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1986

105

Research Working Paper Series, Center for Telecommunications and Information Studies, Columbia University Graduate School of Business, 809 Uris, New York, NY 10027. (212) 280-4222. Not for citation, quotation, reproduction, or distribution without written permission. All papers represent the author's view and not necessarily that of the Center or its affiliates.

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JOURNAL OF COMMUNICATION WINTER 1986 Vol.36 No.1

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A review of the empirical evidence cited by the FCC in favor of increasing the allowable number of radio and TV stations owned by one group raises large questions about quality, diversity, and competition in programming.

On August 9, 1984, the Federal Communications Commission issued its *Report and Order in Docket No. 83-1009,* which proposed changes in its radio-TV group ownership rules. This article peruses the FCC's (now-effectuated) proposed change as a case study in U.S. broadcast deregulation. It focuses, first, on program composition and diversity, and second, on some economic issues the Commission also cites to justify its proposed repeal of the Seven Station Rule, i.e., of the limits placed on multiple-station ownership within the AM, FM, and TV broadcast bands. Briefly, the article reviews the Commission's preliminary factual findings and the assumptions from which it initially 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.[1] The basis of this appraisal is an independent analysis and

On February 1, 1985, the Commission further revised its initial *Report,* 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 and Order in Gen. Docket No. 83-1009,* para. 1, note 2.) Of special interest here is the latest adoption of audience limits as well as numerical ceilings on group (cont'd)

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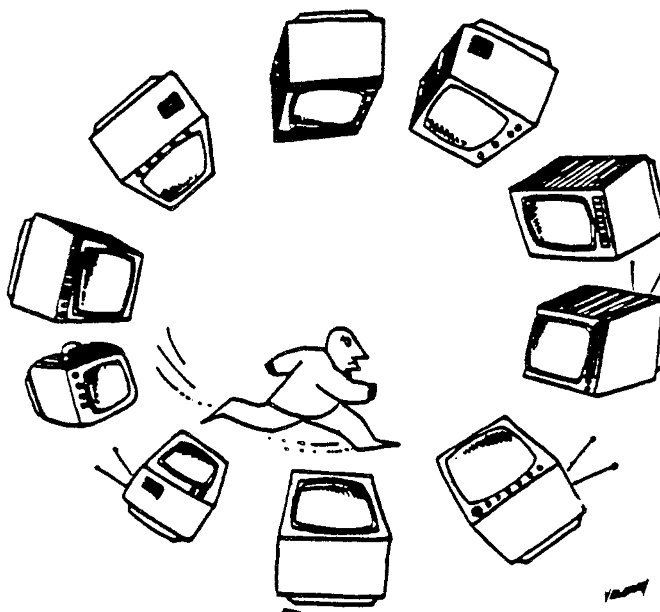

empirical assessment of the present rule as well as of other important policy issues (see 3).[2]

I offer these results as no "last word" on such complex and hotly contested issues. However, an action as far-ranging as this should not be based on faulty factual or analytical premises.[3] 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 deregulatory side effects.

More generally, the FCC's rules change raises issues of how program composition and diversity are defined legally (compared to more philosophic arguments about the public good). It also focuses attention on the economic evidence on which this important decision is based and on the problem it presents for the FCC's "affirmative public interest" respon-

ownership. On one hand, the 12-station numerical ceiling was retained (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" (para. 39).

[2] The entire study was funded over the prior nine-year period by the National Science Foundation and, most recently, by Russell Sage.

[3] The deficiencies itemized below are in no way explicitly dealt with or corrected in the Commission's *Memorandum Opinion and Order* (see esp. paras. 17–22).

sibilities. In this latter regard, I explore the curious FCC "neutrality" in favor of deregulation virtually whatever the factual basis or probable effects that ultimately may follow and irrespective of either's legitimacy. In fact, this article reveals the lengths to which the FCC will go to reach a foregone conclusion (such as deregulation), if necessary by going *beyond* the record of a rule-making proceeding while ignoring comparable evidence to the contrary.

After frequent inquiries, deliberations, and regulatory scrutiny, on August 9, 1984, the Commission's* Report *proposed to terminate its so-called Seven Station Rule Proceeding by raising the existing ceiling on multiple station ownership from 7 television, 7 FM, and 7 AM radio stations to 12 stations in each case.

The FCC had initially conceived this to be a "transitional limitation" only, to expire six years hence, "unless experience shows that continued Commission involvement is warranted." However, Congress directed the Commission to reconsider this total elimination of all limitations on station ownership, and, upon reconsideration, the FCC did in fact drop its original plan to terminate these ceilings in 1990.

The new rules would instead permit any broadcaster to own 12 AM, 12 FM, and 12 TV stations, so long as the television stations do not operate in markets collectively containing more than 25 percent of the nation's television homes. Furthermore, UHF television stations would be assessed for only half of a market's television homes (as counted in Arbitron's areas of dominant influence), whereas group broadcasters would be able to own up to 14 stations in a service and allowed to reach 30 percent of the nation's TV households through their own TV stations, if two stations in each service were controlled by minorities.

In addition, the *Report* stated that "[t]he Commission will continue to scrutinize each individual [group owner] 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" (para. 5). Then 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 imposed by group owners on their 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*" (para. 9, emphasis added). 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 Amend-

ment 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" (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* (para. 17).

Five conceptual and factual deficiencies in the Commission's* Report *can be pinpointed, beginning with the fact that 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 tantamount to "popularity" was the use made of Allen Parkman's analysis of ratings data for early- and late-night local news programs in 1982 (see 5). Note that this study was never directly transmitted to the Commission during its proceeding. Rather, on its own initiative the Commission made explicit reference to Parkman's results (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 non-network group-owned stations in his assessment. For *early*-evening news, he found no superiority of audience ratings on network-owned stations, but for *late*-night news programs, he found that both network group-owned and non-network group-owned stations carried programs with significantly higher audience ratings than nongroup-owned stations did.

Neither Parkman's sophisticated methodology nor the prestigious journal where his article appeared are in question here. What *is* questionable are the 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 informational terms (*Report*, para. 44, note 46). The confusion was further aggravated when 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." (para. 48). In making a similar point about local news shows on CBS-owned TV stations, the Commission then further referred to "a total of at least 65 awards from professional associations in 1983 . . . as well as a combined total of 26 Emmy Awards" (para. 49, note 56). 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 and the "awards" evidence approaching a *non*market standard of artistic and journalistic excellence, set by notable critics and organizations. It is by no means clear that such award-winning programs of owned-and-operated stations themselves had higher ratings than comparable programs of nongroup-owned stations, or even as high as the ratings of the news and public affairs programs on NBC-owned stations that 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 has audiences so small as to be nonratable by the established ratings services. On occasion, PBS has had to contract for special surveys to create such ratings, and has gone even further, to try to devise forms of ratings that differ methodologically 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* (not owned outright) VHF stations. 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 (para. 47) of NBC and CBS studies of program time devoted to news and public affairs on network-owned stations (see, e.g., 3, Tables 6.5, 5.3, and associated text).

In answering the question of whether network-owned stations carry significantly more issue-oriented programming than other stations, the Commission cited deficient statistical evidence on the program composition of network group- and nongroup-owned stations.

The Commission cited this evidence, submitted by the parties, even though it was seriously marred by faulty, unscientific methodology. The Commission then gave this notably deficient evidence "special weight" in its evaluation. Yet more systematic, scientific investigations already had been conducted, had yielded quite different results, and had 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, for example, 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, and the Commission itself quite properly discounted Litwin-Wroth in 1970.[4] One therefore wonders why the FCC gave it so much attention in the present proceeding or indeed why the NAB formally transmitted it again at all. 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 6 of the 200 markets with TV stations operating in 1969 (when Litwin-Wroth was originally filed by the NAB) was at best a slim reed for the Commission to lean on.[5] At the very least, 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, was needed for any persuasive case.

Nor was the NBC tabulation that compared its owned-and-operated stations to all other stations in the top 25 markets any more reassuring

[4] The Commission rejected Litwin-Wroth as unreliable in an earlier Cross Ownership Proceeding. It was actually ignored in the Commission's *Final Report and Order in Docket No. 18110*, April 6, 1970, paras. 36–40. See also *Memorandum Opinion and Order*, March 2, 1971, paras. 22–28, esp. para. 25.

[5] See especially the detailed critique by Barnett (1). He 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 resulting from concentration of media control at the local level" (p. 263).

(*Report,* para. 47). The Commission observed that the NBC figures "would have been more useful [had they] controlled for network affiliation and VHF status as well" (note 52). 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 owned-and-operated and non-owned-and-operated stations' program time in the top 25 markets is really impossible to evaluate without isolating the relative impact on this comparison of control factors such as channel type, network affiliation, and also number of TV homes in the market, age of station, educational status of potential audience, number of VHF stations in the market, and estimated station revenue. Without considering these and other factors, as well as statistical interactions between them, we cannot rule out that what may superficially appear to be a superior programming performance by NBC owned-and-operated stations 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 owned-and-operated stations.[6] We simply do not know.

In contrast, even when my own studies held constant a large number of cogent variables, no significant difference was found 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 the FCC, there is at least some evidence that network-owned stations carried 86 minutes *less* local public affairs weekly than affiliated VHF stations and

[6] The Commission actually described the CBS performance in terms even more tenuous than those 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 7½ 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. (note 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-owned-and-operated affiliated VHF stations, with and without non-network group-owner ties. Account must once again be taken also of market size, number of VHF stations in the market, interactions between these two variables, education of market population, station revenue, etc. 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. 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 here).

112 minutes less than independent VHF stations. Only in the category of *all* information (including commercial announcements) did the owned-and-operated stations carry 31.8 minutes *more* than independent VHF stations (significant at $p < .10$) but with no significant difference between owned-and-operated stations and the amount of such programming carried by the affiliated VHF stations (see 3, esp. chapters 5 and 6).

Far more important determinants of program composition than network ownership are (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 hold true, moreover, regardless of whether stations are 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 VHF stations).[7]

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 on viewpoint diversity" (*Report*, para. 24). Throughout the *Report* 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: in regard to doubling of the number of AM radio stations between 1953 and 1984, the almost sevenfold increase in the number of

[7] An initial and somewhat less sophisticated (but still multivariable) analysis of my original compilations of programming data in 1967 showed no significant difference between owned-and-operated stations and nongroup stations in the time devoted to all local programming, all non-network programs, fine arts and drama, and feature film. In all news and all public affairs, to be sure, the owned-and-operated stations 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 (3, esp. Appendix I Issue 6, pp. 416–422, and more generally, Appendix II, pp. 441–494).

FM stations, the almost sixfold increase in the number of TV outlets, the new growth of multipoint distribution services, the likely entry of thousands of new low-power TV stations, and the wide diffusion of millions of home videocassette recorders (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 (3, pp. 53–61).

At best, the *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. vertical program diversity on a station, over time, where a vertical time slot refers to each of the twenty 15-minute periods between 6 and 11 P.M. available to program on each day of the week; see 3, Table 3.1, p. 54, and 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 that analysis and empirical assessment show to be operationally valid, i.e., diversity as program-type differences *perceived as such by viewers* (see 3, pp. 62–87, 90–91, and Appendix 3A).

The Commission must be faulted, finally, because it was itself hardly unaware of the fact that sources diversity and output diversity need not necessarily coincide. 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*" (para. 52, emphases 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.

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. The presence of owned-and-operated stations 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 on the number of program types per commercial station (cf. horizontal diversity; cf. 3, Table 5.2, p. 145). This is true even after account is taken of network affiliation, channel types, non-network group ownership, newspaper ownership, market size, or number of stations in

the market (cf. 3, Table 5.2, p. 145). 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. 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. 3, Table 5.3, pp. 146–147). It holds true, finally, even when account is taken of the number of public television programs and stations in the market, market size, median family income, and the number of commercial programs (3, Table 8.1).

The Commission failed to generate adequate evidence on the* viability *of informational and issue-oriented programming, nor did it adequately assess the alleged superiority of network- and other group-owned stations as sources of such programming.

A further, final issue raised by the *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*" (para. 53, emphasis added). 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.

At least these several points should have been scrutinized. To infer that stations with more revenues (like owned-and-operated ones) 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. In fact, stations that 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 (3, p. 317). 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.

First, there is no significant difference between group- and nongroup-owned stations, or between owned-and-operated 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 owned-

and-operated stations devoted significantly more of all local, all news, all local news, all public affairs, or all local public affairs than affiliated VHF stations 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 a network or non-network group owner.

Second, it is true that stations earning higher revenues, other things being equal, devote two or three minutes more per week to local, all news, local news, all public affairs, and all information (including commercial announcements) than stations earning smaller revenues, and that this difference is often statistically significant (see 3, Table 6.13, p. 203). But this by no means implies that informational programming is normally so nonremunerative 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 (2).

It is indeed widely assumed that network affiliates as a class may earn as much as 40 to 60 percent of their revenues from advertising on local news shows (*Broadcasting*, Aug. 28, 1978, p. 35). 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 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 earned group-owned (including owned-and-operated) stations a "merit" or "plus" that 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—that is, before 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 (paras. 55–56).

The Commission failed to consider the anticompetitive 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 non-network group owners as market-extension conglomerate mergers. Notably lacking, in particular, was any analysis of the

effects on potential entry into the UHF band of such mergers of stations located in separate geographic areas.

As for the prevention of anticompetitive 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 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" (para. 5). 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 Department of Justice 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* is unimportant in terms of competitive harm . . . [because] the Commission's local rules . . . restrict common ownership in *local markets*" (para. 73, emphases added). 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).

At the very least, however, a far more thoroughgoing analysis of the competitive aspects of TV station mergers and acquisitions was needed before the FCC and Department of Justice 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, (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 Department of Justice both should 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 the *Report* (cf. para. 73), the potentially most anticompetitive 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 that 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 Department of Justice's analytical contention to the contrary (*DOJ Comments in Docket No. 83-1009*, pp. 23–25), there remains the inscrutable total neglect of the market-extending character of TV group mergers and acquisitions 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, (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 the *Report*, 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 threshold, posing a potential threat of entry (that may or may not materialize).

When I examined this issue in 1970 (4), 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 UHF stations at that time but deficient viability to support the potential entry hypothesis. Today, some fifteen years later, the situation could well be decisively different.

The Commission and the Department of Justice 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 the Department of Justice's assertion that, "[s]ince mere ownership of more than seven broadcast services will raise no competitive problems, consideration of the competitive issues raised by broadcast license transfers should impose no burden on Commission resources" (*DOJ Comments in Docket No. 83-1009*, p. 27; see also pp. 2–3). It was true, also, given their conclusion that, however the Commission handles the competitive element in the public interest standard, the Department of Justice 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" (*DOJ Comments*, p. 30).[8]

Finally, it is particularly true of TV station acquisitions by the three national network companies, whose preponderant power in the markets in which they and their owned-and-operated stations already operate 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 non-network groups.

As for horizontal position, for example, whatever the actual record on business conduct, the networks are surely better able than the non-network groups to collude on rates, market shares, and even program schedules. The well-known fact is that each network faces either or both

[8] Unoccupied and nonviable UHF outlets today may conceivably become less so tomorrow. A cursory review of the Commission's latest count of commercial TV allocations by channel type and market size reveals that 27 (7.6 percent) UHF outlets still remain vacant in the top 50 ADI (area of dominant influence) markets, another 27 (11.2 percent) in the second 50 markets, and 106 (44.3 percent) in all 225 markets. This compares with 32 (16.8 percent) UHF vacancies in the top 50 markets in 1980, 54 vacancies (37.8 percent) in the second 50 markets, and 176 vacancies (34.8 percent) in all 200 top TV markets (see FCC Public Notice No. 1053, *Television Channel Utilization - June 30, 1985* and *Dec. 31, 1979*). Indeed, if we calculate "availabilities" as "vacancies" *plus* "applications pending" (for other channels) that *could* be withdrawn or rejected, the figure for 1985 would be a full 211 (35.5 percent) of the 595 outlets allocated to commercial UHF in the top 100 markets that year, and 236 (27.2 percent) of the 868 allocated in all 225 top markets. Depending on the rate at which UHF markets become viable, then, many more instances may arise where the Commission must scrutinize potential entry issues on a case-by-case basis, at least involving those 50 to 100 currently vacant channels (defined in the most conservative fashion). The time to consider any such eventuality was clearly *before* the Seven Station Rule was modified. The decline in vacancies over the period 1980 to 1985 from 176 to 106 (top 200 markets) or 86 to 54 (top 100 markets) hardly suggests lack of ample lead time to probe this intriguing issue, had the Commission been alert to it and so inclined.

its rivals in virtually all TV markets. It does so in part 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 non-network group collusion or interdependence. First, the non-network 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 engaging 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 (4, p. 795). Third, vertical as well as horizontal structure institutes more decisive safeguards against potential business restraints by the non-network groups than by the networks (4, pp. 795–799). Few would quarrel with the above contrast in respective to market power of network and non-network groups. But beyond this, the owned-and-operated stations are widely recognized as the networks' biggest money earners, providing the bulk of the consolidated profits of each network company inclusive of those key stations *and* the network service alone. These supernormal profits are, indeed, derived in some measure from the entry barriers imposed by the 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 Department of Justice 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 non-network 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 non-network groups?

The FCC's *Report and Order in Docket No. 83-1009* proposing to lift the present seven-station ceiling on TV group ownership was severely marred by frequent reliance on methodologically deficient evidence. A

proposed regulatory change this far-reaching 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 of its important affirmative public interest responsibilities.

By way of illustration, this article has identified and briefly discussed six examples of the Commission's unsound premises: (a) its use of inconsistent concepts of "quality"; (b) its failure to specify an unambiguous concept of "diversity"; (c) its 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; (d) its further reliance on methodologically deficient studies of the program composition of network-owned stations; (e) its 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 owned-and-operated stations; and (f) its total failure to assess the likely TV group-owner acquisitions when the present rules are altered, or eliminated, as market-extension conglomerate mergers that could deter potential entry into the UHF band.

These findings are meant to underscore the compelling case for the Commission to have undertaken a more balanced and systematic investigation before it acted. If nothing more, the critique strongly suggests that, in similar cases of future deregulation, the Commission must look far more carefully before it leaps. Its latest perusal of limits on the aggregate audience reach of group owners, above and beyond simple numerical limits, is clearly a step in the right direction. But it also should have considered still other safeguards of stated goals in the face of group-owner deregulation. Henceforth, it is to be hoped that the FCC will take a harder look at the evidence available to it in rule-making proceedings and will rely on sounder, scientific methodological procedures before leaping to preconceived conclusions about deregulation and other matters before it.

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