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NURTURING THE ENVIRONMENT: DIFFERENT REGULATORY APPROACHES

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The subject of this year's Intelevent, "Nurturing the Environment: Different Regulatory Approaches," is most timely and appropriate.

The current proliferation of program channels in America and the oncoming multi-channel, multi-faceted 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. Notwithstanding the proliferation of cable and computers and the day, not too far in the future, when television, computers and telephones will be one and the same, today broadcasting in the U.S. remains the principal means whereby most 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 also includes cable, satellite, and wired and wireless communications, broadcasting must still be viewed as an industry whose operations are guided by a trusteeship requirement. That is, because of the unique place they hold and the importance of the service they provide, broadcasters have a special obligation to serve the needs and interests of their communities, one that has historically distinguished them from providers of nonbroadcast services. Broadcasters themselves recognize this, and take this obligation seriously. And yet, the world is clearly changing. Although broadcast news and entertainment programming remains the most-watched programming in America, cable television systems now reach most American homes and continue to make substantial inroads on the audiences broadcasters rely upon to survive. Also,

oncoming DBS will further compete for audience. The general-appeal programming broadcasters are forced by the demands of mass advertising to present is being subtly, and sometimes not so subtly, changed by the flood of specialized cable programming and cable channels. Cable's technology suits 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 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 and a host of other oncoming changes amply demonstrate that the time has come for the 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 the changing communications environment in favor of competition. It's now time for us also to "walk the walk" by changing the rules that were formulated in a broadcasting environment that is drastically changing.

Let me talk a little bit about what I mean 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."

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. And 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 broadcast, cable and nonbroadcast outlets in which varying viewpoints on important public issues could be voiced and accessed. And "program processing guidelines," a euphemistic term for Commission-approved quotas of certain program types, were a fact 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.

Now, back to the topic at hand. 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 may harm more than they help); and, second, that content regulation becomes virtually a dead issue with the proliferation of outlets for different types of programs 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 and, in my view, very appropriately, given the massive increase in the number of competing radio outlets that exist today. The same needs to be done regarding the TV multiple ownership rules, in order to give television licensees the ability to profit from operational economies 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 whether, and how, they need fine-tuning. 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.

Let me start by discussing the last issue -- the prospect of further rules on children's television -- first. As a general matter, 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 or, increasingly either on videotape or via interactive computers, that is either produced for or suitable for children, some continue to complain that "good" broadcast children's programming is lacking and, presumably, otherwise unfindable.

In my view, any additional enforcement of the Children's Television Act should keep in mind recent court rulings which sent strong messages to the FCC on "indecency" and "must carry."

In particular, the recent 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. The Commission may not impose upon them its private notions of what the public ought to hear.

The Supreme Court 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, indecency and probably the Fairness Doctrine. As a longtime advocate of indecency enforcement and violence regulation, the Supreme Court statement has influenced my legal, if not personal, position.

Now let me give you a preview of my views on the other issues. Should we generously liberalize the television ownership rules? Absolutely. 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 world. The remaining requirement should be national and local percentage audience caps to obviate antitrust problems. Should we make sure that minorities are given a fair shake to acquire radio and television stations in whatever rule changes we make? Again, absolutely. 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 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 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, however, 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 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, oftentimes 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? Here 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 keeping those numbers growing. 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 concluding, I suppose I would again observe that 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, initially in the common carrier area, that one of the principal benefits of technological development and increased competition is that it eventually renders most extrinsic regulation unnecessary. Now that the Commission is poised to re-evaluate 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 new non-scarce multi-channel communications reality of today and tomorrow.

After all, industry entrepreneurship and investment made the American system of broadcasting the best in the world, not government underwriting and not government regulation. Government regulation is necessary to protect the public against the predation of monopolists and those with market power. In the multichannel environment world 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 public 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.

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I'm attaching a summarized list of existing broadcasting regulation as a guide to other countries or developing democracies. This list should also help to dispel any misconception that constitutional First Amendment rights have freed American broadcasters from most regulation. The FCC regulations for cable, mobile services of common carrier are much too voluminous to be enclosed here.

SUMMARY OF BROADCASTERS' PUBLIC INTEREST OBLIGATIONS

The Communications Act establishes broadcasters' general obligation to operate consistent with the "public interest, convenience, and necessity." Traditionally, the FCC has granted broadcasters wide discretion in meeting these obligations, in keeping with their First Amendment rights. The Act and FCC regulations, however, do set out some specific obligations that help to define elements of broadcasters' public interest responsibilities. While many unnecessary or outmoded regulations were eliminated by the FCC beginning in the 1970s, the core public interest obligations remain largely unchanged. Below is a summary of the most important of these obligations. Due to the present and oncoming multiple channel, multi-program communication world of today, many of these rules should be reviewed.

1. PROGRAMMING

A. General obligation to provide issue-responsive programming

* Quarterly issues/programs lists -- licensees must prepare quarterly lists of community issues station addressed during last 3 months; and programming that gave "significant treatment" of those issues. Must be kept in station's public file. Broadcasters "run" on this list at renewal time.

B. Children's television

* Obligation to provide educational and informational programming; restrictions on amounts of advertising.

C. Obscenity/Indecency

* Communications Act and Criminal Code prohibit "obscene, indecent or profane" broadcasts.

D. Lotteries

* Criminal Code restricts broadcasts of certain lottery information.

E. Stations IDs

* Licensees must broadcast station identification announcements at beginning and close of broadcast day, plus hourly.

F. Sponsorship Identification

* Licensees must identify sponsors of broadcasts.

G. Payola/Plugola

* Licensees and employees may not accept direct or indirect consideration for broadcasting songs or other material without disclosing sponsorship.

2. POLITICAL

A. Reasonable Access

* Licensees must provide "reasonable access" to federal candidates for political messages.

B. Equal Opportunity

* Licensees must provide all legally-qualified candidates with equal opportunities for their political messages.

C. Lowest Unit Charges

* Licensees must provide all legally-qualified candidates with lowest unit charges during campaign "windows"; must provide "comparable rates" at all other times.

D. Political, editorial, personal attack rules

* Stations that editorialize in favor of or in opposition to candidates must provide other candidates with notice and reasonable opportunity to respond; similar rules apply to identifiable person or persons "attacked" during discussion of controversial issues of public importance.

3. OWNERSHIP

A. National Limits

TV -- No persons may have licenses for more than 12 TV stations. (25% nationwide reach limit; opportunity for up to 14 stations where minority control is involved.)

Radio -- No person may own more than 20 AM and 20 FM stations. Additional three stations per service allowed if controlled by minorities or small business entities.

B. Foreign ownership prohibited

* Licensees may not be granted to aliens; alien corporate ownership limited to 20-25%.

C. One-to-a-market

* General prohibition on ownership of TV and radio stations in the same markets.

D. Duopoly

TV -- General prohibition against ownership of more than one TV station in a market.

Radio -- New FCC rules allow up to three stations (no more than two in the same service -- AM or FM) in smaller markets (markets with 14 or fewer stations), provided that ownership combination comprises less than half the stations in the market. Common ownership of 2 AM and 2 FM stations allowed in larger markets, provided that ownership combination's combined audience does not exceed 25% of market listening.

E. Cross-ownership

* Ownership of broadcast station and newspaper in same market, or TV station and cable system in same market, is prohibited.

F. Anti-trafficking

* One year restriction on transfers of licenses obtained in comparative proceeding or through minority ownership policies.

4. ENGINEERING

A. Minimum hours of operation

* All broadcast licensees must operate a minimum number of hours per week.

B. EBS

* Emergency Broadcasting System regulations vary for participating and non-participating stations. TV stations must provide captioning of EBS messages for the deaf.

C. Transmitter/Tower

* Stations must operate within specified power and frequency parameters, and keep logs. The FCC also regulates tower lighting and painting.

D. RF Radiation Safety

* New station, modification and renewal applicants must certify compliance with FCC RF rules protecting public and station employees from excessive exposure.

E. FAA

* Stations must meet FCC/FAA requirements for non-interference/obstruction to air navigation.

5. MANAGEMENT

A. EEO

* Broadcast licensees are covered by statutory and FCC EEO policies, as well as general provisions of civil rights laws. All licensees must have EEO policy that prohibits discrimination, and must take positive steps to recruit, hire, and promote women and minorities. FCC reviews licensees' EEO record on periodic basis; all stations' records reviewed at renewal.

B. Renewal

* Stations undergo renewal proceedings every 5 years for TV, every 7 years for radio. Renewal applications must include certifications regarding compliance with rules.

C. Ascertainment

* Licensees must identify community needs and problems by any reasonable means in order to prepare and maintain issues/programs lists. This list must be current and available for public or FCC inspection. This list must also be submitted at license renewal time for FCC review.

D. Network affiliation

* FCC imposes restrictions on TV network affiliation agreements -- agreements may not bar licensee from affiliating with 2 or more networks, may not prohibit licensee from rejecting network programming. TV licensees must file copies of network affiliation agreements with FCC.

E. Public File

* Licensee must maintain files available for public inspection. Files to include any applications filed with FCC, ownership material, affiliation agreements, citizens agreements, EEO reports, political information, issues/programs lists, time brokerage agreements, and letters from public.