

5-2003

The Role of the Federal Communications Commission on the Path from the Vast Wasteland to the Fertile Plain

Kathleen Q. Abernathy
Federal Communications Commission

Follow this and additional works at: <https://www.repository.law.indiana.edu/fclj>



Part of the [Administrative Law Commons](#), [Communications Law Commons](#), [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Abernathy, Kathleen Q. (2003) "The Role of the Federal Communications Commission on the Path from the Vast Wasteland to the Fertile Plain," *Federal Communications Law Journal*: Vol. 55 : Iss. 3 , Article 6. Available at: <https://www.repository.law.indiana.edu/fclj/vol55/iss3/6>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Federal Communications Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The Role of the Federal Communications Commission on the Path from the Vast Wasteland to the Fertile Plain

Kathleen Q. Abernathy*

In 1961, Federal Communications Commission (“FCC” or “Commission”) Chairman Newton Minow expressed a lack of confidence in the services provided by broadcasters.¹ He challenged people to sit in front of their television for a day to see if they would observe, as he had, a vast wasteland. The *Federal Communications Law Journal* has asked us to take up Minow’s challenge today. Yet, as a current FCC Commissioner, I find that it is not my place to make value judgments on the content of broadcasts.

Newton Minow’s speech goes to the heart of the most basic constitutional right, the right of free speech as protected by the Constitution. I believe that FCC Commissioners must tread carefully in regulating, or even passing judgments, on the quality of programming

* Kathleen Q. Abernathy was sworn in as a Commissioner of the Federal Communications Commission on May 31, 2001. Before her appointment to the FCC, Abernathy was director for government affairs at Broadband Office, Inc.; a partner in the Washington, D.C. law firm of Wilkinson Barker Knauer, LLP; vice president for regulatory affairs at U S West (now known as Qwest Communications); and vice president for regulatory affairs at Air Touch Communications. She also served as legal advisor to FCC Commissioner Sherrie Marshall and Chairman James Quello. Abernathy received a B.S. from Marquette University, and a J.D. from Columbus School of Law, The Catholic University of America. She is a member and former president of the Federal Communications Bar Association, and a member of the Washington, D.C. Bar.

1. Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (May 9, 1961) [hereinafter Vast Wasteland Speech].

content. In exercising our regulatory duties, we should be mindful of the need to protect and preserve free speech. In this regard, I am guided by two principles. First, Congress has legislated standards for the Commission to apply, and to the extent that courts hold these standards to be constitutionally permissible, we should enforce Congress's laws and courts' decisions regardless of our own personal predilections. Second, the Commission must refrain from making personal judgments about the messages that the media delivers. The Commission's area of responsibility is to enforce Congress's laws. Broadcasters, in contrast, are the proper parties to make judgments regarding overall media content. It is important to recognize that broadcasters do not act alone. The American public places an important check on the role of the media.

With respect to congressional guidance, legislation gives the FCC direction on how to balance the right of free speech against other public interests. For example, Congress directed the Commission to enforce restrictions on indecency² and, at renewal time, to consider the extent to which a licensee has served the educational and informational needs of children.³ As a result of this guidance, the FCC adopted clear and explicit regulations on when indecent programming may be aired⁴ and how broadcasters must comply with their duty to serve the educational and informational needs of children.⁵ Congress also gave the Commission

2. 18 U.S.C. § 1464 (2000); 47 U.S.C. § 312(a)(6) (2000) (authorizes revocation of a station's license for violation of 18 U.S.C. § 1464); 47 U.S.C. § 503(b)(1)(D) (2000) (authorizes the Commission to assess monetary forfeitures for violations of 18 U.S.C. § 1464).

3. 47 U.S.C. § 303b (2000).

4. The Commission's rules restrict the broadcasting of indecent material to hours when children are less likely to be viewing television—between 10:00 P.M. and 6:00 A.M. 47 C.F.R. § 73.3999 (2001).

5. FCC rules require that, over the term of its license, each television station licensee serve the educational and informational needs of children through both the licensee's overall programming and programming specifically designed to serve such needs ("core programming"). According to FCC processing guidelines, a licensee that has aired at least three hours of core programming a week will be deemed to have satisfied its obligations to air such programming. Core programming is defined as educational and informational programming that

- (1) It has serving the educational and informational needs of children ages 16 and under as a significant purpose;
- (2) It is aired between the hours of 7:00 A.M. and 10:00 P.M.;
- (3) It is a regularly scheduled weekly program;
- (4) It is at least 30 minutes in length;
- (5) The educational and informational objective and the target child audience are specified in writing in the licensee's Children's Television Programming Report . . . ; and
- (6) Instructions for listing the program as educational/informational . . . are provided to publishers of program guides

authority to prescribe guidelines for the identification and rating of programming that contains sexual or violent material, and to require distributors of such video programming to transmit such ratings in the event that voluntary guidelines for doing so had not been established by the industry.⁶ In these areas, Congress crafted a careful balance between protecting First Amendment rights, on one hand, and on the other, protecting our children from objectionable material and providing for their educational growth. Thus, where Congress has, in a constitutionally permissible way, balanced other important governmental interests against free speech interests, the Commission is bound to follow the congressional directives.

In other areas, however, Congress has not legislated. In these circumstances, the Commission is often pressured to act on its own by regulating, or even passing judgment, on what are deemed to be “good” or “bad” messages, or on what is “good” or “bad” television. Those who encourage the Commission to act are often motivated by what they truly believe would be a desirable result. On these issues, however, the Commission cannot begin to stray across the line and start regulating messages based on content. We should not be making personal judgments that reflect our own tastes or desires. Indeed, the Court of Appeals for the D.C. Circuit recently held that the FCC cannot use its general powers under Section 1 of the Communications Act of 1934 for authority to regulate program content:

To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content. Rather, Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.⁷

Some express concern, however, that if Congress does not act and the Commission does not act—who is left to make these content decisions? Who will provide a moral barometer for society? Fundamentally, all citizens who watch television participate in this process. On a daily basis, however, as a country we have chosen to leave content decisions in the hands of the media. The vast majority of broadcasters understand and appreciate the unique role that their organizations play in the local communities and in our national society. Broadcasters generally have taken this responsibility seriously. Moreover, their control over content does not

47 C.F.R. § 73.671 (2001).

6. 47 U.S.C. § 303 note (2000) (Effective Date of 1996 Amendment); Telecommunications Act of 1996 Pub. L. No. 104-104 sec. 551(b)(1); *see also* 47 U.S.C. § 303 note (2000) (Codification).

7. *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002).

go unchecked by the American people. The public has immense power to influence programming decisions simply by turning the channel. Broadcasters, by necessity, respond to the public, thus providing a much more reliable version of “good society” than regulators can ever bring about by governmental decree.

It also is important to remember that today—as compared to 1961—consumers have many more choices vying for their eyeballs. When Newton Minow delivered his speech, the Commission had just “approved an experiment with pay TV, and . . . [was] testing the potential of UHF broadcasting.”⁸ Chairman Minow stated that “most of television’s problems stem from lack of competition.”⁹ He longed for “more channels on the air” and “a half-dozen networks instead of three.”¹⁰ Since that time, television has grown up. Today, there are seven broadcast networks, 1331 commercial television stations (752 of which are UHF stations), and 381 non-commercial educational stations (254 of which are UHF stations). Sixty-nine million households subscribe to cable, and more than eighteen million households subscribe to direct broadcast satellite service. There are more than 230 national cable programming networks and more than fifty regional networks.¹¹ Furthermore, digital television (“DTV”), which gives broadcasters the capability to provide a high definition signal or multiple streams of programming, has been introduced in most markets.¹² Thus, the ability to attract and retain a viewer has unprecedented value. Today’s marketplace dynamic will drive broadcasters to be responsive to their communities.

To the extent that Chairman Minow was concerned about the effects of not having a competitive television market, the current array of video programming and distribution choices should alleviate those fears. To the extent that Chairman Minow was concerned about indecency and violence on television and the lack of educational programming for children, these issues have also been addressed consistent with our constitutional guarantees. To the extent that Chairman Minow was making value judgments about the quality of programs that were on the air—from westerns to game shows, from *The Fabulous Fifties* to *The Twilight Zone*—

8. Vast Wasteland Speech, *supra* note 1.

9. *Id.*

10. *Id.*

11. 2002 Biennial Reg. Review—Review of the Comm’n’s Brdcast. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 18503 (2002).

12. As of January 29, 2003, there were 700 DTV stations operating in 178 markets. The National Association of Broadcasters, DTV Stations in Operation, at <http://www.nab.org/Newsroom/issues/digitaltv/DTVStations.asp> (last visited Jan. 29, 2003).

Number 3]

ROLE OF FCC

439

I respect his opinion as a consumer, but am unwilling as a Commissioner to substitute my judgment for his or any other consumer's. Where Congress has not specifically spoken, broadcasters have an obligation to work together with their communities to determine how to best serve the needs and interests of the public. So, I leave it in the hands of Congress, the media, and the public to lead us on the path from a vast wasteland to a fertile plain.

