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THE FCC AND MEDIA OWNERSHIP: THE LOSS OF THE PUBLIC INTEREST STANDARD

BYRON L. DORGAN*

Justice Oliver Wendell Holmes once wrote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹

While Justice Holmes's jurisprudence has generally been credited with being critical to First Amendment precedent in our country,² this quote also serves to illustrate the importance of media diversity, which is so fundamentally connected to First Amendment principles. Without diversity in broadcasting, the whole concept of a marketplace of ideas would be defeated by the controlling interests of a few.

Because media diversity necessarily first depends on who it is that controls the airwaves, the government has been placed in the role of maintaining this diversity. As the allocator of broadcast licenses, the government is the gatekeeper of the controlling interests. Hence, in the interest of preserving the First Amendment goals of diversity of voices and points of view on our nation's airwaves, the government has historically imposed limits on local and national media ownership.

I. PUBLIC INTEREST AS THE GUIDING PRINCIPLE

The principal government guidance to license allocation is contained in the 1934 Communications Act. In that Act, Congress directs the Federal Communications Commission (FCC)

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1. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

2. See, e.g., Jim Mitchell, *Justice Holmes and Free Speech in a Time of Terror*, ARIZ. DAILY STAR, Sept. 18, 2001, at <http://www.u.arizona.edu/~mitchell/holmes.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

numerous times to serve the “public interest, convenience, and necessity” in issuing licenses.³ As a result, for decades, the FCC, and its predecessor agency the Federal Radio Commission, have required broadcasters to be responsive to local concerns and to represent a diversity of views and opinions.

Although the FCC has done away with the fairness doctrine, which required radio and television broadcasters to allow fair coverage to each side of a public issue, a Supreme Court case on that doctrine provides a valuable analysis of the historical importance of the public interest standard in relation to broadcasters.

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court recognized the finite frequencies available to the FCC to allocate to broadcasters and noted that the government must be allowed to require a licensee to “conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.”⁴

The Court not only found no conflict between such regulation and the First Amendment; in fact, it noted that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”⁵

The Court affirmed that government regulation may be necessary in order to ensure that there is a more open discussion of issues and a more informed public. In fact, the *Red Lion* Court noted that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”⁶

Because the ultimate goal is to serve the public interest, broadcasters are merely “public trustees,” or as the Supreme Court referred to them in *Red Lion*, “fiduciaries.” This tenet was set forth as early as the 1930s by the Federal Radio Commission, which stated that “the station itself must be operated as if owned by the public It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: ‘Manage this station in our interest.’”⁷

3. See Communications Act of 1934, 47 U.S.C. §§ 151–161 (2000).

4. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

5. *Id.* at 390.

6. *Id.*

7. ADVISORY COMM. ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE, FINAL REPORT OF THE ADVISORY COMM. ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 19 (Comm. Print 1998) [hereinafter CHARTING THE DIGITAL BROADCASTING FUTURE] (quoting *In re Schaeffer Radio Co.* (FRC 1930),

For a long time, the FCC recognized the importance of its public interest obligations in overseeing broadcasters, and its regulations reflected these goals. The FCC required broadcasters to take specific steps to demonstrate responsiveness to local concerns and to represent a diversity of views and opinions.⁸ This was in keeping with the principle that a broadcaster was merely licensed to use the airwaves, as the airways belong to the public.⁹

For example, the FCC at one point required license applicants to “show what the applicant has done to ascertain the problems, needs and interests of the residents of his community of license and other areas he undertakes to serve . . . and what broadcast matter he proposes to meet those problems, needs and interests, as evaluated.”¹⁰ These “ascertainment requirements” included consulting with leaders of the significant groups in the community to be served and with members of the general public.¹¹

Other rules included requiring broadcasters to maintain program logs, limit advertising time, and air certain amounts of public affairs programming.¹² These obligations required broadcasters to be in touch with their communities and monitor content in order to ensure fulfillment of the public interest standard.

In addition to these rules for acquiring or maintaining a license, the FCC also enacted limits on ownership by a licensee. The FCC “has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”¹³ As a result, the FCC acted to limit a single entity in a community from holding more than one broadcast license and limited common ownership both within a broadcast service and between broadcast services.¹⁴

quoted in John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5, 14 (1950)), available at <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy); see also *Red Lion*, 395 U.S. at 380.

8. CHARTING THE DIGITAL BROADCASTING FUTURE, *supra* note 7, at 33.

9. *Id.* at 1; see 47 U.S.C. § 301 (1997); see generally *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1939).

10. In the Matter of Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms, 27 F.C.C.2d 650, app. B, question 3 (1971).

11. *Id.* at question 4.

12. CHARTING THE DIGITAL BROADCASTING FUTURE, *supra* note 7, at 24.

13. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 383 (3d. Cir. 2004) (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978)).

14. *Id.*

II. A SHIFT IN POLICY

Over the years, however, the FCC's vision of the public interest standard shifted away from a regulatory approach to a more hands-off style relying instead on marketplace competition to achieve its public interest goals. The FCC eliminated the long-standing rules that had served localism and diversity, such as the ascertainment standards and the program log requirements.¹⁵ Instead, broadcasters and the marketplace took on the role of enforcing the general responsibility to serve the local community and the public interest.

Coupled with this troubling shift away from a strict enforcement of the FCC's public interest standard, an even more striking departure in the area of the media concentration rules occurred, which has done great harm to the preservation of the public interest standard. Beginning in the 1980s, the FCC began to significantly relax ownership limits, starting with waivers of existing limits.¹⁶ For example, in 1984, the FCC revised the "seven station rule," a television ownership limit that had been in place for thirty years, raising the permitted common ownership to twelve television broadcast stations.¹⁷

This trend was exacerbated by the 1996 Telecommunications Act (the 1996 Act), which extended the length of broadcast licenses from five to eight years, raised the national television audience reach cap, and eased radio limitations.¹⁸ In addition, Section 202(h) of the 1996 Act ordered the FCC to conduct a biennial review of its existing broadcast ownership rules and "to repeal or modify any regulation" determined "to no longer be in the public interest."¹⁹

It is important to note that Section 202(h) does not direct the FCC to relax its ownership rules; however, subsequent events have shown that the FCC majority interpreted Section 202(h) in this fashion.²⁰

15. CHARTING THE DIGITAL BROADCASTING FUTURE, *supra* note 7, at 24.

16. *Id.*

17. See Multiple Ownership of AM, FM, TV, and Cable TV Stations, 49 Fed. Reg. 19,482 (May 8, 1984) (codified at 47 C.F.R. § 73.3555 (1984)).

18. CHARTING THE DIGITAL BROADCASTING FUTURE, *supra* note 7, at 24.

19. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 129 (1996) (codified at 47 U.S.C. § 151 (2000)).

20. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 394-95 (3d. Cir. 2004).

III. EXISTING RULES AND MARKETPLACE AT THE TIME OF THE FCC MEDIA OWNERSHIP RULES REVIEW

As a result of Section 202(h), the FCC began a review of the media ownership rules that were in place, and after several court remands of its proposed revisions, began its most recent rules review in September 2002, resulting in its Report and Order issued on June 2, 2003 (“June 2nd order”).²¹

In this third review of media ownership rules, there were six rules under review. These included two national and four local rules: (1) the national television ownership cap, which was set at thirty-five percent; (2) the dual television network rule, which bars a company in a market from owning more than one of the top four broadcast networks of ABC, CBS, Fox, or NBC; (3) the newspaper/broadcast cross-ownership rule, which prohibits a company from owning both a daily newspaper and a local television or radio station in the same market; (4) the radio/television cross-ownership rule, which limits the number of television stations and radio stations a company can own in a market; (5) the local television multiple ownership rule (known as the “TV duopoly rule”), which limits the number of local television stations a company can own in a market; and (6) the local radio ownership rule, limiting the number of radio stations a company can own in a market.²²

Section 202(h) instructs the FCC to determine whether, as a result of competition, the ownership rules should be modified or repealed.²³ Thus, the state of competition in the marketplace is a key factor in assessing whether changes in the ownership rules are necessary. The FCC’s review of its rules, commencing in September 2002 and completed in the summer of 2003, took place in the context of a marketplace that had seen increasing consolidation, rather than increased competition.

In fact, since the 1996 Act, consolidation in the media industry has been overwhelming. Comcast acquired AT&T’s cable properties, AOL acquired Time Warner, Viacom acquired CBS, GE acquired Vivendi Universal’s television and film assets, and

21. Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

22. Online News Hour, *Merging Media: How Relaxing FCC Ownership Rules Has Affected the Media Business*, at <http://www.pbs.org/newshour/media/conglomeration/fcc2.html> (last visited Apr. 19, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

23. Telecommunications Act of 1996 § 202.

News Corporation acquired DirecTV.²⁴ Comcast also partnered with Sony Corporation most recently in agreeing to acquire Metro-Goldwyn-Mayer Inc., one of five remaining U.S. independent film studios.²⁵

The result has been that the companies that produce local and national news are huge conglomerates with distribution, Internet, newspaper, television, and radio assets. All five owners of broadcast networks (CBS, ABC, Fox, Time Warner (WB), and NBC) all own film production, film libraries, television production, and cable networks in addition to their broadcast networks.²⁶ These media giants' control over the public audience has been solid. Despite the promise for more diversity from new sources such as the Internet and satellite, these media companies control nearly the same prime time audience shares as the top three networks did forty years ago.²⁷

These five firms and a sixth close ally account for almost three-quarters of the television audience, programming expenditures and writing budgets of the entire industry, and own over four-fifths of the prime time shows.²⁸ This consolidation has also led to a decrease in independent programming. In 1992, only fifteen percent of new series were produced by a network-controlled company, in 2002 this percentage rose to seventy-seven percent.²⁹

In 2003, an episode of *Nightline* looking into this decrease in diversity quoted *Los Angeles Times* media critic Howard Rosenberg as saying he has "already seen the future, in Los Angeles. There, three of the networks already own at least two TV stations each. On the Viacom stations, you can watch the same news reporter on the same night, on two different channels—and the same investigative reporter—and the same weather man."³⁰

Massive radio consolidation has occurred as well. For example, ten parent companies control two-thirds of listeners and

24. Joe Lauria, *Comcast Joins Consolidation Bandwagon*, THE BUSINESS, Feb. 29, 2004, at 9.

25. Britt Erica Tunik, *Stubborn Sony Wins MGM, Finally: A \$150 Million Nonrefundable Deposit Seals a Three-Year Saga*, INVESTMENT DEALERS DIGEST, Jan. 17, 2005, at 52.

26. *Media Ownership: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 108th Cong. (2003) (statement of Mark Cooper, President, Consumer Federation of America).

27. *Media Ownership: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 108th Cong. (2003) (statement of Gene Kimmelman, Consumers Union).

28. *Id.*

29. *Id.*

30. *Nightline* (ABC television broadcast, June 2, 2003).

radio revenues across the nation, with the largest company owning 1,200 stations nationwide. Prior to 1996, the largest nationwide radio station only owned sixty-five stations each. This consolidation has also resulted in a decrease in local content and diversity of ownership in radio.³¹

The impact of massive media consolidation has had real world consequences, including in my own state of North Dakota. In January 2002, in Minot, North Dakota, a train carrying anhydrous ammonia derailed at 1:39 a.m. and spewed a cloud of anhydrous ammonia over the entire town. Unfortunately, the Emergency Alert System (EAS) that authorities would generally use to put emergency information on the air at the local radio station was not engaged properly, and the police could not reach anyone at the lead radio station by phone. Instead, the radio station continued to play music and the emergency bulletins were delayed while the station staff was located.³²

The failure of the EAS system was a critical factor in the failure to immediately notify the town over the radio, but media consolidation was a contributing factor as well. Of the seven commercial radio stations in Minot, six were owned by one media entity, which had all of its stations on auto-pilot (the seventh was a religious station).³³ While Clear Channel contends that it had staff working that night at the lead radio station,³⁴ common ownership of the overwhelming majority of the commercial radio stations undoubtedly had an impact on the public safety agency's ability to publicize information.

The recent focus on the rise in indecency in broadcasting is also linked to rising media consolidation. The largest owners of television and radio broadcast holdings have received the greatest number of indecency complaints and the largest fines, and over eighty percent of the fines proposed by the FCC for indecent broadcasts were against stations owned by two of the top three radio companies.³⁵ The top radio company alone accounts for over two-thirds of the fines proposed by the FCC since 2000

31. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 432 (3d. Cir. 2004).

32. See Jennifer B. Lee, *On Minot, N.D., Radio, A Single Corporate Voice*, N.Y. TIMES, Mar. 31, 2003, at C1.

33. *Id.*

34. See Clear Channel Communications, *Know the Facts*, http://www.clearchannel.com/Corporate/corporate_ktf.aspx (last visited Apr. 2, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

35. *The Broadcast Decency Enforcement Act of 2004: Hearing Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 108th Cong. 108 (2004) (statement of Michael J. Copps, Comm'r, FCC).

and two of the largest fines proposed by the FCC were against the largest radio companies.³⁶

In 2004, the FCC received over 500,000 indecency complaints in response to the Superbowl Halftime show aired on CBS and produced by MTV, both of which are owned by Viacom.³⁷ This is the largest number of complaints ever received by the FCC for a single broadcast. In addition, the number of indecency complaints increased from 111 in 2000 to 240,350 in 2003.³⁸ In 2004, including the complaints for the Superbowl, the FCC received an astounding number of 1,405,419 complaints.³⁹

Media consolidation and the resulting disassociation from localism have also contributed to the rising indecency in broadcasting. Media conglomerates do not consider or reflect local community standards. The FCC has no record of a television station owned by one of the big four networks pre-empting national programming for failing to meet community standards. However, non-network-owned stations have often rejected national network programming found to be indecent and offensive to local community standards.⁴⁰ In addition, a letter from a station manager of a locally-owned and operated station to a viewer stated that programming decisions are made by network headquarters and not by the locally-owned and operated television station management.⁴¹ The Parents Television Council found that the "losers" of network ownership "are the local communities whose standards of decency are being ignored."⁴²

36. See Frank Ahrens, *Radio Giant in Record Indecency Settlement*, WASH. POST, June 9, 2004, at A1; *FCC Settlement Clears Clear Channel of All Indecency Fines*, COMM. DAILY, June 10, 2004 [hereinafter *FCC Settlement*].

37. S. REP. NO. 108-253, at 5 (2004); Chris Baker, *TV Complaints to FCC Soar as Parents Lead the Way*, WASH. TIMES, May 24, 2004, at A1.

38. Letter from Michael K. Powell, Chairman of FCC, to John D. Dingell, Ranking Member on House Committee on Energy and Commerce 8 (Mar. 2, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

39. See FCC, *Indecency Complaints and NALs: 1993-2004* (Mar. 4, 2005), at <http://www.fcc.gov/eb/broadcast/ichart.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

40. See *Media Ownership: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 108th Cong. (2003) (statement of Jim Goodmon, President and CEO, Capitol Broadcasting Co.), available at http://commerce.senate.gov/hearings/tcstimony.cfm?id=758&wit_id=2050 (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

41. Letter from Cheryl MacDonald, Vice President/General Manager WDAF-TV/FOX 4, to Tim Maupin, Chapter Director, Kansas City Metro Chapter Parents Television Council (July 25, 2003), available at <http://www.parentstv.org/ptc/fcc/2003/lettertopowell.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

42. *Public Interest and Localism: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 108th Cong. (2003) (statement of L. Brent Bozell, III,

Lastly, even recent elections have shown the impact of media consolidation and its negative impact on the public interest. A study of election news for the seven weeks up to the 2002 elections found that large station owners carried a lower percentage of local campaign news than the national average, while the small and mid-sized owners carried a higher percentage of local stories.⁴³

In 2004, the top three networks showed a mere three hours each of the Democratic Convention and the Republican Convention. While PBS and cable channels carried more coverage, the networks showed only an hour a night from 10 p.m. until 11 p.m., and actually skipped a night of coverage for each convention, choosing not to show any coverage of Tuesday night's Democratic Convention or Monday night's Republican Convention.⁴⁴

The Online News Hour reported on the decreasing convention coverage in July of 2000. It reported the sad decline over the years. In 1976, the three major networks provided more than fifty hours of convention coverage. By 1996, that coverage had dropped to twelve hours, and by my calculations, this year we stand at a grand total of six.⁴⁵

It is clear that over the years, with rising media consolidation and government relaxation of licensing and ownership rules, the public interest responsibilities of broadcasters have fallen to the wayside.

IV. THE FCC RULES REVIEW AND JUNE 2, 2003 ORDER

In this context of rising consolidation and increased indecency on the airwaves, the FCC conducted its review of the ownership rules. It is disturbing that although this review found that over two million comments were filed opposing relaxation of the ownership rules, the FCC held only one limited public hearing. There was strong objection at the Commissioner level for the fail-

President, Media Research Center, Parents Television Council, and the Conservative Communications Center), available at http://commerce.senate.gov/hearings/testimony.cfm?id=874&wit_id=2427 (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

43. See LEAR CTR. LOCAL NEWS ARCHIVE, LOCAL TV NEWS COVERAGE OF THE 2002 GENERAL ELECTION 19-20 (2003), available at <http://www.localnewsarchive.org/pdf/LocalTV2002.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

44. David Bauder, *Fox News Channel's Triumph Marks Interesting Week of Convention Coverage*, ASSOCIATED PRESS, Sept. 5, 2004.

45. Online News Hour, *Unconventional Coverage* (July 31, 2000) available at http://www.pbs.org/newshour/bb/media/july-dec00/convention_7-31.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

ure to consult with the public, given the overwhelming impact that revision of the rules could have on the public interest.⁴⁶

Congress was also concerned with the FCC majority's process as well. Senator Snowe and I sent a letter with thirteen other Senate colleagues in April 2003 to then Chairman Powell, noting our disappointment with the FCC's announcement that it would be releasing its rules in final form on June 2, 2003, without any opportunity for Congress or the public to review them beforehand. The letter expressed concern that it would be "virtually impossible to serve the public interest in this extremely important and highly complex proceeding without letting the public know about and comment on the changes" that the FCC intended to make.

In its June 2nd Order, the FCC issued its new broadcast ownership rules. These rules relaxed the local television multiple ownership limit so that in the largest markets a company could own three television stations. The FCC raised the national television ownership cap to forty-five percent and eliminated the prior ban on newspaper/broadcast cross-ownership and combined the previous newspaper/broadcast and radio/television cross-ownership rules into looser cross-media limits. The rules also redefined how local radio markets would be calculated. The FCC developed a "Diversity Index," to determine how many media entities to allow in a market.⁴⁷

The result of these new rules is outrageous as in the largest markets one company could own a newspaper, three television stations, and eight radio stations. In addition, under the Diversity Index created by the FCC, public stations count the same no matter where they are. Incredibly, Minot, North Dakota, would be treated as though it were the same size as Baltimore, San Diego, and New Orleans.⁴⁸

This was, simply put, a cave-in to corporate interests by an agency charged with protecting the public interest. Instead of taking steps to enhance diversity, competition, and localism, the new rules promote concentration and consolidation. Aside from departing from its public interest obligations, the FCC's new relaxed rules were even more inexplicable given the climate in which they occurred: rampant consolidation and a decline in quality and diverse programming.

46. See *FCC Settlement*, *supra* note 36; *Prometheus Radio Project v. FCC*, 373 F.3d 372, 386 (3d. Cir. 2004).

47. See 47 C.F.R. pt. 73.

48. See *Prometheus Radio*, 373 F.3d at 408.

The FCC's actions resulted in an immediate and significant outcry. Public interest and consumer advocacy groups filed into court to stem the deregulation, while media interests contested the rules on the basis that they believed the rules did not go far enough. The Third Circuit Court of Appeals stayed the rules on September 3, 2003, pending review of the case.

During the pendency of the case, Congress took significant steps to disapprove the action of the FCC, further illustrating that the FCC's action had totally contravened statutory intent. Both the House and the Senate passed legislation to lower the national television cap back to thirty-five percent from the FCC's increase to forty-five percent. In addition, by a vote of 55-40 the Senate passed S.J. Res. 17, my resolution of disapproval to negate the FCC's action. Unfortunately, due to opposition by House leadership, the resolution of disapproval was not taken up in the House, despite widespread support, and subsequent amendments to other legislation to strike the FCC's rules have also met resistance by the House Republican majority.

On June 24, 2004, however, the Court of Appeals for the Third Circuit acted decisively in remanding a majority of the new FCC rules, resulting in a victory for the public interest and a defeat for media consolidation. The court specifically noted that it did not interpret Section 202(h) of the 1996 Telecommunications Act to mean that the public interest analysis required a loosening of the ownership rules. In fact, the court noted that the Commission had equal authority to implement more stringent regulations.⁴⁹

While the court affirmed some of the Commission's Order, it found that for the most part the rules did not meet with the FCC's public interest obligations, and for that reason remanded the rules back to the FCC. The court concluded:

[W]e have identified several provisions in which the Commission falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets.⁵⁰

49. *Id.*

50. *Id.* at 435.

The court rejected the FCC's Diversity Index that wholly disregarded community and localism in favor of generalized market weights, saying that "[a] Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality."⁵¹

The court also noted the lack of public notice prior to the development of the new rules and advised that the FCC make its rules on remand open to public notice and comment.⁵²

CONCLUSION

The Third Circuit's ruling and continued stay of the FCC's new rules should be a wake-up call to the majority at the FCC. The agency now has a chance to go back to its roots and its fundamental purpose as set forth by Congress: to act in the public interest. The public is not served by ever growing media behemoths that drown out local or varied voices and impose uniform standards on diverse communities. The fundamental principles of the First Amendment and of fostering discourse can only be achieved when limits on media ownership are imposed with the public interest, and not corporate favors, as a guide. The American public deserves better from the FCC. I hope that this time the FCC will take its responsibility to heart as the agency reviews its action pursuant to the court's remand.

51. *Id.* at 408.

52. *Id.* at 411-12.