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The FCC's Barrier Study: Back to the 'Future of Media' and Media Ownership?

by

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The FCC recently hosted a public meeting at its Washington headquarters to discuss a draft report concerning the critical information needs of the American public.¹ The announcement of the meeting aroused my curiosity because the draft report sounded a lot like the “Future of Media Report” the Commission had published in June of 2011, albeit with a new twist.² When the Commission launched the Future of Media project in early 2010, I questioned the wisdom of the undertaking, which initially seemed destined to both exceed the Commission’s jurisdiction and run afoul of the First Amendment.

When the Future of Media Report was released, however, it exhibited a sufficient amount of restraint to assuage the qualms of Future of Media skeptics.³ Given the recent public meeting’s seemingly similar focus, I was eager to learn what the new draft report might contain. Although the report’s underlying research effort seemed quite impressive, I was somewhat disappointed by what I found.

Despite their similarity, the two reports differ in several significant respects. For one thing, each report came about for a different reason. While the findings of the Knight Commission on Information Needs of Communities in a Democracy and other “blue ribbon reports” appear to have inspired the Future of Media project,⁴ the more recent draft report resulted from Section 257 of the Communications Act, which directs the Commission to periodically review and report to Congress on “the existence and

proposed elimination of barriers to entry in the telecommunications and information services market.”⁵ Therefore, the research underlying the draft report became known as the “Barrier Study.”

The respective organizational structures of the Future of Media project and the Barrier Study also differed. The Future of Media project was overseen by the FCC Chairman’s Office, and although experts from outside the Commission participated in the project’s informal working group, the vast majority of those involved in putting the report together came from within the Commission.⁶ For the Barrier Study, however, the FCC’s Office of Communications Business Opportunities – which serves as the principal advisor to the Chairman and the Commissioners on issues affecting small, women-owned, and minority-owned communications businesses – and the FCC Media Bureau jointly issued a request for solicitation seeking independent research proposals from entities outside the Commission.⁷ That process resulted in an award of a contract to the University of Southern California’s Annenberg School for Communication & Journalism (“USC Annenberg”), which assembled the Communication Policy Research Network, a 30-member national multi-disciplinary team of social scientists, legal scholars, journalists, and communications experts, to conduct the study.⁸

There were also noteworthy differences between the two reports’ respective information-gathering processes. In addition to reviewing existing research, the Future of Media working group held several public workshops, conducted over 600 interviews of individuals representing virtually every conceivable media stakeholder group, and reviewed and analyzed over 1000 written comments from the public.⁹ The effort of the Barrier Study research team consisted exclusively of a literature review “summarizing the full range of research on the subject of how Americans meet their critical information needs, how the media eco-system operates to address critical information needs, and what barriers exist in providing content and services to address critical information needs.”¹⁰

At the Commission’s public meeting, USC Annenberg’s Dean Ernest J. Wilson III and key members of the research team presented a summary of the Barrier Study, after which a panel of scholars responded. A webcast of the public meeting, a power point presentation titled “Critical Information Needs of the American Public: Definition, Evaluation, Barriers,” and a draft executive summary of the report reflect an effort that was quite admirable in a several respects.¹¹ The FCC’s decision to commission a critical review of existing research seemed more useful and efficient than conducting more surveys and interviews, which might either have overlooked or merely duplicated what the Commission’s Future of Media working group, the Knight Foundation, or other well-regarded research organizations may already have discovered. In fact, the USC Annenberg’s research team generated a collection of more than 1000 relevant existing peer-reviewed sources, which it narrowed down to just under 500 for inclusion in a final annotated bibliography. Moreover, relying on an outside research organization to undertake the review undoubtedly had the added benefit of enabling Commission staff to continue focusing on other important tasks for which their expertise and experience better suited them.

Its merits notwithstanding, the Barrier Study report appears to have two problem areas. The first is the “new twist” mentioned at the beginning of this *Perspectives*. Specifically, the Barrier Study’s link to Section 257 of the Communications Act may involve the Commission in media ownership issues that have proven challenging in the past and already appear to be generating some controversy.¹² On the questions of entry barriers and ownership diversity, the Commission will need to proceed with caution.

In addition, neither the summary of the draft report nor the ensuing discussion of the Barrier Study had much to say regarding a very important resource for informing the public. As is too often the case, inquiries such as the Future of Media project and the Barrier Study tend to proceed from an assumption that there is a problem only the *government* can, should, or must solve. This assumption is misplaced.

In remarks about the Future of Media Report at the Columbia School of Journalism in June of 2011, Chairman Genachowski was quick to acknowledge how new technologies are creating myriad opportunities for the public to obtain essential information.¹³ Certainly the Internet, as now enhanced by wireless broadband, is enabling an enormous variety of information to flow more rapidly, widely, plentifully, and affordably than ever before. Moreover, the *absence* of government regulatory intervention is well recognized as a major factor in the Internet’s remarkable development.

As an article by Professor Dennis L. Weisman and Professor and former FCC Commissioner Glen O. Robinson reminds us, “Even the FCC previously has been mindful of the benefits of an unregulated Internet.”¹⁴ The article also warns that long-term harm can result from “establishing a precedent for regulatory intervention in an area that has traditionally been largely outside the regulatory arena.”¹⁵

When the final report from the Barrier Study comes out, I hope that it will acknowledge the power of technology and human ingenuity, operating within a free market, to meet the information needs of the public. I also hope that when policymakers and regulators consider the Barrier Study’s findings, they will be mindful of the possibility that heavy-handed governmental intervention in the marketplace can itself become the barrier preventing information from reaching those who need it.

Finally, if Congress would reduce the number of reports the Commission is required to provide and the Commission would spend more time allocating spectrum for wireless broadband and less on launching new studies, that would be helpful, too.

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¹ “Public Discussion of Literature Review of Research on Critical Information Needs and Market Entry Barriers” (BO Docket No. 12-30), Public Notice DA 12-395 (rel. June 13, 2012).

² Steven Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities: The changing media landscape in the broadband age* (June 21, 2011) [hereinafter “Future of Media Report”].

³ See, e.g., Patrick Maines, *Dodging a Bullet: The FCC’s Report on the Future of Media, Media and Communications Policy*, June 13, 2011, www.mediacomppolicy.org/2011/06/articles/fcc-1/dodging-a-bullet-the-fccs-report (noting the Future of Media Report’s level-headed analysis and acknowledgement of the constitutional limits on governmental involvement in media).

⁴ Future of Media Report, *supra* note 2, at 8.

⁵ 47 U.S.C. §257 (c).

⁶ Of the 114 individuals listed in the Future of Media Report as working group members and significant contributors, 97 came from within the FCC and 17 came from outside the Commission. See Future of Media Report, *supra* note 2, at 362-65.

⁷ See “The Office of Communications Business Opportunities and the Media Bureau Announce the Release of a Request for Quotation for Study Examining the Critical Information Needs of the American Public” (OCBO Docket No. 12-30), Public Notice DA 12-156 (rel. February 6, 2-012).

⁸ See “OCBO Announces Award of Contract for Literature Review” (BO Docket No. 12-30), Public Notice DA 12-585 (rel. April 13, 2012). See also Dean Wilson, Weil and PH.D. Student Ognyanova Present Public’s Critical Information Needs to FCC,” USC ANNENBERG NEWS (June 26, 2012) <http://annenberg.usc.edu/News%20and%20Events/News/120626FCC.aspx> (last visited July 31, 2012) (describing the Communication Policy Research Network.) The Federal Budget Office lists the Contract Award Dollar Amount as \$70,855.00. See Barrier Studies Solicitation Number: FCC12Q0009 at <https://www.fbo.gov/index?s=opportunity&mode=form&tab=Core&id=860b018abf99f0> (last visited August 1, 2012).

⁹ Future of Media Report, *supra* note 2, at 362.

¹⁰ See FCC Barrier Studies, Solicitation Number: FCC 12Q0009, at 4-5, <https://www.fbo.gov/?tab=documents&tabmode=form&subtab=core&tabid=a776834bec01fbfda b1f64da098d0036>.

¹¹ See webcast at <http://www.fcc.gov/events/public-discussion-literature-review-research-critical-needs>; presentation power point at http://annenberg.usc.edu/News%20and%20Events/News/~media/FCC_062612.ashx; and draft executive summary at http://transition.fcc.gov/bureaus/ocbo/ASCJ_CPRN_FCCLitReviewSum061712.pdf.

¹² See, e.g., Margie Del Castillo, “Almost No Discussion of Women/POC Media Ownership at FCC Hearing on Media Market Entry Barriers,” June 27, 2012, <http://www.womensmediacenter.com/blog/entry/discussion-women-poc-media-ownership-fcc-hearing-media-market-entry-barrier> (visited August 1, 2011).

¹³ Julius Genachowski, Chairman, Fed. Communication Commission, Remarks on Information Needs of Communities at the Columbia School of Journalism, New York, NY, June 10, 2011 (text available at <http://www.fcc/headlines-archive/2011>).

¹⁴ Dennis L. Weisman and Glen O. Robinson, *Lessons for Modern Regulators from Hippocrates, Schumpeter and Kahn*, PERSPECTIVES FROM FSF SCHOLARS Vol. 6(2) (Jan.12, 2011), at 13, http://www.freestatefoundation.org/images/Lessons_for_Modern_Regulators_from_Hippocrates,_Schumpeter_and_Kahn.pdf.

¹⁵ *Id.*