RECISSION OF THE FCC's GROUP OWNERSHIP RULES--PROBLEMS POSED BY DEFICIENT EVIDENCE IN BROADCAST DE-REGULATION

by

Harvey J. Levin

Augustus B. Weller Professor
of Economics
Director
Public Policy Workshop
Hofstra University

May 1985

This paper was prepared for the Annual Meeting of the International Communication Assocительно, Honolulu, Hawaii, May 1985

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I. Scope and Background of Current Group Owner Proceeding

After frequent inquiries, deliberations, and regulatory scrutiny, on August 9, 1984, the Commission proposed to terminate its so-called Seven Station Rule Proceeding by raising the existing ceiling on multiple station ownership from seven television, seven FM, and seven AM radio stations, to 12 stations in each case.[1] It further conceived this to be a "transitional limitation" only, to expire six years hence, "unless experience shows that continued Commission involvement is warranted". The FCC Report and Order in Docket No. 83-1009 further stated that "(t)he Commission will continue to scrutinize each individual acquisition to assure itself that the acquisition does not contravene any of the Commission's public policy concerns, particularly those related to diversity and competition." (Report, para. 5).

Then, at para.9, the Report noted that the present Seven Station Rule "may have been based in large degree upon a false assumption," at least insofar as the alleged monolithic views group owners on their

[1]See FCC Report & Order in Docket No. 83-1009, August 9, 1984 (hereafter called Report).

stations are concerned. "Statistical evidence adduced in ... this proceeding", the Commission continued, "...shows that group owners broadcast more issue-oriented programming than non-group owned stations (emphasis added)(Report, para. 9)". And most important, the Report stated that because of this "plus" in furthering the diversity of ideas through issue-oriented programming, "it may be said that group ownership actually furthers, rather than frustrates, the foremost First Amendment goal of augmenting popular discussion of important public issues." These benefits of group ownership, the Commission concluded, "provide an important basis for our decision to eliminate the Rule." (Report, para. 9)

In commenting, finally, on its original goal in adopting the Seven Station Rule in 1948, the Report again underscored that "the fundamental purpose of its new national ownership rules was both 'to promote diversification of ownership in order to maximize diversification of program and service viewpoints', and to 'prevent any undue concentration of economic power contrary to the public interest.' These two theories -- the need for diversity of programming and editorial viewpoints, and the need to ensure that no competitive harm occurs -- are the two explicit rationales for the Commission's Seven Station Rule." (Report, para.17)

My paper peruses the Commission's now effectuated proposed rule change[2] as a case study in U.S. broadcast de-regulation. In

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[2]On February 1, 1985, the Commission further revised its initial Report & Order responsive to petitions for reconsideration filed by the Motion Picture Association of America, the National Association of Television Program Executives, the National Black Media Coalition, and Westinghouse Broadcasting and Cable (Group W), among others. (Memorandum Opinion & Order in Gen. Docket No. 83-1009, para. 1, footnote 2.) Of special interest here is the Commission's latest

particular, I focus on program composition and diversity, and secondly, on some economic issues the Commission also cites to justify its proposed repeal of the Seven Station Rule. Briefly, the paper reviews the Commission's preliminary factual findings and the assumptions from which it concluded that the Seven Station Rule should be replaced by a Twelve Station Rule for six years after which all restrictions on station ownership would be eliminated.[3] The basis of this appraisal is my own independent analysis and empirical assessment of the present rule, as well as of a still larger number of important policy issues.[4]

I offer these results here as no "last word" on such complex and hotly contested issues. However, an action as farranging as this should not be based on faulty factual or analytical premises.[5] Nor does the fact that "no better" or "more complete" evidence was transmitted by the parties justify an action of this magnitude, without the Commission first discharging its affirmative public interest responsibilities to generate such evidence. Nor, specifically, without considering alternative safeguards of its reputed objectives to minimize any unwanted de-regulatory side-effects.

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adoption of audience limits as well as numerical ceilings on group ownership. On one hand, the 12-station numerical ceiling was retained. (Id., para. 38). Beyond this, the Commission found that the "maximum audience reach available...should be an amount no greater than 25% of the national audience...as a percentage of all...television households." (Id., para. 39).

[3] Id., para.

[4] See Levin, Fact and Fancy in Television Regulation (Russell Sage Foundation, 1980), passim.

[5] The deficiencies itemized below are in no way explicitly dealt with or corrected in the Commission's Memorandum Opinion & Order. See especially paras. 17-22.

II. Five Conceptual and Factual Deficiencies in the Commission's Report and Order

Illustrative of what was needed in the abovementioned problem areas were systematic studies to rectify a number of serious factual or conceptual deficiencies:

A. The Report's Analysis of "Quality" Was Confused

In its laudatory references to the popularity of local news programming carried by group owners, the Commission confused the goal of market efficiency with that of program quality in terms of critical standards of journalistic, artistic, and electorate-informing excellence. "Quality" was at one point virtually equated with "popularity" whereas at other points it was related to meritorious awards made by distinguished committees or review boards.

Illustrative of the confusing evidence which tacitly assumed that "quality" was tantatamount to "popularity", was Allen Parkman's admittedly sophisticated analysis of ratings data for early and late night local news programs in 1982.[6] Note that no such study was ever directly transmitted to the Commission during its proceeding. Rather, on its own initiative the Commission made explicit reference to Parkman's results (Report, para.44). In that study, Parkman in effect established that "group owned stations (had) significantly higher ratings (i.e., viewership) on their local news programs than nongroup". Although not directly analyzed there, moreover, the author also broke out network from nonnetwork group owned stations in his assessment. For early evening news, he found no superiority of

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[6]See Allen Parkman, "The Effect of Television Station Ownership on Local News Ratings," Rev. of Econ. and Stat., Vol. 64, No. 2 (May 1982), pp. 289-95.

audience ratings on network owned stations, but for _late_ night news programs, he found that network group and nonnetwork group owned stations, both carried programs with significantly higher audience ratings than nongroup stations did.

For present purposes there was no question about Parkman's sophisticated methodology, or about the prestigious journal where his paper appeared. More serious were erroneous inferences the Commission drew from Parkman's findings, and the use to which it put them.

Thus ratings data are related to the ratio of actual to potential viewing audience for particular programs. Therefore, they hardly constitute any sound yardstick by which to assess "program quality" in artistic, educational, or information terms (_Report_, para. 44, note 46). The confusion was further aggravated in para. 48 where the Commission next reported NBC's "lengthy list of honors gained by NBC-owned stations, including national honors such as the George Foster Peabody Award; Ohio State University awards for meritorious achievement in educational, informational, and public affairs broadcasting..etc., etc." In making a similar point about local news shows on CBS owned TV stations, the Commission then further referred in note 56 of para. 49, to "a total of at least 65 awards from professional associations in 1983...as well as a combined total of 26 Emmy Awards..." Reference was made, finally, to CBS claims that "(t)he excellence of (its) news service has been recognized in the dozens of awards each station has received from leading professional organizations and community organizations."

These were obviously quite different standards of quality--the

ratings data without question approaching a bald market standard, with the "awards" evidence approaching a nonmarket standard of artistic and journalistic excellence, set by notable critics and organizations. It is by no means clear that such award-winning O&O programs themselves had higher ratings than comparable programs of nongroup owned stations, or even as high ratings as the news and public affairs programs on NBC-owned stations which the Commission cites elsewhere in its Report (para.47).

This inconsistent use of ratings and awards data as evidence of quality is further underscored by the well-known fact that PBS programming, widely recognized to be meritorious in cultural, informational, educational, and public affairs terms, often have audiences so small as to be non-ratable by the established ratings services. On occasion, PBS has virtually had to contract for special surveys to create such ratings, and gone even further, to try to devise methodologically different forms of ratings, which basically differ from those used to measure commercial program audiences. In short, commercial ratings data at most reveal a program's popularity, not its quality in educational, informational, or artistic terms.

Lastly, if the FCC chose to rely on Parkman's ratings analysis for local news, it should also have considered the further evidence that, for all prime time programming, network owned VHF stations had audience ratings for metropolitan markets not significantly different from those of network-affiliated VHF stations, not owned outright by the networks. As in the Parkman analysis, these other studies also took account of many carefully selected control factors, and, on that score, yielded statistics far more reliable than those to

which the Commission gave special weight in its discussion (in Report para. 47), of NBC and CBS studies of program time devoted to news and public affairs on network owned stations.[7]

B. Do Network-Owned Stations Carry Significantly More Issue-Oriented Programming Than Other Stations?

In answering this question, the Commission cited deficient statistical evidence on the program composition of network group and nongroup-owned stations, and did so even though said evidence, submitted by the parties, was seriously marred by faulty, unscientific methodology. The Commission then gave such notably deficient evidence "special weight" in its evaluation. Yet more systematic, scientific investigations had already been conducted, yielded quite different results, and utilized a far more rigorous and scientifically acceptable methodology. It is therefore unclear why the Commission chose to ignore this more compelling evidence.

As for news, public affairs and local non-entertainment and informational programming, e.g., one wonders what the National Association of Broadcasters study by consultants Litwin and Wroth (cited in Report, para. 45, note 46), and the NBC studies reported in para. 46 (note 51), and para. 47 (note 52), would have concluded had they been conducted with statistical methodology as sophisticated and rigorous as Parkman's. In fact, however, the Litwin-Wroth study cited at length by the FCC, must be largely discounted because of its badly faulted methodology.[8]

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[7]See, e.g., Levin, Fact and Fancy in Television Regulation, tables 6.5, 5.3, and associated text.

[8]The Commission itself rejected Litwin-Wroth as unreliable in an earlier Cross Ownership Proceeding. It was actually ignored in the Commission's Final Report & Order in Docket No. 18110, April 6, 1970,

The Commission itself quite properly discounted Litwin-Wroth in 1970, and one therefore wonders why FCC gave it so much attention in the present proceeding, or indeed, why the N.A.B. formally transmitted it again at all, in the first place. So subjective an appraisal of media performance, by such an unrepresentative group of respondents, aligned with the community's dominant social groups, in a mere six of the 200 markets with TV stations operating in 1969 (when when Litwin-Wroth was originally filed by N.A.B.), was at best a slim reed for the Commission to lean on.[9]

At the very least, then, systematic analysis of the amount of time devoted to local news, local public affairs, all non-entertainment, and all information, to say nothing of the revenues devoted to such programming, is what was doubtless needed for any persuasive case, and it is disquieting that the Commission should ground a de-regulatory decision as important as this, on evidence as flawed as the above.

Nor was the NBC tabulation which compared its owned and operated stations, and all other stations in the top 25 markets, any more reassuring (Report, para.47). In footnote 52, the Commission observed that the NBC figures "would have been more useful (had they)

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paras. 36-40. See also, Memorandum Opinion & Order, March 2, 1971, paras. 22-28 (especially para. 25).

[9]See especially, detailed critique in Barnett, "Cable Television and Media Concentration: Part I", Stanford Law Review, January 1970, pp. 260-73. At p. 263, Prof. Barnett writes: "The research methods employed by Litwin were so biased in favor of common ownership, and the premises so arbitrarily contrived to the same end, as to vitiate all the findings and conclusions opposed to diversification. At the same time, despite the biased methodology and the attempts to minimize unfavorable results, the study in fact reports a significant incidence of public harms resultinmg from concentration of media control at the local level."

controlled for network affiliation and VHF status as well." But the FCC might have gone still further in challenging the reliability of NBC's findings, and their claims about the superiority of NBC-owned stations in the quantity and quality of their news and public affairs (local or otherwise), in prime time, or over the whole broadcast day.

In any case, NBC's statistical comparison of O&O and non-O&O program time in the top 25 markets, is really impossible to evaluate without isolating out the relative impact on this comparison of control factors like channel type, network affiliation, and also number of TV homes in the market, age of station, educational status of potential audience, number of VHFs in the market, and estimated station revenue.

Without considering factors like these among others, as well as statistical interactions between them, what may superficially appear to be a superior programming performance by NBC O&Os, may in actual fact be due in some (perhaps large) measure to these _other_ (control) factors (and _not_ to ownership). The same may indeed be true for the studies of CBS and ABC O&Os.[10] We simply do not know. In a

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[10]The Commission actually described the CBS performance in terms even more tenuous than it applied to NBC. To state that each CBS-owned station "devotes...from one and three quarters to three and a quarter hours of each weekday's programming to local hard news broadcasts..."(para. 49); or that 7 1/2 to 17 hours of each station's weekly program schedule is made up of public issue-oriented broadcast interviews, documentary broadcasts, youth-oriented religious broadcasts, etc. (footnote 56), reveals little about the intrinsic merit of CBS-owned stations as such. To determine how much of such public affairs, news, or issue-oriented programs they carried literally because they were network-owned stations, the amount of time that CBS-owned stations devoted to such program categories must at the very least be compared with that of non-O&O affiliated VHF stations, with and without nonnetwork group owner ties. Account must once again be taken also of market size, number of VHFs in the market, interactions

proceeding with such farreaching ramifications, in short, it is disquieting to see the weight the Commission gave such flimsy and potentially misleading evidence.

In contrast, even when my own studies held constant a large number of cogent variables, they found no significant difference between network owned stations and VHF affiliates, in the amount of time devoted to a) all local programs, b) all news, c) local news, d) all public affairs, and e) all information (including commercial announcements). Indeed, in local public affairs, one of the most crucial categories for FCC, there is at least some evidence that network-owned stations carried significantly less local public affairs weekly than affiliated VHFs (86 minutes less), and 112 minutes less than independent VHFs. Only in the category of all information (including commercial announcements) did the O&Os carry 31.8 minutes more than independent VHFs (significant at the 10% confidence level), but with no significant difference between O&Os and the amount of such programming carried by the affiliated VHFs.[11]

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between these two variables, education of market population, station revenue, etc. The FCC simply had no scientific basis for giving network O&Os special merits based on allegedly "superior" quantitative performance in local, issue-oriented programming, without first isolating out the contribution to that quantitative performance attributable to O&O ownership alone, and excluding all other potential influences. Nor can weight really be awarded the NAB public service programming study (NAB Comments, Appendix A, pp. 6-8), even though its programming variables do appear to be carefully coded. Once again, NAB's analysis was far too gross for present purposes. The mere analysis of group and nongroup programs in local, informational, and total non-entertainment terms, was far too simplistic for the Commission to rely on. Here, too, as with the NBC and CBS studies, refined multivariate analysis was needed to segregate out the simultaneous impact of numerous key control factors (cf. those listed above in this footnote and on pp. 9-10).

[11] See Levin Fact and Fancy in Television Regulation (1980), especially chapters 5 and 6.

Far more important determinants of program composition than network ownership, I found to be: a) station revenue, whatever the ownership type, b) age of station (which bears on a station's linkage with preferred advertising and network organizations), c) status of station as network affiliate or independent, and even d) percent of a market's population with four or more years of college education. The above findings held true, moreover, regardless of whether stations were VHF or UHF, and taking into account market size and number of VHF stations in the market (with heavier weighting given to markets with three or more VHFs).[12]

C. The Commission Was Vague and Ambiguous On Viewpoint Diversity

The Commission failed to clarify or even make explicit its own concept of "diversity", at best left vague and ambiguous even though far more specific conceptualization was possible.

A primary FCC objective in adopting the Seven Station Rule was to "encourage a diversity of independent viewpoints." For that reason the Commission sought to analyze "the effect of eliminating this rule

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[12] An initial and somewhat less sophisticated (but still multi-variable) analysis of my original compilations of programming data in 1967, showed no significant difference between O&Os and nongroup stations in the time devoted to all local programming, to all nonnetwork programs, to fine arts and drama, and to feature film. In all news and all public affairs, to be sure, the O&Os did carry some 30 minutes more weekly than all nongroup stations as a whole, taking account of market size, channel type, and network affiliation. However, local news and local public affairs are not broken out, and neither are several critical variables interacted with one another to give full scope to their true impact. Accordingly, I further refined and reconfigured the analysis, updated and enlarged the data base, and used a more sophisticated statistical methodology. The results were striking. For a comparison of the simpler additive statistical model, and the more refined interactive additive model, and of the reliability, accuracy, and validity of coefficients estimated using either method, see Levin, Fact and Fancy in Television Regulation, especially Appendix I Issue #6 (at pp. 416-22), and more generally, Appendix II, pp. 441-94.

on viewpoint diversity..."(Report, para.24). Throughout the latest Report and Order the FCC referred to diversity of ideas, of programming, of editorial viewpoints, of independent sources of programming and of information. (Cf. paras 12, 17, 23-26, 30, 32-33, 35, 37, 41-45, 52,61-62). Much of its evidence on diversity, however, was related to sources diversity in the broadest, most general terms. Namely, in regard to doubling of the number of AM radio stations between 1953 and 1984, the almost seven-fold increase in the number of FM stations, the almost six-fold increase in the number of TV outlets, the new growth of Multi-Distribution Services Systems, the likely entry of thousands of new low-power TV stations, and the wide diffusion of millions of home video cassette recorders (VCRs). (Report, paras. 34-35)

However, there was no explicit or systematic analysis of diversity in terms of program types or program outputs rather than sources. This is true even though sources diversity may but need not yield proportionate amounts of output diversity, and even though output diversity may not require sources diversity.[13]

At best, the FCC Report utilized its diversity concept in a loose, ambiguous fashion. It neither identified nor distinguished between sources diversity and diversity of program outputs (cf. program types). Nor did it distinguish between program options and program types. Nor between, say, options or types across all stations in the market (cf. horizontal diversity), or as the average number of programs, program types, or program options, carried daily on any station, or class of station, throughout the broadcast day (cf.

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[13] Ibid., pp. 53-61.

vertical diversity, where a vertical time slot is each 15-minute period, 6PM-11PM each day of the week). (See Levin, ibid., Table 3.1, at p. 54; see also, analysis and discussion at pp. 54-61).

The Commission's failure to clarify its concept of diversity must indeed be faulted further in that program type diversity is by now grounded on a typology which analysis and empirical assessment show to be operationally valid, i.e., diversity as program type differences perceived as such by viewers. (See ibid., pp. 62-87, 90-91; also Appendix 3A).

The Commission must be faulted, finally, because it, itself, was hardly unaware of the fact that sources diversty and output diversity need not necessarily coincide. In Report, para. 52, it noted that "(t)he fact that...diversity of viewpoints in local news reporting and in editorializing on local issues exists alongside a group or network ownership structure means that it is indeed possible to have greater viewpoint diversity than there is ownership diversity (emphasis added)." This makes all the more puzzling the Commission's failure to spell out its own diversity concept for purposes of regulatory assessment, or to seek out evidence more affirmatively in those terms.

Some Illustrative Evidence on Program Diversity

In sum, cursory review of an exhaustive analysis of the relative contribution of network-owned stations, non-owned affiliates, and independent stations, to different kinds of program type diversity, yields the following pertinent conclusions:

1) The presence of O&Os has no significant impact one way or the other on the number of program types across all stations in 143

TV markets in 1967, in prime time, or of the number of program types per commercial station (cf. horizontal diversity) (cf. Levin, loc. cit., Table 5.2, at p. 145).

2) This is true even after account is taken of network affiliation, channel types, nonnetwork group ownership, newspaper ownership, market size, or number of stations in market (cf. ibid., Table 5.2, at p. 145).

3) The same holds true also for so-called vertical program type diversity, pertaining to the average number of program types carried by different stations daily, in prime time.

4) However one conceptualizes types diversity, then, the impact of network-owned stations is not significantly different from that of nongroup owned stations, holding constant the same independent variables just cited (cf. ibid., Table 5.3, at pp. 146-47).

5) It holds true, finally, even when account is taken of the number of PTV programs and stations in the market, market size, median family income, and the number of commercial programs. (Ibid., Table 8.1).

D. <u>The Report Failed to Analyze The Viability of Issue-Oriented Programming</u>

The Commission failed to generate adequate evidence on the <u>viability</u> of informational and issue-oriented programming. Nor did it adequately assess the alleged superiority of network-owned stations and other group-owned stations as <u>sources</u> of such programming, let alone as sources of support allegedly needed to <u>fund</u> it.

A further, final issue raised by the FCC's Report pertains to its assertion that it "ha(d) been given no evidence indicating that

stations which are not group owned better respond to community needs, or expend proportionately more of their revenues on local programming...and produce more news, investigative journalism, or issue-oriented programming (emphasis added)." (Report, para 53).

As in other places where the Commission cited the absence of "more" or "better" evidence presented to it as tacit reason to accept sorely deficient evidence as fact, here, too, one cannot but feel distressed at the failure of a federal agency to seek out such evidence affirmatively, in particular by mounting basic studies of its own. Clearly such issues were analyzable, and contradictory findings should have been carefully assessed.

At least these several points should have been scrutinized:

1) To infer that stations with more revenues (like O&Os) are better able than less affluent ones to carry more of the relatively less profitable informational programming, by no means implies that all such programming is unprofitable, absolutely.

2) In fact, stations which carry more information give advertisers access to the kind of educated higher-income viewers more likely to consume the advertised product. Understandably, therefore, such stations appear to command premium rates from advertisers, at the margin at least. (Levin, ibid., p.317).

3) Hence, one must mention two caveats regarding the Commission's observation that there is no evidence that nongroup owned stations spend more of their revenues on local or issue-oriented (public affairs) programming.

A. There is no significant difference between group and nongroup owned stations, or between O&Os and nongroup owned

stations, in the amount of public affairs they carried in 1967 (though in both cases, nongroup owned stations carried less news). Nor, using a more refined analysis for 1972, is there any evidence at all that O&Os devoted significantly more of all local, all news, all local news, all public affairs, or of all local public affairs, than affiliated VHFs did in that year. Wholly aside from the revenues devoted to such programming, then, the amount of program time so devoted gives no special merit (or demerit) to network or nonnetwork group owner.

B. It is true that stations earning higher revenues, other things equal, devote 2 or 3 minutes more time to local, all news, local news, all public affairs, and all information (including commercial announcements), weekly, than stations earning smaller revenues, and that this is often statistically significant. (See Levin, ibid., Table 6.13, at p. 203). But this by no means implies that informational programming is normally so non-remunerative as to require cross subsidy from more lucrative program activity. The TV networks are well-known not to lose money on their news and public affairs programming, once program costs are taken into account.[14]

It is indeed widely assumed that network affiliates as a class may earn as much as 40-60% of their revenues from advertising on local news shows.[15] The fact is that news and local public affairs shows are normally very low-cost. Therefore, the revenues they generate add relatively more to net income than they would if their

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[14]Robert Crandall, "Regulation of Television Broadcasting", Regulation, Jan./Feb. 1978, pp. 31-39.
[15]Broadcasting, August 28, 1978, p. 35.

program costs were comparable to those for comparable network programming, or for network entertainment programs generally.

Such issues should have been explicitly addressed, analyzed, and disentangled before the Commission concluded that the absence of evidence that nongroup owned stations divert more revenues to local interest or issue-oriented programming, gave group-owned stations (including the O&Os) a "merit" or "plus" which helped justify abrogation of the Seven Station Rule (para 53).

Furthermore, evidence on the viability of local and issue-oriented programming (as well as on the amount) should also have been considered before the Commission proposed to drop its Seven Station Rule for First Amendment purposes. Before that is, First Amendment values, and the FCC's "concern for a well-informed citizenry", led it "to give special weight" to faulty evidence that network groups carry significantly more public affairs and news programming. (Report, paras 55-56).

E. The Commission Failed to Consider the Anti-Competitive Consequences of TV Station Acquisitions on Potential Entry Into the Underutilized UHF Band

Neither the Commission nor the Department of Justice considered the character and potential consequences of TV station acquisitions by network and nonnework group owners as market-extension conglomerate mergers. Notably lacking, in particular, was any analysis of the effects of such mergers between stations located in separate geographic areas on potential entry into the UHF band.

As for the prevention of anti-competitive activities, the Commission's "other primary concern...when it adopted the Rule of

Sevens..." (para. 64), the Report gave special weight to the Department of Justice's conclusion that "elimination of the Seven Station Rule will raise little risk of adverse competitive effects in any market", and that "license transfers involve no significant competitive risk merely because they result in common ownership of more than seven stations in a broadcast service." (para 65).

Furthermore, the Commission noted (in para 5) that "(i)t will continue to scrutinize each individual acquisition to assure itself that the acquisition does not contravene any of the Commission's public policy concerns, particularly those related to diversity and competition". It further noted that "some buyers of stations may have superior skills...and may be able to do a better job of matching programming to local tastes and thus gain larger audiences...(and therefore) earn more from the station and hence value it more highly" (para 82). Furthermore, the Report continued, "some group owner may have cost advantages derived from economies of scale" (para 82). Station purchase prices may in any case be higher, the higher the "stream of revenues the station would yield over...time...(insofar as that) determines how much (the buyer) is willing to pay to purchase that yield, plus the potential for an increase in market value" (para 83).

How likely was it that group acquisitions of additional stations with the recission of the Seven Station Rule, will "permit the group owner to act in an anticompetitive manner"? The FCC and Justice Department ruled this out as "highly unlikely" (para 84), their main reason being that the national advertising market is already "dominated by the three national networks".

Dropping the Seven Station Rule, they say, "will not increase concentration in the national network market, because each network has already achieved access to almost every local market through its affiliation agreements" (para 71).

Lastly, the FCC contended that "the fact that local competitors may share common ownership with stations in other markets (emphasis added) is unimportant in terms of competitive harm...(because) the Commission's local rules...restrict common ownership in local markets (emphasis added)" (para 73). The Report then concluded that "the prohibition against common ownership of two competing stations in the same market and service makes the Rule of Sevens unnecessary as a guarantee against competitive harm" (para 73).

I must take exception to that conclusion, as well as to its economic and regulatory premises. At the very least, a far more thoroughgoing analysis of the competitive aspects of TV station mergers and acquisitions was needed before the FCC and DOJ could properly conclude, among other things, that (a) spot advertising provides advertisers with access to specific local markets only, such that "(i)f the price is too high, the amount of advertising may be lowered, but...will not be switched to another market" (para 70); (b) the rule change "should not affect competition in spot advertising...(because)...spot advertising is sold in those local geographic markets, and the rule does not address concentration in those markets..."(para 71); and above all, that (c) the so-called duopoly rule (which prohibits common ownership of competing TV stations in the same market), is a more than adequate safeguard against any competitive harm alleged to follow from lifting the Seven Station Rule

(para 73).

In line with the Commission's promise to "continue to scrutinize each individual acquisition to assure...that...(it) does not...(impair)...diversity and competition" (para 5), finally, the Commission and the DOJ should both have given explicit attention to group owner acquisitions of TV stations as market-extension conglomerate mergers.

Specifically, broadcast mergers and acquisitions can be classified as horizontal, vertical, or conglomerate. Under the duopoly provision mentioned in this Report (cf. para 73), the potentially most anti-competitive mergers (of two TV stations in the same local geographic market) simply cannot occur. The Commission is quite correct about that aspect of the competitive safeguard of duopoly rules which seemingly render the Seven Station Rule unnecessary.

Less clear, perhaps, is whether the forward acquisition of more TV stations by major TV network program suppliers will significantly foreclose their new local geographic markets from alternative sources of program supply. But for argument's sake, even granting the Justice Department's analytical contention to the contrary (DOJ Comments, pp. 23-25), there remains the inscrutable total neglect of the <u>market-extending character of TV group mergers and acquisitions</u>, and of their effects on the probability that: (a) a group owner entering a market may deter net new station entry therein; (b) the group owner's acquisitions may lessen potential competition because, had the merger been prohibited (by the existing Seven Station Rule or otherwise), it would have entered through internal company expansion; or at the

least, that (c) the group owner would have remained a potential threat at the sidelines, if entry by merger were precluded.

What is notably missing from the economic analysis in this Proceeding, then, is any systematic scrutiny of TV group owner acquisitions in terms of their effects on potential entry. Even if stations are located in separate geographic areas, that is, preventing a merger might induce a group owner in one market to build a new station in a second market. Or, at least, to hover at that market's threshhold, posing a potential threat of entry (that may or may not materialize).

When I examined this issue in 1970,[16] I found few if any VHF outlets available in the top 50 markets, or elsewhere. Hence the likelihood then that preclusion of a group acquisition would generate net new entry depended largely on the potential viability of unused UHF channels in the second market. I did find numerous unoccupied UHFs at that time, but deficient viability to support the potential entry hypothesis. Today, fifteen years later, the situation could well be decisively different.

The Commission and DOJ did clearly owe the public at least some scrutiny of that issue, and a direct, systematic review of group acquisitions as a form of market-extension conglomerate mergers in geographically separate markets. This was clearly true in light of DOJ's assertion that, "(s)ince mere ownership of more than seven broadcast services will raise no competitive problems, consideration

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[16]Levin, "Competition, Diversity, and the Television Group Ownership Rule", Columbia Law Review, May 1970, reprinted in Yearbook of Broadcasting Articles, Federal Publications, 1980 (Anthology Edition of 21 Articles Published Between 1934 and 1978).

of the competitive issues raised by broadcast license transfers should impose no burden on Commission resources." (DOJ Comments, p.27, also, at pp. 2-3). It was true, also, given DOJ's conclusion that, however the Commission handles the competitive element in the public interest standard, the DOJ will itself "continue to evaluate the competitive effects of mergers and acquisitions of TV and radio stations to determine if they violate federal antitrust laws." (Ibid., p.30).[17]

Finally, it is particularly true of TV station acquisitions by the three national network companies whose preponderant power in the markets they and their O&Os already operate in, may more likely upset interstation competitive balance in the new markets they propose to enter through the merger route. Thus there is little question that the national network companies have far more economic power than the several nonnetwork groups.

As for horizontal position, e.g., whatever the actual record on business conduct, the networks are surely better able than the nonnetwork groups to collude on rates, market shares, and even program schedules. The well-known fact is that each network faces either or both its rivals in virtually all TV markets. It does so in part

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17Unoccupied and non-viable UHF outlets today may conceivably become less so tomorrow. A cursory review of the Commission's latest count of TV allocations by channel type and market size, reveals that 24 UHF outlets are still vacant in the top 50 ADI markets, another 24 vacant in the second 50 markets, and 98 in all 225 markets. This compares with 27 UHF vacancies in the second fifty markets. Depending on the rate at which UHF markets become viable, many more instances may arise where the Commission must scrutinize potential entry issues on a case-by-case basis. The time to consider any such eventuality is <u>before</u> the Seven Station Rule is modified, or eliminated, not after numerous acquisitions across geographically separate markets create increasing numbers of potential entry cases. For the latter would necessarily require detailed, costly, and time-consuming review by a Commission whose imminent oproposed rule change would ironically have created the problem in the first place.

through the stations it owns outright, and in part through the hundreds of others with which it is affiliated. In their horizontal structure, then, there is no question that the networks are intimately aware of one another's pricing and programming decisions.

In contrast, there are widely recognized safeguards against nonnetwork group collusion or interdependence. First, the nonnetwork groups normally do not affiliate all their stations with any single network, and hence are less likely than otherwise to derive special advantages in bargaining for premium network compensation rates, or time rates. Second, the average group owner in top markets confronts as many separate competitors as there are stations in its market, mainly because no group normally faces the same group rival in more than one market. The likelihood of group owned stations tacitly (or overtly) agreeing to share markets, or engage in parallel pricing would clearly be greater where two or more groups faced each other across the whole group, i.e., in all of their TV markets. Available evidence indicates this not to be the case.[18] Thirdly, vertical as well as horizontal structure institutes more decisive safeguards against potential business restraints by the nonnetwork groups than by the networks.[19] Few would quarrel with the above contrast in respective market power of network and nonnetwork groups. But beyond this, the O&Os are widely recognized as the networks' biggest money earners, providing the bulk of the consolidated profits of each network company and its O&Os as a whole. These supernormal O&O profits are, indeed, derived in some measure from the entry barriers imposed by the

[18] Ibid., p. 795.
[19] Ibid., pp. 795-99.

FCC's Table of Allocations in the more lucrative metropolitan markets, and in particular, by the dearth of VHF outlets located therein.

Additional acquisitions by network groups would further strengthen network entrenchment in the key TV markets, and their resultant market power. Yet still notably lacking here is any DOJ or FCC analysis of the competitive side-effects of TV group mergers and acquisitions where the networks, as the acquiring firms, are already dominant in national TV network advertising, and account for nine-tenths of prime time TV program clearances. For example, would the networks' further, let alone unlimited, acquisition of nongroup VHF network affiliates (or even of VHF independents) result in greater competitive imbalance in the leading markets? Would it do so more than would comparable acquisitions by nonnetwork groups, which do not dominate their present markets locally, or regionally, nearly as much as the TV networks do? Would lifting the Seven Station Rule reduce the economic incentives to enter UHF markets, significantly more for network groups than for nonnetwork groups?

CONCLUSION

The FCC's Report and Order in Docket No. 83-1009 proposing to lift the present seven-station ceiling on TV Group Ownership, and in six years to eliminate it completely, was severely marred by frequent reliance on methodologically deficient evidence. A proposed regulatory change this farreaching required far more detailed and scientific assessment of key factual presuppositions. Nor did the failure of the several parties hitherto to transmit more complete and rigorous evidence relieve the Commission from its important

affirmative public interest responsibilities.

By way of illustration, my paper identifies and briefly discusses in all six examples of unsound premises; viz., (1) the Commission's use of inconsistent concepts of "quality"; (2) the Commission's failure to specify an unambiguous concept of "diversity"; (3) the Commission's explicit reliance on an outdated and badly faulted non-academic study of group owner programming, rejected by the FCC in an earlier proceeding as based on a biased and unscientific sample of respondents; (4) the Commission's further reliance on methodologically deficient studies of the program composition of network-owned stations; (5) the Commission's failure to examine evidence on the viability of informational and issue-oriented programming whoever produces and transmits it, before granting any special 'plus' to affluent, top market-entrenched network O&Os; and (6) the total absence of any assessment of the likely TV group owner acquisitions when the present rules are altered, or eliminated, as market-extension conglomerate mergers which could deter potential entry into the UHF band.

Time being of the essence, this critique has necssarily drawn on the writer's own published studies of TV group ownership and the rules geared to limit it. That evidence was painstakingly developed over a 9-year period with support from two well-known scholarly research foundations. I offer these published findings as no "last word" on such hotly contested issues, but simply to underscore the compelling case for the Commission to have undertaken a far more balanced and systematic investigation before it acted. If nothing more, the critique strongly suggests that, in similar cases of future de-

regulation, the Commission must look far more carefully before it leaps. Its latest perusal of limits on the aggregate audience reach of group owners is clearly a step in the right direction, above and beyond simple numerical limits. But it should also have considered still other safeguards of stated goals in the face of group owner de-regulation.