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# Q's World: The Future of Broadcast Regulation

Commissioner James H. Quello\*

In the past sixty years, since the passage of the Communications Act of 1934, the field of communications has grown from one where telephone, telegraph, and radio defined the field to one where television, cable, cellular, and satellite only scratch the surface of modern digital telecommunications. The next sixty years promise to further transform the field and make it a centerpiece of not only the national economy, but also the lives of all Americans. These changes, often driven by technological innovations, have brought tremendous competition to the business of communications that has required, and will continue to require, a modernization of the regulatory framework under which the entire telecommunications sector operates.

Broadcasting in particular has seen a remarkable change from the days when the scarcity argument reinforced the need for heavy governmental regulation. The current proliferation of programming channels in America and the oncoming multichannel, multifaceted communications superhighway create a dynamic new environment that calls for a comprehensive review of communications regulation by Congress and the FCC. A new regulatory approach must be explored in the current climate of mega-mergers, joint ventures, and converging technologies.

The major industries affected by the development of a multichannel, multimedia environment and by the convergence of broadcast and information technologies are broadcast radio and television. My most important public policy objective as a Commissioner has been, and continues to be, the preservation of free over-the-air broadcasting for all the public. Notwithstanding the proliferation of cable and computers and the

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day not too far in the future when television, computers, and telephones will be one and the same, broadcasting in the U.S. remains the principal means whereby Americans receive the information and entertainment that constitutes such a vital part of our daily lives. More than any other medium, broadcasting not only reflects, but also helps shape our culture.

The vital role broadcasting plays in defining our American identity sets up an important set of issues for public policymakers who must establish ground rules for the coming of the new National Information Infrastructure. As the most important component of the current information infrastructure, which includes cable, satellite, and wired and wireless communications, broadcasting must still be viewed as an industry whose operations are guided by a trusteeship requirement. Because of the unique place broadcasting holds and the importance of the service it provides, broadcasters have a special obligation to serve the needs and interests of their communities, one that has historically distinguished them from nonbroadcast service providers. Broadcasters themselves recognize this, and they take this obligation seriously. And yet, the world is clearly changing. Although broadcast news and entertainment programming remain the most-watched programming in America, cable television systems now reach most American homes and continue to make substantial inroads into the audiences broadcasters rely upon to survive. Also, direct broadcast satellite (DBS) will further compete for audience share. The general appeal programming which broadcasters are forced to present, by the demands of mass advertising, is being subtly, and sometimes not so subtly, changed by the flood of specialized cable programming and cable channels. Cable's technology allows it to be a purveyor of a wide variety of nonvideo services. Broadcasters, at least today, cannot say the same. And in radio, the coming day of satellite radio services calls into question whether or not broadcast radio stations, those most local of all local broadcast services, can continue to function in the changing market as they have in the past.

These coming changes amply demonstrate that the time has come for the Federal Communications Commission (FCC or Commission) to do some serious revisionist thinking about the rules we apply to broadcasting and perhaps even fundamentally change our current regulatory approach. But, this demands that we abandon decades-old principles and notions about broadcasting and adjust our focus so that we see it no longer as the centerpiece of the American communications infrastructure, but rather as one component of a much larger, radically different, infinitely more complex infrastructure now emerging. Abandoning set notions about anything, much less something as historically critical to our regulatory mission as broadcasting, is never easy, but as a Commission we have, for

the past year, “talked the talk” of changing the communications environment to favor competition. It is now time for us also to “walk the walk” by changing the rules that were formulated in a broadcasting environment that is drastically changing.

It is important to elaborate a bit about what is meant when I say we must adjust our regulatory approach to broadcasting in light of the new multichannel, multimedia environment. Because of the critical role broadcasting plays in defining our American way of life, the Commission has traditionally sought to make sure that broadcast programming reflects the diversity of tastes and viewpoints that have become so prominent a part of our American way of life. The public policy question central to regulating broadcasting has always been: What regulatory approach best assures that broadcasters will, in fact, meet this obligation in their day-to-day operations? In addressing this question, the Commission is constrained not only by the principles of the First Amendment, but also by the provisions of the Communications Act itself, which specifies that “no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”<sup>1</sup>

These specific prohibitions against the Commission’s prescribing what type of programming broadcasters must broadcast has led us to rely on structural and behavioral regulation, rather than on content regulation, as the best means of assuring that broadcast programming caters to the diverse needs of the local audience. Thus, by increasing the number of broadcast stations and by limiting the number of stations one entity can own, we have tried to maximize the availability of a diverse cross section of programs and viewpoints. By vigorously enforcing rules requiring that minorities and women be given equal employment opportunities in the broadcast industry, we are attempting to increase the amount of diverse programming by diversifying the corps of industry executives who select, produce, and air it.

This truce between structural and behavioral regulation on the one hand and content regulation on the other has always been an uneasy one. From time to time, the Commission has attempted to add some forms of content regulation on top of structural and behavioral regulation in order to achieve some real or perceived statutory goal. Thus, for example, the Fairness Doctrine remained on the books for years, notwithstanding the limitations on ownership and the dramatic increase in the number of

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1. Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091 (codified as amended at 47 U.S.C. § 326 (1988)).

broadcast, cable, and nonbroadcast media outlets in which varying viewpoints on important public issues could be voiced and accessed. And "programming processing guidelines," a euphemistic term for Commission-approved quotas of certain programming types, were a part of regulatory life, notwithstanding the fact that the Commission also required broadcast licensees to engage in a very detailed and exacting process of identifying the concerns of the local community, so that they could be sure their broadcast programming was tailored to meet them.

What adjustments to this traditional approach to broadcast regulation do the convergence of technologies and the emergence of multichannel, multimedia competition call for? One might think that the explosive and continuing growth in the number of broadcast and nonbroadcast programming sources would lead to two conclusions: first, that stringent structural and behavioral rules are no longer necessary (and, in fact, have a chilling affect that may harm more than help); and, second, that content regulation becomes virtually a dead issue with the proliferation of outlets for different types of programming and viewpoints.

Over the course of the next few months, the Commission will either launch or conclude rulemaking proceedings that will go to the heart of the structural and behavioral rules I have touched upon today. We will, for example, look at both the radio and television ownership rules. The radio multiple ownership rules have already been relaxed with additional provisions for minority owned stations. This is very appropriate in my view given the massive increase in the number of competing radio outlets that exists today. The same needs to be done regarding the television multiple ownership rules, in order to give television licensees the ability to profit from operational economies of scale without meaningfully diminishing either diversity in ownership or diversity in viewpoint. On the behavioral side of the house, we will look at the broadcast equal employment opportunity rules and see if they need fine-tuning and, if so, to what extent. And on the content front, we will consider the volatile issue of what, if anything, the Commission can or should do to increase the amount of children's programming on broadcast television.

As a general matter relating to children's television, one might think that the proliferation of program options that has accompanied the growth in the number of both broadcast and nonbroadcast channels would have abated the calls for generic rules that attempt either to require the broadcast of certain types of desired programming or to prohibit the broadcast of certain types of undesired programming. Nevertheless, despite the increase in the number of hours of children's programming available on broadcast television and the tremendous expansion in nonbroadcast entertainment,

educational, and informational programming available on cable channels, videotape, or interactive computers, some continue to complain that "good" children's broadcast programming is lacking and, presumably, otherwise unavailable.

In my view, any additional enforcement of the Children's Television Act should only be carried out with an eye toward recent court rulings which sent strong messages to the FCC on "indecentcy" and "must-carry." In particular, the Supreme Court ruling on must-carry this summer, although not rejecting the principle of must-carry, stated:

The FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."<sup>2</sup>

The Supreme Court's statement in the must-carry case must be considered by both the FCC and Congress when contemplating content-related issues such as children's TV, violence, indecentcy, and probably the Fairness Doctrine. As a longtime advocate of indecentcy enforcement and violence regulation, my legal, if not personal, position has been influenced by the Court's statement.

Another issue of importance in this area is the television ownership rules, which should be liberalized. The same competitive forces that so amply warranted loosening the radio ownership rules apply just as cogently, and perhaps even more so, to television. There is little justification for artificially restricting the number of television stations one entity can own in a multichannel, superhighway world. The only remaining requirement should be the establishment of national and local percentage audience caps to obviate antitrust problems. Also, we must make sure that minorities are given a fair chance to acquire radio and television stations in whatever rule changes we make, but in this regard it seems to me that the lessons we have been learning in the context of our auctions of spectrum for narrowband PCS and IVDS services are instructive. The first and perhaps most important lesson is that, unlike thirty years ago when the only practical means available for new entrants to break into the communications business were radio and television stations, the proliferation of entirely new broadcast and nonbroadcast services available for investment and acquisition has rendered this former focus artificially narrow. While it may be true

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2. *Turner Brdcst. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2463 (quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7293 (1960)), *reh'g denied*, 115 S. Ct. 30 (1994).

that radio and television stations remain the most desirable and readily cognizable telecommunications properties, it seems to me we cannot totally ignore the fact that nothing—particularly communications markets—remains static. Those who understand new services and the expanded opportunities of digital services and who perceive new opportunities and new niches to fill are likely, in the long run, to be the industry leaders of tomorrow.

Regardless of whether the investment opportunity is in one of the traditional broadcast or newer nonbroadcast services, in the final analysis minority ownership is most effectively furthered by taking reasonable steps to assure that capital flows to potential minority buyers. I would hope that in setting its new ownership rules the Commission will try to achieve this goal in more effective ways than by being overly stringent in setting limits on the number of stations that can be commonly owned.

Similarly, while the growth in the number of programming sources has not appeared to vitiate the need for certain types of behavioral rules, I believe it does justify a different approach to their enforcement. Perhaps chief among these are the equal employment opportunity (EEO) rules I spoke of earlier. With the immense increase in the number of outlets, both broadcast and nonbroadcast, that offer employment opportunities has come a problematic heightened EEO enforcement effort by the Commission. This enforcement program is typified by hefty fines usually well into five figures, often for comparatively minor recordkeeping and procedural infractions rather than for serious underemployment of minorities and women, much less for actual discrimination against them.

Do our broadcast equal employment opportunity rules need to be further reviewed? My concern is that our current approach, which involves levying heavy fines for procedural and recordkeeping infractions even when the station's employment profile looks fairly good, is becoming an exercise wherein the means are being mistaken for the end. We must not lose sight of the fact that the end we seek to achieve is the employment of women and minorities in numbers commensurate with their presence in the local workforce and the continued growth of those numbers. If a broadcaster is honestly achieving these ends, I see no point whatsoever in levying heavy fines merely because the way the ends were achieved somehow deviated from our employment search requirements.

I mention all these concerns not out of a lack of sympathy with the objectives of good children's programming, ownership diversity, and equal and fair employment opportunities for all Americans. They are, and will always be, among the capstones of a successful regulatory environment for the broadcast media. Rather, my concern is prompted by the proposition

that it is counterproductive to pursue these goals in a multichannel world using outdated tools and philosophies.

In conclusion, today's multichannel, multimedia environment challenges regulators to depart from traditional notions of broadcast regulation. I think it is fair to say that this is not a process that many regulators, more used to traditional, activist types of regulatory intervention, are very comfortable with. But for years the Commission has stated, in rulemaking after rulemaking, that one of the principal benefits of technological development and increased competition is that it eventually renders most extrinsic regulation unnecessary. Now, as the Commission is poised to reevaluate some of its principal rules governing broadcasting, it is time to make sure that, when the regulatory rubber meets the road, our new rules reflect the emerging nonscarce, multichannel communications reality of today and tomorrow.

After all, industry entrepreneurship and investment, not government underwriting and regulation, made the American system of broadcasting the best in the world. Government regulation is necessary to protect the public against the predation of monopolists and those with market power. In the multichannel environment of today and tomorrow, broadcasters are not a monopoly. Nor are they scarce, either in absolute number of broadcast outlets or as one component of a mind-boggling plethora of electronic and print media. They simply do not require continued rigid government monopoly-type oversight. And policymakers need to consider carefully the implications of this exploding multichannel and multimedia competition on broadcasters' incentives to continue to provide universal, free television service. TV broadcasting, the most influential and pervasive of all news and information media, is ready for a different, more marketplace-oriented regulatory approach appropriate for an entirely competitive industry.

