

Peer-Review Report:

“Minority and Female Ownership in Media Enterprise”

By Beresteanu and Ellickson

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I have been asked to perform a peer review of the Study by Beresteanu and Ellickson “Minority and Female Ownership in Media Enterprise.”¹ In performing this review, I have been asked to consider the following things: (1) whether the methodology and assumptions employed are reasonable and technically correct; (2) whether the methodology and assumptions are consistent with accepted economic theory and econometric practices; (3) whether the data used are reasonable and of sufficient quality for purposes of the analysis; and (4) whether the conclusions, if any, follow from the analysis.

I. Summary of Beresteanu and Ellickson Data Findings:

The Beresteanu and Ellickson Study finds that “*minorities and females are clearly underrepresented*” in Radio, TV and Newspapers relative to their proportion of the U.S. population.² But it states that “*females and minorities are underrepresented in almost all industries in the economy at relatively similar rates.*”³ It then asserts that “it appears that access to capital is a primary cause of underrepresentation for minorities, but deeper analysis (with more data) would be needed to address the position of females.”⁴ Lastly, it concludes that “the data being currently collected by the [Federal Communications Commission] FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”⁵

¹ Arie Beresteanu and Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, (June 2007) available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A8.pdf (last visited Oct. 27, 2007).

² *Id.* at 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 2-3.

In a recommendation section, the Beresteau and Ellickson Study also suggests that the FCC consider whether there are in fact quantifiable benefits to increasing minority and female ownership; It cites to Gentzkow & Shapiro suggesting that media content is driven more by demand than supply.⁶ It also suggests that the FCC should track ownership patterns below the 50% ownership cutoff.⁷ Lastly, it suggests that nontraditional media (e.g., the Internet) gives voice to an ever-increasing range of viewpoints and that broadband access should be subsidized.⁸

The Beresteau and Ellickson Study acknowledges that it is unable to make strong conclusions.⁹ In fact, B. D. McCullough of Drexel University, in his peer review, highlights the lack of rigor of the Beresteau and Ellickson Study.¹⁰ Professor McCullough states:

At the outset, it should be noted that a review of the author's curricula vitae indicates that they certainly have the ability to do the sophisticated analysis that this reviewer would prefer to have seen rather than a *simple analysis* that they actually did.¹¹

Professor McCullough specifically states: "The FCC should have contracted with the authors to do a full-blown study of the problem, rather than simply conduct a small and perfunctory analysis.¹² The FCC got what it paid for, and if the results are not very good the fault does not lie with the authors."¹³

II. Critique of the Beresteau and Ellickson Study

I agree with Professor McCullough that the Beresteau and Ellickson Study is overly simplistic. This peer-review is designed to flesh out the deficiencies in the Beresteau and Ellickson Study. The Beresteau and Ellickson Study's assumptions and methodology are flawed. It fails to analyze the effectiveness of the Failed Station Rule ("FSSR") and fails to evaluate any of MMTC's recommendations to improve minority ownership, each of these required by Third Circuit on remand. Instead, the Beresteau and Ellickson Study develops a legally flawed and unsound methodology that inflates the percentages of minority and women broadcasters by using Census data that includes music program distribution, piped-in music services and network television. The Beresteau and Ellickson Study also fails to compare the data by experience, age, or size of the firms. Although the Beresteau and Ellickson Study makes a *prima facie* showing of unequal access to capital markets as the basis for the disparity in minority ownership,

⁶ *Id.* at 3-4.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ *Id.* at 2.

¹⁰ B. D. McCullough, *Peer-review Report on "Minority and Female Ownership in Media Enterprises by Beresteau and Ellickson,"* available at http://www.fcc.gov/mb/peer_review/prstudy7.pdf (last visited Oct. 27, 2007).

¹¹ *Id.* at 1 (Emphasis added).

¹² *Id.*

¹³ *Id.* (Professor McCullough blames the lack of rigor on the low compensation paid to the reviewers).

the Study fails to do a deeper analysis of the problem. Lastly, the Beresteanu and Ellickson Study fails to show that diverse ownership does not lead to diverse content or that Broadband and the Internet solves the problems of minority and women underrepresentation in the broadcast market. Overall, I find the Beresteanu and Ellickson Study is insufficient to meet the rational decision-making standard.

III. Background:

The Supreme Court has recognized that governmental entities have a compelling governmental interest in remedying discrimination.¹⁴ In *Adarand v. Peña*, the Supreme Court stated that “[t]he lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”¹⁵ Failure to address possible discrimination against FCC licensees and potential licensees would contravene the FCC’s public interest mandate established under statute.¹⁶

The Beresteanu and Ellickson Study fails to address established law, precedent, and FCC regulations and policies addressing minority and women ownership issues and the remand order in *Prometheus* case.¹⁷ Racial and gender diversity in the ownership of the broadcast spectrum has been a vital public interest consideration of the FCC for the past thirty years. In 1978, the FCC issued a Statement of Policy on Minority Ownership of Broadcast Facilities in which it implemented race-conscious programs designed to increase diversity in ownership.¹⁸ Congress has codified the FCC’s responsibilities in ensuring opportunities for women and minorities to own broadcast facilities. Section 309 (J)(3) of the Communications Act specifically provides:

In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the *Commission shall include safeguards to protect the public interest in the use of the spectrum* and shall seek to promote the purposes specified in section 151 of this title and the following objectives:
(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, *and businesses owned by members of minority groups and women*;...¹⁹

¹⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁵ *Id.* 237.

¹⁶ 47 U.S.C. §309(j)(3) (2000); 47 U.S.C. §257(b).

¹⁷ *Prometheus Radio Project v. FCC*, 373 F. 3d 373 (3d Cir. 2003).

¹⁸ *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965).

¹⁹ 47 U.S.C. §309(j)(3) (2000)(Emphasis added).

In addition, in Section 309(J)(4)(D) provides that in prescribing regulations pursuant to paragraph (3), the FCC shall “ensure that small businesses, rural telephone companies, and *businesses owned by members of minority groups and women* are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences and other procedures.”²⁰

The FCC also has an additional duty pursuant to Section 257(c) to report triennially to Congress on the steps taken to eliminate market entry barriers identified in the FCC proceedings. More specifically, Section 257(b) instructs the FCC “to promote the policies and purposes of this [Act] *favoring diversity of media voices*, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.”²¹ The FCC has identified discrimination to be a market entry barrier.²²

Between 1999-2001, the FCC released several market entry barrier studies that showed evidence of discrimination against minority broadcast licensees and broadcast applicants by advertisers,²³ the capital markets,²⁴ and other members of the communications industry.²⁵

²⁰ 47 U.S.C. §309(j)(4) (D)(2000)(Emphasis added).

²¹ 47 U.S.C. §257(b) (2003)(Emphasis added).

²² See In re Sec. 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, 11 F.C.C.R. 6280, 6301-02, 6305-07 (1996).

²³ KOFI OFORI, CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, FEDERAL COMMUNICATIONS COMM’N, WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS 11-13 (Jan. 1999) , *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/adsynopsis.html. (last visited Oct. 29, 2007) (study found that some advertisers refused to advertise on minority-owned or -formatted stations. This was called No Urban/No Spanish Dictates. The Study also found that when the advertisers placed advertisers on minority-owned or -formatted stations, they faced substantial rate discounts, called “Minority Discounts.”); *see also* IVY PLANNING GROUP, LLC, WHOSE SPECTRUM IS IT ANYWAY? HISTORICAL STUDY OF MARKET ENTRY BARRIERS, DISCRIMINATION AND CHANGES IN BROADCAST AND WIRELESS LICENSING: 1950 TO PRESENT (Dec. 2000) (cataloguing anecdotal evidence from a number of minority-owned broadcasters who experienced No Urban/Spanish Dictates and Minority Discounts, *available at* <http://www.fcc.gov/opportunity/meb%5Fstudy/historical%5Fstudy.pdf> (last visited October 27, 2007). *Compare* Philip Napoli, *Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences*, 46 J. BROADCASTING & ELECTRONIC MEDIA 169, 181 (2002)(finding that stations whose audiences were over 50% minority earned less advertising revenue than stations whose audiences were mostly nonminority).

²⁴ William D. Bradford, PhD., DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES 27 (Dec. 5, 2000), *available at* http://www.fcc.gov/opportunity/meb_study/capital_market_study.pdf (last visited Oct. 28, 2007) (finding that the loan applications of minority-owned firms was less likely to be accepted than nonminority firms. These minority borrowers also paid higher interested rates on their loans than nonminority firms).

²⁵ *See* KPMG FINAL REPORT: LOGISTICAL REGRESSIONS MODELS OF THE BROADCAST LICENSE AWARD PROCESS FOR LICENSES AWARDED BY THE FCC at 4 (Nov. 2002) (last visited Oct. 29, 2007) *available at* http://ftp.fcc.gov/opportunities/meb_study/broadcast_lic_study_pt3.pdf (finding that minority singleton comparative hearing applicants were more likely to be challenged in a comparative hearing than non minorities)(last visited Oct. 28, 2007).

More recently, the FCC acknowledged that the relaxation of the ownership rules might have an adverse effect on minority and women ownership.²⁶ In fact then-Chairman Michael Powell formed a Federal Advisory Committee to assist the FCC in creating new opportunities for minorities and women.²⁷ In remanding this matter back to the FCC, the Third Circuit specifically referenced the FCC's failure to satisfactorily explain its rationale for repealing the Failed Station Rule ("FSSR").²⁸ Pursuant to this rule, "a television licensee or construction permit holder was required to provide notice of the sale to a potential out-of-market buyer before it could sell failed, failing or unbuilt stations to an in-market buyer."²⁹ The FCC created the FSSR to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled-and consequently more affordable-stations were for sale.³⁰

The Third Circuit specifically stated:

In repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission entirely failed to consider an important aspect of the problem and this amounts to arbitrary and capricious rulemaking.³¹

The Third Circuit also required the FCC on remand to evaluate the recommendations of the Minority Media and Telecommunications Council ("MMTC") to improve minority ownership.³²

The Beresteanu and Ellickson Study fails to evaluate or analyze the effectiveness of any of the FCC's prior policies that were designed to increase minority and women ownership. The Beresteanu and Ellickson Study fails to evaluate or analyze the FCC's 1999-2001 market entry barrier studies of the minority- and women-owned broadcasters. The Beresteanu and Ellickson Study fails to analyze the effectiveness of the FSSR and fails to evaluate any of MMTC's recommendations to improve minority ownership as required by Third Circuit's remand of this matter to the FCC. Instead, the Beresteanu and

²⁶ For instance, in relaxing the ownership rules, the FCC grandfathered some of the ownership arrangements that exceeded the expanded ownership limits. However, the FCC prohibited the sale of the above-the-cap arrangements except to small businesses, many of which according to the FCC are minority or female owned. See FCC Sets Limits on Media Concentration, at 8 (June 2, 2003)(Summary of the Broadcast Ownership Rules) available at www.fcc.gov/headlines2003.html; see also 18 F.C.C.R. 13620, 13807-11, ¶¶482-489 (released July 2, 2003); see also Separate Statement of Commissioner Kathleen Q. Abernathy at 4 (June 2, 2003), available at <http://www.fcc.gov/headlines2003.html> (last visited Oct. 27, 2007).

²⁷ FCC Federal Advisory Act Notice of Public Meeting, 69 Fed. Reg. 345 (Jan. 5, 2004), available at <http://www.fcc.gov/DiversityFAC/040126/meetingNoticeJan04.pdf> (last visited October 27, 2007).

²⁸ *Prometheus Radio Project*, 373 F. 3d at 420.

²⁹ *Id.*

³⁰ *Id.* citing *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶¶ 13-14, 74.

³¹ *Id.*

³² *Id.* at 420, n.59.

Ellickson Study develops a legally flawed and unsound methodology (which will be discussed below) to determine the percentage of minority and women broadcasters.

IV. The Methodology of Beresteanu and Ellickson Study

a. Exposition of Beresteanu and Ellickson Methodology

The Beresteanu and Ellickson Study finds that minority and women broadcast owners are underrepresented in the radio, TV and newspaper industries at similar rates to their underrepresentation in almost all industries.³³ In doing this analysis, the Beresteanu and Ellickson Study uses census data, and it finds that “[a]cross all non-farm, privately held businesses with paid employees, women own only 17.74% of firms, while men own 68.41%.”³⁴ They find that “[i]n radio, TV, and newspapers, women own 14.01%, 13.68%, and 20.56% respectively.”³⁵ They conclude that the “numbers are broadly in line with the overall universe of businesses.”³⁶ For minorities, Beresteanu and Ellickson use the same methodology and find that “Business ownership is highly skewed towards nonminorities (white nonHispanic)—only Asians own a share of the economy commensurate with their overall share of the population.”³⁷ For example, their census data show the following demographics of all nonfarm businesses: Hispanics own 3.85%, Whites own 91.32%, Blacks own 1.82%, American Indians own .47%, and Asian Americans own 6.21%.³⁸ For radio stations, they find that Hispanics own 3.71%, Whites own 93.29%, Blacks own 4.35%, American Indians own .17%, and Asian Americans own 2.27%. For TV stations, they find that Hispanics own 6.04%, Whites own 89.11%, Blacks own 4.89%, American Indians own 0%, and Asian Americans own 6.03%.³⁹ And finally for newspaper publishers, they find that Hispanics own 1.58%, Whites own 93.50%, Blacks own 2.44%, American Indians own 1%, and Asian Americans own 3.24%.⁴⁰ Overall, for minority-owned businesses, the Beresteanu and Ellickson Study concludes that “the patterns are not out of line with the economy at large. Again whatever is driving these asymmetries is not unique to firms in these three lines of business, it is an economy-wide phenomenon.”⁴¹

b. Critique of the Beresteanu and Ellickson Study’s Methodology

The U.S. Supreme Court has recognized that an inference of discriminatory exclusion may arise “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the

³³ Arie Beresteanu & Paul Ellickson, *Minority and Female Ownership in Media Enterprises*, *supra* note 1 at 5-8.

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 8.

³⁸ *Id.* at 7. Table 2.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 7.

number of contractors actually engaged....”⁴² For example, courts sanction the use of a disparity index that measures the percentage of minority contractor participation divided by the percentage of qualified minority contractor availability.⁴³ Utilization ratios were derived from Department of Labor regulations that established guidelines for showing adverse impact.⁴⁴

The U.S Supreme Court approved utilization ratios as a methodology to be used in determining disparities in minority and women participation in various industries.⁴⁵ Use of utilization ratios methodology presents complexity when used in the broadcast industry because unlike government contracting, broadcasting has no set of available qualified applicants and broadcast applicants have fewer opportunities to win a license. Given this complexity, KPMG in performing one of the market entry barrier studies devised a conditional probability model to ascertain underutilization.⁴⁶ The KPMG model focused on the same issues as utilization ratio, i.e., the harm to available and participating minorities in the broadcast industry.

In contrast, the Beresteanu and Ellickson Study compares the percentages of minorities and women in the radio, TV, and newspaper industry with the participation of minorities and women in all nonfarm businesses. They conclude that the disparities in media are symmetrical to disparities among all businesses. Therefore, they in essence conclude that these disparities are societal problems, not one for the FCC to address. This methodology is flawed for several reasons.

First, the underlying premise of utilization ratios is to examine whether the market participants in a particular industry are receiving such a low percentage of government benefits that one can make an inference of discrimination. This analysis demands a particularized examination of the possible harm to market participants in a particular industry. The harm to be examined is to those market participants who are available and stand ready to enter that industry under examination. This analysis requires a much more rigorous inquiry than is presented in the study at hand.⁴⁷ The Beresteanu and Ellickson Study purports to show that the disparity for minorities and women in the broadcast industry is comparable to the overall disparity for minority- and women-owned nonfarm businesses. This analysis is inexact and insufficient. It would not pass constitutional

⁴² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

⁴³ See *Contractors Ass’n of E. Pa, Inc. v. City of Phila.*, 6 F.3d 990, 1005, 1007 (3d Cir. 1993); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F. 2d 1401, 1414-16 (9th Cir. 1991) *cert. denied*, 503 U.S. 985 (1992).

⁴⁴ Uniform Guidelines on Employee Selection Procedures (1978), General Principles, 29 C.F.R S 1607.4(D) (2003).

⁴⁵ *Croson*, 488 U.S. at 509.

⁴⁶ KPMG, FINAL REPORT: LOGISTICAL REGRESSION MODELS OF THE BROADCAST LICENSE AWARD PROCESS FOR LICENSES AWARDED BY THE FCC, *supra* note 25 at 32 ; *but see* FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority-and Women-Owned Companies in FCC Wireless Spectrum Auctions (Dec. 5, 2005), *available at* http://www.fcc.gov/opportunity/meb_study/auction_utilization_study.doc (last visited Oct. 27, 2007)(Ernst & Young used utilization ratios to determine disparity in auction outcomes of minority- and women-owned businesses).

⁴⁷ *Concrete Works v. City of Denver*, 540 U.S.1027 (2003)(Scalia dissent from denial of writ of certiorari)

scrutiny and review. It does not examine whether there are minorities and women in the broadcast industry who have suffered harm. Moreover, it assumes that a disparity in the broadcast industry is derived from the same causes as disparity in all nonfarm businesses. This analysis in the Beresteanu and Ellickson Study invokes Justice O'Connor's admonition in the *Croson* where she stated: it was a "completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population."⁴⁸ The converse is also true; it is unrealistic to assume that women- and minority-owned broadcast businesses would necessarily be underutilized in the exact same degree (or for the exact same reasons) as women- and minority-owned businesses in other industries and that symmetry was the result of societal discrimination as opposed to invidious discrimination without a more particularized and rigorous analysis.

Second, the methodology of the Beresteanu and Ellickson Study is overly inclusive. First, it compares radio, TV, newspapers with nonfarm businesses. The FCC does not license newspapers, and regulates them only in the context of cross ownership rules.⁴⁹ The FCC has no statutory obligation to evaluate or promote diversity in newspapers. The broadcast census categories that the Beresteanu and Ellickson Study chose to analyze are also overly inclusive.⁵⁰ They rely on U.S. Census Bureau's 2002 Survey of Business Owners ("SBO"). The Census Bureau uses the North American Industry System ("NAICS") to assign industry codes for the SBO. The Beresteanu and Ellickson Study used NAICS code 515112 for "radio stations" and NAICS code 515120 for "TV stations."

Radio Stations NAICS code 515112 includes:

AM radio stations; Broadcasting stations (except exclusively on Internet), radio; Broadcasting studio, radio stations; FM stations; music program distribution (except exclusively on the Internet; radio; piped in music services, radio transmitted; Radio broadcasting (except exclusively on the Internet) stations (e.g., AM, FM, short); Radio stations (except exclusively on the Internet); Rebroadcast radio stations (except exclusively on the Internet).⁵¹

"Music program distribution" and "piped-in music services are not licensed by the FCC.

⁴⁸ *Croson*, 488 U.S. at 507.

⁴⁹ Broadcast Ownership Review FNPRM at P1, n.8 (examines the cross ownership of daily newspaper and broadcast station in the same market).

⁵⁰ See Comments of Catherine J.K. Sandoval, Assistant Professor of Law, Santa Clara University; Carolyn Byerly, PhD., Associate Professor, Department of Communications, Howard University; and Akilah Folami, Assistant Professor, Hofstra University School of Law Regarding the Study Commissioned by to the Federal Communications Commission in the Above Proceedings, "Minority and Female Ownership in Media Enterprises," by Arie Beresteanu and Paul B. Ellickson and the Critique of Professor B.D. McCullough's "Peer Review Report" The Beresteanu and Ellickson Study (Oct. 19, 2007)(hereinafter "Comments of Sandoval, Byerly, and Folami") at 10-14.

⁵¹ U.S. Census Bureau, 2002 NAICS Definitions, 515112 Radio Stations, *available at*: <http://www.census.gov/epcd/naics02/def/ND515112.htm> (last visited October 27, 2007).

Similarly, NAICS classification 515120 for television includes: “television broadcasting stations and television broadcast networks.”⁵² The FCC regulates and licenses television stations but not television networks. Both of these categories are overly inclusive, and use of this data creates a distortion in the analysis and race and gender disparity.⁵³ The use of these census categories inflates the number of minority and women owners in the Beresteanu and Ellickson Study.⁵⁴

Third, the Beresteanu and Ellickson Study⁵⁵ and several other scholars⁵⁶ have suggested that the FCC minority- and women-ownership data are incomplete and need to be updated. However, the Beresteanu and Ellickson Study fails to explain why this inexact census data is better than the FCC dataset, and it fails to resolve the differences between census data, which they use and the demographic data compiled by the FCC. So for instance, the FCC data show that women own 1.55% of TV stations and 2.98% of radio stations.⁵⁷ In contrast, the census data used by the Beresteanu and Ellickson Study shows that women own 13.67% of “TV stations” and 14.01% of “radio stations.”⁵⁸ Similarly, the FCC data show that minorities own 1.15% of TV stations and 2.76% of radio stations.⁵⁹ In contrast, the census data used by the Beresteanu and Ellickson Study shows that minorities own 16.96% of “TV stations.” These differences present huge disparities that need to be resolved. As Justice Scalia points out in his dissent to the denial of *certiorari* in *Concrete Works of Colorado v. Denver*,⁶⁰ if the government finds the use of its data too onerous, “it should have employed some other measure to make the statistical analysis valid-which obviously requires, as *Croson* said, that comparison be made, not with all minority firms, but with those that are qualified, willing and able to take the [government] contracts.”⁶¹

Fourth, many courts hold that a statistical analysis of discrimination in the private sector market is fundamentally flawed when the data used fails to include a comparison of revenues of comparable minority and women business enterprises and majority firms based on experience, age, or size of firms, and fail to take into account other variables, which might impact on minority and women business enterprise operations.⁶² The

⁵² U.S. Census Bureau, 2002 NAICS Definitions, 515112 Television Broadcasting, *available at* <http://www.census.gov/epcd/naics02/def/ND515120.htm> (last visited on Oct. 27, 2007).

⁵³ Comments of Sandoval, Byerly, and Folami, *supra* note 50 at 10-14.

⁵⁴ *Id.*

⁵⁵ Arie Beresteanu and Paul B. Ellickson, *supra* note 1 at 3.

⁵⁶ B. D. McCullough, *supra* note_ at 3; Derek Turner and Mark N. Cooper, LACK OF RACIAL AND GENERAL DIVERSITY IN BROADCAST OWNERSHIP AND THE EFFECTS OF FCC POLICY: AN EMPIRICAL ANALYSIS (2007), *available at* http://web.si.umich.edu/tprc/papers/2007/735/Turner_TPRC.pdf. (last visited Oct. 27, 2007).

⁵⁷ Derek Turner and Mark N. Cooper, *supra* note 56 at 1.

⁵⁸ Arie Beresteanu and Paul B. Ellickson, *supra* note 1 at 5-8.

⁵⁹ Derek Turner and Mark N. Cooper, *supra* note 56 at 1.

⁶⁰ *Concrete Works of Colorado, Inc. v. City of Denver*, 540 U.S. 1027 (Scalia Dissent).

⁶¹ *Id.*

⁶² *See, e.g., Concrete Works of Colorado*, 540 U.S. 1027 (Scalia Dissent); *Engineering Contractors Assn. of South FLA., Inc. v. Metropolitan Dade Cty.*, 122 F. 3d 895, 917 (11 Cir. 1997)(after regression analysis was conducted controlling for firm size statistical disparities became insignificant).

Beresteanu and Ellickson Study fails to analyze or compare the minority or women statistics through any of this analysis.

The methodology used by the Beresteanu and Ellickson Study is legally flawed and of unsound methodology.

V. Capital Market Discrimination

The Beresteanu and Ellickson Study concludes that “the observed ownership asymmetries are economy-wide, [and] they are undoubtedly linked to broad systematic factors. While some of this pattern may well be due to discrimination, the most direct explanation lies in unequal access to capital (which may itself be rooted in discrimination, or other long standing disadvantages [sic].”⁶³ The Study notes the start-up costs in the broadcast industry could be “\$160,000 for equipment alone.”⁶⁴ The Study then examines the difference between the mean and median net worth between minorities and whites in 2004; it concludes that “[t]hese numbers conclude that, in terms of access to personal capital, there is a great deal of inequality across these groups”⁶⁵ and that “nonminorities have access to between 8-to-14 times as much personal capital as minorities.”⁶⁶ Lastly, they conclude that

Nonminorities control a much larger fraction of aggregate wealth than minorities, allowing them to own a much larger fraction of business. Assuming that aggregate wealth is a strong indicator of the ability to finance large commercial ventures, in order to change ownership patterns we need to either change the aggregate distribution of wealth or otherwise increase access to capital.⁶⁷

The Beresteanu and Ellickson Study did not have data on the difference in access to capital by gender.⁶⁸ The Study acknowledges that business ownership is positively related to income and negatively to poverty so that access to wealth also explains the gender disparity that they observed.⁶⁹

In his peer review, Professor McCullough observes that “[w]hile the authors make a *prima facie* case that lack of access to capital is important, the actual assertion of such link between race and access to capital would require a more careful analysis.”⁷⁰ He suggests that this analysis would be a full study in itself and would require an analysis of other factors such as education and personal net worth.⁷¹

⁶³ Beresteanu and Ellickson, *supra* note 1 at 8.

⁶⁴ *Id.* citing <http://www.christianradio.com/sterling/enhanced.html>. (last visited on Oct. 27, 2007).

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ B.D McCullough, Peer Review, *supra* note 10 at 2-3.

⁷¹ *Id.*

The Beresteanu and Ellickson Study makes a *prima facie* case of unequal access to capital. This analysis is consistent with the prevailing literature. The Department of Justice has found “[o]ver and over again, studies that show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with identical collateral and borrowing credentials.”⁷² One of the FCC market entry barrier studies found that the loan applications of minority-owned broadcast firms were less likely to be accepted than those applications of nonminority firms.⁷³ The study also found that minority-owned firms also “paid higher interest rates on their loans” than nonminority firms.

However, for the Beresteanu and Ellickson Study to be legally sound, it needs to examine the unique challenges that broadcasters confront in using the FCC license as collateral to secure a loan, and the role that auctions play in the broadcast applicant’s ability to raise capital. Moreover, the Beresteanu and Ellickson Study lacks an analysis of the particular harm, if any, to minority- and women-owned broadcasters and broadcast applicants.

The Beresteanu and Ellickson Study of capital market discrimination should have: (1) performed a statistical regression controlling for race, education, age and personal income of broadcast applicants’ access to capital markets; (2) examined how the use of “Old Boy Networks” tends to exclude minorities and women from broadcast deals and capital;⁷⁴ and (3) examined how advertising industry discrimination against minority-formats and owners might undervalue minority-owned stations and their revenue possibly affecting those stations’ ability to raise capital;⁷⁵ and (4) examined the effect of FCC policies incorporating access to capital such as auctions that effect minority and female participation and success.⁷⁶

VI. Media Content and Minority and Women Ownership

Historically, the FCC has relied on promoting a diversity of views as justification for its programs to encourage minority and women ownership. The Supreme Court upheld these minority-ownership programs in *Metro Broadcasting, Inc. v. FCC*.⁷⁷ The Supreme Court specifically provided that a “diversity of views and information on the airwaves serves important First Amendment values [and the] benefits redound to all

⁷² See Proposed Reform to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26042, 26057-58 (May 23m 1996).

⁷³ WILLIAM D. BRADFORD, DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES v-vii (Dec. 5, 2000), available at http://www.fcc.gov/opportunities/meb_study/capital_market_study.pdf. (last visited Oct. 27, 2007).

⁷⁴ Comments of Sandoval, Byerly, and Folami, *supra* note 50 at 19.

⁷⁵ See Philip Napoli, *Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences*, 46 J. BROADCASTING & ELECTRONIC MEDIA 169, 181 (2002).

⁷⁶ *Id.*

⁷⁷ 497 U.S. 547 (1990).

members of the viewing and listening audience.”⁷⁸ In 2003, the Supreme Court found that racial diversity is a compelling interest for student body diversity in higher education.⁷⁹ Writing for the majority, Justice Sandra Day O’Connor noted that benefits of diversity are “not theoretical but real,” and noted that “major American businesses . . . in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures ideas and viewpoints.”⁸⁰ More recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court upheld the finding that diversity is a compelling government interest.⁸¹ Justice Anthony Kennedy’s concurring opinion, stressed that the government should use race-neutral means before using race as a factor. But he concludes that if race-neutral means fail to work, then the government can use race as one of several factors used to achieve diversity.⁸²

Achieving racially diverse broadcast ownership has been a core FCC value for the past thirty years.⁸³ Over the past twenty years, there have been several studies that showed a link between minority ownership and minority content,⁸⁴ including one of the FCC market entry barrier studies that found that minority station owners were more likely to present racially diverse programming and focus on the minority community.⁸⁵ There has not been a recent study of the link between gender ownership and diversity of broadcast content.⁸⁶

The Beresteanu and Ellickson Study suggests that there be a quantification and evaluation of ownership benefits. They cite recent research of Gentzkow and Shapiro⁸⁷ that suggests that “media content is driven much more by demand considerations (i.e., consumer preferences) than supply factors (i.e. owner preferences).”⁸⁸ They note that the Gentzkow and Shapiro Study of newspapers found that “conservative” newspapers

⁷⁸ *Id.* at 568. (In 1995, the Supreme Court raised the standard of review used to analyze race-based federal programs to strict scrutiny and overturned the Metro Broadcasting only to the extent that it applied intermediate rather than strict scrutiny. See *Adarand v. Peña*, 515 U.S. at 227 (1995)).

⁷⁹ *Grutter v. Bollinger*, 539 U.S. at 325 (2003).

⁸⁰ *Id.* at 330.

⁸¹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007)(Roberts C.J., Plurality Opinion).

⁸² *Id.* (Kennedy, J. Concurring Opinion).

⁸³ Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965).

⁸⁴ See Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities* (Oct. 2001); available at http://www.fcc.gov/ownership/roundtable_docs/waldfogel-c.pdf (find[ing] evidence that policies promoting minority ownership increase the amount of minority-targeted programming); Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 CAL. L. REV. 841, 869 (1995).; CONGRESSIONAL RESEARCH SERVICE, *MINORITY BROADCAST STATION OWNERSHIP AND BROADCAST PROGRAMMING: IS THERE A NEXUS?* (June 29, 1988) (On file with the library of Congress).

⁸⁵ Christine Bachen et al, *Diversity of Programming in the Broadcast Spectrum: Is There A Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* (Dec. 1999), available at http://www.fcc.gov/opportunity/meb_study/content_ownership_study.pdf (last visited Oct. 28, 2007).

⁸⁶ See *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1994) (finding that FCC established no links between gender diversity and ownership).

⁸⁷ Matthew Gentzkow and Jesse M. Shapiro, *What Drives Media Slant, Evidence from U.S. Daily Newspapers*, May 24, 2007, available at <http://faculty.chicagogsb.edu/matthew.gentzkow/biasmeas081507.pdf> (last visited Oct. 28, 2007).

⁸⁸ Arie Beresteanu and Paul B. Ellickson, *supra* note 1 at 13.

provide “conservative” viewpoints and “liberal” newspapers provide “liberal” viewpoints because their subscribers prefer it.⁸⁹ Therefore, “media bias” is a “profit maximizing choice.”

Scholars have found broadcast coverage of minorities to be either nonexistent or overtly stereotypical. From 1995 to 2004, the broadcast networks aired an estimated 140,000 stories, but just over 1,200--less than one percent--were about Latinos--all during a time when the Latino population in the United States doubled.⁹⁰ Of those stories, 36 percent were about immigration, with an emphasis on the related social and economic problems.⁹¹ A 2005 study found that of 102 primetime network programs, just 14 featured an Asian American actor, and only one featured two or more.⁹² Other studies have deplored how local network news has exploited crime stories featuring alleged African American perpetrators.⁹³ Other studies have found that people watch local news because they need the information, but it may cause viewers to be involuntarily biased against people of color.⁹⁴ A recent report on the media's representation of young men of color, published by the Joint Center for Political and Economic Studies, found that the media “encourage whites' tendencies to imagine, exaggerate, and misunderstand group differences” even though many whites profess egalitarian beliefs.⁹⁵

Joel Waldfogel, an associate vice dean at the University of Pennsylvania's Wharton School, examined the relationship between Hispanic voter turnout and the presence of local Spanish-language television news. Dean Waldfogel found that the media functioned in “lumpy markets” where the fixed costs are high and preferences among consumers vary widely--which means that media markets often do not serve consumers at the margins.⁹⁶

Waldfogel surveyed 254 metro areas across the country, examining the relationship between media markets and voting patterns.⁹⁷ He found that voter turnout among non-Hispanics hovered around 58 percent in markets that had local Spanish-language news as well as those that did not.⁹⁸ But the numbers were dramatically different for Hispanics

⁸⁹ *Id.*

⁹⁰ FEDERICO SUBVERI, NETWORK BROWNOUT REPORT 2005: THE PORTRAYAL OF LATINOS AND LATINO ISSUES ON NETWORK TELEVISION NEWS 2004, WITH A RETROSPECTIVE TO 1994 (JUN. 2005) at 5 <http://www.unityjournalists.org/images/NAHJbrownout0616.pdf> (last visited Oct. 28, 2007).

⁹¹ *Id.* at

⁹² ASIAN PACIFIC AMERICANS IN PRIME TIME: SETTING THE STAGE, (2005) available at <http://www.advancingequality.org/?id=76> (last visited Oct. 29, 2008).

⁹³ See generally, ROBERT M. ENTMAN AND ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA.

⁹⁴ Jerry Kang, *Trojan Horses of Race*, 118 HARVARD L. REV. 1489, 1566 (2005)

⁹⁵ See generally, Robert M. Entman, YOUNG MEN OF COLOR IN THE MEDIA: IMAGES AND IMPACTS, available at <http://www.jointcenter.org/publications1/publication-PDFs/DellumsReport1JanA.pdf> (last visited Oct. 29, 2007).

⁹⁶ Neil Carlson and Leonard M. Baynes, *Rethinking the Discourse on Race: A Symposium on How the Lack of Racial Diversity in the Media Affects Social Justice and Policy*, 21 ST. JOHN'S J. LEGAL COMM. 575, 598 (2007).

⁹⁷ *Id.*

⁹⁸ *Id.*

with voter turnout of 37 percent in areas that did not have local Spanish-language news, and 45 percent for areas that did.⁹⁹ “The big effect is that [local Spanish-language news] raises the Hispanic turnout”¹⁰⁰

The dearth of minority programming--especially for Asian Americans, Latinos, and American Indians--suggests that consumer demand is not driving content. Moreover, reliance on the Gentzkow and Shapiro Study to make conclusions about the relation between content and race in broadcasting is faulty logic. The Gentzkow and Shapiro Study analyzed political bias in *newspapers*, *NOT* racially diverse content in *broadcasting*.¹⁰¹ In contrast, the Beresteanu and Ellickson Study examines *race and gender in broadcasting*. These are quite different issues and two quite different studies involving two very different media. The Beresteanu and Ellickson Study’s reliance on the Gentzkow and Shapiro Study is misplaced and fails to prove that media ownership policies need to be rethought or reexamined. However, there does need to be a reexamination of gender ownership and content.

VII. Broadband Subsidies

The Beresteanu and Ellickson Study states “that more people are getting news and information from nontraditional sources, the most important of which is the Internet. There are news sites, information sites, opinion sites, and a wide array of ‘blogs’ catering to almost every segment of the population.” The Study suggests that if the government is interested in maximizing the number of voices that get heard (or at least have the opportunity to get heard), subsidizing broadband access is a relatively cheap and effective method of doing so that has little (if any) downside.”¹⁰²

Increasing broadband access is a worthwhile goal. However, the Broadband and Internet are distinct markets from broadcasting. The Supreme Court found that product markets are to be determined by “the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”¹⁰³ According to the Court, the submarkets are determined “by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”¹⁰⁴

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Comments of Sandoval, Byerly, and Folami, *supra* note 50 at 20-21. (pointing out the problems in Gentzkow and Shapiro methodology by excluding all non-English-language newspapers, including those that are minority- and women-owned and including only daily newspapers which excludes most African-American –owned newspapers).

¹⁰² Arie Beresteanu and Paul B. Ellickson, *supra* note 1 at 14.

¹⁰³ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁰⁴ *Id.* at 325-26.

In advocating for increased focus on broadband, the Beresteau and Ellickson Study fails to conduct a market analysis to determine whether the broadband and Internet markets is a substitute for the broadcast market. Broadband and Internet appear to be separate communications markets than broadcasting and do not appear to be ready substitutes for broadcasting. First, studies show that 99% of the public has a television in their home. In contrast, the most recent Pew Internet and American Life Project Study shows that only 47% of Americans have broadband access.¹⁰⁵ Twenty-nine percent of the public state that they have no Internet access, and 27% do not own a computer.¹⁰⁶ The Digital Divide has been well documented and still exists. Seventy-one percent of white Americans have Internet access as compared to 60% of African Americans and 56% of Latinos.¹⁰⁷ Second, the Third Circuit in *Prometheus* observed that although it was reasonable for the FCC to conclude the Internet contributed to viewpoint diversity, the FCC nevertheless gave the Internet too much weight because it is not a complete substitute for newspapers and broadcast stations.¹⁰⁸ The Court found the FCC record contained little persuasive evidence that the Internet contained a significant presence of local news sites.¹⁰⁹ The Court found that “[t]here was a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The Court found that these websites did not provide an “independent” viewpoint and should not be considered as contributing diversity to local markets.”¹¹⁰ Similarly, in the case of minority-oriented content, the Beresteau and Ellickson Study fails to show that minority consumers substitute the Internet or broadband for broadcast stations. Third, although the government currently subsidizes Internet access at schools and libraries,¹¹¹ such access provides second-class access for Internet users. People are limited by the hours of operation of the schools and libraries. They are likely to be subjected to the budgetary limitations of the government institution, including limited technical assistance. They may have to wait on long lines to gain access. It is no comparison to watching television in the comfort of one’s home.

VIII. Conclusion:

The Beresteau and Ellickson Study is overly simplistic. Its assumptions and methodology are flawed. It fails to analyze the effectiveness of the Failed Station Rule (“FSSR”) and fails to evaluate any of MMTC’s recommendations to improve minority ownership, each of these required by Third Circuit on remand. Instead, the Beresteau and Ellickson Study develops a legally flawed and unsound methodology that inflates the

¹⁰⁵ John B. Horrigan and Aaron Smith, Home Broadband Adoption 2 (2007)(Pew Internet and American Life Project), available at http://www.pewinternet.org/pdfs/PIP_Bropadband%202007.pdf (last visited Oct. 28, 2007).

¹⁰⁶ *Id.* at 3.

¹⁰⁷ Susannah Fox and Gretchen Livingston, Latinos Online 10 (Pew Internet and American Life Project) (2007), available at http://www.pewinternet.org/pdfs/Latinos_Online_March_2007.pdf. (last visited Oct. 28, 2007).

¹⁰⁸ *Prometheus Radio Project*, 373 F.3d 372, 406.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See generally *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87, 335-78 (1996).

percentages of minority and women broadcasters by using Census data that includes music program distribution, piped-in music services and network television. The Beresteanu and Ellickson Study also fails to compare the data by experience, age, or size of the firms.

Although the Beresteanu and Ellickson Study makes a prima facie showing of unequal access to capital markets as the basis for the disparity in minority ownership, the Study fails to do a deeper analysis of the problem. Lastly, the Beresteanu and Ellickson Study fails to show that diverse ownership does not lead to diverse content or that Broadband and the Internet solves the problems of minority and women underrepresentation in the broadcast market. Overall, I find the Beresteanu and Ellickson Study is insufficient to meet the rational decision-making standard.