

Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of

2002 Biennial Regulatory Review–Review
of the Commission’s Broadcast Ownership
Rules and Other Rules Adopted Pursuant) MB Docket No. 02-277
to Section 202 of the Telecommunications)
Act of 1996)
)
Cross-Ownership of Broadcast Stations)
and Newspapers) MM Docket No. 01-235
)
Rules and Policies Concerning Multiple)
Ownership of Radio Broadcasting) MM Docket No. 01-137
in Local Markets)
)
Definition of Radio Markets) MM Docket No. 00-244
)

COMMENT

The Federal Communications Commission (“FCC”) deserves high praise for attempting to co-ordinate and rationalize its multiple ownership rules.¹ The FCC deserves even higher praise for recognizing the need to tie such decisions to basic goals,² and the possibility that some goals might be better promoted by more direct action.³ This Comment addresses one very basic

¹ See Notice of Proposed Rule Making, FCC 02-249 (released Sept. 23, 2002) (hereinafter “NPRM”) at ¶ 1 (“a comprehensive review of the Commission’s media ownership rules.”).

² See *id.* at ¶ 5 (“In conducting this reassessment . . . , we must clearly define our objectives The Commission’s ownership policies traditionally have focused on advancing three broadly defined goals: (1) diversity, (2) competition, and (3) localism. . . . In addition, [the Commission] will consider whether there are additional objectives that the Commission should strive to achieve through [its] media ownership rules . . . [such as] increased innovation of media platforms and services.”).

³ See *id.* at ¶ 49 (“Would one or more kinds of diversity be better promoted by alternatives to structural regulation, such as behavioral requirements? We invite comment on whether we should promulgate behavioral regulations,” their content and administration.).

goal which lurks unstated behind calls for localism and diversity – a goal which should be directly addressed in behavioral requirements: providing local news programming from independent sources. This Comment also suggests that major deregulation should not be undertaken absent more empirical study of central issues.

Summary of Substantive Suggestion

The Commission should require that any change in ownership result in an increase (or minimally no diminution) of independently produced local news programming by broadcast and multichannel video programming distributors (hereinafter “MVPD”).

Summary of Process Suggestion

Before making any major deregulatory changes, the FCC should conduct much more exhaustive empirical study of (i) the effect on voting patterns from changes in the availability of local news sources, and (ii) the effect of ownership consolidation on news reporting and editorializing.

Analysis

The FCC’s mission is to regulate communications to promote the public interest, convenience, and necessity. *See, e.g.*, 47 U.S.C. § 308(b). Pursuant to basic First Amendment theory, this regulatory standard “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public;”⁴ “a governmental purpose of the highest order.”⁵

This fundamental insight was shared by the founding generation. As James Madison famously wrote, “Knowledge will forever govern ignorance”; “[a] popular government without popular information[] or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”⁶ By “popular government,” of course, Madison meant a government created and controlled by a voting populace. The voting populace should be informed; the informed populace should control the government by voting.

⁴ *Id.* at ¶ 33 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

⁵ *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663 (1994) (cited NPRM at ¶ 21).

⁶ Letter from James Madison to W.T. Berry (Aug. 4, 1822), *in* James Madison, *The Complete Madison* 337 (Saul K. Padover ed. 1953).

Yet most of the empirical studies reported by the FCC ignore voting behavior. Only one study touches on this central behavior, and that information is not emphasized in the FCC's Internet posted summary. FCC Media Ownership Working Group study number 3, "*Consumer Substitution Among Media*," by Joel Waldfogel, reports:

Existing research on media consumption and voting suggests that, even if substitution [between media] operates, it is not complete in the [behavioral] sense. Changes in availability of black-targeted radio stations and weekly newspapers, 1994-1998, affect the tendency for blacks to vote (see Oberholzer-Gee and Waldfogel, 2001). There would be no effect on voting if changes in use of other media offset the effects of changes in availability of black-targeted radio stations and weeklies. Although there is evidence (above, and Sinai and Waldfogel, 2001) that small groups substitute nonlocal media (such as cable and Internet) for local media where local products are unavailable, this substitution does not generate behavioral neutrality.

In another context there is additional evidence against behavioral neutrality. National newspapers serve as substitutes for local ones, in the sense that markets with faster growth in a major national paper's circulation experience greater decline in local daily paper circulation among readers targeted by the national paper (see George and Waldfogel, 2002). **Behavioral neutrality fails in the sense that in markets with greater increase in the national paper's circulation, there is a greater decline in the tendency for the targeted audience to vote in local (non-presidential) elections. Here again, although consumers view the products as substitutes, they do not have the same effect on civic behavior.**

The conception of each medium as entirely distinct would be unduly restrictive because there is evidence (here and elsewhere) that consumers substitute across media. At the same time, however, substitution is not apparently so complete that the effects of changes in one medium are offset by changes in another to leave civic behavior unchanged. It is conventional and trite to conclude a study with a call for more research. Nonetheless, some of these questions will only be answered with additional research.⁷

In short, loss of certain local media has been empirically demonstrated to lower voting in local elections. No one has yet studied this effect in full. Common sense, of course, may slightly close the gap. Loss of local newspapers presumably lowers voting because it lessens knowledge of local events.⁸

⁷ Joel Waldfogel, *Consumer Substitution Among Media* 40-41, FCC Media Ownership Working Group, Study No. 2002-3 (Sept. 2002), available at <http://www.fcc.gov/ownership/studies.html> (last visited Dec. 25, 2002) (emphasis added).

⁸ The Internet is not a substitute for local newspapers. Unless a local newspaper is posted to the Internet, a person interested in home-town news must take complex action to locate relevant items. Unless the inquirer already knows the basic content of each item of local news for which s/he is searching, s/he is more likely to retrieve over whelming noise than the sought

The conclusion seems clear and inescapable. Unless the FCC obtains overwhelming empirical evidence that loss of local news reporting (by broadcast stations or through MVPDs) does *not* lower local voting, such local news casts should be protected. In the absence of contrary empirical evidence, the FCC cannot fulfil its core function without protecting the existence of “diverse and antagonistic voices” communicating local news.

data.

The FCC did authorize another facially relevant study, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, by David Pritchard, which purported to discover that “common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in the commonly owned outlets.”⁹ As this study itself points out, the small sample size makes the study unsuitable for reliance.¹⁰ Leaving aside this major flaw, the study is based on unsupported assumptions which do not mesh with common sense.¹¹ First, I question the unstated underlying assumption that the newspaper-broadcast cross-ownership rule was important enough to major American media companies to over shadow the presidential candidates’ stance on all other areas of disagreement. Second, I question the stated “second assumption . . . that the companies owning broadcast-newspaper combinations themselves favored repeal of the rule” barring such cross-ownerships.¹² The studied media companies owned both newspapers and broadcast outlets because cross-ownerships pre-existing the rule were grand-fathered. If, as the study asserts, such cross-ownership is desired for competitive reasons, these grand-fathered exclusions gave their holders a competitive advantage over other media companies. If the rule ended, other companies would be able to neutralize this advantage. While other factors might still have led the studied media companies to favor repeal, this position is hardly intuitive. Therefore, this key assumption should never have been accepted as an axiom. Between these two flaws and the acknowledged problem with sample size, this study is worse than useless– it is potentially misleading. Certainly, no reasonable administrative agency should rely on this study for support of the

⁹ David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Election 1*, FCC Media Ownership Working Group, Study No. 2002-2 (Sept. 2002), available at <http://www.fcc.gov/ownership/studies.html> (last visited Dec. 25, 2002)

¹⁰ *See id.* (“The limited number of observations in this study prevents us from drawing firm or sweeping conclusions about the implications of our findings.”).

¹¹ *See id.* at 5-6.

¹² *See id.* at 5.

counter-intuitive conclusion that common ownership is unrelated to news coverage. Of course, one might be able to partially neutralize the problem of shared-slant caused by common-ownership if the FCC promulgated a rule requiring separation of news production facilities when local outlets are commonly owned. Such a rule would be congruent with this Comment's recommendation that the FCC protect the continued existence of independently produced local news programs.

Protection of independent sources of local news programming is best delivered directly. The courts have repeatedly rejected FCC structural rules on the ground that the structural rules have not been proven to correlate sufficiently with their ultimate policy goal.¹³ The FCC has recognized the difficulty of protecting local newscasts indirectly, by calling for empirical studies of the news-effects of ownership changes.¹⁴ The FCC also recognized that "most MVPDs carry largely the same all-news channels,"¹⁵ and that "when both television stations in a duopoly carry local news, the newscast typically is produced by a single set of personnel using one set of facilities."¹⁶ Furthermore, business action in the shadow of a believable threat of government regulation is no proof of how business would act under deregulation. If, as some industry cementers have suggested, consolidated broadcast networks would have business reasons to expand local news casts, the industry should have no major problem with an FCC rule requiring such news casts.

Such a direct rule might be formulated in any of several ways. First, the FCC might choose to retain all current ownership rules but allow waiver if listed conditions are met—including the condition that the resulting business entity will not lower the number of independently created local news broadcasts, i.e. the economies of scale gained by consolidation may not include using "a single set of personnel using one set of facilities" to produce multiple local news programs. Second, the FCC might eliminate certain ownership restrictions, but set a floor on the number of independently produced local news broadcasts that must be available in each local market (perhaps the number currently existing). Third, the FCC might modify its number of voices criteria by defining "voices" in terms of independently produced sources of local news.

¹³ See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-44, *rehearing granted* 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broadcast Gp. v. FCC*, 284 F.3d 148, 163 (D.C. Cir. 2002); see also NPRM ¶ 19 (mentioning that D.C. Cir. in these cases "faulted the Commission's justification of its rules as lacking supporting factual evidence."). Economists have not demonstrated any high level of ability at forecasting future results of complex organizational regulations.

¹⁴ See, e.g., NPRM at ¶¶ 95-97, 160-62.

¹⁵ *Id.* at ¶ 119.

¹⁶ *Id.* at ¶ 80.

Yes, such a direct rule would be a content based requirement triggering relatively high First Amendment scrutiny. The rule, however, should survive judicial review if it merely requires the continued existence of diversely produced local news programs. Such an FCC regulation would not be view point based. Such a regulation would not involve government picking the content or editorial slant of political speech. Such a regulation would be narrowly tailored to serve a “governmental purpose of the highest order.”¹⁷

The FCC may, of course, choose to commission studies on the correlation between media ownership and voting. However, in the interim, the FCC should not take any action allowing the death of independent, local news casts. I rely on the insightful comment of Commissioner Michael J. Copps:

¹⁷ Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (cited NPRM at ¶ 21).

Because the stakes are so incredibly high, it is far more important that we get this done right than that we get it done quickly. . . . Suppose for a moment that the Commission decides to remove or significantly change current limits on media ownership – and suppose our decision turns out to be a mistake. How do we put the genie back in the bottle then? No way.¹⁸

Respectfully submitted
December 26, 2002

Malla Pollack, Esq.

Visiting Associate Professor of Law¹⁹
University of Memphis
Cecil C. Humphreys School of Law
3715 Central Ave.
Memphis, TN 38152-6513
901-678-1393 (tel.)
901-678-5210 (fax)
mpollack@memphis.edu

¹⁸ Concurring Statement of Commissioner Michael J. Copps to NPRM (dated Sept. 24, 2002), *available at* <http://www.fcc.gov/headlines.html> (last visited Dec. 25, 2002).

¹⁹ This Comment represents the personal views of Malla Pollack and does not purport to represent the opinion of any institution. Institutional information is submitted for identification purposes only.