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Address to the Media Institute
By Commissioner Kevin J. Martin
Washington, DC
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Introduction

Good afternoon, and thank you for inviting me to speak with you today. It is a particular pleasure to be invited to speak to the Media Institute, which has had such an impact on my career and my "thinking" regarding media regulation.

I grew up as the fourth child in a family five, and the First Amendment was rarely adhered to in my house when I was young; my voice was definitely stifled by my 4 siblings. So, I truly appreciate every opportunity to exercise my Constitutional rights.

I did not realize at the time that this would be the most important preparation for my experience as the fourth of five Commissioners. Debate about which items will or will not be placed on the Agenda, for example, can be strikingly similar to who controls what television channel will be watched or radio station listened to in the car.

But, my experience as a child taught me perhaps the most important lesson regarding free speech. For even when I was able to garner the attention of my parents, I quickly learned that unless I had something unique to say, competing voices would soon drown mine out.

And therein lies the most important premise underlying all of the government's role in media regulation: while the First Amendment protects one's right to speak, it does not guarantee that you will be listened to, and competition among voices is ultimately the best method of ensuring that the most unique and important information is ultimately heard.

It is in that vein that I would like to speak to you today regarding our history of broadcast regulation and how the competitive landscape – the increasing number of voices available because of new technologies to garner people's attention – should be effecting those rules.

Historical Perspective

Since the emergence of radio as a means of communication in the early 20th century, government has regulated the airwaves through the issuance of licenses in order to preserve "the public interest." Congress passed the Radio Act of 1927, declaring that the airwaves are in fact a public resource, and a scarce one at that, and should therefore be regulated by the government. While the available spectrum would grow with time and advances in technology, the underlying presumption has always been that spectrum is a

scarce resource, and that presumption has been used to justify its greater regulation of broadcasting, including content restrictions, licensing procedures, and ownership regulations.

The regulating of the public airwaves and the issuing of licenses would prove to be a weighty responsibility. In order to grant licenses, regulators would have to create some guidelines by which to do so. Congress bestowed this obligation on the Federal Radio Commission and later its successor, the FCC.

By thus empowering the Commission, Congress gave the Commission the ability to define, and subsequently redetermine again and again, what the public's interest was to be. This is, in my humble opinion, a very lofty task for any regulator to undertake.

The Commission's unique role in regulating broadcasters was upheld by the Courts in 1969 in *Red Lion Broadcasting Co. v. FCC*.[1] That decision deemed that inherent differences between modes of media communication require differences in the First Amendment standards applied to each. In the broadcasting world, the Court deemed that the free speech rights of the viewing public outweigh, and essentially are more important than, the First Amendment rights of the broadcasters themselves. The Court based its conclusion that certain broadcast regulation withstands First Amendment scrutiny in part on:

> The scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views ….[2]

Times and technology are no doubt significantly different than they were thirty years ago. In keeping with the Commission responsibility to protect the public interest, we must reevaluate the FCC's media regulations in the context of the current marketplace.

The Changing Marketplace

The vast majority of the Commission's existing ownership regulations were implemented in the context of a very different era. It was a time when most Americans relied on three free, over-the-air networks for television programming. Cable television was in its infancy, and DBS was a distant dream. The Internet was yet an obscure network-in-progress within the defense department. Today, by contrast, we have an astounding array of options from which to get our news and entertainment—hundreds of television channels, thousands of radio stations, millions of Internet websites, and movies on demand from our living rooms. Since 1975, for example,

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[1] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[2] *Id.*, at 400-401.

- Radio
    - Radio stations have increased from 7,785 to 12,932 stations.
    - Radio programming has diversified from 15 to between 90 and 95 distinct formats, with Spanish often cited as the fastest growing format.
    - Satellite digital radio has been born, proposing to dramatically alter the way Americans listen to radio and the programming available to them.
- TV
    - Licensed television stations have increased 76%.
    - The "Big Three" networks have become seven, yet their collective viewership has declined.
    - Television programming has skyrocketed. In 1999, there were 147 basic cable networks, 43 premium networks, and nine pay-per-view networks. In the last two years these numbers have only increased, with digital platforms increasing both capacity and service options, such as video-on-demand.
    - The number of households paying for TV increased from 17% to 86.4%, with 88.3 million households pay for TV by subscribing to a multi-channel video programming distributor.
- Newspapers
    - The number of daily newspapers has declined from 1,756 to 1480 (in 2000), but circulation has declined only slightly, from 62.1 to 59.4 million.
    - Meanwhile, the number of weekly newspapers—targeting niche audiences and discrete communities—has increased, and their circulation has doubled (and 80% of these papers are free!).
- Internet
    - The Internet was born—and quickly grew up.
    - Today, an estimated 166 million Americans have access to the Internet, with over 8.75 million sites representing a blinding array of diverse content as well as outlet opportunities.

These statistics indicate how much the media marketplace, and thus the foundation of many of the FCC's content regulations and ownership restrictions, has changed. Consumers have a much richer diversity today. They have more voices from which to

choose their entertainment, information and news. And advertisers similarly have many more outlets through which they can capture the audience's attention.

Today's Challenges

In light of these dramatic changes in the marketplace today—many of which are still occurring—how should the Commission treat broadcast regulation?

First, it is time for the Commission to recognize that the nature of broadcasting may no longer be so uniquely situated as to be un-deserving of full First Amendment protections.

Second, we need to reexamine the Commission's ownership restrictions. In this regard, I commend Chairman Powell for his leadership in initiating several proceedings that ask, for example, how the Commission should be examining radio ownership and whether the newspaper/broadcast cross-ownership restriction should continue.

In the past, the Commission has used prophylactic rules in its application of media ownership restrictions. The costs and benefits of such structural rules, however, need to be re-examined to determine whether prophylactic guidelines ruling media ownership continue to be the best way to preserve the public interest.

On one hand, structural rules allow for administrative ease both for the regulators and those whom they regulate. Certainly, bright-line rules allow us at the Commission to assess applications more easily and in a more timely fashion than would be possible otherwise. In addition, the industry also is well served by knowing exactly what the rules are and what the decisions regarding applications are likely to be.

On the other hand, bright-line rules can be problematic, in that they are by nature going to be either over- or under-inclusive. Moreover, the determination of any "magic" number of stations or media outlets that a certain organization can own will by its very nature be an arbitrary one.

With this background in mind, I make the following five suggestions as to how we should approach these pending reviews:

1. We should define the market more broadly.

   For instance, is the relevant product market for considering a radio license transfer only radio advertising? Don't advertisers today consider radio stations, newspapers, and television acceptable substitutes? Do viewers consider cable and DBS substitutes? Should these products comprise separate markets, or are they more accurately part of the multi-channel video market?

2. With respect to competitive analyses, we should be wary of duplicating the efforts of the competition experts.

The FCC's responsibility to promote competition is always central to a finding that a proposed merger is in the public interest. When neither the DOJ nor the FTC looks at a proposed merger (because, for instance, the dollar amount is too low to require an HSR filing), perhaps the FCC's analysis should include a comprehensive competitive assessment of the proposed merger effects on the market. But when either DOJ or FTC reviews a merger and declines to proceed, we should give significant weight to such a determination.

3. Where we have structural ownership limits in place, we need to presume that mergers that meet these limits are in the public interest.

Particularly when these limits are not merely the result of our own determination, but rather expressly mandated by Congress, they should provide, at a minimum, a guide for any public interest analysis. Such limits should help make our review easier, not more complicated.

4. Where we do not have applicable structural ownership rules, we must provide guidance regarding how the Commission will conduct case-by-case analyses.

I believe it essential to establish certain presumption as to what we believe the public interest to be, and to specify broadly what factors the Commission will consider in making its decisions. To interested parties, this information is essential. I also believe good, efficient government requires it.

5. Finally, we need to critically evaluate our traditional thinking on how ownership consolidation affects localism and diversity.

For instance, evidence suggests that consolidation actually enhances program diversity by encouraging owners to create programming that targets niche markets, rather than producing bland programming that has the greatest chance of capturing the greatest number of viewers or listeners. Whether increased consolidation has the same impact on viewpoint diversity, however, is still an open question. It does appear that mergers may preserve the ability of media companies to offer local content—particularly local news—by enabling local broadcasters or publishers to stay in business rather than selling out to a national company.

Conclusion

The media landscape has changed, and it is time that the FCC recognize these changes and react accordingly. Our rules must be relevant to be effective. The issues we face in several of our pending proceedings are no doubt challenging, but we can and must rise to the occasion. I look forward to working with my colleagues at the Commission, and with you in the industry, to fashion appropriate rules for the 21st century media marketplace.

Again, thank you for having me here today.