

Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications

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"If the strong arm of the law does not prevent monopoly ownership and make discrimination illegal, American thought and American politics will be largely at the mercy of those who operate these stations."¹

INTRODUCTION

The telecommunications² industry has a new identity in the 1990s.³ Previously distinct industries such as telephone, known as common carriers,⁴ television, known as broadcasting,⁵ and cable⁶ are now converging to provide similar and competing services. Developments in fiber optic⁷ and satellite technology, for example, permit multichannel systems that can simultaneously transmit voice, data, and video communications to the public over one system. Furthermore, the number of available outlets for video and information programming⁸ has increased. This is due

¹ 67 CONG. REC. 5558 (1926) (Statement of Rep. Johnson).

² This Article uses "telecommunication" to mean telephone, voice, and data communications products and services. The term includes the manufacturing, distribution, installation, and servicing of equipment as well as the provision of voice, data, and on-line information retrieval services. See MINORITY BUSINESS DEV. AGENCY, U.S. DEP'T OF COMMERCE, MARKET ANALYSIS OF THE TELECOMMUNICATIONS INDUSTRY - VOL. 1 MINORITY BUSINESS PARTICIPATION 7 (1991) [hereafter *Market Analysis - Vol. 1*].

³ *Everything That Communicates Must Converge*, FORTUNE, Jan. 14, 1991, at 35; WALTER G. BOLTER, TELECOMMUNICATIONS POLICY FOR THE 1990s AND BEYOND (1990).

⁴ "Common carrier" means "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . but a person engaged in radio broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153(h) (1988).

⁵ "Broadcasting" means "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1988).

⁶ The definition of "broadcasting" does not encompass cable because cable uses coaxial cable. Instead, cable is considered "wire communication." See 47 U.S.C. § 153(a) (1988) (reproduced *infra* note 50). Note, however, that the term mass media includes both broadcasting and cable service. See *infra* note 12 (defining "media of mass communications").

⁷ Fiber optic technology was developed during the late 1980's by telephone company research and development divisions. Fiber optics increases the channel capacity and efficiency for cable systems and enables interactive services, such as home shopping and banking, by using cable systems and telephone lines. See John J. Keller, *Big Cost Savings for Fiber Optic Systems Are Seen in New Way to Amplify Signals*, WALL ST. J., June 12, 1991, at B4.

⁸ See National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630,

to the emergence of hybrid technologies such as Multipoint Distribution Service (MDS),⁹ Satellite Master Antenna Television (SMATV),¹⁰ and Direct Broadcast Satellite (DBS).¹¹ These technologies are known as “media of mass communications” (mass communications)¹² because they all provide and control program content. One effect of these developments is that clear distinctions between common carriers and broadcasters have become blurred.

The Federal Communications Commission (FCC) has struggled since the early 1980s to keep pace with the developing technologies by adopting a proper regulatory framework. This framework serves the dual purpose of encouraging new technology while safeguarding the public interest pursuant to the Communications Act of 1934 (Communications Act).¹³ Historically, one important aspect of safeguarding the public interest has been encouraging diversity.¹⁴

The term “diversity” has not been precisely defined. It is neither a static concept subject to rigid guidelines, nor is it intended to be a punitive measure against broadcasters. In essence, diversity in mass communications means facilitating diverse and antagonistic viewpoints and prohibiting undue concentration of control by any one licensee.¹⁵

The FCC has implemented diversity policies by promulgating a series of rules and regulations that apply to mass communications. These regulations are generally authorized by Title III of

634 (D.C. Cir. 1976) (affirming MHz allocations for development of nationwide cellular mobile radio communications systems), *cert. denied*, 425 U.S. 992 (1976).

⁹ See *infra* note 180 (defining MDS).

¹⁰ See *infra* note 181 (defining SMATV).

¹¹ See *infra* note 182 (defining DBS).

¹² “‘Media of mass communications’ includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.” 47 U.S.C. § 309 (i)(3)(C)(1) (1988).

¹³ 47 U.S.C. §§ 151-613 (1988).

¹⁴ See *infra* notes 36-70 and accompanying text.

¹⁵ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (stating that First Amendment rests on assumption that wide dissemination of information from diverse and antagonistic sources is essential to public welfare); *TV 9, Inc. v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

the Communications Act.¹⁶ Title III diversity requirements include (1) multiple and cross-ownership restrictions,¹⁷ (2) Equal Employment Opportunity (EEO) requirements,¹⁸ and (3) financial incentives.¹⁹ Other Title III diversity requirements apply to broadcasting but have not been uniformly extended to newer technologies. These requirements include (1) foreign ownership restrictions,²⁰ (2) reasonable access and equal opportunity to purchase air time for political candidates,²¹ (3) sponsorship identification requirements,²² and (4) minority preferences.²³

To encourage the development of new technologies, the FCC has adopted a policy of deregulation,²⁴ which de-emphasizes regulation and looks to the marketplace to foster competition. Under deregulation, the FCC uses a flexible regulatory approach to authorize new services.²⁵ This approach allows the FCC to experiment with regulation. Thus, the FCC may impose minimal regulation on an ad hoc basis or defer regulation while gathering

¹⁶ 47 U.S.C. §§ 301-399.

¹⁷ See 47 U.S.C. § 303(r) (authorizing FCC to create regulations that further Title III provisions); see also *infra* notes 351-76 and accompanying text (discussing ownership restrictions).

¹⁸ 47 C.F.R. § 73.2080 (1991). For discussion regarding EEO requirements, see *infra* notes 322-49 and accompanying text.

¹⁹ See *infra* notes 85-89, 377-97 and accompanying text (discussing financial incentives).

²⁰ 47 U.S.C. §§ 310 (a)-(c).

²¹ 47 U.S.C. § 312(a)(7).

²² 47 U.S.C. §§ 317, 508.

²³ 47 U.S.C. § 309(i)(3).

²⁴ Under deregulation, the Federal Communications Commission (FCC) has allowed the marketplace to dictate which technologies provide the public with the most effective service of communications. Although some argue that deregulation began as early as the mid-1970s, the 1980s Reagan Administration is largely credited with deregulation of telecommunications. NORMAN MARCUS, *BROADCAST AND CABLE MANAGEMENT* 5 (1986). See Akosua B. Evans, *Current Topics in Law and Policy: Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 *YALE L. & POL'Y REV.* 380, 383 (1990) (discussing that Reagan Administration relied on marketplace rather than government to place minorities in economic mainstream); see also Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 *CATH. U. L. REV.* 401, 419-23 (1989) (discussing how FCC considered various deregulation plans throughout 1970s but did not propose new rules until 1982).

²⁵ The flexible regulatory approach is authorized under the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604 (1988). For further discussion, see *infra* note 183.

useful information regarding new technologies, including their potential impact on existing industries and the public.²⁶

In recent years, the FCC has extended its ad hoc approach to classifying, as well as regulating, mass communications technology. Traditionally, the FCC's criteria for such classification has focused on the services offered to the public and the control over program content.²⁷ Today, however, the FCC relies on engineering considerations to classify mass communications technology.

One effect of this new approach is that mass communications are no longer subject to uniform diversity requirements. Without uniform requirements, the traditional diversity safeguards are being systematically eliminated. Critics of diversity policies support the current trend with several arguments. One argument is that diversity is just a euphemism for affirmative action and set-aside programs, some of which have recently been declared unconstitutional.²⁸ Another argument is that diversity has become a "straightjacket" for competition.²⁹ Finally, critics complain that diversity is no longer needed because, due to the increase in video outlets, the electromagnetic spectrum is no longer scarce.³⁰

This Article responds to these critics by making four basic points. First, diversity is important to preserve because it ensures that the integrity of the public trust is not unduly compromised by the economics or profit-driven motivations of individual licen-

²⁶ National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1200, 1207 (D.C. Cir. 1984).

²⁷ See *In re* Subscription Video Services, 51 Fed. Reg. 1817 (1986) (proposed Jan. 15, 1986) (discussing historical classification of STV and DBS services).

²⁸ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down city's minority construction contract requirements because they establish quotas); *Lamprecht v. FCC*, 60 U.S.L.W. 2537 (1992) (declaring unconstitutional FCC policy of granting qualitative enhancement to applicants in comparative license proceedings based on female ownership). *But see* *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

²⁹ FCC Commissioner Ervin Duggan, Address at the National Association of Broadcasters 1992 Convention, Las Vegas, Nev. (Apr. 1992).

³⁰ See John Holmes, *Innovations Force FCC to Change the Station*, INSIGHT, Aug. 12, 1991, at 20 (noting that House of Representatives approved transfer of 200 megahertz of broadcast spectrum from government to private sector); ITHIEL DE SOLA POOLE, *TECHNOLOGIES WITHOUT BOUNDARIES: ON TELECOMMUNICATION IN A GLOBAL AGE* 40-46 (1990) (stating that although spectrum is limited there is much space).

sees.³¹ The public trust requires the government to protect access to information and communications and to check the tremendous power of the media to influence public thought. Regulation stabilizes the balance between private interests' economic goals and the government's responsibility for safeguarding the public trust.

Second, diversity policies and competition are not mutually exclusive goals that can be attained under deregulation.³² While the marketplace may foster competition among the industries, many diversity policies focus on internal operations of a licensee that the marketplace cannot effectively influence or dictate.

Third, the FCC's current ad hoc approach to regulating and classifying mass communications violates the Communications Act.³³ The ad hoc approach results in a fundamental restructuring of the industry. Pursuant to the Communications Act, the FCC must address long-term impacts when making these substantive and sweeping changes. Failure to comply with this statutory mandate results in lack of uniform regulation and leads to ineffective enforcement.³⁴

Fourth, with the inevitable convergence of the telephone and mass communications industries, the FCC must adopt a uniform regulatory structure that imposes minimum Title III diversity requirements on all program providers.³⁵ Under a uniform structure, the FCC could review, evaluate, and comprehensively prioritize diversity policies and then uniformly apply them to new and existing technology.

To make these points, this Article examines the importance of current diversity policies and proposes a regulatory framework for mass communications that incorporates these policies. Part I discusses diversity policies and describes how the FCC has used regulation to implement its diversity policy objectives. Because the application of diversity policies depends on the classification of a particular technology, Part II focuses on the problems with using traditional classifications to define emerging hybrid technologies. This Part also discusses the FCC's more recent use of a flexible regulatory approach for classifying mass communications.

³¹ Andrew C. Barrett, *Opportunities in the Communications Industry: Opportunities for Minorities and Women in the 1990s*, 8 COMM. LAW 18 (1990).

³² See *infra* notes 222-43 and accompanying text.

³³ See *infra* notes 256-91 and accompanying text.

³⁴ See *infra* notes 299-307 and accompanying text.

³⁵ See *infra* notes 318-94 and accompanying text.

Part III critiques the flexible regulatory approach and contends that it has been misused by the FCC to make fundamental changes in regulating mass communications. Finally, Part IV proposes a two-tier Uniform Regulatory Framework under which all mass communications would be covered by minimum Title III requirements. These requirements would include financial incentives for small business.

I. DIVERSITY OBJECTIVES

A. Background

“Diversity” in telecommunications is an elusive concept that dates back to the Radio Act of 1927 (Radio Act).³⁶ Congress enacted this legislation to establish a “unified and comprehensive regulatory system” that could be flexible enough to address the evolving broadcast industry.³⁷ Previous regulation³⁸ had been ineffective in resolving the widespread fear of potential domination and abuse by broadcasters.³⁹ Broadcasters were perceived to exercise tremendous influence over program content because they had the power to select, edit, and choose the method, manner, and emphasis of presentation.⁴⁰ It was thought that this con-

³⁶ Radio Act of 1927, ch. 169, § 11, 44 Stat. 1162, 1167 (1927) (current version at 47 U.S.C. § 85 (Supp. II 1990)).

³⁷ FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940).

³⁸ The Radio Act of 1927 succeeded the Radio Act of 1912, ch. 287, §§ 1-11, 37 Stat. 302 (1912) (current version at 47 U.S.C. § 85 (Supp. II 1990)). The Radio Act of 1912 regulated domestic radio services, primarily radio telephone. The first standard broadcast station was established in 1921. GLEN O. ROBINSON & ERNEST GELLHORN, *THE ADMINISTRATIVE PROCESS* 288 (3d ed. 1986); T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE*, 43-44 (2d ed. 1989) (citing *NBC v. United States*, 319 U.S. 190 (1943)).

³⁹ 67 CONG. REC. 5558 (1926).

⁴⁰ *In re* Amendment of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, 1050 (1975) [hereafter *1975 Ownership Rules*], amended by 53 F.C.C.2d 589 (1975); see also *In re* Amendment of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306, 311 (1970) [hereafter *1970 Ownership Rules*] (stating that power to select, edit, and structure information can be tempered on structural basis); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, 683 (D.C. Cir. 1951) (upholding FCC’s power to encourage media diversification because of policy concerns regarding potential domination of several media by one permittee in particular area), cert. denied, 342 U.S. 830-31 (1951).

trol would have a profound impact on public viewpoints.⁴¹

Many believed that without government control, the public interest would be subordinated to monopolistic domination by broadcasters.⁴² Therefore, Congress adopted the policy of using regulations to ensure diversity. Under the Radio Act, Congress established a Federal Radio Commission (FRC) to regulate the allocation and assignment of frequency bands to individual licensees.⁴³ The FRC granted licenses for three years, based upon a standard of "public convenience, interest, and necessity."⁴⁴

Following the Radio Act, Congress imposed additional statutory restrictions on broadcasters, which were later incorporated into Title III of the Communications Act. These restrictions safeguarded diversity by imposing on licensees equal opportunities for political candidates,⁴⁵ sponsorship identification for broadcast materials,⁴⁶ and U.S. citizenship requirements.⁴⁷

The Communications Act also consolidated jurisdiction over common carriers and broadcasting in the FCC.⁴⁸ Under the Communications Act, the FCC is authorized to grant, renew, and revoke licenses. The FCC may also authorize new services, restrict the hours during which stations operate, and limit the strength of broadcast signals to avoid interference with other signals.⁴⁹ The policy underlying the Communications Act is to secure and protect the public interest. The Communications Act affords this protection by regulating existing wire⁵⁰ and

⁴¹ See generally *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977) (discussing application of fairness doctrine to broadcast communications that promote sale of commercial products), *cert. denied*, 436 U.S. 926 (1978).

⁴² *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

⁴³ See *NBC v. United States*, 319 U.S. 190, 213-14 (1943) (describing Federal Radio Commission as endowed with wide licensing and regulatory powers).

⁴⁴ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 137-38.

⁴⁵ Compare Radio Act of 1927, ch. 169 § 18, 44 Stat. 1162, 1170 (1927) with 47 U.S.C. § 315 (Supp. II 1990) (establishing restrictions to safeguard diversity that became known as the "fairness doctrine" and "access rules").

⁴⁶ Compare Radio Act of 1927 § 19 with 47 U.S.C. § 317 (1988) (establishing disclosure of sponsorship requirements).

⁴⁷ Compare Radio Act of 1927 § 12 with 47 U.S.C. § 310 (1988) (establishing license ownership restrictions).

⁴⁸ 47 U.S.C. § 151.

⁴⁹ 47 U.S.C. § 303.

⁵⁰ The Communications Act defines "wire communication" as:

[T]he transmission of writing, signs, signals, pictures, and

radio⁵¹ communication services while encouraging the development of new technology that will enhance the efficiency of services to the public.⁵²

The policy of diversity, which the FCC implements through its licensing and rulemaking processes, has two distinct objectives. The first is to provide the "best practicable service" through the "widest possible dissemination of information from diverse and antagonistic sources."⁵³ The second is to prevent "undue concentration of ownership" in broadcasting.⁵⁴ These policy objectives are founded on the First Amendment and antitrust policies, respectively.⁵⁵ The First Amendment is intended to preserve an

sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(a).

⁵¹ The Communications Act defines "radio communication" as:
[T]he transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(b).

⁵² See generally 47 U.S.C. § 151 (setting forth overall purpose of Communications Act); *WOKO, Inc. v. FCC*, 109 F.2d 665, 667 (D.C. Cir. 1939) (stating that underlying policy of Communications Act is to secure and protect public interest).

⁵³ See generally 45 U.S.C. § 151; *TV 9, Inc. v. FCC*, 495 F.2d 929, 936-37 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *1970 Ownership Rules*, *supra* note 40, at 310 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and discussing purpose of First Amendment).

⁵⁴ Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965); *TV 9, Inc.*, 495 F.2d at 936.

⁵⁵ The federal courts have consistently upheld the use of First Amendment and antitrust considerations to promote diversity of control over media of mass communications. See *Associated Press*, 326 U.S. at 19-20 (discussing First Amendment argument for application of Sherman Act); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 794-95 (1978) (stating that FCC may consider First Amendment and antitrust values in determining where public interest lies regarding diversification policies); see also *1975 Ownership Rules*, *supra* note 40, at 1048 (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-76 (1940)) (noting that FCC diversification policy is derived from First Amendment and antitrust policy sources).

uninhibited marketplace where diverse social, political, aesthetic, and moral ideas and experiences are accessible to the public.⁵⁶ That fundamental right of accessibility cannot be constitutionally abridged by Congress or the FCC.⁵⁷ The Justice Department and the FCC have concurrent jurisdiction over antitrust issues involving mass communications.⁵⁸ The antitrust policy governing mass communications is to prevent undue concentration of control through ownership and to foster competition.⁵⁹ Competition is considered "the best way to assure a multiplicity of voices" which is in the public interest.⁶⁰

Under the Reagan Administration, the FCC's policy regarding diversity began to shift. In 1980, an FCC Network Inquiry Staff Report claimed that ownership restrictions had produced few public interest benefits.⁶¹ The report concluded that no causal connection existed between the restrictions and the goals of competition and diverse viewpoints.⁶² The Administration asserted that the development of new technologies, such as cable and MDS, would add more competition and diversity to mass media markets.⁶³

The FCC responded by adopting a marketplace approach to broadcast regulation for protecting the public interest.⁶⁴ The

⁵⁶ 1975 *Ownership Rules*, *supra* note 40, at 1048 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

⁵⁷ *Id.* at 1049 (citing *Red Lion*, 395 U.S. at 390).

⁵⁸ FCC cannot enforce antitrust laws. *Id.* (citing *United States v. RCA*, 358 U.S. 334 (1954)). FCC can consider antitrust policies in public interest licensing, however. *Id.*

⁵⁹ 1970 *Ownership Rules*, *supra* note 40, at 310 ("[C]entralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.").

⁶⁰ 1975 *Ownership Rules*, *supra* note 40, at 1049.

⁶¹ Emord, *supra* note 24, at 419-20 (citing NETWORK INQUIRY SPECIAL STAFF, FCC FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION II-2 to II-13, II-32 to II-38 (1980)).

⁶² *Id.* at 419.

⁶³ See *In re Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 27-31 (1984) [hereafter *Seven Stations Rule*] (stating that dramatic increase in broadcast outlets adds potential for greater viewpoint diversity).

⁶⁴ Emord, *supra* note 24, at 421 & n.109; see also *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (stating that in

new approach allowed the private broadcast licensee to decide, as much as possible, the best way to compete for its audience. This was the beginning of deregulation. Since then, minimizing regulation and promoting new technology have become paramount.⁶⁵ Regulation has been viewed as an impediment to technology because it tends to preserve the status quo rather than facilitate innovation and more efficient use of the electromagnetic spectrum.⁶⁶

The increase in programming outlets has led many critics of diversity policies to argue that diversity has been achieved or become outdated.⁶⁷ As cable and subscriber services have continued to expand, the FCC has supported "economies of scale arguments" to relax diversity ownership restrictions.⁶⁸ Broadcasters, cable systems, and telephone companies are now consolidating their operations, diversifying into other areas, and becoming vertically integrated.⁶⁹ The FCC has sanctioned this move, subject to limitations, as "within the public interest" because it leads to

appropriate circumstances public interest allows FCC to substitute marketplace approach in place of regulation).

⁶⁵ See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Western Union Tel. Co. v. FCC*, 674 F.2d 160, 164-65 (2d Cir. 1982) (upholding FCC order allowing international record carriers to engage in unregulated competition); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d, 630, 640 (D.C. Cir. 1976) (discussing FCC belief that competition is best way to hasten development of improved technologies and stating that FCC intends to leave special mobilized radio systems free of all federal regulation by not classifying them as common carriers), *cert. denied*, 425 U.S. 992 (1976).

⁶⁶ *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1199 (D.C. Cir. 1984).

⁶⁷ See *Seven Stations Rule*, *supra* note 63, at 24-27 (concluding that market has viewpoint diversity).

⁶⁸ *Id.* at 44-46, 50-51.

⁶⁹ In 1982, repeated abuses and anti-competitive conduct prompted a court ruling requiring the break-up of AT&T and its interest in the Regional Bell Operating Companies (RBOCs), which provided local exchange service. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The parties entered into a Modified Consent Decree on August 24, 1982, which District Court Judge Harold Greene approved. As part of the consent decree, restrictions were imposed for seven years on services that telephone companies could offer. *Id.* at 186. Among the restrictions, telephone companies were prohibited from getting involved in information services, except for information services incidental to their telephone services, such as telephone directories. *Id.* at 189-90.

more efficient broadcast operations.⁷⁰

B. FCC's Policy Objectives Applied

Diversity policies and rules have traditionally been applied only to broadcasters. With the development of cable as a competitive video provider, however, traditional definitions have become inadequate. In 1982, the FCC adopted the term "media of mass communications" to apply to all radio and video technology. In 1984, Congress extended Title III diversity principles to cable⁷¹ and to other media of mass communications on an ad hoc basis where licensees had control of program content.⁷²

The FCC has not, to date, extended diversity policies to common carriers. The traditional rationale is that common carriers are not appropriate objects of regulations aimed at achieving diversity because common carriers do not have ultimate decision making authority over the content of the information transmitted over their lines.⁷³ Although the FCC has received petitions to extend diversity to common carriers, it has not taken any action to date.⁷⁴ As a result, under the current structure, the FCC's classification of a given technology as broadcasting or cable system determines whether Title III regulations apply to that technology.

Diversity principles have historically been implemented through a series of rules and policy statements.⁷⁵ The first set of

⁷⁰ *Seven Stations Rule*, *supra* note 63, at 50.

⁷¹ 47 U.S.C. §§ 521-559 (1988). The Cable Act was intended "to assure the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." *Id.* § 532.

⁷² Allen S. Hammond, IV, *To Be or Not to Be: FCC Regulation of Video Subscription Technologies*, 35 *CATH. U.L. REV.* 737, 739 n.15 (1986).

⁷³ Under the Communications Act, common carriers are not considered broadcasters. *See supra* note 4 (providing definition of common carrier). Furthermore, the Cable Act provides, "It shall be unlawful for any common carrier . . . to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier." 47 U.S.C. § 533(b)(1).

⁷⁴ *See, e.g.*, ADVISORY COMM. ON ALTERNATIVE FINANCING FOR MINORITY OPPORTUNITIES, FCC, STRATEGIES FOR ADVANCING MINORITY OWNERSHIP OPPORTUNITIES IN TELECOMMUNICATIONS: FINAL REPORT, APPENDIX A (May 1982) [hereafter *Strategies for Minority Ownership*].

⁷⁵ During the 1940s, FCC adopted rules restricting common ownership, operation, or control of more than one broadcast station in substantially the same service area, where the primary contours overlapped. *See FCC v.*

rules was race-neutral and focused on the policy objectives of diverse viewpoints and competition. Two examples of the new rules are the fairness doctrine and the ownership or duopoly rules. The fairness doctrine requires both television and radio broadcast licensees to devote a reasonable portion of programming to discuss controversial issues of public concern.⁷⁶ The duopoly rules restrict ownership of multiple broadcast properties by the same person or entity.⁷⁷

National Citizens Comm. for Broadcasting, 436 U.S. 775, 780 & n.1 (1978) (discussing early FCC rules governing television broadcast stations); 49 Fed. Reg. 19, 482-83 (1984) (providing historical overview of FCC action). The earlier FCC rules prohibited any person (1) from operating more than one television broadcast station, and (2) from owning more than one standard broadcast station in the same community. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 780 (citing *NBC v. United States*, 319 U.S. 190, 193, 206-08 (1943) and *Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16,065 (1943)).

In 1964, the FCC tightened restrictions on multiple ownership by prohibiting common ownership of two AM or two FM stations in the same broadcast service area if the existing and predicted primary service contours overlapped. *Id.* (citing *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476 (1964)). In 1970, FCC further restricted concentration of ownership by prohibiting all new licensees from owning both a radio station and a VHF television station in the same market. *Id.* at 781 & n.3 (citing *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C.2d 306 (1970), *as modified in* 28 F.C.C.2d 662 (1971)). The modified 1971 rule amended the 1970 rule to allow AM-FM combinations and to deal with UHF-radio combinations on a case by case basis. *Id.* No divestiture was required. *Id.* This rule applied only prospectively. *Id.* at 781. FCC also included a waiver provision to allow the sale of a combination to a single party if it was in the public interest. *1970 Multiple Ownership Rules, supra* note 40, *as modified in* 28 F.C.C. 2d 662, 673 (1971).

⁷⁶ See *In re Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249-50 (1949).

⁷⁷ *Seven Stations Rule, supra* note 63. In 1953, FCC limited the total number of broadcast stations any individual or group could own to seven AM radio stations, seven FM radio stations, and five VHF stations. *Id.* at 22. In 1984, FCC relaxed this so-called Seven Stations Rule and increased the limit to twelve stations. *Id.* at 55. The rule was considered temporary and transitional, and FCC increased the ownership caps for six years only. *Id.* Waivers from the rule were discouraged in an effort to equalize FCC's treatment of network and non-network groups. *Id.* In 1985, FCC reconsidered and then affirmed the relaxed rule. *In re Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74 (1985). However, FCC deleted the six-year sunset provision as unnecessary and imposed a 25% audience reach cap to

During the mid-1960s, racial and economic tensions led to civil unrest and disorder. This caused some regulators to reconsider how minorities⁷⁸ were portrayed in the media. A study of race relations revealed a plethora of negative stereotypes and gross underrepresentation of minorities in the media.⁷⁹ Regulators responded by expanding the diversity principle to embrace enhanced representation and participation of minorities in broadcasting.⁸⁰ These initial efforts to achieve diversity targeted pro-

mitigate the effects on diversity if rapid network expansion and concentration of ownership occurred. *Id.* at 87. FCC also imposed incentive discounts for UHF television and minority ownership to account for diversity objectives. First, UHF was given a 50% discount for audience reach under Arbitron. *Id.* at 93. Second, FCC increased the ownership limit to 14 for group owners with at least two minority-controlled stations. *Id.* at 94. FCC also provided that group owners with cognizable interests in minority-controlled television stations would be allowed to reach a maximum of 30% of the national audience as long as minority-controlled stations contributed at least 5% of the aggregate reach. *Id.* For additional background on earlier multiple ownership regulations, see Rules Governing Standard [AM] and High Frequency [FM] Broadcast Stations, 5 Fed Reg. 2382, 2384 (1940); 1970 Ownership Rules, *supra* note 40, at 306; 1975 Ownership Rules, *supra* note 40, at 1046.

⁷⁸ The Communications Act defines "minorities" to include Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders. 47 U.S.C. § 309(i)(3)(C).

⁷⁹ OTTO KERNER, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (1968). FCC licensed the first minority broadcaster in 1949. Evans, *supra* note 24, at 387. By 1971, however, only 10 of approximately 7,500 radio broadcast licenses were minority-owned. *Id.* In 1981, minorities owned less than 1.5% of all broadcast properties, most of which were radio stations in small markets. DAVID HONIG, RELATIONSHIPS AMONG EEO, PROGRAM SERVICE, AND MINORITY OWNERSHIP IN BROADCAST REGULATION 86 (1981). This figure has increased slightly to 2.51% over the last decade but the total numbers have declined in recent years. A 1991 study revealed that of approximately 10,389 total minority-owned properties, 196 were minority-owned mass media properties. *Market Analysis - Vol. 1, supra* note 2, at 1. The breakdown of minority ownership is as follows: 3.03% of AM stations, 1.95% of FM stations, and 2.36% of television stations. *Id.* There are only 7 minority-owned cable companies. *Id.*

⁸⁰ See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980-81 (1978); FCC, Policy Statement on Minority Ownership of Cable Television Facilities, FCC 82-524, Dec. 22, 1982; Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982); see also *Strategies for Minority Ownership, supra* note 74 (discussing nongovernment strategies for financing minority acquisition of telecommunications properties).

gramming through ascertainment rules.⁸¹ These rules required broadcasters to inquire about local community problems and needs as well as to refrain from employment discrimination.⁸²

Since 1968 the FCC has required broadcasters to comply with specific EEO guidelines.⁸³ These guidelines prohibit licensees from discriminating among potential employees and require affirmative action plans to ensure good faith efforts in recruiting qualified minorities to the work force.⁸⁴ In addition, the FCC has instituted programs to encourage minority ownership as a means of addressing diversity in programming. Among these programs are the tax certificate⁸⁵ and distress sale

⁸¹ These ascertainment rules initially developed case by case during the 1960s and only later were officially codified. Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303 (1960). For examples of this ad hoc approach, see *In re* Minshall Broadcasting Co., 11 F.C.C.2d 796 (1968); *In re* Sioux Empire Broadcasting Co., 16 F.C.C.2d 995 (1969); *In re* City of Camden, 18 F.C.C.2d 412 (1969). The ascertainment rules required that broadcasters inquire into a community's local problems and needs. *In re* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971); *In re* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976).

⁸² *In re* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766, 769-72 (1968) [hereafter *1968 Employment Practices*]; *In re* Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 F.C.C.2d 354 (1975); *In re* Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976).

⁸³ *1968 Employment Practices*, *supra* note 82, at 769.

⁸⁴ See *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (per curiam) (holding that full hearing regarding allegations of actual licensee employment discrimination and of failure to meet affirmative action obligations was required).

⁸⁵ In 1943, Congress delegated tax certificate authority to FCC. FCC initially used the authority to remove the hardship of involuntary transfers caused by the divestiture requirement under the multiple ownership rules. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983 (1978). In 1978, for example, as part of its policy statement on minority ownership, FCC authorized the Minority Tax Certificate Program. *Id.* Also, by 1978 FCC routinely used tax certificates as incentives to licensees to divest themselves of media property that had been grandfathered under the ownership rules. See I.R.C. § 1071 (1988) (authorizing nonrecognition of gain or loss on sale or exchange of property to effectuate FCC policies); see generally *In re* Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration, 69 F.C.C.2d 1591, 1596 (1978) and *In re* Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982) [hereafter *Policy Statement on Minority*

programs.⁸⁶ These programs provide financial incentives to non-minorities to sell or joint venture with minority entrepreneurs.⁸⁷ The tax certificate program allows those who sell to or invest in minority broadcast stations to defer capital gains.⁸⁸ The distress sale policy permits a licensee, threatened with a license revocation, to sell the station to a minority-controlled entity for seventy-five percent of its fair market value.⁸⁹ This enables the seller to get some return on her investment while making minority ownership more feasible.

The FCC has also attempted to encourage diversity by adopting minority⁹⁰ and female⁹¹ preferences. Typically, the FCC uses

Ownership], reprinted in COMMUNICATIONS MEDIA CENTER, NEW YORK LAW SCHOOL, MINORITY TAX CERTIFICATE SOURCEBOOK (1991).

⁸⁶ See *Policy Statement on Minority Ownership*, *supra* note 85, at 858-59.

⁸⁷ Time brokerage agreements were also recognized as a viable financial incentive by the National Telecommunication Information Agency (NTIA). See *In re* Petition for Issuance of Policy Statement, 69 F.C.C.2d 1591, 1592 (1978).

⁸⁸ Erwin G. Krasnow et al., *Minority Tax Certificates: Tax Planning and Business Strategies for Buyers, Sellers, and Investors 1* (1990) (on file with author).

⁸⁹ See Kurt A. Wimmer, *The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric To Urge Policy Change*, 41 FED. COMM. L.J. 133, 145-46 (1989). The distress sale policy has achieved moderate success. The FCC Consumer Assistance Office and the Office of Public Affairs published statistical data indicating that 38 distress sales occurred between 1978 and 1988. CONSUMER ASSISTANCE AND SMALL BUSINESS DIV., FCC, MINORITY OWNERSHIP LISTS, STATIONS THAT HAVE ELECTED TO SEEK DISTRESS SALE RELIEF DISTRESS SALES APPROVED (Sept. 3, 1991) (on file with author). Since 1988, however, the numbers are inconsequential, because FCC rarely denies renewals or revokes broadcast licenses for violation of its rules. Wimmer, *supra* at 146.

⁹⁰ See *Policy Statement on Minority Ownership*, *supra* note 85, at 849-53. The D.C. Circuit applied pressure on FCC to adopt minority preferences. See *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); Wimmer, *supra* note 89, at 147. For an example of a license recently awarded based on minority preference, see *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992). The unsuccessful applicant in *Bechtel* has appealed, challenging the license award and FCC's minority preference policy. *Galaxy Communications, Inc. v. FCC*, 61 U.S.L.W. 3038 (U.S. July 21, 1992). If the Supreme Court grants certiorari, the minority preference policy may be declared unconstitutional. See *infra* notes 95-98.

⁹¹ Women were not considered "minorities" under the policy, although they were given some merit in the comparative proceeding. See *In re* Petition for Issuance of Policy Statement, 69 F.C.C.2d 1593 n.9 (1970) (discussing women as minority applicants); see also DEP'T OF COMMERCE, REPORT OF THE

comparative hearings or lotteries to award broadcast licenses.⁹² Minority and female preferences favor broadcast license applicants who propose to integrate minorities and females into station management. Under deregulation, however, the FCC began to reexamine these policies with a view to eliminating or greatly curtailing them.⁹³ It has taken intervention by Congress, through its appropriations authority, to block the FCC's efforts to eliminate these rules.⁹⁴

Despite congressional intervention, the future of diversity policies is questionable in the absence of a firm regulatory framework. Both the ascertainment rules and the fairness doctrine have been eliminated under deregulation.⁹⁵ Furthermore, the D.C. Circuit has eliminated female preferences by declaring them unconstitutional.⁹⁶ Although the minority preference policy and the distress sale program have been upheld by the United States Supreme Court,⁹⁷ these policies may not withstand judicial scrutiny given the Court's present composition.⁹⁸ Moreover, preference consid-

PRESIDENT'S INTERAGENCY TASK FORCE ON WOMEN BUSINESS OWNERS (1978).

⁹² See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

⁹³ See, e.g., *In re Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C.R. 1315 (1986). In 1987, President Reagan signed into law H.R.J. Res. 395. The resolution included a provision restricting any use of funds to repeal or retroactively apply changes to the distress sale policy, minority or gender preferences, and tax certificates. *In re Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 3 F.C.C.R. 766 (1988).

⁹⁴ See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736-37 (1981).

⁹⁵ In 1976, FCC formally eliminated ascertainment rules on the grounds that market forces and competition would best achieve diversity in programming. See *In re Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976); *FCC v. WNCN Listeners Guild*, 450 U.S. 582-83 (1981). In 1988, FCC announced that the fairness doctrine was no longer in the public interest and thus abandoned it. *In re Syracuse Peace Council v. Television Station WTVH*, 3 F.C.C.R. 2035, 2039 (1988).

⁹⁶ *Lamprecht v. FCC*, 60 U.S.L.W. 2537, 2537 (D.C. Cir. 1992).

⁹⁷ *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

⁹⁸ In *Metro Broadcasting*, the Supreme Court upheld the minority preference and distress sale by a 5-4 vote. *Id.* at 3002. The Court held that the policies were within the public interest based in large part on a strong congressional policy in favor of the programs. *Id.* at 3012-16. Justices

erations will be rare and inconsequential as the FCC uses auctions, rather than comparative hearings or lotteries, to issue licenses.⁹⁹

The only remaining vestiges of diversity policies that the FCC applies with any consistency to all mass communications are the ownership rules, tax certificate program, and EEO requirements. These regulations and programs will be discussed at some length in Part IV. Part IV also briefly discusses diversity policies such as the sponsorship identification and foreign ownership restrictions.

II. FCC'S REGULATORY FRAMEWORK FOR CLASSIFYING TECHNOLOGY

The FCC's regulatory framework for classifying mass communications technology determines which diversity policies will apply. This Part will review the traditional and more recent criteria that the FCC is using for classifying mass communications technology. The material in this Part establishes that the FCC needs to reform its regulatory framework to provide more consistent diversity regulations.

One development that has created the need for reform is the new hybrid technologies which have blurred the distinctions between the traditional classifications. The development of cable, for example, coupled with technologies such as computers, fiber optics, satellites, and video compression, make it possible for voice, data, and video services to converge under one system.¹⁰⁰ In addition, the new hybrid subscriber-based systems have

Brennan and Marshall have since retired, however. The dissenters strongly attacked the nexus argument correlating ownership of broadcast properties and diversity of viewpoints. *Id.* at 3037-44.

⁹⁹ FCC increasingly is moving toward a lottery system in lieu of a comparative hearing. *See In re Amendment of Commission's Rules to Allow Selection Using Random Selection on Lotteries Instead of Comparative Hearings*, 93 F.C.C.2d 952 (1983). The lottery system, however, has come under attack for abuse by application mills who charge unwary applicants thousands of dollars. *See In re Amendment of Commission's Rules to Establish Service and Technical Rules for Government and Non-Government Fixed Service Usage*, 6 F.C.C.R. 4320 (1991) (curtailing applicants' ability to file multiple applications to increase their lottery chances). *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1356 (D.C. Cir. 1988).

¹⁰⁰ One example of converging technologies is Personal Communication Networks, also known as cellular telephone services, developed by cable systems to compete with telephone services. Another example is an

rendered the physical separation between types of systems an ineffective means of classifying mass communications technology.¹⁰¹

Another development that has created the need for reform is the FCC's adoption of new classifications without first developing a consistent framework for implementing them. For example, although hybrids are media of mass communications for some purposes, the FCC has adopted new classifications such as "non-common carrier," "non-dominant common carrier,"¹⁰² or "point-to-multipoint nonbroadcast"¹⁰³ to exempt subscription services from Title II and Title III regulation.

A. Traditional Distinctions

Traditionally, regulators have drawn clear distinctions between common carriers and broadcasters based on the type of service provided, who received it, and the manner in which it was received.¹⁰⁴ Services were distinct. Common carriers used wire communications to send voice and data communications.¹⁰⁵ Broadcasters used radio communications to transmit radio or video programming.¹⁰⁶ Common carrier services, such as telephone, were made available to an indiscriminate group of people for a fee on a first come, first serve basis. By contrast, broadcaster services, such as television, were made available to the general public for free. Specialized services for private users or subscribers, such as canned background music or intra-office communica-

electronic bulletin board, which uses computers to provide access to information via telephone lines.

¹⁰¹ Alfred C. Sikes, Remarks at the Northern Telecom Inc. Executive Marketing Symposium, Colorado Springs, Colo., June 19, 1991 (on file with author).

¹⁰² National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

¹⁰³ See *In re* Subscription Video, 2 F.C.C.R. 1001, 1006 (1987) [hereafter *In re* STV] (discussing intent-based approach to broadcast classification resulting in "non-broadcast" classification); National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, 668 (D.C. Cir. 1988) (discussing new intent-based approach to broadcast classification resulting in classification as "point-to-multipoint" services rather than broadcasting).

¹⁰⁴ The Communications Act specifically states that radio broadcasters shall not be deemed common carriers. 47 U.S.C. § 153(h) (reproduced in part at *supra* note 4).

¹⁰⁵ *Id.*

¹⁰⁶ See 47 U.S.C. § 153(o) (reproduced at *supra* note 5).

tion, were generally exempt from regulation.¹⁰⁷

1. Common Carriers

A common carrier is any person engaged in rendering communication services for hire to the public.¹⁰⁸ Telephone companies, for example, are common carriers and subject to regulation under Title II of the Communications Act.¹⁰⁹ Under Title II, common carriers are subject to price and service requirements.¹¹⁰ Common carriers are also required to obtain certificates of "public convenience and necessity" from the FCC to construct or extend telephone lines and must file rate tariffs with state public utilities commissions.¹¹¹ Charges for common carrier service must be just and reasonable.¹¹² Finally, Title II requires common carriers not to discriminate¹¹³ in terms of making individualized decisions about who will receive the service and whether and on what terms

¹⁰⁷ See *National Ass'n for Better Broadcasting*, 849 F.2d at 667 (stating that services not intended for public distribution to general audience do not constitute broadcasting).

¹⁰⁸ See 47 U.S.C. § 153(h) (reproduced in part at *supra* note 4). State public utility commissions originally licensed common carriers as "public utilities." With the enactment of the Communications Act of 1934, they were redefined as "common carriers."

¹⁰⁹ 47 U.S.C. §§ 201-226.

¹¹⁰ See 47 U.S.C. § 153(h) (reproduced in part at *supra* note 4). Common carriers are subject to a higher standard of care than are private carriers. In part, the rationale for the higher standard of care is that common carriers hold themselves out to the public and therefore accept a sort of public trust. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

¹¹¹ 47 U.S.C. §§ 203(a), 214.

¹¹² 47 U.S.C. § 202(a) states:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id.; see, e.g., *FCC v. Midwest Video Corp*, 440 U.S. 689 (1979) (discussing charges that cable operators may levy).

¹¹³ "Discrimination" means "the arbitrary and capricious classification of entities by irrelevant standards." *1975 Ownership Rules*, *supra* note 40, at 1050.

to offer the service.¹¹⁴

Defining who constitutes the public, however, is by no means clear.¹¹⁵ Case law suggests that "public" does not mean the entire public.¹¹⁶ However, private line services,¹¹⁷ which are not considered common carriers,¹¹⁸ may still serve a significant and similar clientele.¹¹⁹ The FCC focuses on the manner and terms by which the carrier approaches and deals with its customers rather than asking who the customers are.¹²⁰ It has been sufficient that the carrier *in practice* serves all persons indiscriminately.¹²¹

In 1981, the FCC classified certain non-dominant carriers¹²² of communication services, such as teletext, as non-common carriers.¹²³ This reclassification exempts them from Title II regulation.¹²⁴ Non-common carriers may provide video and

¹¹⁴ FCC v. Midwest Video Corp., 440 U.S. at 701-02.

¹¹⁵ National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). Classifying common carrier services turns on whether the carrier has the intent to provide services indiscriminately to the public. *Id.* at 642. The key factor is whether the operator offers service to whoever may legally and practically use it. It is irrelevant that the service is so specialized that only a few need or desire it.

¹¹⁶ *Id.* at 641.

¹¹⁷ FCC defines "private line service" as "a service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2 (1991). One example of a private line service is mobile radio operators for firemen, police, and taxicab drivers; they provide service to themselves or third parties. *National Ass'n of Regulatory Util. Comm'rs*, 525 F.2d at 634.

¹¹⁸ *See id.* at 642.

¹¹⁹ *See Home Ins. Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958).

¹²⁰ *See National Ass'n of Regulatory Util. Comm'rs*, 525 F.2d at 642.

¹²¹ *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927) ("A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests.") (citation omitted).

¹²² "Non-dominant common carriers" are carrier services which are ancillary to primary service and which do not have the power to control price. *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Examples are subscriber information services such as "teletext," which is an ancillary service provided by some newspaper companies.

¹²³ *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 84 F.C.C.2d 445, 463-70 (1981).

¹²⁴ *Id.* Subscriber services providing primarily news and information are considered "noncommon carriers." *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 85 F.C.C.2d 1, 30-40 (1980). Non-common carriers are exempt from Title II regulation.

information service, thus combining services traditionally offered separately by broadcasters and common carriers. In these cases, the FCC classifies the technology based on the dominant service provided.

2. Broadcasters

Broadcasters use the airwaves to disseminate general information and entertainment programming to the public.¹²⁵ Radio and free television stations, for example, are broadcasters and are regulated under Title III of the Communications Act of 1934. Title III requires the FCC to grant broadcaster licenses based on a showing that licensees will satisfy the "public interest, necessity and convenience" by providing the best practicable service to the area.¹²⁶

The Radio Act of 1927 was the first legislation to define broadcasting. Congress debated and later rejected classifying broadcasters as public utilities with an obligation to act as common carriers by providing service on a nondiscriminatory basis.¹²⁷ Instead, Congress opted for a narrowly tailored approach in which broadcasters would remain under private control. But certain uses central to democratic values, such as political access, would be subject to well-defined public obligations.¹²⁸ This led regulators to impose on broadcasters equal access rules for political candidates.¹²⁹

The FCC originally classified broadcasters based on the licensee's intent in providing programs for the public.¹³⁰ Broadcasters intended to provide programming of general interest and for

However, they are still subject to the basic substantive carrier requirements to charge just and reasonable rates and to not engage in unreasonable discrimination. 47 U.S.C. §§ 201-202.

¹²⁵ See 47 U.S.C. § 153(o) (defining broadcasting; reproduced at *supra* note 5).

¹²⁶ 47 U.S.C. § 307(a).

¹²⁷ *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1199 (D.C. Cir. 1984). For discussion about legislative and administrative development of the broadcast system, see *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 103-14 (1973).

¹²⁸ *National Ass'n of Broadcasters*, 740 F.2d at 1199.

¹²⁹ 47 U.S.C. § 312(a)(7).

¹³⁰ See *In re Amendment of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service*, 3 F.C.C.2d 1, 9 (1966) [hereafter *In re Amendment STV*].

public distribution.¹³¹ Initially, the FCC did not clearly define subscriber services for radio and wire communications. Subsequently, the FCC created a new label, "point-to-point,"¹³² for some of the specialized radio subscriber services.¹³³ Under this new label, these services were exempt from Title III regulation.¹³⁴ On the other hand, the FCC generally classified video subscriber services as broadcasters.¹³⁵

In 1984, the D.C. Circuit held in *National Ass'n of Broadcasters v. FCC*¹³⁶ that DBS service directed at homes was intended to be received by the general public and, therefore, was broadcasting subject to Title III.¹³⁷ The court ruled that Title III applied to both DBS operators and customer-programmers¹³⁸ leasing satellite space to transmit programming. The *National Ass'n of Broadcasters* decision required customers of common carrier DBS licensees, either the carrier or lessee-customer, to comply with

¹³¹ *National Ass'n of Broadcasters*, 740 F.2d at 1201 (citing *Functional Music, Inc. v. FCC*, 274 F.2d 543, 548 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)); see *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 666, 668 (D.C. Cir. 1988) (noting that "broadcasting" does not occur when transmissions are sent to limited number of receivers).

¹³² *National Ass'n for Better Broadcasting*, 849 F.2d at 676; see *National Ass'n of Broadcasters*, 740 F.2d at 1205 (stating that activity that would provide nongeneral interest, point-to-point service need not be regulated as broadcasting where format interests only narrow class of subscribers and does not implicate broadcasting objectives).

¹³³ For examples of specialized radio subscriber services, see *In re Greater Washington Educ. Telecommunications Ass'n, Inc.*, 49 F.C.C.2d 948 (1974) (discussing use of educational FM subcarrier for specialized information to the blind); *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967) (discussing FM multiplex radio transmission of background music to subscribers); *Functional Music, Inc.*, 274 F.2d at 543 (discussing FM station that broadcasts music and simultaneously furnishes to subscribers same music without advertising).

¹³⁴ Specialized radio subscriber services specifically exempted were those services intended to be received for specific receive points as opposed to those intended for receipt by the general public. *In re STV*, *supra* note 103, at 1003.

¹³⁵ *In re Amendment STV*, *supra* note 130, at 8; see *In re Inquiry into the Development of Regulatory Policy re: Direct Broadcasting Satellites*, 86 F.C.C.2d 719, 750 n.64 (1981) (classifying subscription services as "broadcasting" until FCC determines otherwise).

¹³⁶ 740 F.2d 1190.

¹³⁷ *Id.* at 1204.

¹³⁸ *Id.* at 1200. Customer-programmers lease satellite space to transmit programming. FCC had ruled that customer-programmers did not need licenses.

Title III obligations.¹³⁹ By holding that the lessor still had control over program content, the court invalidated the FCC's attempt to exempt customer-programmers from classification as broadcasters.¹⁴⁰

Following the *National Ass'n of Broadcasters* ruling, however, the FCC initiated a rulemaking to nullify the court's requirement that customer-programmers be regulated under Title III.¹⁴¹ The FCC accomplished this in *In re Subscription Video* by modifying the criteria for defining broadcasters.¹⁴² The new criteria focused on the technology, transmission, and receipt techniques, rather than the traditional content-based intent criteria.¹⁴³ The FCC perceived a distinction in the legislative history between intent to broadcast an omnidirectional signal to an indeterminate public, and the use of special equipment to broadcast to specific individuals.¹⁴⁴ In the absence of a clear legislative mandate, the FCC concluded that free television and over-the-air subscription television (STV)¹⁴⁵ were intended to be distinct for purposes of serving the public.¹⁴⁶ Because subscription services use special equipment and involve a contractual relationship, the FCC concluded that such services were not intended to be available to the general public.¹⁴⁷

The result has been a new classification for subscription video services such as STV: "point-to-multipoint nonbroadcast serv-

¹³⁹ *Id.* at 1203-04; *In re STV*, *supra* note 103, at 1001.

¹⁴⁰ *National Ass'n of Broadcasters*, 740 F.2d at 1201.

¹⁴¹ See *In re STV*, *supra* note 103, at 1001.

¹⁴² *Id.*

¹⁴³ *Id.* at 1003-06. The new criteria were upheld in *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 668 (D.C. Cir. 1988).

¹⁴⁴ *In re STV*, *supra* note 103, at 1003. FCC cited the ambiguous nature and use of the term "broadcasting" and its application to STV services. *Id.* at 1003-04.

¹⁴⁵ Subscription television is an over the air pay television system in which paying viewers receive decoders to unscramble the system. CARTER ET AL., *supra* note 38, at 51. STV's viability is questionable in light of a drop in subscribers from 1.4 million in 1981 to about 25,000 in early 1986. *Id.*

¹⁴⁶ The dissent in *National Ass'n for Better Broadcasting* argued that the legislative intent clearly indicated that STV would be considered "broadcasting." 849 F.2d at 673 & n.8 (Wald, C.J., dissenting) (citing 68 CONG. REC. 2576, 2881, 3033, 3258 (1927) (Remarks of Sens. Pittman, Walsh, Copeland, Dill and Rep. Davis)).

¹⁴⁷ *In re STV*, *supra* note 103, at 1006; *National Ass'n for Better Broadcasting*, 849 F.2d at 671.

ices.”¹⁴⁸ Under this new classification, the test is whether the licensee or programmer intends the signal to be received only by subscribers and not by the general public.¹⁴⁹ As will be discussed in Part III, the FCC has never addressed the impact of this decision.

3. Cable

Cable television (CATV)¹⁵⁰ became the first new hybrid technology in telecommunications. This technology uses wire communications, as opposed to airwaves, and fiber optics, microwave technology,¹⁵¹ and satellites to deliver video programming to subscribers for a channel fee.¹⁵² CATV was developed in the late 1940s to provide television service to remote areas with poor or no reception.¹⁵³ Since then, cable has evolved into a versatile communication system. It can carry fifty-five or more channels for radio and television programming and may provide a variety of new information and interactive services.¹⁵⁴

¹⁴⁸ *National Ass'n for Better Broadcasting*, 849 F.2d at 668.

¹⁴⁹ *Id.*

¹⁵⁰ CATV involves a master antenna placed where it can receive a usable broadcast signal, a power booster and signal converter to enhance the signal, and a coaxial or fiber optics cable to carry the signal to the home viewer. CARTER ET AL., *supra* note 38, at 390. ROBINSON & GELLHORN, *supra* note 38, at 298 n.5.

¹⁵¹ Microwave technology enables operators to transport television signals hundreds or even thousands of miles beyond the original range of the broadcast. ROBINSON & GELLHORN, *supra* note 38, at 298 n.5. This means that antennae erected in San Diego can pick up programming of Los Angeles stations that are over one hundred miles away.

¹⁵² FCC, INFORMATION BULLETIN ON CABLE TELEVISION 1 (Jan. 1990) [hereafter *FCC Bulletin*]. Cable has a tiering structure which charges a basic subscription rate for network, local and access television programming, and advertiser-supported program services as well as additional fees for entertainment, sports, information, or specialized programming it either produces or acquires. The latter is called “pay cable” and usually requires a decoder or descrambler to pick up the channel. See CARTER ET AL., *supra* note 38, at 389-91.

¹⁵³ *FCC Bulletin*, *supra* note 152, at 1.

¹⁵⁴ CARTER ET AL., *supra* note 38, at 389. In addition to radio and television signals, cable operators also offer wire services such as news, weather, and stock market reports; cable network program services including movies, sports, and special entertainment features; and programming designed for specific audiences such as children, women, and ethnic and racial minorities. Other services include local programming and access channels as well as leased channels for public and institutional uses.

Cable is a hybrid technology¹⁵⁵ because it can originate and transmit its own programming, which is a broadcast function,¹⁵⁶ and it can act as a carrier to retransmit an existing television signal, which is a common carrier function.¹⁵⁷ In addition, unlike broadcasting and telephone companies, cable obtains its revenue from subscribers as well as advertisers who purchase time on local-originated and satellite programming.¹⁵⁸

Regulation of the cable industry has been sporadic and inconsistent.¹⁵⁹ In 1972 the FCC adopted complex, comprehensive

Interactive services include electronic banking, shopping, utility meter reading, home security, and facsimile newspaper and mail services. *FCC Bulletin*, *supra* note 152, at 1-2.

¹⁵⁵ Hybrids are sometimes referred to as non-broadcaster non-carrier spectrum use under Title III. MICHAEL BOTEIN, JURISDICTION AND ANTITRUST CONSIDERATION IN THE REGULATION OF THE NEW COMMUNICATIONS TECHNOLOGIES: DEVELOPMENT AND REGULATION OF NEW COMMUNICATIONS TECHNOLOGIES 98 (1980).

¹⁵⁶ The Cable Act defines "cable system" so as to exclude systems which only retransmit television signals or use satellite programming to deliver service to subscribers in multiple unit buildings under common ownership, control, or management. *See* 47 U.S.C. § 522(6) (reproduced in part at *infra* note 167). Cable was originally set up to provide retransmission of existing television signals, but expanded into program origination with more efficient use of the technology. The D.C. Circuit has held that FCC has discretion in deciding whether to classify cable as a common carrier. *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

¹⁵⁷ Cable systems that develop a minimum of 20 channel capacity for access by third parties, and that furnish equipment and facilities for access purposes, are not common carriers. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979).

¹⁵⁸ Broadcasters receive most of their revenue from advertising dollars, based upon ratings. "Ratings" measure listenership based upon the number of persons who are likely to watch or listen to a particular program. PETER PRINGLE ET AL., ELECTRONIC MEDIA MANAGEMENT 186, 377 (2d ed. 1991).

¹⁵⁹ In 1966, FCC expanded its jurisdiction to regulate cable. FCC's regulation of the industry was minimal, however, focusing primarily on protecting local programming from imported distant signals from television. In March 1966, FCC established rules for all cable systems requiring them to carry all local TV stations; prohibiting systems from duplicating distant signals of local programming on the same day; and prohibiting systems from broadcasting distant signals into the 100 major markets without a hearing on the adverse effects on local programming. *See FCC Bulletin*, *supra* note 152, at 2 (citing *In re Amendment to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems*, 2 F.C.C.2d 725 (1966)).

regulations¹⁶⁰ which covered many aspects of cable operation. Over the next decade, however, the FCC eliminated most of these regulations.¹⁶¹ The FCC retained some jurisdiction, but left much of the regulation to state and local authorities.¹⁶² Local authorities then engaged in jurisdictional disputes and imposed unreasonable conditions and fees on cable operators.¹⁶³ This left the industry in turmoil.¹⁶⁴ Finally, Congress intervened by passing the Cable Communications Policy Act of 1984 (Cable Act).¹⁶⁵ In 1985, the FCC modified its rules to implement the Cable Act.¹⁶⁶

Congress intended the Cable Act to end major areas of contention between cable systems¹⁶⁷ and government franchising

FCC's authority to regulate cable was challenged but upheld by the Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), even though there was no mention of cable technology in the Communications Act.

¹⁶⁰ Cable Television Report and Order, 36 F.C.C.2d 143 (1972). Under these 1972 rules, cable operators were required to obtain a certificate of compliance from FCC prior to operating a system or adding a television signal. *FCC Bulletin*, *supra* note 152, at 3. In addition, other rules were imposed relating to franchise standards, signal carriage, network program nonduplication and syndicated program exclusivity, nonbroadcast and cablecasting, cross-ownership, equal employment opportunity, and technical standards. *Id.* Cable operators were also required to file annual reports on employment and finances. *Id.*

¹⁶¹ *FCC Bulletin*, *supra* note 152, at 3. The franchise standards were deleted in 1977; the certificate process was substituted with a signal registration process in 1978; and the distant signal carriage restrictions and syndicated program exclusivity rules were eliminated in 1980. *Id.* Court actions invalidated the pay cable programming rules in 1977 and the cable television access rules in 1979. *Id.* In 1983, FCC deleted its financial reporting requirements. *Id.*

¹⁶² *See* Cable Television Report and Order, 36 F.C.C.2d 143, 204-10 (1972) (concluding that deliberately structured dualism of state, local, and federal regulation is necessary).

¹⁶³ The Cable Act defines a "cable operator" as any person or group providing cable service over a cable system and owning a significant interest in the system or who controls or is responsible for the management and operation of the system. *See* 47 U.S.C. § 522(4).

¹⁶⁴ DAVID BRENNER & NORMAN PRICE, *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO* 3.01 (1990).

¹⁶⁵ 47 U.S.C. §§ 521-559.

¹⁶⁶ *See* 50 Fed. Reg. 18,637 (1984) (codified at 47 CFR Parts 1, 63, 76, and 78), *modified*, 104 F.C.C.2d 386 (1986) (amending FCC rules to implement certain provisions of Cable Communications Policy Act of 1984).

¹⁶⁷ The Cable Act defines "cable system" as:

authorities. Thus, the new Act applies to all franchising authorities, whether federal, state, or local.¹⁶⁸ The Cable Act contains provisions similar to both Title II¹⁶⁹ and Title III¹⁷⁰ require-

[A] facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community [but] does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right of way; or (C) a facility of a common carrier which is subject . . . to the provisions of subchapter II [regarding common carriers] . . .

47 U.S.C. § 522(6).

¹⁶⁸ Municipalities authorize the operation of franchise cable systems, but state agencies may also grant permission. Local authorities have jurisdiction to award one or more franchises to operators in a given service area, authorize the construction of a cable system over the public right of ways and through easements and to impose franchise fees. *See* 47 U.S.C. §§ 541-542. While the legal form of the awards is not usually exclusive, in fact most cable systems are *de facto* monopolies within the area of their franchise. ROBINSON & GELLHORN, *supra* note 38, at 299. Some courts have upheld *de facto* exclusive franchises where there is a substantial government interest, e.g., where the market is adequate for only one operator at a time. *See* Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). *But see* Century Fed. Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986) (holding that city's intent to grant only one franchise violated First Amendment). Local jurisdictions do not regulate rates, however, except for basic services offered in areas without "effective competition." "Effective competition" means a franchise area that receives three or more unduplicated off-the-air broadcast signals. *In re* Amendment of Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 3 F.C.C.R. 2617 (1988). The Cable Act limited local regulation and exactions relating to franchise terms, renewals, and fees as well as rate regulation, the number of channels, and mandatory access channels. ROBINSON & GELLHORN, *supra* note 38, at 289.

¹⁶⁹ *Compare* 47 U.S.C. § 543 *with* 47 U.S.C. §§ 201-05 (comparing rate regulations in Cable Act with common carrier service and charges regulations in Title II).

¹⁷⁰ *Compare* 47 U.S.C. § 533 *with* 47 U.S.C. § 310 (comparing ownership restrictions in Cable Act with license ownership restrictions in Title III); *compare* 47 U.S.C. § 554 *with* 47 U.S.C. § 398(b) (comparing equal employment opportunity regulations in Cable Act with equal opportunity employment regulations in Title III).

ments. Cable systems are not regulated as common carriers,¹⁷¹ although operators may not discriminate by denying access to cable service on the basis of income class,¹⁷² and may be required to file informational tariffs for interstate non-cable communications services.¹⁷³ Cable operators must also comply with EEO requirements.¹⁷⁴ Cable systems have been protected from competition through cross-ownership restrictions¹⁷⁵ imposed on television stations,¹⁷⁶ and telephone companies.¹⁷⁷ However, to protect the development of newer technologies, cable has also been restricted from acquiring an interest directly or indirectly in Instructional Television Fixed Service (ITFS)¹⁷⁸ and MDS systems.¹⁷⁹

B. *New and Evolving Video Technologies*

During the early 1980s, new hybrid technologies in video trans-

¹⁷¹ See 47 U.S.C. § 153(h) (defining common carrier; reproduced in part at *supra* note 4); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1978).

¹⁷² *FCC Bulletin*, *supra* note 152, at 6.

¹⁷³ *Id.*

¹⁷⁴ 47 U.S.C. § 554.

¹⁷⁵ 47 U.S.C. § 533. FCC rules prohibiting networks from having any cable interests and telephone companies from owning cable systems have been upheld by the courts. *Iacopi v. FCC*, 451 F.2d 1142 (9th Cir. 1971); *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971); *1975 Ownership Rules*, *supra* note 40, at 1049. FCC is in the process of lifting cross-ownership to permit competition in the cable industry. See *Telephone Company-Cable Television Cross Ownership Rules*, 3 F.C.C.R. 5849 (1988); *In re Telephone Company-Cable Television Cross Ownership Rules*, 2 F.C.C.R. 5092 (1987).

¹⁷⁶ 47 U.S.C. § 533(a). Networks were prohibited from owning cable systems anywhere in the country. The network restriction was relaxed in 1992. Under the new rules, networks will be able to acquire cable systems serving up to 10% of homes passed nationwide and up to 50% of homes passed in a market. Joe Flint, *FCC Lets TV Networks Into Cable Ownership*, *BROADCASTING*, June 22, 1992, at 4.

¹⁷⁷ 47 U.S.C. § 533(b)(1)-(b)(2).

¹⁷⁸ ITFS is a service technically similar to MDS but used for the distribution of educational and institutional video programming. *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1350 n.2 (D.C. Cir. 1988).

¹⁷⁹ A cable company also cannot directly or indirectly own, have an interest in, control of, or lease MDS, MMDS or ITFS capacity in geographic areas which overlap MDS or MMDS protected service areas. They can be the lessor of programming, however. *In re Amendment of Rules Governing Frequencies in the 2.1 and 2.5 GHz Bands*, 6 F.C.C.R. 6764, 6874 (1991) [hereafter *In re 2.1 and 2.5 GHz Bands I*].

mission emerged such as MDS,¹⁸⁰ SMATV,¹⁸¹ and DBS.¹⁸² New cable technology and the break-up of AT&T helped foster these new hybrid technologies. Each can deliver video, data, and information services through various means to subscribers for a fee. The primary market for these technologies to date, however, has been video and data services.

Most of these hybrid technologies have been authorized and regulated on an ad hoc basis pursuant to the Regulatory Flexibility Act of 1980 (Regulatory Act).¹⁸³ The Regulatory Act was intended to equalize the administrative burden of small businesses and larger firms by tailoring regulations to account for disparities in size and financial resources, while fulfilling the societal and economic goals of the underlying statute.¹⁸⁴ Pursuant to

¹⁸⁰ MDS service includes a special antenna placed on the subscriber's roof to receive the signal, and a down converter to convert the signal to a lower frequency to be picked up by a standard VHF television set. See CONSUMER ASSISTANCE AND SMALL BUSINESS DIV., FCC, FACT SHEET ON MULTIPOINT DISTRIBUTION SERVICE 1 (Feb. 1989) [hereafter *Fact Sheet on MDS*].

¹⁸¹ SMATV is a hybrid satellite and cable technology, similar to MDS. SMATV competes with cable by transmitting television signals from satellites directly to satellite receiving antenna atop large multi-unit dwellings and hotels. The signal is converted to a usable frequency and distributed by coaxial cable to subscribing tenants. It is different from a traditional cable system in that it does not use the public right of ways. *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 806 (D.C. Cir. 1984).

¹⁸² DBS is a radio-communication service which involves the use of high powered geostationary satellites to transmit multichannel programming over wide geographical areas directly to homes, multifamily dwellings, and cable systems. See Hammond, *supra* note 72, at 741-43. Signals are transmitted from earth stations to high powered satellites that receive, amplify, and retransmit the signal to inexpensive receiving dishes. *In re Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 F.C.C.2d 676, 677 & n.1 (1982), *recon. denied*, 94 F.C.C.2d 741 (1983), *aff'd sub nom. National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984).

¹⁸³ 5 U.S.C. § 604 (1988). The Act was designed to "equalize the relative impact of federal regulations or create more access to the benefits of federal programs." Legislative History of the Regulatory Flexibility Act, 1980 U.S.C.C.A.N. 2788, 2793 [hereafter *Legislative History*]. This policy was to be achieved through innovative administrative procedures. *Id.* Much of the focus was on reporting and record keeping requirements such as adopting a long and short IRS form and SEC stock offering forms for smaller companies. *Id.* at 2793-94.

¹⁸⁴ *Legislative History*, *supra* note 183, at 2795-96.

Regulatory Act provisions, the FCC is required to make findings regarding the impact of new technology and services on the public and existing industries.¹⁸⁵ The FCC may impose minimal regulatory restrictions.¹⁸⁶ The FCC also retains the right to impose further restrictions, or defer regulation, until it gathers market information about the industry.¹⁸⁷

The FCC has retained exclusive jurisdiction in authorizing new technologies in order to promote their development. Accordingly, unlike cable regulation, the FCC has preempted state and local regulation of these nonbroadcast video services on the grounds that they do not use public right of ways or that they involve interstate commerce.¹⁸⁸ The FCC has recently excluded most of these technologies from the definition of cable systems and broadcasting, although they are still media of mass communications.¹⁸⁹ Instead, the FCC has reclassified them as "point-to-multipoint nonbroadcast service."

1. Multipoint Distribution Service (MDS)

MDS was developed in the early 1970s using microwave signals to deliver video, data, text, and other information to a pre-selected audience including the general public, single and multiple dwelling units, and businesses. Originally, MDS was primarily

¹⁸⁵ FCC is required to make findings regarding (1) reasons for action; (2) objective; (3) legal basis; (4) description, potential impact, and number of small entities affected; (5) recording, record keeping, and other compliance requirements; (6) federal rules which overlap, duplicate, or conflict with this rule; and (7) any significant alternative minimizing impact on small entities and consistent with stated objectives. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1199 (D.C. Cir. 1984) (refusing to extend Title III broadcast restrictions of Communications Act to all DBS systems in service of flexible regulatory approach); *In re Direct Broadcast Satellites*, 90 F.C.C.2d 676, 706-07 (1982) [hereafter *In re DBS*] (requiring use of flexible regulatory approach during interim experimental period).

¹⁸⁸ See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (concluding that FCC preempts conflicting state regulations if regulation is reasonable accommodation of opposing policies); *New York State Comm'n on Cable Television*, 749 F.2d 804, 810 (D.C. Cir. 1984) (discussing *Ortho-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon.*, 82 F.C.C.2d 178 (1980), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d. Cir. 1982)).

¹⁸⁹ *In re Definition of a Cable Television System*, 5 F.C.C.R. 7638, 7642 (1990).

used to transmit business data. Since then, MDS has also been used to transmit entertainment programming.¹⁹⁰ MDS is often the alternative to basic cable in rural areas.

Even though MDS may provide both common carrier and broadcast services, the FCC has classified MDS as a common carrier, regulated under Title II.¹⁹¹ The FCC ostensibly chose to regulate MDS as a common carrier rather than as a broadcaster because MDS uses frequencies previously assigned to carriers.¹⁹² As a common carrier, MDS licensees are required to file tariffs with the FCC, and to offer services for hire on a first come, first serve nondiscriminatory basis.¹⁹³ Licensees often lease much of their transmission time to programmers such as subscription services for pay programming. Common carrier MDS operators may not own or have an interest in the programming carried on their signals, and cannot control program content or serve primarily their other business interests.¹⁹⁴

MDS may also operate as a non-common carrier service which programs its own facility or leases transmission time to an affiliated programmer without having to file a tariff.¹⁹⁵ This type of service is commonly referred to as wireless cable or Multichannel Multipoint Distribution Service (MMDS). MMDS is a microwave pay television system.¹⁹⁶ It differs technologically from MDS in that it uses omnidirectional facilities to reach as many subscribers as possible. MDS, on the other hand, uses point-to-point facilities to reach specific receivers. The only difference in service offerings between MMDS and MDS is that MMDS has more channel capacity than MDS. MMDS is also licensed through a lottery system with minority and diversity preferences.¹⁹⁷

¹⁹⁰ The only critical difference between MDS and cable is the use of public right of ways. *New York State Comm'n on Cable Television*, 749 F.2d at 810.

¹⁹¹ 47 C.F.R. § 21.900 (1991).

¹⁹² BOTEIN, *supra* note 155, at 92 (citing Report and Order, 29 Rad. Reg. 2d (P & F) 38 (1974)).

¹⁹³ *Fact Sheet on MDS*, *supra* note 180, at 2; *see also* Allen S. Hammond, IV, *Now You See It, Now You Don't: Minority Ownership in an "Unregulated" Video Marketplace*, 32 CATH. U.L. REV. 633, 633 n.1 (1983) (defining and describing MDS licensees' requirements).

¹⁹⁴ *Fact Sheet on MDS*, *supra* note 180, at 2.

¹⁹⁵ *Id.*

¹⁹⁶ *Market Analysis - Vol. 2*, *supra* note 2, at 72.

¹⁹⁷ *In re 2.1 and 2.5 GHz Bands I*, *supra* note 179, at 6776-78.

2. Satellite Master Antenna Television (SMATV)

SMATV was developed in 1979 to allow multiple unit buildings to receive full-time, nonbroadcast video networks that conventional cable did not serve.¹⁹⁸ SMATV is what hotel guests and residents of many large apartment complexes view. The FCC has asserted jurisdiction over SMATV as part of its ancillary authority to ensure the federal interest in the "unfettered development of interstate transmission of satellite signals."¹⁹⁹

SMATV is neither classified as a cable system nor as a broadcaster.²⁰⁰ Instead, SMATV is analogous to ITFS and Operational Fixed Service (OFS).²⁰¹ As such, SMATV is not subject to extensive Title III regulation,²⁰² although it is subject to the Cable Act's EEO provisions.²⁰³

¹⁹⁸ BRENNER & PRICE, *supra* note 164, at 13-2.

¹⁹⁹ *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1230 (1983).

²⁰⁰ SMATV is not a cable system because it does not use public right of ways and serves commonly owned multiple unit dwellings. SMATV is not a broadcaster because the programming is not intended to be received by the general public. BRENNER & PRICE, *supra* note 164, at 13-3 to 13-4; *see* 47 U.S.C. § 522(6) (defining cable system; reproduced at *supra* note 167); *In re Definition of a Cable Television System*, 5 F.C.C.R. 7638 (1990) (clarifying definition of cable system). SMATV is not subject to FCC rules regarding franchising, franchise fee limits, technical standards, mandatory signal carriage, sports blackouts, or network nonduplication. BRENNER & PRICE, *supra* note 164, at 13-6.

²⁰¹ *See* 47 C.F.R. pt. 94 (1991) (establishing regulations for operational-fixed radio licensing and operations); *In re Amendment of Point-to-Multipoint Use Bands by Private Operational Fixed Microwave Licensees and General Procedures for an Application in the Private Operational Fixed Microwave Service*, 3 F.C.C.R. 3532 (1988).

²⁰² Hammond, *supra* note 193, at 635 n.6.

²⁰³ 47 U.S.C. § 554(h)(1). However, SMATV is exempt from EEO requirements if (1) it serves less than 50 subscribers; (2) the SMATV operator is also the landlord, in which case it only applies to those employees primarily engaged in telecommunications; (3) the operator has less than five employees, in which case it does not have to file annual statistical reports on compliance with EEO rules. *Id.*; *see* BRENNER & PRICE, *supra* note 164, at 13-10. FCC has preempted state and local jurisdiction reasoning that open entry policies in the satellite field would create more diversity and competition in the industry. *See, e.g., Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1229-34 (1983); *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 808 (D.C. Cir. 1984). However, SMATV is subject to local jurisdiction over zoning, public health, and safety issues. BRENNER & PRICE, *supra* note 164, at 13-14.

3. Direct Broadcast Satellite (DBS)

DBS provides regional and national²⁰⁴ programming services to remote areas that no other media, such as cable or broadcasting, serves.²⁰⁵ The FCC authorized DBS in 1982²⁰⁶ primarily to provide video services. The FCC, however, permits DBS to provide voice and data services as long as these services are subordinate to its primary use.²⁰⁷ The potential for DBS to directly compete with cable and other media services has yet to be realized.²⁰⁸ DBS is essentially deregulated and not subject to many restrictions imposed on broadcasters, although it is subject to licensing procedures.²⁰⁹ Also, aside from prohibiting foreign ownership, there are no cross-ownership restrictions for DBS.²¹⁰

²⁰⁴ FCC abandoned its previous policies of localism to embrace DBS deployment because it would provide enhanced services to the public. *National Ass'n of Broadcasting v. FCC*, 740 F.2d 1190, 1197 (D.C. Cir. 1984). The advantages of DBS were high quality video and audio service to remote areas, narrowcasting, increased channel capacity, and television transmission of non-entertainment programming, such as medical and information data. *Id.* at 1195.

²⁰⁵ *Id.* at 1197.

²⁰⁶ DBS began beaming television and cable programming to households in 1975; however, FCC did not officially authorize and license the service until 1982. *CARTER ET AL.*, *supra* note 38, at 440.

²⁰⁷ *In re Potential Uses of Certain Orbital Allocations by Operators in Direct Broadcast Satellite Service*, 4 F.C.C.R. 6306, 6310 (1989); *see also In re DBS Systems*, 92 F.C.C.2d 64, 68 (1982) [hereafter *In re DBS Systems*] (discussing Commission's position that non-conforming uses must be clearly secondary).

²⁰⁸ Success for DBS will largely be predicated on (1) the cost of the receiving antenna; (2) the number of space orbital slots assigned to the United States from the International Telecommunications Union's Region II (Western Hemisphere) Administrative Radio Conference (RARUC); and (3) the number and channel capacity of geostationary satellites which will be launched into space and the allocated uses of those channels. *See generally BRENNER & PRICE*, *supra* note 164, at 15-26 to 15-28.

²⁰⁹ *Id.* at 15-5; *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1199 (D.C. Cir. 1984).

²¹⁰ *In re DBS*, *supra* note 187, at 713; *see* 47 C.F.R. § 100.11 (1991) (establishing eligibility requirements for authorization to operate DBS service). "The traditional reasons for ownership regulation—to promote competition and First Amendment diversity of sources of programming—were not sufficient to trigger DBS ownership limits." *BRENNER & PRICE*, *supra* note 164, at 15-15. One court found DBS and conventional TV distinct in terms of technology, marketability, and capitalization requirements and ruled that cross-ownership for such a new technology would be unduly restrictive. *National Ass'n of Broadcasters*, 740 F.2d at 1206.

DBS has been classified according to its proposed services and the manner it proposes to offer those services to the public.²¹¹ DBS operators may be classified as a common carrier, broadcaster, or hybrid.²¹² The classifications are important because they determine which regulations apply. Where the applicant seeks to offer common carrier services, it is classified as a common carrier and is required to offer its satellite transmission services indiscriminately to the public and to file tariffs with the FCC²¹³ pursuant to Title II of the Act.²¹⁴ DBS operators functioning as broadcasters are subject to EEO requirements.²¹⁵ An applicant can also be classified as a hybrid where it provides video services on some channels and voice and data on others.²¹⁶ To date, however, no applicant has been approved for a hybrid service.²¹⁷

III. CRITIQUE OF FCC'S FLEXIBLE REGULATORY APPROACH

The previous Part discussed diversity policies in the media of mass communications, including the FCC's recent adoption of a flexible regulatory approach for classifying new technologies. This Part will now establish the importance of regulation to further these diversity policies and then demonstrate that the FCC's current approach fails to adequately address the impact of these policies on the public.

A. Diversity Is an Important Government Interest

Diversity policies are important because they safeguard the public interest. Safeguarding the public interest has been the central focus of regulating mass communications since the inception of the Communications Act. Its importance continues

²¹¹ *In re DBS*, *supra* note 187, at 708-11.

²¹² *See id.* (discussing regulatory classification for DBS operators).

²¹³ Non-dominant carriers are not subject to tariff requirements. *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 95 F.C.C.2d 554 (1983).

²¹⁴ 47 U.S.C. §§ 201-26 (Supp. II 1990).

²¹⁵ *In re DBS*, *supra* note 187, at 715. The relevant job market for recruiting purposes is the entire nation, unless a geographic location becomes narrow. BRENNER & PRICE, *supra* note 164, at 15-11 (citing Continental Satellite Corp., 66 Rad. Reg. 2d (P & F) 1185, 1194 (1984)).

²¹⁶ BRENNER & PRICE, *supra* note 164, at 15-12.

²¹⁷ *Id.*

today.²¹⁸ There appears to be general consensus among regulators that diversity is an important telecommunications goal. The dispute among regulators is whether regulation is necessary to achieve diversity. Some argue that diversity can be attained through the marketplace.²¹⁹ This Article disputes that argument and maintains that, not only should there be some regulation to ensure diversity, but such regulation should be uniformly applied to all mass communications. Diversity regulation is consistent with the statutory mandate of the Communications Act and neither thwarts nor conflicts with current FCC deregulatory policies.

The FCC, however, has recently made fundamental changes in regulating mass communications on an ad hoc basis without adequately addressing their impact on the public.²²⁰ This has resulted in three foreboding trends. First, diversity issues are overlooked or dismissed without due consideration. For example, by relaxing ownership restrictions, the FCC has allowed growing concentration and consolidation within the industry. Second, inconsistent decisions are jeopardizing the legal status of services. Third, technologies typically are reclassified by default rather than by thoughtful deliberation.²²¹ One example is the

²¹⁸ See, e.g., *In re Revision of Radio Rules and Policies*, 6 F.C.C.R. 3275, 3285 (1991) [hereinafter *Radio Rules*] (remarks of Commissioner Andrew C. Barrett).

²¹⁹ *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

²²⁰ FCC has failed to give a reasoned explanation and has deferred without explanation from taking any action at all. See *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1355 (D.C. Cir. 1988) (noting FCC's claim that issue of service classification for ITFS is still unanswered); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1200 (D.C. Cir. 1984) (stating FCC's conclusion that flexible regulatory approach allowed customer-programmers to be unregulated); *In re STV*, *supra* note 103, at 1005 (discussing reclassification of broadcasting).

²²¹ FCC Commissioner Rivera summarized the problem:

In light of the recent decision in *National Association of Broadcasters v. FCC*, one of the questions that also must be resolved is how best to put this service into compliance with the regulatory classification guidelines outlined by the Court . . . My colleagues' unfortunate head-in-the-sand approach (i.e., refusing to admit the existence of a problem by failing even to solicit comment on this question), not only puts the status of ITFS operations at legal risk, but deprives this agency of useful public input . . .

Telecommunications Research & Action Ctr., 836 F.2d at 1355 n.13.

In a footnote to the Commissioner's remarks, he went on to state: "By

convergence of regulated and unregulated technology to provide video service.

These trends suggest that uniform diversity requirements for mass communications are both timely and necessary for the future stability of the industry. The threat of undue editorial influence, arising when only a few entities control the media, is still very real and requires adherence to some diversity requirements. These requirements can be enforced in a deregulated marketplace through minimal, uniform regulations.

1. The Mandate for Minimum Title III Requirements

Congress clearly intended that some regulation of mass communications be imposed under the Communications Act to safeguard diversity.²²² The importance of diversity has been established through longstanding congressional and FCC policies which have been affirmed by the Supreme Court.²²³ Under this mandate, the FCC must ensure that "one voice not dominate broadcast stations."²²⁴

Critics of diversity policies argue that the increase in video outlets provides diverse viewpoints and that the electromagnetic spectrum is no longer scarce.²²⁵ Consequently, they argue that diversity has already been achieved. They also believe that the dynamics of the marketplace will effectively respond to any remaining diversity concerns. Therefore, they conclude, the need for diversity regulation no longer exists. These arguments fail for four reasons.

default, ITFS is presently considered a private, nonbroadcast service . . . Now that we permit ITFS licensees to lease excess capacity to MMDS programmers, that classification plainly must be revised." *Id.*

²²² See *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 674 (D.C. Cir. 1988) (Wald, C.J., dissenting) (stating that Congress enacted 1927 Radio Act to protect public from potential abuse by powerful broadcasters); *National Ass'n of Broadcasters*, 740 F.2d at 1199 (stating that crucial question when Congress enacted 1927 Radio Act was how to balance public and private control). The Commission has acknowledged, for example, that MMDS is a media of mass communications and therefore eligible for the minority and diversity preferences, even though it is not a broadcast service. *In re 2.1 and 2.5 GHz Bands I*, *supra* note 179, at 6777.

²²³ See, e.g., *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990) (holding that minority ownership policies are substantially related to legitimate government interest in broadcast diversity).

²²⁴ *National Ass'n of Broadcasters*, 740 F.2d at 1202.

²²⁵ *Holmes*, *supra* note 30, at 20; *DE SOLA POOLE*, *supra* note 30, at 40-46.

First, assuming *arguendo*, that an increase in the number of video outlets increases the likelihood of diverse and antagonistic viewpoints, the Communications Act still mandates that there be some public protection to prevent the undue concentration of power.²²⁶ Congress intended that some regulation would be necessary to protect the public.²²⁷ Failure to use regulation to protect the public interest is thus a violation of the mandate.

Second, the need for regulation has become particularly critical as licensees consolidate their operations, become more concentrated and vertically integrated, and diversify into other technological areas to provide program and information services. For example, Multiple System Operators (MSO) in cable and group owners in broadcasting are consolidating their operations by absorbing single station owners. Contractual agreements such as local marketing agreements²²⁸ will likely become increasingly popular for video services as a vehicle to allow stations to program and control the sales activities of other stations.²²⁹ The

²²⁶ See *National Ass'n for Better Broadcasting*, 849 F.2d at 673 n.9 (noting that when Congress discussed classification it recognized potential public danger of broadcasters' control over a mass audience).

²²⁷ See *id.* at 674; *National Ass'n of Broadcasters*, 740 F.2d at 1202 (citing 67 CONG. REC. 5557-58 (statement of Rep. Johnson)).

²²⁸ Local Marketing Agreements (LMAs) are agreements between stations within or without the same service area under which one station programs and sells air time of the brokered station. These arrangements are popular for financially distressed stations because they help reduce overhead costs. LMAs are similar to time brokerage agreements which were previously restricted under the Commission's cross-interest policy. See *In re Reexamination of the Commission's Cross-Interest Policy*, 4 F.C.C.R. 2208 (1989). The cross-interest policy was designed to prevent a person or entity from having a "meaningful relationship" with two competing media properties in the same service area. *Id.* This policy, first developed in the 1940s, has evolved over the years on a case by case basis pursuant to §§ 4(i) and 303 of the Communications Act. In 1989, FCC narrowed the cross-interest policy to time brokerage agreements and deferred enforcement to alternative remedies such as private civil remedies under contract law or federal and state antitrust remedies for anti-competitive activity. *Id.* at 2214. Except as applied to joint ventures, employee relationships, and nonattributable equity interests, the policy has been eliminated. *Id.*

²²⁹ In 1992, FCC formally endorsed LMAs as within the public interest and adopted rules governing such arrangements. See Memorandum from Peter D. O'Connell (Reed Smith Shaw & McClay) to Broadcast Stations (Apr. 11, 1992) (citing *In re Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755 (1992)) (on file with author). Under the rules, LMAs will not violate FCC's cross-interest policy so long as the licensee maintains control over

benefits from combining station operations will change the economics of the industry, making it more difficult for individuals and small businesses to compete. New entrants will simply not be able to compete for advertising dollars against operators who have acquired a greater share of a given market or expanded their market coverage to reach several markets.

Local programming is also at risk as stations increasingly simulcast or use satellite-delivered programming instead of producing their own. Operators will no longer have the same incentive to be as responsive to local issues as they may have been in the past, when regulation imposed such a requirement.²³⁰ Basic diversity requirements balance these trends by preserving entrepreneurship, which fosters continued technological development and innovation. At Commissioner Andrew C. Barrett's initiation, the FCC has already started responding to aspects of this issue through efforts targeted at small businesses.²³¹

Telephone companies, television networks, and cable systems have requested permission from the FCC to diversify into other regulated areas to offer voice, data, and video services.²³² The FCC recently voted to allow television networks to own cable systems.²³³ It is inevitable that the telephone companies will be

programming, keeps at least one full-time and one part-time employee, and keeps separate accounting and other books. See Memorandum from Peter D. O'Connell (Reed Smith Shaw & McClay) to Broadcast Stations (Apr. 11, 1992) (on file with author). Moreover, one station may not program more than 15% of the program hours per week on the other station without being subject to attribution under the ownership rules. *Id.* Such agreements must be filed with FCC. See *In re* Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 F.C.C.2d 997, 1032 (1984). The extent to which such agreements may adversely impact upon license renewal has yet to be determined. The licensees of both stations remain responsible for what is aired on their respective stations.

²³⁰ See, e.g., *In re* Harriscope of Chicago, Inc., 6 F.C.C.R. 4948, 4949 (1991) (asserting authority to require STV licensees to provide public service programming).

²³¹ In October 1992, FCC established the Office of Small Business Activities. See *Radio Rules*, *supra* note 218, at 3286.

²³² See Mary Lou Carnevale, *Information, Please*, WALL ST. J., May 18, 1992, at R19 (reporting on efforts of telephone companies to expand into new services).

²³³ Joe Flint, *FCC Lets TV Networks Into Cable Ownership*, BROADCASTING, June 22, 1992, at 4.

allowed to offer video services.²³⁴ Computers also open up a wide range of new information and video services as they interface with regulated technology.²³⁵ Spurned by fiber and satellite technology, services such as wireless cable, DBS, and SMATV are presently trying to compete for traditional video service markets.²³⁶

Cable companies also want to compete with telephone companies in developing Personal Communications Networks (PCN)²³⁷ for two-way voice transmission.²³⁸ A PCN uses existing cable networks to link cellular telephones through small radio relay stations distributed throughout a city.²³⁹ The convergence of regulated and unregulated markets to allow a single operator to provide voice, data, and video services, combined with the potential cross-subsidization of these industries, will make it increasingly difficult to distinguish who is regulated and under what provisions. This will render the FCC impotent to enforce ad hoc regulations.

Third, history has clearly shown that the marketplace will not temper concentration of power. Consider the market's failure to adequately regulate both the telephone and cable industries. As a result of this failure, the FCC intervened and imposed cross-

²³⁴ John J. Keller, *Future Phone*, WALL ST. J., May 18, 1992, at R6.

²³⁵ *Id.*

²³⁶ See generally John Schwartz, *The Next Revolution*, NEWSWEEK, Apr. 6, 1992, at 42 (reporting on new wave of technology and services as the computer, consumer electronics, and telecommunications fields blend together).

²³⁷ PCN is a digital microcellular system. It operates at higher frequencies in the spectrum (1.7 to 2.3 GHz) and thus allows for lower power and cost telephones than are available through conventional cellular technology. *Market Analysis - Vol. 1, supra* note 2, at 34.

²³⁸ Cable companies are now considering upgrading their main lines of coaxial cable with fiber optics. The upgrade would double the capacity of cable networks and also enable them to carry signals much further. This increased capacity would provide new opportunities for wireless personal communications such as pocket telephones, paging systems, facsimile machines, and hand-held computers, which some laud as an eventual replacement for conventional telephones. Edward L. Andrews, *Cable TV Battling Phone Companies—Two Technologies Vie to Control Future of Communication*, N.Y. TIMES, Mar. 29, 1992, § 1, at 1.

²³⁹ Randall M. Sukow, *PCS - New Set of Initials in Cable's Future; Personal Communication Service Cable TV Technology*, BROADCASTING, Dec. 17, 1990, at 73.

ownership restrictions.²⁴⁰ The break-up of AT&T in 1982 resulted from repeated anti-competitive practices and provided the impetus for subsequent ownership restrictions.²⁴¹ Concern over monopolization and undue influence is also at the center of the current debate over whether telephone companies should be allowed to provide video program services.²⁴² Similarly, anti-competitive practices by cable systems against MDS, ITFS, and MMDS systems have resulted in cable systems being prohibited from having any control, interest in, or affiliation with MDS or MMDS systems.²⁴³ These examples provide the legal justification for continued protective diversity regulation and show why the marketplace cannot address these issues.

²⁴⁰ The cross-ownership restrictions and the practice of granting exclusive franchise licenses effectively left the cable industry without competition, much in the same way as the telephone industry. Left unregulated and without competition, the cable industry eventually employed some of the same anti-competitive practices that the telephone companies used. *See, e.g.,* *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976) (dismissing anti-trust claim against grantee of exclusive franchise); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) (dismissing anti-trust action against cable owners who induced city council to grant exclusive franchise); *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972) (dismissing anti-trust action against cable company that had established monopoly), *cert. denied*, 409 U.S. 1001 (1972). Public complaints over rising subscriber rates and poor service by cable operators, however, has led Congress to consider legislation reregulating the cable industry. Mary Lou Carnevale, *FCC Reinstates Price Controls for Cable TV*, WALL ST. J., June 14, 1991, at B1. Senate Bill 12, The Cable Television Consumer Protection Act of 1991, reregulates the cable industry in a variety of ways. It requires retransmission consent from broadcasters in order to carry their programs. The bill also requires cable operators to continue carrying local programming. Finally, the bill sets forth rules to prevent operators from refusing to sell originated programming to competitors. Randy M. Sukow, *Senate Lowers the Boom on Cable*, BROADCASTING, Feb. 3, 1992, at 4. The bill was passed into law on September 17, 1992. Anti-competitive practices by cable operators have also thwarted the success of new technologies such as MDS and SMATV. As a result, the Commission continues to impose cross-ownership restrictions upon cable for MDS services. *See In re 2.1 and 2.5 GHz Bands I*, *supra* note 179.

²⁴¹ *See supra* note 69 (discussing break-up of AT&T). α

²⁴² This debate has intensified since July 1992 when FCC ruled that regional telephone companies may transmit movies and other television services via telephone lines. *See* Carla Lazzareschi, *FCC Allows Phone Firms to Carry TV Programming*, L.A. TIMES, July 17, 1992, at D1.

²⁴³ *See supra* note 179 and accompanying text.

Finally, diversity requirements usually relate to the internal operations of a licensee, which the marketplace cannot monitor, control, or influence. While competition within the marketplace may define which services will be most efficient, some government intervention is still required to safeguard the consumer public. For example, the marketplace cannot ensure that licensees will provide accurate information regarding sponsorship. Nor can the marketplace ensure that licensees will not discriminate against individuals or acquire competing stations in the same market. Historically, FCC regulation has been necessary to address these issues. Because it lacks an independent enforcement mechanism, the FCC must rely on the public complaint process to enforce its rules and regulations. However, unless basic records are required to be maintained for public inspection, there is no way for the public to effectively monitor a licensee's internal operations.

2. Classification Criteria Should Include Program Content and Technology

Diversity requirements for mass communications technologies differ according to their classifications. Classifications for mass communications traditionally focused on whether the licensee had editorial control over program content.²⁴⁴ Media operators that controlled program content were classified as broadcasters and were regulated under Title III, regardless of whether they leased space to programmers or programmed themselves.²⁴⁵ The FCC's revised classification system focuses only on technology

²⁴⁴ See *In re STV*, *supra* note 103, at 1003-05.

²⁴⁵ *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1202 (D.C. Cir. 1984). The court stated that ownership was not the touchstone of broadcasting and that exempting customer-programmers would allow DBS operators to circumvent Title III altogether simply through a cross-leasing agreement. *Id.* Instead, what mattered was that DBS operators—whether advertiser or subscriber funded—intended their programming to be received by the general public. *Id.* at 1201. The FCC had previously reached this conclusion itself. *In re Amendment STV*, *supra* note 130, at 9 (stating that broadcaster classification is based on intent to disseminate service to the public, not based on whether revenue comes from advertisers or subscribers). Therefore, the court held that where the broadcaster's intent is to provide program service without discrimination to as many members of the public as will buy it, such service remains broadcasting even though special receiving equipment is required. *National Ass'n of Broadcasters*, 740 F.2d at 1201.

without regard to program issues. The problem with a technology-based system is that it lacks uniformity and consistency. The technology keeps changing while the range of services and applications, such as programming, voice, or data, remain constant.

For example, broadcasting, cable, STV, MDS, MMDS, DBS, and SMATV are all media of mass communications because they can control program content. While they all market their programming services to the general public, they are not all classified to be subject to basic diversity requirements.²⁴⁶ Cable systems, for example, are the technological predecessors to video subscription services such as MDS, MMDS, and SMATV. All of these services provide the same type of programming, but because their technologies differ, they are subject to different regulations. Cable systems are regulated by the Cable Act, requiring them to comply with ownership restrictions and EEO requirements.²⁴⁷ Meanwhile, although MDS, MMDS and SMATV provide the same type of programming, they are not classified as cable systems and, therefore, are not regulated under the Cable Act.²⁴⁸

MDS is classified as a common carrier and regulated under Title II, exempt from ownership restrictions but subject to EEO requirements if it programs the channel.²⁴⁹ STV and DBS have been reclassified from broadcasting to "point-to-multipoint non-broadcast service." Thus, they are now exempt from ownership and EEO requirements.²⁵⁰ On the other hand, SMATV is classified as neither broadcasting nor as a cable system. Nevertheless, SMATV still must comply with EEO requirements.²⁵¹

Because the FCC has not provided any reasonable explanation for these distinctions and looks to the applicant to propose service, the licensee will seek to be classified under the least restric-

²⁴⁶ 47 U.S.C. §§ 309(i)(3)(C). MDS, a common carrier point-to-multipoint service, OFS, a private-to-multipoint service, and STV are all indistinguishable multiple addressed home entertainment services. *In re STV*, *supra* note 103, at 1008 n.2. Moreover, teletext is considered broadcasting even though it uses a decoder. *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 513-16 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

²⁴⁷ See 47 U.S.C. §§ 533, 554 (setting forth ownership restrictions and EEO requirements); *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 677 n.23 (D.C. Cir. 1988).

²⁴⁸ *In re Definition of a Cable Television System*, 5 F.C.C.R. 7638 (1990).

²⁴⁹ 47 C.F.R. §§ 21.900-14 (1991).

²⁵⁰ See *In re STV*, *supra* note 103, at 1001.

²⁵¹ See 47 U.S.C. § 554(h)(1).

tive classification. For example, by proposing to lease space to programmers, some DBS applicants have sought classification as common carriers while avoiding traditional Title II regulation.²⁵² Other DBS applicants have proposed that they be exempt from either classification, even though they were clearly providing programming services.²⁵³

These inconsistencies are the result of the FCC's ad hoc approach to classifying mass communications technologies. The effect is that diversity requirements are arbitrarily applied to, and oftentimes exempted from, mass communications. The FCC has yet to engage in thoughtful deliberation and, therefore, has not been able to offer a reasonable explanation for these inconsistencies. Nor has the FCC been able to reconcile these differences with the mandate of the Communications Act. The inconsistencies also hamper effective enforcement of FCC rules. As a result, the FCC often finds itself at odds with the D.C. Circuit, having to continually modify or reconsider its rules. This is not administratively efficient.²⁵⁴

A more effective approach, consistent with congressional intent, would combine the traditional program content-intent based criteria with engineering determinations to classify technology. This would preserve the integrity of previous policies and classifications while adjusting the classification criteria to reflect the dynamics of new telecommunication technologies. Under a proposed "Uniform Regulatory Framework" all diversity requirements could be evaluated, prioritized, and then applied as mandatory or discretionary rules to all mass communications, as currently defined under the Communications Act.²⁵⁵ This would enable the FCC to consider these diversity requirements comprehensively, in light of statutory intent, industry developments, and public impact. More specific recommendations are included in Part IV.

²⁵² *In re Applications to Establish Interim Direct Broadcast Satellite Systems*, 92 F.C.C.2d 64, 67 (1982). FCC opted only for traditional classifications but reserved the right to revisit individual cases under its reconsideration rules at some later point. *Id.* at 68.

²⁵³ *Id.*

²⁵⁴ See *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 670 (D.C. Cir. 1988) (noting that FCC may want to reconsider its position pursuant to its mandate to protect public interest should its decision result in mass exodus from free to pay TV).

²⁵⁵ 47 U.S.C. § 309(i)(3)(C)(1).

*B. The Flexible Regulatory Approach Ignores the Impact
on Diversity Policies*

Under its ad hoc approach, the FCC has effectively authorized new technology on an experimental basis,²⁵⁶ promulgated transitional rules,²⁵⁷ and simplified its rules.²⁵⁸ This is because the ad hoc approach allows the FCC to defer regulation in order to make informed decisions regarding industry practices and then to tailor regulation accordingly.²⁵⁹ This approach, however, has also enabled the FCC to avoid its statutory obligations²⁶⁰ by fundamentally restructuring mass communications without a reasonable explanation or consideration of the long range implications.²⁶¹

1. FCC Has Violated Statutory Mandate

The Regulatory Act is clear that under no circumstances are statutorily mandated goals and purposes to be compromised by using a flexible regulatory approach.²⁶² As the D.C. Circuit stated

²⁵⁶ See *In re DBS*, *supra* note 187, at 707 (discussing why minimum regulation is necessary for direct broadcast satellite technology during its experimental phase).

²⁵⁷ See *1970 Ownership Rules*, *supra* note 40.

²⁵⁸ See *In re 2.1 and 2.5 GHz Bands I*, *supra* note 179, at 6764 (adopting regulatory approach to simplify rules and facilitate wireless cable); *In re Amendment Regarding Point-to-Multipoint Use of the 2.5, 10.6 and 18 GHz Bands by Private Operational Fixed Microwave Licensees*, 5 F.C.C.R. 1220 (1990) (streamlining rules for point-to-multipoint frequencies and declining to use band for subscriber video services); *In re Amendments of Commission's Rules to Establish Service and Technical Rules for Government and Nongovernment Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz*, 6 F.C.C.R. 4320 (1991) [hereafter *In re Fixed Service*] (adopting approach to prevent multiple filings for point-to-multipoint service).

²⁵⁹ See *In re DBS*, *supra* note 187, at 707 (discussing FCC's decision to defer regulation of direct satellite broadcasting).

²⁶⁰ See, e.g., *In re STV*, *supra* note 103. FCC acknowledged that it initiated this rulemaking to address the "considerable impact" that the *National Ass'n of Broadcasters* decision would have because that decision required FCC to apply the statutory obligations under Title III to services, i.e., customer-programmers, that previously were unregulated. *Id.* at 1001.

²⁶¹ *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1354-55 (D.C. Cir. 1988) ("When fundamentally changing the permissible use of a medium . . . the Commission has a duty to address significant issues that parties raise in the course of its rulemaking.").

²⁶² *Legislative History*, *supra* note 183, at 2797.

The Committee is emphatically opposed to any weakening of the legislatively mandated goals of federal regulation in the name of

in *National Ass'n of Broadcasters v. FCC*.²⁶³

We recognize the Commission's authority to approve services on an experimental basis in an effort to gather important market data to be used in the completion of a regulatory framework But that discretion is not boundless: *the Commission has no authority to experiment with its statutory obligations*.²⁶⁴

Hence, the FCC cannot engage in "strained statutory construction that 'produces absurd or impracticable' consequences,"²⁶⁵ such as the potential adverse restructuring of the industry.²⁶⁶

The statutory mandate of the Communications Act is to safeguard the public interest, particularly with regard to diversity requirements.²⁶⁷ To satisfy this obligation, the FCC must solicit public comment, consider the impact of its regulations on the public and the industry, and reasonably explain its decisions.²⁶⁸ The FCC's ad hoc approach to regulation, however, has violated its statutory obligation by repeatedly failing to adequately consider the impact of eliminating diversity policies for mass communications.

One example of this violation is the FCC's redefinition of broadcasting and cable systems. In *In re Subscription Video*, the FCC claimed that it redefined the criteria for broadcasting in order to avoid regulating customer-programmers under Title III.²⁶⁹ The FCC made this decision when initiating a rulemaking on subscription video services. Theoretically, video services comprise all subscription video services, including cable. But the

cost reduction. The bill clearly stipulates there is to be no loss of regulatory goals. The language states that agencies shall seek and consider alternative proposals to the proposed rule "consistent with the stated objectives of applicable statutes."

Id.

²⁶³ 740 F.2d 1190 (D.C. Cir. 1984).

²⁶⁴ *Id.* at 1200-01 (emphasis added) (citations omitted).

²⁶⁵ *Id.* at 1202. ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended . . . [F]idelity to the statutory terms themselves instead produces a coherent pattern of regulation.") (citation omitted).

²⁶⁶ See, e.g., *1970 Ownership Rules*, *supra* note 40.

²⁶⁷ See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (explaining that courts grant substantial judicial deference to FCC's judgment regarding how to best serve public interest and that diversity should not be FCC's only policy consideration).

²⁶⁸ See 5 U.S.C. §§ 553(c), 603, 604 (1988).

²⁶⁹ *In re STV*, *supra* note 103, at 1005.

FCC narrowed its focus to subscription television (STV) and DBS when discussing the impact of excluding EEO requirements. The FCC claimed that using a flexible approach to exempt STV from EEO requirements would have a de minimus impact on small business because there were only "one or two STV stations still in operation."²⁷⁰ In fact, the subscription video ruling is not limited to STV but applies to subscription DBS services, customer program services, and satellite cable program services.²⁷¹ The FCC never addressed the impact of exempting these other services from EEO requirements.

Following the redefinition of broadcasting criteria, the FCC reclassified cable systems²⁷² to exclude DBS, ITFS, MMDS, and OFS from regulation under the Cable Act.²⁷³ The FCC based this reclassification on the revised technology-based criteria, again without any consideration of the similarity in services being offered.²⁷⁴ In neither case did the FCC address the impact of redefining these classifications, nor did the FCC reconcile the traditional program service issues.

Another example of ignoring its statutory mandate is the FCC's adoption of a tie breaker lottery system for licensing ITFS without including the minority preferences.²⁷⁵ The FCC attempted to

²⁷⁰ *Id.* at 1005. In Appendix B, FCC also includes "twenty entities that propose to provide direct broadcast satellite service." *Id.* at 1007. The scope of the rule affects "all subscription television services and those direct broadcast satellite services that operate in the subscription mode." *Id.*

²⁷¹ *In re STV*, *supra* note 103, at 1001, 1006, 1009 n.26.

²⁷² For the definition of "cable system," see *supra* note 167.

²⁷³ In reaching its decision, FCC focuses on distinctions in equipment requirements without regard to program content issues. *In re Definition of a Cable Television System*, 5 F.C.C.R. 7638, 7641 (1990). Under its new criteria, resellers or wholesalers of cable programming who do not have subscribers are not cable systems. Although the Cable Act provides no definition of "subscribers," FCC defined the term as members of the general public who receive broadcast programming distributed by cable television systems and who do not further distribute it. *Id.* at 7642. Thus, the Commission does not include in its definition of "subscribers" the use of common carrier telephone lines or programming transmitted to hotels and multiple dwellings. *Id.* at 7642.

²⁷⁴ The Commission said "[a cable system] encompasses only video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths to provide service to subscribers and only those that use such technology outside individual buildings." *Id.* at 7638.

²⁷⁵ *Telecommunication Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1357 (D.C. Cir. 1988); *In re Instructional Television Fixed Service*, 3 F.C.C.R. 4565, 4565 (1988) [hereafter *In re ITFS*].

change its selection process for authorizing excess channel capacity of ITFS channels for commercial nonsubscription use. ITFS channels were under-utilized for educational and institutional use and the FCC was considering commercial use of those channels. Pursuant to its Title III authority, the FCC adopted a tie breaker lottery system for selecting ITFS licensees but omitted minority preferences for applicants who diversify ownership of mass communications.²⁷⁶ In so doing, the FCC contravened its statutory mandate without reasonable explanation of the impact.

The FCC justified its flexible approach, claiming that in the absence of significant public benefits, diversity policies and minority preferences were "neither required nor appropriate."²⁷⁷ The D.C. Circuit disagreed. In *Telecommunications Research & Action Center v. FCC*, the court of appeals held that the FCC lacked inherent authority to use the lottery system without employing statutory media diversity and minority ownership preferences.²⁷⁸ Upon reconsideration, instead of including the preferences, the FCC adopted a previously rejected²⁷⁹ quantity-based system that also omitted preference considerations.²⁸⁰ Under the quantity-based system, if two applicants were indistinguishable under a random selection process, the authorization for ITFS would be awarded to the applicant that proposed to serve the greatest number of students.²⁸¹ The FCC rejected requests from minority interest groups for a stay pending solicitation of further public comments.²⁸²

The FCC also failed to address whether the Title III broadcasting regulations applied to nonsubscription commercial use of ITFS. Instead of taking affirmative action, the FCC ruled that ITFS was nonbroadcasting for the indefinite future,²⁸³ and

²⁷⁶ *Telecommunications Research & Action Ctr.*, 836 F.2d at 1350.

²⁷⁷ *In re* Amendment of Instructional Television Fixed Services, 101 F.C.C.2d 49, 67 (1985).

²⁷⁸ *Telecommunications Research & Action Ctr.*, 836 F.2d at 1361; see 47 U.S.C. § 309(i) (stating that significant preferences should be granted to applicants which would increase diversification).

²⁷⁹ The Commission had previously rejected the quantity-based system suggesting that quality of service was more important. *In re ITFS*, *supra* note 275, at 4565.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1355 (D.C. Cir. 1988).

deferred classifying nonsubscription commercial use of this technology.²⁸⁴ Relying on its previous ruling in *In re Subscription Video*,²⁸⁵ the FCC first claimed that commercial use of ITFS was not broadcasting because it was typically provided on a subscription basis.²⁸⁶ Because this claim did not address using the channel for commercial nonsubscription services similar to free TV, the FCC, post hoc, stated that it had ruled to defer regulation until a proposal for such use was made.²⁸⁷ Having already authorized noncommercial use of ITFS, this meant that commercial video service could be provided within a nonbroadcast classification without FCC approval.²⁸⁸

In *Telecommunications Research & Action Center*, the D.C. Circuit chastised the FCC for its “head-in-the-sand” approach to classification. The court implied that the FCC violated the intent of the Communications Act by using ad hoc classification with post hoc explanation:

What the Commission is doing by its inaction is silently authorizing possible statutory violations but refusing to decide the issue until a private challenge arises. It is an *administratively awkward posture*, at best.²⁸⁹

On remand, the FCC continued to defer classification, requiring only prior FCC notification and approval.²⁹⁰

The FCC has repeatedly attempted to circumvent diversity regulation for subscription services while failing to address the long range impact of this approach. This creates a dangerous precedent for future regulation inasmuch as the trend for program providers is to offer programming on a subscription basis.²⁹¹ The

²⁸⁴ Failure to address how ITFS would be classified meant that “by default,” it continued to be classified as private nonbroadcast service despite FCC’s authorization to use the channel for noneducational services. *Telecommunications Research & Action Ctr.*, 836 F.2d at 1351. FCC had previously restricted uses of such frequencies but gradually relaxed these rules after the channel was underutilized to encourage the development of MDS and “wireless cable.” *Id.* at 1350.

²⁸⁵ 2 F.C.C.R. 1001 (1987).

²⁸⁶ *Telecommunications Research & Action Ctr.*, 836 F.2d at 1353-54.

²⁸⁷ *In re ITFS*, *supra* note 275, at 4564.

²⁸⁸ *Telecommunications Research & Action Ctr.*, 836 F.2d at 1354.

²⁸⁹ *Id.* at 1356 (emphasis added).

²⁹⁰ *In re ITFS*, *supra* note 275, at 4564.

²⁹¹ See *National Ass’n for Better Broadcasting v. FCC*, 849 F.2d 665, 679-80 (D.C. Cir. 1988) (noting that Commission has duty to regulate service-providers and to prevent abuse).

systematic elimination of diversity rules using a flexible regulatory approach violates both the purpose of the Regulatory Flexibility Act and the FCC's statutory mandate under the Communications Act.

2. Lack of Public Input

The FCC's ad hoc approach is also dangerous because it tends to permit decisionmaking without useful public input. In *In re Subscription Video*, for example, the FCC concluded that a change by a licensee from free television to subscription television would not constitute a major change, necessitating either public notice or a hearing.²⁹² The FCC reasoned that notifying the public did not serve the licensee's best interest. Consequently, requiring public notification of the change from free television to STV was "neither necessary nor appropriate."²⁹³

On appeal, the D.C. Circuit labelled the FCC's analysis "counterintuitive."²⁹⁴ The court concluded that changing from free television to STV constituted a major change. Under the applicable standard of review, however, the court could not overturn the decision solely on the basis that it was inappropriate.²⁹⁵ The dissent pointed out that the conversion by a broadcast licensee to a subscription service in the first year of its license would make it exempt from Title III for almost five years. If there was only one channel in the area, this could be the end of free television.²⁹⁶ Clearly, this would not be a minor change but one that would warrant public comment and a hearing.

The FCC has a statutory obligation to consider the public's response when revising regulations. Yet, the FCC seems to be shifting its statutory obligation to the public, requiring the public

²⁹² As a minor change, the licensee need only notify FCC in writing 30 days prior to discontinuance or commencement of STV operations pursuant to 47 C.F.R. § 73.642(b) (1991). *In re STV*, *supra* note 103, at 1006.

²⁹³ *Id.*

²⁹⁴ *National Ass'n for Better Broadcasting*, 849 F.2d at 670.

It is counterintuitive to hold that nothing major has changed when a television viewer who is accustomed to turning to channel 9, for example, and receiving his favorite program, finds one day that upon turning to that same channel he receives merely scrambled static, which he cannot decipher without the aid of an expensive decoder.

Id.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 681.

to challenge its actions after the fact through the complaint process.²⁹⁷ Even when substantive rule changes will affect the public, the FCC's approach denies the public the opportunity to challenge these changes in advance.²⁹⁸ Furthermore, the FCC's approach allows the FCC to elevate private interests over public interests without accountability. Consequently, a flexible regulatory approach should not be used for classifying technology.

C. Ad Hoc Approach Is Impractical Under Current Trends

1. Greater Potential for Abuse

The potential for abuse in a constricted market will also make individually tailored ad hoc regulations virtually impossible to monitor and enforce.²⁹⁹ For example, the FCC sought to distinguish customer-programmers from operators who program the channel. The National Association of Broadcasters challenged this before the court of appeals.³⁰⁰ In a dissenting opinion, one of the judges noted that a DBS operator could circumvent Title III regulation simply by entering into cross-leasing agreements.³⁰¹ Application mills in MMDS licensing have also thwarted FCC efforts to stimulate wireless cable services.³⁰² As a result, it is important that the FCC have a workable framework to enforce its rules.³⁰³

²⁹⁷ *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1356 (D.C. Cir. 1988) (stating that viewers have no duty to complain about station's failure to comply with broadcast regulations, but that FCC has duty to regulate broadcast services and decide how those services should be classified).

²⁹⁸ *See Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 995 (D.C. Cir. 1966) (holding that public interest in denied broadcast renewal application warrants hearing); *see also NBC v. FCC*, 362 F.2d 946 (D.C. Cir. 1966) (holding that FCC had properly heard and decided question of electrical interference outside of district court).

²⁹⁹ In the past, the Commission has prohibited such consolidation of interests for that very reason. *See In re ABC-ITT Merger Case*, 7 F.C.C.2d 245, 272 (1966) (concluding that FCC's diversity control factor over ABC will, as part of giant corporate conglomerate, noticeably change); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1202 (D.C. Cir. 1984) (explaining that all DBS operators, using cross-leasing arrangement, could be exempt from Title III regulation).

³⁰⁰ *National Ass'n of Broadcasters*, 740 F.2d at 1190.

³⁰¹ *Id.* at 1202.

³⁰² *See In re 2.1 and 2.5 GHz Bands I*, *supra* note 179, at 6776; Joe Flint, *Wireless Cable Lotteries Attacked by FTC*, BROADCASTING, Apr. 20, 1992, at 42.

³⁰³ CBS proposed three types of HDTV service on its system: (1) HDTV

Under the ad hoc system, the FCC bases classifications on an applicant's proposed services. The onus is on the applicant to notify the FCC of any subsequent changes in the actual services that the market may dictate. If, after the license is granted, the operator determines that the market has shifted, the licensee could easily switch back to a service that is regulated. The FCC does not monitor operators directly, but relies on the public or other operators to complain of violations. The potential for abuse under this scheme³⁰⁴ could inevitably result in a plethora of legal challenges based on inconsistent FCC rulings.

The FCC often fails to take action, relying instead on other agencies to pursue violations. The FCC has deferred to the Justice Department to pursue antitrust violations,³⁰⁵ even though the Department does not give much weight to diversity concerns in resolving antitrust issues.³⁰⁶ In addition, the Federal Trade Commission has had to intercede to enforce trade restrictions against deceptive practices in MMDS lotteries.³⁰⁷

2. Subsequent Modifications Are Unlikely

The FCC has broad discretion to use regulation to stimulate technology and to protect the public interest. The FCC, however, has repeatedly said it is unwilling to speculate or regulate based

satellite service to terrestrial television stations for retransmission to homes which would be advertiser supported; (2) entertainment and information programs to supplement program service which would be per-channel or per-program supported; and (3) satellite-to-theater movie distribution, professional, industrial, business and residential services which would be subscriber supported. *In re DBS Systems*, *supra* note 207, at 70.

³⁰⁴ *Fighting Fraud*, WALL ST. J., May 18, 1992, at R13. Responding to questions about what consumers do if they believe they are being ripped off, Ken McEldowney, head of Consumer Action, a San Francisco-based research and consumer-advocacy organization, said, "One of the real problems is that the regulatory framework has so many holes in it." *Id.*; Flint, *supra* note 302, at 42.

³⁰⁵ Antitrust laws prohibit corporate mergers that are substantially likely to lessen competition or that tend to create a monopoly. 15 U.S.C. § 18 (1988); *In re ABC-ITT Merger*, 7 F.C.C.2d 245, 251-52 (1966).

³⁰⁶ Prior to deregulation, FCC actively considered such policies because traditional antitrust criteria were primarily intended to preserve competition in advertising. *1975 Ownership Rules*, *supra* note 40, at 1079. In addition, the Justice Department has tended to place a greater emphasis on public policies underlying the need to preserve competition than on diversity aspects. *Id.*

³⁰⁷ Flint, *supra* note 302, at 42.

on issues that may never occur.³⁰⁸ The effect is that special interest groups, rather than public interests, are being protected.³⁰⁹ History has proven that the FCC is unable to effectively monitor and make adjustments in light of actual experience.³¹⁰ The huge capital investment required by licensees to compete in telecommunications today and the uncertainty of success makes it unlikely that revisiting ad hoc rules at a later time will result in substantive modifications. Divestiture or retroactive regulation is also unlikely.³¹¹

In 1975, for example, diversity concerns led the FCC to require all commonly owned media holdings in areas with an effective monopoly to divest within five years. This requirement would have ensured that one owner would not own more than one newspaper, or one television station, or an AM-FM combination.³¹² This was the first time the FCC restricted common ownership in areas of the media which it did not directly regulate, such as newspaper combinations. This was also the second time that the FCC forced the divestiture of existing broadcast combinations.³¹³ The media industry responded to the divestiture requirement with such an outcry that the FCC modified the rule. Critics argued that the divestiture of all combinations would cause disruption for the industry and hardship for individual owners. They claimed that this would harm the public interest and undermine the FCC's more general goal of providing the "best practicable service to the American public."³¹⁴

³⁰⁸ *In re DBS Systems*, *supra* note 207, at 84.

³⁰⁹ Hammond, *supra* note 72, at 740.

³¹⁰ See *Telelocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) (noting FCC's ongoing obligation to monitor and adjust regulatory programs).

³¹¹ See *In re Amendment of Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 F.C.C.R. 6792, 6799-800 [hereafter *In re Amendments to 2.1 and 2.5 GHz Bands II*] (resolving that cross-ownership restrictions did not require divestiture of existing cable/MMDS operators because of restrictions' potential hardship to both operators and customers).

³¹² *1975 Ownership Rules*, *supra* note 40, at 1046; see *1970 Ownership Rules*, *supra* note 40, at 306 (prohibiting granting of licenses to persons owning two or more broadcast station licenses in one market).

³¹³ See, e.g., *1975 Ownership Rules*, *supra* note 40, at 1047 (discussing common ownership of newspaper-broadcast combinations). A 1943 rule forced the divestiture of about 20 AM radio combinations. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 812 (1978).

³¹⁴ *1975 Ownership Rules*, *supra* note 40, at 1074, 1078.

The FCC balanced the disruption that divestiture could cause the industry against the value of diversity ownership to the public.³¹⁵ Upon reconsideration, the FCC modified its divestiture requirement to apply to only sixteen combinations found to be effective monopolies.³¹⁶ More recently, the FCC refused to require divestiture, citing economic hardship and undue disruption of existing ITFS/cable and MDS/cable operations.³¹⁷ Because the FCC has a tendency to temper its diversity policy by countervailing economic interests, substantive review of diversity requirements is both appropriate and timely.

IV. A MODEL UNIFORM REGULATORY FRAMEWORK

It is timely for the FCC to consider a more uniform and deliberate approach to regulating mass communications. The FCC has correctly decided that the marketplace should determine which applications will provide the public with the most efficient service. The FCC now has the opportunity to analyze and evaluate the regulatory experiments of the last decade. This should lead to a regulatory framework that is uniform, straightforward, and not unduly burdensome on licensees. The regulatory framework should also be flexible enough to anticipate future technological developments. To move forward into this next phase, the FCC must adopt a Uniform Regulatory Framework for the media of mass communications.³¹⁸ A Uniform Regulatory Framework can incorporate technological advances as well as traditional program-content criteria. Uniform and consistent regulation will result in stability for the mass communications industry.

This Part proposes a model Uniform Regulatory Framework for the media of mass communications. One advantage of this particular framework is that it adopts the legal precedents already established under the FCC's statutory authority. This framework uses existing classifications, definitions, and regulations to reaffirm the continued validity of diversity regulations, even under

³¹⁵ *Id.* at 1074.

³¹⁶ *Id.*

³¹⁷ *In re Amendments to 2.1 and 2.5 GHz Band II*, *supra* note 311, at 6799.

³¹⁸ *Legislative History*, *supra* note 183, at 2790. The flexible approach was not intended to replace traditional regulation. In fact, there are instances when the flexible approach has been considered inapplicable to FCC rulemaking. See 47 Fed. Reg. 11,905 to 11,910 (1982) (proposed May 19, 1982) (making the flexible regulatory approach inapplicable to Table of Assignments).

deregulation. Deregulation and diversity should be interrelated within the same regulatory framework. In short, this proposal offers a time-tested and effective approach to regulating mass communications that provides uniformity in: (1) design of basic requirements, (2) implementation, and (3) application to all mass communications.³¹⁹

A. Adopting a Policy Statement

The FCC would begin by adopting a policy statement that reaffirms the importance of diversity to further competition in the marketplace. The statement would declare that diversity protects the public interest and may be implemented with minimal requirements. The policy statement affirming diversity under deregulation would benefit the public by protecting the diversity of program outlets, encouraging diverse sources of local programming, ensuring competition by encouraging research and development, and minimizing the potential adverse effects of undue concentration by networks and conglomerates.

The policy statement would also acknowledge that the traditional lines of demarcation between broadcasting and common carriers are no longer applicable. Consequently, the statement would adopt the broader classification of media of mass communications, rather than broadcasting, for diversity purposes. This policy statement would lay the groundwork for the Uniform Regulatory Framework. This Article proposes a two-tier diversity requirements structure for the regulatory framework. The first tier would implement mandatory requirements while the second tier would authorize the FCC to enact further discretionary regulations. This two-tier structure would address developmental, engineering, and diversity objectives for existing and future mass communications.

B. Tier 1 Title III Requirements

Tier 1 would protect the public by imposing the current minimum Title III diversity requirements on all mass communications. This would include such basic requirements as sponsorship identification, foreign ownership restrictions, public inspection files, basic penetration caps, and EEO requirements. Waivers would be available only upon a showing of compelling need.

³¹⁹ *Legislative History*, *supra* note 183, at 2790.

Because EEO requirements have been in greatest jeopardy of being eliminated, Tier 1 would emphasize that these requirements should be imposed across the board.

1. Foreign Ownership Restrictions

The foreign ownership restrictions would prevent a foreign entity from operating a subscription service that could be used for propaganda purposes. Under present FCC rules, a foreigner can provide video programming on a subscription basis without being subject to any FCC regulation.³²⁰

2. Public Inspection Files

Public inspection files would allow the public access to pertinent information which is necessary to monitor compliance with FCC rules. Requiring such files to be kept would create a minimum financial burden because the information can be generated internally and is usually kept during the normal course of business for auditing, personnel, and other purposes.

3. Basic Ownership Caps

All ownership restrictions have included basic penetration caps, such as twenty-five or thirty percent of the market. These caps are the maximum allowable regardless of the number of properties that the FCC may allow a single licensee to own, control, operate, or influence. This issue will be explored further in the discussion of Tier 2 requirements.³²¹

4. EEO Requirements

The Uniform Regulatory Framework would adopt all Title III EEO requirements. These requirements are important because employment within the industry provides access to technical experience. This experience will increase entrepreneurial opportunities. A 1991 study of Minority Business Enterprises³²² revealed that, of the total number of telecommunications firms in

³²⁰ National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, 679-80, 680 n.32 (D.C. Cir. 1988).

³²¹ See *infra* notes 351-71 and accompanying text.

³²² See *Market Analysis - Vol. 1, supra* note 2, at 18 (defining "Minority Business Enterprise," as ". . . a business that is owned or controlled by one or more socially or economically disadvantaged persons," who are Black, Hispanic, Native American, Asian Indian, or Hasidic Jew).

the United States, there were only approximately 490 (.5%) minority telecommunications firms. The study further reported that 196 (2.51%) of these firms were in mass media,³²³ and 294 were in telecommunications.³²⁴ Moreover, revenues from these firms constituted less than .5% of the industry revenues.³²⁵ Revenues for the telephone services industry alone were \$167 billion in 1989.³²⁶

The FCC has had a long-standing policy of prohibiting discrimination in the work force.³²⁷ The FCC perceives EEO rules as serving the needs and interests of the minority community while “enrich[ing] and educat[ing] the nonminority audience” as well.³²⁸ Imposing EEO requirements on all mass communications would address both employment discrimination as well as underrepresentation in telecommunications ownership and hiring.³²⁹

EEO requirements currently apply to cable,³³⁰ Low Power Television,³³¹ common and non-common carrier MDS,³³² and broadcast DBS.³³³ These requirements have not been extended to other subscription video services. One former FCC Commis-

³²³ The breakdown is as follows: 3.03% of AM stations, 1.95% of FM stations, and 2.36% of television stations. *Id.*

³²⁴ *Id.* at 1. The largest concentration of Minority Business Enterprises in nonbroadcast telecommunications is in equipment manufacturing.

³²⁵ *Id.* at 44.

³²⁶ *Market Analysis - Vol. 1, supra* note 2, at 44.

³²⁷ Since 1968, FCC has required broadcasters to comply with specific EEO guidelines. *See 1968 Employment Practices, supra* note 82, at 772.

³²⁸ *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

³²⁹ There is a perceived nexus between the ability of minorities to obtain the necessary technical knowledge to run and manage a station and ownership. Financing is considered the greatest barrier to ownership. Most lenders evaluate broadcast loans based in large part on the broadcast experience of the applicant. Therefore, if minorities could get more and better jobs in broadcasting, particularly in management, there is a greater likelihood of success in obtaining financing to own a station. *See, e.g., Los Angeles Women's Coalition for Better Broadcasting v. FCC*, 584 F.2d 1089, 1092 (D.C. Cir. 1979) (per curiam).

³³⁰ 47 U.S.C. §§ 553, 554 (1988).

³³¹ 47 C.F.R. § 73.2080 (1991).

³³² 47 C.F.R. § 21.307 (1991); *see In re Amendments to 2.1 and 2.5 GHz Bands II, supra* note 311, at 6809 (citing federal regulations regarding EEO general policy).

³³³ *In re Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service*, 4 F.C.C.R. 6306, 6307 (1989) [hereafter

sioner has argued that EEO requirements should apply to both broadcasters and nonbroadcasters.³³⁴ There is some precedent for extending EEO requirements to common carriers, as long as there is a nexus between discrimination and rate regulation.³³⁵ For example, the contribution of DBS to the public is such that it should not be dictated by whether the public pays for the programming as subscribers.³³⁶ As the FCC stated in adopting EEO requirements for broadcast DBS: "Employment decisions made at an early stage in the organization of DBS systems may have a lasting impact on the representativeness of the workforce of DBS operators."³³⁷

Under current EEO guidelines, licensees with more than a certain minimum number of employees³³⁸ are required to make periodic filings regarding their employment practices. These filings report the number of minorities on the workforce, the nature and types of jobs in which they are employed, and the efforts made to recruit minorities. Under a Uniform Regulatory Framework, the current EEO requirements and procedures would apply to all mass media.

The FCC exercises concurrent³³⁹ jurisdiction to enforce EEO rules with the Justice Department and the Equal Employment

Orbital Allocations]; see *In re Amendments to 2.1 and 2.5 GHz Bands II*, *supra* note 311, at 6809 (citing federal regulations regarding EEO general policy).

³³⁴ *Orbital Allocations*, *supra* note 333, at 6310 (Separate Statement of Commissioner Patricia Diaz Dennis).

³³⁵ *Cf.* NAACP v. FCC, 425 U.S. 662 (1976) (upholding Federal Power Commission's right to consider consequences of discriminatory employment practices to the extent it is directly related to establishing just and reasonable rates).

³³⁶ *Orbital Allocations*, *supra* note 333, at 6311 (Separate Statement of Commissioner Patricia Diaz Dennis).

³³⁷ *In re DBS*, *supra* note 187, at 715.

³³⁸ In 1968, the original minimum number of employees was 25. Currently, licensees with 5 or more employees must submit affirmative action plans. See *In re Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 243 (1969) (discussing adoption of rules modeled upon the Civil Service Commission's equal opportunity program); 47 C.F.R. §§ 73.125, 73.301, 73.599, 73.680, and 73.793 (1991) (stating the general EEO policies).

³³⁹ The court, however, has ruled that FCC is required to ensure compliance only with its own EEO rules. See *National Org. for Women v. FCC*, 555 F.2d 1002, 1017-18 (D.C. Cir. 1977) (stating that FCC's role regarding license renewal process is not to adjudicate past discrimination in employment, but rather to determine if licensee is complying with its own equal employment opportunity rules).

Opportunity Commission (EEOC) pursuant to their authority under the Civil Rights Act.³⁴⁰ Complaints regarding discrimination in hiring are referred to the EEOC for resolution.³⁴¹ Once a determination is made, the FCC has discretion to consider the claim in evaluating license renewal.³⁴² The FCC judges compliance based on the licensee's actual recruitment and hiring practices, applying a zone of reasonableness test based on the population and abilities of people for qualified and unqualified positions.³⁴³ Failure to comply or make good faith efforts in hiring minorities may result in denial of the licensee's application for renewal, although historically the FCC has only imposed fines.³⁴⁴

Although EEO efforts have shown some success, minority representation in the workforce is still small.³⁴⁵ The primary reason

³⁴⁰ 1968 *Employment Practices*, *supra* note 82, at 772.

³⁴¹ *Id.*

³⁴² See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981) (noting Commission's broad discretion in determining how much weight should be granted to increasing diversity in license renewal evaluation).

³⁴³ *National Black Media Coalition v. FCC*, 775 F.2d 342, 344-47 (D.C. Cir. 1985).

³⁴⁴ *Evans*, *supra* note 24, at 386 (citing *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240, 244 (1969)). Between 1976 and 1984, for example, the Commission designated no hearings based on EEO violations, despite the fact that hundreds of EEO complaints were filed. David Honig, *The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 *How. L.J.* 859, 868 (1984); see, e.g., *Los Angeles Women's Coalition for Better Broadcasting v. FCC*, 584 F.2d 1089, 1092 (D.C. Cir. 1978) (*per curiam*) (stating that intentional employment discrimination puts licensee's character qualifications to remain licensee into serious question); *Community Coalition for Media Change v. FCC*, 646 F.2d 613, 614-15 (D.C. Cir. 1980) (stating that misrepresentation of American Indians in EEO report is insufficient to show discriminatory employment); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978) (stating that FCC is not charged with undifferentiated mandate to enforce anti-discrimination laws during license renewal).

³⁴⁵ In 1977, a random study of 40 television stations revealed that while 64.9% of management positions were held by white males, only 5.2% and 4.4% were held by Black men and women, respectively. *Evans*, *supra* note 24, at 386-87. In 1981, FCC estimated that minorities comprised only 14.6% of the broadcasting workforce. HONIG, *supra* note 79, at 86. This figure represented only 70% of the minority population. *Id.*; see U.S. COMM'N OF CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION* (1977); Bari Robinson, *Achieving Diversity in Media Ownership: Bakke and the FCC*, 67 *CAL. L. REV.* 231, 233-36 (1979) (examining barriers to increasing media ownership by minorities). In 1990,

is lack of effective enforcement.³⁴⁶ Unfortunately, this problem reflects a pervasive lack of enforcement of EEO requirements in other industries as well.³⁴⁷ Despite its historical lack of enforcement of EEO requirements, the FCC has become more vigorous about imposing fines for violations.³⁴⁸ Better enforcement will have a positive impact as many in the industry are now responding with expanded EEO programs.³⁴⁹

over 17% of 159,000 industry workers were minorities. White women represented 31% of that total. Black employment was 9%, Hispanic was 7%, Asian was 1.3%, and Native American was .6%. Minority employment among managers, professionals, technicians, and sales workers was at 15.4%, an increase of .5% from 1989. Dwight M. Ellis, *Diversifying the Broadcast Workforce: Challenges and Opportunities* 5, presented at Human Resource Conference of Canadian Association of Broadcasters in Ottawa, Ontario (June 5, 1992) (on file with author).

³⁴⁶ Wimmer, *supra* note 89, at 148. During the 1980's, efforts were initiated to make the EEO reporting requirements more stringent. Following strong opposition from some FCC Commissioners, however, some of the reporting requirements were relaxed, notwithstanding studies revealing a negligible minority presence in management positions. *See Equal Employment Opportunity*, BROADCASTING, Oct. 3, 1983, at 105.

³⁴⁷ A 1985 report demonstrated that nationally minority employment increased only 1% between 1981 and 1985. Wimmer, *supra* note 89, at 149. Studies show that despite slight gains, minorities are employed in lower echelon jobs removed from management and program decision making. *Id.* As of 1990, national employment statistics show that Blacks comprise 5.2% of managers in companies with 100 employees or more, up from 3.7% in 1978 and .9% in 1966. Among professionals, Blacks comprise 5.2% of the total, up from 4% in 1978 and 1.7% in 1966. Joan E. Rigdon & Carol Hymowitz, *For Black Men, Success Resolves Few Problems*, WALL ST. J., May 8, 1992, at B1.

³⁴⁸ A recent trade publication reported that EEO fines had jumped from \$12,500 to a high of \$25,000. Ellis, *supra* note 345, at 4. Better enforcement was prompted in part by court action. *See* *Beaumont Branch of NAACP v. FCC*, 854 F.2d 501, 502 (D.C. Cir. 1988) (mandating hearing on petition to deny license due to sharp decline in Black employment, inadequate explanation of declines, and licensee's failure to comply with EEO requirements).

³⁴⁹ TCI, the world's largest cable MSO, has expanded its EEO efforts. The program includes (1) a mentoring program by senior Black, Hispanic, and female executives to provide career path assistance for lower-level minority managers; (2) an expanded management trainee program targeting one to two slots per major system; (3) internship programs for high school and college students; (4) continued participation in hiring fellows from the Walter Kaitz Foundation; and (5) employee training to sensitize new hires to cultural and ethnic differences. *TCI Takes Affirmative Action*, BROADCASTING,

C. Tier 2 Title III Discretionary Requirements

Tier 2 would include discretionary regulations such as preferences and ownership restrictions. Waivers would be available based upon a showing of substantial need. Because the FCC is presently revising its ownership rules, discussion will focus on the their background and utility under the proposed framework.

1. Preferences

Under current rules, minority preferences apply to MMDS and LPTV, but not to MDS and ITFS.³⁵⁰ Preferences are tied to the licensing procedure used by the FCC in authorizing a technology. Because the FCC has wide latitude in adopting licensing procedures, Tier 2 would include preferences as discretionary.

2. Ownership Rules

The ownership rules comprise (1) the duopoly rule,³⁵¹ which restricts common ownership, operation, or control of more than one facility in the same service area; and (2) multi-ownership rules which limit the total number of properties that may be commonly owned, operated, or controlled nationally.³⁵² Ownership restrictions are central to diversity policies that protect the public against perceived threats of undue media concentration in the same service area.³⁵³ Inasmuch as technology directly impacts

Sept. 16, 1991, at 39. The Walter Kaitz Foundation is geared to placing qualified minority applicants in entry and mid-level jobs with cable systems.

³⁵⁰ See, e.g., *In re* Amendments of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection (Lottery), 4 F.C.C.R. 2256, 2269 n.67 (1989) (discussing preferences given for limited partnerships in which minorities own majority interest). *But see In re* Amendment of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service, 101 F.C.C.2d 50, 51 (1985) (indicating a lack of preference given to a nongeneral interest medium).

³⁵¹ The duopoly rule has been interpreted to apply not only to the number of the same media in a given service market, but also to cross-ownership of different media in the same service market. While some commentators refer to them separately, for purposes of this discussion duopoly will include cross-ownership as well as one-to-a-market or chain broadcasting.

³⁵² There is also the "cross-interest policy" restricting contractual arrangements between competing entities in the same service market.

³⁵³ The justification for these ownership restrictions rested on the principle that "the governing consideration here is power, and power can be

the available outlets in the market, application of the duopoly rule to a particular technology should be left to the discretion of the FCC.³⁵⁴ Consequently, the Uniform Regulatory Framework would include these rules as discretionary.

a. Duopoly Rule

The duopoly rule has undergone various modifications over the years.³⁵⁵ From its inception in the late 1970s, the FCC restricted the number of broadcast facilities that could be owned, operated, or controlled by a single entity.³⁵⁶ In the mid-1980s the FCC

realistically tempered on a structural basis A proper objective is the maximum diversity of ownership that technology permits in each area." *1970 Ownership Rules*, *supra* note 40, at 311.

³⁵⁴ See 47 U.S.C. § 533(b)(4) (authorizing Commission to waive rule under justifiable circumstances); *In re Amendments to 2.1 and 2.5 GHz Bands II*, *supra* note 311, at 6799.

³⁵⁵ The duopoly or "one-to-a-market" rule originated in 1938 in Flint, Michigan. FCC denied an application for a standard broadcast station because the applicant already controlled a station in the area through a parent corporation. *CARTER ET AL.*, *supra* note 38, at 157. FCC ruled that it would not permit the applicant to own two stations in the same market without a compelling showing that the public interest would be served. *Id.*

³⁵⁶ During the 1940s, FCC adopted rules restricting common ownership, operation, or control of more than one broadcast station in substantially the same service area, where the primary contours overlap. See 47 C.F.R. §§ 73.35, 73.240 and 73.636 (removed 1984); Rules and Regulations Governing Commercial Television Broadcast Stations, 6 Fed. Reg. 2284, 2284-85 (1941) (prohibiting (1) any organization from operating more than one broadcast network, and (2) any network from owning more than one standard broadcast station in the same community); *NBC v. United States*, 319 U.S. 190, 193, 206-08 (1943) (upholding chain broadcasting rule); Multiple Ownership of Standard Broadcast Stations (AM radio), 8 Fed. Reg. 16,065 (1943) (prohibiting ownership of more than one station in same broadcast service (AM, FM, or TV) in the same community); *FCC v. National Citizens Comm'n for Broadcasting*, 436 U.S. 775, 780-81 n.1 (1978).

In 1964, FCC tightened restrictions on multiple ownership by prohibiting common ownership of two AM or two FM stations in the same broadcast service area if the existing and predicted primary service contours overlapped. *FCC v. National Citizens Comm'n for Broadcasting*, 436 U.S. at 780-81 n.1 (citing Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C.2d 1476 (1964)). FCC also applied this restriction to two television stations in the same area if the predicted secondary service contours overlapped. In 1970, FCC further restricted concentration of ownership by prohibiting all new licensees from owning both a radio station and a VHF television station in the same market. *1970 Ownership Rules*, *supra* note 40, at 307. A 1971 Order amended the 1970

began to relax its rule. In 1988, the FCC modified the rule to allow greater overlap between AM-FM stations and decided to grant waivers of the duopoly rule in the top twenty-five markets that have at least thirty broadcast voices.³⁵⁷

In 1989 the FCC determined that "substantial changes in the marketplace" warranted further modifications.³⁵⁸ As a result, the FCC relaxed the duopoly rule for radio stations to allow common ownership of two same-service stations whose primary city contours overlap. The FCC reasoned that the cost savings inherent in joint operations could be used to invest in better programming and technical equipment.³⁵⁹

In 1992 the FCC relaxed its radio rules even further, using the same economy of scale argument.³⁶⁰ The FCC also cited the negative effects of shrinking advertising dollars on radio stations.³⁶¹ Under the current rules, a single licensee may own up to 2 AM and 2 FM stations in the same market with a total of 15 or more stations.³⁶² In markets with fewer than 15 stations, a single licensee may own up to 3 stations; 2 can be in the same market.³⁶³ Noncommercial stations will not be counted. In no instance, however, can any licensee reach a combined audience share of more than 25%, as determined by Arbitron ratings.³⁶⁴

ownership rule to allow AM-FM combinations and to deal with UHF-radio combinations on a case by case basis. *In re* Amendment of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 28 F.C.C.2d 662, 663 (1971). No divestiture was required. This rule applied only prospectively. FCC also included a waiver provision to allow the sale of a combination to a single party if it was in the public interest. *Id.* at 673.

³⁵⁷ CARTER ET AL., *supra* note 38, at 158.

³⁵⁸ FCC News Release: Notice of Proposed Rulemaking on Duopoly Rule, Report No. DC-817, Jan. 15, 1987.

³⁵⁹ *Id.*

³⁶⁰ FCC Chairman Sikes stated that the old rules "were more restrictive than necessary to protect competition and diversity in local markets. [These rules] are undermining those concerns by artificially denying radio broadcasters the much needed opportunities that stem from being able to spread administrative, equipment, personnel and programming costs over more of an advertising base." *Documentation Questioned; Dingell Orders Hill Investigation of FCC Radio Ownership Proceeding*, 12 COMMUNICATIONS DAILY, Mar. 23, 1992, at 1.

³⁶¹ *Id.*

³⁶² Joe Flint & Peter Viles, *Hill Squeezes the FCC's Radio Rules*, BROADCASTING, Aug. 10, 1992, at 4.

³⁶³ *Id.*

³⁶⁴ *Id.*

The FCC is currently considering similar rules for television. Furthermore, the FCC and Congress are considering relaxing the cable cross-ownership restrictions affecting television stations and telephone companies. Cross-ownership restrictions have been imposed on the operation of cable systems by television stations³⁶⁵ and telephone companies³⁶⁶ in the same service area under certain conditions.³⁶⁷ In addition, cable operators are prohibited from owning or operating a wireless cable and MDS facility.

b. Multiple Ownership Rules

Multiple ownership rules limit the total number of broadcast stations that can be owned by a single entity.³⁶⁸ In 1992, the FCC, relying on its marketplace theory, further relaxed the multiple ownership rules by increasing the national ownership caps to 30 AM and 30 FM stations, subject to a 25% cap on audience share.³⁶⁹ Concerned about the impact of these rules on diversity, Congress threatened to enact legislation to reduce the caps.³⁷⁰ Responding to congressional pressure, the FCC lowered the national ownership cap.³⁷¹ The FCC now permits broadcasters to accumulate nationally no more than 18 AM and 18 FM

³⁶⁵ 47 U.S.C. §§ 533(a), 522(10). Under the rule, television networks were prohibited from having any interest in a cable system anywhere in the country. The courts have upheld FCC rules prohibiting networks from having any cable interests and telephone companies from owning cable systems. See *Iacopi v. FCC*, 451 F.2d 1142, 1148-49 (9th Cir. 1971) (allowing spin-off subsidiary to take over cable television interests); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 859 (5th Cir. 1971) (upholding FCC's rules prohibiting television company from furnishing CATV); *1975 Ownership Rules*, *supra* note 40, at 1049. The network restriction was relaxed in 1992.

³⁶⁶ 47 U.S.C. § 533 (b)(1)-(2).

³⁶⁷ The Commission stated that the cross-ownership ban should extend to secondary contours. See *In re Amendment of Regulations Relative to Community Antenna Television Systems*, 23 F.C.C.2d 816, 820-21 (1970) (codified at 47 C.F.R. § 76.501 (1991)).

³⁶⁸ See, e.g., *In re Multiple Ownership of AM, FM and TV Broadcast Stations*, 18 F.C.C. 288 (1953). The Supreme Court upheld FCC's rule in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

³⁶⁹ *Barrett Abstains; Dissent Likely; FCC Ups Radio Maximum to 30 AMs and 30 FMs, Relaxes Duopoly Rule*, 12 COMMUNICATIONS DAILY, Mar. 13, 1992, at 1-2.

³⁷⁰ See, e.g., *Closed Circuit: Dingell Directive*, BROADCASTING, Apr. 13, 1992, at 18.

³⁷¹ Joe Flint & Peter Viles, *Hill Squeezes the FCC's Radio Rules*, BROADCASTING, Aug. 10, 1992, at 4.

stations.³⁷² In two years, however, this cap will allow ownership of 20 AM and 20 FM stations.³⁷³ Moreover, broadcasters may increase their attributable but noncontrolling interests to an additional three stations if they are controlled by minority broadcasters or small businesses.³⁷⁴

The FCC is currently considering similar rules for television.³⁷⁵ Under these proposals, the television limit would be increased to 20 or 24 stations with a 35% audience share, or 18 stations with a 30% audience share.³⁷⁶ The FCC has also requested comments on eliminating or modifying the rule prohibiting the cross-ownership of TV and AM stations.

D. Financial Incentives

Mass communications should be eligible for financial or other economic incentives such as tax certificates for innovation, small businesses, or minority diversity. These incentives should apply, regardless of whether the service acts as a common carrier or as a broadcaster. FCC and congressional concern for small businesses is clearly established by the policies of the Small Business Administration Act³⁷⁷ and the Regulatory Flexibility Act.

The Uniform Regulatory Framework would allow certain small businesses to be eligible for tax credits or tax certificates. Eligibility for such incentives would be tied to current regulations of the Small Business Administration (SBA). A small business concern would be defined as a business that is not dominant in its field of operations, with annual receipts not in excess of \$500,000.³⁷⁸

Such incentives are timely as small entrepreneurs, consumer groups, and proponents for minority ownership are concerned that the growing concentration of power will defeat attempts to achieve diversity.³⁷⁹ In support, they cite the growing failures of

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ Joe Flint, *FCC Takes First Step to Raise TV Limits*, BROADCASTING, May 18, 1992, at 3.

³⁷⁶ *Id.*

³⁷⁷ 15 U.S.C. § 631 (Supp. II 1990).

³⁷⁸ 15 U.S.C. § 632(a)(1). There is no maximum number of employees as it will vary among industries.

³⁷⁹ See R. S. Kieve, *Open Mike: Concentration Problem*, BROADCASTING, May 11, 1992, at 45; *Owners Urge FCC to Liberalize Radio Rules*, BROADCASTING,

small market stations,³⁸⁰ the drop in minority ownership,³⁸¹ financial constraints for small business entry, and anti-competitive practices. All of these adversely affect the consumer public.³⁸²

1. Tax Certificate Policy

The tax certificate policy has routinely been used as a race-neutral incentive to alleviate hardship resulting from forced divestiture of media properties that have been grandfathered in under the ownership rules.³⁸³ It has also been used to promote minority ownership.

The tax certificate policy provides a tax incentive to those who facilitate minority ownership and control of mass media through sale and investment.³⁸⁴ Under the policy, a seller of a broadcast property to a minority-controlled³⁸⁵ group may defer payment of capital gains tax on the sale if the proceeds are (1) reinvested in qualified replacement property,³⁸⁶ and/or (2) used to reduce the basis of certain depreciable property kept by the seller.³⁸⁷ In

Aug. 12, 1991, at 48 (stating that raising limits on national ownership would substantially reduce diversity opportunities).

³⁸⁰ Edward L. Andrews, *An Unsound Deal? Too Many Stations, Too Few Buyers*, SAN DIEGO TRIB., June 30, 1991.

³⁸¹ Patrick J. Sheridan, *Study to Show Drop in Minority Ownership*, BROADCASTING, Sept. 23, 1991, at 50.

³⁸² Cf. Joe Flint, *Consumer Groups Press Hard on Cable Rereg*, BROADCASTING, Apr. 13, 1992, at 40.

³⁸³ Issuance of Tax Certificate, 19 Rad. Reg. 2d (P & F) 1831 (1970).

³⁸⁴ The tax certificate policy was extended to cable in 1982. FCC, POLICY STATEMENT ON MINORITY OWNERSHIP OF CABLE TELEVISION FACILITIES, FCC 82-524, Dec. 22, 1982, at 5.

³⁸⁵ "Minority-controlled" means (1) a corporation in which 50% of the voting stock is owned by minorities; (2) a limited partnership with minority general partners who own at least 20% of the partnership's total equity and are in control; or (3) a limited partnership where minorities own 51% of the voting stock of the corporate general partner and the corporate general partner owns 21% of the limited partnership's total equity. See Krasnow et al., *supra* note 88, at 3. FCC does not require that the minorities work in the day-to-day management of the station or system, but they must control the overall decision-making of the enterprise. *Id.*

³⁸⁶ "Qualified replacement property" means "similar or related in service or use" to the converted property and has been interpreted to include at the minimum, reinvesting in assets or stock in different types of electronic media of mass communications, i.e., broadcast and cable properties. See *id.* at 1, 7-8.

³⁸⁷ *Id.* at 1.

addition, investors who provide start-up capital to minority-controlled companies within the first year of their operation are eligible for tax certificates when their interests are eventually sold.³⁸⁸ In either case, a minority company that obtains a broadcast station or cable system using the tax certificate must retain the property for at least one year.³⁸⁹ The tax certificate policy is unique because it is within the jurisdiction of the Internal Revenue Service.³⁹⁰ The FCC, however, determines whether a sale is eligible and issues the tax certificate.³⁹¹

The tax certificate policy has been considered the most successful of all the diversity policies for promoting minority ownership.³⁹² Since 1978 the number of tax certificates issued has increased annually from four per year to more than thirty-nine in 1989. To date, the FCC has issued more than 260 tax certificates.³⁹³

The FCC has also extended the tax certificate policy as a race-neutral incentive to AM licensees to alleviate congestion and interference. Under this program AM licensees who cancel their licenses and move to an expanded AM band are eligible for certificates.³⁹⁴ The certificates are issued for three years from the effective date of the order to encourage licensees to act promptly. In 1982, the Advisory Committee recommended legislative amendments to the Internal Revenue Code to allow tax certificate sales on nonbroadcast properties.³⁹⁵ Since then, petitions have been filed to expand the tax certificate program to include com-

³⁸⁸ *Id.*; *In re* Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849 (1982).

³⁸⁹ *See* Krasnow et al., *supra* note 88, at 4.

³⁹⁰ *Id.* at 1.

³⁹¹ *Id.* FCC is required to determine that the sale or exchange of property is "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations . . ." I.R.C. § 1071 (1988); I.R.C. Regs. §§ 1.1071-1(a)(2)(ii) and (3)(b).

³⁹² Patrick J. Sheridan, *Minority Tax Certificates: Doing the Job*, BROADCASTING, Apr. 8, 1991, at 68.

³⁹³ Dep't of Consumer Affairs, FCC, Minority Ownership Lists (Jan. 18, 1990); *see* Mary Tabor, *Encouraging "Those Who Would Speak Out With Fresh Voice" Through the Federal Communications Commission's Minority Ownership Policies*, 76 IOWA L. REV. 609, 621 (1991).

³⁹⁴ *In re* Technical Assignment Criteria for the AM Broadcast Service, 6 F.C.C.R. 6273, 6325 (1991); *In re* Technical Assignment Criteria for the AM Broadcast Service, 5 F.C.C.R. 4381, 4387 (1990).

³⁹⁵ *Seven Stations Rule*, *supra* note 63, at 47.

mon carriers.³⁹⁶ To date, no action has been taken.

The tax certificate program could be extended to hybrid technologies that provide programming, either directly as a programmer or indirectly as a common carrier leasing space to customer-programmers. One problem to be addressed is extending the tax certificate to technology classified as common carriers. The language of section 1071 of the Internal Revenue Code specifically relates the tax certificate to mass communications. One proposed option would be to extend the tax certificate to promote private venture funds to invest in minority-controlled communication technologies. Under the proposal, a tax certificate could be issued if at least fifty percent of the revenues generated by the fund are derived from mass media technologies.³⁹⁷

Moreover, with the growing consolidation of operations, and the increase in the financial requirements to enter telecommunications today, it is consistent with the public interest that the tax certificate policy be extended to small businesses. Small businesses would include, but would not be limited to, those which are "socially and economically disadvantaged" as defined under the SBA rules. The advantages are that the tax certificate is race-neutral and benefits everyone. Expanding the tax certificate would promote new entry by small entrepreneurs without needing to amend the language of section 1071.

CONCLUSION

Diversity is an important government policy that should be protected while encouraging innovation and the development of new technology. Both goals are compatible and can be pursued under deregulation through the Uniform Regulatory Framework proposed in this Article.

As traditional delineations between common carriers and broadcasters are no longer applicable, the FCC should embrace the definition of media of mass communications as the classification under which minimum diversity requirements can be

³⁹⁶ See Matter of Request for Ruling on Commission's Policy Regarding Issuance of Tax Certificates to Promote Minority Ownership, (Filed Oct. 2, 1986) (request by Stellar Communications Corp., a minority-owned business, seeking to purchase a common carrier paging operation) (on file with author). The Common Carrier Bureau has taken no action on the petition.

³⁹⁷ Memorandum from William Kennard, Esq., to Andrew Barrett (May 6, 1991) (on file with author).

imposed. To do otherwise jeopardizes the statutory mandate of safeguarding the public trust, which has been delegated to the FCC to protect.