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COMPETITION IN THE BROADCASTING OF IDEAS AND ENTERTAINMENT — SHALL RADIO TAKE OVER TELEVISION?

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On May 1, 1952, the Federal Communications Commission entered upon the largest give-away program in radio history. After four years of altercation and deliberation, it issued its "Sixth Report and Order" [1] establishing the procedures and physical rules under which it will give the nation's television channels to applicants for television broadcast licenses. By the methods it uses in choosing from the group of applicants those who are to receive these rich prizes,[2] the Commission will create a pattern of station ownership and control of the air waves which will be difficult or impossible to change later. The tremendous impact of television on our national life, political and social, makes it important to examine the policies which will shape this pattern. Who are to be our television broadcasters, and how is the public interest in the fare they provide to find effective expression? Present indications are that the Commission's answers to these questions will be disquieting in the extreme.

Radio and television broadcasters are licensed by the Federal Government to make use of the radio spectrum, and, because the usable frequencies are limited, enjoy, as a group, a monopoly.[3] This

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1. 17 FED. REG. 3905 (1952).

2. There are, of course, not enough channels to give to all applicants, especially in the better locations. Not all channels will be in sufficiently dense population areas to repay the enormous cost of building and running stations. But the many that are will bring truly handsome rewards.

3. Each broadcaster also has a government-protected monopoly on his assigned frequency within his service area.

shortage of usable frequencies places an effective limitation on the number of stations and therefore on the possible numerical extent of competition within the group. In spite of these characteristics inherently circumscribing completely free and open competition, Congress, in setting up the regulatory system for radio and television broadcasting, specifically provided in the Federal Communications Commission Act that such broadcasters were not to be considered common carriers.[4] The Act, moreover, carries many provisions designed to insure competition within the field;[5] and obviously Congress intended to rely on such free competition as was possible to act as a regulatory factor, and on the Federal Communications Commission to use its powers to assure the maximum amount of competition among those favored with licenses to use this limited public domain.

The United States Supreme Court, in its early decisions dealing with the Act, recognized that the preservation of free competition was one of the objectives of Congress in passing the legislation. In *FCC v. Sanders Bros. Radio Station,* the Court said:

> "Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate the Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges and other measures which are unnecessary if free competition is to be permitted." [6]

This proposition was again clearly stated by the Court in *FCC v. Pottsville Broadcasting Co.:*

> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this, Congress provided for a system of permits and licenses." [7]

The Commission itself has, in its *Report on Chain Broadcasting* spelled out its own philosophy on this point:

> "We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market. Radio broadcasting is a competitive industry. The Congress has so declared it in the

4. 48 STAT. 1064 (1934), 47 U.S.C. § 152(b) (1946).

5. See, *e.g.,* 48 STAT. 1082 (1934), as amended, 50 STAT. 190 (1937), 47 U.S.C. § 303(g) (1946); 48 STAT. 1087 (1934), 47 U.S.C. §§ 313, 314 (1946); 48 STAT. 1091 (1934), 47 U.S.C. § 326 (1946).

6. 309 U.S. 470, 474-5 (1940).

7. 309 U.S. 134, 137 (1940).

> Communications Act of 1934, and has required the fullest measure of competition possible within physical limitations. If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system." [8]

Thus, at the outset, there appears complete agreement among Congress, the Supreme Court and the Federal Communications Commission that the public interest in the broadcast field is to be served by preserving free and unfettered competition.

At this point, however, agreement ceases. Competition between whom? Competition in what respect? These, and a host of attendant questions have been left obscure and confused by the large body of Commission (and Court) actions since the Communications Act of 1934. It is the purpose of this paper to suggest answers to some of these questions which seem to the writers to accord with the public interest, and to demonstrate how greatly those answers reached and apparently forecast by the Commission's decisions in the past diverge from the public interest concepts postulated.

In the communications field, competition has at least two aspects. One is the familiar economic competition which it is the purpose of the Sherman and related acts to preserve. The other is that competition for the attention of the public which creates the "free market for ideas" which is believed by many [9] to be the fundamental requisite for workable democratic institutions.

If, as the writers emphatically assume, the preservation of these two types of competition is in the public interest, who are to be the competitors? The air waves are vertically divided into a number of bands, each devoted to one or more services. Thus, in standard broadcast (AM), frequency modulation (FM), and television, which are of chief concern here, each service operates in a separate band protected from interference by the others. Each service also has horizontal, or geographical, limits to the area which it may cover,

8. FCC, REPORT ON CHAIN BROADCASTING (Order No. 37) 88-89 (1941).

9. See generally, CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947) and, for a clear statement of the assumptions underlying the First Amendment to the Constitution, Associated Press v. United States, 326 U.S. 1, 20 (1945). It would seem self-evident that what is desirable for the press is at least equally desirable for the air waves. See CHAFEE, *op. cit. supra.*

within which it is similarly protected. Is the desired competition to be only within each service band and within the geographic service area of the band users? Or will the public benefit be enhanced if competition is also encouraged between the services and between geographic areas as well?

To be more specific, suppose that cities A and B each lie at the center of contiguous, but not overlapping, service areas, and each area has assigned to it three AM, three FM and three television channels. Assume further that the service areas of A and B also constitute relatively independent, internally integrated market areas. Does beneficial competition require only that the three AM stations within the respective areas be kept in separate hands? That is, will the competitive purpose be satisfied if X, Y and Z, three individuals who compete with each other, each own one AM station in A, but are allowed also to have one FM and one television station in A, and, further, to own one of each type in B, as well?

The Federal Communications Commission, with some qualifications which appear below, seems to have answered the above question in the affirmative. It has claimed no mandate to foster or compel competition between services, but does so only between licensees in the same service. The course by which the Commission has reached this conclusion is tortuous, but it is worth retracing since, in the process, there will be revealed some of the consequences of its attitude. These consequences, in turn, will suggest guides for future thought and action.

The Commission, at the outset of its career, had to deal with only one mass communication service. There was no FM or television service in existence, and standard, or AM, radio was without competition as a device for bringing public entertainment and information directly into the home.[10]

10. It is true the telephone preceded radio in the home but it could exclude or control the new service only by pre-empting the communications field. There was at one time a serious threat that it would do so. See Report of the F.C.C. on Investigation of the Telephone Industry in U.S., H.R. Doc. No. 340, 76th Cong., 1st Sess. 389 (1939), quoting an address to the representatives of the Associated Bell Companies by A. H. Griswold, then head of Bell radio activities, delivered February 26, 1923.

In his address, Griswold proposed that AT&T organize a group of leading citizens and organizations in each locality to act as the sole broadcast organization. AT&T would erect, own and operate the station, under a guarantee of expenses and profits by the local group. "The fact remains," said Griswold, "that it [radio broadcasting] is a telephone job, that we are telephone people, that we can do it better than anyone else, and it seems to me . . . that sooner or later, in one form or another, we have got to do the job." One function of the local organization was made clear: "If anyone desires to own his own private broadcasting station, they will say to him, 'come on in with the bunch. We represent the community in radio broadcasting.'"

This grandiose, but not necessarily impossible, scheme became impracticable when AT&T sold its operating radio facilities to RCA in 1926 in the course of settling a patent dispute.

The Commission did, however, find means to implement its mandate on competition. Long before FM and television appeared, it had established quite firm rules that the same interest could not own two radio broadcast stations which served the same area [11] or which substantially overlapped in their service areas,[12] and had placed a limit on the number of stations a single interest could own regardless of location.[13] These were relatively simple concepts, which could have been arrived at by application of Sherman Act analogies. The Commission's rationale was, however, somewhat broader. It is well summarized in *The Louisville Times Company:*

> "The underlying principle of the provisions of the Communications Act of 1934 relating to radio broadcasting is that radio facilities must be licensed by the Commission to the end that the public will be best served. In effecting this requirement of the Act the Commission must consider many elements, one of which, in this case, becomes of particular importance, namely, the furtherance of competition in program service to a community to the end that the best service will be made available.
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> "It is true that in this instance the applicant is the licensee of a cleared channel station, and the application herein is for a local station, and it may be argued that the element of competition is not present as the services are different. But the cleared channel station serves all of the area which the proposed local station would cover, and as the people residing in that area may listen to only one station at one time, it is manifest that they would have to choose between the two. It is clear, therefore, that the two stations must necessarily compete for public reception."

Having thus recognized the element of competition for the public's attention, the Commission went on to say:

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11. Louisville Times Co., 5 F.C.C. 554 (1938); Colonial Network, Inc., 5 F.C.C. 654 (1938); Coryell and Coryell, 6 F.C.C. 282, 301 (1938); South Bend Tribune, 6 F.C.C. 783 (1939).

12. 47 CODE FED. REGS. § 3.35 (1949). The application of this rule is not without difficulties as to degree of overlap and degree of control. See The Enterprize Company, Dockets 10286-8, decided March 3, 1953.

There are also companion doctrines which are troublesome. An applicant who does not will be preferred over a competitor who does own a station in a contiguous but non-overlapping area. Finger Lakes Broadcasting System, 3 PIKE & FISCHER RADIO REG. (hereinafter cited simply as "R.R.") 406 (1946).

A quite amorphous doctrine seems to regard ownership of other stations in the same state or other limited geographic area as disqualifying the competitor of an applicant without such interests. Carolina Advertising Co., 6 F.C.C. 230 (1938); Borger Broadcasting Co., 3 R.R. 330 (1946); Old Dominion Broadcasting Co., 3 R.R. 577 (1946). This doctrine applies to prevent transfer of an independent to a multiple owner in the area. R.R. Jackman, 5 F.C.C. 496 (1938).

13. See reply by Commission to questions of Senate Interstate Commerce Committee, 1 R.R. p. 91:125, 91:130. The same principle applies to FM stations, Rule 3.34, and Television Stations, Rule 3.636. NBC is currently petitioning to have the rule relaxed: Petition of NBC to amend Rule 3.640(b), dated Jan. 3, 1952. (The rule petitioned to be changed is evidently miscited, but the petition is clear.)

> "The Commission has heretofore pointed out that the available frequencies in the broadcast band are limited, and the Commission is loathe [sic] to grant facilities for an additional broadcast station to one who already holds a license for a station in the same community unless it is clearly shown that the public convenience, interest or necessity would be served thereby. Other things being equal, it would appear that if there were a need for an additional local broadcast station in a community and if there were a frequency available for this service, the facilities should be granted to someone who does not already hold a broadcast license for an unlimited time station in that community. Experience shows that where a real need exists for radio service in a populous area, applications to establish service are readily forthcoming.
>
> "In order to assure a substantial equality of service to all interests in a community, to assure diversification of service and advancements in quality and effectiveness of service, the Commission will grant additional facilities to identical interests only in cases where it clearly appears that the facility, apart from any benefit to the business interests of the applicant, is for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled. . . ." [14]

In a separate group of cases, the idea of furthering "competition in program service to a community" here expressed led the Commission into a very different field. In brief, it developed the doctrine that, where two equally qualified applicants were applying for the same facility and one was the owner of a newspaper in the area to be served, the non-newspaper owner would be preferred. The rationale of these cases is that such a preference "will better serve public interest, convenience and necessity in that there will be added to the . . . area a medium for the dissemination of news and information which will be independent of and afford a degree of competition to other such media in that area." [15] The Commission has elsewhere stated that the preference would "result in a greater diversification of the ownership of the media for the dissemination of information and entertainment." [16] Here, the Commission is no longer confining itself to competition between its licensees in a single service band. It has reached out to foster competition between its licensees and media which are not subject to its jurisdiction.[17] Moreover, it has taken cognizance of something

14. 5 F.C.C. 554, 558, 559 (1938).

15. Stevens and Stevens, 5 F.C.C. 177, 182 (1938). See also Southern Tier Radio Service, 3 R.R. 211 (1946); Norman Broadcasting Co., 5 R.R. 120 (1940). There are, in all, upwards of fifty cases expressing this idea. There are many inconsistencies and difficulties in its application; and there will be discussed below certain indications that it is being abandoned or seriously weakened. But it is enough for present purposes to demonstrate that it exists and to note its rationale.

16. Royal Miller Radio, 3 R.R. 168 (1946).

17. It did not do so without challenge. Newspaper interests bitterly criticized the rule and finally succeeded to the extent that, in the bill containing the 1952 amend-

beyond the strictly economic field, and the "free market place for ideas" as indicated by the words "news and information" and has included the broader cultural category of "entertainment." In subsequent cases the Commission has mentioned ownership of local motion picture houses as a factor militating against one of two competing applicants,[18] and thus has clearly evinced its interest in entertainment *per se.*

This rule has been rather narrowly circumscribed by the Commission in a number of ways, however. First, unlike the rules applied to ownership of two stations in the same community [19] and to the overlap situation,[20] it will not disqualify a newspaper applicant who faces no competing applicant for the channel in question.[21] Moreover, a newspaper interest which shows that it is otherwise better qualified, (*i.e.,* better financed or better in technical ability, etc.) will, under the rule, succeed over its weaker rival.[22]

The attempt in the case of newspapers to bar one variety of "cross-channel," [23] or inter-media, concentration of ownership in communications has occasioned, and still occasions, a great deal of argument in cases before the Commission, and has evidently been taken as a serious issue by that body over many years. This course of events leaves the observer totally unprepared for what happened when a new and com-

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ments to the Communications Act, Section 7, subsection (d) was inserted in the House of Representatives forbidding the Commission to discriminate against persons associated with, interested in or owning media primarily engaged in gathering and dissemination of information. This provision was, however, dropped in the final enactment. The reason stated is interesting: "This provision was omitted from the conference substitute because the committee of conference felt that it was unnecessary. It is the view of the conference committee that under present law the Commission is not authorized to make or promulgate any rule or regulation, the effect of which would be to discriminate against any person because such person had an interest in, or association with, a newspaper or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application solely because of any such interest or association." CONFERENCE REP. No. 2426, 82d Cong., 2d Sess. 18 (1952). But compare the qualified approval of the rule voiced in Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359 (D.C. Cir. 1949).

18. See, *e.g.,* Observer Radio Co., 3 R.R. 234 (1946).

19. Genessee Radio Corp., 5 F.C.C. 183 (1938); Florida West Coast Broadcasting Co., 6 F.C.C. 588 (1938).

20. Courier Journal, 5 R.R. 348 (1949). *But cf.,* Norfolk Broadcasting Corp., 3 R.R. 1699 (1947).

21. Harold M. Finlay, 4 F.C.C. 356 (1937); South Bend Tribune, 8 F.C.C. 387 (1941); Fairfield Broadcasting Co., 5 R.R. 190 (1949). There will be no disqualification even if the newspaper has a local monopoly in its field. See South Bend Tribune, *supra.*

22. Orlando Daily Newspapers, Inc., 3 R.R. 624 (1946). Compare Mason City Broadcast Co., 3 F.C.C. 116 (1936). It strengthens a newspaper's application to promise that the radio operation will be kept separate. Telegraph Herald, 4 F.C.C. 392 (1937). An existing licensee apparently has an advantage when applying for renewal over a new applicant for the same channel. Hearst Radio, Inc., 6 R.R. 994 (1951). But contrast § 301 of the Communications Act, 48 STAT. 1081 (1934), 47 U.S.C. § 301 (1946), providing that a license confers no rights beyond its term.

23. The term is taken from CHAFEE, *op. cit. supra* note 9, at 586, 587 where it is recommended that the Commission's efforts in this direction be continued and intensified.

peting medium within the Commission's own jurisdiction made its appearance.

The first real threat to radio's monopoly in the home was the discovery of frequency modulation (FM) as a method of broadcasting. The advent of FM brought about a second method of invading the home on a 24-hour-a-day basis. Existing radio broadcasters for the first time had to face up to something showing promise of affording real competition for the public's attention. The additional broadcast stations which could be added as a result of the discovery of FM virtually threatened the elimination of radio's monopoly, because now there appeared to be enough frequencies for all who might want to enter the broadcast field.[24]

The problem of allocating this new service was approached by the Commission with only slight attention to competition. While it spoke often of attracting new blood to the radio field,[25] the Commission, which earlier had been worried about newspaper ownership of radio stations, was wholly unconcerned about radio ownership of the new FM service. It is true that originally the Commission provided that applicants for the new service must broadcast during at least two hours of the day programs on their FM stations which were not merely duplications of those going out over existing facilities,[26] but no rule was adopted preferring new-blood applicants to those who already owned AM.

The existing radio industry opposed the non-duplication rule vigorously, with interesting results. The original rules governing FM service provided, in Section 3.261(b), that of the 6-hours required minimum broadcast (3 day and 3 night hours) one day and one night hour must be taken up by programs which did not duplicate a program simultaneously broadcast in the same area.

Section 3.261(c) elaborated on this requirement:

> "In addition to the foregoing minimum requirements, the Commission will consider, in determining whether the public interest, convenience and necessity has been or will be served by the operation of the station, the extent to which the station has made or will make use of the facility to develop a distinct and separate service from that otherwise available in the service area."

These rules were announced June 22, 1940, in a press release which specifically called attention to the importance of the provisions

24. Report of Federal Communications Commission, announcing allocation of channels for FM service, May 20, 1940, p. 3.

25. *Ibid.*

26. See 47 CODE FED. REGS. § 3.261(b) (Supp. 1940) discussed *infra.*

aimed at inducing development of a separate service. On March 30, 1943, the Commission, reciting that difficulties were besetting broadcasting owing to the shortages of material and trained personnel occasioned by the military effort of World War II, issued Order 111, suspending the requirement that the 6 hours broadcast be divided into two sections of three hours each, day and night, and, of course, obviating the requirement that the non-duplicating 2 hours be similarly divided.[27]

Evidently Order 111 was insufficient to meet the military emergency; for on July 6, 1943, the Commission issued Order 111-A, suspending the requirement of non-duplicating programs altogether, and reciting the same difficulties and shortages as the cause.[28] However, an accompanying press release, calling attention to the fact that Rule 3.261(c) was *not* suspended, indicated the Commission's continuing concern that separate services be evolved. Nevertheless, in the succeeding two years the contention that the suspension was due solely to military drains upon material and skilled operatives was apparently forgotten. On September 12, 1945, four months after VE Day, and one month after VJ Day, the Commission issued completely revised FM rules, and, instead of reinstating the suspended 3.261(b), finally expunged not only section (b) but also section (c) of the rule. Neither section has since reappeared.[29] The Commission thus not only has permitted existing AM stations to pre-empt the new FM service,[30] but also it has in effect encouraged them to broadcast the same programs they supply with the old service.[31]

The results of this policy have been lamentable. FM, a static-free service with great promise, capable of much higher fidelity reproduction

27. See 9 FCC ANN. REP. 54-56 (1943).

28. See 10 FCC ANN. REP. 16 (1944).

29. Rule 3.261 as it now stands contains the split hours requirement. The only other rule bearing at all on this topic is Rule 3.240 (formerly 3.228) which has always required that in order for an entity to obtain a *second* FM license, it must show that competition among FM services will be fostered or that the station will provide a service separate and distinct from its AM service.

30. In an able set of exceptions opposing certain features of the Examiner's report in the Aladdin case the Chief of the Broadcast Bureau, through the Chief of his Hearing Section, says: "It is evident that the Commission's 1945 FM Report signalized its decision that it was necessary for the present to abandon its concept of FM as an independent aural broadcast system parallel and competitive with AM. By repealing its 1940 requirement of at least two hours daily independent programming of FM stations, dual operators were relieved of an obligation to promote their FM facilities in competition with their AM stations. The Commission's refusal to adopt a diversity or duopoly rule reinforced this impression." (See Docket 9041, Exceptions filed March 17, 1953, p. 14).

This action he attributes to the Commission's belief that FM would ultimately displace AM as the dominant service. (*Id.* at p. 14-15).

31. See 10 FCC ANN. REP. 16 (1944): "Most of the existing FM stations are operated by licensees of standard broadcasting stations, and therefore have program material readily available."

of sound than standard radio, has almost totally failed to develop as a separate service. Carrying only programs which were already available, it evoked no rush to buy new sets. Advertisers, in turn, had no incentive to use it, since it offered them no new market and no new programs to entice a wider market. The entrenched AM owners were able to offer low rates for the new and old service in combination, and independent FM owners were unable to finance a full competing service from such advertising as they could sell at comparable rates. There can be little argument as to the occurrence of these results. They are reflected in the Commission's *Annual Report* for the year ended June 30, 1952:

> "During the year, 21 new commercial FM broadcast stations were authorized. All of these grants were to licensees of standard broadcast stations. . . . At the end of the 1952 fiscal year, 648 commercial FM broadcast station authorizations were outstanding, whereas, at the end of the 1951 fiscal year there were 659 authorizations outstanding. This *decrease* of only 11 authorizations contrasts rather sharply with *decreases* of 73, 133 and 155 for the 1951, 1950 and 1949 fiscal years, respectively." [32] [Emphasis supplied.]

There is, however, controversy over what caused the failure of FM. The Commission, on a number of occasions, has said that the fault lies with the radio manufacturing industry which, for some reason never fully explained, simply did not want to produce FM receivers and stir up public demand for them.[33] This notion contrasts oddly with the known competitive character of the industry which has a direct financial interest in the development of new outlets for its products by way of strong competing services. This was illustrated by the enthusiasm with which the industry welcomed the opportunity to manufacture television sets when occasion arose.[34] It seems unlikely that, had FM attracted set buyers by offering new programming, the industry would deliberately have refused to exploit this source of new revenue. It is, rather, submitted that the root cause was the fact that the Commission completely overlooked the need to promote competition between services as well as within each service.[35]

32. See 18 FCC ANN. REP. 115, 116 (1952).

33. See, for the latest example, the testimony of Chairman Walker before the House Interstate and Foreign Commerce Committee, *Hearing on FCC before House Interstate and Foreign Commerce Committee*, 83d Cong., 1st Sess. 67 (1953).

34. By the end of 1951, after starting in 1946 with 8,000, the industry had produced and placed in use over 15,000,000 television sets. TELECASTING YEARBOOK 49 (1952). And, despite what might be supposed to be a saturated market, the industry produced, in 1952, over 9,000,000 radios in addition to over 6,000,000 television sets. BROADCASTING YEARBOOK 54 (1953).

35. The degree to which it is overlooked is perhaps best illustrated in the case of Meadville Tribune Broadcasting Co., 3 R.R. 544 (1946). The Commission at page 548 said:

The advent of television has again posed a real threat to the vested interests of AM (and FM) radio. It, of necessity, offers a new type of program, and it has now an established public demand. It cannot therefore be suppressed as was FM. With the end of the "freeze" occasioned by channel allocation difficulties, the Commission has started granting licenses at top speed.[36] What it does in this process may well set the nation's television (and radio) patterns for all foreseeable time to come. It is therefore of great interest to examine the pattern so far developed.

Two major radio networks have created television networks. A third radio network has recently been allowed by the Commission to merge with motion picture interests so that it may also have an effective television network in the field.[37] There is one television network that has no interest in AM radio, but the Commission recently found that it was controlled by motion picture interests.[38] The networks, having

". . . The Commission is of the opinion that the public interest, convenience and necessity will be better served by a grant of the application of M. C. Winslow. This selection is based upon the Commission's policy of so exercising its licensing power as to promote, when practical, diversification in the controls [sic] of the media of mass communication. (In re Southern Tier Radio Service, Inc. et al. Docket No. 6655 decided March 20, 1946).

"In the case of the Meadville Tribune Broadcasting Co., a 25% interest is held by an individual who owns a 40% interest and is general manager of a station in Sharon, Pa., which renders primary daytime service in the rural areas surrounding Meadville. 55% of this applicant's stock is held by two brothers who are minority stockholders and active in the publishing of the only daily newspapers published in Meadville. On the other hand, M. C. Winslow has no radio interest *except for the fact that he is grantee of an FM station in Meadville.*" [Emphasis supplied.]

Similar is the Commission's very recent action in granting a permit for a television station to a company formed by two AM stations operating in the same town. No mention was made of the "cross-channel" problem. Macon Television Co., 8 R.R. 897 (1953).

Finally, on March 19, 1953, the Commission decided, in Southern Broadcasting and Television Co., in favor of permitting strong regional concentration, the facts being sufficiently shown in the dissent of two members: "With today's action, construction permits for television stations have been issued, among others, for 4 cities in Southern Idaho. Interested parties in these permits consist of a group composed of Carmon-Wrathall-Smith and McCrea and a group controlled by the J. Robb Brady Trust Company. With respect to 2 of these permits, each group owns a 50% interest. A third station is owned by the Brady group while the fourth station is owned by the Carmon group (excluding Wrathall). *The parties also have similar if not identical AM and FM interests in the same area.* These facts alone, apart from any other problems that may possibly be involved, present a concentration of interest in the media of mass communication in the major cities of a relatively small area that should at least have been the subject of further inquiry, and possibly hearing, to determine whether such a concentration of ownership would be consistent with the public interest." Report No. 2202, Public Notice 88098. [Emphasis supplied.]

36. 18 FCC ANN. REP. 110 (1952).

37. ABC-Paramount Merger Case, 8 R.R. 541 (1953).

38. *Ibid.* It is interesting to contrast this development with what the Commission said in its cogent Chain Broadcasting Report about the undesirability of having two radio networks in the same hands:

"Although the sales and program personnel allocated to the Red or the Blue network may now engage in friendly rivalry, it is hardly to be supposed that this rivalry will ever reach the point where NBC employees are acting against the best interests of NBC. Under such conditions, there can be no competition as that term is properly used.

moved early, now encourage their radio affiliates to move into the new field for their own protection.[39]

As of January 3, 1953, there had been 142 construction permits granted for television stations. Of these permits, 121 were granted to radio interests (AM, FM or both), 50 to newspapers, four to motion picture theatres, 18 to networks, and four to national magazines.[40]

Thus, more than 87% of the existing television stations are owned by radio interests, and 35% of the stations are owned by newspaper interests. Only eight stations, or 5%, are unconnected with any other medium of communication or entertainment.

The significance of these figures may be seen by observing the present television holdings in certain large metropolitan areas. In Los Angeles, there are seven television stations. One is owned by American Broadcasting Company, which operates a local AM-FM station, in addition to radio and television stations in other parts of the country. Another is owned by General Tele-Radio, Inc., which operates a local AM-FM station, in addition to radio and television stations in other parts of the country. Another is owned by a local station, which, in turn, is owned in part by newspaper interests. The NBC network owns one of the television stations, as does CBS. A subsidiary of Paramount Pictures owns one of the television stations, but has no radio interests in Los Angeles. The seventh station is owned by the Los Angeles Times newspaper, which has no radio interests. This situation is closely paralleled by those in Washington, New York, Boston and Detroit, among others.[41]

It should be noted that television stations are extremely expensive to construct and operate and that the early licensees operated at sub-

"NBC's chairman testified that if NBC owned all four networks, there would still be a competitive situation so far as the listener is concerned. This is a time-worn argument of corporations facing charges of monopoly. It proves too much, and reduces the whole theory of our competitive economy to an absurdity. What NBC's chairman was pleased to call 'competition' is not the thing that keeps the opportunity to engage in network broadcasting open to anyone willing to risk his capital and energy, nor does it assure the public the benefits of the healthy and vigorous interplay of economic forces among those engaged in the business. If a single company owned and operated all the drug stores in a city, there would be no less a monopoly because the company refrained from closing all the stores but one, or even organized sales campaigns among the various stores. As long as all the efforts of the employees redound to the benefit of a single employer, there is merely the shadow of competition without its substance." FCC, REPORT ON CHAIN BROADCASTING (Order No. 37) 70-71 (1941).

39. Their entry into the field is facilitated by the channel-by-channel allocation system which compares only the applicants for a given channel instead of considering together all applicants for a given community. As a result, many AM owners will get channels without opposition.

40. In many instances, these figures overlap, as where a newspaper owns both AM and FM in addition to TV. The source of all figures given here is 16 TELEVISION FACT BOOK 25-84 (1953).

41. *Ibid.*

stantial losses for many years. During this period, of course, the Commission did not have a wide choice of applicants. However, at the present time, when the Commission has but recently resumed the granting of construction permits for television stations, the profit in television operation has become apparent. Existing television stations are now operating at substantial profits and bring high prices in the open market when sold. It is now generally believed that television is a very profitable venture, and there is a great rush of applicants from the radio field.[42]

The Commission has made no effort to attract newcomers to the field of commercial television broadcasting. Indeed, the Commission seems to accept it as just and right that this new broadcasting medium shall become the property of those who have done so much to develop the short-playing record and the long-playing commercial in the standard radio field.[43]

On February 15, 1949, the Chairman of the Senate Committee on Interstate and Foreign Commerce addressed a series of questions to the Commission.[44] One of these questions was:

> "To what extent, if any, would such continued use of present television frequencies have the practical effect of denying entry into television operation by the large majority of present-day smaller operators of AM radio stations?" [45]

The reply to this question, which was approved at a meeting of the Commission on February 25, 1949, was as follows:

> "If additional channels are not made available for television, most of the present-day operators in the aural radio field will not have

42. On July 18, 1951, Commission Chairman Coy answered a question by Senator Capehart as to the likelihood that there would be a mass of applicants at the date of the lifting of the freeze, "The gold rush is on." *Hearings before Senate Interstate and Foreign Commerce Committee on FCC Policy on Television Freeze and Other Communication Matters,* 82d Cong., 1st Sess. 30 (1951).

43. There seems no doubt that radio and television programming will tend to parallel each other. Thus, Joseph H. McConnell, then NBC President, is quoted in 8 CODEL'S TELEVISION DIGEST pp. 2-3 (1952), as stating, on the subject of integrating the network's TV and radio functions:

"Placing of the actual operating management of the radio and TV networks under a single, coordinated control will benefit our audience and our customers. NBC radio network listeners will gain access to the outstanding personalities and attractions which have made our NBC-TV network such a success. The NBC-TV audience will have the advantage of a coordinated schedule of entertainment and information programs on both radio and TV.

"We expect this coordinated management to give new excitement to our radio programming by bringing into radio many of our TV stars and attractions. . . . This same coordinated planning will also offer TV homes a more exciting supplementary program schedule on radio. We expect the result to be more use of radio in both radio-only and TV homes."

44. 1 R.R. 91:125.

45. *Id.* at 91:133.

an opportunity to become television broadcasters. This is true because, with 12 VHF channels, it will not be possible for some cities and towns which have standard broadcast facilities to have any television channels. Moreover, in practically all other cities where there will be some television service, there will be far fewer television stations than there are standard broadcast stations. Thus, as a matter of arithmetic, most of the standard broadcast licensees will not be able to enter television if there are only 12 channels assigned. The only way that a large majority of present-day operators in the aural broadcasting field will have opportunity to get into television will be by action of the Commission making available more channels for the television service." [46]

It will be obvious from the tenor of this reply, as well as from that of the question, that television is to be given to those who already have radio stations and that the only worry is whether there will be enough to go around.

In a recent appearance before the House Committee on Interstate and Foreign Commerce, Commissioner Walker expressed the view that the existing radio interests have a vested interest in television. In the course of questioning by Representative Springer, the following colloquy occurred:

"*Mr. Springer:* If you cannot state the Commission's position, do you feel yourself that it is a wise provision in the interest of public policy?

Comm. Walker: Diversity of interests in communications?

Mr. Springer: Yes.

Comm. Walker: Yes, I do.

Mr. Springer: Now, let me ask you this: Have you adopted the same public policy where radio and non-radio interests have been competing for television facilities?

Comm. Walker: No, we have not. Television is going to play such a tremendous role in communications that I think that if some of these broadcasters found themselves out in the cold, so to speak, not being able to apply for some of the television stations, that they would be up against it in broadcasting, and it would be a pretty severe rule to say to a man who has rendered a fine service in broadcasting that he was prohibited from going into television, particularly if television in a measure supplants the radio interest in the broadcasting field. I do not mean by that to disparage radio broadcasting. There will always be radio broadcasting, in my opinion. Further, in my mind, I do not believe that the radio broadcasters will be forced out of business by television. But as I say, it would be a pretty severe rule which would say to a competent radio broadcaster that he could not get

46. *Ibid.*

into the television field. You have to have fairness toward the operator and the public interest, fairness to the operator on the one hand, and a diverse opinion about the public interest on the other. [sic] I would not say that we should not grant to a broadcaster a television station just simply on that factor.

Mr. Springer: My question was only where you had those who were seeking it who were in radio and those who were not seeking it in radio.

Comm. Walker: I would say if you had a much better applicant who was not in radio that he would get the station. But I cannot figure the fact that a man has a radio station would weigh much against him at the moment, because I think he would feel that he was pretty much being put out of business if he knew he could not get a television station because he was in the radio broadcasting business.

Mr. Springer: Are you arriving at that on economic interest or on a question of public policy?

Comm. Walker: Not on economic interest. I just have a feeling of innate justness about the thing. I cannot feel that you would deny a man a television station simply because he was in the radio broadcasting business." [47]

This, then, is the admitted situation, if the Chairman's position is taken as representative of the Commission as a whole: The Commission which originated, and still pays lip service [48] to, the doctrine that

47. *Hearing on FCC before House Interstate and Foreign Commerce Committee,* 83d Cong., 1st Sess. 138-140 (1953). Contrast the Commission's policy statement of January 17, 1944, 7 FED. REG. 702, 703 (1944):

"Aside from the specific question of common ownership of newspapers and radio stations, the Commission recognizes the serious problem involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service.

"In the processing of individual applications for licenses, the Commission will inquire into and in its decisions give expression to 'public interest' considerations. The Commission does not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business. However, it does not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee."

48. The newspaper-radio cases are, apparently, all but abandoned. An indication of this abandonment, apart from the large number of papers which do own stations of all kinds, is the rule, twice recently indicated, that there must be a showing that common control "has been or would be utilized to effect a monopoly of mass communications or has otherwise been or would be exercised contrary to the public interest." Lubbock County Broadcasting Co., 6 R.R. 949, 983 (1951). *Cf.* Fairfield Broadcasting Co., 5 R.R. 190 (1949).

See also, as to the possible transfer of this new rule to television, the reaction of one of the Commission's examiners, who may properly be assumed to reflect, at least generally, the atmosphere of Commission thinking. In the preliminary decision, issued February 2, 1953, in Aladdin Radio and Television, Inc., the examiner held that the

diversification of ownership of the media of mass communication is essential in the public interest is consciously planning to concentrate the three most significant of those media in the hands of a restricted group. A single instance will illuminate the consequences of its present thinking. In 1938, the Commission denied to the Louisville Times Co., the licensee of a clear channel AM station, a license to operate a small 100-watt local station on the ground that diversification of ownership was in the public interest.[49] By 1949, the same interest, which the Commission had stated had a monopoly on daily newspaper expression in its community, while retaining its high-powered AM station, had been granted, in addition, an FM license and a television construction permit to serve the same area.[50]

Conclusion

It is difficult to see how the Commission has overlooked the cogency of its own reasoning in arriving at the results sketched above. It had only to substitute the words "AM," "FM" and "television" in the latter of two paragraphs of its opinion in the *Louisville* case, quoted above,[51] to have a complete answer to arguments that inter-service consolidation is permissible. So amended, the paragraphs would read:

"The underlying principle of the provisions of the Communications Act of 1934 relating to radio broadcasting is that radio

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questions of radio and theatre ownership by applicants could not be considered because there was no proof in the record that such ownership was detrimental to the public interest. (Preliminary Decision p. 59, points 7 and 8.) It is not clear just what sort of record proof could be adduced on such a matter.

The Commission's staff has vigorously attacked this handling of the matter in its Exceptions in the *Aladdin* case, *supra* note 30, at 16: "It is axiomatic that in arriving at a decision in a comparative proceeding. . . . The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only: *Johnson Broadcasting Company v. FCC,* 175 F.2d 351 (App. D.C., 1949), 4 RR 2138, 2144. Since the Commission has decided that diversification of control of media is desirable, the marked difference between the two applicants on this score cannot be ignored. Thus, a grant to Aladdin would concentrate in it three powerful media in the community for the communication of fact and opinion. On the other hand, a grant to Denver would bring a qualified newcomer into the broadcast field. Not only would Denver constitute a new source of communicating fact and opinion, but it would broaden the base for diversified programming. *Cf. Evansville On the Air,* 3 RR 136, 140, 141 (1948). Finally, the fact that a grant to Denver would increase the competitive base in the broadcast field in Denver must be viewed in light of the basic fact that from the '. . . Legislative history of the Act and from various provisions therein that Congress conceived as one of the Commission's major functions the preservation of competition in the radio field. . . .' *Report on Uniform Policy on Violation of Laws,* 1 RR 495, 500 (Part III) and cases there cited."

49. Louisville Times Co., 5 F.C.C. 554, 559 (1938). The Commission noted only parenthetically that the Times and the Courier-Journal, under common ownership, held a complete newspaper monopoly in the area.

50. Courier-Journal and Louisville Times Co., 5 R.R. 348 (1949). The opinion recites the five licenses held by WHAS, including a developmental FM and an experimental facsimile station. *Id.* at 350(a).

51. See text at note 14 *supra.*

facilities must be licensed by the Commission to the end that the public will best be served. In effecting this requirement of the Act, the Commission must consider many elements, one of which, in this case, becomes of particular importance, namely, the furtherance of competition in program service to a community to the end that the best service will be made available.

"It is true that in this instance the applicant is the licensee of [an AM] station, and the application here is for [an FM or a television] station, and it may be argued that the element of competition is not present as the services are different. But the [AM] station serves all of the area which the proposed [FM or television] station would cover, and as people residing in that area may listen to only one station at a time, it is manifest that they would have to choose between the two. It is clear, therefore, that the two stations must necessarily compete for public reception."

Equally applicable is the concluding paragraph, without interpolation:

"In order to assure substantial equality of service to all interests in a community, to assure diversification of service and advancements in quality and effectiveness of service, the Commission will grant additional facilities to identical interests only in cases where it clearly appears that the facility, *apart from any benefit to the business interests of the applicant,* is for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled."[52] [Emphasis supplied.]

If we can assume that actual competition among media is as important to the transportation of communications as it is to the transportation of things,[53] the Federal Communications Commission is heading the wrong way down the track under a full head of steam. That body is, to be sure, understaffed, underpaid and overburdened.[54] These deficiencies may in part explain the doctrinal vagaries explored

52. *Ibid.*

53. The Supreme Court has recently had occasion to comment on this problem which falls, of course, in the public utility field where free competition is not the norm. United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951). It was there stated: "Such limitation was in furtherance of the National Transportation Policy, for otherwise the resources of the railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation." *Id.* at 432, 433. The Court also quoted at length in a footnote the similar views of the ICC expressed in Pennsylvania Truck Lines, *Id.* at 433 n.11.

54. 18 FCC ANN. REP. 18 (1952).

above, but cannot make them persuasive that the public interest is being served.

To outline the situation developed above: Ownership of a newspaper is, under the Commission's rulings, somewhat detrimental to applicants for AM licenses; ownership of local motion picture theaters may have a similar effect. One interest cannot own two stations giving the same service in the same place or too many stations in the same service in different places: the public interest demands that the media of mass communication be held in diverse, competing hands. Nevertheless, AM owners are to be preferred applicants for television licenses in the same area served by their standard broadcast operation; radio networks may, and do, own television networks, as does one branch of a very large motion picture empire.

Some defense can be made of the newspaper rule, taken alone. Newspapers do not compete on a level or very directly with broadcast services,[55] which enter the house on a twenty-four-hour-a-day basis, the paper being read for perhaps an hour. But they do compete to a degree both for advertising dollars and, more importantly, for influence over the thoughts and attitudes of the public. They probably will do so more fully if held by diverse interests.

Far less cogent is the case for insisting on diverse ownership of radio and local motion-picture houses. The owner of the latter, unlike the newspaper owner, has little control over what he shows, and originates none of it. Moreover, what minimal influence he does exert on the public mind is not of a sort which he can readily transfer into such of his radio programs as he in fact produces.

The prohibition of common ownership of stations in the same service at the same place is readily justified—again, only if considered separately from the rules to be discussed below. A little more obscure are the various rules governing the number of stations which can be owned in separate localities. These rules seem rather refined, falling as far short as they do of postulating any threat of unified large-area control.

At all events, combining the maximum effect these rules can possibly have in fostering either economic competition or a free market for ideas in the communications field, the writers submit that their joint force is infinitesimal as compared to the overwhelming contrary effect of the virtually uncontrolled cross-channel, or inter-service, unification which is encouraged among the three broadcast services.

55. This conclusion is borne out in part by a survey conducted by Daniel Starch and Staff, reported in 8 CODEL'S TELEVISION DIGEST No. 8, p. 5 (1952), which found newspaper reading largely unaffected in homes having television.

Since the dominant AM service has been permitted to make a powerless satelite of FM, the public may ultimately lose all the benefits glowing predictions had said would flow from the country-wide competing service. It is generally assumed that the thriving television service will soon surpass, if it has not already, the competitive strength of the older broadcasting services. If radio interests are allowed to own television, they can be expected to subordinate the weaker service to the stronger, as they did with FM. Television being the more costly, but also the more popular, owners of both will undoubtedly build up their TV service and economize on the other—in all probability by duplicating service where possible.[56] The public will ultimately receive a single service in three forms, although three services capable of competing as the Communications Act requires are actually in existence.

Finally, the single service is to be dominated by four nationwide networks, only one of which, the weakest, lacks "cross-channel" integration.

The objective sought by Congress in providing for free competition and the high hopes the Commission once aroused for competitive diversity of service on the air waves and its attendant benefits in diverse and competitive programming seem doomed, perhaps permanently, if the Federal Communications Commission cannot be induced promptly to re-think its present course. The writers believe this prospect is a public disaster, the true magnitude of which it probably is not yet possible to foresee.

56. Another possibility is that AM stations will be degraded to mere record playing and newscasting organs.