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<sup>776</sup> “The Contractor shall investigate and provide a study...addressing the impact of local media market structure on the quantity of radio news provided and the audience for radio news programming in local markets. The Contractor shall analyze the availability of radio stations with “all-news” or “news/talk” formats and the usage of (*i.e.*, listening to) these stations as a function of local market structure... The presence of stations with these formats and listening to these stations provides a useful if imperfect proxy for the availability and consumption of news from local radio stations.” *Id.*

<sup>777</sup> “Consumer Substitution Among Media.” Joel Waldfogel, FCC 2002 MOWG Study #3. Available online, <http://transition.fcc.gov/ownership/materials/already-released/consumer090002.pdf>, last accessed July 1, 2011.

<sup>778</sup> This paper is also discussed in chapter I. See Steven T. Berry & Joel Waldfogel, *Mergers Station Entry, and Programming Variety in Radio Broadcasting*, NBER Working Paper 7080, available online, <http://www.nber.org/papers/w7080> (1999).

<sup>779</sup> *Id.* See also: Steven T. Berry and Joel Waldfogel, “Public Radio in the United States: Does It Correct Market Failure or Cannibalize Commercial Stations?” <http://www.nber.org/papers/w6057>, last accessed July 1, 2011 and “Free Entry and Social Inefficiency in Radio Broadcasting,” <http://www.nber.org/papers/w5528>, last accessed July 1, 2011.

question about whether or not an increase in music formats should be considered a solid measurement of an increase in viewpoint diversity,<sup>780</sup> approximately one out of every three stations in the top 50 markets duplicates an existing format within the same market.<sup>781</sup> Of the remaining stations demonstrating some form of identifiable “format diversity,” several radio formats are different, literally, in name only.<sup>782</sup> Using industry data to define the content of a variety of formats, one can find duplications between format different types, like *Soft Rock* and *Rock/AC* that are different “formats” but share exactly the same definition, audience demographics and sample content.<sup>783</sup> Additionally, several formats are no more than simple variations on a basic theme. For example, data at the Katz Media website showed at least six named variations of the *Adult Contemporary* format.<sup>784</sup> Yet a simple count of formats based on the named format, without knowledge of or an examination of the content of those stations, would mark them as “diverse.”

Professor Waldfoegel’s contribution to the 2010 ownership proceeding included the production of two studies. “Station Ownership and the Provision and Consumption of Radio News,” was completed in response to the request for Media Ownership Study #5, and the study

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<sup>780</sup> The FCC has cited this increase as benefit in the past, including during the 2002 Review Process. Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 17 F.C.C.R. 18503 (2002).

<sup>781</sup> Data obtained from Katz Media Group’s Radio Research Center. Katz Radio Group is the, “number-one national sales representation firm in the radio industry, working with more than 2200 radio stations in over 300 markets across the U.S.” The website contains a handy archive of information about commercial radio stations, including ownership, format and broadcast frequency of those stations, with the data arranged and searchable by market. [www.krgspec.com](http://www.krgspec.com), last accessed July 1, 2011.

<sup>782</sup> Significant to this discussion is my knowledge of the inner workings of the radio industry developed during my career as a major market radio producer, which gives me a useful perspective on the methodology being discussed here. I not only understand, but have I also participated in the marketing process which uses the names of radio “formats” as audience building and sales tools.

<sup>783</sup> Consider these format explanations from Katz: *Soft Rock*: “Soft Rock plays older, softer rock songs from such artists as Steely Dan, Van Morrison, The Eagles, Billy Joel, etc. Offers stronger male appeal than mainstream A/C. Core audience is 35-44. Audience estimates should be used with caution due to small sample size” and *Rock/AC*: “Rock A/C plays older, softer rock songs from such artists as Steely Dan, Van Morrison, The Eagles, Billy Joel, etc. Offers stronger male appeal than mainstream A/C. Core audience is 35-44.” Data taken from [www.krgspec.com](http://www.krgspec.com), last accessed July 1, 2011.

<sup>784</sup> These include: Adult Contemporary, Christian AC, Farm/Adult Contemporary, Hot AC, Rhythmic AC, Urban AC, Rock AC, and Smooth AC. Id.

“aims to provide some evidence on the availability of radio news, along with evidence about the relationship between station ownership and the availability of news programming.”

Repeating his earlier reliance on named formats as a mechanism for “understanding” the content of stations, Waldfoegel states,

One way of characterizing the availability of programming is by counting the number of stations in a given radio format. While there are many distinct formats offering music (top 40, adult contemporary, and so on), there are very few formats under the heading of news. The vast majority are termed simply, “news.” A small group offers “business news.”<sup>785</sup>

Using this measure, along with a set of ratings data from Arbitron, an archive listing of public radio stations, and a set of Government Furnished Information (GFI) on format designations, Waldfoegel develops a classification of five possible non-music station types, commercial news, commercial talk, commercial business news, public news, and public talk.<sup>786</sup> After reviewing the dataset, he concludes that 95% of the markets within the top 300 Arbitron Markets have a commercial “news” station and 41% have a public “news” station.<sup>787</sup>

Next, Waldfoegel turns to a measure of substitutability between the five station classifications, something that was not requested by the Commission’s RFQ. Inexplicably, he frames the unasked question in terms of “benefit” of format similarity.

The near ubiquity of “news” stations raises the question of the similarity of the various types of news stations. For the sake of illustrating the point, if all five of the available news formats were identical, then much of the benefit listeners could derive from news stations would be achieved with the first local news station, and listeners would derive little benefit from additional news stations. Because virtually all markets have a news station, there would be very little scope for different ownership arrangements – or anything else – to increase the benefit available from news stations.<sup>788</sup>

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<sup>785</sup> Joel Waldfoegel, “Station Ownership and the Provision and Consumption of Radio News” available online: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-307471A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307471A1.pdf), last accessed July 1, 2011.

<sup>786</sup> Id.

<sup>787</sup> Id.

<sup>788</sup> Id. at page 6.

Logically, for an agency concerned, at least nominally, with diversity of information, identicalness in news programming would be problematic, but the FCC has repeatedly said that market conditions which result in a quantitative increase in the availability of informational programming are in the public interest and serve as an indicator of viewpoint diversity.<sup>789</sup> Therefore, despite any problems with rivalrous imitation or content sharing which may occur, the FCC believes that the public interest is served with quantitative increases in the production of informational programming, so additional stations carrying a news format, even as loosely defined by Waldfogel's five-type of station design, would be seen, and very likely cited, by the agency as serving the public interest.

In response to the question of the study request, the relationship of ownership to news production, Waldfogel concluded, "Markets with proportionally more commercial news stations in large ownership groups have fewer news stations and less news variety, relative to other markets their size,"<sup>790</sup> and he found, "no evidence that the presence of commercial news stations owned by newspapers promotes the availability of greater news variety or listening."<sup>791</sup>

The study's peer review,<sup>792</sup> prepared by the University of Oklahoma's Catherine Tyler Mooney and released by the FCC states, "Professor Waldfogel's methods and assumptions are reasonable and technically correct,"<sup>793</sup> and "the methodology and assumptions are consistent with accepted theory and econometric practices in the field of empirical economics. Waldfogel makes use of methods used in his previous, well-regarded research to address the Commission's

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<sup>789</sup> Frankly I find this line of thinking, that more than one news station generates no benefits for the public, whether in a regulatory environment based on competition or not, is preposterous. If for no other reason, more news stations would be beneficial through an increase in the overall increase in informational programming that would be available in a market.

<sup>790</sup> Waldfogel, 2011, *supra* note 39 at page 18.

<sup>791</sup> *Id.*

<sup>792</sup> Catherine Tyler Mooney, "Peer Review, Study 5: Station Ownership and the Provision and Consumption of Radio News" [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-307469A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307469A1.pdf), last accessed July 1, 2011.

<sup>793</sup> *Id.* at page 1.

questions.”<sup>794</sup> Mooney also accepts Waldfogel’s suggestion, even in the absence of any evidence to support it, that “most markets support multiple stations, which provide distinct programming from the audience’s perspective.”<sup>795</sup>

Her review was not without criticism, however. Mooney points out that a table that was not discussed in the text reveals a positive relationship between local ownership and the number of news stations,<sup>796</sup> a finding that may be problematic for the FCC if the agency wishes to raise the limits on radio ownership. Most importantly, Professor Mooney’s review makes an accurate observation that the analysis would be improved if news quality and quantity could be assessed at the individual station level.

While it would be beyond the scope of this study, an ideal data set would contain measures of the quantity and quality news programming at the station level.<sup>797</sup>

A measurement of the production of news content at the station level in a variety of ownership and competitive environments was at the heart of the design of my study. When initially proposing the study, I argued that only by examining the actual produced news content, could one develop an understanding of the relationship between the quantity of informational content, ownership and competition.

## **Methodology**

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<sup>794</sup> Id. at page 3.

<sup>795</sup> Of course, this methodology makes the unsupported, and even refutable, assumption that competing stations are somehow different, offering programming options that attract diverse audiences. When in reality, competing stations are usually competing for a share of attractive audience demographics, using content that is demonstrably similar to the programs of their competitors. See John Dimmick & Daniel G. McDonald, Network Radio Oligopoly 1926-1956: Rivalrous Imitation and Program Diversity, 4 J. Media Econ 197, (2001).

<sup>796</sup> Mooney, *supra* note 45 at page 3.

<sup>797</sup> Id. at page 4.

To assess the actual quantity of radio news content being produced by different market and ownership structures, I executed a large collection and analysis of on-air content in the form of scheduled radio newscasts and locally produced public affairs programming being carried on the informational formatted radio stations in three markets, Milwaukee, Madison and Eau Claire, Wisconsin.<sup>798</sup> Although this project is a content analysis, to provide data for the measurements specified in the Statement of Work by the Commission,<sup>799</sup> the study was designed to quantify the production of content, and does not involve a subjective analysis of the nature of the news content for this study.<sup>800</sup>

This study provides data on the state of competition and local production in radio news by ownership type and market structure. Because each of the three markets features competing informationally formatted radio stations, a comparison of news quantity provides a measure of the effects of structural ownership policies on news production in different sized media markets. In addition, the separation of locally produced content from content produced by a network allows for an assessment of the localism which is occurring, especially in the content production process.

Each of the three radio markets included a variety of ownership structures ranging from independent stations to large multi-station operations. The study also included special ownership structures like the grandfathered Newspaper-Broadcast cross ownership of Journal Communications in Milwaukee. Clear Channel operates a local cluster of stations in each

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<sup>798</sup> Each of the 11 ranked media markets in Wisconsin was examined, but Milwaukee, Madison and Eau Claire each presented opportunities for comparisons relevant to the data I sought to collect, and so were chosen for the proposal.

<sup>799</sup> SOW-5, *supra* note 17.

<sup>800</sup> In an attempt to get the FCC to accept my proposal, I included this provision, even though I believed the data set could generate a significant sample of evidence that could have provided some evidence on viewpoint diversity to the Commission as a “bonus.” After the FCC informally declined my proposal by never responding to my bid, I decided to include this analysis as part of this case study, and as such, I discuss the nature of the informational content of the stations and newscasts as part of my comparison with Professor Waldfogel’s study at the end of this chapter.

market, allowing for assessment of the effects of market size on the quantity of local news being produced by a nationally focused radio ownership company. Each market also features a competing cluster of stations owned and operated by a smaller (overall) competitor media organization, again providing the opportunity to generate additional data on the nature of competition for the production of local radio news.

Building on the practical and technical experience gained during the execution of two large scale content analysis projects which examined viewpoint diversity, this study was developed to test of the quantity of news produced by different ownership structures in different size markets. Testing for the quantity of news production, in comparison to subjective measurements of content for diversity, allowed for a larger content sample to be collected.<sup>801</sup> Professional experience with digital audio editing technology assisted in both the recording and the coding process.

For the period of 10 weekdays,<sup>802</sup> all locally produced radio content and scheduled newscasts between 6 am and 6 pm were digitally recorded from multiple stations in each radio market.<sup>803</sup> To avoid a loss of content which can occur when recording the internet feeds of radio

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<sup>801</sup> This was a significant factor in completing this project in a timely fashion. Timing segments is a substantially less involved coding process than assessing each segment for relevance and then slant as I did in the earlier projects. My professional skills with digital editing technology provided additional assistance in completing the coding for this project.

<sup>802</sup> Consisting of two constructed weeks (i.e.. each weekday was recorded twice in each market during the sample period) in August 2010, between August 13 and August 27th. This time frame was chosen primarily to meet the deadlines, especially the September 30, 2010 for initial data reporting, as specified in the FCC's SOW for the project. (See: SOW-5, supra note 17). Recording Equipment had to be obtained and tested, each station had to be monitored, and equipment had to be deployed in each location, and then collected. I had made the assumption (incorrectly) that the FCC would make awards in a timely fashion, and the requirements for content collection across three markets simultaneously made the selection of the dates, at least in part, a practical one, that left enough time to code the sample in order to meet the stated deadlines.

<sup>803</sup> The stations were monitored prior to the study period to develop a daily schedule of newscasts. Some stations carry news at the "top" and the "bottom" of the hour, while some carry only top of the hour newscasts. Stations may also have a "news format," especially at the program level which distributes news throughout an hour of programming. Such programming is common among news/talk or "all news" formatted stations.

stations, this study collected content directly from the over-the-air broadcast of the station using a series of programmable digital recording devices.

Using this content sample, the total running time (TRT) of news content was calculated through content analysis. The coding process allows for a calculation of the percentage of radio news content produced by the station (which is local content) and the percentage of network produced content used by the station in its newscasts.

All recorded audio was coded for the following attributes:

1. Media Market
2. Ownership
3. Date and time of original airing
4. The TRT (total running time) of a newscast.
5. The topic or issue of each produced segment
6. Source of element production (National, Local)

For newscasts, only news audio was coded. Station elements, such as legal Id's, weather forecasts and traffic bulletins were not included unless part of a primary package.<sup>804</sup>

### **Market #37: Milwaukee, Wisconsin.**

The various ownership structures in Milwaukee offered several opportunities to examine the production of radio news by commercial owners. The market includes a cluster of Clear Channel stations, stations operated as part of a locally owned and operated cluster, stations operated as part of a grandfathered newspaper-broadcast cross-ownership, as well as a variety of minority targeted stations.

Station	Format	Power/Freq.	Owner
WBWI-FM	Country	17,500/ 92.5	Bliss Comm
WEZY-FM	Easy Listening	2,700/ 92.1	Bliss Comm
WDDW-FM	Regional Mexican	4,200/104.7	Bustos Media Holdings

<sup>804</sup> A six minute news window typically has a legal identification, a news block, commercials, weather and/or traffic segments. Therefore traffic and weather information can take the form of an element within a newscast, but weather or traffic can actually become the “news” during periods of severe weather.

<b>WISN-AM</b>	<b>Talk</b>	<b>50,000/1130</b>	<b>Clear Channel</b>
WKKV-FM	Urban Contemporary	50,000/100.7	Clear Channel
WMIL-FM	Country	12,000/106.1	Clear Channel
WRNW-FM	Hot AC	15,500/ 97.3	Clear Channel
WOKY-AM	Country	5,000/ 920	Clear Channel
WRIT-FM	Oldies	34,000/ 95.7	Clear Channel
WNOV-AM	Urban Adult Contemp	250/ 860	Courier Comm. Corp
WJTI-AM	Spanish Adult Hits	500/1460	El Sol Brdst
WMYX-FM	Hot AC	50,000/ 99.1	Entercom
WSSP-AM	Sports	5,000/1250	Entercom
WXSS-FM	Contemporary Hit Radio	19,500/103.7	Entercom
WRRD-AM	Spanish News/Talk/Sports	23,000/1510	Good Karma Bdest
WAUK-AM	Sports	400/ 540	Good Karma Bdest
WGLB-AM	Gospel	185/1560	Joel J. Kinlow
WLWK-FM	Classic Hits	14,000/ 94.5	Journal Bdst Grp
<b>WTMJ-AM</b>	<b>News/Talk</b>	<b>50,000/ 620</b>	<b>Journal Bdst Grp</b>
WTKM-FM	Country	5,800/104.9	Kettle Moraine Brd
WTKM-AM	Oldies	500/1540	Kettle Moraine Brd
<b>WMCS-AM</b>	<b>Talk</b>	<b>5,000/1290</b>	<b>Milwaukee Radio</b>
WLDB-FM	Adult Contemporary	16,000/ 93.3	Milwaukee Radio
WLUM-FM	Alt/Modern Rock	8,800/102.1	Milwaukee Radio
WKLH-FM	Classic Rock	20,000/ 96.5	Saga Comm
WHQG-FM	Album-Oriented Rock	50,000/102.9	Saga Comm
WJYI-AM	Christian AC	1,000/1340	Saga Comm
WJMR-FM	Urban Adult Contemp	4,900/ 98.3	Saga Comm
WZBK-FM	Country	4,400/106.9	Saga Comm

Note: Stations in Bold are Informational Formats  
Content Recorded:

WTMJ 11 Hours x 10 Days = 110 Hours  
Longform 6am-2pm  
Longform 3pm-6pm

WISN 7 Hours x 10 Days =70 Hours  
Longform 6am-8am  
Longform 10am-12pm  
Longform 3pm-6pm

Newscasts 9am, 1pm, 2pm

WMCS 7 hours x 10 Days =70 Hours  
Longform 7am-10am  
Longform 3am-6pm

Newscasts 6am, 11am, Noon, 1 and 2pm

Milwaukee Total: Approximately 155 Hours

**Market # 98 Madison, Wisconsin.**

\_\_\_\_\_The Madison, Wisconsin market also provides several opportunities to generate data on the production of news by various ownership structures. Like Milwaukee, Madison has clusters of stations operated by Clear Channel and a competitor, in this case, a locally owned and operated cluster of stations.

Station	Format	Power/Freq.	Owner
WJVL-FM	Country	11,000/ 99.9	Bliss Comm
WMAD-FM	Country	5,100/ 96.3	Clear Channel
WIBA-FM	Classic Rock 1	2,000/101.5	Clear Channel
<b>WIBA-AM</b>	<b>News/Talk</b>	<b>5,000/1310</b>	<b>Clear Channel</b>
WTSO-AM	Sports	10,000/1070	Clear Channel
<b>WXXM-FM</b>	<b>Talk</b>	<b>3,700/ 92.1</b>	<b>Clear Channel</b>
WZEE-FM	Contemporary Hit Radio	12,000/104.1	Clear Channel
WDMP-FM	Country	1,550/ 99.3	Dodge Point Bdest Co
WDMP-AM	Country	250/ 810	Dodge Point Bdest Co
WCHY-FM	Classic Hits	6,000/105.1	Entercom
WMMM-FM	Adult Alternative Rock	2,000/105.5	Entercom
WOLX-FM	Oldies	37,000/ 94.9	Entercom
WWHG-FM	Classic Rock	1,700/105.9	Good Karma Bdest
WTLX-FM	Sports	6,000/100.5	Good Karma Bdest
WNNO-FM	Hot AC	6,000/106.9	Magnum Radio Grp
WMGN-FM	Adult Contemporary	36,000/ 98.1	Mid-West Family
WLMV-AM	Spanish Contemporary	5,000/1480	Mid-West Family
WJJO-FM	Album-Oriented Rock	50,000/ 94.1	Mid-West Family
WJQM-FM	Rhythmic CHR	6,000/ 93.1	Mid-West Family
<b>WTDY-AM</b>	<b>Talk</b>	<b>10,000/1670</b>	<b>Mid-West Family</b>
WHIT-AM	Oldies	5,000/1550	Mid-West Family
WWQM-FM	Country	4,500/106.3	Mid-West Family
WWQN-FM	Country	2,900/106.7	Mid-West Family
WSJY-FM	Soft AC	26,000/107.3	NRG Media
WHFA-AM	Religion	1,000/1240	Starboard Broadcasting
WDDC-FM	Country	3,100/100.1	Zoe Comm
WPDR-AM	Oldies	1,000/1350	Zoe Comm

Note: Stations in Bold are Informational Formats

#### Content Recorded:

WXXM 20 Minutes x 12 Hour= 240 Minutes x 10 Days = 40 Hours  
 No weekday long form programming is produced locally.  
 Newscasts every half hour 6am-6pm

WTDY 9 Hours x 10 Days= 90 Hours  
 Long form 6-10am  
 Long form 3-6pm  
 News 11, 11:30, 12, 12:30, 1, 1:30, 2, 2:30

WIBA 8.75 Hours x 10 Days =87.5 Hours  
 Long form 6am-8am

Long form 8am-11am  
 Long form 3-6pm  
 News at 12noon, 1, 2pm

Madison Total: 217.5 Hours

### **Market # 245 Eau Claire, Wisconsin.**

Eau Claire represents a small market in the study. In addition to competing clusters of stations owned by Clear Channel and Maverick Media, the market also features a locally owned and operated News/Talk Station, and a pair of stand alone operations. Eau Claire provides an ideal opportunity to examine the competitive relationship of large clusters of stations in a smaller market, including the related effects on the quantity and the localism of radio news production.

Station	Format	Power/Freq.	Owner
WISM-FM	Adult Contemporary	10,000/ 98.1	Aloha Trust
WCFW-FM	Soft AC	25,000/105.7	Bushland Radio
WATQ-FM	Country	35,000/106.7	Clear Channel
WBIZ-FM	Contemporary Hit Radio	100,000/100.7	Clear Channel
WBIZ-AM	Sports	1,000/1400	Clear Channel
WMEQ-FM	Classic Rock	17,500/ 92.1	Clear Channel
<b>WMEQ-AM</b>	<b>News/Talk</b>	<b>10,000/ 880</b>	<b>Clear Channel</b>
WQRB-FM	Country	8,900/ 95.1	Clear Channel
WAXX-FM	Country	100,000/104.5	Maverick Media
<b>WAYY-AM</b>	<b>News/Talk</b>	<b>5,000/ 790</b>	<b>Maverick Media</b>
WDRK-FM	Classic Hits	25,000/ 99.9	Maverick Media
WEAQ-AM	Sports	5,000/1150	Maverick Media
WECL-FM	Album-Oriented Rock	3,300/ 92.9	Maverick Media
WIAL-FM	Hot AC	84,000/ 94.1	Maverick Media
WDVM-AM	Religion	1,000/1050	Starboard Broadcasting
WWIB-FM	Christian AC	100,000/103.7	Stewards of Sound
<b>WOGO-AM</b>	<b>News/Talk</b>	<b>2,500/ 680</b>	<b>Stewards of Sound</b>

Note: Stations in Bold are Informational Formats

Content Recorded:

WMEQ 2.5 hours x 10= 25 hours

No locally produced long form programming...all syndicated

Newscasts 6, 6:30, 7, 7:30, 8, 9, 10, 11 Noon, 1pm, 2pm 3pm 4pm, 5pm 6pm

WAYY 4.5 Hours x 10 Days= 45 Hours

Locally produced long form news program 6-9am weekdays

Newscasts 10, 11, 12, 1pm, 2pm 3pm, 4pm, 5pm, 6pm

WOGO 2.5 hours x 10= 25 hours

Newscasts 6am, 6:29, 7, 7:29am 8, 9, 10,11, 12, 1, 2, 3, 4, 5, 6,

Eau Claire Total: 95 Hours

## Research Questions

**RQ1: What type of ownership structure produces the largest quantity of local news and informational programming in each size market?**

**RQ2: What is the relationship between the ownership structure, market size and the quantity of news and informational programming produced?**

**RQ3: What do the results demonstrate about organizational news production by common ownership in different markets?**

## Results

The study results demonstrate that on a case by case basis, the stations owned and operated as part of smaller overall ownership structures are producing more local informational content. In Milwaukee, WTMJ-AM, owned as part of a local newspaper-radio-television cross ownership is producing almost four hours more news per day than its primary news-talk competitor, WISN-AM, which is owned by Clear Channel Communications. In Madison, WTDY, owned by a local operator, is producing more local content than either of the competing news-talk stations, (WIBA and WXXM, both of which are owned and operated as part of a cluster of stations by Clear Channel.)<sup>805</sup> In Eau Claire, WAYY, owned by Maverick Media as part of a cluster of stations, was producing more local content than the news-talk station, WMEQ-AM, which is part of the competing cluster of stations owned by Clear Channel.<sup>806</sup>

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<sup>805</sup> Overall, Midwest Family owns and operates 29 radio stations. The company owns and operates seven radio stations in the Madison Market, which is one more than the competing Clear Channel cluster in town.

<sup>806</sup> Maverick Media owns and operates 19 radio stations nationwide. Both Maverick and Clear Channel control six radio stations in the Eau Claire Market.

**Table 1: Information Programing Production By Stations**

<b>Market</b>	<b>Station</b>	<b>Ownership Structure</b>	<b>Locally Produced Longform News or Talk Weekdays</b>	<b>Locally Produced Newscasts Per Weekday</b>	<b>Network Produced Newscasts Per Weekday*</b>
Milwaukee	WTMJ-AM	Local	14 Hours	22	0
Milwaukee	WISN-AM	National	10 Hours	9	6
Milwaukee	WMCS-AM	Local	6 Hours	0	9
Madison	WIBA-AM	National	10 Hours	18	6
Madison	WXXM-FM	National	0 Hours	18	6
Madison	WTDY-FM	Local	10 Hours	24	12
Eau Claire	WAYY-AM	Local	3 Hours	6	12
Eau Claire	WMEQ-AM	National	0 Hours	0	12
Eau Claire	WOGO-AM	Local	1 Hours	3	12

In terms of the local production of news, on a station by station basis, WTMJ, WTDY and WAYY led their primary competitors in each market in the overall quantity of locally produced news. Other than WMEQ and WMCS, the other seven stations each produce some news audio locally to varying degrees,<sup>807</sup> although the differences in overall quantity would appear to be, at least in part, related to the design of each station's hourly clock.<sup>808</sup> WXXM, WAYY, WOGO, WTDY all incorporated network radio newscasts as part of some of their top and bottom of the hour newscasts, thus reducing the quantity of news produced locally. WMCS, WIBA and WISN use a mixture of locally produced and network newscasts depending on the time of day. WTMJ incorporates network produced news packages into locally hosted and produced newscasts throughout the day. WMEQ was the only station in the sample which relied exclusively on network produced newscasts.

In terms of the relationship between market size and the quantity of informational programming that was produced locally, Madison, the middle sized market, led both Milwaukee and Eau Claire.<sup>809</sup> The largest market in the study, Milwaukee, produces the second highest quantity, and there is a very large drop off in the production of local content in the smallest market, Eau Claire. This finding was true for both newscasts and long-form talk programming.

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<sup>807</sup> WMCS produces two long form public affairs oriented talk shows locally on weekdays, but relies on network feeds for newscasts. WMEQ produced no local programming, other than recorded weather forecasts, during the study period.

<sup>808</sup> Some of the stations run news at the "top" and "bottom" of the hour, which accounts for some of the differences between the stations. The format of the "news block," the extended segment in which a newscast is carried was set up differently for each station.

<sup>809</sup> One possible explanation for this finding is that Madison is the capital of Wisconsin, and as such, is the center of politics in the state, which means that access to news makers, such as state politicians, including the governor, requires the expenditure of less resources.

In terms of ownership structure by size of market, the Clear Channel station in Milwaukee, WISN, and one of the Clear Channel stations in Madison, WIBA, ran similar quantities of locally produced programming. This similarity is not surprising because the stations are commonly owned, have similar programming formats, share management staff and even some of the “local” on-air staff between the stations in each market.<sup>810</sup>

In the smallest market, Eau Claire, the theoretical benefits of common ownership created by the vertical integration of large and small markets do not appear to be trickling down. At least theoretically, stations with less resources, such as those in smaller markets, could benefit from common ownership with stations in larger markets with more resources. News and public affairs programming can be produced at the larger market stations, and then shared with the smaller market stations, allowing the smaller market stations to deliver a higher quality of programming to a local audience. There is no evidence that this process is occurring, even as the commonly owned stations in Madison and Milwaukee are engaged in resource and content sharing. In fact, WMEQ relied exclusively on syndicated national talk programs and network newscasts during the study period. The only evidence of local programming of any type was recorded weather forecasts aired adjacent to network newscasts as part of the top of the hour news block.

## **Discussion**

This three-market analysis demonstrates the following:

1. Local ownership and operation demonstrated a higher quantity of locally produced informational content.

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<sup>810</sup> The relationship between the Clear Channel owned stations in Madison and Milwaukee is a significant one, and has been since the merger of AM/FM and Clear Channel in 2000. The clusters share a general manager, news resources and on-air talent. At various times, the clusters have even shared live programming, with stations in both markets carrying the same program simultaneously. This resource sharing has been used for both informational and music formatted stations.

2. Stations operated as part of smaller local ownership structures produce more content locally than do stations owned by larger competitors.
3. Market size is not clearly related to the quantity of informational programming content that is produced locally.

The data of this study are useful in meeting the needs of the commission on two of the three policy objectives: competition and localism. Yet such a study does not provide data on the level of viewpoint diversity available for radio programming in each market.<sup>811</sup> The Commission's reliance on a measurement of the quantity of informational content does not inform the agency on the democratically important diversity metric. In fact, even a cursory examination of the programming options available among the news-talk stations in each market demonstrates that viewpoint diversity is elusive.

Consider the Milwaukee market, where WTMJ and WISN are the primary competitors in the news-talk format. Both stations carry local and syndicated national talk programs throughout the day, all of which feature conservative hosts.<sup>812</sup> Listeners seeking diversity of viewpoint in news-talk stations must turn to a smaller competitor whose programming targets a minority audience of African Americans.

In the Madison market, the viewpoint diversity is primarily provided by the internal competition between the commonly owned WXXM and WIBA. Like WISN in Milwaukee, with which WIBA shares resources, the talk format is decidedly conservative in nature, whether a local or national host is on the air. WXXM carries a variety of syndicated hosts who could be seen as more politically liberal than the mix of hosts on WIBA,<sup>813</sup> but the local programming of

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<sup>811</sup> A fact that I argue speaks volumes about the FCC's actual efforts to gather data relevant to answering the questions before the Commission as part of its 2010 Quadrennial Review Process.

<sup>812</sup> See generally: <http://www.620wtmj.com/shows/schedule>, last accessed July 1, 2011.

<sup>813</sup> During the study period, WIBA carried syndicated talk programs hosted by Rush Limbaugh and Sean Hannity. Some of WIBA's weekday local talk programming was hosted by Vicki McKenna, who also hosts a different show

WXXM, which during the study period consisted of only newscasts carried as part of a network news update, is being produced in the same newsroom, using the same staff, and in many cases, the same packaged audio as the newscasts on sister station WIBA. This is a very significant, if secondary, finding of this study. The sharing of informational content between stations with diametrically opposed political viewpoints demonstrates that the benefits of economy of scale go to the station in the form of economics and not the public in the form of increased diversity.

The results in the Eau Claire market are even more troubling. Only four hours of local news-talk programming per weekday is produced across the three competing informationally formatted stations. In addition, WMEQ's lineup of national conservative hosts offers little alternative to the programming options on WAYY or the religious based, conservative programming available on WOGO.<sup>814</sup>

One of the primary justifications for an increase in the limits on radio station ownership was the belief that larger media companies could share resources among commonly owned media properties through the economy of scale. Stations operated in larger cities, which inevitably have more resources, could use technology to share airstaff, including newspeople, with stations in smaller markets. Yet even a cursory look at the production of informational content in radio markets at three different size tiers demonstrates that while resource sharing is occurring, such as between the Madison and Milwaukee Clear Channel stations, in some ways, resource sharing can be counterproductive to the diversity goal. In Madison, radio stations with diametrically opposed talk programming share a newsroom and news production staff. Even by

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carried by WISN in the Milwaukee market. WXXM's long-form programming is entirely syndicated, including the national talk shows hosted by Bill Press, Stephanie Miller, Ed Schultz and Randi Rhodes.

<sup>814</sup> WMEQ's national programming lineup included the national talk shows of Rush Limbaugh, Dennis Miller and Jason Lewis. Competitor WAYY's weekday programming included the national syndicated shows of Glenn Beck, Sean Hannity and Mark Levin. WOGO carries national programming hosted by Bill Bennet, Laura Ingraham and Michael Medved.

the FCC's one to one ownership metric for viewpoint diversity that has to raise some significant questions about the impact of the current policy and the logic behind the use of proxy measurements for content diversity.

In both the Eau Claire and the Milwaukee markets, the data demonstrate significant problems with the FCC's belief that competition will act to create diversity in programming choice. Three competing informational radio formats in Eau Claire have resulted in three conservative formatted stations, which logically means very little in the way of the diverse and antagonistic standard for viewpoint diversity. In Milwaukee, the two primary competitors have been demonstrated to be,<sup>815</sup> and largely remain, ideologically conservative in nature, again raising questions about relying on a competition proxy to create viewpoint diversity between owners. In fact, the internal competition between Clear Channel's six stations in Madison is generating more viewpoint diversity in the talk programming than any of the externally competitive situations between owners in the three markets examined by this study.

One part of the FCC's reliance on a policy that relies on a one owner per viewpoint proxy would seem to be supported by data generated in this study. Clear Channel's resource sharing would at least support the rational basis for this policy implementation, not only internally as with the shared news audio between WXXM and WIBA, but also across markets, between WIBA and WISN.

However, this study also demonstrates two problematic trends for the type of resource and audio sharing which is occurring between the commonly owned Clear Channel stations. First, and most importantly, the resource sharing is being done between the larger, more

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<sup>815</sup> Christopher Terry, Milwaukee's Radio News Trinity: Clear Channel, Journal Communications and Wisconsin Public Radio and Coverage of the 2004 Election, Thesis (M.A. in Mass Communication)--University of Wisconsin--Milwaukee, 2005 and Christopher Terry, "The FCC's Outlet Diversity Policy: A Finger on the Balance Scale of Viewpoint Diversity." paper presented to the 58th Annual International Communication Association Conference, Montreal, Quebec, May 2008.

profitable markets. The smallest market, which has a limited amount resources for local program production and could benefit significantly from some form of content sharing, is left alone.

Cheap, national syndicated talk and network newscast audio, run almost entirely by automation, is all that the Clear Channel station in Eau Claire has the resources to deliver to the local audience it is licensed to serve with informational programming.

The sharing of audio and on-air staff between stations in different markets generates significant economic benefits for the ownership of those stations, and is a perfect case study in how radio companies have made use of the economies of scale that ownership consolidation has created for them. In terms of diversity, though, it is not logical to assume a host in one market changes his or her viewpoint when on the air in another market even at the state level of analysis. In the case of Wisconsin, this is additionally problematic, as there is some geographic overlap in the reception area between the Milwaukee and the Madison market stations meaning that even in the geographic areas that can receive both sets of stations, the selection of programming content, in terms of viewpoint, is just as limited as if the residents had access to only one market.

One take away of this case study is to demonstrate that even when the Commission seeks to develop empirical evidence, the agency's continued reliance on a competition based regulatory philosophy and the related assessments of programming content developed using proxy methodology that the FCC itself even calls "imperfect" is in fact, imperfect. The entrenched decision to continue to evaluate the impact of media ownership policy through proxy methodologies has prevented the FCC from conducting a meaningful evaluation of quantitative amount of informational programming available, to say nothing of assessing the level of viewpoint diversity available to listeners. It is important to note that the use of proxy measurements for news production, such as the one undertaken by Professor Waldfogel, fail to

demonstrate any of the important findings of this case study. Using the counting of stations by format as a methodology produces a result in the Eau Claire Market that would demonstrate a healthy access to at least three commercial news “formatted” stations. But in the smaller market, where two firms have each reached the limits on radio ownership and thus have come to dominate control of the local radio dial, less than four hours of local informational programming is being produced per day, and one has to include the daily output of a very small local competitor to even reach that number.

While the case study I present has important limitations including: a simple three market design, which was conducted entirely within the state of Wisconsin, with a short time window for content sampling, the results are illustrative of the larger point of this case study and of this dissertation. The evidence the FCC is collecting is not representative of the actual policy outcomes or capable of providing the basis for a solid empirical evaluation of the policy implementation. Without a decision by the agency to support a an analysis of the diversity of programming content, the empirical support for a policy decision will remain absent from the rulemaking record. Ultimately, the evidence requirement of Section 202(h) means that the absence of usable empirical evidence will exist regardless of the FCC’s policy decision in favor of reductions, increases, or even a continuation of the status quo for media ownership limits. If the FCC remains on its current evidence-challenged path, the agency has little hope of meeting the demands of the remands in either of the *Prometheus Radio Project* cases, or of sustaining its structural ownership policies against future judicial review.

# Chapter 6:

# Conclusions

## Chapter 6: Conclusions

This dissertation was completed in an effort to understand the evidentiary basis underlying the rationale in the rulemaking and adjudication decisions under the FCC's media ownership policy. My methodology, while relatively simple, is thus far, unique. While other research in this area has sampled evidence or comments from FCC media ownership proceedings,<sup>816</sup> I examined the entire record. After reviewing over 1000 decisions from twenty years of FCC actions on media ownership, to examine the agency's logic, evidence and rationale, I have determined that the policy choice to use competition among media owners in order to achieve viewpoint diversity is not working, and that the policy has not been supported by sufficient evidence. Importantly these problems appear to be interrelated.

Perhaps the most significant finding of this study is that insufficiency of evidence is not a new issue for the FCC. In five of the reviews mandated by §202(h) of the Telecommunications Act, the FCC has solicited non-interested party evidence in just three,<sup>817</sup> and sponsored the production of just a handful of studies each time. Even in those proceedings the data generated has made, at best, a limited contribution to a meaningful policy evaluation, or even to understanding the basic relationship between media ownership and viewpoint diversity. Additionally, the FCC continues to be reluctant to make the underlying data available to public

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<sup>816</sup> Jonathan Obar, Democracy or Technocracy? And Analysis of Public and Expert Participation in FCC Policymaking, Dissertation, Pennsylvania State University, 2010.

<sup>817</sup> The biennial review in 2002-3, FCC 02-249 (2002), the quadrennial in 2006-7 FCC 07-216 (2007), and the quadrennial proceeding launched in 2010 FCC 10-92 (2010).

scrutiny.<sup>818</sup> And in two instances where meaningful data has been collected on policy impact, the FCC was publicly embarrassed when the agency was exposed for “losing” this data.<sup>819</sup> The result of this administrative process has been the implementation of policy without a sufficiently solid basis to withstand judicial scrutiny, and a policy which has failed to achieve the stated goals of the Commission.

But the FCC’s obstacles in the implementation of media ownership policy go deeper than lack of evidence. The basic logic of using competition, a philosophy which promotes economy of scale, which in turn reduces staff and consolidates ownership, as a policy tool to increase voices and diversity of ownership is and has been a questionable choice from the beginning. Going all the way back to one of the first major media ownership decisions in which both economic concerns and diversity play a dual role, namely the newspaper-broadcast cross-ownership decision in 1975,<sup>820</sup> the FCC has struggled with the relationship between fostering economic competition and facilitating a media system capable of delivering a true diversity of viewpoints. The most significant problem has been the FCC’s tendency to first use proxy measurements, including economics to implement policy and then to defend the agency’s policy decision by relying on the authority which the Commission was granted to protect the important, but abstract, societal goals of information access and viewpoint diversity.

Part of the FCC’s problems with the philosophy of using competition to achieve its policy objectives is that the reliance on competition is ineffective as a proxy for regulation itself. The

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<sup>818</sup> With the release of the first five studies commissioned by the FCC on June 15, 2011, the FCC required commenters who wished to examine the underlying data set to sign an agreement for access to the data. News Release: FCC Releases Five Research Studies on Media Ownership and Adopts Procedures for Public Access to Underlying Data Sets, DA 11-1055, See Protective Order, DA 11-1056 at paragraphs 4-13, online at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1056A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1056A1.doc), last accessed July 1, 2011.

<sup>819</sup> Letter from Kevin Martin to Barbara Boxer, September 15, 2006. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267447A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267447A1.pdf), last accessed July 1, 2011.

<sup>820</sup> In the Matter of Amendment of Sections 73.34, 73.240 and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C 2d 1046 (1975).

FCC has been given the power to regulate broadcasters, including the ability to regulate the content of broadcasters, in order to ensure citizen access to diverse viewpoints. While competition is attractive because it can be evaluated through a variety of economic methodologies, diversity, especially viewpoint diversity, is not an easily quantifiable concept. What has transpired since deregulation is so much attention to competition and free markets that the policy objective of ensuring access to viewpoint diversity has been relegated to the background, not seriously or meaningfully evaluated.

The FCC's decision to promote diversity as a primary policy objective has led to many difficult, interrelated, questions for the agency. How much diversity is sufficient? How should the agency measure diversity? Can diversity be measured by proxy or does the FCC have to engage in a subjective process which directly examines the viewpoints broadcasters disseminate?

There is no simple policy answer to the question, how much diversity is sufficient? The FCC has tried to come up with an answer to this question in several ways, including the use of game theory, assessments of competition in advertising markets and numeric limits on ownership. None of these competition based assessments have provided the FCC with the evidence the agency needs to rationally support its media ownership policy decisions.

On the second question, how should the agency measure diversity, the answer is much clearer. Because, viewpoint diversity is the "touchstone" objective of the FCC's media ownership policy, therefore the agency should assess the effects of the policy on the availability of viewpoints through content analysis of the broadcast content available in individual markets. Although the FCC has refused to even consider this as a possible solution, its stated concerns about subjectivity in any analysis of content are preposterous. The FCC has a demonstrable

history of making subjective regulatory decisions about indecent content,<sup>821</sup> as well as actively using regulation to compel broadcasters to provide both children's programming and political candidates' access to advertising time.

On the third question, the FCC's use of proxies for viewpoint diversity has not solved the Commission's most fundamental problem regarding on media ownership, the lack of evidence to support agency decision making. By definition proxies do not assess policy objectives or outcomes directly. The FCC has suggested three proxy tests, source diversity, program diversity and outlet diversity as possible approaches to assess the agency's diversity goals. Consider each test in terms of the case study presented in chapter 5. The results of the data on the Madison radio stations demonstrate that content production is being shared across commonly owned, but competing media properties.<sup>822</sup> Even by the FCC's own one-owner-one-viewpoint voice count methodology, this evidence demonstrates a problem on relying on internal competition to create diversity. News produced once, but used twice, on two different stations, is not diversity, rather a demonstration of the economy of scale inherent in the consolidation of media properties.

Likewise, even an application of the FCC's preferred proxy method of measuring diversity, does not demonstrate the creation of diversity externally.<sup>823</sup> In each of the three markets, the bulk of the competition for local informational radio news and talk programming is occurring between outlets that carry news as part of an overall conservative talk-radio format. Relying on the Programming Diversity measurement,<sup>824</sup> which examines the type of programs a media outlet carries by type, there's no demonstrable diversity in the program types between the stations. Even the hourly programming clocks were nearly identical. Additionally, the available

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<sup>821</sup> Frank Ahrens, FCC Indecency Fines, 1970-2004, Washington Post, November 11, 2005.

<sup>822</sup> Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 17 F.C.C.R. 18503 at 18517-18519 (2002).

<sup>823</sup> Id, at 18518.

<sup>824</sup> Id. at 18519.

evidence on alternative proxy measurements, like quantitative assessments of news and information production by different ownership structures has demonstrated that ownership policy is not generating the desired policy outcomes.<sup>825</sup>

While the case study in chapter 5 illustrates the problems inherent in the agency's use of proxies for viewpoint diversity, it also reveals a symptom of the larger challenge the FCC has created for itself in terms of the development and collection of reliable evidence to support a policy decision on media ownership. The larger obstacle the agency faces is the reality that it does not matter what measurement method is used by the Commission, every existing evaluation of the impact of the FCC's current policy has demonstrated that the agency's stated policy goals are not being achieved, and in many cases are being undermined, by the rulemaking decisions the Commission has made on media ownership since 1996. No docket evidence exists to support the theory that either internal or external competition is increasing the quantity or diversity of informational programming. Such a finding demonstrates that the decision to rely on competition as a proxy for diversity is, and has been, a poor policy choice.

Largely missing from this debate has been an assessment of the level of access to content diversity that the competition model of regulation is creating. There can be little debate that in the overall modern mass media environment, a remarkable range of informational content is being produced. But the issue, in the FCC's own regulatory terms, is whether or not citizens have the ability to access a wide range of diverse and antagonistic viewpoints through broadcast stations. Newer communication and content distribution systems have not replaced

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<sup>825</sup> Federal Communications Commission, 2004, "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News," online at <http://transition.fcc.gov/ownership/2006-materials.html>, Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie, "A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied." available online: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-307486A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307486A1.pdf), last accessed July 1, 2011.

broadcasting, a point that even the reviewing courts are now recognizing.<sup>826</sup> The FCC's own evidence introduced during the 2010 quadrennial review suggests that new media, while pervasive in the modern media environment, are a limited contributor to viewpoint diversity, as a large proportion of the content available is actually reposted from or links to content from existing media sources, most notably the media "dinosaurs" of newspapers, radio and television.<sup>827</sup> This finding, along with the statistics on internet access, which demonstrate that nearly a third of the US lacks dependable internet access,<sup>828</sup> suggests strongly that the consideration of new media as a major contributor to diversity should wait until the review in 2014.

The FCC's media ownership limits only regulate the ownership of broadcast licenses, but the effects of the policy are incredibly important. Broadcasting is inherently a local medium that is cheap and easy to access. Other than the basic reception equipment, there are no ongoing costs for subscription or service, making the content of local broadcasters accessible to essentially all citizens. Even in an age of the internet, broadcasters have an important informational role to play, a role that, at least in theory, their licenses require them to perform.

Despite the FCC's reliance on competition, market incentives have not been enough to encourage broadcasters to meet the basic requirements of their important societal role. While the lack of agency oversight to ensure the proposed benefits of any given merger are actually realized is certainly one part of a larger problem, that market incentives have been simply insufficient in generating viewpoint diversity. No evidence exists to suggest the policy is

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<sup>826</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), {Hereafter: Prometheus 2004}

<sup>827</sup> Pew Research Center For People and the Press, *Key News Audiences Now Blend Online and Traditional Sources: Audience Segments in a Changing News Environment*, (2008), available at <http://people-press.org/report/444/news-media> ("Pew People and the Press"), last accessed July 1, 2011 and Mark Leccese, "Online Information Sources of Political Blogs," *Journalism and Mass Comm Q.*, V 86, Number 3, 2009 at 578-593.

<sup>828</sup> *Id.*

producing the desired results. Even programming which is being produced by a media organization is not making it to air on stations owned by the company that produces it, even in cases when that programming is being produced at those stations.<sup>829</sup>

While the FCC has acted in a questionable fashion, Congress is not without blame in the current debate over media ownership. The ownership limits established by the 1996 Telecommunications Act deprived the FCC of its role as the expert for the first time since the passage of the 1934 Communication Act. Congress's decision to dictate ownership limits to the Commission, rather than giving the agency a statutory delegation that would have allowed the FCC to engage in a rulemaking process to expand ownership limits, is responsible, at least in part, for the administrative quandary the agency now finds itself in. Congress's actions turned the agency and its experts, who are in the best position to make assessments about the effects of the changes, into little more than ministerial bureaucrats. The Commission did as it was instructed, and implemented the new rules without a formal rulemaking process. If this sequence of events had unfolded differently, it would have allowed the FCC a chance to develop an evidentiary record to justify these changes.<sup>830</sup> The ongoing reviews of the FCC's media ownership rules are part of a continuing process that began without evidence about the state of the media industry, including without an assessment of the quantity or quality of informational programming which broadcasters were providing before the passage of the Telecommunication Act. This lack of evidence, itself the result of the FCC's decision to implement the ownership limits specified within the Telecommunications Act without engaging in a rulemaking process to develop a

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<sup>829</sup> In my professional experience as a radio producer, I have produced programming for Clear Channel in Milwaukee that is not available on Milwaukee radio stations. One such example was the syndicated radio program hosted by Rev. Jesse Jackson. Clear Channel's radio syndication arm, Premiere Radio Network, produces and distributes the Jackson program, Keep Hope Alive. The program is not carried by any of the six Milwaukee Clear Channel radio stations, including a station which targets an African American male audience.

<sup>830</sup> In the matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 11 FCCR 12638 at 12371

procedure for doing so, has plagued the agency's decision making ever since, as the *Prometheus* decisions in 2004 and 2011 demonstrate.<sup>831</sup>

The remand in the first *Prometheus* decision made clear that the FCC could consider the current media ownership limits too expansive, and determine that less concentration would actually be in the public interest.<sup>832</sup> Of course, such a finding would require that the rulemaking record contain substantial evidence, sufficient to meet a weight of evidence test on judicial review. Where might this evidence come from? I would suggest that the FCC's media ownership dockets already contain a valuable set of data that the agency has largely ignored.

As in many areas of regulation, interested parties have tried to pollute the rulemaking process with dubious information and research for some time.<sup>833</sup> The FCC is not without fault in dealing with this problem, which in the modern administrative environment has become increasingly common. Yet the FCC's disregard for the large quantity of public input in the media ownership review dockets in both 2003 and 2007<sup>834</sup> has resulted in the Commission missing an opportunity to tap into a valuable source of first-hand qualitative evidence about the effects of media ownership at the local level, evidence that Obar has demonstrated is overwhelmingly opposed to the Commission's actions towards permitting additional consolidation.<sup>835</sup>

Despite the Supreme Court's decision in *Red Lion* that placed the information needs of citizens ahead of the First Amendment rights of broadcasters,<sup>836</sup> the FCC has been very reluctant

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<sup>831</sup> Id.

<sup>832</sup> *Prometheus* 2004, supra note 11.

<sup>833</sup> Reading through the comments available in the media ownership review dockets in 1998, 2002, 2006 and 2010 reads like a who's who of media ownership consolidation. CBS and Clear Channel have even tried to argue that the entire scheme of media ownership regulation is unconstitutional. See *Prometheus Radio Project v FCC*, Case: 08-3078 Document: 003110585945, (2011).

<sup>834</sup> See generally M.A. McGregor, *When the "Public Interest" is not What Interests the Public* 11 *Comm L & Pol.* 207 (2006) and B. Scott, *The Politics and Policy of Media Ownership*, 53 *Am U. L. Rev.* 645, (2004).

<sup>835</sup> Jonathan Obar, *Democracy or Technocracy? An Analysis of Public and Expert Participation in FCC Policy Making*, Dissertation, Pennsylvania State University, December 2010.

<sup>836</sup> *Red Lion Broadcasting Co. v Federal Communications Commission*, 395 U.S. 367 (1969).

to engage the potential body of evidence these citizen comments represent, a reality noted in the first Prometheus decision, which cited the quantity of the comments in the docket from 2003.<sup>837</sup>

The primary reason for the FCC's objection to using this information to support a policy decision would appear to be methodological. Based on its research solicitations in 2010, the FCC continues to favor evidence that makes a quantitative assessment of the effects of ownership based on statistical measurements of just about anything except content.

Individually, the citizen comments in the media ownership review dockets may not represent the type of expert evidence the FCC requires to support a decision on a weight of evidence test, but collectively the volume of comments should have been considered as evidence that additional ownership consolidation was opposed by the public. The agency, as the expert, acts as the arbitrator in determining the evidentiary value of docket submissions. Even setting aside the comments which included discussions of market changes in specific terms, the sheer quantity of the comment should have at least raised some red flags for an agency that willingly adjudicates violations of indecency guidelines based on the filing of a single complaint.

As the mediator between the public and broadcasters, the FCC should consider public comments not as individual pieces of expert evidence, but collectively as elements that express the public's view of the status of their media system. In cases where a citizen comment includes evidence or a discussion of market conditions, these enhanced comments should form the basis for the development of additional evidence. Although research suggests that the "agency captured by industry thesis"<sup>838</sup> is far too simple of an explanation about the relationship between

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<sup>837</sup> Prometheus 2004, supra note 11.

<sup>838</sup> The suggestion that the FCC was, has been and remains a weak administrative body "captured" by the industry that the agency is in charge of regulating has existed for some time. See: James L. Baughman, Television's Guardians: The FCC and the Politics of Programming, 1958-1967. (1985).

broadcasters and the FCC,<sup>839</sup> the proposition that the agency has favored the broadcasters over citizens has been supported by the aCommission's action when implementing media ownership policy. Ironically, the decision to ignore public comments within the record is analogous to removing viewpoints from the public sphere, the very objective these polices are designed to meet207207.

The FCC traditionally relied simultaneously on two regulatory mechanisms, structural and content regulation, to achieve the agency's stated policy objective of viewpoint diversity. As the FCC implemented policies that largely abandoned content regulation in favor of structural regulation, questions about the effect on the policy objective began to arise. As these questions were explored, the evidence showed that the policy choice to rely entirely on structural ownership limits was not generating a positive policy outcome for diversity. Relying on structural limits without corresponding controls on media content has not demonstrated an increase in access to viewpoint diversity, yet the FCC has continued to rely on the entrenched choice of structural ownership limits.

For more than fifty years after the passage of the 1927 Radio Act, the FRC and later the FCC made an entrenched choice to regulate broadcasters under a public trustee model.<sup>840</sup> Decisions about licensing, content regulation and the limits on ownership reflected the principle that a broadcast license came with certain obligations for serving a local audience. When the FCC changed course in the 1980's, and began to adopt new regulatory principles, the preference for marketplace competition became an entrenched choice.

Competition as a regulatory approach reflects a philosophy that is opposed to governmental intervention in the marketplace. The FCC's use of competition as a proxy for

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<sup>839</sup> Id.

<sup>840</sup> See: Five Determiners of Regulatory Policy, Chapter 2 in Erwin G. Krasnow & Lawrence D. Longley, The Politics of Broadcast Regulation, (1978).

diversity is not only unhealthy, it is also illogical for a policy area that by its very nature relies on government intervention. Broadcasters simply cannot operate without government allocation of the spectrum and the corresponding protection of the use of that spectrum by the FCC. The issuing of licenses, a requirement for a broadcaster to operate, is a unique position in our society, one that allows the government to choose who gets to speak. Broadcasting thus generated a new set of regulatory principles, because it was so different from any other system of communication.<sup>841</sup> The very existence of this system upended traditional first amendment theory on government intervention in speech. The Supreme Court recognized this difference, and continued to largely support the FCC's trustee regulatory principles, including controls on content, until the agency began to argue against itself during the 1980's.<sup>842</sup> Reviewing courts gave the agency deference in many cases, but as the policy decisions became more questionable, the courts granted the FCC less deference, became more skeptical, and ultimately began to remand agency decisions.

When the Fairness Doctrine was repealed, it was done so as part of a policy process and legal review which occurred at the FCC and in lower courts.<sup>843</sup> For now, the constitutionality question of the doctrine remains bound to the *Red Lion* decision.<sup>844</sup> The FCC's decision to use a competition model implemented through structural regulations to increase content diversity was also a policy decision, one that has produced questionable results in achieving the agency's stated goals of media ownership policy.

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<sup>841</sup> Radio "brought forth new regulatory principles and institutions; politicians were forced to rethink the ways in which they communicated with their constituents, and all Americans had to adjust to the emergence of a new medium of cultural and political communication." Douglas Craig, *Fireside Politics: Radio and Political Culture in the United States, 1920-1940*. (2000).

<sup>842</sup> One of the major factors in the repeal of the Fairness Doctrine was the FCC's 1985 Fairness Report, an assessment of the Fairness Doctrine in action, which the D.C. Circuit said had undermined the enforcement of the doctrine. See *Syracuse Peace Council v FCC*, 867 F.2d. 654 (D.C. Cir 1989).

<sup>843</sup> See *Meredith Corporation v FCC*, 809 F.2d 863 (D.C. Cir. 1987), *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, (1986), and *Syracuse Peace Council v. FCC*, 867 F.2d. 654 (1989).

<sup>844</sup> *Red Lion*, supra note 21.

The FCC has argued that any regulation other than that designed to address market failures is a violation of first amendment rights.<sup>845</sup> Beresford, in a staff paper from the FCC, argued that scarcity was no longer a necessary regulatory position as the media marketplace is different in an age with media options like cable and the internet.<sup>846</sup> But this logic cuts both ways. Reapplication of content controls as policy mechanism could be supported if the marketplace, due to consolidation and concentration has become unable to produce viewpoint diversity. One option would be reinstating content regulations on broadcast content.

Imposing just the first prong of the Fairness Doctrine, which required broadcasters to provide coverage of important public issues, could provide a working design similar the quantitative requirements of the FCC's Children's Television Programming rules.<sup>847</sup> Such regulations could be justified by pointing out that if the marketplace were functioning correctly, the local public affairs content should already be available.<sup>848</sup> Since there are questions about whether this programming is available in the quantities the FCC desires, a regulatory action requiring the airing of informational programming would act to correct a market failure, and by the FCC's own argument, not be an infringement of the First Amendment.

The agency decision to deregulate, and even argue against enforcing its own policies, created a regulatory void following the implementation of the 1996 Telecommunication Act.

Rather than the public trustee model, the idea that the market could provide solutions to

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<sup>845</sup>Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 17 F.C.C.R. 18503 (2002).

<sup>846</sup>J.W. Beresford, The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed, FCC Staff Paper, (2003). <http://transition.fcc.gov/ownership/materials/already-released/scarcity030005.pdf>, last accessed July 1, 2011.

<sup>847</sup>Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996.

<sup>848</sup>Epstein has proposed an alternative approach to implementing content guidelines. He suggests that the FCC provide broadcasters with a choice. Accept content guidelines and additional concentration of structural limits would become acceptable. Failure to accept the content provisions would impose a freeze on an organization's ability to acquire additional media properties. M. Epstein, "From Scarcity to Market Power Quid Pro Quo: Toward a Workable Right of Access in U.S. Media." Chapter 15 in Media Ownership Research and Regulation, (2008).

regulatory problems became almost a religion at the FCC. Allowing media companies the benefits of economies of scale, without any thought for how such economies would actually be created, was cited as a justification for an increase in media ownership limits. As a result, media companies merged at a prodigious rate, then quickly reduced air and news staffs, and implemented content sharing practices to reduce production costs, all of which logically result in a reduction of the diversity in media. The convergence of new and old media has only expanded these problems. While there are more and more media *outlets* available everyday, content production, especially local content production, continues to suffer.

An examination of the policy implementation for media ownership demonstrates that the FCC's problems with basic logic, like Commissioner Robert McDowell's statement that, "It is not at all clear, of course, that relaxation or elimination of the existing rules necessarily will lead to a major wave of ownership consolidation"<sup>849</sup> are only continuing into the digital age of new media. The FCC's Future of Media report, released June 9th, 2011, is largely illustrative of many of findings of my own research.

“...because of the digital revolution, serious problems have arisen, as well. Most significant among them: in many communities, we now face a shortage of local, professional, accountability reporting. This is likely to lead to the kinds of problems that are, not surprisingly, associated with a lack of accountability—more government waste, more local corruption, less effective schools, and other serious community problems. The independent watchdog function that the Founding Fathers envisioned for journalism—going so far as to call it crucial to a healthy democracy—is in some cases at risk at the local level.”<sup>850</sup>

The FCC's solution to this problem is to expand new media outlets. New media is not providing local coverage, but the FCC's illogical solution to the problem is to facilitate the growth of more new media through the implementation of the agency's national broadband

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<sup>849</sup> Statement of FCC Commissioner Robert McDowell, 2010 Notice of Inquiry, In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2010 Notice of Inquiry, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-92A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf), last accessed July 1, 2011.

<sup>850</sup> FCC, “The Information Needs of Communities,” the Future of Media Taskforce's report is available online at <http://www.fcc.gov/info-needs-communities>, last accessed, July 1, 2011.

plan.<sup>851</sup> Relying on an entrenched technocratic value system, and the belief that more media outlets will allow the marketplace to correct these problems is an idea that just will not die at the Commission. Not surprisingly, as the FCC scrambles to implement its broadband plan domestically, other countries are winning the broadband race with better infrastructure and access speeds.<sup>852</sup>

So what are the possible solutions? First I suggest the Commission consider its statutory authority when implementing media ownership policy. In terms of the internet, the FCC lacks the statutory authority over the internet that the agency has for the regulation of broadcasters. Given this lack of authority, until universal broadband access is available, I believe that the FCC should review its media ownership rules without considering new media, which many citizens in the country lack access to. The absence of evidence is problematic enough without adding the complication of trying to assess a media environment which can change literally by the minute. One of the major obstacles the Commission faces in the 2010 Quadrennial review is how to account for the role new media outlets play in the media environment.<sup>853</sup> It is a logical question, but the statutory mandate that was given to the FCC was to assess the competition and ownership rules for licensed broadcasters.<sup>854</sup> By narrowing the inquiry to the regulated industries specifically, the difficulty in assessing diversity and ownership is greatly reduced. While the Third Circuit has made the suggestion that new media could be considered separately from

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<sup>851</sup> <http://www.broadband.gov/plan/>, last accessed July 1, 2011.

<sup>852</sup> Akamai, "The State of the Internet," Volume 3, Number 2 Q2 2010 report, <http://www.websiteoptimization.com/bw/1010/>, last accessed July 1, 2011.

<sup>853</sup> "The Internet has clearly not wholly supplanted traditional media, such as broadcast stations, newspapers and cable systems, but it has increased the quantity of news and programming available to consumers. Our review must take account of the Internet's role and significance." In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2010 Notice of Inquiry, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-92A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf), last accessed July 1, 2011.

<sup>854</sup> § 202 of Telecommunications Act.

broadcasters,<sup>855</sup> the Commission has not proposed this approach, nor has the agency asked for comment on whether or not such an approach could be a rational policy solution. By failing to consider the option of handling new media outlets separate from broadcasters when assessing the state of media, the FCC is trying to incorporate, understand and apply a set of rules to a variety of media services and distribution systems over which it has limited, and in many cases, no jurisdiction. Logically, this reality is further complicating a regulatory problem that is clearly already significantly convoluted on its own.

Second, in the future, the FCC should consider changes in media ownership, such as license transfers, through individual adjudications which actually consider the public interest benefits that a merger will generate rather than relying on broad numerical rules. Absent a new delegation or the agency magically producing evidence that would support a significant policy change, the massive wave of consolidation is over. The result of the consolidation is a media environment that is radically different than it was before the passage and implementation of the 1996 Telecommunication Act. Each media market in the United States has a unique environment and mix of media outlets. While broad rules are easier to enforce overall, engaging in adjudication on a case by case basis will allow the FCC some leverage to assure that the application of broad rules is actually generating the policy outcome that the Commission is looking for. Adjudication could also provide a harder look at markets like Eau Claire, WI, where two organizations each meet the broad rulemaking approved local ownership limit of six radio stations, and where these rules have resulted in only two major and one very minor competitor.

Third, the time has come for the FCC to conduct a meaningful policy evaluation of media ownership. Setting aside the legal requirement for this process, many of the agency's obstacles for media ownership policy could be removed if the Commission was willing to legitimately

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<sup>855</sup> Prometheus 2004, supra note 11.

evaluate the last fifteen years of policy outcomes. If the agency remains committed to diversity and localism as policy goals, then it must take steps to assure those goals are being met. An examination of the media content being produced will have to play a part in this review, and while the range of media content being produced is massive, the assessment really only needs to cover a small section of the actual content, programming of the informational variety.<sup>856</sup>

Academics may have an important role to play in this process.<sup>857</sup> Future research will need to develop a working solution to the methodological problems inherent in measuring the relationship between viewpoint diversity and ownership structure. The existing study designs which have relied on keyword searches and subjective coding systems of politically related content will always be subject to harsh peer review, and may ultimately never provide sufficient evidence to address the relationship.<sup>858</sup> Likewise, both qualitative measurements of news quality and quantitative measurements of content production, without a meaningful assessment of the source of, or of the viewpoints within, the content will also be of limited evidentiary value in the FCC's future quadrennial reviews.

Fourth, the FCC needs to reconsider the continuing reliance on a regulatory philosophy based on competition. A philosophy of non-governmental control in an industry which requires governmental intervention, and in many cases even government subsidy is simply irrational in

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<sup>856</sup> In terms of radio, this will often be no more than one or two stations in most markets. In terms of broadcast television, just the newscasts and public affairs programming. This represents a tiny fraction of the media content produced on a daily basis.

<sup>857</sup> Ronald Rice, Chapter 1 in Media Ownership Research and Regulation, (2008).

<sup>858</sup> Keyword methodology, such as was used by the National Association of Broadcasters in the newspaper-broadcast cross ownership proceeding in 1975, is not an effective methodology for examining viewpoint diversity, and studies which use measurements of bias are inherently subjective by design. Studies of this type have typically scored bias by media segment. Quantitative assessments of the diversity of people allowed to express a viewpoint on a discussion topic may present an opportunity to assess the number of voices aired. FCC Docket #18110, NAB: James Anderson, Broadcast Stations and Newspapers: the Problem of Information Control, Exhibit "E", In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, August 18, 1971.(Docket 18110, Volume 23) National Archives, accessed August, 2007.

legal and practical terms. The use of marketplace mechanisms to create content diversity was, and remains an illogical policy, but more importantly, a policy choice that is not achieving the desired policy objectives. New, or at least, different, approaches to policy must be considered and implemented.

Conceptually, the FCC needs to take steps to actively apply delegated jurisdictional powers to increase the quantity and availability of speech. While first amendment protections were designed to protect political speech from government intervention under the traditional libertarian press system in place at the inception of the United States, theories of free speech include the idea that the government can also play a positive role in ensuring that speech can occur, going so far as to even subsidize the process.

On some issues, like the Commission's controls on indecency and requirements children's television, the FCC styles itself as an agent of consumer protection. This consumer advocacy role also has support in legal terms, as the Supreme Court has upheld broadcast content regulations as constitutional since the chain broadcasting decision in 1943.<sup>859</sup> Applying the Neo-liberal idea that the rights of the audience to receive speech are as important as the rights of the speaker, a position the Supreme Court has also affirmed as constitutional in regulatory implementation,<sup>860</sup> the FCC can be, if the agency chooses, to be the government mechanism which, to paraphrase Owen Fiss, "hands out the megaphones."<sup>861</sup>

The most direct approach to a regulatory solution is to work within the existing system by implementing a quantitative requirement on broadcast licensees for informational programming.

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<sup>859</sup> National Broadcasting Co. v. United States, 319 U.S.190 (1943).

<sup>860</sup> Red Lion, supra note 21.

<sup>861</sup> "...the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources--hand out megaphones--to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others." Sometimes there is simply no other way." See Owen Fiss, The Irony of Free Speech, (1996).

If desired, these quantitative requirements could even be applied across the commonly owned stations at the market level. Similar quantitative obligations are currently applied to television licensees through the Children's Television requirements.

Mandating a certain quantity of informational or public affairs programming does not require that these mandates be intrusive or extremely specific.<sup>862</sup> Based on the evidence examined for this dissertation, the policy objective should first be to increase the actual quantity of informational content available. And while quantitative requirements would be an important first step, simply increasing the quantity of informational content may not be enough to achieve the fundamental policy goal of increasing the diversity of viewpoints available to a local audience.

To meet this policy goal, as well as the corresponding remands from the Third Circuit in the two *Prometheus Radio Project* decisions,<sup>863</sup> the FCC needs to develop a regulatory process where the agency is enticing broadcasters into increasing content diversity. The obvious incentive the Commission possesses to encourage companies to commit to increase the quantity and availability of diverse programming content is to provide an opportunity to acquire more station licenses. This option is not without modern precedent, as the FCC required programming and other mandates when approving the ComCast-NBC merger.<sup>864</sup> As a policy option, horse trading an increase in ownership limits for content diversity also fits into the existing regulatory model of competition. The practical downside of an enticement option is the requirement that the

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<sup>862</sup> See: Jerome A. Barron, Access to the Press-A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967) and Jerome A. Barron, Access Reconsidered, 76 Geo. Wash. L. Rev 826 (2008).

<sup>863</sup> *Prometheus* 2004, supra note 11.

<sup>864</sup> In approving the merger between the large cable and internet service provider ComCast and the NBC media properties, including broadcast stations owned and operated by NBC, the FCC required provisions on program distribution, pricing, content and infrastructure development be made to protect existing program services and distribution services. See, In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, FCC 11-4. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-4A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.doc), last accessed March 19, 2012.

FCC would need to provide oversight to ensure that broadcasters were actually providing the new content to audiences, something the FCC has failed to do since 1996.

An alternative would be to develop a plan to move a percentage of stations away from the consolidated media companies and give control of the stations to groups which will use the stations to target niche audiences. Previous evidence suggests that minority owners are a logical way to achieve this goal, as minority owners are more likely to create content which targets minority groups.<sup>865</sup> Such a plan might also give the FCC a policy option to meet the requirements of the remand of the agency's latest policy proposal on minority ownership.<sup>866</sup>

It is curious that some media organizations continue to fight ownership regulation as vehemently as they do, going so far as to argue that the ownership rules are, in fact, the FCC's stealth approach to content regulation.<sup>867</sup> Setting aside an imaginary situation in which one could even get the modern FCC to consider the regulation of media content beyond broadcast indecency, political campaigns or children's programming, the reality is that broadcasters have been given an incredibly valuable gift. A broadcast license is a privilege that, thanks to massive consolidation, few people enjoy. The government protects a licensee's monopoly use of public spectrum, and also provides the holder of that license an unmatched opportunity to have its viewpoints, bias and ideologies magnified in the public sphere. In terms of commercial broadcasters, the gift also includes the ability to make a great deal of money for providing content to local audiences. Yet, many companies have abused the public trust and filled the media environment with cheap automated music or syndicated programming, rather than informational content for the local audience their license requires them to serve.

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<sup>865</sup> Laurie Mason, Christine M, Bachen, Stephanie L.Craft, "[Support For FCC Minority Ownership Policy: How Broadcast Station Owner Race Or Ethnicity Affects News And Public Affairs Programming Diversity.](#)" 6 Comm L. & Pol. 37 (2001).

<sup>866</sup> *Prometheus Radio, et al. v. FCC & USA - No. 08-3078 (3rd Cir.)* (2011)

<sup>867</sup> *Id.* at 44.

The contentions that the FCC has been and remains a relatively weak regulatory body fails to consider some of the decisions the agency has made during enforcement of regulations. As the agency which has jurisdiction over broadcast license renewals, the FCC has a significant mechanism to ensure broadcaster compliance. Even after provisions within the 1996 Telecommunication Act made the revocation of licenses for broadcast stations more difficult, requiring a demonstration that a broadcaster had violated the law or broken agency provisions, the FCC made a policy choice to use consent decrees to settle a variety of outstanding violations of the indecency guidelines in 2004,<sup>868</sup> and again in 2007,<sup>869</sup> on violations of agency regulations which dealt with sponsorship identification, plugola and payola. The FCC had a major opportunity to use the jurisdictional power the agency has been given through statutory delegation to compel broadcasters to come into line with policy goals, but in each case, the agency was willing to let broadcasters buy their way out of trouble, and in the process, the Commission chose broadcasters interest over the public interest.

It is a small justice that the tendency of large media companies to cut staff and share programming after consolidation in order to squeeze more profits out of their licenses has in fact made additional changes to the rules difficult for the FCC to implement and for the media organizations to enjoy. Had the large media organizations created after the implementation of the Telecommunications Act been better public citizens by paying more attention to the production

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<sup>868</sup> See: Clear Channel Consent Decree on Indecency Violations, <http://transition.fcc.gov/eb/Orders/2004/FCC-04-128A1.html> (2004) Last accessed March 19, 2012. Emmis Communications Consent Decree on Indecency Violations, <http://transition.fcc.gov/eb/Orders/2004/FCC-04-199A1.html>, (2004) Last accessed March 19, 2012. Viacom and Infinity Consent Decree on Indecency Violations, <http://transition.fcc.gov/eb/Orders/2004/FCC-04-268A1.html>, (2004). Last accessed March 19, 2012.

<sup>869</sup> See: Citadel Broadcasting Consent Decree, <http://transition.fcc.gov/eb/Orders/2007/FCC-07-28A1.html>, (2007), Last accessed March 19, 2012. CBS Radio Corp. Consent Decree, <http://transition.fcc.gov/eb/Orders/2007/FCC-07-27A1.html>, (2007) Last accessed March 19, 2012. Entercom Communications Consent Decree, <http://transition.fcc.gov/eb/Orders/2007/FCC-07-42A1.html>, (2007) Last accessed March 19, 2012. Clear Channel Communications Consent Decree, <http://transition.fcc.gov/eb/Orders/2007/FCC-07-29A1.html>, (2007) Last accessed March 19, 2012.

of local news and public affairs programming, and by extension providing increased viewpoint diversity, the FCC might have been able to support further relaxing the limits on media ownership.

When considering the FCC, it is very hard to square the agency once headed by James Lawrence Fly and Newton Minow and their battles against the “Vast Wasteland”<sup>870</sup> with the agency led by Mark Fowler, and his suggestion that the television was no more than “toaster with pictures.”<sup>871</sup> While I disagree with Fowler’s assessment of the importance of media, I propose that because the toaster is responsible for keeping our democracy warm on both sides, it is worth the effort to ensure that the toaster is functioning properly, a process that can be completed successfully if the FCC takes the time to generate the relevant evidence to assess the effects of the last 15 years of policy implementation.

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<sup>870</sup> *Television and the Public Interest*, by Newton Minow, speech to the National Association of Broadcasters, May 9, 1961. Audio recording and Transcript online at:

<http://www.americanrhetoric.com/speeches/newtonminow.htm>, Last accessed July 1, 2011.

<sup>871</sup> "The television is just another appliance - it's a toaster with pictures." Quote attributed to Mark Fowler. See: *Evangelist of the Marketplace*, Richard Stengel, Jay Branegan, Peter Ainslie, *Time Magazine*, November 21, 1983.

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