discrimination which prevented them from reaching the application stage.[11] For example, such persons may have suffered discrimination in obtaining financing, and thus could not form the business entity necessary to compete. "But for" discrimination earlier in the process, these persons would also be included in the applicant pool.

In contrast to such previous studies, in the utilization studies released today, FCC staff directed that researchers follow a conservative approach. Specifically, the pool of qualified bidders was defined as those who actually applied for the licenses. Not only does this approach exclude any discrimination prior to the application stage, but unlike the contracting context, it does not include any pool of qualified bidders who simply chose not to apply for a particular license. In short, these studies attempt to adapt and apply the judicial standards to the licensing context using a narrow definition of the pool of minorities and women who may be "willing and able" under Croson.

In addition, it is important to note that utilization ratios are based upon legal doctrine and the body of case law that has been developed in the wake of the Supreme Court's decision in Croson. Therefore, FCC staff asked contractors to calculate these utilization ratios to satisfy the applicable legal standards. Although utilization ratios are the only calculations widely recognized by the courts, to comport with prevailing econometric practices, the FCC has also asked contractors to supplement these numbers with substantially more rigorous and methodologically sophisticated econometric analysis. Specifically, FCC staff asked contractors to conduct logistic regression analyses to review the licensing process while controlling for relevant control variables. The portion of the Broadcast Licensing Study entitled "Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC" presents such calculations for the award of broadcast licenses. The Capital Markets and Auctions Regression Study includes this type of analysis for the award of wireless licenses by auction.

---

[11] See, e.g., Opportunity Denied: A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State at Appendix A pages 32-41 (copy on file with the FCC's Office of Communications Business Opportunities); see also Contractors Ass'n of Eastern Penn. v. City of Philadelphia, 6 F.3d 990, 1008 (3d Cir. 1993) (noting that the small number of firms owned by Hispanic or Asian-American persons "itself may reflect barriers to entry caused in part by discrimination" but requiring statistical evidence to support theory); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992) (same). By contrast, other studies have explicitly avoided making such calculations, and have simply noted this fact. For example, in calculating utilization of minority firms in federal procurement, the Commerce Department chose this latter strategy and noted that when it calculated the relative capacity of minority and non-minority firms, "to the extent that differences in size, age, or number of firms reflect discrimination against small, disadvantaged businesses, this analysis does not take direct account of such discrimination, which may be substantial." 63 Federal Record 35714, 35718.

The second research question under the remedial rationale is whether there is evidence that the FCC was unwittingly a passive participant in private discrimination. As noted above, the Supreme Court in Croson observed that discrimination requiring remediation could either be discrimination by the governmental actor or by its "passive complicity" in the discrimination of others. Specifically, the research questions presented ask whether the FCC has unwittingly perpetuated patterns of private discrimination through its rules for license allocation? In this regard, the Capital Markets and Auctions Regression Study explores whether and to what extent discrimination in capital markets may have affected applicants for FCC licenses. This study is based on data from a survey of current broadcast licensees and applicants for wireless licenses through FCC auctions. Unfortunately, many survey respondents declined to answer questions regarding their credit ratings, so the study was unable to control for credit ratings in particular. However, the study controls for whether collateral and personal guarantees were required, which reflect, to some extent, credit worthiness. While there already are numerous studies of capital market discrimination in various sectors of the economy, this Study examines the experiences of people seeking financing in connection with their attempts to acquire broadcast and wireless licenses. The study seeks to determine whether firms owned by minorities and women experienced greater difficulty in obtaining funds than did other firms, thereby putting the women and minorities at a competitive disadvantage in obtaining FCC licenses.[12] It also examines whether minorities and women have had to rely on different financial strategies in order to obtain the financing they require. The findings of this study could then assist the FCC in determining whether, for example, auctions have perpetuated patterns of disadvantage created by discrimination in capital markets. Moreover, the Auctions Regression portion of the study explores whether when controlling for other relevant variables, race and gender are statistically significant variables in predicting applicants' success in auctions. This analysis will help determine whether minorities and women have been disadvantaged in obtaining wireless licenses through FCC auctions. A premise of this study is the hypothesis that the failure of minorities and women to qualify as applicants is due in large measure to discrimination in capital markets. An additional premise is that capital market discrimination may have constrained the bidding budgets of minorities and women who have qualified for auctions.

Another study relevant to the passive participation inquiry is the Broadcast Licensing Study, which explores in detail the comparative hearing process for distributing broadcast licenses. The logistic regression portion of this study asks which applicant characteristics were statistically significant in determining the likely license winner. This analysis will help determine whether the FCC's stated criteria for comparative hearings were truly determinative. Moreover, among the numerous variables measured in this study are the applicants' assets, liabilities, and the number of

[12] The Advertising Study, which was released in 1999, see supra note 3, examined another type of private discrimination that may disadvantage minorities seeking FCC licenses. Specifically, it explored the extent to which discriminatory practices among advertisers have prevented minority-owned stations from earning the revenues they might otherwise be expected to obtain.

legal motions filed. These variables permit the researchers to measure the impact of financial qualifications and of applicants' access to, and fees spent on, attorneys. In this way, the study can help determine whether comparative hearings may have perpetuated patterns of disadvantage that may have been caused by discrimination in capital markets. In addition, this study examines the extent to which licenses were allocated according to the FCC's stated rules, including the rules permitting credit for participation by minorities and women. As noted above, from the late 1970s through the end of comparative hearings in 1993, the FCC's stated policy was to award a positive credit to applicants with some ownership or management by minorities or women. The study examines the effectiveness of this policy, and whether it may have been manipulated by non-minority applicants who sought to benefit their applications without providing meaningful participation for minorities or women. This analysis will permit the FCC to evaluate whether the FCC perpetuated patterns of disadvantage by condoning such actions.

Finally, the FCC's potential passive participation in private discrimination is evaluated in the Historical Study. Through numerous interviews, this Study examines the stories behind the numbers and reviews the real life stories of real people who have sought FCC licenses from 1950 to the present. Courts have recognized that this type of evidence can be helpful in illustrating statistical findings, and that in establishing a pattern of discrimination "the combination of convincing anecdotal and statistical evidence is potent." Coral Construction Co. v. King County, 941 F.2d 910, 919 (9th Cir.1991). As the Supreme Court has noted, anecdotal evidence may "bring the cold numbers convincingly to life." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977). The Historical Study examines a variety of barriers to entry encountered by minority- and women-owned firms, such as limited access to capital and discrimination in broadcast advertising. The interviews covered a cross-section of people by year, method of license acquisition, type of license, type of FCC acquisition rules, race/ethnicity, gender, and size of business. Further, the Study asks whether the FCC has exacerbated barriers to entry for minorities and women through such means as the lifting of ownership caps and underutilization of programs designed to promote minority and female license ownership.

Key Findings

As a Staff Executive Summary, this document does not take any position on the conclusions of the studies or on whether the studies, when viewed together, show that the Commission has a compelling interest to adopt programs promoting license ownership by minorities and women. Each of the studies provides only one piece of the evidence, and each of the quantitative studies has been subject to some difficulties in data gathering. However, when they are considered along with the body of existing research and any further research that may be done in this area, the studies should enable the Commission to begin to assess the extent of market entry barriers facing applicants for FCC licenses, and to discuss what actions the Commission may take to address this issue.

Each of the five studies released today contains its own introduction or executive summary outlining its major findings. This Section lists examples of those key findings from each study.

1. Content/Ownership Study:

- Minority-owned radio stations were far more likely to choose a program format that appeals particularly to a minority audience;
- Minority-owned radio stations were more likely to provide news and public affairs programming on events or issues of particular concern to minorities;
- Minority-owned radio stations report greater racial diversity of on-air talent;
- Of radio stations that reported tailoring national news stories to the local community, minority-owned stations were far more likely to tailor the story to minority community concerns; and
- The same differences were not found in the case of television, and in most cases, including the areas noted above, there were no statistically significant differences between minority- and majority-owned television stations.

2. Broadcast Licensing Study

- During the time period in which the FCC's policy of awarding credit for minority ownership was in effect:
  - The **number of minority individuals** in an application positively influenced win rates in comparative hearings;
  - However, **minority controlling ownership share** did not increase the likelihood of an application being successful. These findings suggests that, although non-minorities included minorities in applications, such participation was non-meaningful (sham); and

- Overall, there was a lower probability for an application with any type of minority ownership winning a license than a non-minority application winning a license, when controlling for other relevant variables;

- During the time period of the FCC's policy of awarding credit for ownership by women, there was a positive and significant relationship between female ownership – both by additional numbers of women and by higher percentage of female ownership – and the probability of license award, suggesting that the FCC's policy of awarding credit for ownership by women was more effective than that for minority-ownership;

- Both applicant assets and the total number of legal motions filed were strongly correlated with the likelihood of an applicant winning a broadcast license. If there has been discrimination in capital markets, then this would suggest that minorities and women might have been disadvantaged in comparative hearings, even though no license fees were required; and

- Although a high percentage of licenses were awarded to singleton applicants without need for a comparative hearing, minorities were far less likely to be able to use this singleton process. That is, when original applications had higher proportions of minorities, they were statistically more likely to be challenged, despite the fact that such applications were entitled to credit for the minority participation in comparative hearings, and, as a result, were theoretically harder to challenge. While this phenomenon does not necessarily reflect discrimination, it does show that minorities were less able to obtain licenses without completing the lengthy and expensive comparative hearing process. This same result was not true for applications with more female participants.

3. Auction Utilization Study

- Measured across all wireless auctions through 1999, minority and women applicants were less likely to win at least one license than were non-minority applicants;

- In an auction by auction comparison, the percentage of winning minorities is sometimes larger and sometimes smaller than the corresponding percentage for non-minority applicants. Similarly, women applicants won more frequently than did men applicants in certain auctions, but less frequently than men in other auctions;

- The inclusion of installments payment in auctions increased the rate at which minority and women applicants won licenses;

- In order to bid in auctions, an applicant must qualify by submitting a completed short form application and an upfront payment. Minorities and women qualified for auctions at significantly lower rates than non-minorities. The reasons for this result are not entirely clear, suggesting this as an area for future research; and

- The differences in utilization rates between minority and women applicants and other applicants are generally less pronounced among small companies than among large companies.

4. Capital Markets and Auctions Regression Study

- Among applicants for wireless licenses, the applications for debt financing by both minorities and women were statistically less likely to be approved than the applications of non-minorities;

- Among current broadcast licensees, minorities' applications for debt financing were statistically less likely to be approved than non-minorities' applications. The applications for women were also less likely to be approved than those for men, but this result was not statistically significant;

- Minorities paid statistically higher interest rates on their loans than did other borrowers. However, there were no statistically significant differences in interest rates on the basis of gender; and

- After controlling for relevant variables, both minority- and women-owned businesses were statistically less likely to obtain wireless licenses in FCC auctions than were businesses owned by non-minorities.

5. Historical Study

- Minorities and women repeatedly report encountering discrimination in their efforts to obtain capital to finance their broadcast and wireless businesses, discrimination in securing advertising on their stations, and discrimination by members of their communities and members of the communications industry;

- Small telecommunications businesses generally, and those owned by women and minorities in particular, report that the market consolidation permitted by the relaxation of the FCC's ownership rules has created nearly insurmountable obstacles to those seeking to enter, or even survive as a small player, in the broadcast industry;

- Minority-owned firms report that the repeal of the former tax certificate program – which, from 1978 until its repeal in 1995, provided tax incentives to encourage firms to sell broadcast licenses to minority-owned firms – has had a severe negative impact on their ability to obtain new stations; and

- Interviewees believed that EEO enforcement has been uneven over the past fifty years. This reported uneven enforcement coupled with industry hiring practices has hindered the ability of minorities and women to obtain the work experience that could one day assist them to become broadcasters themselves.

Kathryn Schmeltzer
Pillsbury Winthrop Shaw Pittman LLP
October 11, 2006

HISTORY OF THE LOCAL TV OWNERSHIP RULE

- Duopoly Rule – 1940 to 1964
  - The original version of the Duopoly rule prohibited the licensing of a new station which would serve "substantially the same area" as another station owned or operated by the same licensee. *Rules and Regulations Governing Experimental Television Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (1940).
- Contour Overlap Duopoly Rule - 1964 to 1999
  - The second version of the Duopoly rule prohibited ownership or control of television broadcast stations with overlapping predicted Grade B contours. *Amendment of Secs. 73.35, 73.240 and 73.636 of the Commission's Rules relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 2 RR 2d 1588 (1964).
  - In 1991, FCC released *Broadcast Television in a Multichannel Marketplace*, FCC OPP Working Paper No. 26, 6 FCC Rcd 3996 (1991), resulting in a rulemaking proceeding proposing to lessen the regulatory burden on TV broadcasters.
  - In 1996, Congress passed the Telecommunications Act of 1996 and directed the FCC to conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate the local TV ownership rule; the statute also required that the FCC review all of its ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition."
- Eight Voices Test and Top Four Rule - 1999 to present
  - An entity may directly or indirectly own or control two television stations licensed in the same DMA provided that (i) the Grade B contours of the stations do not overlap; or (ii) at least 8 independently owned and operating full-power stations would remain post-merger and no more than one of the stations is ranked among the top four stations in the DMA. *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999).
  - FCC permits waiver of ownership rules for failed, failing, or unbuilt stations. Applicant must demonstrate that "in-market" buyer is the only reasonably available entity willing and able to operate the station, and that selling the station to an out-of-market buyer would result in an artificially depressed price.

- On appeal, the U.S. Court of Appeals for the D.C. Circuit determined that the ownership rule, which was justified largely on the basis of protecting viewpoint diversity, was insufficiently deregulatory and arbitrary and capricious. The Court further required the FCC on remand to justify the rule as "necessary in the public interest" or repeal or modify it as required by Section 202(h) of the 1996 Act. *Sinclair v. FCC*, 284 F.3d 148 at 159, 162-65 (D.C. Cir. 2002).

- *2002 Biennial Review* Rule – stayed by Third Circuit

  - An entity may have a cognizable interest in two stations in a DMA or three stations, if there are 18 or more stations in that DMA; provided that, no more than one of the stations is ranked among the top four stations in the DMA. *2002 Biennial Review*, 18 FCC Rcd 13620 (2003).

  - On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the FCC's conclusions that consolidation improved local programming and that media other than broadcast television contributed to viewpoint diversity. The Court determined that the Commission's assumption that six equal-sized competitors, based on spectrum capacity, would ensure competition was unsupported by the record and also inconsistent with the Commission's use of actual market shares, as opposed to capacity, as a basis for retention of the Top Four Rule. The Court upheld the Commission's retention of the Top Four Rule, concluding that there was support in the record for the Commission's decision. *Prometheus v. FCC*, 373 F.3d 372 (3rd Cir. 2004), *cert. denied* 73 U.S.L.W. 3466 (U.S. June 13, 2005).

  - The Court also rejected the FCC's elimination of the requirement to demonstrate that no out-of-market buyer is reasonably available for a failed/failing/unbuilt station waiver request of the ownership rules.

- 2006 Quadrennial Review

  - The FCC invites comments on all of the issues remanded by the *Prometheus* court.

The Media Institute Policy Views

Media Consolidation, Regulation, and the Road Ahead

Richard T. Kaplar and Patrick D. Maines

The year 2006 will mark the 10-year anniversary of the last major overhaul of communications law in this country. Ten years is not a long time by many measures — after all, Congress's previous body of communications law lasted 62 years, from 1934 to 1996. But in a digital age when computing power is said to double every 18 months, 10 years is an eternity. And technology — this digital technology to be precise — is driving today's media at a faster pace and in more directions than ever.

It is no wonder, then, that the Telecommunications Reform Act of 1996 is itself ready for reform. Before lawmakers and regulators lose themselves in the thicket of detail that is sure to envelop them, however, let's step back and ask some simple questions. Do policymakers see the big picture? Do they get it? Or are their perceptions about today's media industry (and its relation to government) mired in another era? These aren't idle questions; in fact, the answers will have everything to do with the shape of the telecom industry for years to come.

Any overhaul faces a fundamental challenge. The communications landscape has changed drastically in the last 10 years, and especially in the last five. Consumers now have a broad array of choices that include the Internet itself, Internet radio, satellite radio, broadband video, television downloads on the Internet, IP video from telephone companies, cell phone video, iPods and other MP3 players, and music download services (legal and otherwise) on the Internet. The dominant Internet players, Google and Yahoo!, are both launching video services in addition to offering voice telephony.

Much has been written about how these "new media" are threatening the very existence of the so-called "legacy" or "old media" like newspapers, broadcast television and radio, and yes, even cable (which has joined the ranks of "old media" in recent years). Yet policymakers act in an oddly conflicted way. They give lip service to the media revolution and the explosion of new technologies, but they regulate the old media in the same old myopic ways.

The assumptions are still the same: Broadcast television and radio are the source of information and entertainment for most people and enjoy a special place atop the media hierarchy (now, more than ever, because they're "free"). Spectrum is "scarce" and broadcasters operate against limited competition using airwaves that "belong to the public," so must be controlled by the government. (Cable TV doesn't use airwaves, but gets regulated anyway because it comes out of the same box in the living room.) Given this limited playing field, government must do everything it can to make sure that as many speakers as possible get a chance to speak. And then there's the "public interest," always vague and ever amorphous, which provides the raison d'etre for all of these regulatory gymnastics.

Every one of these assumptions needs to be challenged. For the purposes of this paper, however, we will focus on only one that has become the mantra of regulators and media activists alike: "Media consolidation is bad and must be limited by the government." But wait a minute — is consolidation (or "concentration") really bad, or merely a rational and necessary development in today's transformed media environment? In an economy where virtually every major industry has seen a trend toward fewer but larger companies, it is hard to fathom why the media industry should be any different. Might not consolidation actually be helpful in creating a stronger (and, paradoxically, more diverse) industry that could ultimately serve the public better?

Is consolidation really bad, or merely a rational and necessary development in a transformed media environment?

In the eyes of government regulators, consolidation is bad because it appears to be the opposite of "diversity," which policymakers view as a highly desirable characteristic of media. The Federal Communications Commission has made a mission of promoting this diversity goal for more than 70 years. In a variety of ways, the FCC has relentlessly attempted to apply the diversity principle enunciated by the U.S. Supreme Court in *Associated Press v. United States*, 326 U.S. 1, 20 (1945), that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." But is this role as the nation's diversity cop really in the best interest of today's media-consuming public?

Let's take a look at how we got here. The underlying presumption is that a democratic society functions best when its citizens are well educated and able to make informed decisions about the conduct of government and other matters affecting their well-being. Diversity is an essential ingredient in this process because it leads to a pool of ideas both large in quantity and wide ranging in quality. The listener is thus well served if he or she has a wide selection of viewpoints to weigh, and from which to choose, in this "marketplace of ideas." The system of regulation that persists to this day can be traced to lawmakers and small broadcasters in the 1920s who feared that AT&T's proposed common carrier model for spectrum use, called "toll broadcasting," would result in AT&T having both monopoly power and editorial control over the airwaves. Neither prospect would bode well for diversity.

The government rejected AT&T's proposal, concluding that a marketplace approach could not be trusted to serve the public interest. Instead, government would control the airwaves, and would enforce diversity by choosing who could speak and who could not speak as a broadcaster. This, of course, implied a government role in controlling program content, at least to the extent that government would award licenses to some and not others based on the viewpoints they could be expected to express on the air.

The FCC subsequently expanded the notion of diversity to include three distinct categories: "viewpoint diversity" (the marketplace of ideas

Diversity is best attained by cultivating a large, robust, and competitive media industry — not by restricting competitiveness.

discussed above); "source diversity" (multiple owners of media outlets in a market — call it "ownership diversity"); and "outlet diversity" (different types of media in a market, *e.g.*, radio, television, and newspapers). The problem in a nutshell is that today's media marketplace is an extremely competitive environment from an economic standpoint. However, the government still attempts to regulate one sector of that market to achieve a policy goal; that is, government regulates the "old" broadcast media to achieve the goal of viewpoint diversity.

Here's how it works. Short of becoming a programmer itself, or engaging in blatant and egregious censorship, the FCC does not have a legal way to mandate viewpoint diversity directly. That would require the type of pervasive and absolute authority over programming decisions long proscribed by statute. Thus the FCC does the next best thing. It mandates ownership diversity as a proxy for viewpoint diversity. The Commission assumes that different owners will bring different editorial voices to the airwaves, resulting in diversity of viewpoints. But of course there is no guarantee that the Commission's carefully chosen entrants will actually speak with different voices, or that commonly owned entrants will speak with the same voice. Moreover, the FCC is setting the parameters of media competitiveness by choosing the competitors. There was a time when this system, despite its obvious flaws, worked reasonably well. But it was a time when broadcasting was the only electronic media game in town.

Today, however, these old media have to play by the government's rules at a time when they must compete with a much broader range of unregulated media (which, by the way, should stay unregulated). The oft-invoked "level playing field" is anything but level these days. If government control over market entry and business practices cripples old media to the point of being unable to compete, they will fail. This failure-by-regulation obviously distorts the economic workings of the media marketplace. But it also defeats the FCC's paramount policy goal of diversity, because it drives media speakers out of the market. Clearly, diversity is best attained by cultivating a large, robust, and competitive media industry — not by restricting the competitiveness of one important sector of that industry. The marketplace will provide ample diversity if allowed to work.

To their credit, the FCC and Congress have recognized this from time to time and have repealed regulations that stifled competition. The FCC, for example, repealed the Fairness Doctrine in 1987, citing the "explosive growth" in media. This doctrine had required broadcasters to devote a reasonable percentage of time to the presentation of public issues, and to provide a reasonable opportunity for presenting contrasting views on controversial issues of public importance. The Commission also repealed the financial interest and syndication rules and the prime-time access rule. The "fin/syn" rules prohibited the major TV networks from owning programming they obtained from outside sources, and from syndicating programming in the United States. The prime-time access rule reserved the 7–8 p.m. time slot for non-network programming.

In addition, the FCC eased the "one-to-a-market" rule to allow common ownership of a TV station, AM, and FM radio station in markets of a certain size, and it progressively raised the cap on the number of television and radio stations one entity could own nationally. Congress, meanwhile, repealed the cap on the number of stations one entity could own nationally; repealed the statutory ban on cable/broadcast cross ownership; directed the FCC to repeal its ban on cable/network cross ownership; and repealed the statutory ban on telephone companies competing with cable companies.

Conversely, however, policymakers have decided to retain other anti-competitive rules. And at times even the courts have entered the fray, thwarting attempts to relax ownership restrictions. One example is the duopoly rule, which originally prohibited one entity from owning two television stations in a market. Amended versions have been bouncing between the FCC and the D.C. Circuit, and now the Third Circuit, since 1999.

Another is the newspaper/broadcast cross ownership rule. This measure, in effect since 1975, prohibits one entity from owning both a newspaper and a broadcast outlet in the same market. Here is a perfect example of "old school" thinking that prevents two types of old media from enjoying economies of scale and synergies that could make both more competitive and more sound financially. Once again, the quest for diversity was the motivating factor. As the Commission put it when it commenced the cross ownership rulemaking in 1970:

"We have long been concerned with the particular problem of newspaper-broadcast joint control as an important factor in the overall attempt to secure diversity in the control of broadcast facilities. It has now become clear that the most significant aspect of the problem is the common control of television stations and newspapers of general circulation...."

Of course, the FCC had not always viewed this as a problem. In the early 1950s, the Commission actively sought out newspaper publishers who would like to receive television broadcast licenses, believing the publishers especially qualified because of their journalistic expertise and community stature. So if there ever was a "problem" here, it was largely of the FCC's own making.

Nonetheless, once the rule was in effect it took on a life of its own, proving much more durable than other media prohibitions that gradually fell by the wayside. This was, in no small way, a direct reflection of congressional will. After the FCC repealed the Fairness Doctrine in 1987 and the Commission was looking a bit too deregulatory to some on Capitol Hill, Congress enacted a provision in FCC appropriations legislation in 1988 prohibiting the FCC from spending money on reviewing or repealing the newspaper/broadcast cross ownership ban. That spending prohibition was finally repealed in the 1996 Telecom Act.

Today, media scarcity by any definition has long since vanished, eliminating any need for the government to impose diversity.

However, repeal of the cross ownership ban was far from imminent, or certain. During the tenure of Chairman Michael Powell, the FCC did adopt a liberalized scheme of ownership regulations for medium and large markets. But the Commission never, as a separate item, voted to repeal the newspaper cross-ownership rule entirely. Even the revamped scheme was met by a hailstorm of opposition from Congress, and a federal appeals court in Philadelphia issued an order staying implementation of the new rules.

But why? Market conditions in 1975 were nothing like they are today, or were in 1996, or even in 1988. In the mid-1970s, the "big three" networks ruled the airwaves, UHF TV was barely a force, and cable was little more than a community antenna hookup that brought in distant broadcast signals. Home computers did not exist, and the Internet as we know it had not been invented. Consumer electronics had yet to feel the impact of digital technology. Everything was "analog," although no one called it by that name then. Today, in contrast, media "scarcity" by any definition has long since vanished, eliminating any need for the government to impose diversity.

Maintaining a pointless rule, however, clearly has a strong negative impact on competition. Just among the old media, the playing field is tilted steeply against those who would like to own a newspaper and a broadcast outlet in the same market. These entities are now at a competitive disadvantage vis-a-vis common owners of newspapers and cable systems, television and radio stations, and television stations and cable systems — not to mention the owners of "grandfathered" newspaper/broadcast combinations. (Interestingly enough, studies have shown that these grandfathered combinations tend to produce journalism of higher quality, precisely because the cross-owned outlets can draw on each other's resources.) And to the extent that a media company is less robust financially because of the newspaper/ broadcast ban, it is less able to compete with companies offering new media products and services, or combinations of old and new media.

The radio industry is another "old medium" struggling to compete, not only against myriad new technologies for delivering music and entertainment, but against government regulations that threaten the economic viability of radio operators. In today's highly competitive media environment, however, any player that can't achieve its optimal economic potential may be marked for ultimate extinction.

Now, however, it is very much in the interest of multiple-station owners to strive for as much viewpoint diversity as possible.

Congress recognized this to a certain degree in the 1996 Telecom Act, when it eliminated the cap on the number of radio stations that one company could own nationally. Congress was still concerned about promoting diversity, but since radio historically had been a local medium, removing the national cap could spur economic growth without threatening local diversity. To be sure that this diversity was still protected, however, Congress set limits on the number of stations that one company could own in a market, depending on the market's size. In the largest markets, one company could own four AM and four FM stations. Ten years ago, this seemed like a reasonable way to preserve local diversity while giving station owners room for some growth.

Here again, however, the landscape has changed drastically. Local broadcast radio faces its most direct challenge today from satellite radio, which was not a factor in 1996. The two satellite providers, XM Radio and Sirius, are already experiencing huge growth and are poised for more in the next few years. In 2005, the number of XM Radio subscribers jumped 84 percent, from 3.2 million to 5.9 million. Sirius went from 1.1 million subscribers to 3.3 million — a gain of 190 percent in only one year. Analysts predict the two satellite services will reach 20 million subscribers by 2009. Broadcast radio is also facing competition from iPods and downloadable "podcasts," cell phones that can download music, and music services offered by Internet, cable, and DBS operators.

In this dynamic and competitive environment, it is quaint indeed to think that over-the-air radio will remain the province of mom-and-pop stations. Some single-owner stations will of course survive, either because they fill a unique programming niche in their market, or because their owners are content with the slim profit margins that would bedevil corporate number crunchers. In an age of large broadcast groups, national satellite radio, and other big-scale competitors, however, mom-and-pop stations will be the exception rather than the rule. What will this mean for diversity?

What we are seeing here is a paradigm shift that the FCC has been slow to grasp. In the old days, when many broadcasters owned only one station, the FCC might be forgiven if it believed that each owner was possessed of only one viewpoint and that more owners meant more viewpoints. Now, however, it is very much in the interest of multiple-station owners to strive for as much viewpoint diversity as possible.

What's happening is that economic market forces are deconstructing the American radio mythology of the 20th century.

Consider a company that owns eight stations in one market (the current maximum allowed). If all eight stations were known for programs that were politically conservative, for example, the owner would be missing all of the listeners who might be interested in liberal or moderate viewpoints. It would make far more sense for that owner to devote one or two stations to conservative viewpoints, one or two to liberal viewpoints, and so forth, to appeal to the greatest number of listeners. Since there are only a fixed number of listeners in each market, a multiple-station owner can attract more of those listeners by offering a more diverse (rather than less diverse) array of viewpoints among its stations.

The corollary is that the measure of success has changed as well. Broadcast radio stations still exist primarily to (1) give listeners what they want to hear; and (2) serve the needs of their local communities. The radio stations that are most successful at doing this, *i.e.*, at meeting their "public interest" obligations, will be the ones most likely to prosper financially. Thus, the incentive to serve their markets and meet these obligations is economic, especially for national multiple-station owners that may be publicly traded and subject to high shareholder expectations. Success is measured by achieving a profitable bottom line, not by achieving some sort of "thought control" or political dominance of a radio market.

The FCC's old paradigm for viewpoint diversity, on the other hand, is based precisely on trying to prevent this kind of thought control. In today's multiple-station environment this old paradigm is irrelevant and senseless. How long would shareholders tolerate declining stock prices even if a multiple-station owner "controlled" political thought in a market (as if such a thing were possible anyway)?

In any event, the type of diversity that may be of paramount interest to many radio listeners today is not viewpoint diversity, but format diversity. And here too diversity has flourished, thanks in large part to multiple-station owners. The concept is the same: An owner of several stations in a market will want to program a wide variety of formats to capture as many listeners in that market as possible. Since the 1996 Telecom Act raised the cap on local station ownership, for example, the number of music formats has more than doubled. And once again, the reward for giving listeners the kind of music and other programming they want to hear is economic success.

What's happening is that economic market forces are deconstructing the American radio mythology of the 20th century, which took root in the 1920s. In its purest form, this mythology stated that every local radio market would be filled with many stations, each owned by a different owner speaking with a unique voice, thereby creating a patchwork of diversity. Moreover, these stations would focus on local news and public affairs, would air public service announcements, would broadcast emergency information, and would serve the public interest in other ways prescribed by their federal overseers. The unspoken part of the mythology was that, because the federal government would limit market entry to only a relative handful of players, and because broadcast radio had a unique lock on its audience, station owners would do quite well financially. In fact, a radio station license would be valued by those in the know as a license to print money.

But the mythology is crumbling, and has been for some time. Economic competition has changed the unspoken part of the mythology. By the early 1990s, 60 percent of radio stations were in the red. Congress addressed that situation in the 1996 Telecom Act by increasing the number of radio stations that one company could own in a market—thereby deconstructing the mythology still further. Faced with unprecedented competition from new and old media alike, today's individual radio station is not the money machine it once was. Paradoxically, however, Congress and the FCC want to perpetuate the American radio mythology, even if it means seriously wounding or even killing broadcast radio in the process. Government regulators still impose public interest obligations on radio broadcasters but not on satellite, wireless, or Internet providers. The same is true of indecency regulations. Meanwhile, the FCC still views itself as the defender of "localism" and the arbiter of diversity, even though both are now driven by market forces. And Congress, by keeping caps on local radio station ownership, does its part to perpetuate the "diversity" part of the mythology even as it hampers the competitiveness of station owners.

An unfettered media marketplace will provide more than enough diversity, especially in an environment of multiple-station owners.

The fact that old media are being hamstrung by government regulation has not gone unnoticed by either advertisers or Wall Street. Radio captures about 8 percent of advertising dollars, a figure that hasn't changed since 1980. The chances of radio maintaining its 8 percent share are in doubt, moreover, because radio has been losing listeners to other media—and fewer listeners mean fewer dollars from advertisers. Wall Street has been decidedly bearish. A Lehman Brothers report in early 2005, for example, lowered an earlier prediction of radio's long-term growth from 4 percent to a tepid 2.5 percent. Advertising on the unregulated Internet, meanwhile, is exploding. A study by PriceWaterhouseCoopers released in January 2006 finds that online advertising in the third quarter of 2005 amounted to $3.1 billion, up a full 33 percent over the same period a year earlier. And online video advertising grew a remarkable 175 percent in 2005.

One need only look at the stock charts of unregulated media companies like Google or eBay, or at the market caps of satellite radio entrant Sirius vs. broadcaster Clear Channel, to see where investors are placing their bets. With revenue of only $187.5 million, Sirius has a market cap, as this is written, of just under $8 billion; Clear Channel Communications, with revenue of about $9.3 billion, has a market cap of $16 billion. In other words, even though Clear Channel has revenue that is 50 times greater than that of Sirius, its market cap is barely twice as large.

Conclusion. Congress and the FCC need to step back and look at the big picture of today's media environment. They are placing the old media — newspapers, television, radio — at a competitive disadvantage vis-a-vis new media and technologies by continuing to regulate the old media in the same old ways. First, policymakers must realize that they no longer need to be the media's diversity police. An unfettered media marketplace will provide more than enough diversity, especially in an environment of multiple-station owners. The old regulatory paradigm geared toward preventing thought control has become irrelevant. Next, policymakers need to foster a more robust economic climate by easing restrictions that apply solely to the old media.

Here are two concrete suggestions: (1) Congress should direct the FCC to repeal the newspaper/ broadcast cross ownership rule. Thirty years of experience with the grandfathered newspaper/ broadcast combinations shows that we have nothing to lose; in fact, we will probably gain better journalism. (2) Congress should ease restrictions to allow some further consolidation of radio ownership. A proposal offered by one multiple-station owner, for instance, would raise the local ownership cap from eight to 10 radio stations in the nine markets with 60 or more stations. It would also raise the cap from eight to 12 stations in the seven markets with 75 or more stations. This strikes us as a reasonable and even conservative adjustment that would allow such group owners to take more programming risks, boost diversity, and serve their markets better. The same principle should be applied to television ownership — including smaller markets, where TV stations are giving up their local news in alarming numbers because they can't afford it, and their owners can't merge with other local station owners to gain the needed economies of scale. It should come as no surprise that benefits such as better journalism and more program diversity go hand-in-hand with a healthy bottom line.

If Congress and the FCC are truly concerned about the media they regulate, they must be concerned first and foremost with the economic viability and competitive strength of those media. Policymakers who fail to grasp this essential truth, and who continue to impose burdensome and even ruinous regulations on this one sector of the communications industry, may be remembered for having turned our old media into relics of a bygone era.

***Richard T. Kaplar** is Vice President and **Patrick D. Maines** is President of The Media Institute.*

Policy Views are published by The Media Institute, a nonprofit research organization specializing in the First Amendment and communications policy. These papers are intended to provide timely analyses of communications policy issues. For more information, contact The Media Institute or visit our Web site at www.mediainstitute.org.

February 2006

The Media Institute 2300 Clarendon Boulevard, Suite 503 • Arlington, VA 22201
703-243-5700 • E-mail: info@mediainstitute.org • www.mediainstitute.org