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DEFINING THE PUBLIC INTEREST IN TERMS OF REGULATORY NECESSITY

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From the time of the 1934 enactment of the Communications Act, its touchstone has been the “public interest, convenience and necessity.”¹ The phrase, as applied to broadcasters, would provide the rationale for a regulatory regimen designed to ensure that government licenses were used to serve the public and that qualified operators of those licenses used that privilege for public benefit. If not, the privilege could be taken away. For more than a half century the Federal Communications Commission (FCC) was the veritable tail that wagged the industry’s dog as a sometimes heavy regulatory hand permeated nearly every aspect of station ownership, operation and control.

There has been considerable debate over just what Congress intended when, in creating a single agency to regulate both wired and wireless communication, it borrowed the standard of “public interest, convenience, and necessity” from predecessor statutes governing telephony² and radio.³ Over the years most

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¹ Communications Act of 1934, ch. 655, 48 Stat. 1064 (1934).

² Prior to 1934, wired communications including telephone had been under the jurisdiction of the Interstate Commerce Commission and subject to regulation as a common carrier, linked to railroad regulation because phone lines were typically strung along railroad rights-of-way and along publicly financed roads. Telephony, like railroads, stage coaches and canal boats, was deemed to be a business “affected with a public interest,” and subject to operation under state or federal certificates of “convenience and necessity.” See e.g. William J. Byrnes, *Telecommunications Regulation: Something Old and Something New*, THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996, 31, 31-33, (Max D. Paglin ed., 1999). See also Glen O. Robinson, *Title I: The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, 3, 3-8 (Max D.

interpretations have focused on “public interest,” to the exclusion of “convenience” or “necessity.” Perhaps that was because “convenience and necessity” had merely tagged along with “public interest” when it was lifted from common carrier regulatory contexts that did not readily apply to the competitive broadcast industry. Newton Minow recalls that when he first became FCC chairman in 1961, he asked Washington’s former Senator Clarence C. Dill (who had been the leading Senate sponsor of the Radio Act of 1927 and an active participant in the debate over the Communications Act of 1934)⁴ what legislators had meant by “the public interest.”⁵ Senator Dill, long since retired, told Minow

that he and his colleagues . . . knew they had to have some legal standard with which to award licenses to some people while rejecting others, because there were not enough channels to go around. “A young man on the committee staff had worked at the Interstate Commerce Commission for several years,” Dill recalled, “and he said, ‘Well, how about “public interest, convenience and necessity”?’ That’s what we used there.’ That sounded pretty good, so we decided we would use it, too.”⁶

Certainly, whatever the Congressional intent had been in adopting “public interest, convenience and necessity” as the standard under which a competitive broadcast industry would be regulated, legislators had not intended to invoke “necessity” in its traditional and theretofore used sense—under which regulated common carriers like railroads had to demonstrate the “necessity” of offering a duplicative service—on the theory that unnecessary duplication would provide no benefit to consumers, but would force them to bear the extra costs of construction.⁷ “Necessity” in the context of broadcast regulation went undefined and largely forgotten as the FCC, the industry, consumers and

Paglin ed., 1989).

³ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (establishing Federal Radio Commission and granting it authority to regulate radio broadcasting).

⁴ See Robinson, *supra* note 2, at 11-23.

⁵ See NEWTON N. MINOW AND CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND*, 4 (1995) (noting that author approached Senator Dill, draftsmen of Communications Act of 1934, and asked Senator what he meant by “public interest”).

⁶ See *id.*

⁷ See Robinson, *supra* note 2, at 15.

even the courts spoke in shorthand about the meaning of “public interest.”⁸

Indeed, former FCC Commissioner Glen O. Robinson has suggested that in the absence of any general presumption against competition, a common sense reading would reduce “public interest, convenience and necessity” to “public interest/convenience.”⁹ Moreover, notes Robinson, Congress appears to have used the conjunctive and the disjunctive interchangeably and “quite casually” in different sections of the Communications Act—sometimes referring to “public interest, convenience, *and* necessity,” sometimes to “public interest, convenience, *or* necessity,” without much apparent justification for the choice in the context.¹⁰

It was not until passage of the Telecommunications Act of 1996 that the Congress would undertake a major overhaul of the 1934 statute. The 1996 statute, while it retained the phrase “public interest, convenience and necessity” as the broad mandate pursuant to which the FCC was to regulate broadcasting, perhaps inadvertently, also may have breathed life into the formerly gratuitous “necessity,” creating in the process a new touchstone for FCC regulatory power.¹¹ Deregulatory in spirit, the 1996 statute and recent court interpretations suggest that the “necessity” of regulation could now become the new litmus by which the FCC is to implement and the courts are to weigh regulation in the “public interest, convenience and necessity.”

⁸ Interpretations of its meaning have run the gamut from what has been described as “Deliver the Mail” to “Holy Grail.” Under the first view, public interest is served when the FCC performs “neutral, mechanical, logistical functions,” aimed at preventing technical interference. Under the second, public interest is served when the FCC pursues “some grand, moral, civilizing goal,” aimed at shaping content in socially desirable ways. See Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L. J. 605, 606 (1998). Some would argue that the standard is so broad as to be meaningless and thus an impermissible delegation of Congressional powers to an unelected regulatory agency. See, e.g., Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 FED. COMM. L. J. 427 (2001). Others suggest that it was intended to give the FCC broad and flexible powers to advance with direct and indirect regulation broadcast content attuned to desirable social goals.

⁹ Robinson, *supra* note 2, at 15-16.

¹⁰ See *id.* at 16.

¹¹ See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

THE FCC'S OWNERSHIP RULES

To promote the twin “public interest” goals of diversity and competition, the FCC early in its history adopted regulations severely limiting the number of radio and television stations that any one party could own either nationally or within a local market. For decades these rules were strictly enforced, rarely waived and highly restrictive. Over time, however, the growth of FM radio in the 1970s and 1980s and the expansion of the total number of radio stations to over 10,000 created a highly competitive marketplace that enhanced program diversity through niche programming formats. At the same time the technological engine of development created alternative, competitive means of program delivery that gradually and steadily eroded the major networks’ market dominance of the television industry. In the video marketplace, the growth of subscriber-based industries like cable TV, the development of direct broadcast satellite and the advent of the internet provided alternative attractions to the consumer and lessened the grip of television’s major networks over the audience.¹² From 1970 to the present, the networks’ share of the prime time audience has gradually dropped from 95% to less than 50%.¹³ Faced with such competitive pressures, the broadcast industry urged Congress and the FCC to relax the shackles of heavy regulation so broadcasters could better compete with new industries that were subject to lesser regulation. The pretext for deregulating broadcasting was that over-regulation threatened to bring about the demise of free, over-the-air commercial television, which would not sit well with the public. Hence, during the 1980s and 1990s, the “7-7-7” rule that guided the industry for close to four decades and the “one to a market” rule that prevailed for more than half a century were relegated to mere footnotes of history, giving way to the creation of mega-dynasties in radio and television, with the largest companies now owning over 1,000

¹² See e.g., Beatrice E. Garcia, *High-Speed Service Changing Web Usage, Study Says*, THE MIAMI HERALD, June 24, 2002, at 14A (citing study by Pew Internet and American Life Project that found that extra time consumers with broadband are spending online “is coming at the expense of television and the print media”).

¹³ In June 2002 cable networks claimed a 54.0 prime time share for the month, compared with a 38.4 share for the major broadcast networks. This marked the first time in history that cable surpassed a 50 share in prime time. See Allison Romano, *Cable Breaks 50-Share Mark in Prime*, BROADCASTING & CABLE, Jul. 8, 2002, at 12.

radio stations or television stations that reach more than 40% of the nation's television homes.¹⁴

From a competitive standpoint, the coming of age of the multivideo universe has, in fact, put free, over-the-air commercial television at a serious disadvantage. This marketplace shift has led to a corresponding shift of the regulatory paradigm from regulation to promotion of competition across industries within the video marketplace. As a consequence, certain regulatory barriers were removed first by Congress in the Telecommunications Act of 1996 and thereafter by the FCC—on the theory that the public interest would better be served by more vibrant inter-industry competition. The intent was to place the broadcast industry on a more level playing field.

The relaxation of ownership rules, aimed at attaining better balance, has fueled a trend toward consolidation to better position such inter-industry competition. At the same time, easy access to public money in the 1980s and 1990s made maximization of shareholder values the ultimate goal, supplanting governmental imprimatur as the standard by which to measure successful operation. In the process, a radio industry once owned by many smaller companies and individuals came to be dominated by a handful of previously unimaginably large players. The television marketplace as well has seen a less than subtle shift in the balance of power from the local affiliates and program suppliers to the networks.

Against this backdrop have come two recent decisions, *Fox Television Stations v. FCC*¹⁵ and *Sinclair Broadcast Group, Inc. v. FCC*,¹⁶ in which the Court of Appeals for the D.C. Circuit appears for the first time to have shifted its focus from “public interest” to “necessity” as the standard by which to evaluate the rationale behind the few remaining FCC rules that govern the structural marketplace in the broadcast industry.¹⁷ In *Fox*, the

¹⁴ See Stuart A. Shorenstein & Andrew D. Fisher, *Media Concentration Rules Are on Shaky Ground*, 226 N. Y.L.J., Oct. 17, 2001, at 1, 6 (stating 7-7-7 rule limited single entity to no more than 7 AM, 7 FM and 7 television stations nationwide and one-to-a-market rule prevented single owner from owning both radio and television station in same market).

¹⁵ 280 F.3d 1027 (D.C. Cir. 2002).

¹⁶ 284 F.3d 148 (D.C. Cir. 2002).

¹⁷ See *Sinclair Broadcast Group*, 284 F.3d at 165 (holding FCC failed to demonstrate that exclusion of non-broadcast media from eight voices exception was necessary in public interest); *Fox Television*, 280 F.3d at 1043 (stating FCC failed to show NTSO rule was

court found that the FCC's 35% national ownership cap for television was arbitrary and capricious.¹⁸ In *Sinclair*, the court found that the FCC had also been arbitrary and capricious in adopting a rule that would allow the creation of television duopolies, but only in those markets in which eight independently owned broadcast television stations would remain.¹⁹ In both cases the court remanded the affected rules to the FCC for justification, amendment or elimination.²⁰ Significantly, in neither case did the court find that adoption of such rules would be *per se* unconstitutional on First Amendment grounds. Rather, the courts determined that there was insufficient record support for adoption of either rule under the standards set by Congress in the Telecommunications Act of 1996, which required that FCC ownership rules be shown to be "necessary in the public interest."²¹

Assuming that these decisions are not overturned on appeal, it appears that a new paradigm may well emerge in which the multivideo universe will become the relevant market for measuring diversity and competition, not the broadcast industry standing alone. Furthermore, at least with respect to ownership rules, these decisions strongly suggest a new and narrower emphasis on the *necessity* of the Commission's regulation as the proper test under the Telecommunications Act of 1996, rather than the broader "public interest" standard that might have been applied to a different kind of rule or in an earlier era.

necessary in public interest to safeguard competition or enhance diversity).

¹⁸ See *Fox Television*, 280 F.3d at 1044 (holding FCC decision to retain NTSO rule arbitrary and capricious).

¹⁹ See *Sinclair Broadcast Group*, 284 F.3d at 152 (stating FCC failed to demonstrate that exclusion of non-broadcast media in the eight voices exception was not arbitrary and capricious).

²⁰ In the *Fox Television* decision the court also struck down the FCC's rules restricting cable television and broadcast television station cross-ownership in a single market as beyond repair, even if not necessarily unconstitutional (though the court allowed that it might be, given the different standards that have been established for review of rules pertaining to cable). See *Fox Television*, 280 F.3d at 1049-53.

²¹ See *Sinclair Broadcast Group*, 284 F.3d at 159 (stating court's review was informed by Congress's instruction in Telecommunications Act that FCC shall repeal or modify any regulation found to no longer be in public interest); *Fox Television*, 280 F.3d at 1033 (stating Telecommunications Act of 1996 requires FCC to review ownership rules every two years to determine if such rules are necessary in public interest).

Fox Television v. FCC

It is hardly surprising that News Corp.'s Fox Television provided the impetus for the court's interpretation of the new regulatory standard mandated under the Telecommunications Act of 1996. Rupert Murdoch's bold entry into American television little more than a decade earlier with the acquisition of a group of stations and the launch of the Fox network had fundamentally changed the business, paving the way for future upstarts like UPN and the WB. Murdoch's global strategic focus on platform development and securing distribution²² depended in part on challenging protective regulations that had grown up around the television establishment. Though American and British broadcast traditions had developed along very different lines, Murdoch's description of his approach to bringing Sky Television to Great Britain is not all that different from his approach to bringing Fox to the United States: "When we launched Sky Television, we had to cut through a thicket of rules, regulations and customs that were designed to preserve the broadcast monopoly—or, by then, duopoly—that had existed for decades. Through perseverance, and at considerable expense, we have been able to do that."²³ As a result, in both the United States and Britain, Murdoch saw News Corp. as "a huge guarantor of continued competition for generations."²⁴

At issue in *Fox Television v. FCC* were national limits on television station ownership, regulations that had changed not at all in the first four decades of television's growth and only relatively slowly thereafter.²⁵ Since the 1940s the FCC had imposed rules that placed limits on the number of television stations one party could own nationwide. The number seven, adopted in 1954 as the national cap for AM, FM and television, held for thirty years.²⁶ In 1984 the Commission, in what in hindsight seems a modest move but at the time marked a major

²² See WENDY GOLDMAN ROHM, *THE MURDOCH MISSION: THE DIGITAL TRANSFORMATION OF A MEDIA EMPIRE* 237 (John Wiley & Sons 2002)

²³ See *id.* at 22.

²⁴ See *id.* at 262

²⁵ See Shorenstein & Fisher, *supra* note 14, at 1 (stating that television station ownership rules of Communications Act of 1934 were strictly enforced for decades).

²⁶ See *id.* at 1 (stating 1954 FCC rules prohibiting common ownership of more than 7 FM, 7 AM and 7 television stations remained unchanged for 30 years).

policy shift, increased the national caps for AM, FM and TV from seven to 12.²⁷ Shortly thereafter, and only for television, the Commission added a rule that would prohibit any one owner, whether or not it had reached the 12-station limit, from owning stations that reached more than 25% of the nation's television households²⁸

Over the next decade, the FCC continued to relax its rules on radio ownership. However, the limits on national television station ownership remained at 12 stations and 25% of national audience until Congress passed the Telecommunications Act of 1996. The first wholesale amendment of the Communications Act of 1934, the Telecommunications Act of 1996 (as interpreted by the court in *Fox Television*) required the FCC to modify not only the specifics of its television ownership rules, but also its whole approach to ownership regulation.²⁹ In the 1996 Act, Congress ordered the FCC to modify its rules to eliminate its numerical limits on national ownership of television stations altogether and to up its audience cap to 35%.³⁰ More important, Congress also ordered a biennial Commission review of all ownership rules.³¹ Under the new law, the biennial review was to be utilized by the Commission to "determine whether any of such rules are necessary in the public interest as the result of competition"³² and to "repeal or modify any regulation it determines to be no longer in the public interest."³³ This language was the basis for the court's remand in *Fox Television*³⁴.

In *Fox Television*, the court considered consolidated petitions by Fox, NBC, CBS and Viacom arising from the FCC's first

²⁷ See Shorenstein & Fischer, *supra* note 14, at 6 (stating FCC established 12 station limit in 1984 in response to growth in mass media market).

²⁸ See *id.* (stating FCC established "audience reach cap" limiting ownership interests in television stations to maximum of 25 percent of national television audience).

²⁹ See *Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (stating Telecommunications Act of 1996 began process of deregulating organization of broadcast and cable television).

³⁰ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, §§ 202(c)(1)(A), (B) (directing FCC to modify rules for multiple ownership by eliminating numerical limit on national television station ownership and by increasing national audience reach limitation to 35 percent).

³¹ See *id.* at § 202 (h) (directing FCC to review ownership rules biennially).

³² *Id.*

³³ *Id.*

³⁴ See *Fox Television*, 280 F.3d at 1043 (holding Commission failed to adduce valid reason why NTSO rule was necessary in public interest).

biennial review of ownership rules in 1998.³⁵ The FCC's decision not to repeal or modify the national television station ownership rule (NTSO Rule), among others, argued Fox, violated the Telecommunications Act of 1996, the Administrative Procedure Act (APA), and the First Amendment.³⁶ Interestingly, the television industry's powerful trade organization, the National Association of Broadcasters (NAB), and the Network Affiliated Stations Alliance (NASA) found themselves allied against the networks and with the Consumer Federation of America (CFA) and the Office of Communications of the United Church of Christ (UCC), interveners filing briefs in support of the Commission's decision to retain its rules.³⁷ That the networks and the NAB found themselves on opposite sides of the issue is indicative of the complexities raised by the FCC's ownership rules, which protect some station owners and stand as obstacles to the ambitions of others. The division over ownership issues prompted all the major networks but ABC to bolt the NAB, which took the position favored by many network affiliates concerned over their viability in a consolidating market.

The court traced the history of technological change that had led the Commission to modify its ownership rules in 1984. The court noted that in 1984 the Commission itself had determined that repeal of the NTSO Rule "would not adversely affect either the diversity of viewpoints available on the airwaves or competition among broadcasters," concluding that diversity was a local concern to which the NTSO Rule was "irrelevant," and had expressed its intention to sunset its newly adopted national television ownership numerical cap of 12 after a six-year transition period.³⁸ However, Congress blocked implementation

³⁵ See *id.* at 1036 (citing 1998 *Biennial Regulatory Review*, Biennial Review Report, 15 F.C.C.R. 11058, 2000 WL 791562 (2000)). Fox, NBC, Viacom and CBS had challenged FCC's decision not to modify or repeal national television station ownership rule, which would prevent Fox from going forward with purchase of stations from Chris-Craft that would boost Fox's national audience reach to over 40 percent and would threaten Viacom's ability to keep stations it had acquired when it purchased CBS.

³⁶ See *id.* at 1033 (stating petitioners challenged FCC decision not to repeal national television station ownership rule on grounds that decision violated Administrative Procedure Act, Telecommunications Act and First Amendment).

³⁷ See *id.* (stating National Association of Broadcasters filed briefs in support of Commission's decision to retain ownership rule).

³⁸ See *id.* at 1034 (citing *Amendment of Multiple Ownership Rules*, Report & Order, 100 F.C.C.2d 17 (1984)).

of the FCC's 1984 proposal,³⁹ and the Commission on reconsideration modified its rules to add the 25% audience cap and to retain indefinitely the numerical limit of 12 stations, which it had originally intended only as an interim solution.⁴⁰

In defending its 1998 decision to retain the 35% national audience cap ordered by Congress in the Telecommunications Act of 1996, the Commission argued that it should not repeal the rule in a time of transition. The Commission claimed that before it repealed the 35% cap, it needed time: (1) to observe the effects of recent changes to the rules governing local ownership of television stations; (2) to observe the effects of the increase in the national ownership cap to 35%; and (3) to preserve the power of affiliates in bargaining with networks.⁴¹ In addition, the Commission argued that repealing the rule would only increase concentration in the national advertising market and the program production market.⁴² The networks countered that these justifications were inadequate to show that the rule was "necessary in the public interest," as required by the Telecommunications Act of 1996.⁴³

³⁹ See *id.* at 1034 (citing Second Supplemental Appropriations Act, Pub. L. No 98-396, § 304, 98 Stat. 1369, 1423 (1984)).

⁴⁰ See *Fox Television*, 280 F.3d at 1034 (citing *Amendment of Multiple Ownership Rules*, Mem. Op. & Order, 100 F.C.C. 2d 74, 90-92 (1984)). It has often been noted that the FCC's concept of "public interest" shifts over time as different Commissioners, appointed by different administrations and approved by different legislators, give their own meaning to this flexible mandate. In this case the Commission had attempted to justify eliminating national ownership caps in 1984, during the aggressively deregulatory Reagan administration, and had been thwarted by the opposition party in Congress. Years later, the pendulum having swung back toward more regulation during successor Commissions and eight years of a Democratic administration, the "public interest" findings of its predecessor came back to haunt a successor Commission as the court scrutinized these apparent inconsistencies. In arguing for repeal of the rule, the networks claimed the Commission had failed to explain its rationale in departing from its earlier position that the national limits should be repealed.

⁴¹ See *id.* at 1042 (indicating Commission offered three specific reasons for its retention of NTSO rule, all three of which failed).

⁴² See *id.* at 1036 (stating Commission also believed repealing rule would "increase concentration in the national advertising market").

⁴³ The networks sought to bolster their argument against a 35 percent audience cap by referencing a decision months earlier of the D.C. Circuit Court that found that a 30 percent cap on cable ownership a violation of the First Amendment. See *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (2001) (holding FCC failed to meet its burden under First Amendment). While the court agreed with the networks that television stations face more local competition than do cable systems, the court found that the standard under which it reviewed cable regulation (intermediate scrutiny) was more demanding than the arbitrary and capricious standard under the APA. Moreover, the court noted that Congress had limited the FCC's authority to impose regulations on cable solely to further diversity in programming. Therefore, while the court agreed that the cable decision offered a "point of reference," it did not find the case controlling with

According to the networks, there is no evidence that broadcasters have undue market power in any relevant market.⁴⁴ Therefore the Commission's stated goal of safeguarding competition was unsupported. On this point the court agreed, calling the Commission's claim of a need to protect competition in either the national program market or the national advertising market "wholly unsupported and undeveloped."⁴⁵ While the court did not accept the networks' further contention that diversity alone could not justify ownership regulation as "necessary in the public interest," it agreed with the networks that the Commission had failed to justify why the NTSO Rule served the interest of diversity.⁴⁶ The Commission had never explained why it was no longer adhering to its 1984 finding that national diversity is irrelevant. Further, "the Commission's passing reference to national diversity does nothing to explain why the Rule is *necessary* to further that end."⁴⁷

The Commission tried to justify the 35% cap as a tool for allowing future observation of the effects of its relaxation of local ownership rules. But the court said it could find no "obvious" relationship between the national cap and the local ownership rule and the Commission had not provided any evidence of a "non-obvious" relationship.⁴⁸ More important, the court agreed with the networks that Congress had not intended that the FCC retain a rule to see whether it might become useful. "The Commission's wait-and-see approach cannot be squared with its statutory mandate promptly—that is, by revisiting the matter biennially—to 'repeal or modify' any rule that is not 'necessary in the public interest.'"⁴⁹ Nor did it matter that Congress itself had set the 35% cap in the Telecommunications Act of 1996; it did so as a "starting point from which the Commission was to assess the need for further change."⁵⁰ Furthermore, the Commission's claim

respect to broadcast television regulations. *See Fox Television*, 280 F. 3d at 1040-41.

⁴⁴ *See Fox Television*, 280 F.3d at 1041 (stating networks argued that broadcasters have no undue market power that would dampen competition).

⁴⁵ *Id.* at 1042.

⁴⁶ *See id.* (providing two reasons why FCC's diversity justification failed).

⁴⁷ *Id.* (emphasis added).

⁴⁸ *See id.* (stating there is no obvious relationship between relaxation of local ownership rule and retention of the national ownership cap and the Commission offered nothing to suggest a non-obvious relationship).

⁴⁹ *Fox Television*, 280 F.3d at 1042.

⁵⁰ *Id.* at 1043.

that retaining the rule was necessary to strengthen the bargaining power of network affiliates, thus promoting diversity of programming, even if relevant, was nowhere supported in the record. In fact, the court noted, this assertion ran counter to the Commission's 1984 finding that it had "no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming."⁵¹ "The Commission may, of course, change its mind, but it must explain why it is reasonable to do so."⁵² Because the Commission "has adduced not a single valid reason to believe the NTSO Rule is necessary in the public interest, either to safeguard competition or to enhance diversity,"⁵³ the NTSO Rule was found to be arbitrary and capricious in violation of the APA⁵⁴ and was remanded to the FCC.

Sinclair Broadcast Group v. FCC

Scarcely more than a month after the Court of Appeals remanded the NTSO Rule to the Commission, it did the same with the Commission's local television ownership rule in *Sinclair Broadcast Group v. FCC*.⁵⁵ As in *Fox Television*, the court was harshly critical of the Commission's failure to explain how its local ownership rule, which only allowed television duopolies under specific circumstances, was "necessary in the public interest."⁵⁶ As one industry trade publication put it, with *Sinclair* following so closely on the heels of *Fox Television*, the FCC appeared to be "beating a path to the woodshed with the D.C. Court of Appeals holding it firmly by the ear."⁵⁷

In *Sinclair*, as in *Fox*, the court was asked to consider whether the FCC had met the 1996 statutory mandate in framing new rules on local television duopolies. Rules adopted by the FCC in 1999 for the first time allowed common ownership of two

⁵¹ *Id.*

⁵² *Id.* at 1044-45.

⁵³ *Id.* at 1043.

⁵⁴ *See id.* (concluding 1998 FCC decision to retain NTSO rule was arbitrary and capricious and in violation of Administrative Procedure Act).

⁵⁵ 284 F.3d 148, 152 (DC Cir. 2002) (remanding local ownership rule to FCC).

⁵⁶ *See id.* at 165 (holding Commission failed to show that exclusion of non-broadcast media from eight voices exception was necessary in public interest).

⁵⁷ *Scarcity of Rationales*, BROADCASTING & CABLE, Apr. 8, 2001 at 82.

television stations in the same market, but only if one of the stations was not among the four highest rated stations in the market and only if eight independently owned, full-power, operational television stations remained in the market.⁵⁸ Sinclair Broadcast Group challenged the local ownership rule on several grounds, one of which was that limiting common ownership of television stations to local markets with eight independent broadcast television voices was arbitrary and capricious.⁵⁹

The court noted that in 1991 the Commission had issued a Notice of Inquiry⁶⁰ concerning relaxation of local television ownership rules and, a year later, in a Notice of Proposed Rulemaking, observed that a minimum of *six* independently owned stations would be enough to provide outlets for ABC, NBC, CBS, Fox and two independents and permit mergers in 38 of the top 50 markets.⁶¹ In a Further Notice of Proposed Rulemaking in 1995, the Commission sought further guidance concerning the number (if any) of independent voices that should remain in a market after the creation of a television duopoly and suggested that cable ought to be counted among those independent voices.⁶² Before the Commission acted on the matter, Congress passed the Telecommunications Act of 1996, directing the FCC to conduct a rulemaking to determine whether to retain, modify or eliminate its television local ownership limits.⁶³ When in 1999 the Commission adopted the rule at issue in *Sinclair*, it opted for a minimum of eight independent voices and excluded from consideration as “voices” any media but full-service broadcast television stations.⁶⁴ In so doing, Sinclair

⁵⁸ See *Sinclair Broadcast Group*, 284 F.3d at 152 (citing *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, FCC 99-209 (rel. Aug. 6, 1999), 64 Fed. Reg. 50,651 (Sept. 17, 1999), on recons., FCC 00-431, (rel. Jan. 19, 2001), 66 Fed. Reg. 9039 (Feb. 6, 2001) (codified at 47 C.F. R. § 73.3555(b) (2002)).

⁵⁹ See *id.* (stating Sinclair challenged ownership rule on three grounds, one of which was that rule was arbitrary and capricious).

⁶⁰ See *id.* (citing *Review of the Policy Implications of the Changing Video Marketplace*, Notice of Inquiry, FCC 91-215 (rel. Aug. 7, 1991), 56 Fed. Reg. 40,847 (Aug. 16, 1991)).

⁶¹ See *id.* (citing *Review of the Commission's Regulations Governing Television Broadcasting*, Notice of Proposed Rulemaking, FCC 92-209 (rel. June 12, 1992), 57 Fed. Reg. 28,163 (June 24, 1992)).

⁶² See *id.* (citing *Review of the Commission's Regulations Governing Television Broadcasting*, Further Notice of Proposed Rule Making, FCC 94-322 (Rel. Jan. 17, 1995), 60 Fed. Reg. 6,490 (Feb. 2, 1995)).

⁶³ See *id.* (citing 1996 Act, §202(c)(2)).

⁶⁴ See *Sinclair Broadcast Group*, 284 F.3d at 152-55 (discussing basis for

argued, the Commission “plucked the number eight out of thin air” and arbitrarily defined “voices,” excluding media that it had included as “voices” for purposes of its radio-television cross-ownership rule.⁶⁵ The Commission explained that it had limited “voices” to broadcast stations *in the absence* of definitive empirical studies quantifying the extent to which the various media are substitutable in local markets.⁶⁶ As in *Fox*, the court refused to accept the *absence* of critical studies as a justification for a rule limiting ownership. “This ‘wait-and-see’ approach . . . cannot be squared with [the FCC’s] statutory mandate . . . to ‘repeal or modify’ any rule that is not ‘necessary in the public interest.’”⁶⁷ Accordingly, the court remanded the rule to the Commission for further consideration, holding that the definition of “voices” in the local ownership rule was arbitrary and capricious.⁶⁸

THE FUTURE OF THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY STANDARD

In neither *Fox* nor *Sinclair* did the Court of Appeals find that rules limiting television ownership, nationally or locally, were unconstitutional on First Amendment grounds. Nor did the court find that the broad concept of “diversity” was an impermissible goal for the FCC to further with ownership rules. However, in both cases, the court ruled that the Telecommunications Act of 1996 demanded far more than broad theories about the benefits of diversity or competition to justify ownership regulations.

Just how much evidence will be enough to meet the new “necessity” standard set by Congress? That remains to be seen. In 2001 (prior to the Court of Appeals’ decisions remanding either the NTSO Rule or the local ownership rule), FCC Chairman Michael Powell recognized the difficult job the FCC

Commission’s decision to choose eight independent voices and its reasons for excluding media other than full service broadcast television stations).

⁶⁵ See *id.* at 158-159 (emphasis added) (emphasizing petitioner’s contention that Commission did not properly support its position).

⁶⁶ See *id.* at 164 (emphasis added) (explaining that Commission’s rationale for limiting voices to broadcast television involved unresolved question about extent to which non-broadcasting alternatives were accessible).

⁶⁷ *Id.* at 164 (emphasis added) (citing *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002)).

⁶⁸ See *id.* at 169 (holding that definition of voices in local ownership rule was arbitrary and capricious and remanding rule to FCC for further consideration).

would have justifying, much less crafting, ownership regulations that meet stricter court scrutiny:

“I think that the foundation of the media regulatory environment is on shaky sand. And increasingly the courts are putting a rigorous and scrutinizing eye [on this] and are asking the Commission to justify with much greater rigor *than it's been capable of*, why it's imposing these kinds of restrictions.”⁶⁹

Circuit Judge Sentelle, concurring in part and dissenting in part in *Sinclair*, suggested the kind of justification he would demand as he explained why he would have vacated, rather than simply remanded, the local ownership rule. Even though “diversity” and its effects are “elusive concepts, not easily defined,”⁷⁰ wrote Judge Sentelle, “[p]urporting to promote ‘diversity’ does not give the agency a free pass.”⁷¹

The Commission should define its diversity goal, and in doing so explain the distinctions (and interaction) between programming diversity and viewpoint diversity, rather than simply quoting boilerplate on the “elusiveness” of diversity.

Even accepting for the moment that the FCC could regulate in the name of diversity without further elucidating that goal, it must still, at a minimum, explain how its rule furthers diversity. . . . Were the goal merely to preserve competition, the FCC could readily apply the Department of Justice/Federal Trade Commission Antitrust Merger Guidelines. It declined to do so, apparently because its “diversity requirements” are a different goal than competition *per se*. . . . Therefore, the FCC must at least make some effort at showing how its Local Ownership Rule furthers diversity *in the local market*—because it is purporting to regulate to protect local diversity.

. . . . Because the Commission has failed to justify affirmatively the need for any duopoly rule, with or without an eight voices exception, I would vacate the Local

⁶⁹ Shorenstein & Fischer, *supra* note 14, at 6 (emphasis added) (quoting Chairman Powell, interviewed on “The NewsHour with Jim Lehrer,” Transcript number 7129 (Aug. 9, 2001)).

⁷⁰ *Sinclair Broadcast Group*, 284 F.3d, at 169-170 (Sentelle, J., concurring and dissenting in part).

⁷¹ *Id.* at 170.

Ownership Rule.⁷²

Reacting to the *Fox Television* and *Sinclair* decisions, the FCC has accused the court of "interpreting the congressional mandate too rigidly."⁷³ There may be merit to the FCC's claim. After all, the language of §202(h) of the Telecommunications Act of 1996 requires that the Commission biennially "determine whether any of [its ownership] rules are *necessary in the public interest*," but only requires the Commission to repeal or modify regulations "it determines to be *no longer in the public interest*."⁷⁴ Given the fluidity with which the Commission, the courts and even the Congress have used and interpreted "public interest" over the years, and the absence of either an unambiguous legislative direction as to the implications of or prior court interpretation of the phrase "necessary in the public interest," it could be argued that the D. C. Circuit is making too much of the insertion of "necessary" into one, but not both sentences of this section of the statute. As critics have suggested, the breadth and vagueness of "the public interest, convenience and necessity" may have led the courts to uphold broad FCC interpretations in some instances, but the very breadth of the standard also has invited broad court interpretations that a more precisely drafted statute might not have invited or allowed.⁷⁵ Under this theory, perhaps the Court of Appeals in *Fox* and *Sinclair* did indeed go farther toward applying the rigors of "necessity" than Congress had intended.

However, the legislative history of the Telecommunications Act of 1996 provides support for the court's insistence that "necessary in the public interest" is indeed a stricter standard than the "public interest" as it heretofore has been interpreted. Commentators have noted the "virtually universal agreement"⁷⁶ at the time of the passage of the Telecommunications Act of 1996 on the need to encourage competition and to promote marketplace solutions. "Major new legislation generally needs

⁷² *Id.* at 170-72 (emphasis added).

⁷³ See generally Bill McConnell, *Reg review is spring-loaded*, BROADCASTING & CABLE, July 15, 2002, 42 at 44.

⁷⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202 (h), 110 Stat. 56, 110 (1996) (emphasis added).

⁷⁵ See May, *supra* note 8, at 448 (illustrating elusive nature of amorphous concept known as "public interest").

⁷⁶ Byrnes, *supra* note 2, at 54.

one basic concept on which there is broad agreement, “⁷⁷ and in 1996, that concept was competition. A little like their counterparts in the Roaring Twenties, legislators in the mid-1990s were pumped up with the advances of technology and the surging stock market. The American confidence in business and consumerism that sent Calvin Coolidge to the White House and paved the way for the industry conferences that led to the passage of the Radio Act of 1927 are the lens through which “public interest, convenience and necessity” ought to have been viewed all along, some would argue. Seen through that lens, the public interest is best served by creating and promoting an economically robust and technically advanced private radio industry subject only to such regulations as are necessary to promote investment and innovation.⁷⁸ Certainly, the Congress that passed the Telecommunications Act of 1996 was controlled by a majority as convinced as their 1920’s counterparts that the public interest would in most cases be served better by free market competition than by regulatory intervention.⁷⁹

Perhaps the Communications Act of 1934 was not the reason that established communications companies had become so entrenched, and the FCC so often had become the protector of the

⁷⁷ *Id.* at 54.

⁷⁸ See generally Willard D. Rowland, *The Meaning of “the Public Interest” in Communications Policy—Part II: Its Implementation in Early Broadcast Law and Regulation*, 2 COMM. L. & POL’Y 363, 366-67 (1997) (describing President Coolidge’s statement “the business of America is business” as capturing the core spirit of America in 1920s).

⁷⁹ It should be noted that marketplace solutions have been favored not just by members of Congress but also by FCC Commissioners of both parties, both before and after the chairmanship of Mark Fowler during the Reagan administration, in which deregulation may have reached its zenith. After it found itself on the losing side of the issue in 1970’s court cases that would pave the way for competition in the telephone business, the FCC, chaired by Carter appointee and Democrat Charles Ferris, had already begun serious deregulation before Fowler came on the scene. Harold W. Furchtgott-Roth (a Republican Commissioner appointed by a Democratic President, Bill Clinton), who often dissented from the decisions of a Commission led by Democrat William Kennard, said of the art of writing good regulations: “Regulatory agencies sometimes become ambivalent about markets and at times delude themselves into believing that regulation can ‘create’ or ‘improve’ a market. Regulation rarely, if ever, does either.” See Harold W. Furchtgott-Roth, *The Art of Writing Good Regulations*, 53 FED. COMM. L. J. 1-4, 3 (2000). Commissioner Kathleen Abernathy, appointed by President George W. Bush in 2001 to a Commission headed by fellow Republican Michael Powell, echoed the new Chairman’s avowed preference for limited regulation: “[F]ully functioning markets deliver better products and services to consumers as compared to markets regulated by the government . . . government should be reluctant to intervene in the marketplace.” Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 FED. COMM. L. J. 199, 200 (2002).

status quo. However, according to one historian discussing the climate in which the Telecommunications Act of 1996 was hammered out, "if the 1934 Act was not the villain of the piece, it had become the enabler . . . bureaucratic tendencies in agencies only interfered with the ability of the market to adjust to dislocations . . . as competition began to take root in the marketplace, it became appropriate to consider whether specific regulatory practices of the past continued to be needed."⁸⁰ While the Telecommunications Act of 1996 may have specified no precise formula for just what factual record would be sufficient to justify retaining an ownership rule, the court took as its premise that the framers of the Telecommunications Act of 1996 vastly preferred the marketplace over regulation and had mandated a biennial review of existing rules as a way to weed them out. Congress had expressed a "presumption in favor of repealing or modifying the ownership rules,"⁸¹ in keeping with its "vision of a telecommunications marketplace where the flexibility and innovation of competition replaces the heavy hand of regulation."⁸² As the court put it in *Fox Television*, "[T]he mandate of §202(h) might better be likened to Farragut's order at the battle of Mobile Bay ("Damn the torpedoes! Full speed ahead.") than to the wait-and-see attitude of the Commission . . ."⁸³ Thus, concluded the court, "The statute is clear that a regulation should be retained only insofar as it is *necessary in, not merely consonant with*, the public interest."⁸⁴

The new emphasis on "necessity" as the proper standard for FCC ownership rules comes at a time when the broad character and content considerations that the FCC had undertaken in the "public interest" have been dealt repeated and significant blows. Comparative hearings have been replaced by auctions as the basis for granting new broadcast licenses, and under the terms of the Telecommunications Act of 1996, license renewal applicants have achieved substantial protection from challengers. Both these developments have significantly narrowed the

⁸⁰ Byrnes, *supra* note 2, at 53.

⁸¹ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002).

⁸² Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L. J. 251, 252 (1997).

⁸³ *Fox Television Stations v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002).

⁸⁴ *Id.* at 1050 (emphasis added).

circumstances in which the FCC might find itself tempted or compelled to interpret “public interest, convenience and necessity” too broadly as a basis for licensing decisions or in furthering desirable programming, which were presumed in an earlier period of the industry’s development to be served by now defunct comparative criteria like integration of ownership and management, ascertainment of community needs and minimum news and public affairs program percentages.

As the Court of Appeals noted in both *Fox*⁸⁵ and *Sinclair*⁸⁶, the Supreme Court has not yet abandoned the scarcity rationale: “[T]he Supreme Court has already heard the empirical case against that rationale and still declined to question its continuing validity.”⁸⁷ Judge Sentelle, who would have vacated rather than remanded the local ownership rule in *Sinclair*, expressed his thoughts on the scarcity rationale:

While there may be merit to petitioner’s argument that the “diversity” rationale is essentially content-based, and that therefore heightened scrutiny should be implicated, that argument has been rejected . . . Therefore, the FCC can effectively prescribe a limit on the *amount* of speech a person may engage in through broadcast media because a person is prohibited from engaging in more speech (through a second station) if she owns (or programs more than 15% of the content of) another station. Perhaps with now-Chairman Powell’s announcement that the “time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today’s communications marketplace,” the Supreme Court will take notice . . . That being said, this Court is “stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lion* no longer rules the broadcast jungle . . .”⁸⁸

Therefore, the Court of Appeals would not (or could not) throw out the scarcity rationale; “even if we agree that it no longer makes sense . . . it is not the province of this court to determine

⁸⁵ *Id.* at 1046.

⁸⁶ *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

⁸⁷ *Fox Television*, 280 F.3d 1046 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638 (1994)); *see also Sinclair*, 284 F.3d at 161 (stating Supreme Court has refused to abandon scarcity rationale).

⁸⁸ *Fox Television*, 284 F.3d at 172.

when a prior decision of the Supreme Court has outlived its usefulness.”⁸⁹ Nonetheless, questions abound as to the continued vitality of the scarcity rationale as a theoretical basis for regulating broadcast content or structure. Most cities have but one daily newspaper and dozens of broadcast stations and other electronic media.

In the public utility law tradition from which “public interest, convenience and necessity” arose, the burden of showing “necessity” was on the applicant who wanted to start a new service. This was based on a presumption against competition. In the new regime created by the Telecommunications Act of 1996, that old concept of necessity has been turned on its head—competition is presumed to be good, and regulation allowed only as a “necessity” where it is shown that the marketplace cannot produce desired results. To survive the D.C. Circuit’s scrutiny under the 1996 statute, ownership rules will have to be shown to be “necessary” in the public interest, not just “consonant” with the public interest. Therefore, in the aftermath of *Fox* and *Sinclair*, “necessity,” rather than “public interest,” may well become the modern standard under which future FCC rules will be judged. The Commission itself acknowledged this to be the court’s interpretation of the standard set by the Telecommunications Act of 1996 in its comprehensive rulemaking re-examining media concentration and ownership.⁹⁰ However, the Commission questioned whether the court had captured the intent of Congress or had elevated the bar of necessity well above the level Congress had meant to set in section 202(h) of the 1996 statute and sought comment on what the standard should be.⁹¹ How the FCC and ultimately the courts define this new standard will be closely watched to see if a new regulatory paradigm in fact emerges.

Among the biggest ironies is that for years it was broadcasters who sought to free themselves from the burdens of regulation. The NAB, one of the most powerful lobbying groups in the

⁸⁹ *Fox Television*, 284 F.3d. at 1046 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

⁹⁰ FCC 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 67 Fed. Reg. 65,751, ¶ 18 (Proposed Sept. 23, 2002) (to be codified at 47 C.F.R. pt. 73).

⁹¹ *Id.*

country, over the course of several decades successfully championed the notion of deregulation, or, better yet, unregulation. However, when the balance of power in the industry shifted to the networks from independently owned affiliates, the NAB found itself caught in the switches. Rather than sit on the sidelines of a major industry battle, to protect the majority of its members, the NAB sought to preserve structural rules such as the ownership caps that the networks sought to eliminate. Having argued for so long against regulations that strangled the industry, broadcasters found the court unreceptive to their arguments that ownership regulations were now “necessary” to protect the public interest. This new mantra will inevitably lead us toward a broader definition of market where competitors are driven by the marketplace to capture eyeballs through whatever technological means are available, instead of the manner in which facilities are licensed and regulated by the government. The single signal of a non-subscriber-based, over-the-air commercial television station may even be seen to be at such a competitive disadvantage in a multi-channel video universe that the justification for structural limitations on the industry will disappear entirely. Ironically, broadcasters may finally emerge victorious over the FCC’s regulatory framework. But the victory will be Pyrrhic if the nation’s broadcasters find themselves unable to hold onto their share of a fragmented market or, worse yet, are swallowed by an old nemesis like cable TV.

