

# **FCC Studies of the Television Marketplace under George W. Bush: Flawed Measurements and Invalid Conclusions**

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*Multiple Congressional acts require the Federal Communications Commission to review its ownership rules or measure the degree of competition in the television marketplace in various intervals. The FCC under the Bush Administration did not adhere to the most basic element of those mandates and issued reports long after the required time period on numerous occasions. There was a more substantive flaw in the FCC studies of the broadcast and cable marketplace from 2001 until 2009 as the Commission relied on incomplete data and utilized inadequate definitions in its analysis. This essay evaluates FCC reports on ownership in prime time television and the video programming marketplace issued during the Bush Administration and critiques those measurements against ones built upon more accurate data and more appropriate definitions. The conclusion reached is that the FCC consistently underreported on the level of concentration and conglomeration in the broadcast and cable industries during the Bush Administration.*

**T**he proposed merger between NBC Universal and Comcast opened a new chapter in debates over media consolidation when it was announced on December 3, 2009. The public battle between News Corp. and Time Warner Cable over retransmission consent for Fox owned and operated stations at the end of that same month raised further questions about the degree of conglomeration in the television marketplace. Federal Communications Commission Chairman Julius Genachowski stood on the sidelines through the opening salvos in those disputes, outside of a single statement on retransmission consent. There were no doubt various reasons for his reaction after less than six months back at the Commission, but there was also a clear challenge. During the Bush Administration, the FCC failed to meet its Congressional mandate to provide an accurate measurement of competition and diversity in the television marketplace, the analysis needed to understand the events of December 2009.

There were times when the Commission's alleged manipulation of data during the Bush Administration earned rebukes in the courts or Congress. In 2003, Chairman Michael Powell announced wholesale relaxation of ownership rules then watched as Congress and the Court of Appeals rewrote or remanded those changes. In 2007, Chairman Kevin Martin created a firestorm when he explored the enactment of a provision of the Cable Communication Act of 1984 that allowed for increased government regulation of cable television.<sup>1</sup> A com-

mittee staff report in the House of Representatives later claimed that Martin “manipulated, withheld, or suppressed data, reports, and information” and “created distrust, suspicion, and turmoil” among the Commissioners.<sup>2</sup> The proposed revisions of Commission ownership rules in 2003 garnered the most attention, with particular focus on the public response and the Diversity Index used to argue for the changes. Others have focused on these issues in detail.<sup>3</sup> There were, however, also substantive issues with the quality of the data collected and the validity of the conclusions reached in FCC studies of broadcast and cable television at the national level.

In the summer of 2010, the FCC Media Bureau launched an examination of how the Commission “collects, uses and disseminates data” in an effort to “improve its fact-based, data-driven decision making.”<sup>4</sup> These goals mirrored similar pronouncements made almost a decade earlier when Powell created a Media Ownership Working Group in 2001, stating that the Commission needed to rebuild the “factual foundation” for its ownership regulations and claiming the FCC had made policy decisions “without a contemporaneous picture of the media market.”<sup>5</sup> That the Commission announced similar initiatives to address similar problems under both Democratic and Republican control would suggest a more fundamental issue with how the FCC studies the marketplace and how it uses such research to support regulations and policies. That issue frames three basic questions that are the cornerstones of this analysis. First, how did the FCC use studies of the national television marketplace to promote market regulation under the Bush Administration; second, how did media conglomerates and lobbyists influence such studies and reports; and, third, how does the use of additional sources and/or criteria alter the picture of competition and diversity in the television marketplace.

### **Theoretical & Legislative Framework**

The rapid expansion of broadcast and cable television is the common justification for changes in FCC policies and regulations. Critics of regulation claim that the growth of cable and satellite services nullified the central tenet of the scarcity rationale, the legal argument that finite broadcast spectrum allows for some limitations of the First Amendment rights of licensees. Michael Powell was one of those detractors long before he became chairman of the FCC, arguing, “We must take the truth about scarcity of broadcast media out of the closet.”<sup>6</sup> The transformation of television in the United States since the mid-1970s is impossible to refute, but one must question whether the multiplicity of outlets has created true diversity.

The issues raised in such debates connect with the cornerstones for the critical political economy of communication outlined in Dallas Smythe’s seminal work: “[W]ho gets what scarce resources and services, when, how and where?” and “[W]ho takes what actions in order to provide what scarce goods and services, when, how and where.”<sup>7</sup> That focus remains at the core of this theoretical approach a half-century later, what Peter Golding and Graham Murdock describe as a concern with the “balance between capitalist enterprise and public intervention.”<sup>8</sup> Golding and Murdock outline four “historical processes” central to the

critical political economy: “growth of the media; the extension of corporate reach; commodification; and the changing role of state and government intervention.”<sup>9</sup> How the FCC measures and in turn regulates the television marketplace, and the degree to which media conglomerates influence this process, resides squarely within this framework.<sup>10</sup>

The focus on conglomerate influence on state action relates to another component that is of equal importance. Rather than a focus on political and economic theories in isolation, devoid of agency and action, critical political economy is concerned with the exercise of power and, in particular, media power and state power. Vincent Mosco defines political economy as the “study of the social relations, particularly power relations, that mutually constitute the production, distribution and consumption of resources.” Within this framework, power is understood as “both a resource to achieve goals and an instrument of control within social hierarchies.”<sup>11</sup> For the purposes of this analysis, those resources are broadcast and cable television programs and services and the power to be examined is that of the media conglomerates within the FCC as well as broader arguments relative to the perceived benefits of “deregulation.”

The rhetoric that such debates revolve around “deregulation” in and of itself reveals the imprint of power. Since the 1980s, when Ronald Reagan ascended to the presidency and FCC Chairman Mark Fowler co-authored “A Marketplace Approach to Broadcast Regulation,” the idea of deregulation is the cornerstone around which all debates are framed.<sup>12</sup> That was most evident in the mid-1990s, when the precursor to the Telecommunications Act moved through the Senate as an act to “accelerate” a “pro-competitive, de-regulatory national policy framework.”<sup>13</sup> Within the political economic framework, it is not a matter of deregulation but rather a choice between different forms of regulation, each of which offers costs and benefits to different groups in society. Mosco argues that political economy “takes the entire social field, including the pattern of industry activity, as forms of regulation.”<sup>14</sup> As such, the elimination of government regulation is “not deregulation but the expansion of market regulation.”<sup>15</sup> This, in turn, connects to the process of commercialization and the replacement of state policies that promote the public interest with those that endorse market interests.

There is another feature of critical political economy that holds significance for this study. Mosco outlines four central characteristics of this framework: social change and history, social totality, moral philosophy and praxis. The first three connect with ideas addressed above, but the lattermost is also quite important since praxis focuses on knowledge as an “ongoing product of theory and practice.”<sup>16</sup> In short, political economy is concerned with research that helps redress power imbalances and changes social structures. This also connects back to a central concern that Golding and Murdock address, that political economy is concerned with “basic moral questions of justice, equity and the public good.”<sup>17</sup>

### Diversity in the Marketplace of Ideas

Questions of ownership in media industries reach to core issues in modern societies. The

American model of the media evolved from the founding notions of a representative democracy, within which the media, in theory, make self-government possible with the creation of a vibrant marketplace of ideas. This marketplace is a cornerstone of democratic governance and a common objective in Congressional legislation and FCC policies, which are often implemented to maintain and/or increase diversity. Philip Napoli argues that the marketplace of ideas metaphor makes diversity one of the foundations of communications policy.<sup>18</sup> It is also an important matrix in the evaluation of media systems, a focal point in critical policy studies.

Definitions of diversity are crucial to this discussion. In its 2002 Biennial Regulatory Review, the Commission reaffirmed diversity as one of its core objectives and advanced a set of factors that promoted its continued existence, including outlet and source diversity.<sup>19</sup> In the view of the Commission, outlet diversity resulted from independently owned firms in a given market, while source diversity related to the availability of media content from various producers. In the summer of 2003, in response to the vocal rebuttal to the biennial review of media ownership, Powell claimed “the United States has the most diverse media marketplace in the world.”<sup>20</sup> There is little question that there were more media outlets, but had such multiplicity resulted in diversity from independently owned firms and a wide range of producers? One can argue that it is possible to “increase the number of channels and the number of goods in circulation without significantly extending diversity.”<sup>21</sup>

There are various types of diversity to consider in the analysis of different kinds of media. Denis McQuail outlines a framework built upon five stages in the process of communication for the design of diversity research: source diversity, channel diversity, diversity of content ‘as sent’, diversity of content ‘as received’ and receiver/audience diversity.<sup>22</sup> Napoli refines this framework to focus on three dimension of diversity: source diversity, content diversity and exposure diversity.<sup>23</sup> The inclusion of source diversity, including a focus on ownership diversity, provides a clear connection to this analysis. In particular, Napoli addresses the distinction often made between content ownership and outlet ownership and the challenges this presents with broadcast and cable television where conglomerates often “simultaneously qualify as both content and outlet owners.”<sup>24</sup>

The discussion of exposure diversity is also quite important and connects to the measurement of cable and satellite programming services that follows. Napoli argues that this is the “neglected diversity dimension” and makes the connection to the stage in the communication process of “content ‘as received’” that McQuail outlined.<sup>25</sup> The measurement of this dimension of diversity is more or less clear in the case of broadcast television, since the Nielsen ratings provide such data albeit with questions about accuracy and claims of bias. Cable and satellite services provide a far more difficult challenge, however, since Nielsen data is only available for prominent networks. The audience for Bloomberg Television, for example, could support a claim that news programming “as received” is more diverse than before, but Bloomberg did not subscribe to the Nielsen service in 2011 and chief executive officer Andy Lack said such measurements were somewhere “down the line.”<sup>26</sup>

The limitations on Nielsen data point to the need for other means to address what Napoli argued is an important question: “what factors effect the levels of exposure diversity among

audiences.”<sup>27</sup> In the case of cable and satellite programming, the rate of carriage of such services on multichannel systems becomes critical and varies widely. The potential for exposure among audiences is far greater for a service carried in 100 million households than one in less than 30 million, let alone those that count their subscribers in the tens of thousands. Napoli argues that the marketplace of ideas metaphor is not satisfied with the mere existence of diverse “ideas, sources and perspectives” but that “Diversity of exposure must exist as well.”<sup>28</sup>

### Congressional Mandates & FCC Studies of the Marketplace

The Congressional mandates that require the FCC to measure the degree of competition and consolidation within the broadcast and cable television industries were written long before George W. Bush was sworn into office. The Cable Television Consumer Protection and Competition Act of 1992 called on the FCC to report to Congress on an annual basis on the “status of competition in the market for the delivery of video programming.”<sup>29</sup> The objectives for this clause were clear in the introduction to Section 628 of the Act: to “promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market.”<sup>30</sup> Such a requirement was consistent with the mood on Capitol Hill at that time, as the Children’s Television Act of 1990 passed in the previous Congress. Both acts were in reaction to the wholesale embrace of market regulation under President Reagan.

The origin of the second Congressional mandate is more difficult to explain but provides an important example of corporate influence on the legislative process. Section 202(h) of the Telecommunications Act of 1996 called upon the FCC to review “all of its rules biennially as part of its regulatory reform review.” That part of the act was consistent with the language in earlier legislation, although the use of “regulatory reform” indicates the intent of the mandate. More significant, however, was what followed, since it called on the Commission to “determine whether any such rules are necessary in the public interest as the result of competition” and stated that the Commission “shall repeal or modify any regulation it determines to be no longer in the public interest.”<sup>31</sup> The final clause was akin to a poison pill, since it required the FCC to either eliminate or alter regulations or to make an argument that defended the continued existence of the rules. All of these decisions and justifications, moreover, could be challenged in the courts.

That was exactly what the authors of that section of the Telecom Act had in mind. While Senator Larry Pressler took credit for pushing the act through Congress, it was a pair of lobbyists for News Corp., Preston Padden and Peggy Binzel, who hatched section 202(h).<sup>32</sup> The original focus of the 1996 Act was on telecom services, but it soon evolved into a broader rewrite of the Communications Act with broadcast and cable television on the docket. Two of the focal points in such discussions were the national television station ownership rule, which was raised from 25% to 35% of television households in the act, and the newspaper-television cross ownership rule, combinations that had been barred since the 1970s. When

News Corp. and others could not convince Congress to include a wholesale repeal of those rules, Padden and Binzell advocated for the biennial review to insure that the ownership rules remained in play. The approach industry lobbyists embraced was clear: “You have to think long term. You have to convince a corporation that, when dealing with Congress, the front door may be locked, but there’s always a window open somewhere.”<sup>33</sup>

### The New Television Marketplace

On the night of February 28, 1983, the series finale of *M\*A\*S\*H* was watched in 60.2% of television households nationwide. The total audience for the final episode was estimated at 105.9 million viewers. Some two decades later, *Friends* ended a decade-long run on NBC. There were far more television households and far more potential viewers in 2004, but the audience for the final episode of *Friends* was less than half that of *M\*A\*S\*H*, with 52.5 million viewers in 29.8% of television households. Some might attribute the relative size of the audiences to the iconic stature of *M\*A\*S\*H*, but most would point to a more fragmented television marketplace. The number of cable households more than doubled between 1983 and 2004, from 29.4 million to 65.4 million, but most striking was the increase in the number and variety of programming services available in those households.

There is no doubt that the emergence of cable and satellite television as content providers transformed the marketplace. But there is another fact that is undeniable. Since the mid-1980s, changes in FCC policies and regulations have allowed for unprecedented consolidation of broadcast networks, cable services and motion picture studios in a mere handful of conglomerates. The elimination of the Financial Interest and Syndication Rules alone paved the way for three prominent mergers of television and motion picture assets: ABC and Disney in 1996, CBS and Paramount in 2000, and NBC and Universal in 2004. An important question that must be addressed is whether the approval of such mergers and acquisitions, as well as many other regulations and policies, were based on a strong “factual foundation” and a “contemporaneous picture of the media market” as Powell promised in the early days of the Bush Administration.

### FCC Analysis of Prime Time Programming

Much of the debate surrounding the 2002 and 2006 ownership reviews conducted during the Bush Administration focused on issues related to horizontal reach, such as the newspaper-television cross ownership and national television station ownership rules. Far less attention was paid to analysis related to vertical depth. There were no specific FCC rules related to prime time television under review, since the Commission allowed the Financial Interest and Syndication Rules (fin/syn) to expire in 1995, but both the 2002 and 2006 reviews included analyses of prime time television that addressed questions about source diversity. In each case, the studies undertaken were used to support further market regulation, but there

are serious flaws with both the data utilized and the manner in which the studies were integrated into broader policy decisions.

### *Prime Time & 2002 Biennial Regulatory Review*

When the Commission eliminated the fin/syn rules in the 1990s, it argued that the broadcast networks were no longer in a position to leverage a financial interest in programs on their schedules. Under the Bush Administration, however, the FCC showed little interest in ascertaining whether such a conclusion was valid. There are various issues one could pose with how the Commission addressed the level of concentration in the prime time marketplace. In 2003, Mara Einstein took an unusual step and wrote an editorial in *Broadcasting & Cable* over how the Commission used her analysis on the impact of the fin/syn rules on the diversity of program genres that was part of the 2002 Biennial Regulatory Review. She begged that her research be used as intended, to “stimulate wider discussion on media ownership, media diversity and the underlying economics that guide media content.”<sup>34</sup>

The inclusion of the Einstein analysis in the biennial review is problematic on numerous levels. The stated purpose of the study was to determine whether there was a “correlation between the FCC’s imposition of financial interest and syndication rules and program diversity on prime time broadcast network television” with a focus on content diversity.<sup>35</sup> Einstein concluded that program diversity increased as source diversity decreased following the expiration of the fin/syn rules, refuting claims that consolidation had “negative effects on diversity.”<sup>36</sup> While the Commission reaffirmed program diversity as one of its core objectives in the 2002 review, that was not the projected outcome of the fin/syn rules. The purpose of the rules was to promote an “increase in the opportunity for the development of truly independent sources of prime time programming.”<sup>37</sup> As such, while increased program diversity through fin/syn would be a benefit of the Commission rules, it was implemented to address source diversity and the conclusion was that the “market is seriously unbalanced to the disadvantage of producers and a freer, more diversified television production and distribution process.”<sup>38</sup> The Einstein analysis, moreover, showed a significant decrease in source diversity following the expiration of the rules in the 1990s.

There is another dimension of the use of the fin/syn rules in the biennial review that is troublesome. While the Commission was anxious to use the perceived ineffectiveness of the fin/syn rules to support its argument for further market regulation, it refused to consider the degree to which the marketplace was once again unbalanced. As part of the review, the Coalition for Program Diversity called upon the Commission to create a “25% Independent Producer Rule” to ensure that prime time programs are “as diverse as possible” whereas the Writers Guild of America advocated a requirement that broadcast and cable networks purchase 50% of the “entertainment” programming on their prime time schedules from independent sources.<sup>39</sup> Although the Commission invited comments on “behavioral rules to serve our public interest goals” as part of the biennial review, it concluded that the fin/syn proposals were “not squarely within the four concerns of our *Notice*” and that it “did not

intend, nor do we think the *Notice* can be fairly read to suggest, that a fin/syn overlay would or could substitute for structural regulation as a means of protecting our desiderata – localism, competition, and diversity.”<sup>40</sup> As such, while the majority on the Commission used the research related to the fin/syn rules to support its agenda, it argued that the rules themselves were outside the scope of the biennial review.

### *Prime Time & 2006 Quadrennial Regulatory Review*

While one can cast doubt upon the appropriateness of the research questions that ground the FCC analysis of prime time television under the Bush Administration, there are also basic issues one can raise with the accuracy of the ownership data the FCC uses in its analysis of the marketplace.<sup>41</sup> When the Commission allowed the remaining fin/syn rules to expire in 1995, it argued that “no evidence has been presented that demonstrates that the established networks have exercised undue market power in acquiring a financial interest in prime time entertainment programming.”<sup>42</sup> That conclusion was expected, but more significant was that the FCC eliminated mechanisms to determine whether networks wielded “undue market power” moving forward. When the FCC relaxed the rules in 1991, it instituted various reporting requirements related to network acquisition of program rights and participation in syndication.<sup>43</sup> This included a certification that “rights in an outside production or a producer-initiated in-house production were not obtained as a condition of network licensing or airing of the program.”<sup>44</sup>

That confirmation was not the lone element of the reporting requirements that were eliminated. In 1995, multiple petitioners requested that the Commission maintain and even strengthen the reporting requirements, arguing that the FCC needed to monitor the conduct of the networks to assess the true impact of rule changes.<sup>45</sup> One of the rules in place required networks to submit annual reports listing programs in which they held a financial interest or syndication rights. The Commission eliminated all such reporting requirements, arguing that the commentators had not demonstrated the need to continue such an obligation and agreeing with broadcast claims that it was an unreasonable burden. As a result, even the FCC does not have a complete record of the shows broadcast on the public airwaves in which the networks and their parent corporations hold a financial interest or syndication rights.

The impact of this failure was evident in the 2006 Quadrennial Regulatory Review. The FCC commissioned Austan Goolsbee to examine the use of market power in the prime time program marketplace, but it could not provide the basic information needed to support valid measures and conclusions. Goolsbee utilized one of the best available resources, the *International Television and Video Almanac*, but it lists the “suppliers” or “producers” of a given program, which focuses on the point of production and does not account for all companies that have a financial interest. Goolsbee concluded that “primetime broadcast television is a heavily vertically integrated endeavor and one can see that the life of an independent producer of programming is likely to be rather difficult.”<sup>46</sup> He concluded that around 18% of programs for the 2000-01 through 2004-05 seasons came from outside the conglomerates

that owned the broadcast networks. The question is whether such measures were accurate.

The 2004-5 season illustrates the implications of Commission refusal to continue the most basic reporting requirements. The addition of other methods to ascertain an ownership interest in programs paints a much different picture. These methods include production listings in prominent trade publications, including *Variety* and *The Hollywood Reporter*, end-of-show credits including copyrights, and the U.S. Copyright Office database. The last steps are important ones. Most sources, for example, list Endemol USA as the program supplier for *Extreme Makeover: Home Edition* on ABC, but Greengrass Productions holds the copyright. This is significant, since Greengrass is a production unit within Disney.

In the FCC analysis, Goolsbee concluded that CBS held a financial interest in 57.1% of the shows on its schedule in 2004-05.<sup>47</sup> The Nielsen index published in *The Hollywood Reporter* also included 28 shows for CBS that season. When information in the *International Television & Video Almanac* is cross-referenced with listings in trade publication and end-of-show credits, there is an ownership interest traceable to CBS or corporate parent Viacom in 24 of 28 shows, 85.7%, with two of the non-aligned shows short-lived reality programs inserted between multiple runs of *Survivor* and *The Amazing Race*.<sup>48</sup> Goolsbee concluded that broadcasters held a financial interest in an average of 81.5% of the programs on their network or other networks between 2000-01 and 2004-05. The *Hollywood Reporter* included the Nielsen ratings for 156 series for the 2004-05 season. When additional methods are utilized, there is an ownership interest traceable to the corporate parent of one of the networks in 143 of 156 shows, 91.7%.

### *The Marketplace Revisited, Part I*

The central question in the FCC analyses of prime time programming is whether the broadcast networks utilize their position to extract a financial interest in programs on their schedules and what this means in terms of source diversity. That was a concern when the FCC enacted the fin/syn rules in 1970 and it remained an issue long after it allowed the rules to expire. The problem is that the Commission did not mandate that a broadcast network provide basic information, such as the prime time programs in which it holds a financial interest. The reporting requirements in place between 1991 and 1995 would allow for valid measurements of the prime time marketplace.

These flaws undermine the debate over such issues. In 2006 and 2007, a consortium that included the Directors Guild of American and the Writers Guild of America called on the Commission to institute a rule that required the networks to allocate 25% of prime time program time to “truly independent” sources. In that proposal, a source would be considered an “independent source” if it was not “directly or indirectly owned or controlled by or affiliated with ABC, CBS, FOX or NBC, or their subsidiaries or sister companies.”<sup>49</sup> The Commission did not have a complete picture of independent production at that time, which made it impossible to consider such proposals.

The measurement of the marketplace using the methods outlined above presents a more

accurate picture and reveals higher levels of concentration. For the last four seasons under the Bush Administration, 2004-05 through 2007-08, the six major media conglomerates – Disney, National Amusements (Viacom/CBS), NBC Universal, News Corp., Sony Corp. and Time Warner – held a financial interest in between 94.7% and 89.4% of the programs with attributable ownership, not counting movies, live sporting events and encore presentations. Sony Corp. is something of an interloper in this group since it does not own a broadcast network. Removing Sony from the group provides a snapshot of the share of “truly independent” sources defined above. In 2004-05 and 2005-06, all of the Sony programs were co-productions with CBS, so the share remains the same. When one removes the Sony programs that were co-productions with CBS in 2006-07 and 2007-08, the market share for the five conglomerates stands at 89.3% and 88.3%, respectively. The share of programs from independent sources on the debut schedules over four seasons, between 5.3% and 11.7%, is lower than that found in FCC studies and well below the 25% proposed in FCC filings.

#### FCC Analysis of Cable and Satellite Programming Services

The rise of cable television and perceived demise of broadcast television is an argument advanced often in analyses of the marketplace. In the midst of Congressional debate over the 1992 Cable Act, Representative Jack Fields stated that without retransmission consent, “free, over-the-air TV could go the way of the dinosaur.” Such connections between broadcast and cable have been around since the beginning. In 1958, the FCC ruled in *Frontier Broadcasting v. Collier* that the Commission had jurisdiction over cable to the degree that it is “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of broadcast television.”<sup>50</sup> The Commission formulated the first federal regulations in response to broadcast concerns over signal carriage, which included a requirement that all local broadcast stations be carried, and prohibited the importation of distant signals.

The Cable Television Consumer Protection and Competition Act of 1992 embraced similar concerns. While rate regulation was one focal point of that act, the impact of cable on broadcast television was evident with the inclusion of must-carry and retransmission consent provisions. Congress also mandated that the FCC report on the state of “competition in the market for the delivery of video programming” on an annual basis. The Commission under the Bush Administration failed to meet that obligation in the most basic sense, with over 20 months between the release of the eleventh report in 2005 and twelfth report in 2006 and almost 27 months until the release of the thirteenth report in 2009. The thirteenth report, in fact, was released on January 16, just four days before Barack Obama was sworn into office. It is important to remember that this reporting requirement was part of Sec. 19, with a stated purpose being to “promote the public interest, convenience, and necessity by increasing competition and diversity” in the marketplace. There is little doubt that the time since the passage of the 1992 Cable Act witnessed an increase in the number of services and genres, but it is far less certain that these changes resulted in content from diverse producers

and diverse owners, the objectives behind source diversity, and whether this in turn creates exposure diversity.

### *The Role of the NCTA in FCC Reports*

The list of programming services the Commission included in the Eleventh Annual Report to Congress on the cable and satellite marketplace would suggest that there was indeed abundance. The report identified 388 national programming services in 2004, with 89 of those under the same corporate umbrella as a cable operator. Those numbers marked an increase in the number of national programming services and a decrease in vertical integration between services and operators. When the report was released in February 2005, Chairman Powell argued that the video marketplace was the “most competitive and diverse” ever and proclaimed that the “monopolies of the past” had been neutralized. No sooner had the report been released than questions arose about the validity of such conclusions.

Commissioners Michael Copps and Jonathan Adelstein were among those raising concerns, arguing that the Commission had gathered “less than adequate data” and conducted insufficient analysis.<sup>51</sup> The fundamental flaw in the Commission approach was evident in the second paragraph of the report: “We do not require data submissions nor do we audit data provided.”<sup>52</sup> As noted above, the report stated that the commission “identified 388 satellite-delivered national programming networks” in 2004, but the tables that listed those networks cited less than 25 sources. The most significant in this group was a publication of the National Cable and Telecommunications Association (NCTA), *Cable Developments 2004*. The bulk of the services contained in the FCC report were taken from the “Directory of Cable Networks” in the NCTA publication. The NCTA is the leading advocate for the cable industry in Washington, so it has a vested interest in such debates. There is no question, moreover, that the interests of the NCTA are best served through the image of a robust marketplace, whether such appraisals are accurate or not.

The annual assessment of the video marketplace serves as a factual foundation for the Commission as well as Congress. An examination of the report, however, poses serious questions about the reliability of the analysis and validity of the conclusions. Some of the flaws are basic errors. The Eleventh Annual Report, for example, included a number of channels that were counted multiple time as well as various channels that went dark prior to the start of 2004 or did not launch before the end of the year. Most problematic were programming services that died long before 2004 but remained in the analysis. This included My Pet TV which began distributing one hour of programming a day in 1997 but closed in 1998. While the network went dark, it appeared on the FCC list of national video programming services six years later and remained in the NCTA database in 2009.

*What is a Network?*

The inclusion of programming services long since defunct or still on the drawing board points to a much larger issue in the annual reports. When the FCC enacted the fin/syn rules in 1970, the Commission established clear definitions of what constituted a network: “fifteen or more hours per week to at least twenty-five affiliated television licensees in ten or more states.”<sup>53</sup> This provision of the rules allowed News Corp. to launch the Fox network in 1986 with Twentieth Century Fox Television programming since it did not qualify as a “network” under the FCC definition. While News Corp. skirted the rules, a network definition that integrated both time (hours) and reach (affiliates and states) made applying the fin/syn rules viable. The failure of the Commission to utilize a definition of national programming services in its annual reports on video programming, on the other hand, rendered the measures of the marketplace almost meaningless.

In the Twelfth Annual Report, issued in 2006, the Commission celebrated a dramatic increase in the number of satellite-delivered national programming networks, from 388 in 2004 to 531 in 2005, an increase of 143 networks. Eclipsing the mythical 500-channel barrier might have seemed significant, but there was precious little analysis of what the numbers represented and where the expansion came from. The Commission did address some of the problems evident in the Eleventh Annual Report outlined above and there was additional discussion of related issues such as must carry and retransmission consent, but the report fell well short of the kind of analysis that Commissioners Copps and Adelstein called for after the previous report.

Flaws with the FCC analysis become evident in the examination of foreign language services. As noted earlier, the NCTA was the main source of data in the report issued in 2005 and it did not account for most foreign language services available via direct-broadcast-satellite. The FCC utilized more resources in its subsequent report, but this did little more than muddy the waters. Of the networks listed in the Twelfth Annual Report, more than one-third of them, over 200, transmitted in languages other than English. That total also represented a four-fold increase from the previous report. As such, while there was an increase of 143 national programming services between the two reports, the addition of 153 non-English services meant the number of English language services decreased between 2004 and 2005.

Some of these services were Spanish language feeds of well-known English-language services such as HBO Latino, ESPN Deportes and CNN en Espanol. A few were long established Spanish language cable services such as Galavision, which began 2009 in over 50 million households. And several were foreign language services that were part of the Comcast-owned International Networks that were also available via direct-broadcast-satellite. The majority of these services, however, were in-language programming from international sources carried on no more than one affiliate, Dish Network or DirecTV, with minuscule household penetration. This is a serious flaw. The 2005 FCC report, for example, included four Urdu-language services that were available via Dish Network. While it is difficult to find subscriber figures for these services, the 2000 census estimated that the U.S. had a total

population of 262,900 who spoke Urdu at home. In the FCC measurement of the marketplace, the four Urdu language services equaled four Disney owned networks – ESPN, ESPN2, ESPN Classic and ESPNNews – that were in over 60 million households each at the start of 2009.

The failure to include total households and the number of affiliates in the measure of national programming services were among numerous flaws with the FCC methodology. Various Spanish-language and religious services distributed their programming via local broadcast stations, which made them more akin to ABC, CBS and NBC than to traditional cable services. Trinity Broadcasting Network, for example, ranked as the eighth largest station group in 2008 with 25 full-power stations that reached over 35 percent of television households nationwide.<sup>54</sup> TBN also owned over 200 low-power television stations that gain local cable coverage through must-carry provisions. What was also interesting about TBN is that it used digital multi-casting to broadcast the Church Channel as well as JCTV, Smile for a Child, and TBN Enlace, which programmed for youth, children and Spanish-language speakers, respectively. While satellite systems, including religious services such as Glorystar, and Internet Protocol Television services such as Sky Angel IPV, transmitted some or all of the TBN networks, the failure to differentiate such networks was another flaw in the FCC approach.

Other significant questions with the FCC studies is that there are no distinctions made between services that transmit a few hours a week and those that are on 24 hours a day, seven days a week and between services that have dedicated channels on cable and satellite systems and those that are carried on other networks or video-on-demand. The Twelfth Annual Report included Deep Dish TV, a non-profit organization that supports movements for social change and economic justice, in its list of programming services. There is little question that Deep Dish TV brought diversity to the marketplace, but its programming was carried on public access channels on local cable systems and on Free Speech TV or Link TV on DirecTV and Dish Network. Deep Dish TV launched in 1986 and distributed over 300 hours of programming in its first 22 years, about what CNN and Fox News Channel distribute every two weeks.

### *The Marketplace Revisited, Part II*

In its Thirteenth Annual Report, which the Commission adopted in November 2007 but did not release until January 2009, the FCC counted 565 satellite-delivered national programming networks in 2006. The first concern of the Commission was on vertical connections and it concluded that 84 networks (14.9%) were integrated with at least one cable operator, a decrease since the previous report.<sup>55</sup> It then shifted the lens to national programming networks affiliated with other media entities, including broadcast networks and stations, and found an additional 124 networks (21.9%) with such connections.<sup>56</sup> The Commission concluded that more than half of the national programming networks, 274 of 531 (51.6%), had no connections to cable operators or other media entities. Without further investigation, this

might suggest that the major media conglomerates are not dominant in the cable and satellite marketplace. That, however, would be a flawed conclusion since these measures do nothing to assess exposure diversity.

The issues discussed earlier inflate the total number of national programming networks included in the FCC report, but there is another problem with the methods used. At the start of 2009, for example, MTV had carriage in 97 million households compared to just 250,000 for BET Hip-Hop. In the Thirteenth Annual Report, however, these Viacom-owned services were no different in the eyes of the Commission, in spite of far more exposure for MTV. One could argue that MTV earned carriage in almost every cable and satellite household because it appeals to television viewers and there would be some truth to that claim. Such a conclusion, however, would ignore MTV ownership links to cable operators from 1981 until 1995 and corporate links to CBS station group starting in 2000. These connections provided MTV with leverage in its quest for carriage.

The number of cable and satellite households is a critical factor for programming services and an important measure of exposure diversity. Since most national and regional programming services receive carriage fees on a per home basis, even small increases can affect the financial health of a network. The 30 million household threshold, moreover, was long viewed as the minimum needed for the sale of national advertising, although Turner Broadcasting shuttered CNN/fn because it concluded that number was not enough to make it viable. These factors point to the need to examine cable and satellite services that eclipse 30 million and 60 million households.

The focus on national programming services that reach these critical levels paints a far different picture of outlet and source diversity as well as exposure diversity in the marketplace. Based on figures in corporate documents, NCTA and Cable Advertising Bureau publications and trade journals, there were a total of 59 cable and satellite services with carriage in more than 60 million households at the start of 2008, not counting C-SPAN and C-Span 2. The six conglomerates with ownership of a major motion picture studio and/or mainstream broadcast network had an ownership interest in 72.9% of those networks. Since Sony Corp. had a financial interest in just one network, GSN: Game Show Network, through a joint venture with Liberty Media, five conglomerates had an ownership interest in 71.2% of those services. What is significant about these numbers is that just one of those conglomerates, Time Warner, was also a cable operator at the time, so vertical integration was not a major factor.

The addition of Liberty Media and Comcast to this group is also revealing. Most of the services within Liberty Media built their subscriber base while connected to Tele-Communications, Inc., the largest cable MSO of the 1990s. The services within Comcast, on the other hand, expanded within the largest cable operator of the 2000s after it merged with a successor to Tele-Communications, Inc. When Liberty Media and Comcast are included in these totals and Sony is removed, valid given the fact that Liberty Media owns the other 50% of GSN, seven corporations have a financial interest in 88.1% of the cable and satellite programming services in over 60 million households at the start of 2008.

The 30-60 million grouping is harder to determine. While accurate figures were available

in corporate documents and trade publications for most of the services that eclipse 60 million households, the lower threshold introduces a broader range of ownership. With DirecTV and Dish Network reaching 30.6 million households at the start of 2008, moreover, it was appropriate to include broadcast outlets such as Trinity Broadcasting Network that are carried on basic tiers of both services. An estimated 44 networks reached between 30 and 60 million cable and satellite households without the use of local broadcast stations and the five major media conglomerates had a financial interest in 15 of those. The inclusion of Liberty Media and Comcast increased that total to 25 of 44 (56.8%). The premium movie channels also present challenges, since the six most prominent brands – HBO, Showtime, Cinemax, The Movie Channel, Encore and Starz! – offer multiple channels on most cable and satellite systems. For the purposes of this analysis, each of these groups are counted once, with National Amusements, Time Warner and Liberty Media controlling two each.

The dominance of the five conglomerates with ownership of both broadcast networks and motion picture studios and the two corporations with historic links to Tele-Communications Inc. is clear in this analysis. Those seven corporations had an ownership interest in 88.1% of the networks in over 60 million cable and satellite households and 56.8% of the networks in between 30 and 60 million households at the start of 2008. With the addition of the six premium services, the seven conglomerates have an ownership interest in 76.1% of the services measured. The success of the broadcast groups in surpassing 60 million households, moreover, would suggest that stations are valuable properties in carriage negotiations.

### **Conclusion**

The connections between broadcast and cable interests in the age of media conglomerates are undeniable. In 2000, when Disney and Time Warner waged war over retransmission consent for a collection of ABC owned and operated stations, Disney sought increased carriage for six networks: Disney Channel, Toon Disney, SoapNet, ESPN2, ESPN Classic and ESPNNews. The success of that campaign was evident at the start of 2008, when ESPN2 and Disney Channel were carried in over 90 million households and the other four were carried in over 60 million households each. The license that ABC held to operate local broadcast stations might have stated that it was to serve the public interest, convenience and necessity, but in this case it was Disney interests that came first.

The battle between Disney and Time Warner Cable also points to the need for more sophisticated measurements of television production and distribution. It is apparent from this analysis that the FCC under Republican leadership was unwilling or unable to produce such studies. There are also broader issues with the FCC and how it measures the marketplace, ones that touch on the close relationship between the Commission and the industries it regulates. The failure of the Commission to write rules under the Clinton Administration that required broadcast licensees to report ownership interest in prime time programming undermined its own analysis of the marketplace. The rationale that it was a burden to the broad-

cast networks to provide such information points to the influence of the conglomerates within the FCC. The Commission's reluctance to utilize basic definitions and classifications under both Republican and Democratic control, moreover, rendered the analysis of cable and satellite programming services all but meaningless. The failure to provide an accurate measurement in these areas undermined Congress and the Commission in their roles as guardians of the communications infrastructure.

A more sophisticated measurement of the prime time marketplace raises serious concerns about source diversity. The Commission sponsored analysis of the prime time marketplace concluded that the life of an independent program producer would be "difficult" during this period. The introduction of additional information, however, makes the situation even more perilous. For the last four seasons under the Bush Administration, 2004-05 through 2007-08, the five media conglomerates with ownership interests in both motion picture studios and broadcast networks held a financial interest in over 88% of the prime time programs the schedules of ABC, CBS, NBC, FOX and CW. These percentages point to appalling levels of source diversity, but they also underscore the flaws in the FCC analysis of prime time television.

The inclusion of exposure diversity into these discussions with a focus on cable and satellite programming services raises additional concerns with FCC studies. While Nielsen ratings provide a snapshot of diversity 'as received' among the most prominent cable and satellite services, many such networks are not included in these measurements and that raises serious questions. Additional methods are needed to paint an accurate picture of the marketplace. Carriage of cable and satellite services is also often negotiated in bundles, linked to retransmission consent of broadcast stations with conglomerates such as Disney, so the level of household penetration often connects back to questions about market power and leverage. The revised measurement of cable and satellite services reveals far less diversity when additional criteria are introduced into the analysis, with close to 90% of the services in over 60 million households at the start of 2008 under the umbrella of seven media conglomerates.

When the Commission launched its 2002 Biennial Regulatory Review, it set forth five factors that promoted diversity, two of which are critical to this study. As discussed earlier, the Commission defined source diversity as the availability of media content from a variety of content producers, while it defined outlet diversity as the existence of multiple independently owned firms in a given market. It is undeniable that there is a dramatic increase in the number of prime time program hours and the number of programming services, but multiplicity does not equal diversity. In this analysis of prime time programming, there was limited source diversity in the television marketplace. In these domains, independent productions and non-aligned services were all but extinct. In the analysis of cable and satellite television, there were independent and non-aligned networks, but their household penetration levels were often miniscule when compared to prominent services. Once again, the major conglomerates were dominant in these discussions, raising serious concerns about source diversity. The FCC should be concerned with the degree of consolidation and level of concentration in the television marketplace, but the Republican majority under President Bush showed little apprehension as it pushed forward its agenda under chairmen Powell and

Martin.

## Notes

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3. See Robert McChesney, "Media Policy Goes to Main Street: The Uprising of 2003," *The Communication Review*, no. 7 (2004): 223-258; Ben Scott, "The Politics of Media Ownership," *American University Law Review*, no. 53 (2003-04): 645-677; Philip M. Napoli and Nancy Gillis, "Reassessing the Potential Contribution of Communication Research to Communication Policy: The Case of Media Ownership," *Journal of Broadcasting & Electronic Media*, no. 50:4 (2006): 671-691.
4. Federal Communications Commission, "Pleading Cycle Established for Comments on Review of Media Bureau Data Practices," June 29, 2010.
5. Federal Communications Commission, "FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group," October 29, 2001.
6. Michael Powell, "Willful Denial and First Amendment Jurisprudence," Remarks before the Media Institute, 1998.
7. Dallas Smythe, "On the Political Economy of Mass Communication," *Journalism Quarterly* (1960).
8. Peter Golding and Graham Murdock, "Culture, Communications and Political Economy," in *Mass Media & Society*, 3<sup>rd</sup> edition, eds. James Curran and Michael Gurevitch (New York: Oxford University Press, 2000), 72.
9. *Ibid*, 74.
10. Vincent Mosco, *The Political Economy of Communication*, 2<sup>nd</sup> edition (Thousand Oaks, CA: Sage, 2009), 24.
11. *Ibid*, 220.
12. Mark S. Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," *Texas Law Review*, 60 (1981-82), 207-257.
13. Telecommunications Competition and Deregulation Act of 1995, S.652, 104<sup>th</sup> Cong., 1<sup>st</sup> sess, 1995.
14. Mosco, 2009, 176.
15. *Ibid*, 176.
16. *Ibid*, 35.
17. Golding and Murdock, 73.
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19. The other types of diversity that the Commission discussed were program diversity, viewpoint diversity, and minority and female ownership diversity.
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21. Graham Murdock, "Large Corporations and the Control of the Communications Industries," in *Culture, Society and the Media*, ed Michael Gurevitch, Tony Bennett, James Curran, and Janet Woollacott, 120 (London: Methuen, 1982), 120.
22. Denis McQuail, *Media Performance: Mass Communications and the Public Interest* (London: Sage Publications, 1992), 155-158.
23. Napoli, 129.
24. Ibid, 130.
25. Ibid, 146.
26. Quoted in Mike Reynolds, "HD Launch Puts Bloomberg in Focus," *Multichannel News*, May 9, 2011.
27. Napoli, 146.
28. Ibid, 147.
29. Cable Television Consumer Protection and Competition Act of 1992, 102<sup>nd</sup> Congress, S. 12, 1497.
30. Ibid, 1494.
31. Telecommunications Act of 1996, 104th Congress, S. 652, 56-57.
32. Alicia Mundy, "Put the Blame on Peggy, Boys," *CableWorld*, June 20, 2003, 26.
33. Quoted in Mundy.
34. Mara Einstein, "Dereg? We Should Talk Re-Reg," *Broadcasting and Cable*, April 28, 2003, 50.
35. Mara Einstein, "Program Diversity and the Program Selection Process on Broadcast Network Television," Federal Communications Commission (2002), 3.
36. Ibid, 33.
37. Federal Communications Commission, "Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting," 23 FCC 2d, 394 (1970).
38. Ibid, 387.
39. Federal Communications Commission, "2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996," 247-248.
40. Ibid, 248.
41. Federal Communications Commission, "Review of the Syndication and Financial Interest Rules," Report and Order, 10 FCC Rcd 23 (1995).
42. Ibid.
43. Federal Communications Commission, "Evaluation of the Syndication and Financial Interest Rules," Memorandum Opinion and Order, 7 FCC Rcd 1 (1991).
44. Ibid, 3154.
45. Federal Communications Commission, "Review of the Syndication and Financial Interest Rules," Report and Order, 10 FCC Rcd 23 (1995).
46. Austan Goosbee, "Vertical Integration and the Market for Broadcast and Cable Television Programming," Federal Communications Commission (2007), 11.

47. The study on the ownership of prime time programming that was part of the 2006 Quadrennial Regulatory Review used proprietary information and the Commission would not release the list of network programs included in the analysis. Comparable lists were compiled using various trade publications, network documents and additional sources.
48. CBS owned a share of the copyright for the two latter shows through subsidiaries, Survivor Productions and Amazing Race Productions.
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50. Federal Communications Commissions, *Frontier Broadcasting v. Collier*, 32 FCC 459 (1962).
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53. Federal Communications Commission, Report and Order. Competition and Responsibility in Network Television Broadcasting. 23 FCC 2d (1970), 382-429.
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