WHY THE FCC AVOIDS BROADCAST DIVERSITY METRICS

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The FCC's treatment of diversity metrics in the media ownership proceeding is malodorously unscientific. When it comes to diversity, and especially race and gender diversity, the current FCC's adversity to science has pushed the state of civil rights in broadcasting back in time by about 40 years.

What is Being Measured?

The key issue in diversity metrics is how much better off are consumers because of a marginal increase in diversity. The FCC's "Diversity Index" purportedly will measure the extent to which a market has diverse programming, but it does so without serving as a metric for how viewers and listeners benefit from increases or decreases in the level of diversity.

The "Diversity Index" is the fruit of a model process of anti-scientific rulemaking. The Index was not presented for public comment or public review; indeed, the public was given no notice the FCC was considering the Index. Nor was the Index peer reviewed.

The Index essentially draws predictions based on anticipated consumer behavior. Unlike chemical, physical or even economic behavior, consumer behavior has sociological and cultural attributes, and thus is often difficult to predict. Consequently, in their comments in 2003's media ownership rulemaking proceeding, MMTC and sixteen other respected national civil rights and religious organizations noted that any Index that might measure diversity would need to be pre-tested.

MMTC also presented two formulas for the FCC's consideration. One measures the "tipping point" below which a radio market automatically consolidates because there is not enough free revenue to support independent stations. The other formula states the marginal utility to consumers of additional source diversity.

Notwithstanding these and other comments in the rulemaking, the FCC neither pretested its Index nor explained why it was not pretesting the Index. Further, without a hint of irony, the FCC claimed that it was using the Index only to validate pro-consolidation conclusions that it had made earlier without the benefit of a scientific formula. Finally, the FCC failed even to mention the existence of MMTC's two formulas. To say the least, this is not rational rulemaking; under the Administrative Procedure Act it was patently unlawful. This is the way an agency behaves when it values ideology over science.

When Should Diversity Be Measured?

A natural issue arising in every rulemaking is the time upon which the agency's rules will take effect, and in particular whether they will take effect immediately or in stages. This is hardly a trivial matter: small businesses cannot adjust as easily as large businesses when faced with immediate and radical changes in the regulatory landscape. Consequently, in the ownership rulemaking, MMTC and the civil rights and religious organizations offered a proposal for "Staged Implementation." Under this paradigm, every two years, the FCC would measure diversity, competition, localism, and minority and female ownership. If the market were not failing, an additional degree of deregulation would take effect; but if the market were failing, the FCC could issue a mid-course correction. Finally, if the market were still failing two years hence, the FCC could apply the brakes. In this way, the FCC could avoid the impossibility of "putting the genie back in the bottle," as Commissioner Copps has expressed the signature dilemma of structural ownership rulemaking.

Staged Implementation was hardly a radical proposal: a virtually identical idea was advanced by Paxson Communications, the family-oriented television network. Yet the FCC's decision did not mention MMTC's or Paxson's proposals. Instead, the FCC simply ruled that all of its deregulatory decisions would take effect immediately. Thus, again, the Commission showed that it is not interested in measuring diversity when there is a chance that the metrics might be used to preserve diversity.

Who Measures Diversity?

Leaving the government in charge of measuring diversity has an inherent disadvantage: an ideological administration can kill science it does not like or twist that science to fulfill its own preconceived positions. An example of this is presented by the National Telecommunications and Information Administration's (NTIA's) research on civil rights issues affecting telecommunications and media. A series of studies by NTIA in the late 1990s, particularly its 1999 study, "Falling Through the Net," documented in copious detail the extent

and persistence of the race, wealth and class-based "digital divide." NTIA also compiled annual studies on the extent of minority broadcast ownership. Unavoidably, these studies showed that minority broadcast ownership was seriously and adversely impacted by consolidation.

After 2001, the new administration continued the digital divide studies. However, it stopped using the term "digital divide," and it organized the conclusions in its reports to create the impression that there was really no serious race, wealth or class division in Internet and computer access. Ironically, in 2002, the administration attempted to repeal the key program (the Telecommunications Opportunity Program (TOP) that was designed to bring about a cure for class and race divisions in Internet and computer access. In 2001, NTIA also stopped publishing its minority ownership report.

Deploying the marketplace to "measure" diversity is an attractive alternative to command-and-control regulation, as the EPA has found in its use of market-tradable credits for greenhouse gas emissions. Borrowing from the EPA's concept, MMTC proposed a system of "Diversity Credits" which would be attached to broadcast licenses with weights commensurate with the extent to which the license-holder provides diversity. In particular, small and minority owners would receive many Credits, while large conglomerates would receive few Credits. If a transaction advances diversity, the FCC would issue more Credits to the buyer; if a transaction reduces diversity, the FCC would call in Credits from the buyer. If the buyer lacks enough Credits in its Credit "bank", it could buy more Credits on the open market – probably from small and minority businesses that hold more Credits than they could ever use. In this way, the FCC could incentivize diversity, disincentivize concentration, minimize regulatory intervention, and provide a new source of capital to small and minority businesses – the sale of their excess Diversity Credits.

How did the FCC handle the Diversity Credits proposal in the rulemaking proceeding? The FCC did not mention that the proposal had even been filed.

What Does The FCC Do With Scientific Measurements?

The field of civil rights provides numerous examples of how the FCC handles scientific data. Repeatedly, if the data reveals discrimination and barriers to minority and female entry, the FCC has looked the other way.

In 1969, in response to the Kerner Report, the FCC adopted a regulation banning intentional discrimination in broadcast employment. However, the FCC seldom enforces this regulation, even though its own cases and appeals court cases hold that an intentional discriminator is not entitled to receive or retain a broadcast license.

In 2002, a landmark Ford Foundation study, The Realities of Intentional Job Discrimination in America - 1999, by leading scholars Albert and (the late) Ruth Blumrosen, examined EEO-1 annual employment data using the standard Supreme Court-approved statistical

test for inferring intentional discrimination. The study found that 15% of broadcasters discriminate intentionally against women, 20% against African Americans and 24% against Hispanics. The Blumrosens study also found that 30% of telephone companies discriminate intentionally against women, 32% discriminate intentionally against African Americans, and 25% discriminate intentionally against Hispanics,

Regulation and rule enforcement have deep consequences for racial diversity in the media. For example, MMTC found that after the FCC's EEO rules were suspended because of an appeals court case in 2001, 42% of broadcast job postings on state broadcast association job sites actually omitted the formerly ubiquitous three-letter "EOE" (equal opportunity employer) tag. This astonishing finding underscores what every civil rights lawyer well knows: without enforcement, old habits of race and gender exclusion tend to re-infect the workplace.

The return of race and gender exclusion is clearly evident in broadcasting. Thanks to non-enforcement of the EEO rules, minority participation in radio and television news has dropped very dramatically. In particular, the 2003 Radio/Television News Directors Association (RTNDA)/Ball State University Annual Survey, which tracks minority participation in broadcasting, yielded these findings [n/a is "not available"]:

Job Category	% Minority (1994)	% Minority (2001)	% Minority (2002)	% Minority (2003)
Total TV News Workforce	17.1%	24.6%	20.6%	18.1%
Total Radio News Workforce	14.7%	10.7%	8.0%	6.5%
TV News Directors	7.9%	8.0%	9.2%	6.6%
Radio News Directors	8.6%	4.4%	5.1%	5.0%
TV General Managers	n/a	8.7%	5.2%	3.6%
Radio General Managers	n/a	5.7%	3.8%	2.5%

See Bob Papper, "Women & Minorities: One Step Forward and Two Steps Back, The Communicator (RTNDA, July/August, 2003), pp. 20-25. RTNDA attributes the dramatic decline of minority participation in radio to "the elimination of the EEO rules." Id., p. 21.

How did the FCC deal with these statistics? It issued a ruling saying it disagreed with the Blumrosens' study – without explaining why. It ignored MMTC's study of the discontinuation of "EOE" tags on broadcast ads. It ignored the RTNDA's study on the disappearance of minorities from broadcast news management. But the FCC did decide, in January 2004, to propose to eliminate the 22-year old requirement that common carriers provide annual reports on minority and female employment.

To be sure, in 2003 the FCC began to conduct enforcement audits for broadcast EEO compliance, applying a standard enforcement algorithm to a random sample of broadcast renewal applicants -- a rare example of the positive application of science in FCC civil rights

enforcement. Yet these audits have produced nothing. The year 2003 was the first year since 1970 when the FCC did not initiate a single EEO prosecution – even for unintentional violations of its uncontroversial, race-neutral recruitment regulations.

On the subject of minority ownership, the FCC's failure to examine the fruits of scientific research is especially disturbing. In 1996, in Section 257 of the Telecommunications Act, Congress required the FCC to triennially review the impact of its regulations on small businesses. In its first Section 257 Report, issued in 1997, the FCC promised to conduct studies on the status, history and prospects for minority ownership, the impact of FCC regulation on minority ownership, and the extent and nature of need for any additional regulatory intervention. The FCC released its six Section 257 Studies on December 12, 2000.

The studies, produced by some of the nation's leading media scholars, were a damning portrayal of government inaction, ineffectiveness, and (in the past) open intervention to help discriminators and segregationists secure and retain broadcast licenses.

In February 2001, the new administration considered two MMTC rulemaking proposals aimed at incentivizing minority television ownership. In rejecting these proposals, the Commission held that it had not had sufficient time to review the Section 257 Studies, but it again promised to do so.

Yet by September 2002, there had still been no review of the Section 257 Studies. In that month, the FCC issued its omnibus notice of proposed rulemaking (NPRM) on broadcast ownership, and along with the notice it issued twelve scientific studies on broadcast diversity and competition – none of which addressed minority ownership. Mysteriously, though, the NPRM did not seek public comment on the Section 257 Studies. Thus, MMTC and the National Association of Black Owned Broadcasters (NABOB) asked the FCC to seek public comment on the Studies. The FCC could have responded with a simple, one-sentence order seeking public comment on the Studies. Instead, the FCC twice issued rulings saying it was <u>considering</u> whether to seek public comment. Then the FCC simply let the comment date pass. In its final rulemaking decision, issued June 2, 2003, the FCC said that public comment had been unnecessary; yet in the decision it again failed to analyze the Section 257 Studies.

It soon became apparent that the FCC had not inadvertently forgotten the Section 257 Studies. In the third Section 257 Report, issued February 2004, the FCC not only failed <u>again</u> to analyze the Section 257 Studies, it failed to mention that the studies had ever existed. This omission was not made in a ministerial document: rather, it was made in a formal Report to Congress.

Finally, with respect to one metric there is no dispute: there is significant discrimination against minorities and women in the broadcast transactional marketplace. To help cure this cancer on the industry, MMTC and the civil rights and religious organizations proposed a rule

banning transactional discrimination on the basis of race and gender. The organizations filed their proposal in the 2003 media ownership rulemaking.

For the first time in the history of American civil rights jurisprudence, a proposal for a federal nondiscrimination law or rule generated no opposition. But rather than rise to this historic opportunity, the FCC held in June, 2003 that it would "decline to adopt a rule without further consideration of its efficacy as well as any direct or indirect effects on the value and alienability of [propensity to sell] broadcast licenses." To appreciate what this means, keep in mind that when more minorities and women learn that stations are for sale so that they can offer bids, the market undergoes a classic fixed-supply/increased demand correction leading to higher prices for the underlying assets. Yet the FCC, with its brilliant economists, actually believed that if the supply of broadcast stations for sale were held constant but demand were increased, the price might go down and station owners might refuse to sell their stations.

To appreciate how far this anti-scientific rationale has debased the civil rights debate at the FCC, consider this: the last time such arguments were seriously presented before any federal tribunal was in the Senate filibuster to the 1968 Fair Housing Act. At that time, the likes of Senators Stennis and Thurmond predicted that nondiscrimination in the sale or rental of residential housing units would reduce property values and cause whites to refuse to sell or rent dwelling units. Of course these fears proved unfounded: housing integration increased property values as capital was permitted to find its highest valued use.

In the Prometheus Radio Project v. FCC litigation in the Third Circuit of the U.S. Court of Appeals, the FCC continues to affirmatively defend its failure to adopt a rule against transactional discrimination. It follows that the FCC's failure to ban transactional discrimination was not an inadvertent mistake. Instead, it was a deliberate throwback to pre-segregation days.

Conclusion

The civil rights initiatives ignored and rejected by the FCC would have been saved if the FCC respected the science at its disposal. These initiatives are not radical: most of the proposals before the FCC would build upon (and in some cases simply restore) deregulatory initiatives largely developed between 1971 and 1977, when the FCC was chaired by moderates Dean Burch and Richard Wiley.

Observers of other federal agencies, particularly the EPA, have been highly critical of the current administration's politicization of science. Regrettably, the FCC appears to be no exception to this dangerous trend. When the FCC seeks to justify a political outcome disfavored by over 99% of the commenters in a rulemaking proceeding (which was actually the case in the broadcast ownership proceeding) it creates its own "metric" without public participation, notice, peer review or even pretesting. When the FCC does not like scientific results, it simply ignores them, especially when the subject is civil rights. It even follows this trend in official reports to Congress.

Never before has the FCC exhibited the antipathy toward science and metrics that this administration has exhibited on the subjects of diversity and civil rights. Hopefully, never again will the commission be so bent on ignoring the fruits of scientific research.

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