

STUDENT NOTE

“Those who really deserve praise are the people who, while human enough to enjoy power, nevertheless pay more attention to justice than they are compelled to do by their situation.”

*Thucyclides*¹

**PAYING ATTENTION TO JUSTICE:
THE FCC AND THE FAILURE TO DEREGULATE**

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The true quality of a regulatory agency is crucially tested at the prime of its power. The Federal Communications Commission (FCC) seems to set its own leadership course when it breaks away from the restrictions imposed upon it by the law. At the moments when legal oversight is not strong, that is, when it is most important for the agency to “pay more attention to justice.” The FCC has failed this test of institutional character on many occasions.² Instead of rising to the occasion, the FCC has capitalized on these situations to achieve goals that it would be unable to attain through traditional policymaking. The result has been an unenforceable, unpredictable and arbitrary policy and process that has undercut the Commission’s standing and the “public interest.”³

These criticisms come from three fundamental principles in regulatory policy.⁴ The first is that an agency should not act beyond its boundaries of power, even when it can easily do so, because this undermines its statutorily defined mission or purpose.⁵ Second, an agency should not establish

¹ Thucydides, *HISTORY OF THE PELOPONNESIAN WAR* 50 (Rex Warner tr., Penguin Books, 1972).

² Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy “Voluntary” Agreements*, in *WORKING WITH THE FCC IN THE NEW MILLENNIUM: FROM REGULATION TO ENFORCEMENT*, 292 (Practicing Law Institute, 2001).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

responsibilities that it is not prepared or willing to fully enforce, because this damages the agency's credibility.⁶ Finally, the rules need to be applicable and visible to the public.⁷ The Commission could easily achieve its public policy objectives if it followed these principles, but it has often strayed from them. The FCC has been able to take advantage of its power to achieve policies and objectives outside of its directive, allowing it to manipulate its power and escape judicial review and to some extent, congressional review as well.

I. BACKGROUND

This country was founded on the belief that the voice of the people would be represented through the legislature, which would be subject only to constitutional restraints. In our system of law, the courts check Congress's actions and decisions, and Congress is deemed to have erred when it produces improper legislation that breaches the Constitution.

The media have always been an outlet for the voice of people in this country, but have come under increased scrutiny through regulation of media ownership. Since the 1930's and 1940's, the U.S. government has embraced the belief that ownership of the media must be regulated to ensure competition and a diversity of viewpoints, in order to serve the "public interest."⁸ Electronic ownership regulations, for example, first appeared in the 1940's and still remain in force today. The last few years have proven, though, that these restraints on the telecommunications industry, which is premised on change and improvement, are due for modification. The limitations on television station ownership were relaxed in the Telecommunications Act of 1996,⁹ and the decision in *Fox Television, Inc. v. FCC*¹⁰ represents the biggest change in the ownership rules

⁶ *Id.*

⁷ *Id.*

⁸ 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, *MM Docket No. 98-35, Release-Number FCC 98-37, 13 F.C.C.R. 11276, *11277* (March 13, 1998)(*1998 Notice of Inquiry*).

⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁰ *Fox Television Stations, Inc. v. FCC*, No. 00-1222, Consolidated with, 00-1263, 00-1326, 00-1359, 00-1381, 01-1136, 280 F.3d. 1027 (D.C. Cir. 2002).

since they were first imposed on the industry in the 1940's.

The FCC has enforced restrictions on the number of broadcast stations that one party may own for more than sixty years. Most of the ownership restrictions have involved broadcasting, in one form or another, and these restrictions were initially based on the idea of spectrum scarcity. The broadcast ownership restrictions exist to serve two main objectives.¹¹ The first objective is to further the First Amendment ideal of promoting the public welfare by providing diverse and antagonistic viewpoints, and the second is to promote competition in order to ensure the efficient use of resources.”¹² This paper will, in turn, look at the history of some of these ownership restrictions, mostly in the area of broadcasting, and how they have evolved to where we are today.

Television ownership has been restricted on the national level by the National Television Station Ownership (hereinafter referred to as “NTSO”) rule, which was first promulgated in 1941. It originally prohibited common ownership of more than three television stations nationally.¹³ This limit was raised to five stations in 1944.¹⁴ The “Rule of Seven” was imposed on television in the 1950's prohibiting an entity from owning more than seven stations, and limiting the number in the VHF band to five.¹⁵ In 1984, the FCC, taking technological changes into consideration, raised the number to twelve stations nationally, and subsequently the FCC mandated that stations under common ownership could not reach more than 25% of the national television audience.¹⁶ These restrictions remained in place until the Telecommunications Act of 1996 was enacted, when

¹¹ 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, *MM Docket No. 98-35, Release-Number FCC 00-191, 15 F.C.C.R. 11058, *11061; 2000 FCC LEXIS 3198; 20 Comm. Reg. (P & F) 882* (FCC June 20, 2000)(*1998 Biennial Review Report*).

¹² *Id.* at *11061-*11062.

¹³ Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 *CommLaw Conspectus* 269, 272 (Summer 1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Congress told the FCC to ban the twelve-station cap and raise the audience reach from 25% to 35%.¹⁷

In 1940, ownership restrictions included a ban on television duopolies within local geographic areas. This rule promulgated that two broadcast stations owned by the same entity were not allowed in substantially the same area.¹⁸ This broad distinction was defined more narrowly in 1964, when the FCC prohibited “common control of two stations if it resulted in overlapping predicted Grade B contours.”¹⁹ This was the rule still in effect when the Telecommunications Act of 1996 was enacted. The Act relaxed local ownership restrictions by effectively permitting “a broadcast station to affiliate with a network organization that maintains more than one broadcast network, unless such networks are created by a merger between ABC, CBS, Fox, or NBC, or a merger between one of these four established networks and UPN or WB.”²⁰ In other words, this rule supports common ownership of multiple broadcast networks that are created by internal growth and new entry, but it discourages common ownership of multiple broadcast networks created by mergers between certain networks.”²¹

In addition to ownership restrictions, several cross-ownership restrictions were enacted. These restrictions were based on government fears of giant monopolies controlling all the media in this country, as well as the lack of diversity that might be caused as a result. Cross-ownership restrictions have been imposed on cable/broadcast combinations, telephone/cable combinations and newspaper/television combinations, for example. This paper will focus on the cable/ broadcast cross-ownership (hereinafter referred to as “CBCO”) rule.

The FCC first recognized that there was an inherent concern involved with the common ownership of a local television system and a local cable system

¹⁷ *Id.* at 275.

¹⁸ *Id.* at 274.

¹⁹ *Id.* n.164. The Grade B contour is a station’s geographic market and it encompasses roughly a 50-70 mile radius around the television station’s transmitter.

²⁰ 1998 Biennial Review Report, *supra* note 10, at *11095.

²¹ *Id.*

in 1964.²² The obvious fear was that a broadcaster might use the local cable system to further its station's own interests, thereby discriminating against other local stations.²³ Since then, the FCC's policy regarding cable/broadcast cross-ownership has evolved with a lack of consistency.²⁴ The FCC was worried that a cable operator who owned a broadcast station might have the incentive not to carry the broadcast signals of competing stations.²⁵ In addition, the FCC was concerned that a cable operator who owned a broadcast station could discriminate against other broadcasters by offering cable-broadcast joint advertising sales and promotions.²⁶

The CBCO rule was adopted in 1970 as Section 76.501²⁷ of the FCC's rules. The rule basically prohibited a cable system from carrying the signal of any television broadcast station if that broadcast system was directly or indirectly owned, operated, or controlled by that cable system. In 1973, the FCC articulated its justification for enacting the rule by reinforcing its goals to "increase competition in the economic marketplace and increase competition in the marketplace of ideas."²⁸ The FCC stated that the rule would further its policy favoring diversity of control over local mass communications media, thereby leading to diverse sources of programming and ideas.²⁹ In addition, the FCC was concerned about undue concentration of media control.³⁰ In 1992, the FCC repealed the rule prohibiting network ownership of cable systems, but the FCC did not repeal the CBCO rule; instead, the FCC recommended that Congress

²² 1-9 TELREG at 9.03, EVOLUTION OF THE BROADCAST STATION CROSS-OWNERSHIP RESTRICTIONS 1 (Matthew Bender & Company, Inc. 2000).

²³ *Id.*

²⁴ *Id.*

²⁵ Fox, 280 F.3d at 1044 (2002)

²⁶ *Id.*

²⁷ 47 C.F.R. § 76.501.

²⁸ 1-9 TELREG at 9.03, *supra* note 22, at 2.

²⁹ 1998 Biennial Review Report, *supra* note 10, at *11110.

³⁰ *Id.* at *11110-*11111.

repeal the statutory prohibition.³¹ The Telecommunications Act of 1996 did repeal the prohibition,³² but it never required the FCC to repeal the CBCO rule.

As mentioned above, the Telecommunications Act of 1996 changed many of the ownership rules that had been in effect since the 1940's, and the Act's ultimate goal was to deregulate the structure of both the broadcast and cable television industries.³³ To help achieve this goal, Section 202(h) of the Act instructed the FCC to review each of its ownership rules every two years. In its biennial reviews, the FCC was to determine whether the rules were still "necessary in the public interest as a result of competition."³⁴ In addition, the FCC was to repeal or modify any regulation that it determined to be no longer in the public interest.³⁵ The FCC must consider the twin interests of competition and diversity to determine whether rules are still necessary in the public interest. The FCC's first review began in 1998 and its failure to repeal or modify the NTSO or CBCO rules caused networks to challenge their decision.

Although the Telecommunications Act of 1996 repealed some regulations and directed the industry down a road of deregulation, the public interest standard by which the FCC is to review its ownership rules has not really changed. The FCC has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, and by preventing "undue concentration of economic power."³⁶ Section 202(h) of the 1996 Act did not embellish on this standard and therefore, the standard has remained vague; it allowed the FCC too much

³¹ In the Matter of Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, *MM Docket No. 82-434, Release-Number FCC 92-262, 7 F.C.C.R. 6156, *6166; 1992 FCC LEXIS 3932; 70 Rad. Reg. 2d (P & F) 1531* (FCC July 17, 1992)(1992 Report and Order).

³² Section 202, *supra* note 8.

³³ *Fox*, 280 F.3d at 1033 (2002).

³⁴ 1998 Biennial Review Report, *supra* note 10, at *11059.

³⁵ *Id.*

³⁶ In the Matter of Amendment of Section 73.3555, of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *MM Docket No. 83-1009, Release-Number FCC 84-350 34954, 100 F.C.C.2d 17, *18; 1984 FCC LEXIS 2213; 56 Rad. Reg. 2d (P&F) 859* (FCC August 3, 1984)(1984 Report and Order).

discretion, with no definitive direction or guideline for the agency to determine what is acceptable in terms of competition and diversity. The large, subjective scope of the “public interest” standard has allowed the FCC to manipulate its means in order to achieve the ends it has sought, maintaining most of its ownership regulations. As will be seen in the discussion of the *Fox v. FCC* case below, the pattern of inconsistency and lack of justification by the FCC in retaining its rules has caused the Court to take the most drastic action regarding the ownership rules since they were enacted.

II. *FOX TELEVISION, INC. V. FCC*

A decision by the United States Court of Appeals for the District of Columbia Circuit, on February 19, 2002, demonstrated the Court’s frustration and intolerance towards the Federal Communication Commission’s continued refusal to justify or explain its reasons for maintaining its ownership rules. Five consolidated petitions were present to the court in *Fox Television Stations, Inc v. Federal Communications Commission*, challenging the FCC’s decision not to repeal or modify, in any way, the national television station ownership rule (NTSO) and the cable/broadcast ownership rule (CBCO). Petitioners, Fox Television Stations, Inc, National Broadcasting Company, Inc., Viacom Inc., and CBS Broadcasting Inc., addressed the NTSO rule, while petitioner, Time Warner Entertainment Company, L.P., addressed the CBCO rule.

The Telecommunications Act of 1996 purported to initiate a process of deregulation in the structure of the broadcast and cable television industries. Pursuant to section 202(h) of the 1996 Act, the FCC reviewed each of the ownership rules in 1998 to decide if they remained “necessary in the public interest”. On March 13, 1998, the FCC issued a *Notice of Inquiry* requesting comments on all the ownership rules, specifically the NTSO and CBCO rules.³⁷ Reply comments were filed in June 1998, but as of the fall of 1999, the FCC had not yet finished reviewing the rules.³⁸ In November 1999, Congress directed the FCC to finish its first biennial review within 180 days.³⁹ Finally, two years after the commencement of the first review, the FCC announced its decision on May

³⁷ *Fox*, 280 F.3d at 1035 (2002).

³⁸ *Id.*

³⁹ *Id.* at 1036.

26, 2000. The FCC decided to retain the NTSO and CBCO rules by a vote of 3-2. The FCC also decided to repeal or modify other ownership rules, which are not of issue to this case, such as the telephone/cable cross-ownership rule,⁴⁰ the cable/network cross-ownership rule,⁴¹ and the rules regulating restrictions on national and local radio stations.⁴² The FCC released a report explaining its decision a few weeks later.⁴³

The Commission's decision to retain the two rules had direct effects on the petitioners. For example, Viacom's acquisition of CBS brought its national audience reach to 41%. The only reason that Viacom was able to avoid ridding itself of enough stations to meet the 35% cap established by the NTSO rule was this court's stay order, which was issued on April 6, 2001.⁴⁴ In addition, the NTSO rule was preventing Fox from purchasing Chris-Craft Industries, an acquisition that would enable Fox to reach more than 40% of the national audience.⁴⁵ As for Time Warner, the FCC's CBCO rule blocked the company from buying television stations, in New York City for example, where it already owned a cable system.⁴⁶ Time Warner claimed that there would be "obvious pro-competitive efficiencies"⁴⁷ from combining a television station in New York City with its cable programming service, NY1, which provides full-time local news.⁴⁸ Time Warner also asserted that the CBCO rule prohibited its Warner Brothers network from being able to compete with networks that owned stations in major television markets.⁴⁹

⁴⁰ 47 U.S.C. § 302(b)(1).

⁴¹ 47 U.S.C. § 202(f)(1).

⁴² 47 U.S.C. § 202(a), (b), (e).

⁴³ See *supra*, note 10.

⁴⁴ *Fox*, 280 F.3d at 1036.

⁴⁵ *Id.* at 1036.

⁴⁶ *Id.* at 1036 – 1037.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1037.

⁴⁹ *Id.*

In its *1998 Biennial Review Report*, the Commission asserted three main reasons for keeping the NTSO rule. The first reason was to examine the effects of recent changes to the rules governing local ownership of television stations.⁵⁰ Unconvinced, The United States Court of Appeals for the District of Columbia Circuit failed to see an obvious relationship between the changes in the local ownership rule and the retention of the national ownership cap.⁵¹ In addition, the court noted that the FCC failed to offer any relationship. Second, the FCC claimed that it also wanted to observe the effects of the increase in the national ownership cap from 25% to 35%.⁵² The court condemned the FCC's "wait-and-see approach," which went against the FCC's mandate to promptly "repeal or modify" any rule that was not "necessary in the public interest".⁵³ Last, the FCC alleged that the NTSO rule preserved the power that affiliates had in bargaining with their networks, which in turn, would allow affiliates to better serve their local communities.⁵⁴

The networks attacked the FCC's reasons for retaining the NTSO rule. The networks first stated that the FCC posed no evidence in its *1998 Report* "that broadcasters have undue market power," diminishing competition in any relevant market.⁵⁵ The court agreed with the networks on this point and maintained that the FCC offered no valid reason to claim that the NTSO was necessary to protect competition.⁵⁶ As for the diversity prong of the public interest standard, the networks claimed that there was no evidence that "the national ownership cap was needed to protect diversity."⁵⁷

⁵⁰ *Id.* at 1036.

⁵¹ *Id.* at 1042.

⁵² *Id.* at 1036.

⁵³ *Id.* at 1042.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1041.

⁵⁶ *Id.* at 1042.

⁵⁷ *Id.*

The court's conclusion that the FCC's decision to retain the NTSO rule was both arbitrary and capricious and in violation of section 202(h) was supported by three main reasons. First, the FCC failed to do what section 202(h) required of them: to establish the relationship between the facts and its decision to retain the NTSO ownership cap.⁵⁸ The court focused on one paragraph in the FCC's brief describing the broadcasting market, which was merely of a list that included: the number of television households, the number of television stations, the percentage of stations that are affiliated with networks, and the number of stations an average viewer could receive.⁵⁹ The FCC failed to define the relevant markets or even to assess the competition within the markets.

Second, the FCC failed to address its contrary position in its *1984 Report and Order*, which furthered the court's finding that the FCC's decision was arbitrary and capricious. Basically, the *1984 Report and Order* stated the FCC's finding that the NTSO rule should be repealed because it focused on national rather than local markets and because competition made the rule obsolete.⁶⁰ The court recognized the FCC's ability to change its mind, but attacked the agency's failure to explain its departure from a previous view with a reasoned analysis.⁶¹

Last, as previously mentioned, the FCC failed to give an adequate reason to support its decision. The court did not vacate the rule as recommended by the networks, but remanded the case to the agency for further consideration because it did not find the rule to be unconstitutional.⁶²

Time Warner made several arguments in support of its claim that the FCC's decision to keep the CBCO rule was arbitrary and capricious and contrary to section 202(h). The court found the Commission failed to adequately respond to these arguments and further found that any arguments the FCC did make were

⁵⁸ *Id.* at 1044.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1044.

⁶¹ *Id.* at 1044. Court points to *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L.Ed. 2d 443, (1983), which stated that "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis."

⁶² *Id.* at 1047.

unpersuasive. Time Warner argued that the FCC applied too lenient a standard when it concluded that the CBCO rule “continues to serve the public interest” and not that it was “necessary in the public interest.”⁶³ The Commission was silent to this attack. The court agreed that section 202(h) clearly states that a regulation should be retained only if it is found to be necessary, and not merely consistent with the public interest.⁶⁴

The FCC simply did not address the competition goal with regard to the CBCO. The FCC had not explained why joint advertising rates were discriminatory and failed to show substantial evidence that this discrimination was a non-compliance problem.⁶⁵ In addition, refusals by cable operators to carry digital signals were not really a problem, because the FCC declined to impose must-carry rules for duplicate digital signals.⁶⁶ The FCC did not address the effect that DBS services had on competition and it did not address its contrary *1992 Report and Order*. The court concluded that the FCC had not shown a “substantial enough probability of discrimination to deem reasonable a prophylactic rule as broad as the cross-ownership ban, especially in light of the already extant conduct rules.”⁶⁷ The court concluded that the FCC failed to justify retention of the CBCO rule as necessary to safeguard competition.

The FCC did retain the CBCO rule despite having considered the increase in the number of competing stations since the rule was enacted in 1970.⁶⁸ The FCC did not offer an explanation for this behavior, but even the court questioned whether there was anything more convincing than this concession by the FCC to support the possibility that the rule is no longer necessary to further diversity.⁶⁹ The FCC also made no response to Time Warner’s argument that a concern regarding diversity cannot allow a broad prohibition of cross-ownership,

⁶³ *Id.* at 1049-1050.

⁶⁴ *Id.* at 1050.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1051.

⁶⁸ *Id.* at 1052.

⁶⁹ *Id.* at 1050.

especially in light of the *TV Ownership Order*, in which the FCC concluded that the common ownership of two broadcast stations in the same local market would not adversely effect diversity.⁷⁰ The court found that the FCC's diversity rationale for retaining the CBCO rule was "woefully inadequate." Consequently, the court vacated the rule because it felt that vacating the rule would not significantly affect the FCC's regulatory program negatively.⁷¹

III. ANALYSIS

This paper concerns the standard and method by which the FCC reviews its rules. The FCC has always reviewed its rules to determine if they are still necessary in the public interest in terms of diversity and competition.⁷² Section 202(h) of the Telecommunications Act of 1996 has delegated the FCC to review its ownership rules every two years, under the same basic "public interest" standard it has always used. The FCC has failed to do this in an acceptable manner. The court, as seen in *Fox v. FCC*, finally became frustrated with the FCC and made some decisions for the agency. Part of the problem has been that "public interest" is an elusive term, in which many groups including critics, courts, congressional representatives, and broadcasters have failed to reach a consensus as to its meaning. The "public interest" standard has caused the FCC to act inconsistently, in a subjective manner and with too much discretion.

Regarding its ownership rules, the FCC stated in its *1998 Notice of Inquiry* that its regulation of broadcast service has been "guided by the goals of promoting competition and diversity."⁷³ The FCC knows that competition is an integral part of its directive because "it promotes consumer welfare and the efficient use of resources."⁷⁴ The viewpoint diversity objective promotes a goal that the Supreme Court has stated is an underlying component of the First

⁷⁰ *Id.* at 1052.

⁷¹ *Id.* at 1053.

⁷² 1998 Notice of Inquiry, *supra* note 7, at *11277.

⁷³ 1998 Notice of Inquiry, *supra* note 7, at *11277.

⁷⁴ *Id.*

Amendment.⁷⁵ The FCC recognizes this point as stated by the Supreme Court that “the First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁷⁶

The repeal or complete modification of the “public interest” standard is long overdue. The standard must either be completely repealed, or modified according to the context in which it is being used. For example, the goal of the Telecommunications Act of 1996 to deregulate the broadcast and cable industries will never come to fruition unless the public interest standard is narrowed in its application, providing a method by which to review the ownership rules in each respective industry. The arguments and proof in this paper should persuade Congress or the courts to take further action. This paper first questions the meaning of the public interest, and then critically questions why the government has the duty to decide what is necessary to further public interest. This paper will show how the vagueness of the “public interest” standard has caused the FCC to make inconsistent and unpredictable decisions and whether the FCC should continue to decide what is necessary in the public interest. Lastly, this paper will propose how the FCC should deal with ownership regulations.

Although the scope of the public interest standard has always proven to be indefinable, it has continued to be the foundation upon which broadcasting is based in this country. The public interest has included many different values, interpretations, and objectives and much of this has depended upon one’s prejudices, goals, and predispositions.⁷⁷ The concept has turned into a compilation of different values, interpretations and opinions that are as diverse as the audience it serves in this country. What an academic considers to be in the public interest may be completely different from what a politician or a minority group considers to be in the public interest. The only way to reconcile this subjective view would be to implement an objective test with which to determine public interest, but Congress has not done this. Of course, it may be that Congress is not able to do this or does not want to deal with the political pressure. How can the FCC consider minority groups, children, educational

⁷⁵ *Id.*

⁷⁶ *Associated Press v. United States*, 326 U.S. 1, 10 (1945).

⁷⁷ Thomas C. Sawyer, *The Evolving Public Interest*, PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING, 77 (Jon T. Powell & Wally Gair eds., Quorum Books 1988).

programming, local programming, politics, and entertainment and come out with rules reflecting interests of all? If this may not be possible has the public interest standard outlived its purpose?

In *United States v. Playboy Entertainment Group, Inc.*,⁷⁸ the Court asserted that the “Constitution exists to grant the people, as opposed to the government, the ability to evaluate moral, artistic, and intellectual content.”⁷⁹ Although this case was concerned with content regulation, which is subject to a higher level of scrutiny than content-neutral ownership regulations, it still makes a valid point. In order to structure and review ownership rules, the FCC must consider competition and diversity in light of the public interest. Further, Section 202(h) of the Act instructs the FCC to review the ownership rules to determine if they are “necessary in the public interest.” But how does the government really know what is in the public interest? What is in the public interest in a small town in Idaho will be extremely different from that of the City of New York. The City of New York will naturally have more competition than a small town in Idaho and the views of people from both locales will vary widely. How do we reconcile this disparity when applied to an ownership rule such as the NTSO rule, which is applied on a national level? The test or method of review may have to be different when considered in different areas of the country.

In the FCC’s *1998 Biennial Review Report*, Commissioner (now Chairman) Michael K. Powell, in a separate statement, equated the quote, “beauty is in the eye of the beholder,” to television. Commissioner Powell said, “it is difficult and perhaps constitutionally impermissible for government to impose its conception of worthiness or beauty on viewers.”⁸⁰ He also pointed out an interesting trend in programming, which is a movement from broadcasting to narrow casting.⁸¹ When television first began, broadcasting was the main means, besides movie theaters, in which one could receive video content.⁸² Broadcast

⁷⁸ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

⁷⁹ 1998 Biennial Review Report, *supra* note 10, at *11147 n.22.

⁸⁰ 1998 Biennial Review Report, *supra* note 10, at *11147.

⁸¹ *Id.*

⁸² *Id.*

provides one signal to many people and Commissioner Powell posed that this is its central virtue, but also its central limitation;⁸³ It could only offer one program at a time, and therefore, the program has to appeal to the broadest possible audience.⁸⁴ He concluded by saying that this, by its nature, causes broadcasting to have trouble in fostering diversity.⁸⁵ This supports the proposition that the government may not be the best entity to decide what is the most diverse program for a national audience.

The vagueness and sweeping scope of the public interest standard has given the FCC an abundant discretion, leading to unsupported and inconsistent decisions. This, in turn, has caused unpredictability as regarding the FCC's treatment of broadcast and cable ownership rules. The courts are also negatively affected by the FCC's inconsistent decisions because "predictability lends itself to the establishment and maintenance of judicial legitimacy on which courts depend for their respect and power."⁸⁶ Inconsistent decisions by the FCC and the unpredictability this causes, makes it very difficult for courts to make decisions.

As the court mentioned in the *Fox v. FCC* case, the FCC's position in its *1984 Report and Order* regarding the NTSO rule was completely contrary to its current position and the FCC offered no reason why it has completely changed its position.⁸⁷ In 1984, the FCC considered the effects of technological changes in the mass media. The FCC subsequently repealed the NTSO rule. The FCC decided that the repeal of the rule would not adversely affect either the diversity of viewpoints available or competition amongst broadcasters.⁸⁸ The FCC said the rule was unnecessary because the U.S. "enjoys an abundance of independently owned mass media outlets."⁸⁹ The FCC also stated that "the

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, (Fall 1997).

⁸⁷ *Fox*, 280 F.3d at 1042 (2002).

⁸⁸ *Id.* at 1044.

⁸⁹ *Id.* at 1034.

number of broadcast stations has increased more than tenfold since the initial multiple ownership rules were adopted.”⁹⁰ If this was true in 1984, it is more so true today. As for diversity, the FCC concluded that group owners were not likely to impose a “monolithic” viewpoint.⁹¹ Economic competition was also not a concern in repealing the NTSO rule, according to the FCC, because it felt that competition would not be affected negatively.⁹² How could have the public interest completely changed from 1984 to today, especially in light of the technological advances?

In former Commissioner Harold Furchtgott-Roth’s dissent in the *1998 Notice of Inquiry*, he said that The Commission’s reason for maintaining the subject rules boils down to this: it feels that it has deregulated enough for the time being and simply does not want to go any further.”⁹³ Obviously, the FCC cannot do this, but until the decision by the court in the *Fox v. FCC* case was reached this past December, the FCC was getting away with it. In fact, the FCC was getting away with it for years. With no precise meaning of public interest available, the Court had no means to scrutinize a decision by the FCC. The court pointed out in the *Fox* case, “that Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.”⁹⁴ This presumption obviously did not influence the FCC when it reviewed the broadcast ownership rules in 1998. Could the complete change of view by the FCC be influenced by politics? The broad scope of “public interest” would allow the FCC to make decisions based on policy or other considerations and get away with it. The flexibility that the FCC currently experiences because of the vagueness of the public interest standard, opens the door for an abuse of discretion and an unfettered bias by the FCC in reviewing its ownership rules.

The FCC’s 1998 position regarding the NTSO rule was not the only contrary position that the FCC has taken. The FCC’s position in 1992, regarding the CBCO rule, also contradicted its position in the *1998 Biennial Review*. Once

⁹⁰ 1984 Report and Order, *supra* note 35, at *2.

⁹¹ *Fox*, 280 F.3d at 1034 (2002).

⁹² *Id.* at 1044.

⁹³ 1998 Biennial Review Report, *supra* note 10, at *11135.

⁹⁴ *Fox*, 280 F.3d at 1047 (2002).

again the FCC failed to justify its inconsistent position. In its *1992 Report and Order*, the FCC concluded that, because of all the current changes in the video marketplace, there was no longer a need for an absolute prohibition on broadcast/cable cross-ownership.⁹⁵ The Commission did not repeal the rule, however, because Congress had created a similar prohibition by statute. The FCC instead recommended that Congress repeal its statutory prohibition. Congress repealed the statutory prohibition in the enactment of the Telecommunications Act of 1996, but Congress never required the FCC to repeal the CBCO rule and the FCC never did so.⁹⁶

The court in the *Fox v. FCC* case determined that the FCC's failure to explain its contrary position in its *1992 Report and Order* and its failure to consider competition from DBS, alone made the FCC's decision to retain the CBCO rule arbitrary and capricious.⁹⁷ In its *1992 Report and Order*, the FCC stated that an absolute ban on the network-cable cross-ownership rule no longer served the public interest.⁹⁸ In addition, the FCC stated that, "Not only has the rule outlived its original purpose of fostering a competitive video marketplace, but it may also hamper competition by precluding three experienced market participants from owning cable systems, and by unnecessarily limiting the television networks' ability to diversify and generate other revenue streams."⁹⁹ This is a strong statement to leave unexplained after its contrary decision in the *1998 Biennial Review Report*. Why did the FCC not state how the public interest has affected its decisions to change their positions? The FCC does not state why these rules now appear to be in the public interest again.

According to former Commissioner Harold Furchtgott-Roth's dissent in the *1998 Biennial Review Report*, under Section 202(h) the Commission's job is "to explain why changes in competition have not rendered broadcast ownership rules superfluous in promoting the public interest."¹⁰⁰ In addition, he stated that

⁹⁵ 1992 Report and Order, *supra* note 31, at *6157.

⁹⁶ *Fox*, 280 F.3d at 1035 (2002).

⁹⁷ *Id.* at 1050-1051.

⁹⁸ 1992 Report and Order, *supra* note 31, at *6174.

⁹⁹ *Id.* at *6160-*6161.

¹⁰⁰ 1998 Biennial Review Report, *supra* note 10, at *11132.

in the FCC's analysis of the NTSO and CBCO rules, the Commission "never analyzes the continued utility of the rules 'as the result of competition,' as the statute requires."¹⁰¹ The FCC in effect turned Section 202(h) on its head because it does not consider the effect of competition on the continued need for the rules, but rather, the FCC considered the effects of the rules on competition.

In assessing current levels of competition in its *1998 Review*, the FCC first defined the economic markets. The markets included the product market or geographic market, for example. In reviewing broadcast ownership rules, the FCC looked in particular at three economic markets, which include the market for delivered video programming, the advertising market, and the program production market.¹⁰² The FCC also tentatively considered that cable directly competes with broadcast television stations in each of these markets and also that broadcast radio and newspapers compete with television in the local advertising market.¹⁰³ Next, the FCC focused upon whether and to what extent market power existed and was being exercised, and what effect the ownership rules have had on the market power in each of the markets.¹⁰⁴ Although this appears to be a structured and efficient manner by which to consider the effects that the ownership rules have on competition, the FCC failed to critically or even adequately assess these factors in its 1998 Review. The FCC mentioned many statistics and reports, but did no analysis or thorough investigation as to how these findings affected competition and diversity with regard to the rules.

In dealing with diversity, the FCC considered how the broadcast and non-broadcast media advance three types of diversity that the broadcast ownership rules have tried to cultivate. The three types of diversity considered were viewpoint, outlet and source diversity. The FCC described viewpoint diversity as "helping to ensure that the material offered by the media reflect a wide range of diverse and antagonistic opinions and interpretations."¹⁰⁵ Outlet diversity was

¹⁰¹ *Id.*

¹⁰² 1998 Notice of Inquiry, *supra* note 7, at *11277.

¹⁰³ *Id.* at *11277-*11278.

¹⁰⁴ *Id.* at *11278.

¹⁰⁵ *Id.*

described by the FCC as offering a variety of delivery sources, including broadcast stations, newspapers, cable and DBS, that choose and offer programming directly to the public.¹⁰⁶ Finally, source diversity referred to “promoting a variety of program or information producers and owners.”¹⁰⁷ These three viewpoints on diversity seem to be a viable manner in which to judge diversity, but the FCC failed to show how it reached its conclusions using these factors.

Most people can speculate what influences the public interest or what the public interest should be, but there are thousands of people who define it every day through their actions. These people include broadcasters, programmers, and newsmen, for example. These people are at the center of all the influences such as government regulations, local needs and interests, economic success, audience ratings, and individual’s complaints and compliments.¹⁰⁸ Each broadcaster has to consider all of these influences and pressures, and set priorities with respect to the locality in which it operates. In light of all these natural influences, do we really need the government to regulate ownership and attempt to decide what serves the public interest? Beyond the FCC and its regulations, the broadcaster realizes that it will not survive if it does not serve its public interest.

In looking at the history of the broadcast ownership rules, one has to wonder what formula has been used to arrive at the numbers and percentages that make up the restrictions in these rules. How does the government decide how many stations one entity is allowed to own nationally or what percentage of the national audience one entity is allowed to reach? The answer is simply that there is no formula. The process seems completely arbitrary. The government sits and “cherry picks” numbers that sound good. The Telecommunications Act of 1996 repealed the number of broadcast stations one entity could own and it raised the national audience cap by ten percent. Is this supposed to make the government look good? How did they make these decisions?

The Telecommunications Act of 1996 poses a commendable idea of

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Sawyer, *supra* note 75, at 80.

deregulation, and the Act repealed and modified several rules upon enactment. What the Act failed to do was change the standard by which the FCC would review the rules to accomplish this goal. Congress realized that many of the rules were archaic, but it never really questioned if the standard by which to review the rules was archaic. It has been suggested that “the regulatory framework created by the 1996 Act has failed to produce many of the benefits promised by its supporters.”¹⁰⁹ Further, “the Act has provided an excuse for the FCC to expand its already swollen bureaucracy.”¹¹⁰ This Note further presses that even though “some in Washington ‘paradoxically and mischievously’ refer to the current state of affairs as ‘deregulation,’ the FCC continues to regulate emerging technologies and to re-regulate previously deregulated communications industries.”¹¹¹ In addition, the FCC has not been willing to repeal obsolete regulations and it has been able to get away with this behavior because of the unclear scope and application of the public interest standard.

This paper proposes, not only a change in the standard of review by the FCC of its ownership rules, but a transformation by the FCC from a regulatory agency to an enforcement agency. The FCC needs to meet the challenge of reinventing itself in order to stay abreast of the rapidly changing communications industry.¹¹² The FCC should shift its focus away from regulation and concentrate on competition from a non-regulatory perspective. A move from market regulator to market facilitator would be the best transition for the FCC to make in restructuring itself. The FCC will need to focus on its efforts towards addressing issues that will not be solved by the market, instead of concentrating on managing monopolies.¹¹³ Both the public and communications entities will be better off if the communications entities are encouraged and guided, rather than regulated and hampered from expanding with the technological changes and advancements.

¹⁰⁹ Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 HARV. J.L. & PUB. POL’Y 503, 504 (Spring 2001).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Federal Communications Commission, *Chairman Kennard Delivers to Congress Draft Strategic Plan for 21st Century*, WORKING WITH THE FCC IN THE NEW MILLENNIUM: FROM REGULATION TO ENFORCEMENT, 321 (Practising Law Institute 2001).

¹¹³ *Id.*

As competition continues to increase in the communications markets, direct regulation by the FCC will become less necessary. It is important that the FCC recognizes and accepts this inevitable fact. The introduction of Internet-based and other technology driven communications services will diminish the traditional regulatory distinctions between different areas of the communications industry. For instance, today modems can be connected to telephone or cable lines. Despite this blurring of communications sectors, the FCC's primary goals will not change. The FCC must still promote competition in the communications industry, protect consumers, and support access to all Americans to current and advanced telecommunications services.¹¹⁴

Changes such as the promotion of competition in the FCC's role from a market regulator to a market facilitator would not deteriorate competition and would allow for a complete monopolization of the mass media industry, as some may believe. Currently, the Department of Justice and the Federal Trade Commission review all requests for mergers. The FCC's role in merger review is to make sure that the merger will serve the public interest. In considering the competitive effects of a merger, the FCC's method of review is similar to that of the FTC and the DOJ.¹¹⁵ The only difference is that the FTC and DOJ follow the 1992 Horizontal Merger Guidelines,¹¹⁶ while the FCC merely uses a balancing approach under the public interest standard, which "by its nature [has lacked] consistent guiding principles."¹¹⁷ Therefore, changing the FCC's role would not have an anti-competitive effect as some may fear. The FCC needs to refocus its efforts from managing monopolies to really concentrating on issues that will not be taken care of by the market itself. This includes continuing license regulation, but focusing more on customer service. The FCC has admitted, in its more candid moments, that it has failed to implement an appropriate customer service mentality.¹¹⁸

¹¹⁴ *Id.*

¹¹⁵ Lisa Blumensaadt, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 *COMMLAW CONSPECTUS* 291, 301 (Summer 2000).

¹¹⁶ *Id.* at *301-*302.

¹¹⁷ *Id.* at *308.

¹¹⁸ Daniel E. Troy, *supra* note 107, at *513.

IV. CONCLUSION

Congress passed the Telecommunications Act of 1996 in light of the new competitors in the telecommunications and video service markets. Over time it was becoming clear that the competitive marketplace could replace regulation in many telecommunications markets. The Telecommunications Act of 1996, however, did not really achieve what it set out to do, namely, deregulation. Congress, feeling immense pressure from various industry interests, did not go far enough in mandating deregulation.¹¹⁹ Instead, Congress left the job in the FCC's hands, without conducting virtually any oversight. The result was a failure by the FCC to deregulate as directed. Consequently as a result of much frustration with the FCC, the Court of Appeals for the District of Columbia Circuit demanded the repeal of the CBCO rule and instructed the FCC to reconsider the necessity of the NTSO with regard to the public interest.

The FCC must undergo a facelift. The FCC should begin by acknowledging that there are competitive changes surging through the mass communications marketplace and this demands "real deregulation" and "real reform."¹²⁰ Congress, as lawmakers, must ensure that deregulation and reform is accomplished, unlike the failed attempt experienced in 1996. Congress needs to "employ explicit 'sunset' directives or 'competitive rebuttable presumptions' to ensure that outdated regulatory requirements are eliminated in a timely fashion."¹²¹ In addition, the "indeterminate" public interest standard should be replaced with a more specific set of legislative guidelines that better examine our "competitive Information Age environment."¹²²

¹¹⁹ Randolph J. May, *A Leaner FCC*, WORKING WITH THE FCC IN THE NEW MILLENNIUM: FROM REGULATION TO ENFORCEMENT, 317 (Practising Law Institute 2001).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*