INSIDE THE FCC ©®

Premiere Edition *Commentary & Analysis* *Summer 2016*

Bravo for Broadcast

VIEW FROM WALL STREET

Broadcast is Healthy

Marci Ryvicker, CPA, CFA

INSIDE

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Bravo for Broadcast

As 2016 nears an end, the broadcast industry is undergoing unprecedented change and transformation. With increased competition, dynamic consumer demands and the advent of innovative technologies, broadcasters face an array of new challenges to their core business today.

But with new challenges come new opportunities. There are high expectations for ATSC 3.0, a new broadcast standard, pioneered by Sinclair, that will allow greater targeting, digital and advertising capabilities for over-the-air broadcasters. Broadcasters also have mustered reasonable responses to competition from other media, including over-the-top and pay TV.

The 2016 Broadcast Incentive Auction provided broadcasters with three possible options for the future: sell all your spectrum; sell half your spectrum and share a single channel, or keep your spectrum and continue to broadcast. Whatever choice a broadcaster makes, it is clear that the broadcast spectrum footprint will shrink, and the remaining landscape will be richer and arguably more valuable than before. But, the auction has not unfolded as the FCC contemplated, and the final chapter is yet to be written.

Through this all, broadcast remains one of the most ubiquitous, reliable and indispensable media in the country, if not the world. There is a healthy measure of M&A activity as evidenced by the mega merger of Nexstar and Media General, and several smaller transactions within this year.

Our distinguished group of contributors, including former FCC Chairman Dick Wiley, have penned incisive commentaries on key issues affecting the broadcast industry, including insights on legal, policy and regulatory trends shaping today's media landscape.

Cover Photo: Charging Bull © Wikipedia

Taken together, we hope their articles will provide a jumping off point for further discussion and enlightened action on the underlying issues. We owe a special thanks to each of our authors and their organizations for their contributions.

Thus, we believe it is altogether fitting to launch the premiere issue of Inside the FCC with an exclusive and dedicated focus on what we call *Bravo for Broadcast.*

2016 Federal Communications Commissioners, from left. Ajit Pai (R), Mignon L. Clyburn (D), Chairman Tom Wheeler (D), Jessica Rosenwercel (D), Michael O'Rielly (R) . Photo FCC.

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Insights on Communications, Media and Technology Policy

The FCC has emerged as one of the most important independent regulatory agencies in the U.S. government, and perhaps in the world. With statutory authority to regulate the nation's communications systems, devices and apparatus, the FCC holds the power to approve or deny mergers; assess liability; levy fines and penalties; bring suit; award licenses and contracts; allocate spectrum; conduct hearings and inquiries; promulgate and interpret rules; establish standards and codes, and exercise a wide range of regulatory actions affecting television, radio, telephone, wireless, mobile, Internet, cable, satellite and international telecom services in the multibillion dollar telecom, media and technology (TMT) sector.

Under Chairman Tom Wheeler, the FCC has become a lightning rod for Congress, which has heightened its legislative oversight of the agency. Controversial rulings on **media ownership, net neutrality, spectrum auctions, television and cable service, telephone services and pricing, video options, privacy and many other issues,** have brought intense scrutiny and criticism from outside and inside the agency. Increased partisanship and division seem to be the order of the day, as evidenced by a record number of strict party-line votes.

Photo: FCC

At stake in this environment are billions of dollars in investment capital and consumer services, often hinging on a single decision by the FCC.

While the FCC continues to deliberate the fates of entire industries, there is more to its actions than meets the eye. For every item, rule or notice under consideration, there are behind-the-scenes policies, practices and personalities at play, in addition to intense lobbying by some of the most powerful and well-connected industries. As a result of the Internet, even the average American has become more aware of, more interested in, and more affected by federal communications policies. If there ever was a question, all doubts were put to rest when over 4 million Americans, and a popular television talk show host, forced the policymakers to make an about-face on their approach to regulating the Internet.

Although the FCC is governed by an arcane set of rules, practices and procedures developed over the decades, there are usually signs as to how it will act, often which defy logic or rationality. For outsiders, discerning these signs is difficult. Yet for those who work and practice on the inside—in the inner sanctum of the vaulted "eighth floor"—the FCC can be an open book.

Inside the FCC provides readers with an insider's perspective on the policies, practices and personalities that drive important decisions in the communications, media and technology world today, and insights on the emerging issues we are likely to face tomorrow.

We invite you to be among the first to go Inside the FCC.

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Contents

View from the Top

An Exclusive Interview with

Perry A. Sook

CEO, Nexstar Media Group

If everything goes as planned, by the end of the year, Perry A. Sook will become the leader of the largest broadcast television station group in the United States. With the Federal Communications Commission (FCC) poised to approve the pending $4.6 billion merger between Nexstar Broadcasting and Media General, Mr. Sook is making broadcast history. This edition of Inside the FCC features an exclusive interview with Nexstar Founder, Chairman and CEO, Perry A. Sook.

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Inside: Nexstar is now a powerhouse broadcast group, but it has not always been so. How did you get here?

Sook: Well, you might say we are an overnight success, 30 years in the making. Actually, I have always been interested in communications, broadcasting, and journalism. It was my major in college, and I spent my early career learning everything I could about television and radio, including sales, advertising and programming. When I had the opportunity to acquire two television stations in 1991, I jumped at it, because broadcasting is my passion. It took me about 14 months to find the right stations and to put the financing together, but we built those stations based on local content, and eventually sold them at a good profit. Those early moves helped us to finance our company, and led to the creation of Nexstar Broadcasting in 1996 with one station in Scranton, Pennsylvania.

Inside: You are known for your laser focus on local programming and local content. What is the rationale behind this strategy?

Sook: You are right. We believe strongly in the value and viability of local markets. And that is not to say anything negative about other approaches, it's just that local works very well for us.

I believe this is the Golden Age of television. People are spending more hours watching television than ever before, and our local reach has never been more powerful and influential. When we look at what's happening with the rotation of advertising dollars away from print media in local markets, the main beneficiary is local television. Radio has about the same share of advertising as it was 10 years ago, but local television is taking a larger share of the pie, relative to local competitors.

I firmly believe we still have room to grow, and that we are without peer as a reach vehicle locally and nationally, at the network level. These market realities are why local television and national television will always be at the top of the agenda when you want to reach audiences in a big way.
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Inside: Given your perspective, what unique challenges face broadcasters today?

Sook: We are not just in the television or radio business anymore. At our foundation, our very core I believe that our business is a simple business. We are a local service business, just like the local dry cleaner, bank or grocery store we make our living providing services to our local communities.

So what are our services? In my opinion again, it is very simple, we provide two. At our essence we are in the business of 1) creating unique and relevant local content and 2) providing business to consumer advertising solutions.

Whether you produce local newscasts, local talk shows, severe weather warnings, telethons, traffic reports, local contests, live remotes, sponsor local concerts or do ticket giveaways, this is all local content that is relevant and popular in your local communities. And like any local service business, we have to show interest and invest in our local communities if we want the communities to spend time and money with us.

At the end of the day, as a commercial, for profit, enterprise our challenge is to make the cash register ring for local businesses, using our full array of local media assets. Whether it is on air, on line, via D-1, D-2, mobile, social or other local media assets, I view these all as just tools in the toolbox to provide our basic local services of relevant local content and local advertising solutions.

Inside: Based on that, how do you measure success?

Sook: There is a third service we provide, which is to distribute content that we don't own, namely national network and syndication to our local communities. In my mind this is the least central to the essence of our core business but ends up being the one we spend the most time talking about.

There is always a lot of noise around our industries, around measurement, networks, digital migration, Hulu, Pandora, and others. I believe if we spend our time focused on the basics of what we do, we will not get distracted by other unrelated issues.

I believe our ultimate success will be determined by what we produce and not by what we run and we all have a stake in re-engineering our companies towards that end.

Inside: Depending upon what you read, revenue for broadcasters is always a thorny issue. What is your take on revenue?

Sook: When I started in radio in the mid 70's and television in 1980 and even when I started Nexstar in 1996, we basically had one revenue stream, which was selling on-air commercials. We got a little bit of money from the networks to air their commercials on our air and that was about it. Whether you are in television or radio, you have to accept the fact that the traditional on-air ad channel will grow at GDP like rates of 2-3% per year over the next five years. We see this as the average C.A.G.R. over that forecast period and realize that it will not be straight line growth each year, and this also assumes the normal business cycle and no extraneous shocks to the economy for global financial or geo-political events.

Admittedly, 2-3% is growth, but not the amount of growth that investors or owners like to see. But this is the core revenue growth projection that we use in our financial and acquisition modeling at Nexstar.

However, we have used our local content and local business relationships to leverage into new revenue streams that will continue to provide double digit top line and bottom line growth for our company.

The biggest catalyst of Nexstar's all-time record revenue BCF and EBITDA in each of the last three years has been the evolution of our business model. What started as a company with two revenue streams, namely commercials and network compensation has evolved into multiple revenue streams—from commercials, e-media, mobile, retransmission agreements and management services.

Those last four revenue sources

didn't even exist seven or eight years ago and today they make up over 40% of our EBITDA and as I mentioned they continue to grow at double digit rates. Within three years those revenue sources will contribute over 50% of our EBITDA.

The basic construct of the local TV station business model, because of this diversification - is stronger than it has ever been. We have the ability to cross promote from on air to on line and vice versa. And first and foremost we are local, we offer localism and that is what people care most about.

Inside: What distinguishes Nexstar from competitors—what is your unique selling proposition?

Sook: Our unique collection of assets drives our ability to thrive in a multiplatform world. Local content, a branded relationship with both consumers and advertisers in our communities, driven by the fact that we have an extensive, and as we all know, expensive, infrastructure of employees, those feet on the street gathering our local content and servicing our local businesses, and to top it all off we have this TV or radio station megaphone 24/7 and 365 to promote what we have to offer, it's the ultimate portal.

Local markets cannot be effectively served by an algorithm. Unless or until you have made the investment in people at the local level you just cannot compete effectively.

As I mentioned earlier, all of the so called new media companies would kill to have the "street level" experience and exposure that we have in our local markets.

We believe in this business as a local service business that usually comes with a national content franchise, (also known as a network affiliation) and if your acquisition and business processes are fine- tuned, why would you not want to scale the business?

I am encouraged with our company's and industry's ability to evolve the business model and develop new revenue streams that didn't exist half a dozen years or so ago and I am confident in our collective continued ability to innovate, evolve and change.

Inside: Nexstar has agreed to merge with Media General. By broadcast standards, this is a very big deal and puts your company at the very top of the industry. Can you discuss?

Sook: This is a big deal, it is a $4-plus billion transaction, it's the fourth largest transaction ever done in the television business and that includes buying networks and big station groups, so it's the fourth largest transaction ever done in the business. Big wasn't necessarily what made it attractive to us. While we have bought 60 television stations over the last four years, this will be another big acquisition but not the only one we've ever made. But I felt going back to when LIN and Nexstar went public, within six months of each other in 2003, that these two companies and then the companies they've become with their acquisitions and mergers, are companies that do a lot more things the same than they do differently.

Our company will be at scale, serving medium-size and smaller markets and that's where we make our bones, how we make our money and I think what we do best. We are going to be involved in local content, local news, build local digital sites and super-serve local advertisers in the business community.

We'll be the largest owner of televisions stations with 171 TV stations owned or operated and operating in 100 markets, second-largest in the United States in terms of National audience reach with 39% of audience which is the statutory cap. But again, it's a collection of businesses that serve local communities and Nexstar will be basically the holding Company that will help to allocate capital and help to keep score and add up the financials and articulate to the financial community. But our mission is local and the brand that we want known locally is the local brand that serves and helps that local community.

We're very excited about this combination. We are still working through the regulatory review process, but we have provided all the details to the FCC and Justice Department and expect an approval to close the transaction before the end of this year.

Inside: You have spoken about the digital side as a bright spot of the broadcasting business. What's your vision?

Sook: The digital opportunity is exciting as we put these two companies together. We will give birth to a company with combined revenues of a quarter billion dollars; that's a big company in and of itself just on the digital side, so I think we'll have the resources, the people, and the access to capital to continue to grow that business.

And it is one of the fastest growing segments of our business, growing at double digit rates, which is better than core television revenue has grown in recent years. So, we need growth if we want to continue to attract capital, to attract talent. So, our focus on digital is that the two companies, again, there are some duplication, which we'll have to figure out, but that the companies are complementary; we don't have a company like HYFN that does social and native advertising. We have a programmatic digital video company called Yashi that will be a complement to the existing Media General product offering. Our goal with our digital businesses is to have the best in industry tech stack as well as product offerings, again, to be able to go into markets and super-serve local advertisers and local viewers. And I think that we will have the tools here, I think this is a case where 1+1=3 on the digital side, and it's one of the most exciting parts of the transaction.

View from the Top Profile

Perry A. Sook, 58

Founder, Chairman, President, CEO: Nexstar Broadcasting Group, Inc. Traded on NASDAQ as NXSTR.

Spouse: Sandra

Children: Laura, Victoria, Perry, Jr.

Education: Ohio University

Director:

- **National Association of Broadcasters**
- **TV Advertising Bureau**
- **Ohio University Foundation**

Honors and Awards:

- **Broadcasting and Cable Hall of Fame**
- **Radio Television Digital News Foundation**
- **National Association of Media Brokers**
- **Borrell Award of Merit**
- **New York State Broadcasters Hall of Fame**
- **Broadcaster of the Year– Texas Association of Broadcasters**
- **Ohio University Broadcaster of the Year**
- **Broadcasters Foundation of America**
- **2016 American Horizon Award, The Media Institute**

Creator, Founder's Day of Caring

Launched the largest multicast network distribution in broadcast history in 2016.

Inside: What is your vision for the industry and for your company going forward?

Sook: Obviously, without our solid foundation and good execution, we wouldn't be here today. The vision of this company and our goal, my mandate to myself and to our team is to leverage each our strength and maximize every new opportunity that we can to become the local consumer and local advertiser's number one choice across all screens. And if we do that, we will be successful, we will continue to survive, and dare I say we will even continue to prosper. So that's our vision and our goal. This is the only business that we're in and we believe the local business is the best part of the media business to be in.

We have no aspirations to own cable networks or do anything on a national platform. We do local well. We plan to continue to build on those strengths and remain with core competencies of developing local content that is relevant, contextual, interesting and professionally produced, and help local businesses sell stuff and grow their businesses, regardless of the screen or the technology or the changes.

~ IFCC ~

Bullish on Broadcast

Broadcast is not just healthy; it is the HEALTHIEST *of the sectors that I follow.*

Marci Ryvicker, CPA, CFA

I have come to realize that a big part of my day-to-day as an equity analyst will forever be fending off the Wall Street bear case against broadcast television stocks – which (according to these bears) are facing an imminent demise for any one of a number of reasons, such as: no one watches local news, the networks will eventually take every single itty bitty piece of retrans revenue, the networks will ultimately bypass the station model altogether and go "direct-to-cable," ALL television ad dollars are moving to digital RIGHT THIS VERY SECOND, and the list goes on and on and on.

As frustrating as these conversations have become, I take them in stride (or at least try to) and do the best that I can to explain that these fears are nothing but a figment of their imagination (in my opinion).

Unlike a lot of these Wall Street bears, I have been involved in broadcast since I started my sell-side career back in 2002 and in my view, I disagree with every point above and reiterate a thesis that has been enumerated throughout our research over the past several years.

Our thesis is quite simple and can be captured in just three words: BROADCAST IS HEALTHY. In fact, I have gone so far as to state in various research reports that I believe broadcast is not just healthy; it is the HEALTHIEST of the sectors that I follow.

Here's why:

One, broadcast is domestic. There are no direct global macro concerns; and there is no volatility from foreign exchange.

Two, the network-affiliate relationship has become STRONGER given the retrans/reverse relationship. The networks depend on their stations for TWO of their three revenue streams (advertising and reverse comp), and it is in each network's interest to ensure that its affiliates are financially stable and growing. I would also venture to say that the network-affiliate relationship is even STRONGER STILL with the advent of live over-the-top services – as the networks need cooperation from the affiliates in order to participate in all of these pending skinny bundles.

Three, broadcast is MUST HAVE – in an emergency, it's news; in a time of leisure, it's sports or awards shows or *The Voice* or whatever you happen to be into. And just think about the uproar that occurs when a broadcast channel is NOT available in a particular market (say from a retrans dispute).

Four, broadcast is "safe" – we say this because there are no privacy issues for consumers. There is no click fraud or bot concerns for advertisers. With broadcast, you know what you're getting – you see it right there in front of you - there is nothing more, nothing less.

Five, there are some real potential financial and economic catalysts on the horizon – the incentive auction, consolidation, and ATSC 3.0 – just to name a few.

Now, I am not a complete Pollyanna – I know there are a number of challenges that the broadcasters face. And there are some things that I re-

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ally don't like – for example, debt. I am not a fan of some of these balance sheets –- the average public broadcast company has a leverage ratio (defined as net-debt-to-trailing EBITDA) of anywhere from 4.0x – 5.5x – which can become onerous in an economic downturn.

I also don't exactly view this medium with the same excitement that I do as a user (not to be confused with my job as an equity analyst) of Facebook and Google – which appear to be sexier, more innovative and just plain "young." And I would be remiss not to mention the steep regulatory challenges that have been imposed on a sector that is supposed to be local, diverse and innovative.

I, quite frankly, struggle with some of Washington DC's "rationale" when it comes to regulating the broadcast space. For example, how is it that a certain MVPD (Multi Video Programming Distributor) can operate multiple cable networks, two broadcast stations and the internet pipe in a single market; while a broadcast company cannot own a television station or newspaper operation in L.A., or Baltimore, or wherever? In today's world, with the amount of choice and the growing number of distribution platforms, continuing to depend on legislation dating back to the 1990's just doesn't make a whole lot of sense.

With all this as a backdrop, I do want to focus on the future of broadcast, which isn't something I get to do a whole lot given the shorter time horizon of most of my Wall Street clients.

It's actually been kind of fun to think about what this industry might look like after the auction – assuming it's a successful one (we aren't assuming otherwise, but we really have no information – that $86.4B initial clearing cost really threw us for a loop). Our gut tells us that the first "order of business" post the auction will be another substantial round of consolidation. How could there not be, when this auction (again, assuming it is successful) should result in a bunch of broadcasters with newfound money AND some cleared cap space?

And we assume that consolidation continues for the foreseeable future until the sector is left with just a handful of very strong broadcasters with significant scale – much along the lines of that "survival of the fittest" mentality.

Unfortunately, we don't know HOW big the "survivors" will ultimately be given the various questions around the current 39% ownership cap. We hope that Congress, at some point, goes beyond acknowledging in words that the media landscape has changed and actually does something about it – by raising that 39% cap to 45% or even 50%.

Once consolidation is "done" – whether it's because the 39% cap is reached, or sellers and buyers come to an impasse or what have you – I imagine that the second post-auction priority for most broadcasters would be debt reduction.

While this might not sound all that exciting to the readers of this particular publication, I do think it makes a big difference to consumers and to Wall Street. On the consumer level, less debt means more money likely allocated to organic investment rather than interest expense. On the Wall Street level, less debt generally means lower volatility and the potential for yield.

I'll close with my last thought – which, to me is the most exciting. It's ATSC 3.0. To me, ATSC 3.0 is the real game changer for broadcast and it's a real positive for the consumer. Updating the broadcast industry's standard would enable TV spectrum to move from competing in the stationary wireless marketplace to competing in the mobile wireless marketplace.

This should provide consumers with another distribution platform where they can access LOCAL news from anywhere at any time. And it would also allow these companies to create new revenue streams, which means more money for programming. I don't know when ATSC 3.0 is really going to matter – but I do know it's a significant opportunity for these companies and this country.

While it feels like the broadcasters will continue to face an uphill battle – whether that is due to Washington or the Wall Street bears – I leave you with these three little words:

BROADCAST IS HEALTHY.

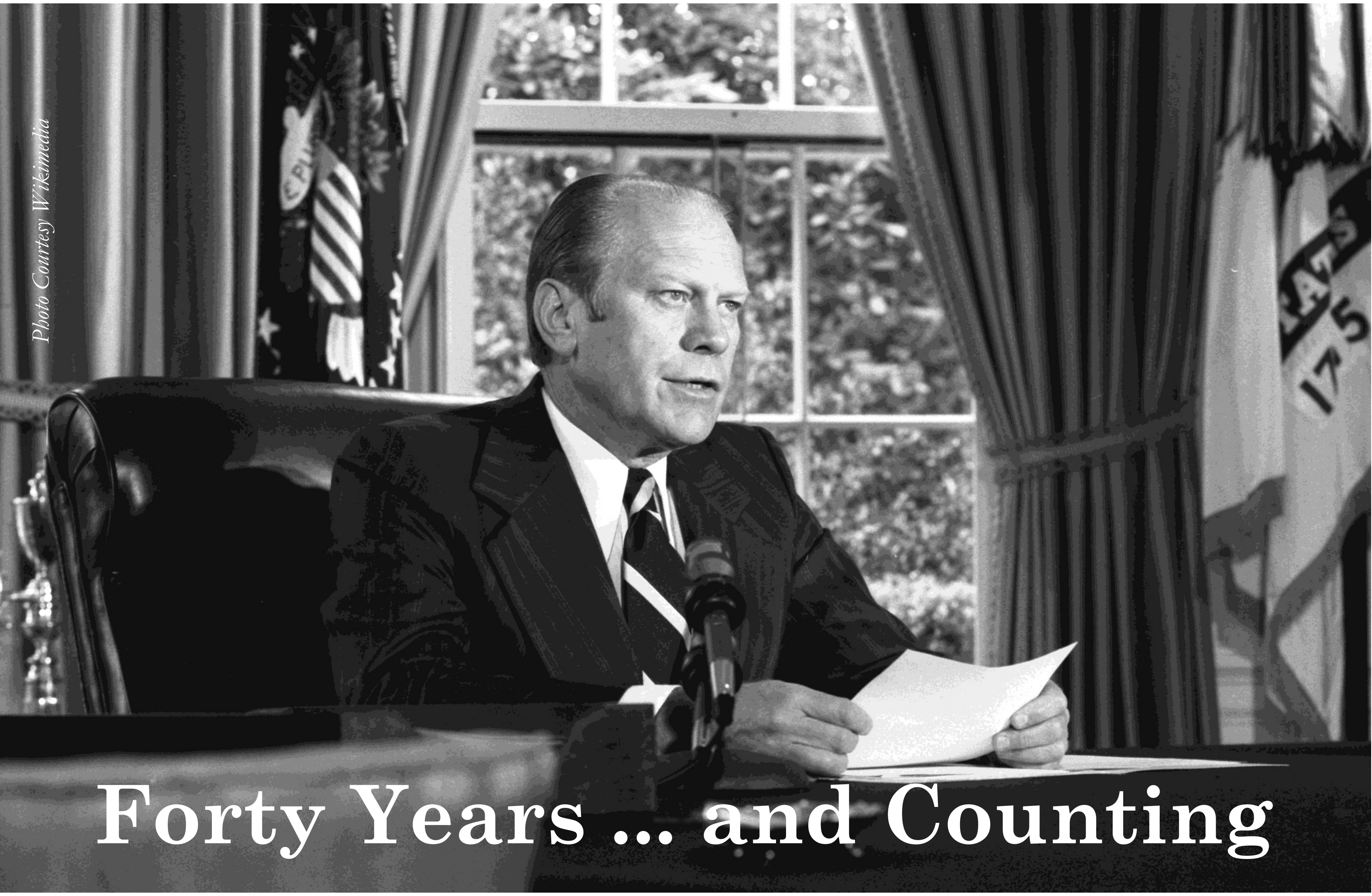


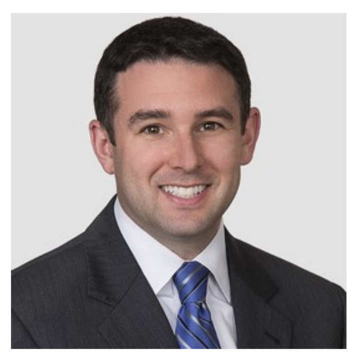
Photo Courtesy Wikimedia

Forty Years ... and Counting

Newspaper / Broadcast Cross-Ownership Rule Has Outlived its Role

Richard E. (Dick) Wiley & Ari Meltzer

__Richard (Dick) Wiley, Esq.__ is the Co-Founder and Chairman Emeritus of Wiley Rein LLP. He served as Chairman, Commissioner and General Counsel of the Federal Communications Commission (FCC) from1970-1977. __Ari Meltzer, Esq.__ is an Associate Attorney at Wiley Rein LLP in Washington, DC.



In 1975 the Federal Communications Commission (then chaired by Dick Wiley) adopted the newspaper/broadcast cross-ownership rules. In the interest of promoting diversity, the Commission ordered a prospective restriction on the acquisition of a broadcast license by a local newspaper. The Commission's action was taken at a time when newspapers played a dominant role in the nation's media landscape, and the cross-ownership regulations largely were based on concerns related to that perceived dominance.[1]

Now, some 41 years later, the rules remain substantially unaltered. And, yet during this same period, the nation's media marketplace has undergone a remarkable technologically-driven metamorphosis.

The reality is that – far from dominance – many newspapers today are struggling to prosper (or, in some cases, even survive) due to a plethora of informational and advertising-related alternatives to the printed page brought about primarily by the Internet.

And while the fledgling television industry of the early 1970s has greatly expanded in number and scale, it also has encountered ever-increasing competitive pressures from numerous multichannel subscription-based video services (cable, satellite and telephone alike). Similarly, free, over-the-air radio broadcasting – while still vibrant today – is faced with a multitude of pay and Internet-related audio rivals.

Moreover, in recent years, major newspaper/broadcast groups have moved their faster (electronic media) and slower (print) growth properties into separate organizations. They have done so primarily for business and financial reasons but, also perhaps, due to a realization that the FCC is simply unwilling to make any meaningful modifications to its age-old cross-ownership rules.

The ultimate result of all this is a stunning dissonance between a radically changed industry structure and environment and, by contrast, an almost completely static regulatory regimen. The FCC's inaction seems especially disconcerting because Congress, in the 1996 Telecommunications Act, directed the agency to examine its media ownership rules every two (now four) years to determine whether they are still "necessary" in the public interest.[2] In light of all of the vast developments in the media sector over the last four decades, affecting both newspapers and broadcasting as discussed above, it would seem difficult, if not impossible, for the Commission to contend that its cross-ownership regulations remain necessary or even justifiable.

But, it has not been the legislature alone which has suggested the possible need for change. The Judiciary also has attempted – however imperfectly – to point the way forward.

In 2003, the FCC – under then Chairman Powell – adopted a number of deregulatory reforms to its ownership panoply (including newspaper/broadcast).[3] The Commission's action was partially in response to rulings by the U.S. Court of Appeals for the District of Columbia, which raised questions concerning the agency's rationale for maintaining some of its regulations. [4]

However, all of the deregulatory initiatives of the Powell Commission were overturned by the Third Circuit Court of Appeals in 2004 (specifically, by a 2-to-1 majority panel which assumed jurisdiction over media ownership and has retained it now for over thirteen years).[5] While the panel's continuing inaction understandably has frustrated the industry, the judges nevertheless have questioned several times whether a blanket prohibition on newspaper/broadcast combinations in the same market is appropriate.

In its 2004 decision, the Third Circuit concluded "that cable and the Internet contribute to viewpoint diversity", rendering the cross-ownership rules ripe for revision.[6] And just this year, the same panel lamented the fact that "the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest." [7]

Despite these Congressional and judicial nudges, the FCC's recently-released Quadrennial Review Order holds firm on maintaining not only cross-ownership but the substance of all its other ownership rules as well.[8] In particular, the Order retains the existing newspaper/broadcast ban and, only very modestly, provides an exception for failed and failing properties, replaces the analog TV contour with a digital one, and offers a vague standard for possible waivers. [9]

Needless to say, broadcasters and newspaper publishers were hoping for and expecting much more.

Indeed, Chairman Wheeler's immediate predecessor, Julius Genachowski, had proposed (but never finalized) an elimination of at least the newspaper/radio prohibition.[10] The Newspaper Association of America (NAA) has long led the struggle to abolish, or at least lessen, the cross-ownership ban.

Additionally, the National Association of Broadcasters (NAB) has fought the good fight for many years. In a series of pleadings filed before the Commission's action, the NAB indicated that it intended to appeal the Order, arguing that the cross-ownership regulations are vestiges of a "bygone era" and presenting evidence that demonstrates the "perilous state" of the newspaper industry. [11]

The shame in all of this is that it perhaps could have been a much different (and more productive) story. The continuing stability and profitability of elements of the broadcasting industry might have helped to preserve some of the "lost" newspapers. At a time when newspaper layoffs have become all too common, staffing in local television newsrooms has continued to grow. And, concomitantly, the strength of local printed news reporting (always a hallmark of newspapers' "journalistic tradition") would have been a valuable asset to many broadcasters, especially in sometimes hard-pressed smaller markets.

In a recent ex parte filing, Rick Kaplan, NAB's General Counsel, argued that, given the vast changes in the way consumers obtain news and information since 1975, "the Commission cannot show that either the printed newspaper rule or the radio/television cross-ownership rule remain 'necessary' in the public interest". [12]

Mr. Kaplan's reference to the radio-TV rule – something that Chairman Genachowski also proposed to eliminate – calls to mind that there are other existing FCC ownership regulations that the agency could have (but didn't) reconsider – in particular, the local television rule (and its eight-voices test for new "duopolies") and the 39% cap on national TV holdings by any one broadcast entity.

The More Things Change

"The world has demonstrably changed since then. I think my earlier handiwork is outmoded. It was a good rule for 1975. We were concerned at the time that newspapers would dominate television, which people forget had only really been created 20 years or so earlier. It's almost been over 40 years later and many things are different."

— Former FCC Chairman Dick Wiley

In all, the often-delayed and essentially inert nature of the Quadrennial Review process at the FCC would seem to be far removed from what Congress intended in its 1996 legislation.

Only time will tell whether further judicial review or the political process will bring about different and more sensible results in the future. And, hopefully, this will be particularly so with regard to the oldest and arguably the most counter-productive of the FCC's rules: newspaper/broadcast cross-ownership.

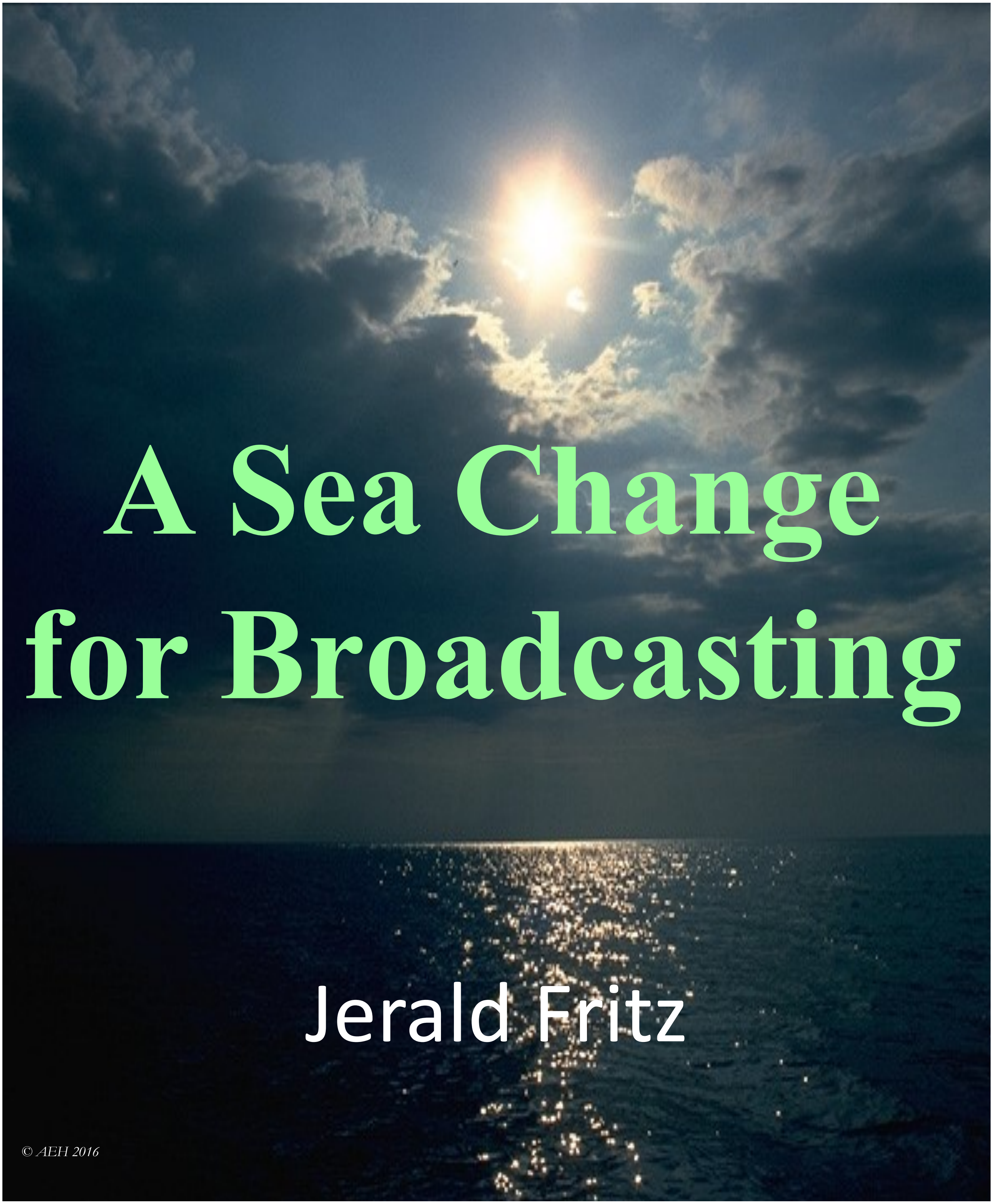
~ IFCC ~

Notes

1. In the Matter of Amendment of Sections 73.34, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, & Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1074 ¶ 27 (1975).
2. Telecommunications Act of 1996, § 202(h), 110 Stat. at 111–12 , 47 U.S.C.A. § 609
3. See In Re 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).
4. See Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027 (D.C. Cir.), opinion modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002), Sinclair Broad. Grp. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).
5. Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004), as amended (June 3, 2016), amended sub nom. Prometheus Radio Project v. FCC (3d Cir. June 3, 2016).
6. Id. at 400.
7. Prometheus Radio Project v. FCC, No. 15-3863, 2016 WL 3003675, at *13 (3d Cir. May 25, 2016).
8. In Re 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order, FCC 16-107, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (rel. Aug. 25, 2016).
9. Id. ¶187 (if parties can “show that their proposed combination would not unduly harm viewpoint diversity in the local market”).
10. In the Matter of 2010 Quadrennial Regulatory Review -- Review of the Commissions Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Promoting Diversification of Ownership in the Broadcast Services, Notice of Proposed Rulemaking, 26 FCC Rcd. 17489, 17523-32, ¶¶ 96-117 (2011) (proposing revisions to the newspaper/television cross-ownership ban and elimination of the newspaper/radio ban).
11. Letter from Rick Kaplan, General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182 (July 7, 2016), available at https://ecfsapi.fcc.gov/file/10707285727052/CrossOwnershipRulesExParte070716.pdf (NAB July 7 Ex Parte).
12. NAB July 7 Ex Parte.

A Sea Change for Broadcasting

Jerald Fritz



Sea Change

Noun; a profound or notable transformation first coined by William Shakespeare in The Tempest.

Indeed, The Tempest may be a particularly accurate metaphor for the turbulence of today's telecommunications ecosphere. For those of you who remember your Shakespeare, the Tempest storm was conjured up by the magician, Prospero, and his enchanted agent, Ariel, to wreak havoc on conspirators who had deposed him from his Dukedom and left him to die at sea. So it seems that the "new" Prosperos should be conjuring a storm that will revolutionize not just television broadcasting, but also triggering a new competitive opportunity for all forms of data distribution.

Who are these modern-day Prosperos?

They are the tenacious visionaries at Sinclair Broadcast Group; and the hundreds of engineers at the Advanced Television Systems Committee; and forward thinking broadcasters with Pearl Television, Nexstar and Gray Television; and eager consumer equipment manufacturers at Samsung and LG; and public broadcasters who seek new ways to enhance their missions; and the emergency warning community; and yes, even FCC Chairman Wheeler in his zeal to transform the competitive landscape of data distribution. All are involved in the Sea Change that is the Next Generation broadcast transmission standard.

It has been said that the "Public's interest defines the Public Interest." There is no better example of this than meeting the evolving demands of content consumers by broadcasters.

This sea-change will alter dramatically the way traditional over-the-air broadcast content is consumed. The Next Generation standard holds the key to transforming a mature industry into a vibrant competitor for data delivery and meeting the sophisticated demands of viewers. Converting from a single purpose transmission language that only conveys television programming, the new standard is an enhancement providing for increased data bits that are for the first time mobile, universal and Internet Protocol-based. It opens opportunities to deliver enhanced core television services such as robust, multiple channels of higher quality, ultra high definition video and immersive, "3D" audio, as well as the entire range of geo-targeted programming and advertising, personalized content delivery, data collection and measurement, and advanced emergency alerting functions – all of it receivable on mobile devices. The number of datacasting opportunities to meet business and consumer demands is limited only by entrepreneurial imagination. "Next Gen" is nothing less than a massive enrichment to the Public Interest.

How does this "better" way of distributing data, however, enhance the community? How does it permit interactions to evolve to facilitate inclusive, supportive and interesting communities? Since the Next Generation transmission standard is based on the one-to-many – multicast – broadcast architecture, it is not interactive on its own. Designed to fit into the converging world of today's 'two way' (unicast) hybrid environment, however, it can be. This massive one-way pipe brings many options to consumers including, most importantly, Internet Protocol connectivity – it

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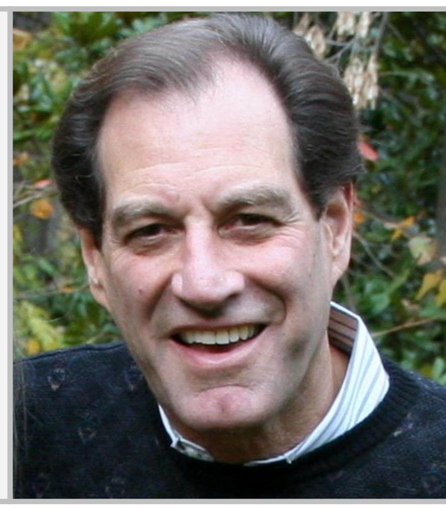


enhances the ability for consumers to interact and connect with each other based on a set of common experiences.

Consumers will be able to use the Internet backhaul to provide interactive choices on media selected by the consumer – with evolving alternatives established to meet consumer demands.

For example, viewers might choose to continue watching a baseball game that has gone into extra innings while others may choose to watch regular programming. These dynamic features are inherent in the Next Gen standard. Similarly, a viewer may have choices of different angles of a sporting event, access to real time statistics, and alternative captioning options.

In emergency situations, the Next Gen standard can "wake up" a sleeping device and provide not simply a warning crawl but actual live Doppler weather radar maps, evacuation routes and in multiple languages. Amber Alerts will now be able to show pictures of abducted children, suspected perpetrators, vehicles and location maps – all through the unique, dynamic capabilities of this 'convergence-based' new standard.

Single Frequency Networks (SFNs) enabled by the Next Gen standard will also permit broadcasters to hyper-localize programming and advertising to meet the specific needs of viewers.

A car dealer, for example, located in one portion of a market may want to target advertising to reach viewers close to its location. Similarly, a political candidate in a district that is part of a multi-state market may only want to reach his/her district's voters. And stations may want to provide different news stories to discrete parts of the market, reflecting the interests of just that area. Impossible today, but uniquely doable using the same channels with the Next Gen standard.

A significant added benefit will be the ability of broadcasters to replace translator stations that will likely be lost in the ongoing Spectrum Incentive Auction. Using same channel SFNs, stations may be able to continue serving those viewers who have relied on translators to extend the stations' service reach. Significantly, the IP nature of the platform allows the broadcast pipe to fit in neatly and naturally into the distribution fabric of 5G wireless data distribution systems.

The Next Gen platform also uses the non-media capacity of a broadcast channel to enhance the lives of consumers in many other ways.

For example, the enormous data pipe that is enabled by the Next Gen standard can provide efficient and almost instantaneous e-book distribution, on-demand movies, operating system upgrades, agriculture support, building maintenance, digital signage provisioning, distance learning, and automobile telematics updates, including navigation system maps.

It can even serve as the backbone of the Internet of Things. Shakespeare's Prospero becomes Buck Rogers!

The Next Gen system can offload capacity to the wireless telephone industry for more efficient use of downstream content delivery. Why use up the one-to-one capability of the wireless industry for uses that are best delivered with a one-to-many architecture, preserving spectrum for band–hungry interactive uses? This hybrid approach to spectrum use makes more efficient use of the spectrum.

Most importantly, the new standard provides the ability to transmit robust content to mobile devices – portable pedestrian screens and those in fast moving vehicles. That increases the reach of all content providers in a uniquely efficient way. And significantly, it meets the demands of a mobile public, not tethered to a home screen mounted on the wall. Reaching younger viewers who are growing up with seemingly exclusive reliance on mobile devices is a critical sustaining imperative for all broadcasters.

A bold consortium of industry players has asked the FCC to expedite approval of this new standard for voluntary deployment. Broadcasters (both commercial and public), equipment manufacturers, and an alliance emergency services advocates have now triggered the regulatory process.

Initial comments have been filed with unsurprising unanimity as to the need for platform competition. Uniquely, the proposal frees the government from top-down management of Next Gen deployment in favor of a flexible market-by-market implementation structured by broadcasters who are able to react to individual market needs.

Importantly, as the new standard is deployed, no current viewer will be disenfranchised since the deployment plan leaves the current channel in place for the foreseeable future. Nothing proposed and no comments filed should prevent the Commission from moving expeditiously to the next step of proposing rules. It should not be a heavy lift and the benefits are substantial.

In fact, the Commission is attuned to allowing industries to move forward quickly with innovative approaches to spectrum use. For example, the complex "Spectrum Frontiers" proceeding involving setting the stage for the next generation of wireless services recently saw the Commission rapidly evaluate how to combine licensed and non-licensed use of spectrum, a commercial-to-commercial shared access regime, and unlicensed use, as well as provisions to protect incumbent federal government uses in some bands.

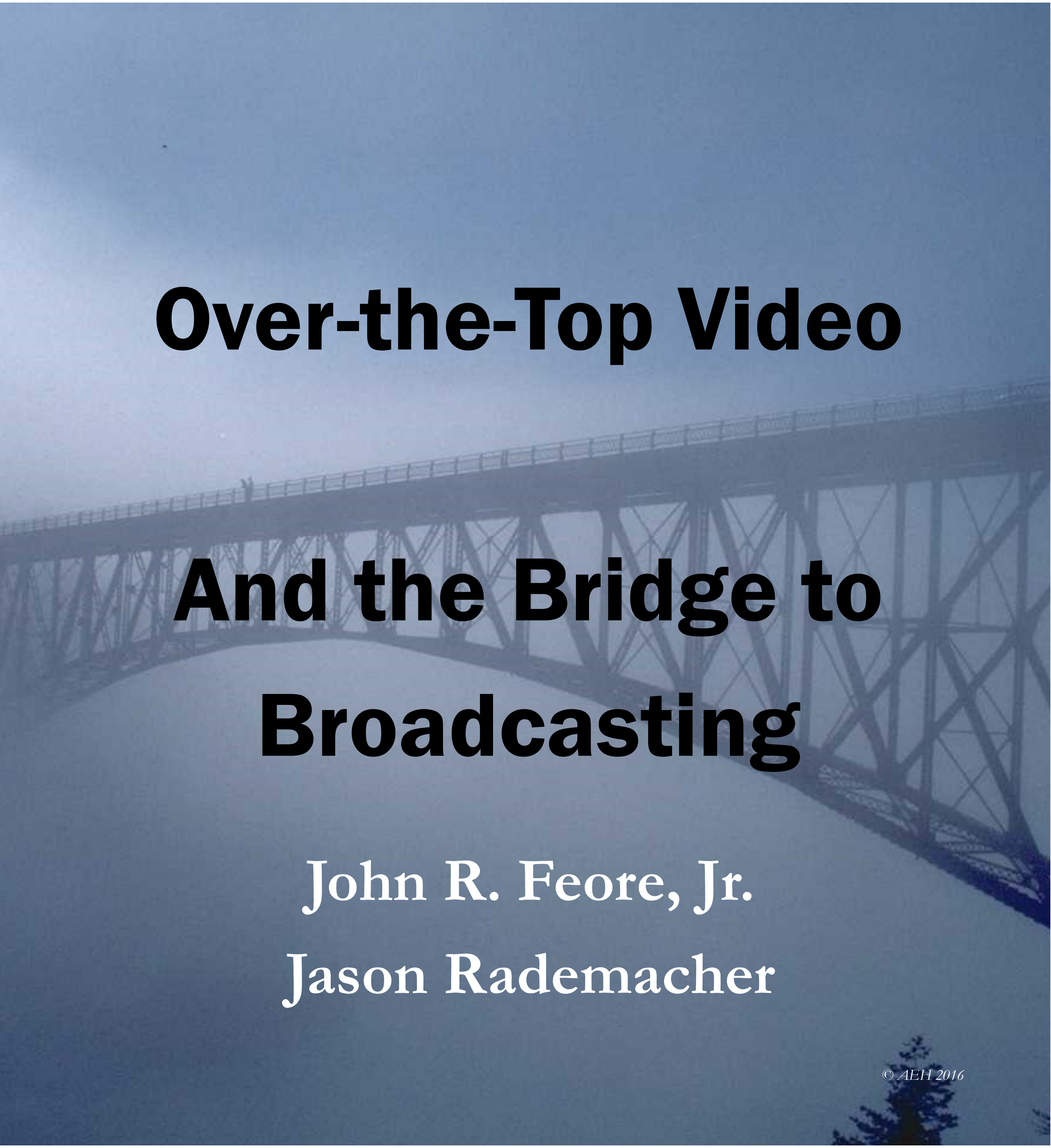
The Commission noted that it did not intend to define what qualifies as '5G', and that standards bodies were still developing requirements. Notably, 5G's nascent status has not prevented the Commission from moving forward to spur these innovations.

The Next Gen TV proposal before the Commission asks it to approve only a small piece of the new transmission standard – and a voluntary one at that. This will ensure that broadcast television licensees have the flexibility to offer services and features the market demands, and avoids bogging the Commission down while additional layers of the service are defined.

Almost four years before he was sworn in as FCC Chairman, Tom Wheeler noted prophetically that, "Broadcasters aren't television purveyors anymore; they are digital pathways, some of whose content happens to be video. … The question is whether the industry will grab the opportunity it presents to reposition themselves to be players in the digital future."

We could not agree more with Mr. Wheeler's assessment. He could easily be the new "Prospero" in the telecom Tempest that reforms the competitive landscape and dramatically enhances the Public's interest.

~ IFCC ~



Over-the-Top Video

And the Bridge to Broadcasting

John R. Feore, Jr.

Jason Rademacher

Why Can't I Watch My Local TV Stations on the Internet?

A Case Study in Regulatory Paralysis

In December 2014, the FCC proposed – and Chairman Tom Wheeler enthusiastically endorsed – a plan that would have taken a big step towards freeing local television broadcasters to become a full participant in the burgeoning online video delivery marketplace. [1] The FCC adopted a notice of proposed rulemaking that would classify online video distributors ("OVDs") as multichannel video programming distributors ("MVPDs"), which would have brought online delivery of local television stations one step closer to reality. [2]

Today, more than 18 months later, this issue has slipped to the bottom of the Chairman's agenda, and local broadcasters remain on the outside looking in when it comes to online video delivery.

Critics of the federal regulatory agencies frequently say that the government should not pick winners and losers when it adopts new regulations. What gets less attention is that in the heavily regulated communications sector, the FCC can just as easily ensure that market participants become "losers" simply by adopting no regulations at all.

That may turn out to be the case with the FCC's OVD reclassification proceeding if the agency continues to take no action.

At Stake — Fostering Localism into the Internet Age

The carriage of local television stations by MVPDs has been heavily regulated since the 1960s. The FCC first regulated cable retransmission and carriage of local stations as a part of its regulation of the national broadcast television system. The theory was that local television broadcast stations play a crucial role in distributing locally-produced news and other informational programming to local communities throughout the country. Multichannel video providers had the potential to threaten that system by refusing to carry local broadcast stations, thereby endangering stations' economic viability and the local services they provide. Over the years, the FCC's rules had a checkered history in the courts. But Congress fundamentally agreed that regulating MVPD carriage of broadcast signals was essential to maintaining a vibrant local marketplace of ideas, so it ultimately replaced the FCC's rules with the mandatory carriage and retransmission consent provisions of the 1992 Cable Act. Those provisions were twice upheld by the United States Supreme Court.

The important part of the current law for purposes of the FCC's classification of OVDs is that all MVPDs are required to negotiate in good faith with and obtain the broadcasters' consent before retransmitting a local television station's signal.[3] The converse also is true: multichannel video distributors that are not classified as MVPDs cannot take advantage of the retransmission consent regime instituted by Congress to gain access to local broadcast signals. That means OVDs – no matter how much their multichannel video services resemble cable or satellite services – cannot insist on negotiations with local broadcasters for retransmission consent.

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Given this state of affairs it is not surprising that the FCC initiated its proceeding to consider classifying OVDs as MVPDs in part to help them gain access to local television signals. For all the Internet has done to revolutionize the way people do just about everything, one thing it doesn't do particularly well is stimulate the creation of local news and information providers.

Local television stations and local newspapers remain the leaders in providing local news and information to communities across the country. OVDs offer a bridge from traditional MVPD distribution of TV stations to the online video future, while also promising to significantly increase the amount and visibility of local programming content available over the Internet.

And they can only do that if they have access to retransmission consent for local TV signals. Viewed a certain way, the FCC's OVD reclassification has the capacity to both thoroughly modernize and steadfastly preserve localism for the Internet age. And that's why Chairman Wheeler was so enthusiastic about this proceeding in 2014. Now it's over a year and a half later, and there's been no action. What happened?

The "Free Market" Complication

When the FCC released its NPRM in the OVD reclassification proceeding, both Commissioners Ajit Pai and Michael O'Rielly concurred, expressing reservations about introducing new government regulation into the Internet space. Both Commissioners cited the explosive and undeniable growth in the Internet video business over the past several years as a reason the FCC should restrain itself from "getting in the way" of private enterprise.

Both Commissioners also indicated they doubted they would support the regulations proposed in the NPRM. Many participants in the Internet video space also seized on the "free market" vs. intrusive government regulation framework described by Commissioners Pai and O'Rielly and implored the FCC to leave the market free to sort itself out.

Free market arguments carry a lot of weight at the FCC. This is in no small part because Congress unambiguously expressed its view in the Telecommunications Act of 1996 that when the choice is between free markets and regulation, the FCC should err on the side of relying on market mechanisms to deliver consumer welfare. But even the best policy principle needs to be tested in each new context to be sure it is actually achieving the policy results Congress intended.

What none of the Commissioners or participants opposing classifying OVDs as MVPDs discussed was whether there is a path for local television stations to gain carriage of their signals by OVDs. An easy and workable path currently does not exist, and the "free market" has been unable to provide one.

This is because the market for retransmission of local television broadcast signals is anything but "free." It is a tightly regulated market that is characterized by pervasive government regulation to ensure universal delivery of over-the-air programming to viewers in local markets. Under current U.S. law, to carry local broadcast television signals, MVPDs need two things: retransmission consent from each station and a license from the holders of the copyrights to the programming that local stations air.

As for retransmission consent, broadcasters can elect either to exercise their rights of automatic carriage for no fee under the Communications Act's mandatory carriage provisions or to negotiate a fee or other arrangement in the form of a retransmission consent agreement. The negotiation of these agreements is governed by "good faith bargaining" rules instituted by Congress and enforced by the FCC.

On the copyright side, the government long ago stepped in to make sure that MVPDs could secure the necessary licenses without having to negotiate separate licenses with each copyright holder. To simplify the process of MVPDs' obtaining the necessary copyright licenses to air broadcast programming, in 1976 Congress adopted a compulsory copyright licensing scheme by which MVPDs pay copyright royalties to a pool of funds that are then distributed by the Copyright Office to individual stations based on government-established royalty rates.

Absent the compulsory license, MVPDs could not carry broadcast signals because they would never be able to secure all of the necessary copyright licenses. Since OVDs are not currently classified as MVPDs, they are not required to obtain retransmission consent, but they do need a copyright license.

At this point, no OVD has obtained the necessary copyright licenses, and there is reason to believe that none would be able to do so. Several years ago, the Copyright Office looked at the feasibility of abolishing the compulsory copyright license for cable and satellite providers and determined that private negotiation of these licenses would not be a practical alternative.

The heavily regulated market for carriage of local television signals by cable and satellite providers may not be a "free market" model, but it has been a model that has worked for decades to ensue MVPD delivery of local television signals. The government has gone through the trouble to design this regulatory framework because federal policy has been to promote universal availability of local broadcast signals because of the role they play in local news and information creation and distribution.

The FCC has it within its power to partially adopt this model for OVDs by classifying them as MVPDs, thus entitling – and requiring – them to negotiate retransmission consent with broadcasters. In effect, this situation calls on the FCC to choose between letting the "free market" handle something that market is ill-equipped to handle or helping craft a path for local television stations to reach Internet audiences.

That requires a balancing of the public interest in free market solutions versus the public interest in access to local content over a medium – the Internet – that will dominate communications in the 21st century. This is not an easy choice, but it is exactly the kind of issue that the FCC was designed to consider and resolve.

Copyright Complication and FCC's Choice

One potential explanation for the FCC's inaction on the OVD reclassification issue is that simply classifying OVDs as MVPDs would not guarantee that they will be able to gain access to local TV signals. As indicated above, this is because OVDs still would need copyright licenses for content broadcast on local stations, and, in the past, the Copyright Office has ruled that OVDs do not qualify for the compulsory licenses available to cable and satellite MVPDs.

Commissioner O'Rielly noted this fact in his separate statement, suggesting that FCC action would be premature under these circumstances.

The reality is a little more complicated than that. First, while the Copyright Office has indicated that OVDs are ineligible for the cable compulsory license, it has also indicated that its position on that issue might be open to reconsideration if the FCC ruled that OVDs are MVPDs.

Second, in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, the Supreme Court suggested that some OVDs are indistinguishable from cable operators. This has led OVDs to argue in various court cases that they should be treated as cable operators for purposes of gaining access to the cable compulsory copyright license.

While several courts that have considered this issue have rejected the proposition that OVDs should be eligible for the cable compulsory license, in 2015, a federal district court in California held that an OVD named AereoKiller satisfies the statutory requirements for eligibility for the compulsory license.

That case is currently on appeal with the Ninth Circuit Court of Appeals. If the district court's decision in that case is upheld, it would create a split between the Ninth Circuit on the pro-OVD side and the Second Circuit and a federal district court in Washington D.C. that have ruled against OVD eligibility.

For the FCC, there are two ways to look at this situation. First, it could identify OVD qualification for the compulsory license as a block to OVDs gaining access to local TV signals and conclude that action to reclassify OVDs as MVPDs would be a useless exertion.

Politically, given the signaled opposition of Commissioners Pai and O'Rielly, such a doomed-to-fail reclassification would go into the books as yet another party-line, 3-2 decision, this one accomplishing very little. And, many of the OVDs that would gain access to local broadcast signals don't want to be classified as MVPDs because they want to be governed by the "free market," not federal regulation.

Second, the FCC could look at this case as an opportunity to influence a debate that has been raging across all branches of government. Part of the FCC's role is to resolve these questions to the extent it can so that other agencies, the courts, and Congress can understand the state of the law and respond accor4dingly.

Regardless of how the FCC decides that OVDs should be classified, if Congress disagrees, it can clarify the law. If the FCC reclassifies OVDs as MVPDs, that might prompt the Copyright office or the courts to change their view of whether such providers are eligible for the compulsory license. If the FCC does nothing, this sensible communication between the various parts of the government will not take place.

Finding the Path Forward

At this point, all indications from the FCC are that it will not act any time soon on the OVD reclassification issue. That will leave OVDs free to continue acting as they have, essentially unregulated by the FCC. And, it will leave them without direct access to the local television stations that produce the majority of local video news and information programming.

The likelihood is that OVDs will focus on non-local video content that can be economically distributed across the country. If substantial viewership shifts from traditional MVPDs to OVDs before OVDs gain access to local television signals, broadcast viewership may suffer and the system that currently supports local broadcasting will be damaged.

Another possibility is that the largest MVPDs and other large conglomerates seeking to enter the multichannel video space, with the funds and the leverage to negotiate with national television networks may strike deals directly with those networks that permit local stations to opt-in and be shown on the traditional MVPD's OVD offering. That result would bring local television stations to OVDs on whatever terms the national networks deem appropriate.

That result also would shut start-ups and new entrants out of the market because they would not have the leverage necessary to obtain local signals at reasonable rates. So this "free market" solution, which allows the OVD market to proceed free of regulation, would actually be a closed market benefitting the largest national MVPDs and TV networks while diminishing local stations' control of their signals and leaving little room for the market disrupters the online environment has typically fostered.

No matter what choice the FCC makes in this proceeding – including its decision to do nothing – it will result in winners and losers and a video programming market that is heavily regulated.

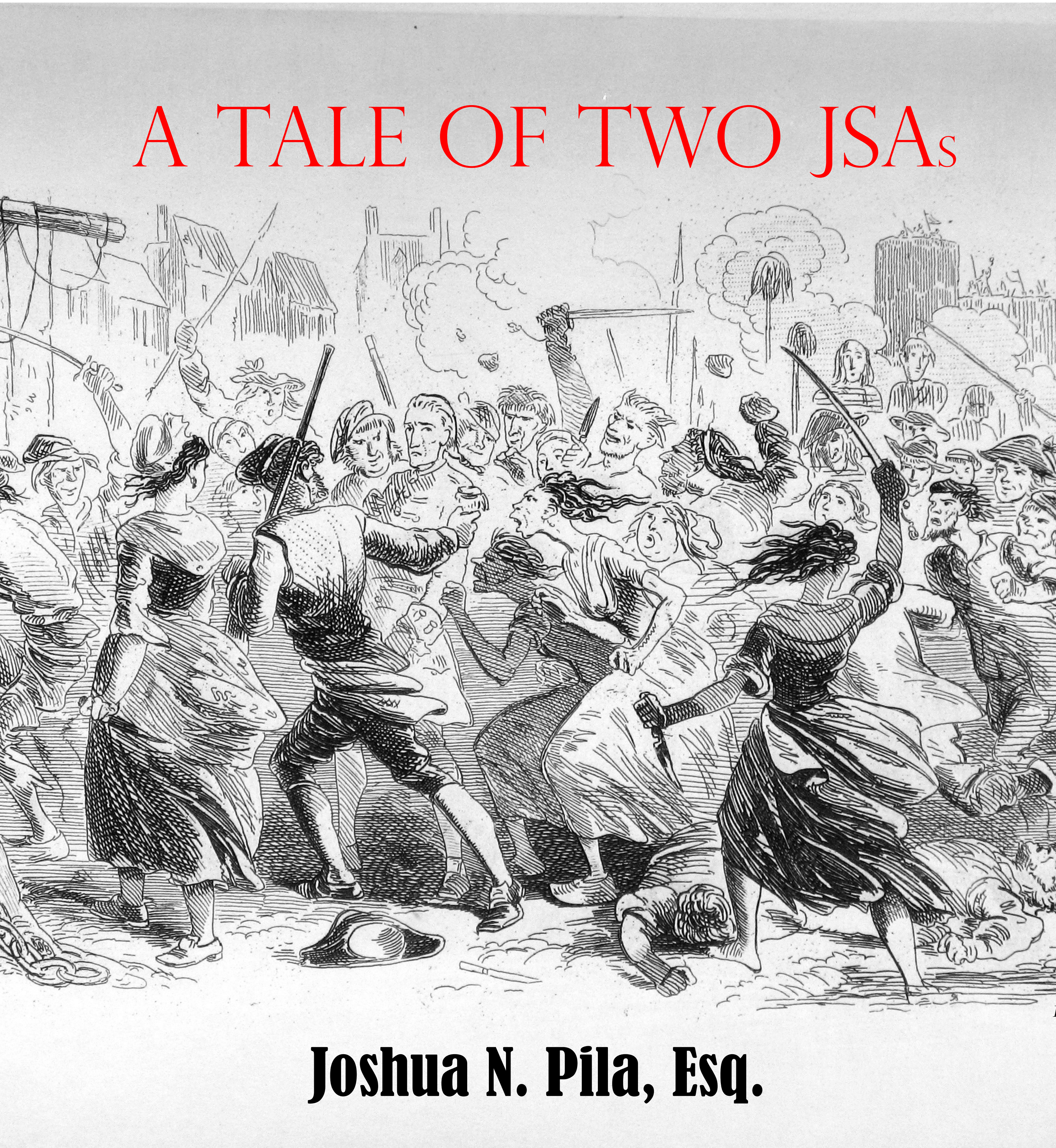
The question is which of the various policies that Congress has directed will win out. Is broadcast TV localism more or less important than minimizing regulation of business using the Internet? Is the "free market" served by leaving all today's regulations in place but deciding not to add a new one? Only the FCC can answer these questions, and, so far, it has declined to do so.

~ IFCC ~

Notes

1. FCC Chairman Tom Wheeler blog, *Tech Transitions, Video, and the Future*. October 28, 20014.
2. In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services. Notice of Proposed Rulemaking, MB Docket No. 14-261. December 19, 2014.
3. For cable operators and satellite providers, this "consent" also can take the form of an election by the broadcaster that its station should be carried under the mandatory carriage provisions of the Communications Act. Absent additional legislation from Congress, OVDs cannot be subjected to the existing laws governing mandatory carriage.

A TALE OF TWO JSAs



Joshua N. Pila, Esq.

It was the best of times,

it was the worst of times. . . .

~ Charles Dickens

As much as London and Paris reflected the best and worst times of which Dickens wrote, so too do the divergent paths of broadcast television Joint Sales Agreements ("JSAs") and multichannel video programming distributor (MVPD) Joint Sales Agreements (also called "interconnects" by MVPDs).

Background

Of course, broadcasters and cable operators have long faced different regulatory stories. It might therefore be appropriate to start with the silo-based regulatory regime that covers both broadcasting and MVPDs.

The Federal Communications Commission's ("FCC" or "Commission") authority over broadcasters arises from Title III of the Communications Act and stretches wide. It includes broad "public interest" authority over ownership, indecency, political advertising, public files, children's programming, accessibility, and licensing, just to name a few. Noticeably, as a result of the spectrum scarcity argument of Red Lion, [1] the Commission's authority over broadcast content is much larger.

On the other hand, the Commission's authority over MVPDs arises from Title VI (and now given the net neutrality regulations, perhaps from Title II). While no statutory ownership authority exists, the FCC's authority over MVPDs is still broad - including retransmission consent good faith, public files, accessibility, and (for now) net neutrality.

Historic differences aside, it would seem that with current marketplace competition between MVPDs and broadcasters the Commission would exercise its powers over broadcasters in close parity with their MVPD counterparts. As the JSA tale below shows, however, such a person would be wrong (at least under the current administration).

The Worst of Times – Broadcast TV JSAs

For broadcast television JSAs, it has been the "worst of times". In 2014, the Commission ruled that JSAs between same-market television broadcast stations involving the sale of more than 15 percent of a station's advertising time would be "attributable" (that is, would count toward the FCC's ownership caps) (the "TV JSA Attribution Rule"). [2]

The Commission declined to "grandfather" then-existing broadcast television JSAs, and instead the Commission gave entities with pre-existing broadcast television JSAs two years to come into compliance with the new rule. Congress, however, later extended the temporary grandfathering period to 2025. [3]

In May of this year, as part of the long-running media ownership appeal pending in the Third Circuit in Prometheus Radio Project v. Federal Communications Commission, a Third Circuit panel (among other things) vacated and remanded the TV JSA Attribution Rule. [4] The Court noted "On remand, if the Commission is able to justify (by finding they are in the public interest) the existing ownership rules to which television JSA attribution applies—or, in the alternative, if it replaces the current rules with new ones it determines to be in the public interest—nothing in our opinion would prevent it from readopting the JSA rule at that time."

Shortly thereafter, Chairman Wheeler accepted the Court's invitation and released a "Fact Sheet" describing the proposed rules he was circulating among the commissioners [5] for a vote in response to the Third Circuit's overall media ownership decision (including the TV JSA Attribution Rule).

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The "Fact Sheet" stated that the Chairman planned to ask Commissioners to vote once again to attribute broadcast television JSAs, subject to a grandfather provision mirroring the congressional 2025 time frame. On August 25, 2016, the Commission released a Second Report and Order implementing this proposal.

The Best of Times – MVPD JSAs

In contrast to the long and circular regulatory path for broadcast television JSAs, the Federal Communications Commission's efforts with regard to MVPD JSAs can be summed up easily – nothing. While the U.S. Department of Justice is investigating whether the Comcast Spotlight JSA is anti-competitive, [6] the FCC has been silent about MVPD JSAs.

Why the Disparate Treatment?

Against this backdrop, the commissioners must carefully consider why television broadcasters should be treated any differently than MVPDs regarding JSAs.

Some may argue that the existence of media ownership limits by statute justifies differential treatment between MVPDs and television broadcasters, but that statute expressly gives the Commission flexibility to recognize competitive marketplace conditions in applying such rules. Broadcasters argue that the statute affirmatively requires the Commission to justify each rule given new market realities, but even if one were to take a narrower view of the statute, the FCC still must take competitive marketplace conditions into account when adding a new rule (which is what the TV JSA Attribution Rule does).

Others may argue that broadcasters command a larger share of local advertising dollars than MVPDs, and therefore need to be regulated more heavily. Such arguments miss that the video advertising marketplace is shifting and that with the purchase of high-profile national and local sports and entertainment programming in direct competition with broadcasters, MVPDs are going straight for the jugular of their broadcast competitors for local advertising sales. There's simply no reason why local television broadcasters should have to compete with local MVPD JSA sales forces with one hand tied behind their back.

Still others may point to broadcast television's general "public interest" obligations as a reason for a regulatory difference. Recognizing the importance and longevity of the Commission's authority, one wonders why the "public interest" wouldn't be best served as Chairman Wheeler has often said "Competition, Competition, and Competition". Why hamstring broadcast television stations fiercely fighting to keep eyeballs in a multi-screen world by limiting them from revenue opportunities available to their MVPD competitors?

In short, whatever the argument that broadcast television is somehow "special" and needs more regulation than MVPDs, the Commission must recognize the TV JSA Attribution Rule for what it is – regulatory arbitrage. One category of competitors – MVPDs – would not be bound by the rule, while their direct local competitors – television broadcasters – would be required to comply. If nothing else, fundamental fairness counsels against such a public policy.

~IFCC~

Notes

1. Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969)

2. 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order, 29 F.C.C.R. 4371 at ¶ 390 (Mar. 31, 2014).

3. Pub. L. No. 114-113, § 628, 129 Stat. 2242, 2469 (2015).

4. Prometheus Radio Project v. FCC, Nos. 15-3863, 15-3864, 15-3865 & 15-3866 (May 25, 2016).

5. http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0627/DOC-340033A1.pdf

6. http://fortune.com/2015/11/25/comcast-doj-antitrust-probe/

Is Diversity on TV . . .

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. . . A Mere Diversion?

Sanford Moore

Much has been said and written about the issue of diversity in areas and industries under FCC jurisdiction, such as minority broadcast ownership. Yet, there has been a steady decline in African American ownership of television and radio stations over the years, and there is little possibility of a meaningful level of participation being achieved in the foreseeable future.

The primary obstacle has been access to capital, or more succinctly, the lack of money and the lack of access to investors. However, this focus on ownership has served to hide the real monetary power possessed by African-Americans.

For decades Nielsen has compiled and reported data clearly demonstrating the major role played by African American audiences to the competitive position and financial success of mainstream media enterprises.

Madison Avenue — meaning the major advertising agencies, holding companies and media buying agencies — with the complicity of network television companies, has sought to purposefully minimize and marginalize the importance of African American audiences, and to give a "niggardly" valuation to the economic input of African American consumers. African Americans overconsume everything from CBS to Coke to Cadillac.

Broadcast media's financial success depends upon ratings, which translate into advertising revenue, while cable and other digital platforms combine ad revenue with subscription fees. In both instances, African Americans provide a disproportionate contribution to ratings, ad revenue and subscription fees.

One need only look at Nielsen rating data and U.S. Census population data by zip code for the top 50 DMAs to understand what is clearly apparent. Without African American viewing, African American cable subscriptions, these mainstream media enterprises would be dramatically less financially viable and, in many instances, would not have possessed the balance sheets to fuel and finance their growth, acquisitions and mergers. This corporate growth was made possible under the relaxed consolidation rulings adopted by the FCC since the enactment of the 1996 Telecommunications Act.

Looking at the present state of live TV and the issue of programming diversity, the New York Times recently reported on the ratings phenomenon achieved by the super successful FOX series, *Empire*. In an article titled, "Empire, the Meteor That Never Fell to Earth," author John Koblin recaps an exchange of correspondence between Brian Glazer, Executive Producer of *Empire* and Dana Walden of FOX, where the emojis went from "party hats" to "bags of money."

The unexpected and overwhelming week-to-week success of *Empire* has had the industry and the networks both baffled and bustling. That, in a nutshell, is what African American audiences have represented to the major broadcasters for decades.

Sanford Moore is a retired advertising and media executive, whose strategic advocacy, advice and activism has focused national media attention to the issue of meaningful inclusion of minorities on Madison Avenue, in Hollywood, and on Wall Street.

Yet, these media companies have tried to keep it secret. At no time during *Empire's* record breaking first season, where audiences rose every week, did the African American share of audience fall below 60%. The season Finale drew 21 million viewers with non-African American viewers, falling 39% from the previous week.

During the premiere season, ad rates went from $138,000 per sixty-second spot for the premiere episode to over $600,000 for the two-hour Finale, second only to the perennial leader, *Sunday Night Football.*

Thus, African American audiences represented a staggering 80% of the Finale's viewers and that's what filled the "Bags of Money" at FOX. African American audiences earned FOX the number one spot in multi-platform viewers and the show was the leader in "Tweets" among all TV shows.

For all of its success, the performance of *Empire* is not a new phenomenon. The Thursday night block of Shonda Rhimes' produced / written shows has made ABC the night's highest rated. The Shondaland lineup has included *Grey's Anatomy, Private Practice, Scandal* and *How to Get Away with Murder.*

African American starred shows have instilled new life into VH-1, Bravo and other cable networks. The 1977 broadcast of *Roots,* which drew an amazing 85% of TV households, had the highest rating of any previous entertainment program in history and put ABC, a then also-ran, on the map.

FOX Television, which debuted in 1985, made its bones on the back of African American audiences drawn to the *Arsenio Hall Show* and the iconic *In Living Color,* which spawned the careers of several mega-stars, including Jim Carrey, Jamie Fox and Jennifer Lopez. *The Cosby Show* was the number one Nielsen rated show for five consecutive years and made NBC the dominant network of that time.

As reported by Nielsen, African Americans consume 42% more Live-TV than the general population. They also heavily over-index on video viewing on emerging platforms; PCs, Smartphones and Tablets. African American usage of Twitter has become so dominant in the domestic market for news, digital language, culture and lifestyle that it has created its own phenomenon, *Black Twitter.*

Despite the fact that Nielsen numbers are widely known, this alone cannot convince or compel the CEOs of mainstream media companies and the new mega-digital companies to give credit where credit is due.

But of this you can be sure…if African Americans ever tire of being "second-class" media consumers, of being relegated to digital sharecropping on Twitter and Facebook, and of being shut out from the board rooms and executive suites in Hollywood, New York and Silicon Valley, they can leverage their combined media consumption and buying power to determine the fates of programs and entire networks.

Maybe that is what it takes for networks, advertisers and producers to finally take African American consumers more seriously.

~IFCC~

Editor's Note:

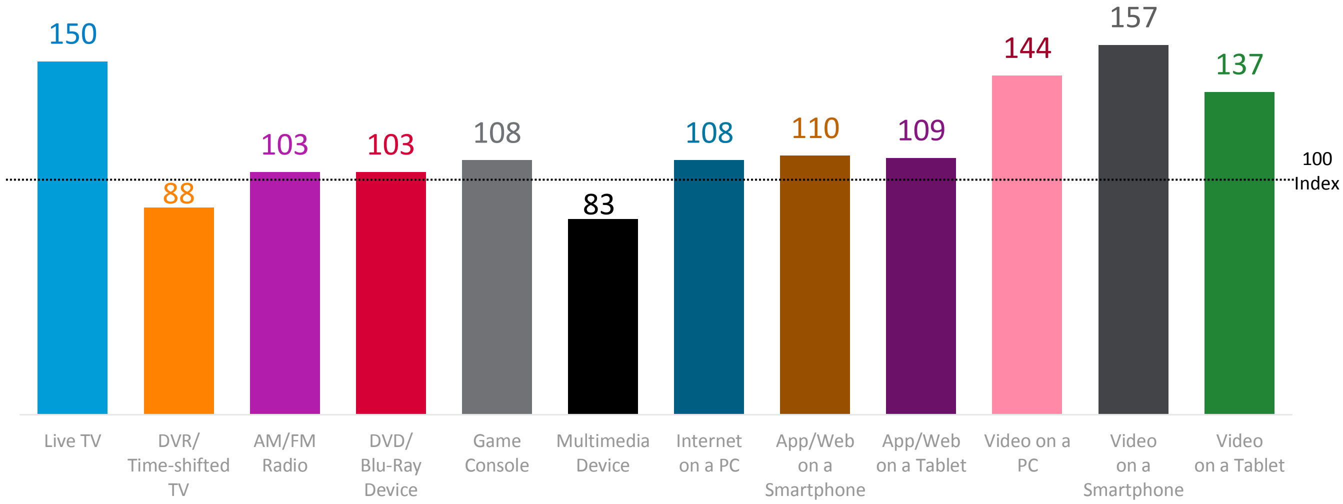
The author cites Nielsen data from several different sources. Relevant references and reports can be viewed as below:

http://www.nielsen.com/us/en/insights/news/2015/multifaceted-connections-african-american-media-usage-outpaces-across-platforms.html

http://www.nielsen.com/us/en/insights/reports/2015/increasingly-affluent-educated-and-diverse--african-american-consumers.html

http://www.nielsen.com/us/en/insights/news/2014/connecting-through-culture-african-americans-favor-diverse-advertising.html

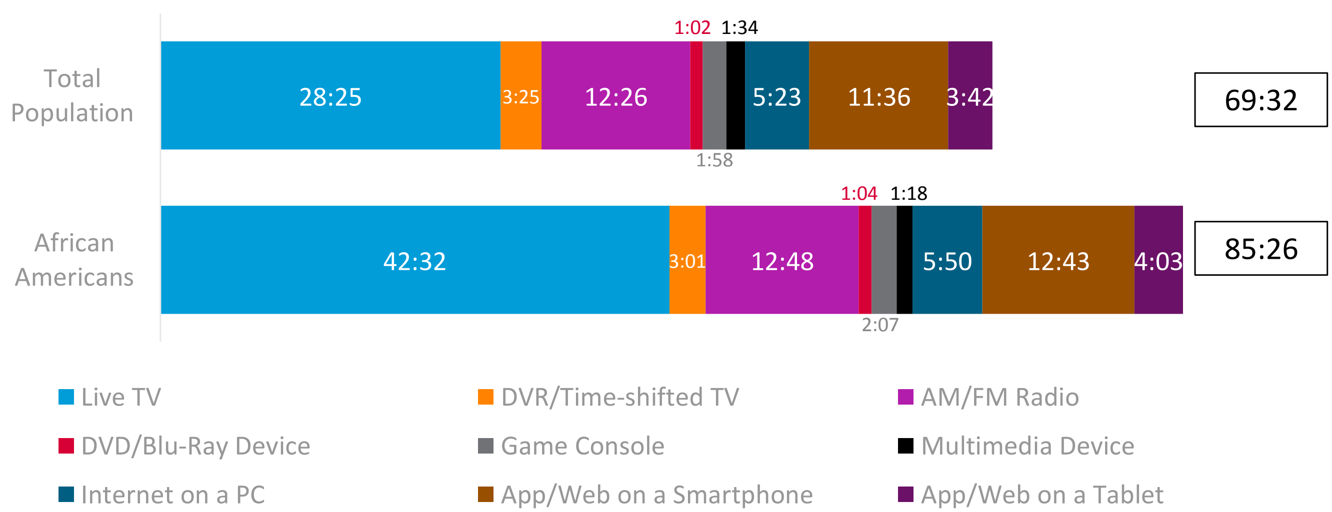
AFRICAN AMERICAN TIME SPENT WITH MEDIA INDEXED TO TOTAL POPULATION



Source: Q1 2016 Total Audience Report, index of total weekly usage across total population: P12+ for radio, P18+ for Smartphone, P2+ for all other

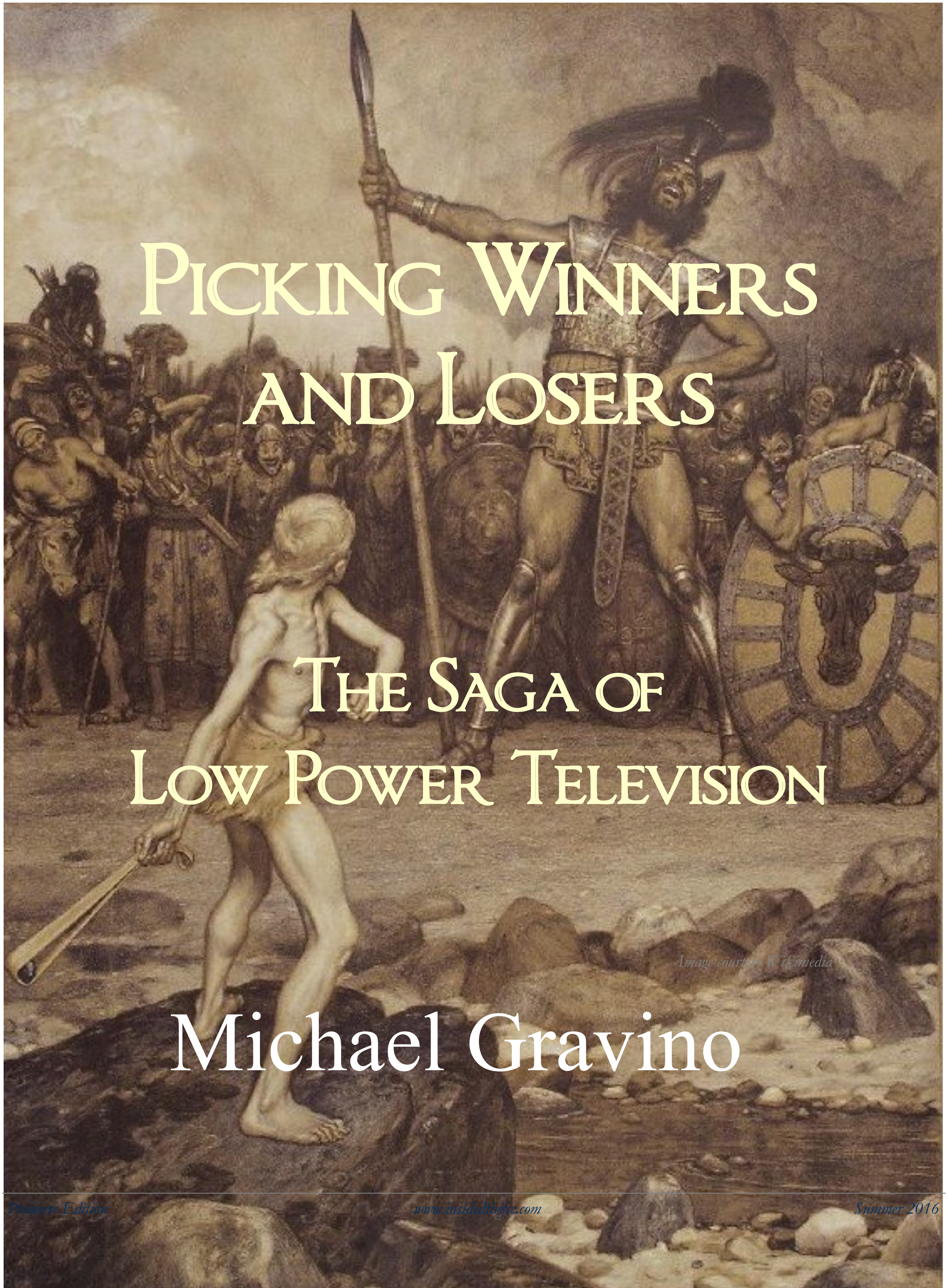
10

WEEKLY TIME SPENT USING MEDIA



Source: Q1 2016 Total Audience Report, weekly usage across total population (hours:minutes): P12+ for radio, P18+ for Smartphone, P2+ for all other

9



Picking Winners and Losers

The Saga of Low Power Television

Image courtesy Wikimedia

Michael Gravino

The 2012 Incentive Auction legislation initiated by the White House will now cost more than a collective $1 billion in relocation costs to the 9400 small business and multicultural FCC license and permit holders for Low Power Television Stations and TV translators.

Heck, the legislation goes even further to state that LPTV and translators are not broadcasters, and should not be protected at all in the repack. So why did the White House, the FCC, and the Congressional committees all agree to this?

__Michael Gravino__ is a LPTV investor and Director of the LPTV Spectrum Rights Coalition in Washington, DC. His detailed research and forceful advocacy on behalf of low power television broadcasters has been well noted by the industry and the FCC.

It started back in 2010 when the FCC commissioned a "Spectrum Analysis" as part of the then developing National Broadband Plan. In it, the FCC staff and consultants included low power television (LPTV) and translators as part of any low band spectrum pool to draw from for an auction.

This was based on literally thousands of 2009 rural filing window applications made by LPTV investors, who wanted to use LPTV spectrum to provide rural broadband. They wanted to utilize the 1999 Digital Data Services Act in which Congress authorized a pilot project for LPTV to use their spectrum for broadband.

But then, senior Congressional Committee staff began the meme that LPTV is secondary to all other services. And because of their "secondary status" they did not deserve any compensation, and that their spectrum assignments could not be used in the auction because they were secondary.

Committee staff did this so that only the major TV broadcasters would get a potential payday in the auction. They did this not based on any facts. They incorrectly assumed that they could just displace LPTV without compensation because these small businesses, non-profit faith broadcasters, and local government agencies with stations, would simply not put up a fight, and had no political clout. They did this without any relevant facts and with no acknowledgment of the actual FCC rules which are in place for LPTV and translators. They did this without any budget analysis, and they expressly forbid the CBO to study LPTV as part of the auction.

And we now see the results of their twisted logic, an incentive auction which is way overpriced to start, and which may only clear 84-60 MHz, and which will slow down deployment for wireless use until after 2020, far beyond when the industry said it would need to start using it. Imagine for a moment if LPTV were included in the auction, and you can see that the $900 million NYC station which was used as the starting point for bids would have been so much lower. With forty four (44) of the 6-MHz LPTV and translator licenses and permits in the NYC TV DMA, and over 100 in the LA TV DMA, it is obvious that enough spectrum was available to make an auction work far better than the way it is now.

Instead, industry, Congress, and the FCC all chose to support displacing LPTV and translators, literally taking their spectrum, offering no compensation, and providing no relocation funding. And they did this all with glee, with joy, with satisfaction that they knew what was best, and that they did not need a study of the issue. How wrong they were.

The biggest impact now is that the government is projected to make nothing at all except taxes from the auction. This is a far cry from the $10 billion to $40 billion "profit" the government was suppose to make with the incentive auction. Had only Congress asked the CBO to score LPTV in the auction, and they would have learned, as we did a few years later, that literally billions more in profits for the government could have been generated faster, and with fewer potential disruptions for viewers, and the emergency alert system.

The incentive auction is actually the LPTV auction

- Did you know that in the 84-MHz clearing, with 51-38 as the new mobile band, that 90% of that spectrum is now licensed or permitted by the LPTV and translator industry?
- And in the current 126-MHz stage, more than 4680 LPTV and translator licensees and permittees will need to move and pay for it themselves?
- Do you still think that there is no cost to the government by not paying LPTV to move?

How wrong you all have been. With just a few billion dollars, the government could have cleared any and all LPTV and translators that wanted to sell out, and then the opening bid prices could have started literally tens of billions lower. This is now a fact, and not just some pronouncement by LPTV.

Congress and the FCC blew it, and we now know who and why it happened. So who is the "they" which has created this $1.5 billion plus adverse impact on the most diverse of all broadcast categories, and the key entry point for FCC broadcast license ownership?

The Rosenworcel Doctrine

Who then, is now causing tens of billions of lost revenues to the government? The meme started with a senior staff legal counsel for the Democratic Senate committee, who is now an FCC Commissioner. It quickly spread to Republican House committee staff, which had just walked through the revolving door from the wireless industry to the Committee.

They all just simply assumed that LPTV and translators had no rights, and could be moved around at will, and did not need to be compensated at all. Our industry now calls this the *"Rosenworcel Doctrine"*, and we have been battling it for more than four years.

I am not a communications attorney, nor have I been a lobbyist before. I entered this battle since I was dramatically affected by the auction as an investor in LPTV stations, and a producer of networks for LPTV. But I quickly learned from those that preceded me in representing the industry, that we were not respected by many in Congress, certainly not in the Administration, and definitely not in the FCC.

Being behind from the start, and with the FCC auction rulemaking already started, I forensically researched how the new doctrine was formed. It seems that the key power players behind the doctrine all conveniently did not even read the existing LPTV and translator rules. Had they done that simple task, or had the FCC corrected them when they made false and misleading statements about the rights of LPTV and translators, they would have seen what I saw.

There exists in the LPTV rules

the "right of displacement".

What this means is that when displaced, as they will be in the incentive auction, that LPTV and translators have the right to find another channel from which to broadcast.

This right is sacrosanct, and was further enshrined by the incentive auction legislation itself, when Congress specifically directed the FCC to not alter the rights of LPTV and translators in the auction rulemaking.

What this means in practical terms is that the 9600+ LPTV and translator licenses and new construction permits each and all have the right after the auction to come back into the new TV band and repopulate it. That is over 56,000 MHz of spectrum which the government could have auctioned at far less cost and far greater profit than it is now.

The Numbers Don't Lie

The fact is that there are about 1800 primary full power licenses which have a collective 4 billion coverage pops, or 24 billion MHz pops. The 400 or so Class A licenses have about 500 million coverage pops, or 3 billion MHz pops. And the 9600+ LPTV and translator licenses and permits have 1.6 billion coverage pops, or 9.6 billion MHz pops.

We now know that the high water mark of the incentive auction clearing will be UHF 50-30, with 2 -29 the new TV band, with exceptions for Land Mobile Radio in a few major markets. And most industry analysts now believe that the auction will close at either the 84-MHz to 60-MHz clearing, meaning 2-36 would be the new TV band. And each and every one of the LPTV and translator licenses and permits will have the chance to go find another channel.

The current 126-MHz auction is priced by the selling broadcasters at $15.66 per TV coverage pop, or about $2.61 per MHz pop. Had LPTV and translators been allowed into the auction, that opening bid price would have been way lower, and as such, it would be making a huge profit for the government.

Making the Wrong Moves

As it stands now, the government stands to make zero after costs are recovered, other than taxes on the transactions. Because Congress did not require the CBO to score the auction with LPTV included, those proponents of the *Rosenworcel doctrine* are now costing the government literally billions of dollars of revenues. That is a lot of pre-K learning, veterans benefits, immunizations against Zika, and a host of other critical items which Congress says it does not have money for.

But at least the big wireless companies will have the spectrum to buy, and the eligible, willing broadcasters get a huge windfall if they sell. Well, too bad federal government and citizens, you get nothing except the right to now pay higher prices for your wireless broadband.

The average price in 2015 for the sale of LPTV and translator spectrum was about $0.42 per TV coverage pop. And about $1.00 for Class A spectrum, which itself saw higher prices in 2013 and 2014 as when Class A auction speculation occurred. That too has proven a potentially bad move for many, as the FCC's "frozen policy" most likely has eliminated the majority of Class A's eligible for the auction. This is due to the freezing of the biggest stations, those which need that $900 million valuation to be given in NYC.

If we take the 1.6 billion LPTV and translator TV coverage pops, and multiply it times the current $15.66 per TV coverage pop opening bid prices, we see that the "market value" for LPTV spectrum is over $25 billion! Our spectrum is exactly the same as the full power or Class A: 6-Mhz. The rules of physics do not adhere to the *Rosenworcel Doctrine.*

Moving Around

There are over 2250 locations from which the 9600 LPTV and translators will broadcast. Most will find a new channel on the same tower, while many others will have to move around their coverage areas to try to replicate their coverage. Only a few will have to totally move out of their markets or channel share, if available. However, as our Right of Displacement details, we have the right to find a new channel, but not the right to demand we duplicate coverage or pop counts. And for this privilege, we have to pay for our own displacement moves.

Why does the *Rosenworcel Doctrine* prey upon the smallest of broadcasters, and force the most diverse and multicultural of the broadcast services to pay out of pocket unlike any other group affected by the auction? And why does it discriminate against the 200+ government, education and civic agencies which control and use more than 2400 licenses and permits? The answer is clear that both parties in Congress were bought and paid for by the wireless lobby to do so. Yet many on both sides of the aisle have talked with us, all except, that is, Commissioner Rosenworcel herself. Her now multi-billion dollar opening bid mistake in how to rig the auction for the primary broadcasters is becoming evident.

This is not a blue vs red, Democrat vs. Republican thing, as many in our industry have claimed. I have had to educate them that this is a big business vs. small business battle. A battle over plain facts, a rigged system, and prejudice against religious broadcasters, ethnic and foreign language broadcasters, and an attempt to wipe out competition.

Why did Congress force the little broadcaster off their spectrum and then force them to pay for their own displacement moves, all the while providing compensation for the big broadcasters, the wireless bidders, the cable companies, and others, including Google and the unlicensed advocates?

As they say, time will tell if these decisions were correct. For the past 4+ years these actions have cost our industry billions in lost opportunities and business development due to the uncertainty of the marketplace. And it will cost a lot more going forward with the repack. Nevermind that LPTV will then have to pay for the new and expensive ATSC 3.0 production and transmission chains.

While 3.0 will eventually help the broadcast industry compete with other IP delivery platforms, the secret is that they will need much more spectrum than the current 6 MHz their stations have. LPTV spectrum is the only place they can go for that spectrum, but they will need to act quickly, as we are not waiting around for them to act.

LPTV Public Service Obligation

LPTV and translators have only one single public service obligation, to provide EAS, emergency alert services, in their coverage area and community of license. That's it, just one obligation. For that, we get a light regulatory touch on what we air, when we air it, and we have options for providing other ancillary services. We are a vital and integral part of the national preparedness system, and Congress has an obligation to not impede our ability to serve the public. Congress needs to rectify the lack of displacement relocation funding for LPTV and translators. But it is stuck, since the auction revenues, if any, cannot be used to assist us. While many businesses in our industry would want a new Class A window, and others would want more power, and others would want MVPD must-carry status and mandatory retrans negotiations, none of these will help the objectives of the National Broadband Plan.

A Simple Fix

There is a simple and powerful mechanism Congress and the FCC could engage, without much cost, would score positively, and which could provide LPTV and translators the financial incentive to exit and create a massive new pool of low band spectrum for use by both the wireless and broadcast industries.

Congress can easily add language to the 1999 Digital Data Services Act, and the existing spectrum leasing authority so that all LPTV and translators could use any flexible use transmission system. This would make the value of those 9600 licenses and permits closer to that $15.66 per TV coverage pop opening bid price, and it would mean a free market of those could take place. A windfall profits tax could be placed on the sale of licenses and permits for a 5 year period, and an increase in the current ancillary fees to 10%. Congress would get a huge windfall in the beginning, and a steady increasing return from the use and resale of these licenses and permits.

Win-Win for Wireless and Broadcast

Both the wireless industry and the big broadcasters could compete for spectrum and get it to its highest best use with the most revenues to the government, and do so in the fastest time of any plan.

What, you want to wait for a total rewrite of the Communications Act? Wait until the auction is over? Ok, then wait until the middle of 2017 to even have this discussion. We ain't going anywhere, and we have the Right of Displacement, so our value will just keep going up and up. And we now have all of the facts we need to fight off any other attempt to harm our industry. When the incentive auction does not clear enough spectrum don't worry. We got plenty, for a price. ~IFCC

AWARN

Advanced Warning and Response Network

Will Make Emergency Communications a Cornerstone of Broadcasting — Again

John M. Lawson

Ever since young David Sarnoff worked 72 hours straight in 1912 at a Marconi wireless station relaying names of the survivors of the *Titanic* from the rescue ship *Carpathia,* emergency communications have been a cornerstone service of American broadcasting. The role reached national strategic significance when the Soviet Union exploded its first atomic bomb in 1949. Civil Defense authorities and broadcasters worked together to create the AM radio-based CONELRAD (Control of Electromagnetic Radiation) to alert the public to impending nuclear attack and allow the president to address the whole nation on short notice.

What became the Emergency Broadcast System (EBS) in 1963 was at one time central to the identify of broadcasters in the hearts and minds of the American public. The Cuban Missile Crisis of 1962 brought home just how close we were to nuclear destruction. EBS was even its own character in perhaps the best political thriller of the 1960's, Seven Days in May. A cabal of treasonous generals planned a coup d'état by kidnapping the president and taking over television and radio by hijacking the EBS. Of course, democracy prevails.

As the Cold War ended and the nuclear threat receded, the broadcasters' role in emergency alerting began to fade from consciousness among the public and even within the broadcasting industry. What became the Emergency Alert System (EAS) in 1997 has been used countless times for state and local alerts on a voluntary basis by individual TV and radio stations. But alerting in general began to be taken for granted during a period of post-Soviet complacency.

Search for a 21st Century Alerting Capability

Things changed after the 9/11 attacks in 2001 and, especially, the Katrina flooding disaster in 2005. Serious attention on improving disaster communications became focused at the federal level, and President Bush signed an executive order in 2006 to create the Integrated Public Alert and Warning System (IPAWS). Congressional action that same year led a reluctant cellular industry to deploy a system for what are now called Wireless Emergency Alerts (WEAs), which are 90-character text messages. This system was fully deployed by 2012.

In the past year, the pace has quickened. Congress passed legislation to modernize IPAWS, and the Federal Communications Commission began a rulemaking to that could require the still-reluctant carriers to expand WEA messages. In March, it released a more sweeping Notice of Proposed Rulemaking to significantly upgrade both EAS and WEAs. On the West Coast, a sensor network for earthquake early warnings is being deployed, and Congress has directed the FCC to produce a plan by September to ensure delivery of these alerts to the public in under three seconds.

__John M. Lawson__ serves as Executive Director of the AWARN Alliance and is a principal at Convergence Services, Inc., a strategic consulting firm focused on new business and service models with Next Generation Television.

A Service Only Broadcasters Can Deliver

Television broadcasting can deliver an alerting capability that no other medium or network can provide.

Uniquely, AWARN will be able to distribute rich media alerts simultaneously to an unlimited number of enabled fixed, mobile, and hand-held devices, indoors or outdoors across an entire television broadcast coverage area.

AWARN also can transmit rich-media emergency information that is created and/or aggregated by alert originators, then transmitted over the broadcast signal and downloaded in the background to user devices.

These capabilities will far exceed warning and disaster recovery communications available to the American public today.

Saving Lives, Renewing Support for Broadcasting

With the continued focused on better alerting solutions, broadcasters have a new opportunity to build on their role as "first informers" and again become the cornerstone of an all-hazards alerting system for a 21st Century America. Re-establishing their historic role in alerting will not only save many lives, it will renew broadcasting's vital "service to America" role and strengthen its policy support. Advanced alerting also will help ensure that broadcast signals can be received on the widest possible range of consumer devices, including PC's, tablets, and smart phones.

The opportunity comes from technical innovation and good business sense. The Advanced Warning and Response Network (AWARN), based on the Next Generation Television standard, also known as ATSC 3.0, will provide a powerful new tool for significantly improving the content, accessibility, pervasiveness, and reliability of America's emergency alerting systems. AWARN is a next-generation, dual-use, disaster communications system for a mobile, 21st Century America. AWARN will utilize the nation's existing terrestrial television broadcasting spectrum and infrastructure and leverage advanced capabilities that are designed into the IP-based Next Gen TV standard.

AWARN rich-media content could include video, radar images, storm tracks and evacuation maps, text, photographs, pictorial instructions, wildfire danger zones and flood inundation maps, and plume models for chemical or radiological releases.

After the disaster, when wireless networks and the electric grid are down, television stations operating on reserve power, can continue to utilize AWARN for providing vital information, such as shelter locations, treatment protocols, and other recovery information, to battery-operated consumer devices. AWARN is also ideal for transmitting multilingual alerts and content that is accessible to people with disabilities.

Responsibility for aggregating rich-media content will remain with alerting authorities. However, stations that produce their own news and weather programming would have the option of inserting their own clips as additional rich-media elements into the alert. People in harm's way would have this and other rich-media alert and response information sent via AWARN literally at their fingertips. They would only need to open a menu on their device and select the files most relevant to them.

Alliance Forms to Deploy AWARN

To support the rapid deployment of advanced alerting, the broadcasting, consumer electronics, and allied industries have come together to form the AWARN Alliance. Alliance members Capitol Broadcasting Company, Pearl TV, and Sinclair Broadcast Group reach over 85 percent of U.S. television households. Pearl TV members own and operate more than 200 network-affiliated TV stations.

Sinclair owns or operates 171 TV stations and, through its affiliate, ONE Media, also has been a major contributor to the development of Next Generation Television. The National Association of Broadcasters (NAB) represents the television broadcast networks and local stations nationwide. Another member, the Public Broadcasting Service, serves 350 member stations.

Alliance members LG Electronics and Zenith, its U.S. R&D subsidiary, are long-time supporters of mobile alerting and key developers of technologies in the "physical layer" transmission system at the heart of the ATSC 3.0 standard.

Other members include GatesAir, a leading television transmitter manufacturer, Monroe Electronics and its Digital Alert Systems subsidiary, whose EAS encoder/decoder equipment is in the majority of U.S. broadcast television stations, and Triveni Digital, whose systems enable television broadcasters to deploy enhanced programs and services to their viewers. Another member is Airwavz TV, which recently unveiled a new mobile phone accessory that will make it easier to view digital television on-the-go. The AWARN Alliance has begun recruiting new members among broadcast groups and allied technology companies.

The Alliance also is expanding its outreach to Congress, the FCC and other federal agencies, and to key public safety groups. SBG and ONE Media are creating a "living room" demonstration of Next Generation Television at WJLA, Sinclair's ABC affiliate based in Roslyn, Virginia. AWARN Alerts will be featured prominently in the Next Gen demonstration.

AMBER, Tornado, and Chemical Spill Alerts

At the NAB Show 2016, Alliance members LG and Sinclair conducted the first over-the-air broadcast of advanced emergency alerting using the ATSC 3.0 standard. Rich-media emergency alerts – including video and public safety information from Capitol Broadcasting's WRAL related to a severe weather emergency – were transmitted by Sinclair from Las Vegas' Black Mountain on Channel 45, under an experimental FCC license obtained by ONE Media. Next-generation broadcast equipment was provided by GatesAir and Triveni Digital, with support from Monroe Electronics.

For its next AWARN "use case," the Alliance is working with the National Center for Missing and Exploited Children (NCMEC) to a create a rich-media AMBER Alert. Rather than the 90-character text message in a WEA, the AWARN AMBER Alert will include (composite) photos of the missing child and suspected abductor, plus images of the make, model, and color of the suspect's automobile, the license plate, highway maps, and contact information. The station's news clips will also be in the background content, all of which users can access at their option through a menu that is accessible from the on-screen banner message.

A creative team at WJLA and engineers at LG and Zenith in the U.S. and South Korea are working with Alliance staff and NCMEC to create the AMBER Alert simulations. Next, the Alliance will create simulated tornado and chemical spill alerts, with active shooter and other use cases to follow. In each simulation, we are actively working with public safety agencies and organizations to make the simulations as realistic and effective as possible.

AWARN Linked with the Future of Television

As an indicator of the key role that AWARN plays in the plans of broadcasters, the AWARN Alliance was one of four signatories to the April 13 Joint Petition for Rulemaking of America's Public Television Stations, The AWARN Alliance, The Consumer Technology Association, and The National Association of Broadcasters Seeking to Authorize Permissive Use of the "Next Generation TV" Broadcast Television Standard. In a positive sign of the regulatory prospects for ATSC 3.0 and AWARN, the Commission released, less than two weeks after the Joint Petition was filed, a Public Notice soliciting comments for a possible Notice of Proposed Rulemaking on ATSC 3.0 voluntary adoption.

The FCC Spectrum Incentive Auction will soon conclude and the $1.75 billion repacking of the TV band will get underway. Leading broadcasters who plan to remain in the broadcasting business are actively planning to "harmonize" their repacking activity with ATSC 3.0 deployment. They also are increasingly committed to adopting AWARN as part of their Next Generation Television service offerings.

With AWARN, they not only will save lives, but also cement their central role in public safety for new generations of Americans.

~IFCC~

Auctions Can Speak Louder Than Words

Media Diversity in the 21st Century

Frank Washington

Almost 40 years

ago, in recognition of a broadcasting environment largely devoid of ownership and program diversity, a hugely successful regulatory device was conceived to increase ethnic minority owned broadcast and cable television properties. I refer to the so-called Minority Tax Certificate, which was germinated in an almost unique confluence of politics, economics and history.

I believe another such opportunity may yet again be timely. I refer to the Federal Communications Commission's (FCC) Incentive Auction of broadcast television spectrum and possibilities it represents for enhancing diversity despite some troubling side effects.

I have devoted much of my career to enhancing under represented groups access to media,[1] including conceiving and implementing the Minority Tax Certificate while a consultant in the Carter White House, as the Legal Assistant to FCC Chairman Charles Ferris, and as Deputy Chief of the FCC's Broadcast and Cable Bureau.[2]

__Frank Washington, Esq.__ is the Founder and CEO of Crossings TV, an Asian television network serving over half dozen communities throughout the United States. He is a communications icon for his groundbreaking authorship of the Tax Certificate Program, which ushered in a new era of minority broadcast ownership.

At that point, the percentage of minority owned stations or systems was less than one percent and there was much political pressure on the broadcast industry and the FCC to improve.

The vehicle I employed was Section 1076 of the Internal Revenue code ("Minority Tax Certificate"). It gave the FCC broad authority to award tax deferrals on the gain to the seller of a broadcast property, if it was deemed in the public interest.

As a result of the ensuing publicity, many new minority entrepreneurs, potential investors and programmers were attracted and inspired by this opportunity, creating a cultural rebirth akin to that of a literary nature represented by the earlier, Harlem Renaissance.[3]

The beauty of the Minority Tax Certificate was at least several-fold. First, both the existing broadcast or cable seller and the buyer were benefitted. The seller because he gained greater tax flexibility by allowing him to delay paying if he could reinvest by buying another station using the sale proceeds within a specified time period. Consequently and not surprisingly, the broadcast industry, as represented by the National Association of Broadcasters ("NAB"), played a key role in enabling and fostering the Tax Certificate.

The buyer benefitted because the seller had an incentive to sell to him where the gain and therefore the tax was high. The certificate thus, in effect, served as the minority buyer's equity in the transaction giving private equity firms and lenders an incentive to enable the buyer by providing the capital.

Finally, because no statutory change was required, it avoided being mired in the divisive politics of the Congressional process and it did not violate President Carter's pledge to not create any new tax loopholes.

Tax Certificate Program Was Big Success

Over the course of its existence, the Tax Certificate increased minority ownership several orders of magnitude right up to when Congress in 1996 repealed the section of the tax code on which it was based.[4] Ironically, it was as a result of a two billion dollar acquisition of Viacom's cable systems in which I was the principal acquirer.

With more than a hint of racism and amid unproven allegations that the certificate was being misused beyond its intended purpose, a newly elected Speaker Newt Gingrich (R-GA), and the Republican Congressional majority deemed its first concerted effort should be devoted to repealing section 1076 of the Tax code on which the Certificate was predicated.

For good measure, Congress made the action retroactive to void the acquisition of the Viacom cable systems.[5] Within a year or so following its demise the negative impact was becoming evident with minority ownership stalling at three percent.[6] While there have since been many notable achievements with the rise of multiple African-American and Hispanic American networks, there are still significant cultural, language and demographic groups feeling underserved or voiceless.[7]

Recently, the FCC announced that the first stage of its incentive auction had yielded $86,422,558,704 worth of broadcast television spectrum that could be sold and repurposed for other, likely, broadband uses.[8]

This is unprecedented, not just for the price tag, but also, because it represents a significant devolution of the broadcast television system created mid -twentieth century.

True, many fine broadcasters will not sell their spectrum and will continue to provide the high quality of local programming that has served our society and economy so well. It is at the edges, however, where the greatest toll is likely to be exacted; that is on the lesser independent, secondary digital and low power stations that will either be bought out or forced off the air. There is a high likelihood this will disproportionately affect the ethnically, socially or demographically least well served, particularly at a local level.[9]

The decision to repurpose limited spectrum for broadband usage that has a higher societal and economic value is unimpeachable from a greater good standpoint. This cannot excuse a failure to mitigate untoward side effects.

Our country is in the midst of great transformative change, as demonstrated by its current political and economic disorientation best exhibited in the current Presidential election. Much of this is fed by voices with no venue, societies in silos, and societal ailments seeking outlet. While broadband services provide a thoroughfare for carriage of many new information sources, they come in an environment of winner-take-all domination by a few, more mainstream services and often do so in a manner that drowns the local in the boundaryless sea that is the Internet.[10]

A New Proposal for a New Time

I propose the following: that the industry pledge a small portion of the proceeds from the auction to a fund that would be focused on investing in digital content and programming designed for underserved ethnic, demographic and social groups.[11] There is precedent for this, following the creation of the Minority Tax Certificate, the National Association of Broadcasters and some other media entities were involved in the formation of a fund to invest in minority broadcast properties.[12] Despite Congress' role in ending the Minority Tax Certificate, there might be some possibility of legislative action to create tax deferral treatment for anyone using a portion of their auction proceeds to invest in such a fund.

Due to the confidentiality provisions of the Incentive Auction, I cannot approach any other broadcaster now participating in it. For that reason, those and other details such as the structure and administrative details of any such fund remain to be worked out.

The broadcast television industry, particularly at the local level, has created unparalleled good. Using a small portion of what only can be described as windfall proceeds to, in effect, reseed the garden they created is totally consistent with the public minded spirit that has served broadcasters and the American public so well for so long.

~IFCC

Notes:

1. Author while at Yale Law School of student note: Towards Community Ownership of Cable Television, 83 Yale L.J. 8 (1974).

2. See "NAB Has Its Own Idea for Boosting Minority Ownership", Broadcasting, September 5, 1977.

3. See https://en.wikipedia.org/wiki/Harlem_Renaissance.

4. See Broadcasting & Cable, April 3, 1995, page 10.

5. See, for example, Death of A Deal, Sacramento Bee, E1, April 7, 1996.

6. See Broadcasting & Cable, October 5, 1998, page 28 and Broadcasting & Cable, September 23, 2014 http://www.broadcastingcable.com/news/washington/fcc-corrects-minority-ownership-figure/134256

7. For example see, **Diversity in U.S. Mass Media**
Catherine A. Luther, Carolyn Ringer Lepre, Naeemah Clark October 2011, ©2011, Wiley-Blackwell

8. For general background on the auction see FCC Adopts Rules for First Ever Incentive Auction, June 2, 2014, https://www.fcc.gov/document/fcc-adopts-rules-first-ever-incentive-auction. The Incentive auction endeavors to spirit away from television broadcasters some of their spectrum valuable for its ability to penetrate buildings and other obstacles and sell it to such companies as AT&T and Comcast to be used for wireless broadband purposes.

9. See Diversity Could Take a Hit Following Auction, TVNewsCheck, April 20, 2016, http://www.tvnewscheck.com/article/94119/diversity-could-take-a-hit-following-auction?ref=search

10. See "Tech's "Frightful 5" Will Dominate Digital Life for Foreseeable Future, New York Times January 20, 2016, http://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html?_r=0

11. While such a fund could be devoted to buying television properties, their scarcity and expense might make it more practical to pursue digital apps or other online vehicles. As an example, I am an investor in an app service called Blackbird Mobile. Using African-American Twitter feeds, it combines news, localness and a Black oriented search to create a most credible information source for a modest initial investment.

12. See Oxendine to Head New Broadcast Venture, The Afro-American, December 19, 1987, page 6, https://news.google.com/newspapers?nid=2211&dat=19871219&id=uCcmAAAAIBAJ&sjid=af4FAAAAIBAJ&pg=3181,1895686&hl=en

AfterWords

From the Editor

Size Matters in the Battle for Viewers

"Never bring a knife to a gunfight" says the old adage. This sums up the challenge facing today's broadcasters, who are engaged in an all-out battle for the hearts, minds and eyeballs of American viewers. When it comes to succeeding in the hypercompetitive consumer video market today, size matters, and bigger is better.

Consolidation and convergence have overtaken the media industry. Cable, internet and telephone companies not only have become larger, but also have become more diverse in their offerings to consumers. Companies such as AT&T, Comcast, Charter and Google now present a range of video, voice and data services to their customers at competitive price points.

Traditional, over-the-air, broadcasters remain relatively pure-play providers who deliver news, entertainment and local content to viewers—for free. They are the first place most of us turn for information in the midst of national emergencies, natural disasters and community crises, and yet broadcasters struggle with a heavy dose of federal regulation and some suggest a hostile FCC which is anathema to its existence.

A Changing Media Landscape

The media landscape is changing in large and dramatic ways. There is an epic technological transition that is driving consolidation, which some have called "merger mania". Clearly, significant changes in the legal, regulatory and business framework over the past 20 years have paved the way for the media and communications environment we live in today.

The Foundations

In 1992, Congress passed the Cable Act because the lack of competition among cable providers was forcing cable rates up and up. Remember when cable rates seemed to increase every year and consumers had little control. Well, that has changed with competition, although most Americans are still not happy with their cable companies. In fact, a growing number of consumers are choosing to "cut the cord", so to speak, and abandon the cable system in favor of over-the-top (OTT) and online video (OVD) services. OTT refers to content that arrives from a third party via the Internet, such as Sling TV, Amazon Instant Video, Crackle, HBO, Hulu and Netflix, among others.

OTT Favored by New Demographics

A new study from Horowitz Research found that 45% of Black viewers are more likely to have made over-the-top (OTT) a key part of their viewing lifestyle. The study also found the trend to be true among other multicultural viewers, with 46% of Asian viewers, and 51% of Hispanic viewers in the study spending more than 20% of their total TV viewing time watching OTT, as compared with 39% among White viewers.

Convergence and Consolidation

In 1993, Congress passed the Omnibus Budget Reconciliation Act, and gave the FCC the authority to institute an auction system to award spectrum to high bidders that wished to offer services in the wireless and satellite spaces. This system has matured such that in the last FCC auction for wireless spectrum in early 2015, companies spent more than $41 billion to acquire licenses for mobile and wireless services.

The 96 Communications Act

The 1996 Telecommunications Act, then the first major overhaul of telecommunications law in nearly 62 years, was enacted to allow any communications business to enter and compete in any market against any current player. We saw cable companies that already started building broadband infrastructure, going into the phone business. There were multiple mobile providers serving in many markets, offering competitive long distance and more.

Now, we are witnessing new trends. In the last two years, mergers in the cable and broadband space have contributed to behemoth video providers. Charter and Time Warner Cable recently completed a $65 billion merger, which was approved with some conditions by the FCC. AT&T, was successful in its bid to acquire DirecTV, which makes it a top player not only in voice, broadband internet and data, but also now in video content. Comcast attempted to merge with Time Warner Cable and Charter Communications, but this combination would have made Comcast the largest provider of broadband services in the nation by far. The size of the deal caused the FCC and many in Congress to have competitive concerns and ultimately caused Comcast to shutter the deal.

All of this activity is taking place during a period of convergence of media onto a single platform--the Internet. Voice, video, data all sooner or later will be carried over broadband, and companies in each of these industries know it and are preparing themselves for the competitive battle ahead for the loyalty of consumers. There are a large number of broadband Internet connections and other technological advances, which have changed the way we access entertainment, news and information.

When we look at the scope of this change, and how many companies stand to be affected by this convergence, it is amazing. There are 4 major national wireless carriers, 5 major cable companies with four million subscribers or more, 2 top-tier satellite TV providers, 5 major commercial networks, and hundreds of local, over-the-air television stations

Legacy Media

Of course, in the last two years alone, there has been a near record number of station acquisitions and consolidation in the television broadcast industry valued in the billions of dollars. The largest TV groups are getting bigger, with Sinclair Broadcasting Group at the cutting edge of that activity with a major acquisition of Albritton Communications in 2014.

While the newer media platforms are growing stronger every day, the record demonstrates that most Americans receive their entertainment, news and information over traditional, legacy media platforms, which are broadcast television, radio and cable or pay TV and newspapers. The overwhelming majority of news content

Broadcast's Next Big Star

If events go as expected, the FCC is poised to approve the merger of Nexstar Broadcasting Group and Media General, Inc. in a deal worth nearly $5 billion. The acquisition and absorption of Media General into Nexstar would result in the broadcasting industry's largest local broadcast group, with 171 stations in 100 markets, reaching 39% of television households in the United States. If approved, the newly-formed Nexstar Media Group will have a market capitalization of over $6 billion, and will usher in a change in the broadcast landscape.

Nexstar Media will emerge as one of the nation's top providers of local news, entertainment, sports, lifestyle and network programming through its broadcast and digital platforms. The company also stands to bolster its already strong presence in the local advertising market, providing attractive scale and synergies for both large and small advertisers looking to capture eyeballs and wallets. The company grew from a single station in Scranton, Pennsylvania in 1996, to the industry powerhouse it is today. Through acquisition, accretion and organic growth, Nexstar's rise has been a textbook study on tight management, lean operations and delivering consistent return to shareholders. Nexstar's stock regularly shows up on Wall Street buy lists, and its value has grown by 617% over the last five years—far exceeding the 63% performance of the Standard & Poor 500 index.

Retrans and JSAs

While the growth has been admirable, it has not been without criticism and controversy. Of particular note has been both the Nexstar and Sinclair positions on retransmission agreements and their adept use of joint sales agreements (JSAs) to fuel growth and strength in key markets. Touting the view that broadcasters are not realizing their inherent value and getting short-changed in the revenue game, Sook and Smith have become the leading forces behind balancing the retransmission consent fees for broadcasters. This staunch position has produced a growing tension in recent years, and has resulted in a few standoff blackouts.

Critics of big broadcasters often point to the blackouts as rationale for FCC intervention. "Good faith" and "totality of the circumstances" are principles of negotiation that critics aver have been elusive in their contracts, and there have been regular calls for the FCC to step in to resolve retransmission agreements. Supported by the National Association of Broadcasters (NAB), these companies eschew regulatory intervention into what are rightfully private contracts.

Both Nexstar's and Sinclair's adept use of joint sales agreements (JSAs) also has been controversial. A good number of its broadcast station holdings have been structured as JSAs – a business model that helps broadcasters to operate more than one station in a market without direct ownership attribution. When FCC Chairman Tom Wheeler took over in November 2013, eliminating JSAs was one of his top priorities. In the face of heavy lobbying and impassioned industry advocacy, the FCC voted along strict party lines to disallow future JSAs. It also voted to require broadcasters that had JSAs to unwind (a fancy term meaning "get rid of") existing arrangements by 2016.

In a stroke of legislative prescience, Congress voted to overturn the FCC's action in its last minute budget bill of 2015. This allowed existing JSAs to survive legally and gave promise to future JSAs as well. Nexstar, Sinclair and Howard Stirk Holdings (led by Armstrong Williams) challenged the FCC's ownership rules in the Court of Appeals for the 3rd Circuit and its disallowance of JSAs. The court's May 25, 2016 decision required the FCC to act on its long-overdue quadrennial media ownership rules before it could act on JSAs (which fall under the ownership rules).

Following this series of events, Chairman Wheeler has navigated back to a position wherein JSAs can again be disallowed. This time in the context of the Nexstar – Media General merger. In short, the Wheeler position is that nothing in the law precludes the FCC from disallowing JSAs in the Nexstar merger, because this is a new transaction that is not subject to the previous "grandfathering" of existing mergers. Nexstar is seeking a waiver from such a rule. If fairness rules the day, the FCC should grant such a waiver request.

Spawning New Minority Broadcasters

Nexstar's legacy of growth would not be complete without acknowledging the role it has played in the creation and development of two of the leading African American broadcasters in the country. When Nexstar was required to divest stations as part of its 2014 multifaceted acquisition of Gray stations, it chose to sell to an African American - owned media company led by West Coast publisher, Pluria Marshall, Jr. Nexstar's sale and ongoing support of three full-power television stations in Iowa, Louisiana and Texas has allowed Marshall entrée into the ranks of broadcast ownership.

Following its decision to divest several television stations as part of the Media General merger, Nexstar has, once again, chosen to empower minority ownership. DuJuan McCoy, a Texas broadcaster and entrepreneur, has purchased two additional stations in Louisiana from Nexstar. At this point, Nexstar – and principally Perry Sook – can take credit for helping to launch five Black-owned television stations in the span of two years. Similarly, David Smith, the President and CEO of Sinclair Broadcasting Group has divested seven stations to Howard Stirk Holdings, which is owned by African American media entrepreneur Armstrong Williams. While some of the consumer groups have opposed the Nexstar – Media General merger on public interest grounds, none can question the company's commitment to support minority ownership, which is a goal that has eluded successive FCC chairmen.

The Public Interest

We have seen a number of mega-mergers in the cable and telco space during the Wheeler FCC. AT&T – DirecTV was valued at $48.5 billion. Charter – TimeWarnerCable was valued at nearly $60 billion, and Altice – Cablevision was valued at $17.7 billion. These combinations continue the spate of consolidation in the pay television market and have contributed to formidable scale in the delivery of content and broadband to consumers.

By contrast, up to now, the largest broadcast television merger in recent years was the $985 million Sinclair- Albritton deal in 2015. While Nexstar's acquisition of Media General is valued at $4.8 billion, this number is far short of even the smallest recent cable merger (Altice at $17 billion), which begs the question: why are some groups opposed?

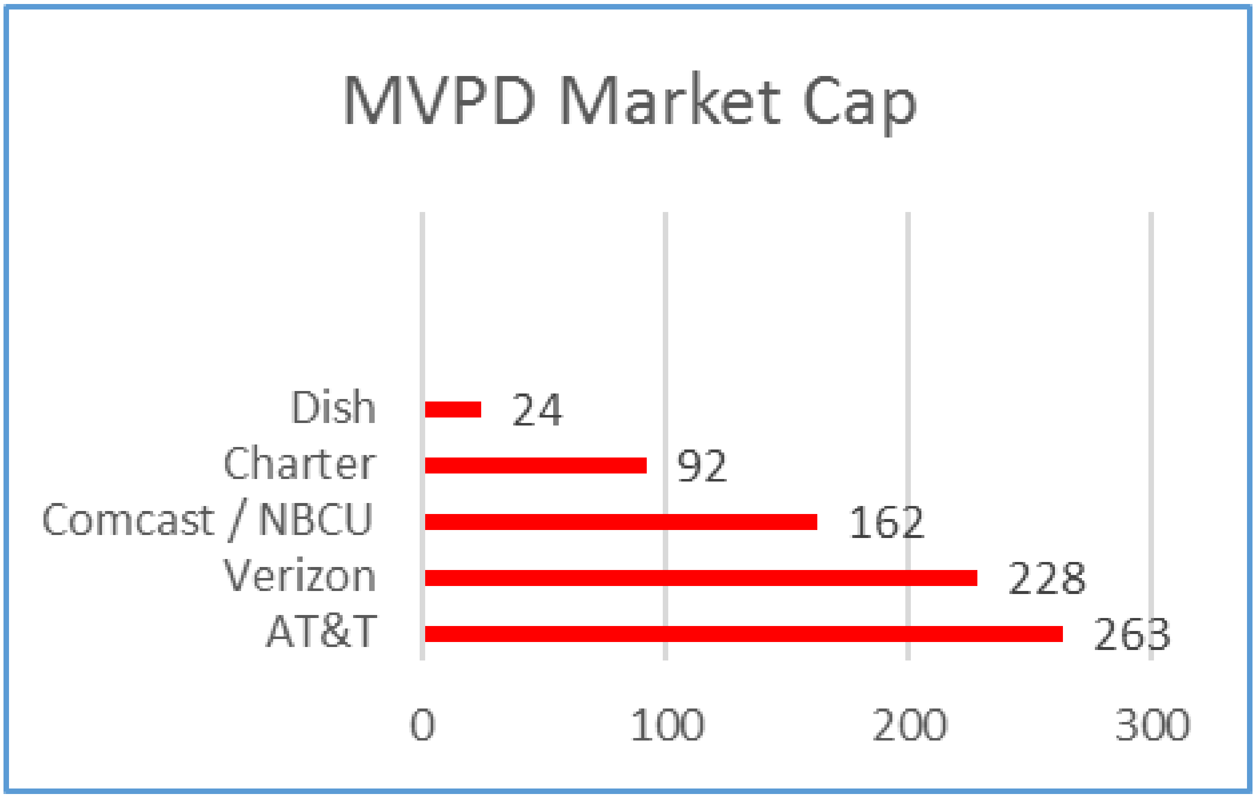
Under the broadest possible reading of the public interest, opponents of the Nexstar-TWC merger have urged the FCC to deny the merger or to impose numerous conditions which would frustrate the purpose of the transaction itself. According to the FCC's own Office of General Counsel, Congress has directed the Commission to review transactions involving licenses and authorizations under the Communications Act and to determine whether the proposed transaction would serve "the public interest, convenience, and necessity." The FCC's guidance further states that:

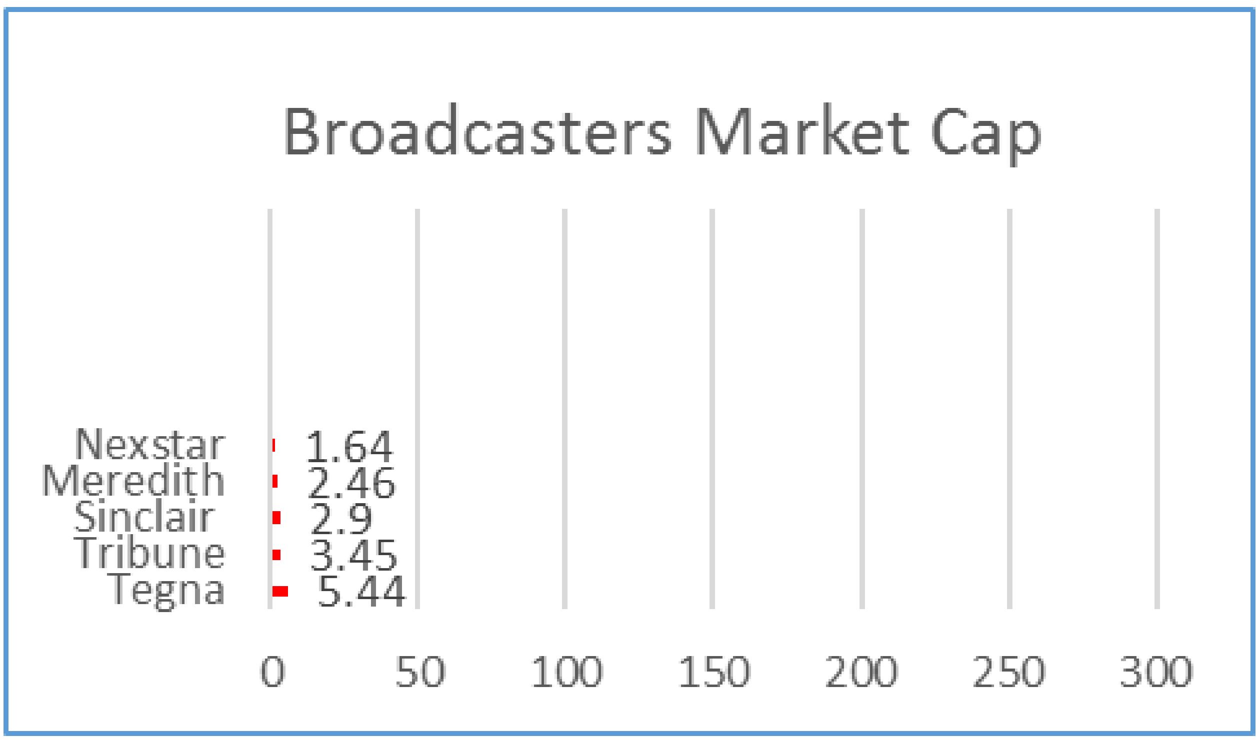
> "The public interest standard is not limited to purely economic outcomes. It necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. The leading examples may come from broadcast transactions, where the Commission has long applied the congressional admonition to promote localism in programming, and especially news programming, available to communities."

Under this standard, a devotion to "localism" alone should be sufficient to pass the public interest test.

Competition in the Video Marketplace

But there is another, more ominous, component to this merger that seems to get overlooked by focusing solely on the dollar value of the deal, the numbers of television households being served, or the national 39% cap for broadcasters. And that is the notion of competition in the video market. As we look at the market capitalization of companies providing service in the U.S., it is clear that even the largest broadcasters have market caps that are substantially less than their MVPD competitors.


MVPD Market Cap
Dish
Charter
Comcast / NBCU
Verizon
AT&T
24
92
162
228
263
0
100
200
300


Broadcasters Market Cap
Nexstar
Meredith
Sinclair
Tribune
Tegna
1.64
2.46
2.9
3.45
5.44
0
50
100
150
200
250
300

While market capitalization rarely figures into regulation, it does have significance in the market, and especially in the delivery of service. Thus, when the largest MVPD has a market cap that is 50 - 100x that of a large broadcaster such as Nexstar, it makes the discussion of competition in video a bit surreal.

In what resembles an Old-West standoff, both broadcasters and MVPDs point to the other as being oversized, and thus wielding too much influence in contract negotiations. This typically arises during the renewal of retransmission agreements, where big numbers affect the bottom line and where walking away—even for a short time -- affects lots of consumers who are unaware of the underlying business maneuvers.

In an industry where scale is important to competition, consolidation should be encouraged by the regulators as advancing the public interest, not impeding it. If, for example, the national cap on television broadcast coverage were to expand to 45 or 50 percent of U.S. homes, as some observers suggest, the ensuing consolidation would inure to the benefit of consumers by virtue of improved service, greater offerings, and more diversity of choice.

If the FCC's own public interest guidance means anything, it should mean that the Nexstar-Media General merger will be approved without burdensome conditions, and that the FCC will not stand in the way of further broadcast consolidation in deference to competition and consumer choice.

How Congress Can Fix the FCC

> *"In the past, people used to say that telecom policy was not particularly partisan and that both parties could often find common ground to work together. The voting record at the Commission certainly bears that out, with the previous five permanent FCC chairmen combining for just 14 party-line votes at open meetings during their tenure. But since Chairman Wheeler assumed his post, this agency has too often pursued a highly partisan agenda that appears driven by ideological beliefs more than by a sober reading of the law. Chairman Wheeler has forced three-to-two votes on party-line items a total of 25 times. Put another way, in three years under Chairman Wheeler, the FCC has seen nearly twice as many partisan votes than in the previous twenty years combined. What were once very rare events are now standard operating procedure at the Commission."*
>
> ~ Sen. John Thune (R-SD), Chairman,
>
> Senate Commerce Committee

The Federal Communications Commission is one of the most important regulatory agencies in the U.S. government, and perhaps in the world. With statutory authority over the nation's communications apparatus, systems and devices, the FCC holds the power to approve or deny mergers; assess liability; levy fines and penalties; bring suit; award licenses and contracts; allocate spectrum; conduct hearings and inquiries; promulgate and interpret rules; establish standards and codes, and exercise a wide range of regulatory actions affecting television, radio, telephone, wireless, mobile, Internet, cable, satellite and international telecom services in the multibillion dollar communications and information technology sector.

Despite all of its power, the FCC is broken.

FCC Chairman Tom Wheeler (D) (top) and Commissioner Ajit Pai (R) often cast opposing votes on major policy decisions at the FCC.

The agency raises millions of dollars for the U.S. treasury through fees, fines and penalties, even though it has operated at less than full capacity for years. It is home to exceptionally capable and committed attorneys, economists, engineers and public servants who belie the term bureaucrat. Although these officials implement the laws passed by Congress, they do not set the regulatory agenda, which is reserved exclusively for the chairman and commissioners--three Democrats and two Republicans.

As these decision makers deliberate on the fate of entire industries, a disquieting anti-business bias has become manifest. Under the beneficent cloak of consumer protection, the FCC has struck blow after blow against business. Beyond hedging on net neutrality, mergers and media ownership, there is growing concern that puffed up enforcement, jurisdictional over-reach, and the claw back of well-settled rules are all antithetical to the needs, interests and well-being of the telecommunications, media and technology sector.

Today, most of the FCC's major decisions fall along a 3-2 party fault line, and allegations of improper process are now the rule, not the exception. What's more, it is clear that the FCC --intentionally or not-- has alienated entire industries by virtue of its "thumb on the scale" decisions in favor of its own priorities. With billions of dollars in investment capital often hinging on a single ruling, business leaders have lost confidence that the Commission will always act prudentially. While broadcasters have levied this charge most often, it has resonated across the panoply of communications providers.

Communications Act Rewrite

Whenever talk turns to rewriting the Communications Act, FCC reform invariably arises--and rightfully so. Reform, however, is a mixed bag. First, the FCC desperately needs a bigger budget to tackle the growing communications agenda it is tasked with regulating. It already is doing more with less, and the agency simply needs greater human and financial resources to be effective. Of course with more money comes more oversight, accountability and responsibility. And in that regard, Congress should be prepared to do its job without the partisan animus it has shown the agency thus far. Haranguing oversight hearings and prodigious requests for documents will not accomplish the intended goal of making the agency work better.

But, there are several important communications laws which could use some enlightened Congressional intervention. For example, in an anti-business ruling sure to keep corporations at risk and class action litigants happy for many years, the FCC's ruling on the Telephone Consumer Protection Act (TCPA) needs a reality check from Congress. The FCC left businesses hanging when it comes to the real-world interpretation and application of the TCPA relating to automatic telephone dialing systems, called parties and reassigned numbers. Its in-your-face message to business was that even a rule of reason will not insure compliance with the law. Surely, this is not what Congress intended when it passed the TCPA in 1991.

Low Power Television and Minority Media

Separately, Congress should provide relief for soon-to-be disenfranchised low power television (LPTV) station and translator owners, who could lose their spectrum, livelihood and the right to broadcast local news, religious, educational, sports and cultural programs following the FCC's broadcast incentive auction next year. Hundreds of religious and local low power broadcasters have begged the FCC to exercise discretion to save a quintessential American institution, but the agency has wrung its hands in deference to the Hill. It is not too late for Congress to correct a legislative wrong when it comes to preserving low power TV and ensuring a fair auction.

And equally important, lawmakers should settle on legally sustainable rules for minority and small business ownership of communications properties. Currently, the FCC encourages designated entities (DEs) to lease facilities in the wireless space as a way to compete in a high-dollar industry. But the FCC has foreclosed small and minority broadcasters from entering into joint sales agreements (JSAs) with bigger television stations, even though that would allow them to stay afloat in a capital-intensive business. This glaring inconsistency among the rules is troubling and needs correction.

The Need for Regulatory Certainty

Businesses need regulatory certainty to survive, thrive and innovate in competitive markets. That means mergers should not be held hostage to special interests seeking entitlements, annuities or bonuses from the transaction, nor take more than a year to review and approve. Companies in non-regulated industries need to know which rules will be enforced before being slapped with headline grabbing fines out of left field. Bidding rules should not be changed after the game. And, eighth floor shenanigans should stop altogether.

An ambitious list to be sure, but it has been quite some time since the leadership in Congress has been as capable, committed or conscious of fixing what ails the increasingly important FCC. These issues, and several more, deserve the focused attention and common sense that only Congress can bring to communications policy, even in a high stakes election year. ~ IFCC~

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