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The Future of Media Report: When Future Success Requires Abandoning Past Regulatory Failures

by

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At the National Association of Broadcasters' annual convention on May 9, 1961, FCC Chairman Newton Minow gave a provocative speech branding the popular medium of television as a "vast wasteland."¹ The epithet quickly became a fixture in the media lexicon and has remained in frequent use by media critics, legal scholars, jurists, and regulators over the past 50 years. At a recent Vast Wasteland Speech retrospective featuring a conversation with Minow and current FCC Chairman Julius Genachowski, the moderator asked both chairmen if they found the label still applicable to today's media landscape.² Minow responded in the negative, asserting that the famous speech had accomplished its purpose of expanding programming choices. He pointed out that for a television viewer today, "[n]o matter what your interest, you have a channel."³ Genachowski, too, stopped short of calling the current media landscape a wasteland but emphasized that there is still room for improvement.⁴

Just a month after the Vast Wasteland Speech anniversary, the Commission released the concluding staff report from a project originally presented as a study of the future of media.⁵ Although the Future of Media Report also recognizes the many programming choices available in today's media marketplace, it echoes Chairman Genachowski's

assessment on the need for improvement and provides recommendations for making media better.

In an FSF *Perspectives* published when the FCC's proposed Future of Media proceeding was getting underway, I voiced some concerns about the scope of the endeavor, its apparent duplication of efforts taking place elsewhere in government and the private sector, its likely diversion of resources from other important Commission responsibilities, and its potential contravention of First Amendment principles.⁶ Although the Report disappointed some,⁷ it also met with a collective sigh of relief from those who shared my initial reservations.⁷

Demonstrating what a *Wall Street Journal* editorial deemed "a rare display of bureaucratic modesty,"⁸ the Future of Media Report has a narrower focus than the original public notice suggested. It also takes a less aggressive regulatory approach than expected, for example, by advocating the reduction of burdensome paperwork and unnecessary rules to which broadcasters are now subject.⁹ The Report's warning against re-instituting the Fairness Doctrine offered welcome reassurance as to the Report's First Amendment intentions,¹⁰ and the following two sentences certainly provided one of the most heartening passages in the entire Report: "In crafting recommendations, this report started with the overriding premise that the First Amendment circumscribes the role government can play in improving local news. Beyond that, sound policy would recognize that government is simply not the main player in this drama."¹¹

Despite the Report's encouraging restraint, some disturbing ideas nevertheless lurk within its pages. In particular, recommendations concerning commercial leased access on cable television caught my attention. The leased access rules no doubt are among the more obscure provisions of the federal media regulations, with their principal claim to fame (if any) rooted in a long, troubled, and mostly unsuccessful history and an equally problematic present. It is quite surprising, then, that a report devoted to improving the media finds resuscitation of this particular regulatory construct worthy of further consideration.

Leased Access's Dismal Regulatory Past

The FCC has tried in vain to make leased access a viable business model for cable television programming for more than four decades. Although the story is far too complicated to go into great depth in this *Perspectives piece*, even a brief summary of the course of events over the past more than 40 years conveys the futility of trying to impose a leased access regulatory model on a rapidly evolving media marketplace.¹²

The Commission first began considering commercial leased access in the 1960s, a decade or so after cable antenna television ("CATV") systems started retransmitting the signals of distant television stations to communities lacking local over-the-air broadcast service. At the time, the typical CATV system could deliver programming on only five to twelve channels.¹³ Recognizing that CATV could do more than simply retransmit

distant broadcast signals, the Commission looked for ways to encourage the development of more diverse cable television programming and identified leasing of cable channels by “independent” programmers (*i.e.*, video programmers unaffiliated with the cable operator) as one means of doing so.¹⁴

In 1972 the Commission adopted a comprehensive set of cable television rules that included mandatory designation of unused cable system channel capacity for lease by independent programmers.¹⁵ The Commission revisited and refined the rules in 1976, incorporating new measures intended to enhance leased access.¹⁶ Several years later, the Supreme Court invalidated the 1976 regulatory scheme of which leased access was a part on the grounds that the rules exceeded the Commission’s statutory jurisdiction.¹⁷

For a time, the Court’s decision left the regulatory fate of leased access in the hands of local officials in the many individual communities in which cable systems operated. The resulting uncertainty and lack of uniformity essentially made leased access unworkable for many cable systems and channel lessees until the Cable Communications Policy Act of 1984 established federal channel set-asides and other leased access requirements.¹⁸ In a 1990 Report to Congress, the Commission found that leased access still had not developed as anticipated but nonetheless contended that channel leasing remained a promising alternative for diversifying the sources of cable television programming.¹⁹ The Commission posited that with more stringent restrictions on cable system leasing practices, “channel brokers” might come forward to acquire leased access capacity from many cable systems across the country and then aggregate and sublease it to various independent program services.²⁰

In omnibus cable television legislation passed in 1992, Congress enacted new measures to stimulate leased access,²¹ which the Commission implemented with rules containing a highly complex leased access rate formula and other detailed requirements covering the process, terms, and conditions for channel use.²² With negligible contribution from leased access, the amount and variety of cable television programming increased, making available over 100 “made-for-cable” program networks in a wide assortment of genres available by 1995.²³ In 1997 the Commission again attempted to bolster leased access by placing even more restrictions on the rates cable operators could charge for channel space.²⁴ In 2000, however, cable programming networks had more than doubled to 281, but leased access growth remained negligible.²⁵

According to the Thirteenth Annual Video Competition Report, by 2006 the number of satellite-delivered cable networks had climbed to 565, of which only 85 (14.9%) were affiliated with cable companies.²⁶ Many cable systems also originated local or regional news and public affairs programming and provided noncommercial public, educational, and government access channels.²⁷ During that period the number of wireline and wireless distribution outlets for video programming also increased.²⁸ In contrast, the Thirteenth Annual Report cited comments recounting leased access’s persistent shortcomings as an outlet for local programming or a practical means for independently owned networks to secure widespread carriage.²⁹

In 2007 the Commission launched another proceeding to reexamine the status of the rate formula as well as other factors affecting leased access.³⁰ Striving again to make leased access more affordable to channel lessees, the Commission adopted rules drastically reducing channel lease rates and imposing even more burdensome procedures on cable operators.³¹

Leased Access's Problematic Regulatory Present

The Commission's most recent leased access rules have not yet gone into effect. In 2008 cable operators who sought judicial review of the revised leased access rules succeeded in obtaining a stay of the rules' effective date pending the appeal.³² Shortly thereafter, the Office of Management and Budget's disapproval of the rules' information collection requirements also prevented the rules from taking effect.³³ Since July 2008 the Sixth Circuit has been holding the matter in abeyance pending further action to resolve the issues raised in the OMB's order. Meanwhile, the Commission has listed cable television leased access as a matter it intends to study in connection with its next Annual Video Competition Report.³⁴

Discussion in the Commission's recent Future of Media Report also presents a discouraging view concerning the value and efficacy of leased access. The Report concludes not only that leased access "has not worked as Congress intended," but also that the entire leased access system appears to be "dysfunctional" and "grossly ineffective."³⁵ The Report also cites cable operator comments contending that the bulk of leased access programming today consists primarily of infomercials and religious programming rather than the diverse locally-oriented programming on issues of public importance for which federal policy makers have long hoped.³⁶

The Report's Leased Access Recommendations

Notwithstanding its acknowledgement of serious deficiencies in the commercial leased access regime, the Future of Media Report makes three recommendations for perpetuating leased access into media's future. First, the Report urges the Commission to consider undertaking yet another comprehensive study on the effectiveness of the leased access program and whether it is meeting the goals set out for it by Congress.³⁷ Second, the Report recommends renewing the effort to make leased access easier and more affordable for programmers to obtain by streamlining the requirements that apply to programmers and revising the rate structures for channel use.³⁸ Third, the Report offers up an alternative "carrot and stick" approach, suggesting that Congress consider legislation relieving cable operators of their current leased access obligations if they: (1) carry or financially support state "SPANs" (program services similar to C-SPAN but focusing on state and local government and issues); or (2) air local cable news coverage (whether created by the cable operator, a broadcaster, or other local player).³⁹ Although many cable operators who already are so doing may be quite happy with this particular recommendation, it certainly raises the potential of a governmentally imposed penalty: give up editorial control over your channels and carry the government's

preferred type of programming or incur the penalty of continuing to comply with burdensome, financially punitive, and futile requirements.

Final Thoughts

As a general proposition, leased access has consistently failed in the past, as have repeated government efforts to make it succeed. Leased access almost certainly will continue to fail, because it is a concept that has proven to be incompatible with a media marketplace far different from the five-to-twelve channel video environment that existed when the first leased access rules took effect. Today not just traditional over-the-air broadcasting and cable television but a variety of competing media outlets using alternate technologies provides a supply of diverse, innovative, and worthwhile programming and information far beyond the “channel for every interest” to which Newton Minow recently alluded. In a recent *Columbia Journalism Review* interview, Future of Media Report principal author Steven Waldman commended the Knight Commission on the Information Needs of Communities in a Democracy for pointing out that people no longer exclusively rely on the media but often use other methods for obtaining information.⁴⁰ Such findings may explain why former channel lessees have increasingly established successful ventures by moving on-line to reach their intended audiences.⁴¹

Another comprehensive leased access study is unlikely to yield any surprises. Nor will further attempts to force a leased access revival miraculously make leased access cable television programmers major players in today’s media marketplace. It also seems highly improbable that the media landscape will deteriorate into a “vast wasteland” – or anything remotely approaching one – for want of leased access. As a result, neither Congress nor the FCC should continue trying to postpone the inevitable by devoting any more time, effort, and government resources to refashioning the leased access mandate. Adapting a favorite phrase from the Future of Media Report, today the marketplace, not the government, should be the main player in promoting media diversity.

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¹ Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (May 1961) [hereinafter Vast Wasteland Speech].

² John Eggerton, *Genachowski, Minow Compare Notes on Media Landscape*, BROAD.&CABLE (May 10, 2011), http://www.broadcastingcable.com/article/468032-Genachowski_Minow_Compare_Notes_On_Media_Landscape.php.

³ Tony Mauro, *50 Years Later, Minow Reflects on 'Vast Wasteland' Speech*, THE BLT: THE BLOG OF THE LEGAL TIMES (May 10, 2011, 11:04 AM), <http://legaltimes.typepad.com/blt/2011/05/50-years-later-minow-reflects-on-vast-wasteland-speech.html>.

⁴ See Eggerton, *supra* note 2.

⁵ Steven Waldman, *The Information Needs of Communities*, at 6 (June 2011) [hereinafter *Future of Media Report* or *Report*].

⁶ Donna Coleman Gregg, *The Key to Media's Digital Future: First Amendment Freedom, Not Desperate Measures*, PERSPECTIVES FROM FSF SCHOLARS Vol. 5(11) (April 16, 2011) <http://www.freestatefoundation.org/publications/perspectivesfromfsfscholars.html>.

⁷ See, e.g., Joel Meares, *More Reactions to FCC Report*, COLUMBIA J. REV. (June 13, 2011, 2:43 PM), http://www.cjr.org/behind_the_news/more_reactions_to_fcc_report.php. See also Statement of Commissioner Michael J. Copps on Release of FCC Staff Report "The Technology and Information Needs of Communities" (June 9, 2011), <http://www.fcc.fob/events/open-meeting-june-2011> (expressing disappointment with the Staff Report's lack of boldness); and Patrick Maines, *Dodging a Bullet: The FCC's Report on the Future of Media*, Media and Communications Policy (June 13 2011, 6:31 AM), <http://www.mediacompolicy.org/2011/06/articles/fcc-1/dodging-a-bullet-the-fccs-report> (praising the Staff Report's level headed analysis and acknowledgment of the constitutional limits on governmental involvement in media).

⁸ *The FCC's Good Deed*, WALL ST.J. (June 14, 2011) , <http://online.wsj.com/article/SB10001424052702303657404576361260495954544.html>).

⁹ Waldman, *supra* note 5, at 347-48.

¹⁰ *Id.* at 25.

¹¹ *Id.* at 6.

¹² For a more detailed account of the regulatory history of the cable television leased access rules from 1969 to 1991, see Fred H. Cate, Donna N. Lampert, and Frank W. Lloyd: *Cable Television Leased Access* (Washington, D.C.: The Annenberg Washington Program in Communications Policy Studies of Northwestern University, 1991).

¹³ *First Cable Television Report and Order*, 20 FCC 2d 201, 205 (1969).

¹⁴ *Id.*

¹⁵ 47 C.F.R §76.251 (a) (7) (1972). See also *Cable Television Report and Order*, 36 FCC 2d 141, 191-92 (1972).

¹⁶ 47 C.F. R. §76.354 (a) (4) (1976), See also *Report and Order in Docket 20508*, 59 FCC 2d 294, 296 (1976).

¹⁷ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

¹⁸ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, (8 Stat. 2779 (1984), 47 U.S.C. § 521 *et. seq.*

¹⁹ See *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (1990).

²⁰ *Id.* at 5049-50.

²¹ Pub. L. No. 102-385, §9(b), 106 Stat. 1460, 1484 (1992) ("1992 Act").

²² *Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5631 (1993). The Commission's 1993 rules went through reconsideration and further revision in 1996 and 1997. See *Order on Reconsideration of the First Report and Order and Further Notice of Rulemaking*, 11 FCC Rcd 16933 (1996), [hereinafter *First 1993 Leased Access Reconsideration*] and *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267 (1997) [hereinafter *Second 1993 Leased Access Reconsideration*]. A leased access programmer's appeal of the 1997 rules as too deferential to cable operators was rejected by the D.C. Circuit Court of Appeals in 1998. *ValueVision Int'l, Inc. v. FCC*, 149 F. 3d 1204 (D.C. Cir. 1998).

²³ *Second Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2069. (2006).

²⁴ *Second 1993 Leased Access Reconsideration, supra.*

²⁵ *Seventh Annual Report on the Status of Competition in the Market for Delivery of Video Programming*, 16 FCC Rcd 6005, 6014 (2001).

²⁶ *Thirteenth Annual Report on the Status of Competition in the Market for Delivery of Video Programming*, 24 FCC Rcd 542 (2007) [hereinafter *Thirteenth Annual Video Competition Report*].

²⁷ *Id.* at 542-51.

²⁸ *Id.* at 645-46.

²⁹ *Id.*

³⁰ *Notice of Proposed Rulemaking (Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage)*, 22 FCC Rcd 11222 (2007).

³¹ *Report and Order and Further Notice of Proposed Rule Making*, 23 FCC Rcd 2909 (2008).

³² *Order, United Church of Christ Office of Communication, Inc. v. FCC*, No. 08-3245 (and consolidated cases) (May 22, 2008) (hereinafter *Sixth Circuit Order*);

³³ *Notice of Office of Management and Budget Action*, OMB Control No. 3060-0568 (July 7, 2008). See also John Eggerton, *OMB Rejects FCC Data-Collection Rules*, BROAD.& CABLE, July 10, 2008, http://www.broadcastingcable.com/article/114511-MB_Rejects_FCC_Data_Collection_Rules.php.

³⁴ See *Further Notice of Inquiry*, MB Docket No. 07-269 (April 21, 2011) at para. 21.

³⁵ See Waldman, *supra* note 5, at 26 and 349.

³⁶ *Id.* at 299.

³⁷ *Id.* at 28.

³⁸ *Id.* at 300.

³⁹ *Id.* at 350.

⁴⁰ Joel Meares, "Q&A with FCC Report Head Write Steve Waldman, Part One," COLUMBIA J. REV. (June 20, 2011 5:43 PM), http://www.cjr.org/behind_the_news/qa_with_fcc_report_head_writer.php

⁴¹ See, e.g. B.I. Ochman, *In Defense of Social Media*, ADVERTISINGAGE (January 19, 2011), <http://adage.com/article/digitalnext/social-media-changed-balance-power/148284/>.