

ON MEDIA CONSOLIDATION, THE PUBLIC INTEREST, AND ANGELS EARNING WINGS

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*The night after I was sworn in, I waited for a visit from the angel of the public interest. I waited all night, but she did not come.*¹

Michael K. Powell, Commissioner, Federal Communications Commission

I haven't won my wings yet, that's why I'm an angel second class.

...

*Strange, isn't it? Each man's life touches so many other lives.*²

Clarence, IT'S A WONDERFUL LIFE

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1. Commissioner Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment, Address Before the American Bar Association 17th Annual Legal Forum on Communications Law 2* (Apr. 5, 1998) [hereinafter *The Public Interest Standard*], available at <http://www.fcc.gov/Speeches/Powell/spmcp806.html>.

2. IT'S A WONDERFUL LIFE (Liberty Films 1946).

INTRODUCTION

Almost everyone knows the holiday story recounted in Frank Capra's *It's A Wonderful Life*. Clarence, a guardian angel "second-class," is sent to earth to save a cynical, distraught, and self-destructive George Bailey on Christmas Eve. We learn that Clarence can only earn his wings if he convinces George that his life is worth living. He does this by showing George what life for all those who knew him would have been like had he never been born. Of course, the story ends happily as George realizes that life is not only worth living but indeed quite wonderful. As a result of delivering this timely and meaningful message to George, Clarence earns his wings.³

In one of his first speeches soon after being sworn in as a commissioner of the Federal Communications Commission ("FCC"), Michael Powell bemoaned the lack of an angel's visit to give him a clearer understanding of the guiding standard in broadcast regulation—the public interest.⁴ Without a clear message as to the meaning of the public interest, he declared the standard too vague. So instead he announced that he planned to follow a public interest standard based on his own "decisional schematic" comprising five lawyerly and largely procedural questions:⁵ (1) Does the FCC have authority to regulate broadcast? (2) Should the FCC nonetheless leave broadcast regulation to Congress or look to Congress for more specific instructions on how to regulate? (3) Should another state or federal agency regulate broadcast? (4) Should the FCC address broadcast regulation at all? (5) Would action by the FCC be constitutional?

Five years later, and now serving as Chairman, Powell leads the charge for even further deregulation of the already deregulated broadcast industry. The most recent FCC decision relaxed a wide range of media ownership regulations remaining on the books and poses the latest threat to the public interest standard and its longstanding goals of localism and diversity.⁶ But amidst this backdrop, there may be some signs that Powell's public interest angel

3. *Id.*

4. *See* The Public Interest Standard, *supra* note 1, at 2.

5. *Id.* at 5.

6. *See* Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286, 46,287-291 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) [hereinafter 2003 Broadcast Ownership Rules] (explaining how new broadcast rules meet policy objectives of localism and diversity); *see also* CHARLES B. GOLDFARB, *FCC Media Ownership Rules: Issues for Congress*, CRS REPORT FOR CONGRESS 10 (2003) (noting that multiple local media outlets foster viewpoint diversity).

is growing restless and may be preparing to deliver a much needed message about the true potential and importance of the public interest standard by giving Chairman Powell and all of us a glimpse of what the world of broadcasting might be like without it.

Consider some recent developments. The FCC's June 2003 broadcast ownership rule reexamination was clearly a tumultuous process. The amount of public participation was unprecedented,⁷ and after the rule changes were announced, the level of public outcry against them was even more so.⁸ The rules were stayed by the Court of Appeals for the Third Circuit soon after being adopted.⁹ In Congress, bipartisan efforts were soon underway to roll back the rule changes or at least tinker with them enough to dilute their predicted effects on increased media consolidation and harm to the public.¹⁰ Indeed, the Senate passed a rare "resolution of disapproval" highlighting their discomfort with the FCC's actions.¹¹

7. The FCC received over 500,000 comments on its proposed rules. Press Release, FCC, FCC Sets Limits on Media Concentration: Unprecedented Public Record Results in Enforceable and Balanced Broadcast Ownership Rules 1 (June 2, 2003) [hereinafter *Limits on Media Concentration*] (characterizing the review of broadcast ownership rules as "comprehensive" and noting broad public participation in the lengthy proceeding), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf. While the broadcasting industry generally endorsed the rule changes, most of the comments filed opposed deregulation. This opposition came from a wide variety of organizations, including the National Rifle Association, the National Organization for Women, Common Cause, the United States Conference of Catholic Bishops, the Leadership Conference on Civil Rights, the Writers Guild of America, and the Parents Television Council. Statement of Commissioner Michael J. Copps, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 1 (June 2, 2003) [hereinafter *Statement of Copps*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.pdf.

8. After the rule changes were announced, criticism came from numerous fronts, including the press, special interest groups, the public, and political and business leaders. For example, MoveOn.org, a grassroots, online political activism organization, collected 340,000 signatures calling for a rollback of the FCC rules. See Press Release, MoveOn.org, Senators Lott and Dorgan Hold News Conference Calling for Rollback of FCC Media Consolidation Rules (Sept. 11, 2003), at <http://www.moveon.org/press/pr/release91103.html> (on file with the American University Law Review). These signatures were presented at a press conference announcing bipartisan opposition to the new rules. *Id.* See also Tom Shales, *Michael Powell and the FCC: Giving Away the Marketplace of Ideas*, WASH. POST, June 2, 2003, at C1 (describing the widespread opposition to the rule changes).

9. See *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (finding that the proposed broadcast rules' potential harm to petitioner, a public interest radio broadcasting company, outweighed the effect of a stay on the FCC or third parties).

10. See generally 149 CONG. REC. S11,383-03 (daily ed. Sept. 11, 2003) (providing text of debates concerning a resolution of disapproval proposed by Senators Dorgan and Lott).

11. S.J. Res. 17, 108th Cong. (2003) (resolving to disapprove and nullify the broadcast rules by a vote of 55-40).

Interestingly, as a result of all this debate, Powell's FCC has recently shown some hopeful signs that it is beginning to grapple with the notion that more—not less—may be required to uphold the public interest standard. On the eve of the rule change adoption, the FCC created a diversity advisory committee to develop strategies and explore ways to enhance participation by minorities and women in the communications industry.¹² Soon after the rule changes were announced, a task force initiative was established within the FCC to explore ways to promote and strengthen broadcasters' commitments to their local communities.¹³ As part of this effort, the FCC noted its hope to resume authorizing thousands of new stations in the community-based low power FM radio service ("LPFM").¹⁴ All told, these FCC initiatives could signal some positive and timely first steps to revitalize the battered public interest standard.

Why should we care about the latest FCC rulings allowing growing consolidation of our mass media? Why should we care about the public outcry over these efforts? Why should we care about a seventy-five-year old public interest standard or its goals of diversity and localism? And why should we care if there may be signs that Powell's FCC is starting to take more of an interest in these goals and may potentially come to the realization that life in this nation is far better as a result of them? We should care because of the unique role that mass media plays in our democracy.

I. THE POWER OF BROADCASTING

The film *It's A Wonderful Life* bombed at the box office,¹⁵ but as a result of countless holiday season over-the-air television broadcasts, it

12. Press Release, FCC, Chairman Powell Announces Intention to Form a Federal Advisory Committee to Assist the Federal Communications Commission in Addressing Diversity Issues (May 19, 2003) [hereinafter Powell Press Release] (discussing the role of the Diversity Committee, which includes advising the FCC on practices to increase diversity in the communications sector and reporting periodically on its progress), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234645A1.pdf (on file with the American University Law Review).

13. Press Release, FCC, FCC Chairman Powell Launches "Localism in Broadcasting" Initiative: Agency Actions are Both Immediate and Comprehensive (Aug. 20, 2003) [hereinafter Localism in Broadcasting Press Release] (listing objectives of the Localism Task Force), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf (on file with the American University Law Review).

14. *Id.* (stating that the Localism Task Force will make recommendations to the FCC on this issue so it may ultimately advise Congress regarding additional LPFM radio station licensing).

15. See JEANINE BASINGER, *THE IT'S A WONDERFUL LIFE BOOK* 60 (1986) (comparing the film's \$3.3 million in revenues from theater rentals with the \$3 million spent on production alone); see also OTTO FRIEDRICH, *CITY OF NETS: A PORTRAIT OF HOLLYWOOD IN THE 1940'S* 350 (1986) (noting that *IT'S A WONDERFUL LIFE* was the first film made

has become one of our most treasured holiday classics.¹⁶ This is all due to the ubiquity of the nation's broadcast airwaves. This minor bit of movie trivia aptly illustrates the unique power of broadcasting. Despite the vast range of viewing and listening alternatives making up our constantly changing media landscape, broadcasting has always been different and it will continue to be different. By its very definition, its signals, like a farmer's seeds, are designed to be scattered across a wide and fertile land.

While broadcasting certainly does a lot of entertaining, it is also the primary source of news and information for most Americans.¹⁷ This remains true even amidst the explosion in cable and satellite television channels, satellite radio, and Internet web sites.¹⁸ The reach of broadcast television and radio is greater than any other news source and Americans spend more time with these sources than any other. Over ninety-nine percent of American households have a radio and over ninety-eight percent have a television set.¹⁹ Most households have more than one of each. Nearly every car has a radio and some cars even have televisions. Radio listeners tune in for an average of over twenty hours a week.²⁰ More than ninety-four percent of Americans over the age of twelve listen each week.²¹ For better or

by the newly formed Liberty Pictures and the film's lack of success greatly contributed to the eventual failure of the company).

16. See BASINGER, *supra* note 15, at 68-75 (surveying the popular and critical reappraisal of *IT'S A WONDERFUL LIFE* from the 1950s to the 1980s that transformed it into the renowned film that it is today, a reappraisal that resulted largely from its regular broadcast on network television).

17. Statement of Commissioner Jonathan S. Adelstein, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 5 (June 2, 2003) [hereinafter Statement of Adelstein] (stating that although information is available in new mediums, such as the Internet, most Americans continue to get news from local television and radio stations), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf. See also MEDIA INFOCENTER, TELEVISION: PRIMARY MEDIA SOURCES FOR NEWS, *at* http://mediainfocenter.org/television/content/leading_news.asp (last modified Mar. 23, 2004) (on file with the American University Law Review) (reporting that as of 2002 over fifty-six percent of adults use broadcast television and radio as their primary source for news).

18. *Id.*

19. See MEDIA INFOCENTER, AUDIENCE PENETRATION, *at* <http://www.mediainfocenter.org/compare/penetration> (last modified Mar. 23, 2004) (on file with the American University Law Review) (providing 2003 data from Nielsen Media Research and discussing radio and television statistical information).

20. See MEDIA INFOCENTER, HOURS SPENT LISTENING TO RADIO PER WEEK, *at* http://www.mediainfocenter.org/music/radio_audience/hours_perweek.asp (last modified Apr. 16, 2003) (on file with the American University Law Review) (providing data from Fall 2001).

21. See ARBITRON, RADIO TODAY: HOW AMERICA LISTENS TO RADIO—2003 EDITION 3 (2003), *available at* <http://www.arbitron.com/downloads/radiotoday03.pdf> (last visited Apr. 18, 2004) (on file with the American University Law Review).

worse, the number of hours of television watched daily by the average household is seven and grows every year, especially the hours watched by children, now three hours.²² Indeed, more than ninety percent of adults watch television every day while only fifty percent read a daily newspaper.²³ In addition, we soon will experience the complete transition to digital broadcasting in both television and radio,²⁴ a service with the transmission capability and flexibility to make over-the-air broadcasting even more pervasive and powerful. The power of broadcasting is unparalleled, and that is why FCC regulation guided by a robust broadcast public interest standard remains so fundamental to our democracy.

II. THE PUBLIC INTEREST STANDARD: LOFTY GOALS

The public interest standard is really best understood as a bargain. All television and radio broadcasters in this country operate under licenses granted to them by the federal government. With these licenses, broadcasters are granted the free and exclusive use of the publicly-owned spectrum and, in return, they agree to act as public trustees and serve the “public interest, convenience and necessity.”²⁵

22. See generally Media InfoCenter, *Time Spent Viewing—Households*, at http://mediainfocenter.org/television/tv_aud/time_house.asp (last modified Mar. 17, 2004), (on file with the American University Law Review) (tracing a rise in family television watching per day from just under six hours in 1970 to seven hours and 44 minutes in 2002). See also HENRY J. KAISER FAMILY FOUNDATION, *ZERO TO SIX: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS AND PRESCHOOLERS 4* (2003) (discussing the results of a comprehensive study on the availability and impact of media on American children, noting that children under the age of six spend an average of two hours every day watching “screen media”), available at http://www.kff.org/entmedia/entmedia_102803pkg.cfm (on file with the American University Law Review); TV Turnoff Network, *Facts and Figures About Our TV Habit*, at <http://www.tvturnoff.org/images/facts&figs/factsheets/FactsandFigures.pdf> (last visited Apr. 17, 2004) (on file with the American University Law Review) (compiling current statistics on television viewing habits, including the fact that U.S. children between the ages of two and seventeen watch television an average of almost twenty hours per week).

23. See MEDIA INFOCENTER, *AUDIENCE SIZE*, at <http://www.mediainfocenter.org/compare/audience> (last modified Feb. 17, 2004) (on file with the American University Law Review) (providing 2002 data on newspaper consumption from Scarborough Research and television consumption from Nielson Media Research).

24. See Joel Timmer, *Broadcast, Cable and Digital Must Carry: The Other Digital Divide*, 9 COMM. L. & POL’Y 101, 103 (2004) (noting that while the digital television transition deadline is 2006, the transition will likely take longer because a congressional requirement that eighty-five percent of households in a viewing region be capable of receiving digital broadcasts before a broadcasting company may discontinue analog transmission). See also FCC, *Digital Radio—The Sound of the Future*, at <http://www.fcc.gov/cgb/consumerfacts/digitalradio.html> (last visited Apr. 18, 2004) (on file with the American University Law Review) (summarizing the FCC’s plans to usher in digital radio’s benefits, including superior sound quality and the virtual elimination of static and signal interference).

25. 47 U.S.C. § 307(c)(1) (2000).

Journalist A.J. Liebling noted long ago, “Freedom of the press belongs to those who own one.”²⁶ But broadcasters do not own their airwaves. A right for one company to broadcast over the nation’s airwaves inherently denies that right to others. Due to the scarcity in valuable broadcast frequencies, government-licensed broadcasters have made a deal with the government to use the public spectrum in exchange for serving the public interest, and the FCC is charged with making sure that bargain is honored.²⁷ For nearly seventy-five years, this public interest standard has guided American broadcast regulatory policy, and, along with competition, the goals of localism and diversity have long formed its foundation.²⁸

Historically, the broadcasting public interest standard has been used to serve the needs of American citizens and to cultivate many localized public forums with diverse viewpoints facilitating citizen participation in our democracy. Just like other federal property, the public airwaves should be preserved and shepherded to make sure they are used to improve the lives of all Americans. The Supreme Court described the broadcaster as a trustee who owes a duty to implement this “right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.”²⁹ The Court of Appeals for the D.C. Circuit has explained that “[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by enforceable public obligations.”³⁰

26. A.J. LIEBLING, *THE WAYWARD PRESSMAN* 265 (1947).

27. See 47 U.S.C. § 151 (2000) (charging the FCC’s with the power and duty to provide, “without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”). The promotion of public interest is repeatedly affirmed in code sections applicable to communications. See, e.g., 47 U.S.C. § 307(a) (2000) (“[I]f public convenience, interest, or necessity will be served thereby [the FCC] shall grant to any applicant therefore a station provided for by this Act.”); *id.* § 309(a) (“[T]he Commission shall determine, in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application.”); *id.* § 309(k)(1)(a) (mandating the award of a license renewal where “the station has served the public interest, convenience, and necessity”); *id.* § 310(d) (forbidding the construction or licensing of a station unless it will serve the public interest). See also Radio Act of 1927, ch. 169; 44 Stat. 1162, 1166 (applying the “public interest, convenience, and necessity” standard to the granting of radio licenses).

28. See *Limits on Media Concentration*, *supra* note 7, at 2 (noting that “[t]he FCC has sought to promote localism to the greatest extent possible through its broadcast ownership limits” and that it “strongly affirmed its core value of limiting broadcast ownership to promote viewpoint diversity.”).

29. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (holding that the FCC’s “fairness” doctrine was constitutional, and was authorized in this case due to the scarcity of airwaves).

30. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d

The goal of broadcast localism is a simple one—licensees should serve the needs of their local communities. Under the mandate of the Communications Act of 1934, the newly established FCC was charged with allotting broadcast frequencies fairly and efficiently throughout the several states and their local communities.³¹ The hope was that these broadcast stations would serve the public much like local newspapers—by providing programming that served the local community. Like the newspaper, the local broadcaster would ideally meet the needs and interests of its community, promote political participation and education, and preserve unique cultural values and local traditions.³² Over the years the FCC's regulatory policies favored fostering locally originated and oriented programming—particularly news and information programming.³³

Similarly, diversity has time and time again been reaffirmed as an essential goal of our national broadcast policy.³⁴ The Supreme Court noted that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”³⁵ Additionally, the FCC has frequently echoed that language and did so even in the June 2003 ownership decision.³⁶ Several types

994, 1003 (D.C. Cir. 1966) (ruling that a broadcast station's renewal license should be revoked pending an evidentiary hearing on allegations of programming misconduct and other violations).

31. Communications Act of 1934 § 307, 48 Stat. 1083 (codified as amended at 47 U.S.C. § 307(b) (2000)) (granting the FCC authority to issue station licenses throughout “the several states and communities”).

32. See ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 186 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) (“[T]he power of the American press is still immense. It makes political life circulate in every corner of that vast land. Its eyes are never shut, and it lays bare the secret shifts of politics, forcing public figures in turn to appear before the tribunal of opinion. The press rallies interest around certain doctrines and gives shape to party slogans; through the press the parties, without actually meeting, listen and argue with one another.”).

33. See Broadcast Ownership Rules, *supra* note 6, at 46,290 (reaffirming the historic and contemporary importance of localism in broadcasting). See also In the Matter of 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, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Report and Orders, 18 F.C.C.R. 13,620, 13,627-637 (2003) [hereinafter 2002 FCC Biennial Broadcast Review Order] (discussing localism goals). See generally Report and Statement of Policy: En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) [hereinafter Report and Statement of Policy]; FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF LICENSEES (1946), reprinted in DOCUMENTS OF AMERICAN BROADCASTING 133-231 (Frank J. Kahn ed., 3d ed. 1978) [hereinafter PUBLIC SERVICE RESPONSIBILITY OF LICENSEES]; Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32, 34 (1929).

34. *Id.*

35. Associated Press v. United States, 326 U.S. 1, 20 (1945).

36. See Broadcast Ownership Rules, *supra* note 6, at 46,288 (“A larger number of

of diversity are traditionally discussed in relation to mass media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity. Viewpoint diversity describes the availability of media content reflecting a variety of perspectives.³⁷ Program diversity refers to the variety of programming formats and content.³⁸ Outlet diversity means that, in a given market, there are multiple independently-owned firms.³⁹ Source diversity is the availability of media content from a variety of content producers.⁴⁰ Additionally, encouraging minority and female ownership has increasingly become an important objective of the FCC's ownership rules.⁴¹

The longstanding limits on media ownership, at both the national and local level, have always been a centerpiece of the public interest standard and its goals of competition, localism, and diversity.⁴² In addition, over the years the FCC has also enacted a number of programming and operational requirements to more specifically promote these goals. In 1929, the FCC's predecessor, the Federal Radio Commission ("FRC"), undertook the first major initiative to promote the goals underlying the public interest standard. The FRC ruled that a station should meet

the tastes, needs, and desires of all substantial groups among the listening public . . . in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family.⁴³

An early FCC released a 1946 staff report, entitled *The Public Service Responsibility of Licensees* and known as the *Bluebook* because of its blue cover, that attempted to refine the standard by mandating four basic components for the fulfillment of a broadcaster's public interest obligations: live local programs; public affairs programming; limits

independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners.").

37. *Id.* at 13,627.

38. *Id.* at 13,631.

39. *Id.* at 13,632.

40. *Id.* at 13,633.

41. *Id.* at 13,634-67.

42. *Id.* at 13,624 ("the modified broadcast ownership structure we adopt today will serve our traditional goals . . . [t]he new rules are not blind to the world around them, but reflective of it; they are, to borrow from our governing statute, necessary in the public interest).

43. Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32, 34 (1929).

on excessive advertising; and sustaining or non-sponsored programs.⁴⁴ While the FCC never officially adopted the *Bluebook*, it proved quite influential in the industry and the National Association of Broadcasters soon issued a very similar voluntary code of programming standards.⁴⁵

The quiz show scandals of the 1950s⁴⁶ shook public confidence in the broadcast industry and prompted the FCC to further clarify the meaning of the public interest standard. In a 1960 programming policy statement, the FCC listed fourteen “major elements usually necessary to meet the public interest.” These elements included:

- (1) opportunity for local self expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, [and] (14) entertainment programs.⁴⁷

This wide-ranging policy statement also reemphasized that broadcasters should determine the tastes, needs and desires of the community and air programming suitable to meet those needs.⁴⁸ This policy, in turn, led the FCC to adopt perhaps the boldest effort to promote broadcasters’ commitment to their local communities; formal community ascertainment requirements. In 1971, the FCC issued an Ascertainment Primer detailing formal requirements and procedures to “aid broadcasters in being more responsive to the problems of their communities [and] will add more certainty to their efforts in meeting Commission standards.”⁴⁹ Among other requirements, these community ascertainment requirements mandated that broadcasters consult with community leaders and members of the general public in developing suitable local and public service programming.⁵⁰ The FCC has also required that a broadcast station’s main studio be located in the community it serves.

44. See PUBLIC SERVICE RESPONSIBILITY OF LICENSEES, *supra* note 33, at 133-221 (providing detailed explanation, examples, and statistics to substantiate what the FCC regarded as a good policy on program regulation in the public interest).

45. *Id.* at 133.

46. See Peter W. Kaplan, *Network Documentaries and Endangered Species*, N.Y. TIMES, Dec. 5, 1985, at C30 (explaining the 1950s quiz show scandals and describing how the television networks aired more documentaries to convince the FCC of their societal worth after the scandals developed).

47. Report and Statement of Policy, *supra* note 33, at 2314.

48. *Id.*

49. *In re* Primer of Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650, 651 (1971).

50. *Id.* at 657-58.

Further, Congress has mandated that the FCC establish rules to ensure greater access to the airwaves for political debate. These rules include providing “reasonable access” to candidates for federal public office, granting equal opportunities to opposing candidates for candidate use of airtime, and limiting advertising rates that candidates may be charged.⁵¹ At one time, a Fairness Doctrine required that broadcasters devote a reasonable amount of time to cover controversial issues of public importance and provide for the airing of contrasting viewpoints.⁵² Congress and the FCC have also acted under the public interest standard to promote certain socially desirable programming such as children’s educational fare, as well as restricting programming deemed obscene, indecent, or otherwise socially harmful.⁵³ The FCC also requires closed captioning of programming for hearing impaired viewers.⁵⁴ Over the years, the FCC’s public interest programming rules have also limited the power of networks over affiliates, required certain non-entertainment programming, mandated cable carriage of local broadcast signals, and limited stations to no more than three hours of network entertainment programming during primetime to promote locally originating programming.⁵⁵

51. 47 U.S.C. §§ 312(a)(7), 315(a), 315(b) (2000). See 47 C.F.R. §73.1941-1943 (implementing “reasonable access” statutes).

52. See 47 C.F.R. §73.1910 (1986) (implementing Fairness Doctrine regulations). In general, the Fairness Doctrine had two requirements: 1) broadcasters had an obligation to report important and controversial community issues; and 2) broadcasters had an obligation to provide airtime for the presentation of alternative viewpoints on these same issues. *In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043 n.2 (1987), *aff’d sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654, 657 (D.C. Cir. 1989). The FCC found in its 1985 Fairness Report that the fairness doctrine actually “chills” speech and thereby disserves the public interest. *Id.* The FCC formally abolished the doctrine in *Syracuse. Id.* at 5047.

53. For example, television broadcasters are required to air children’s educational programming. Additionally, all broadcasters are subject to restrictions on the airing of obscene programs at any time and “indecent” programs at times of the day when there is a reasonable risk that children may be in the audience. Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (partially codified at 47 U.S.C. § 394 (2000)). In 1996, the FCC strengthened its enforcement of the Children’s Television Act. Policies and Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,660 (1996). See also 18 U.S.C. § 1464 (2002) (prohibiting “obscene, indecent, or profane language” from being uttered over the radio); 47 C.F.R. § 73.3999 (2000) (prohibiting television or radio broadcast of obscene material and restricting the broadcast of indecent material); FCC v. Pacifica Foundation, 438 U.S. 826 (1978) (upholding indecency regulations in a case involving Pacifica’s broadcast of comedian George Carlin’s monologue mocking the indecency rules, in which he uttered specific words he believed were forbidden).

54. 47 C.F.R. § 79 (2000).

55. See, e.g., Prime Time Access Rule, 11 F.C.C.R. 546, 550-53 (1995) (reviewing the Prime Time Access Rule’s intent to promote of non-network productions through the prime time restrictions); Cable Tel. Act, Pub.L. 102-385 106 Stat 1460 (1992) (“There is a substantial governmental and First Amendment interest in

III. THE PUBLIC INTEREST STANDARD: TODAY'S EARTHLY REALITY

The Supreme Court has perhaps best described the public interest standard as a "supple instrument for the exercise of discretion."⁵⁶ At times over the past seventy-five years, its flexibility has been used as a sword for democratic ideals, but unfortunately at other times as a shield to protect the broadcasting industry from unwanted burdens. When one looks closely, the many programming requirements embodying the public interest standard have gradually been rendered extinct with each passing FCC broadcast proceeding and with each appellate decision of the last twenty-five years. The FCC eliminated many of these requirements citing broadcasters' First Amendment rights, competitive concerns, and the limited effectiveness and relevance of these rules in an increasingly competitive media marketplace.⁵⁷

In the deregulatory frenzy of the 1980s, much of the FCC's public interest regulation was repealed as a result of a new, market-oriented approach. A new deregulatory FCC determined that competition and the marketplace would better serve the needs of the listening and viewing public.⁵⁸ In addition, public interest obligations, as they existed, were largely deemed a threat to broadcasters' First Amendment rights. Thus, throughout the 1980s the FCC set off on a sweeping program of eliminating or easing many of these longstanding rules under a deregulatory and marketplace approach. Most of the public interest regulations—including specific programming requirements, mandated community ascertainment, and the Fairness Doctrine—were casualties of this period.⁵⁹ These

ensuring that cable subscribers have access to local noncommercial educational stations." See also Jacques Steinberg, *The FCC Gets Local*, N.Y. TIMES, Aug. 24, 2003, at E2 (providing an overview of the FCC's modern commitment to localism in broadcasting in the public interest).

56. *FCC v. Pottsville*, 309 U.S. 134, 138 (1940) (explaining the need for flexible factors to enable the exercise of discretion to carry out congressional intent).

57. *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. at 5047, 5051-52 (stating that the Fairness Doctrine, which required broadcasters to devote time to controversial public issues, actually violates the First Amendment because it "reduce[s] rather than enhance[s] the public access to viewpoint diversity").

58. See generally Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 FED. COMM. L.J. 199, 204-08 (2002) (summarizing the position held by the current majority of FCC commissioners that market forces are the best determinants of the public interest). Ms. Abernathy was elected commissioner in 2001. *Id.* at 199.

59. *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. at 5046, 5049-50 (deferring to the FCC on its findings regarding the negative aspects of the Fairness Doctrine); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076, 1077 (1984) [hereinafter *Revision of Programming and Commercialization Policies*] (relying on market incentives to deliver programming that meets community needs); Deregulation of Radio, Report

regulations were criticized as inefficient, anti-competitive, administratively burdensome, and violative of broadcasters' First Amendment rights. Instead, under the new marketplace model, competition with other stations and the economic best interest of each licensee were viewed sufficient to make them responsive to their community's needs and the public interest.⁶⁰ While today broadcasters are still required to air programming responsive to "issues of concern" to their communities and maintain public files on this programming, the requirement is rarely if ever scrutinized.

The Reagan-era Commission led by Chairman Mark Fowler interpreted the public interest standard as requiring it "to regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork."⁶¹ Additionally, despite the arrival of a Democratic administration and a public interest-oriented FCC, the next decade brought none of this public interest regulation back. Rather, the decade brought a Republican Congress and the Telecommunications Act of 1996, which continued the deregulatory and market-based theme of the 1980s.⁶² Among other things, the 1996 Act dramatically relaxed broadcast ownership limits—eliminating the national radio ownership cap altogether, extending the length of television licenses from five to eight years, and streamlining renewal procedures—making it even harder for new entrants to break in.⁶³ With the 1996 Act, the goals of localism and diversity were yet again nudged aside by the increasingly overarching goals of competition and economic efficiency for broadcasters.

IV. THE JUNE 2003 MEDIA OWNERSHIP DECISION: THE LATEST BLOW

Even after the 1996 Act, ownership regulations limiting the number and types of media properties owned by broadcasters

and Order, 84 F.C.C.2d 968, 971-72 (1981) [hereinafter *Deregulation of Radio*].

60. See *Revision of Programming and Commercialization Policies*, *supra* note 61, at 1102-05 (enunciating the marketplace model as a vehicle for program selection).

61. *Deregulation of Radio*, *supra* note 61, at 971. See generally Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207, 209 (1982) (arguing that the perception of broadcasters as custodians of the community should be replaced with a more market-friendly, business-oriented, community approach).

62. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

63. *Id.* § 202 (codified at 47 C.F.R. §§ 73.3555, 73.658(g), 73.3613(a)(1); 76.501) (ownership limit revisions); § 203 (codified at 47 U.S.C. § 307(c) (2000)) (license terms); § 204 (codified at 47 U.S.C. § 309(k) (2000)) (renewal)

continued to represent the centerpiece of the public interest standard.⁶⁴ Ironically, the protections these structural limitations afforded to diversity and localism principles were often cited in the deregulatory 1980s to support the repeal of many of the public interest programming requirements. However, the recent serial relaxation of these ownership regulations has whittled away much of their force and resulting protections as well.⁶⁵

In its June 2003 ownership decision, the FCC under Chairman Powell attempted to further relax many of the media ownership limits that remain.⁶⁶ Yet the FCC majority still maintains that it based these rule changes on a thorough assessment of the public interest standard and the impact of the rule changes on the longstanding goals of competition, diversity, and localism.⁶⁷ The majority notes that competitive concerns mandated the relaxation of the rules, viewpoint diversity is affirmed as a core value, and localism is said to remain a bedrock principle that continues to benefit Americans in important ways. It insists that these concerns were taken into consideration and the rules carefully calibrated to establish limits on ownership that will withstand judicial scrutiny.⁶⁸

In the order, the FCC adopted a set of cross-media limits replacing the longstanding newspaper/broadcast and radio/television cross ownership rules and relaxed the local television ownership and national television ownership cap limits. By a three to two vote along party lines, the FCC lifted the twenty-eight year old ban that prohibited a newspaper from buying a television or radio station in the same city, and, in relaxing other rules, allowed large broadcasters to buy more stations at both the local and national level.⁶⁹ In supporting the relaxation of these rules as fostering diversity, the majority cites statistics illustrating the dramatic changes in the media landscape and resulting explosion in diverse viewpoints on the air.⁷⁰

64. See, e.g., 2003 Broadcast Ownership Rules, *supra* note 6, at 46,286-87 (acknowledging that even under revised rules, structural limitations remain to serve purposes of viewpoint diversity and localism in the public interest).

65. See generally Statement of Copps, *supra* note 7 (asserting that both long-term and recent rule relaxation undermine the stated principles of localism and diversity, noting for example that minority ownership of broadcast outlets has dramatically decreased).

66. 2003 Broadcast Ownership Rules, *supra* note 6, at 46,286.

67. 2002 FCC Biennial Broadcast Review Order, *supra* note 33, at 13,623.

68. Limits on Media Concentration, *supra* note 7, at 1-2. See also 2002 FCC Biennial Broadcast Review Order, *supra* note 33, at 13,624-27 (surveying the implications of judicial decisions and First Amendment protections on FCC rulemaking in crafting the new rules).

69. *Id.* at 13,691.

70. *Id.* at 13,634.

In particular, they point to the large number of households now paying for cable or direct broadcast satellite services,⁷¹ and the profound impact and ubiquity of the internet.⁷² They also argue that the economic efficiencies achieved as a result of consolidation should also promote higher quality local service to communities.⁷³

The dissenting commissioners caution that growing media monopolies will soon control all we see and hear, even at the local level. Any beneficial effects of the rule changes on diversity and localism are disputed, as they note that already five huge companies alone control all the programming watched by most of the nation's viewers.⁷⁴ As for diversity on the Internet, they claim that these same companies also command most of the pages viewed on Internet websites.⁷⁵ They also cite the digital divide in Internet service. They criticize the majority's actions for diminishing local control of media and the diversity of voices heard over the airwaves and for enhancing the media giants' market power. Simply put, they argue that the rule changes protect the media industry, not the public.⁷⁶

The majority supporting the rules rejects these claims and quibbles with the significance of the cited figures on conglomerate power, arguing that the marketplace is the best barometer of what the viewing and listening public needs and desires. Chairman Powell reasons "the notion seems to be that if we don't like the programming being aired, we can cure the problem by regulating the size and structure of broadcast television and radio" which, in his opinion, "is not only a mistaken assumption, but is dangerously offensive to the principles of the First Amendment."⁷⁷

Competing notions of the First Amendment have long been at the

71. *See id.* (noting that U.S. households receive 102 channels per home).

72. *Id.* at 13,648.

73. *Id.* at 13,670.

74. Statement of Adelstein, *supra* note 17, at 5; Statement of Copps, *supra* note 7, at 1.

75. Statement of Copps, *supra* note 7, at 3 (noting that the most popular Internet news sites are controlled by the same media companies that control television, radio, and newspapers).

76. *See, e.g.*, Statement of Adelstein, *supra* note 17, at 1.

77. Statement of Chairman Michael K. Powell, Regarding the 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,943 (2003). Similarly, Commissioner Kathleen Abernathy notes, "I can only presume that this means that Americans are watching these providers because they prefer their content not because they lack alternatives. It would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming." Statement of Commissioner Kathleen Q. Abernathy, Regarding the 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,946 (2003).

heart of debates over mass media policy, particularly over the application of the public interest standard in regulatory debates over both ownership and programming rules. Justice Holmes' absolutist or "marketplace of ideas" vision of the First Amendment clearly underlies Powell's comment and the FCC's June 2003 decision. In this vision, the "free market place of ideas" is the best place for truth to be found and government should ideally leave this marketplace alone.⁷⁸

In rejecting a rigid marketplace model for broadcasting, however, the Supreme Court has held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁷⁹ Time and again the Supreme Court has affirmed that governmental efforts to encourage diverse views and attention to public issues are quite compatible with the First Amendment.⁸⁰ This Madisonian view of the First Amendment envisions an active role for the government in promoting robust debate of public interest concerns.⁸¹ Under this vision of speech in our democracy, it is not dangerously offensive to the First Amendment to attempt to preserve diverse and locally based democratic discourse over the publicly-owned broadcast airwaves.

78. This theory is most frequently associated with Justice Holmes. *Abrams v. 250 U.S. 616, 630* (1919) (Holmes, J., dissenting) ("[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market."). However, it dates back to John Milton's attack on government licensing of speech in his 1644 *Areopagitica* and to the writings of John Stuart Mill cautioning against government meddling in the free exchange of ideas. See T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 38-40 (2001); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 95 (1993) [hereinafter *DEMOCRACY AND FREE SPEECH*]; Cass R. Sunstein, *Emerging Media Technology and the First Amendment: The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1760 (1995) [hereinafter *Emerging Media Technology*] (emphasizing the inextricable link between the First Amendment and the broadcast media).

79. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

80. Indeed, just this fall in ruling on the campaign finance law, the Supreme Court upheld provisions requiring broadcasters to maintain public files on candidate requests for advertising time and other requests for ad time about elections and other important public issues. In doing so, the Court recognized the need for both regulatory agencies and the public to evaluate broadcasting fairness, supporting the idea that public interest obligations are continually valid. *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 640 (2003).

81. The public deliberation vision of the First Amendment can be traced to the work of James Madison who made clear that free speech was critical as a means to foster political equality and free and open political discourse, and to the writings of Alexander Meiklejohn, who associated free speech with the ideals of democratic deliberation. CARTER ET AL., *supra* note 78, at 44-49; SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 78, at 95; Sunstein, *Emerging Media Technology*, *supra* note 78, at 1760-62. Justice Brandeis is also associated with this view. He wrote: "[T]he greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

V. RESTLESS ANGEL?

Even amidst the FCC's unabashed focus on the broadcast industry's First Amendment freedoms, and competitive concerns in its most recent overhaul of the media ownership rules, the Commission insists that localism and diversity remain bedrock principles that benefit Americans in important ways.⁸² At least in name, the FCC still trumpets these two historic goals as broadcast policy objectives. But, as competitive concerns increasingly nudge localism and diversity goals to one side in regulatory conversations and decision-making, a more concentrated media will be the ultimate result.

Given the reality of our increasingly concentrated mass media, a renewed focus on regulation based on the public interest standard has never been more vital. As the beneficial owner of the airwaves, the public deserves more from the FCC under Chairman Powell as guardian of the longstanding public interest standard; yet, the question remains: will it get more? The two recent initiatives undertaken by the FCC related to the goals of diversity and localism in broadcasting are worth watching to answer that question.

In its June 2003 Order, the FCC reaffirmed that encouraging minority and female ownership historically has been, and continues to be, an important FCC objective.⁸³ In that spirit, the FCC also issued a Further Notice of Proposed Rulemaking to address some of the specific proposals offered in the proceeding to advance female and minority ownership in broadcasting.⁸⁴ In addition, a month before the rule changes were adopted, Chairman Powell announced the creation of a Federal Advisory Committee on Diversity in the Digital Age.⁸⁵ Composed primarily of media and communications industry executives, the Advisory Committee is charged with developing strategies to enhance participation by minorities and women in the communications industry.

The Advisory Committee's Mission Statement emphasizes that one of the FCC's responsibilities under the Communications Act is "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide [] wire and radio communications service"⁸⁶ Moreover, under the Act, the FCC must work to eliminate market entry barriers in order to

82. Limits on Media Concentration, *supra* note 7, at 2.

83. 2002 FCC Biennial Broadcast Review Order, *supra* note 34, at 13,634.

84. *Id.*

85. Powell Press Release, *supra* note 12.

86. 47 U.S.C. § 151 (2000).

promote policies “favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.”⁸⁷ The Advisory Committee notes its hope to achieve these goals “by ensuring that as broad a cross-section of the public as possible has the opportunity to own and/or manage communications and communications related companies.”⁸⁸

The specific tasks to be undertaken by the Advisory Committee include:

Developing strategies that will enhance participation by minorities and women in telecommunications . . . , including timely knowledge of potential transactions and access to the necessary capital;

Developing strategies to increase educational training for minorities and women that facilitate opportunities in upper level management and ownership; [and]

Developing strategies to enhance participation and ownership by minorities and women in the newly developing industries based on new technologies⁸⁹

While dissenting commissioners Michael J. Copps and Jonathan Adelstein welcome the formation of the Advisory Committee and the initiatives discussed in the Further Notice, they note that the FCC should have considered the full impact of consolidation on minorities and women before rushing ahead and allowing massive consolidation opportunities.⁹⁰

In addition, two months after the ownership decision and amidst the congressional and public outcry against the changes, Chairman Powell announced the creation of a Localism Task Force stating “we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns, [] and we are going to tackle it head-on.”⁹¹ He added,

[i]t is important to understand that ownership rules have always been, at best, imprecise tools for achieving policy goals like localism. That is why the FCC has historically sought more direct

87. 47 U.S.C. § 257 (2000).

88. ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE, CHARTER (Sept. 2, 2003), *available at* <http://www.fcc.gov/DiversityFAC/docs/charter.doc> (on file with the American University Law Review).

89. FCC, *Diversity Committee*, at <http://www.fcc.gov/DiversityFAC> (last modified Dec. 4, 2003) (on file with the American University Law Review).

90. Statement of Adelstein, *supra* note 17, at 6; Statement of Copps, *supra* note 7, at 20-21.

91. Localism in Broadcasting Press Release, *supra* note 13, at 1 (internal quotations omitted).

ways of promoting localism in broadcasting. These include things such as public interest obligations, license renewals, and protecting the rights of local stations to make programming decisions for their communities.⁹²

The Localism Task Force charges a group of FCC staff members with a number of duties, including conducting studies to measure localism and the efficacy of the FCC's localism-related rules; organizing a series of public hearings on localism; advising the FCC on recommendations to Congress relating to the licensing of thousands of additional low-power FM radio stations; making recommendations on how best to promote localism in television and radio; and advising on legislative recommendations to Congress that would strengthen localism.⁹³ The FCC soon hopes to release a Notice of Inquiry on these issues.⁹⁴

Commissioner Copps reacted angrily to this late summer announcement, claiming that the task force proposal is "a day late and a dollar short [and] highlights the failures of the recent decision to dismantle ownership protections."⁹⁵ He reasons that "[t]o say that protecting localism was not germane to that decision boggles the mind [as] [t]he ownership protections, as well as the other public interest protections that the Commission has dismantled over the past years, are all designed to promote localism, diversity and competition."⁹⁶ He describes the Commission majority's actions as "a policy of 'ready, fire, aim!'"⁹⁷

Despite the healthy skepticism expressed by commissioners Copps and Adelstein, the recent initiatives on localism and diversity are two good first steps, but more can and should be done. As part of the initiative on localism, the FCC should be sure to expedite the approval of hundreds of applications from religious institutions, community groups, schools, and other nonprofit organizations seeking permission to operate low-power FM radio stations. There are now just over 200 of these stations, each no more than 100 watts and reaching only a few miles, but there should be many more licensed across the country to serve their local communities.⁹⁸ In addition, the

92. *Id.*

93. *Id.* at 2.

94. *Id.* at 3.

95. Press Release, FCC, Copps Criticizes Willingness to Let Media Consolidation Continue (Aug. 20, 2003), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238079A1.pdf (on file with the American University Law Review) (internal quotations omitted).

96. *Id.* (internal quotations omitted).

97. *Id.* (internal quotations omitted).

98. See FCC, *Low Power FM Broadcast Radio Stations*, at <http://www.fcc.gov/mb/>

FCC should dust off and complete the digital television public interest obligation proceedings it began several years ago under Chairman William Kennard. In establishing service rules for digital television licensees, both Congress and the FCC reaffirmed broadcasters' obligation to operate in the public interest.⁹⁹ The FCC began to consider how digital broadcasters will meet this obligation in a December 1999 Notice of Inquiry.¹⁰⁰ The FCC was guided in this inquiry by the recommendations of President Clinton's Advisory Committee on the Public Interest Obligations of Digital Broadcasters,¹⁰¹ and a petition for rulemaking filed by People for Better TV, which is a diverse coalition of public interest groups.¹⁰² The FCC received hundreds of public comments in this proceeding.¹⁰³ This vast record formed the basis for two related proceedings, one seeking comment on ways to ensure that broadcasters fulfill the mandate of the Children's Television Act in the digital age¹⁰⁴ and the other on ways to enhance and standardize the way broadcasters disclose their public interest activities to their communities to strengthen their obligation to air programming responsive to these communities.¹⁰⁵ The records are

audio/lpfm (on file with the American University Law Review).

99. 47 U.S.C. § 336(d); 12 F.C.C.R. 12,810, 12,830 (1997).

100. In the Matter of Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry, 14 F.C.C.R. 21,633 (1999).

101. Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, 62 Fed. Reg. 12,065 (1997). See ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT (1998) (consisting of twenty-two members from the commercial and non-commercial broadcasting industry, computer industries, producers, academic institutions, public interest organizations, and the advertising community), available at www.ntia.doc.gov/pubintadvcom/piareport.pdf.

102. See generally People for Better TV, Comments Before the Federal Communication Commission (Mar. 27, 2000) (comprising in 387 pages the organization's response to the FCC's Notice of Inquiry In the Matter of Public Interest Obligations of TV Broadcast Licensees), available at <http://www.fcc.gov/cgb/dro/comments/99360/5006314434.pdf>. The coalition's membership included Children Now, Civil Rights Forum on Communications Policy, Communications Workers of America, Consumer Federation of America, League of United Latin American Citizens, National Association for the Deaf, National Organization for Women, National Urban League, Project on Media Ownership, and the U.S. Catholic Conference. *Id.*

103. William Kennard, Report to Congress on the Public Interest Obligations of Television Broadcasters as They Transition to Digital Television 3 (2001) (detailing Chairman Kennard's examination of broadcaster public interest obligations in the digital age), available at <http://ftp.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.doc>.

104. Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking, (adopted Sept. 14, 2000), available at http://www.fcc.gov/Bureaus/Mass_Media/Notices/2000/fcc00344.pdf.

105. Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Notice of Proposed Rulemaking, (adopted Sept. 14, 2000), available at http://www.fcc.gov/Bureaus/Mass_Media/

complete, but no further action on these proceedings has been taken by the full FCC since their adoption nearly four years ago.¹⁰⁶ As urged by former Commissioner Ness, in her keynote address to this symposium, the FCC should move forward on these important public interest proceedings and do the same with regard to the digital radio service.¹⁰⁷

While the FCC need not necessarily return to the solutions of the past, it should seize the opportunity in these new initiatives, the pending proceedings, and new endeavors, to think boldly and creatively about meaningful steps to promote the public interest in both television and radio broadcasting in the twenty-first century.

CONCLUSION

Former Commission Chairman Newton Minow has written that the words “[p]ublic [i]nterest are at the heart of what Congress did in 1934, and they remain at the heart of our tomorrows.”¹⁰⁸ For better or worse, media consolidation is presumably here to stay, but the FCC’s public interest initiatives are welcome steps. Ever mindful of Clarence’s visit to George Bailey that Christmas Eve, these small steps may be signs that a more robust public interest understanding for a new century may be on the rise. Perhaps Chairman Powell’s public interest angel is finally ready to earn her wings. In her quest, let her demonstrate to all of us that regardless of how dramatically our media landscape may change over the years, the public interest standard and the goals underlying it remain as relevant and vital as ever to our national broadcast policy and our democracy.

Notices/2000/fcc00345.pdf.

106. See generally Kennard, *supra* note 103 (detailing Chairman Kennard’s examination of broadcaster public interest obligations in the digital age).

107. The Honorable Susan Ness, *Keynote Address, Regulating Media Competition: The Development and Implications of the FCC’s New Broadcast Ownership Rules (Symposium)*, 53 AM. U.L. REV. 533 (2004).

108. A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 xv (Max D. Paglin ed., 1989).