Comment: Antitrust, Concentration, and Competition

Nolan A. Bowie

Lawrence White's paper, "Antitrust and Video Markets: The Merger of Showtime and The Movie Channel As a Case Study," is an excellent tutorial on antitrust law as applied to the video industry and it reveals how the process really works: affirmative inaction. Dribbling, but no baskets.

Notwithstanding the logic and thoroughness of the Antitrust Division's highly touted guidelines and procedures, or that over a dozen attorneys and economists in the division were involved in the investigation and evaluation of the proposed Showtime–TMC merger, or the division's conclusion that the joint venture constituted a violation of the Clayton Act, in the end, Showtime and The Movie Channel obtained, almost intact, the result which they originally sought. Rather than reap common control of the market through merger, the parties achieved common control through a more informal affiliation. Following a year's worth of investigation, evaluation, negotiation, and counter proposals, the cable system owners of Spotlight, Showtime's former competitor, decided to abandon their plans to expand their service and instead sold it to Showtime–TMC. Simultaneously, Paramount entered into a five-year exclusive distribution agreement with Showtime–TMC. The result was greater concentration of control in the video programming market. Therefore, the Antitrust Division's apparent premises that "antitrust has played a substantial role in affecting the structure of these markets, and recent events have indicated that antitrust is likely to continue to be important," are wrong. The Showtime–TMC case study clearly shows how the antitrust laws, as presently administered, do not really protect trade and commerce against what appears to be an unlawful restraint. If the Showtime–TMC model represents the norm, then the public is provided with an invaluable look at the process of antitrust litigation at the Department of Justice.

The division's antitrust activities in the Showtime–TMC case seem to have been effective only to the extent that they served to educate at public expense possible violators of the antitrust laws. While the division may have gone through all the right moves and motions in their investigation and evaluation, the game concluded with "no baskets" and, moreover, without the benefit of full public disclosure regarding the real reasons why certain decisions were reached.

This observation is not mere cynicism but is based on White's revelation that: "In the end, it was William F. Baxter, the Assistant Attorney General for Antitrust, who made the decision in this case, and it is only he who truly knows what specific analysis and arguments led to the specific decisions."

Kenneth Thorpe, in "The Impact of Competing Technologies on Cable Television," puts the reader on notice right from the beginning that little is in fact known about the subject, and that the recent debate over the regulation of cable television is characterized by a lack of an empirical foundation. Surely, however, some additional empirical information concerning this area must exist within the industries involved, though it is made available or accessible only on terms set by the organization possessing it. Such proprietary information, i.e., marketing research data, long-term projection studies, etc., is normally exchanged only for compensation. The implications of this "privatization" of information on the research community are made clear in Thorpe's paper. His attempt to show the nature of the multichannel video distribution industry is hampered by the lack of empirical information.

Thorpe finds that STV appears to have a moderate impact on the price-cost margin of cable operation *provided* "it is suitably differentiated from cable," *provided* it had entered an area before cable television, and further *provided* that it is not owned and operated by the very same cable operators attempting to protect the market for themselves. The nature of the conditions and provisos leads to the conclusion that "most cable operators do not face competition from another distributor of pay programming. Further, even when competition is technically feasible, it often does not occur." This conclusion is the inescapable result of comparing single tier pay services with multichannel options. Why would an educated consumer pay for a single video channel when multichannel pay cable services are also available offering similar programming, more choices, and better reception for a similar price?

Cable, unlike other pay video services, is a monopoly, since cable franchises are usually granted on some de facto exclusive basis. The real issue therefore is whether any business can fairly compete with a monopoly? If not, then regulation is justified, at least when a cable monopolist begins to abuse its market power. Thus, if cable operators begin to overprice their services to reflect their monopoly power, rate regulation, common carriage regulation, content regulation, or even municipal ownership may be necessary to protect the public.

"Regulation of Broadcast Station Ownership: Evidence and Theory," by Stanley Besen and Leland Johnson, presents a pro-deregulation brief in support of undermining or eliminating government restrictions on ownership of broadcast stations. In their zeal to promote the relaxation or elimination of the rules concerning group ownership, regional concentration, and broadcast television-cable cross-ownership as well as the duopoly and one-to-a-market rules, they base their conclusions on a number of questionable and still untested assumptions. They acknowledge that the available empirical evidence on the effects of group ownership on anti-competitive behavior, economic efficiency, and diversity is severely limited, yet they nevertheless speculate, based on "the pattern of evidence, and our own analysis," that either keeping or eliminating the rule would have little effect, except, perhaps, in small markets. This conclusion, if it is to be believed, would demand less speculation and more hard data especially since it so directly challenges the public interest tradition of United States information policy.

U.S. policy has traditionally encouraged diversity in both the source and the content of information because of the belief that a sufficient diversity of source and content will lead to a diversity of ideas. The broadcast ownership rules were, and still are, intended to encourage a number of sources in the dissemination of information to a particular audience. This rationale was reflected in 1940 when the Federal Communications Commission first adopted a rule that ownership or control of more than six FM stations would be considered "contrary to the public interest" (FCC 1940). Again in 1953, the Commission reaffirmed this principle in its *Rules and Regulations Relating to Multiple Ownership* wherein it stated:

> It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees. . . .
>
> The fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints *as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules, diversification of program services is furthered without any governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee.* (FCC 1953)

In 1956, the U.S. Supreme Court upheld the 7-7-7 multiple ownership rule as "reconcilable with the Communications Act as a whole" (*U.S. v. Storer,* 1956).

Nothing is offered in the Besen and Johnson economic analysis either to show why elimination of the group ownership rule would have but "little effect" on the market or to successfully undermine the above-stated rationale affirmed by the Supreme Court. Moreover, nothing is mentioned about the possible consequences that elimination of the group ownership rule would have on minority ownership opportunities, or on the concept of "localism," or concerning the preservation of important democratic values.

It is worth noting here that in its *Statement of Policy on Minority Ownership of Broadcasting Facilities,* the Commission only six years ago said:

> It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." (FCC 1978b)

Elimination of the ownership limitation rule would most surely result in fewer ownership opportunities for minorities (who currently own less than 2 percent of existing broadcast facilities) since they (as well as any new entrants) would be in direct competition with rich and powerful corporations attempting to garner the lion's share of broadcast properties. In addition, the selling prices for broadcast stations are apt to increase beyond even the record setting prices at which some stations are selling today (e.g., VHF television station KHOU-TV Houston, sold for $342 million in 1983) as ever larger group owners compete for choice stations to add to their networks. Such a free-market in broadcast stations is bound to drive the price threshold beyond the economic reach of minorities, whose greatest existing barrier to broadcast ownership is the lack of sufficient economic clout.

If the ownership rules were eliminated, the concept of "localism," would soon follow in its wake.

The tradition of favoring localism is accurately stated by Christopher Sterling (1979):

> The FCC and its predecessors have clearly held that the "best" broadcast station is locally owned and operated. Such ownership was deemed in the public interest as it would presumably be closer to local needs and concerns, and thus the station would more adequately reflect and project that community than some absentee-owned operation or central network.

Localism not only enhances diversity in programming but also in ownership. Yet, Besen and Johnson would have one believe that abolition of the ownership rules is unlikely to influence diversity and that changes in these ownership rules are likely to have little effect on social welfare.

In its decision in *Associated Press v. United States* (1945), the Supreme Court declared that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." This policy was reiterated in *FCC v. National Citizens Committee for Broadcasting:* "If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible" (1978).

Has competition in the video market become so intense during the past ten years to justify removal of the ownership restrictions and their public interest benefits? Is there no linkage between broadcast ownership and the power to influence public opinion? Less than a decade ago, the FCC, in its *Second Report* on TV-Newspaper Cross-Ownership said: "The significance of ownership from the standpoint of "the widest possible dissemination of information" lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest" (1975a).

Besen and Johnson's conclusions generally support policies which would result in the limited spectrum being concentrated and controlled by fewer players rather than more. Such a course would ultimately lead to oligopolistic or monopolistic patterns in the broadcast field, especially in light of what Lawrence White has shown us about the effect of the Antitrust Division's policies and enforcement approach.

Besen and Johnson admit that relaxing or abolishing the various ownership rules would not "confer any notable benefit on society." Thus, there is no valid reason or legal basis to change the rules. Simply put, Besen and Johnson fail to consider the potential detrimental costs to the public interest nor do they show that such costs are outweighed by any anticipated benefits as would be required under the holding in *Citizens Communications Center v. FCC* (1971).