

OHIO STATE LAW JOURNAL

Volume 27

Winter 1966

Number 1

CURRENT ANTITRUST PROBLEMS IN BROADCASTING

RICHARD L. PERRY*

The purpose of this article is to summarize recent developments which involve antitrust problems in the broadcast industry. The industry is regulated by the Federal Communications Commission and consists principally of AM and FM radio and television. The television segment of the industry is subdivided into very-high frequency stations (VHF) and ultra-high frequency stations (UHF).¹ Recent developments involving antitrust problems have largely centered on the television segment of the industry. This fact probably reflects that medium's rapidly growing social and economic importance. Television broadcasting currently reaches 52 million households, or 92 percent of the 57 million households in the United States. The average family spends slightly more than 44 hours per week viewing television, and surveys indicate that television has replaced newspapers as the public's primary source of news.²

STATUTORY PROVISIONS

Section 313 of the Communications Act of 1934 provides:

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in

* Member of the Bar of the District of Columbia.

¹ The VHF channels are numbered 2 through 13. The UHF channels are numbered 14 through 83. For a number of years, UHF stations have been at a competitive disadvantage primarily because the majority of existing television receivers were not equipped to receive UHF signals. This competitive disadvantage will be gradually corrected as a result of the All-Channel Act, which went into effect on April 30, 1964. 76 Stat. 150 (1962), 47 U.S.C. § 303(s) (1964); 76 Stat. 151 (1962), 47 U.S.C. § 330 (1964); 47 C.F.R. §§ 15.65, 15.66 (1965). With a television receiver turnover of approximately 10% per year, the "saturation" of UHF reception will approach 100% in approximately ten years from the effective date of the Act. The history of the Commission's attempts to resolve competitive problems confronting UHF broadcasters is summarized in Note, 75 Harv. L. Rev. 1578 (1962).

² See Address by Commissioner Loevinger, Colorado Broadcasters Association, June 11, 1965.

restraint of trade are declared to be applicable to . . . interstate or foreign radio communications.³

The Supreme Court has declared that "the field of broadcasting is one of free competition."⁴ The Court further said:

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb, according to his ability to make his programs attractive to the public.⁵

Although the broadcast industry is thus one of "free competition," the primary responsibility for enforcing the antitrust laws does not reside in the Federal Communications Commission, but in the Department of Justice and other agencies such as the Federal Trade Commission.⁶ The Supreme Court has held that the Federal Communications Commission has no direct authority to pass on antitrust violations as such.⁷

The Commission's licensing functions are governed by a standard of "public convenience, interest, or necessity."⁸ The fact that the Commission has no direct authority to enforce the antitrust laws, however, does not imply that it may not consider federal antitrust policy in determining whether the "public convenience, interest, or necessity" will be served by granting a license.⁹ For example, the Supreme Court

³ 48 Stat. 1087 (1934), as amended, 47 U.S.C. § 313(a) (1964).

⁴ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

⁵ *Id.* at 475.

⁶ Section 11 of the Clayton Act, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1964), gives the Federal Communications Commission authority to enforce the Act's prohibitions of price discrimination, mergers, and interlocking directorates "where applicable to common carriers engaged in wire or radio communication or radio transmission of energy." The Commission, however, has never exercised its authority under this section. Several of the antitrust laws may be inapplicable to practices of the broadcast industry. Thus, it has been held that the sale of broadcast time is not a "commodity" within the meaning of the Clayton Act. *Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962). *But cf.* *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609-10 n.27 (1953); *Syracuse Broadcasting Corp. v. Newhouse*, 236 F.2d 522, 527 (2d Cir. 1956). See Blake & Blum, "Network Television Rate Practices: A Case Study of the Failure of Social Control of Price Discrimination," 74 *Yale L.J.* 1339 (1965), Loevinger, "The Role of Government in the Field of Advertising," 26 *ABA Section of Antitrust Law Proceedings* 180 (1964).

⁷ *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

⁸ 48 Stat. 1083 (1934), 47 U.S.C. § 307(a) (1964).

⁹ *United States v. Radio Corp. of America*, 358 U.S. 334, 351 (1959); *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-24 (1943).

has held that in the field of international radiotelegraphy, competition is not an unqualified goal but merely "a relevant factor in weighing the public interest."¹⁰ In addition, the Commission has held that it is without power to consider the possible effects of lawful competition, as distinguished from unlawful restraints and monopolies, when passing on broadcast applications.¹¹ The Commission's policies in promoting competition seems to be guided basically by first amendment principles, and are apparently directed more toward achieving the widest possible dissemination of information from diverse and antagonistic sources than they are toward promoting competition in the commercial sense.¹²

If the Commission has no authority to enforce the antitrust laws, does a satisfactory system of liaison exist between the Commission and the antitrust enforcement agencies?

LIAISON WITH ANTITRUST ENFORCEMENT AGENCIES

The Chairman of the House Judiciary Committee has described liaison arrangements between the Federal Communications Commission and the Department of Justice as "inadequate."¹³ Recent developments in the protracted litigation involving certain broadcast stations owned by the National Broadcasting Company and the Westinghouse Broadcasting Company bear this out.¹⁴

¹⁰ *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953).

¹¹ *Southeastern Enterprises (WCLE)*, 13 Pike & Fischer Radio Regulation [hereinafter cited as R.R.] 139, 147 (1957). See Note, 57 Colum. L. Rev. 1036 (1957); Note, 67 Yale L.J. 135 (1957). The Commission, however, must consider economic injury to a competitor if the public interest in the maintenance of adequate service would be affected by granting a license. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958). As a general rule, the antitrust laws are designed to protect competition, not individual competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

¹² See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Goodwill Stations, Inc. v. FCC*, 325 F.2d 637, 640 n.5 (D.C. Cir. 1963).

¹³ Celler, "Antitrust Problems in the Television Broadcast Industry," 22 *Law & Contemp. Prob.* 549, 555-57 (1957).

¹⁴ In 1955 NBC owned VHF television stations in New York City, Los Angeles, Chicago, Cleveland, and Washington, D.C., the nation's first, second, third, tenth, and eleventh largest markets. Westinghouse was the licensee of VHF stations in Philadelphia, Boston, and San Francisco and was an applicant for stations in Pittsburgh and Portland, Oregon. Westinghouse's Philadelphia and Boston stations were affiliated with the NBC network.

NBC desired to exchange its stations in Cleveland and Washington, the tenth and eleventh largest markets, for stations located in more important markets, *i.e.*, Philadelphia and Boston, the fourth and sixth largest markets. NBC offered to trade its Cleveland and Washington stations for Westinghouse's Philadelphia and Boston stations and advised Westinghouse that if the trade could not be consummated, it would attempt to purchase other stations in Philadelphia and Boston. Westinghouse inferred from this that

In 1955 Westinghouse agreed to exchange its Philadelphia stations for NBC's Cleveland station plus 3 million dollars, and NBC offered network affiliation to Westinghouse for its proposed Pittsburgh station. The parties requested approval of the arrangement by the Commission. After conducting an investigation, but without a full hearing, the Commission approved the transaction in December 1955.

A year later, the Department of Justice filed a civil antitrust suit charging that NBC's conduct in arranging the exchange was in violation of the Sherman Act. The Department of Justice and NBC stipulated that the Commission had before it all the information which constituted the basis of the government's complaint.¹⁵ The case was settled by a consent judgment which required NBC to divest its Philadelphia stations. In compliance with the judgment, NBC entered an agreement with RKO General, Inc., a licensee of stations in Boston, under which NBC would exchange its Philadelphia properties for RKO General's Boston stations. Both the Department of Justice and the district court indicated that the proposed assignment would not be inconsistent with the consent decree.¹⁶

When NBC's Philadelphia licenses came up for renewal before the Commission, Philco Broadcasting Company filed a competing application. In addition to this controversy between NBC and Philco, the Commission was also required to approve the arrangements between NBC and RKO General. The Commission conducted extensive hearings into all transactions between NBC and Westinghouse. Following these hearings, the Commission ordered NBC to exchange its Philadelphia stations for Westinghouse's Cleveland stations, without returning the 3 million dollars which had been paid to Westinghouse.¹⁷ The Philco application was denied. The Commission said: "We deem those facts to demonstrate that NBC acquired the licenses of stations WRCV-TV and WRCV(AM) in Philadelphia through the coercive use of its power to grant or withhold network affiliations."¹⁸

With respect to the consent order which had been approved by the district court, the Commission said:

The consent decree involves antitrust matters resting solely within the discretion and competence of the courts We, on the other hand, must determine whether, under the Communications Act, re-

it would lose network affiliation in Philadelphia and Boston if it refused to trade with NBC. Entering Boston and Philadelphia would place NBC in the first, second, third, fourth, and sixth (now the fifth) largest markets.

¹⁵ *United States v. Radio Corp. of America*, 358 U.S. 334, 338 (1959).

¹⁶ *United States v. National Broadcasting Co.*, 186 F. Supp. 776 (E.D. Pa. 1959).

¹⁷ *National Broadcasting Co.*, 2 R.R.2d 921 (1964).

¹⁸ *Id.* at 935.

newal of the Philadelphia licenses and their transfer to RKO General would serve the public interest. We cannot regard this transaction, which in exchange would bring to NBC the present RKO General licenses in Boston, as one which meets the public interest. For the ownership of stations in Boston (in the event that Westinghouse refused to exchange the Philadelphia stations) was, as stated, one of the prime objects of the very misconduct which the public interest requires us to prevent and deter.¹⁹

Thus, the *NBC-Westinghouse* case indicates that Commission approval of a transaction will not necessarily prevent the Department of Justice from seeking remedies under the antitrust laws. Correspondingly, a district court judgment which permits a transaction satisfying the antitrust laws will not necessarily deter the Commission from reexamining the entire transaction and directing a different result in accordance with its own policies. In this case, a transaction which had been approved by the Commission was later challenged by the Department and a transaction approved by the Department was later challenged by the Commission. The Commission also disapproved a transaction which it itself had approved nine years earlier. It is apparent that the differing policies pursued by the Department of Justice under the antitrust laws and by the Commission under the "public interest" standard are capable of producing an uneven enforcement of the law.

LICENSING PROCEEDINGS

The Commission's Uniform Policy on Law Violations

The Communications Act empowers the Commission to promulgate regulations requiring applicants to disclose facts concerning their "citizenship, character, and financial, technical, and other qualifications."²⁰ The Commission's 1951 Uniform Policy on Law Violations sets forth standards for licensing proceedings in which it appears that an applicant has violated federal, state, or local laws.²¹

The "Uniform Policy" makes it clear that the Commission does not intend to enforce the antitrust laws, as such. However, the Commission will consider violations of the antitrust laws to the extent that they reflect upon an applicant's qualifications to serve as a licensee.²²

¹⁹ *Id.* at 947.

²⁰ 48 Stat. 1084 (1934), as amended, 47 U.S.C. § 308(b) (1964).

²¹ Dkt. No. 9572, FCC 51-317, March 29, 1951.

²² In *National Broadcasting Co. v. United States*, 319 U.S. 190, 222 (1943), the Court held that the Commission may exercise its judgment to determine whether violations of the antitrust laws disqualify an applicant, and may "infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee."

The Commission said that it will consider whether the violation was willful or inadvertent, whether there was merely an isolated instance of violation as distinguished from a series of recurring offenses which establish a definite pattern of misconduct, whether the violations have taken place over a long period of time, and whether the applicant is presently engaged in illegal practices.

The Commission said that although the "Uniform Policy" is not confined to violations of the antitrust laws, violations of those laws "have been the principal basis for the Commission's concern in this matter."²³ In particular, the Commission was concerned about "the major motion picture companies who have violated the antitrust laws over a period of years in the motion picture field."²⁴

Several motion picture companies whose applications for broadcast facilities were pending before the Commission had been defendants in *United States v. Paramount Pictures, Inc.*²⁵ In that case, the Supreme Court held that a number of motion picture producers, distributors, and exhibitors had violated sections 1 and 2 of the Sherman Act. The offenses included the fixing of minimum admission prices which exhibitors could charge; the use of unreasonable clearances and runs which gave the defendants a monopoly on "first-run" pictures; the joint ownership of theaters by defendants; the employment of formula deals, master agreements, and franchises which prevented small exhibitors from obtaining "first-run" films; the "block-booking" of films, whereby exhibitors were sometimes required to pay for unwanted films in order to obtain other films; and the discrimination against small exhibitors in favor of large theater chains.²⁶

The Commission said that it would proceed on a case-to-case basis and would review the motion picture companies' records of violations to determine whether they were qualified to operate in the public interest. No licenses were revoked or denied, however, as a result of this review. Since the Supreme Court's decision in the *Paramount* case, a number of the defendants have been licensees of radio and television stations.²⁷

²³ Dkt. No. 9572, *supra* note 21, at 6.

²⁴ Dkt. No. 9572, *supra* note 21, at 7.

²⁵ 334 U.S. 131 (1948).

²⁶ Some of the defendants in the *Paramount* case were later defendants in *United States v. Loews, Inc.*, 371 U.S. 38 (1962), in which the Court held illegal the "block-booking" of films distributed to the television industry.

²⁷ Columbia Pictures Corporation and Screen Gems, Inc. have been licensees of KCPX-AM and TV, Salt Lake City, Utah since 1959; WAPA-TV, San Juan, Puerto Rico since 1962. These companies have had a one-third interest in WOLE-TV, Aguadilla, Puerto Rico since 1962. Twentieth-Century Fox has been the licensee of KMSP-TV, Minneapolis, Minnesota since 1959. Paramount Pictures, Inc. was the licensee of KTLA-

In its 1952 decision authorizing the merger of United Paramount Theaters, Inc. and American Broadcasting Corporation, the Commission announced several rules which apparently limit the extent to which it will consider an applicant's history of antitrust violations.²⁸ The Commission said that no consideration will be given to antitrust violations occurring more than three years prior to the date the application is designated for hearing; actions filed during the three-year period, if based on antecedent facts, will likewise be ignored; the mere fact that a complaint is filed during the three-year period, but not adjudicated, is likewise not relevant;²⁹ and the fact that a case is concluded by means of a settlement agreement, without any finding of violation, does not reflect adversely upon the applicant.³⁰

At the time of the *Paramount-ABC* merger case, 198 antitrust cases had been filed against Paramount. Of these, 124 were still pending, 63 had been settled, 5 had been dismissed, and 4 had been decided in favor of Paramount. Only two cases had been decided against Paramount, and one of these was based upon facts antedating the date of designation by more than three years. This left only one proven antitrust violation against the applicant.

The *Paramount-ABC* case, if followed, would limit consideration of antitrust infractions to those in which the cause of action arose no more than three years prior to the date of designation of the application, and which have been litigated to a conclusion in favor of the plaintiff. Although the record in FCC cases is frequently open for several years following the date an application is formally designated for hearing, the progress of antitrust litigation is often equally slow.

TV in Los Angeles, California from 1947 to 1964. Loews, Inc. was the licensee of WHN (formerly WMGM) in New York City from 1928 to 1962, and owned a 25% interest in KMSP-TV, Minneapolis, Minnesota from 1956 to 1958. Warner Brothers was the licensee of KFVB in Los Angeles, California from 1925 to 1950. A subsidiary of United Artists Corporation is currently an applicant for two UHF television stations in Houston, Texas and Lorain, Ohio. Dkt. Nos. 15213, 15248.

²⁸ Paramount Pictures, Inc., 8 R.R. 135 (1952); Paramount Pictures, Inc., 8 R.R. 541 (1952).

²⁹ See also National Broadcasting Co., 15 R.R. 965, 975 (1957); WHDH, Inc., 13 R.R. 507 (1957); Amalgamated Broadcasting Sys., Inc., 3 R.R. 1176, 1181 (1947); Television Prods., Inc., 3 R.R. 682 (1946). The Supreme Court, however, has indicated that the Commission has the power to refuse a license to a station not operating in the public interest although its misconduct happens to be an unconvicted violation of the antitrust laws. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

³⁰ The Commission has also ruled that an inference of guilt cannot be drawn from a plea of *nolo contendere*. *Westinghouse Radio Stations, Inc.*, 10 R.R. 878, 964-65 (1955).

The limitations upon inquiry thus imposed by the *Paramount-ABC* case would apparently render the "Uniform Policy" inapplicable in many cases.

In 1961 a number of indictments under the Sherman Act were filed against leading manufacturers of electrical equipment. At the same time, officers and employees of certain of these companies were indicted individually. The indictments charged that the defendants had unlawfully conspired to fix prices, engaged in collusive bidding, and divided markets. These practices involved 1.75 billion dollars worth of electrical equipment. The defendants included Westinghouse Electric Corporation, which, through subsidiaries, was a licensee of ten radio stations and four television stations, and General Electric Company, which owned two radio stations and one television station.³¹ Westinghouse pleaded guilty in seven cases and *nolo contendere* in twelve cases. Eleven of its officers and employees were fined and seven received prison sentences. General Electric pleaded guilty in seven cases and *nolo contendere* in thirteen cases. Fifteen of its officers and employees were fined and eleven received prison sentences.³²

The Commission designated the applications of Westinghouse and General Electric for hearings to determine what effect, if any, these antitrust violations had on their qualifications as broadcast licensees. After lengthy hearings, the Commission renewed all of the Westinghouse and General Electric licenses. The Commission held that anti-trust violations do not per se disqualify; they are merely circumstances from which the Commission may draw inferences as to probable future conduct. It said that the electrical equipment cases did not involve the same organizational structure which managed and operated the defendants' facilities. Moreover, the record of broadcast performance of both companies was good, and organizational changes had allegedly been made to assure that further violations of the antitrust laws would not occur.

The Commission has generally ruled that violations of the anti-trust laws are not a disqualifying factor.³³ However, there have been

³¹ See *Westinghouse Broadcasting Co.*, 22 R.R. 1023 (1962); *General Elec. Co.*, 2 R.R.2d 1038 (1964).

³² Evidence before the Commission indicated that General Electric had violated the antitrust laws at least 19 times between 1911 and 1954.

³³ *General Elec. Co.*, 2 R.R.2d 1038 (1964); *Westinghouse Broadcasting Co.*, 22 R.R. 1023 (1962); *Lorain Journal Co.*, 9 R.R. 406 (1953); *Aladdin Radio and Television, Inc.*, 9 R.R. 1, 35 (1953); *Paramount Pictures, Inc.*, 8 R.R. 135 (1952); *Lycoming County Broadcasting Co.*, 4 R.R. 264, 274-75 (1948).

at least two comparative hearings in which such violations were among the grounds cited for preferring one applicant over another.³⁴

As a device for maintaining compliance with the antitrust laws and fostering a national policy of competition in the broadcast industry, the Commission's "Uniform Policy" has had little apparent effect. The significance of past violations can often be offset by giving assurances of future compliance, by making organizational changes designed to assure that the broadcast facilities will not become involved in possible future violations, by injunctive provisions adopted by the court designed to eliminate the recurrence of prohibited conduct, and by the discharge of officers and employees involved in antitrust violations. Companies with a record of good performance in areas immediately within the Commission's jurisdiction have rarely been penalized for bad performance in areas under the jurisdiction of the antitrust enforcement agencies.

DIVERSIFICATION OF CONTROL

When two or more persons file mutually exclusive applications, the Commission designates the competing applications for a comparative hearing to determine which applicant is best qualified to serve the public interest.³⁵ The award is made on the basis of preferences and demerits which represent differences among the applicants. The criteria used in comparative hearings include such matters as local ownership, integration of ownership and management, broadcast experience, record of past broadcast performance, proposed programming, participation of officers and stockholders in civic activities, diversification of the backgrounds of officers and stockholders, proposed staff and technical facilities, and diversification of ownership of the media of mass communications.³⁶ Only one of the foregoing criteria—diversification of ownership of the media of mass communications—involves a consideration of the probable competitive consequences of a proposed grant.

The Commission's 1965 "Policy Statement on Comparative Broadcast Hearings" states that "diversification is a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme."³⁷ The Commission said:

³⁴ Southeastern Mass. Broadcasting Corp., 3 R.R. 1658, 1669 (1947); Arkansas-Oklahoma Broadcasting Corp., 3 R.R. 479 (1946).

³⁵ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

³⁶ See Irion, "FCC Criteria for Evaluating Competing Applicants," 43 *Minn. L. Rev.* 479 (1959); Note, 45 *Geo. L.J.* 265 (1956-57); Note, 64 *Harv. L. Rev.* 947 (1951).

³⁷ FCC 65-689, July 28, 1965, at 3.

As the Supreme Court has stated, the First Amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press v. United States*, 326 U.S. 1, 20. That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established.³⁸

The Commission ordinarily accords a preference to an applicant who holds no direct or indirect interest in any media of mass communications. For example, the ownership of broadcast facilities by persons owning newspapers has been considered in many comparative hearings and has sometimes been a decisive factor.³⁹ In one case, the Commission denied the application of a newspaper on the ground that the applicant had used its alleged newspaper monopoly to force a local radio station out of business.⁴⁰ Whether or not the proceeding is a comparative one, the Commission generally attempts to determine whether a grant will result in an undue concentration of control.⁴¹

Diversification, however, is only one of a number of factors which are considered in comparative cases. Depending upon the weight assigned to the preferences and demerits on other criteria, diversification may or may not be controlling. Diversification is not a controlling factor if it is offset by other criteria.⁴² On the other hand, it may be accorded controlling weight if there are no other significant differences among the competing applicants.⁴³

If the existing and proposed broadcast facilities are located in widely separated sections of the country and do not compete against each other for advertising revenues, program materials, or listening audience, the Commission accords the factor of diversification little or no weight.⁴⁴ However, a broadcast interest located in the same region, although not necessarily in the same community, must be given

³⁸ *Id.* at 2 n.4.

³⁹ See *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C. Cir. 1951).

⁴⁰ *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950). See *United States v. Radio Corp. of America*, 358 U.S. 334, 351-52 (1959); *Miami Broadcast Co.*, 1 R.R.2d 143, 148 (1963).

⁴¹ See *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955).

⁴² *Tennessee Television, Inc. v. FCC*, 262 F.2d 28 (D.C. Cir. 1958).

⁴³ See *Enterprise Co. v. FCC*, 231 F.2d 708 (D.C. Cir.), *cert. denied*, 351 U.S. 920 (1956).

⁴⁴ *Peninsula Broadcasting Corp.*, 18 R.R. 781 (1959).

comparative consideration.⁴⁵ If the existing and the proposed broadcast facilities are located in nearby communities so that competition between them would be adversely affected, the opposing applicant will be favored.⁴⁶ The importance of diversification is also reduced or increased in accordance with the percentage of ownership in the applicant or in the other mass communication media. However, it has been held that although the owners of an existing newspaper and radio station would exercise only a "relatively small voice" in the applicant, the opposing applicant should be favored.⁴⁷

RULEMAKING

Community Antenna Television Systems

Community antenna television systems (CATV) receive and amplify television broadcast signals and redistribute them by wire or cable to subscribing members of the public.⁴⁸ The first commercial CATV system was installed in 1950. There are now approximately 1,300 CATV systems which serve an estimated 3,300,000 viewers. Most CATV systems receive television signals as would a home set. Approximately one-fifth of them, however, employ microwave relays.⁴⁹ Such relays are subject to the Commission's licensing authority.

For a number of years, television broadcasters have urged the Commission to impose competitive limits upon CATV systems vis-à-vis conventional stations. The broadcasters claimed that CATV systems serve only those who are willing and able to pay fees, whereas conventional broadcasters serve the entire public without charge; they serve only persons in areas which can support cable systems, and do not reach many rural areas; they compete unfairly because they distribute television programs to subscribers without the consent of the originating station and without bearing any of the program costs; and they allegedly do not originate a substantial number of local live programs, whereas conventional television stations serve local needs and interests.⁵⁰

Until recently, the Commission ruled that it has no jurisdiction over CATV systems and that there is no basis for regulating the micro-

⁴⁵ *Plains Radio Broadcasting Co. v. FCC*, 175 F.2d 359, 363 (D.C. Cir. 1949).

⁴⁶ *Fisher Broadcasting Co.*, 18 R.R. 369 (1959).

⁴⁷ *Columbia Empire Telecasters, Inc. v. FCC*, 228 F.2d 459 (D.C. Cir. 1955).

⁴⁸ See "Rules re Microwave—Served CATV," 38 F.C.C. 683 (1965) (First Report and Order). *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 517 n.16 (D.C. Cir. 1955).

⁴⁹ See Address by Commissioner Ford, National Community Television Association, June 18, 1964.

⁵⁰ See Address by Commissioner Loevinger, Colorado Broadcasters Association, June 11, 1965.

wave common carriers which transmit signals to them.⁵¹ An exception was made, however, where the effect of a grant would result in the economic destruction of an existing station.⁵²

On April 22, 1965, the Commission, in effect, reversed its earlier rulings and announced that it intends to regulate all CATV systems, whether or not they utilize microwave relays.⁵³ The Commission also said that it would conduct a broad inquiry into all aspects of CATV operations. At the same time, the Commission promulgated rules for CATV systems utilizing microwave relays. The new rules are designed to protect the competitive position of conventional television stations. The rules would require CATV systems to carry the signals of local stations without material degradation in quality.⁵⁴ They would also confer program exclusiveness upon conventional stations by prohibiting CATV systems from duplicating the programs of local stations, if requested, during a period beginning fifteen days before and ending fifteen days after the date of broadcast by the local stations.⁵⁵ In short, CATV systems would be required not to diminish the potential viewing audience of local stations and would be prohibited from competing against their programming.

Another question is whether television broadcast licensees should be permitted to own CATV systems. Proponents of a rule prohibiting such ownership base their arguments on the Commission's policy favoring diversification in the ownership and control of the media of mass communications. Separately owned television stations and CATV systems would, arguably, compete more vigorously for viewers than would facilities owned in common. In addition, a CATV system which is owned by a television station might discriminate against competing stations. Licensees might also exploit their CATV system at the expense of the co-owned television station by failing to broadcast an optimum technical signal in order to secure greater revenue from the CATV system.

⁵¹ *WSTV, Inc. v. Fort Nightly Corp.*, 23 R.R. 184 (1962); "Inquiry into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV 'Repeaters' on the Orderly Development of Television Broadcasting," 18 R.R. 1573 (1959); *Frontier Broadcasting Co.*, 16 R.R. 1005 (1958).

⁵² *Carter Mountain Transmission Corp.*, 22 R.R. 193 (1962), *aff'd*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

⁵³ See "Notice of Inquiry and Notice of Proposed Rulemaking," Dkt. No. 15971, FCC 65-334, April 22, 1965.

⁵⁴ In some cases CATV systems do not offer switching devices which enable their subscribers to receive local stations. It is also alleged that their promotional literature encourages subscribers to abandon expensive antenna systems which permit such local reception.

⁵⁵ "Rules re Microwave-Served CATV," *supra* note 48.

The Commission, however, has reached the "preliminary and tentative" conclusion that cross ownership should not be prohibited.⁵⁶ It stated that the evidence has not thus far indicated the existence of substantial and wide-spread abuses. In addition, it will give further consideration to the question of cross ownership in its present inquiry into CATV.

The CATV industry has experienced rapid growth since its inception in 1950. The outlines of some of the problems which have accompanied this growth can be identified. It is safe to predict, however, that clarification of these problems and the nature of the Commission's regulatory role will not come for some time.

Network Operations

Television programming comes from four sources: (a) the three major network corporations, ABC, CBS, and NBC; (b) "syndication," which means the distribution of programs originally produced for television on a non-network regional or local basis; (c) theatrical film originally produced for motion picture theaters; and (d) local live programming.⁵⁷

The Commission's regulatory authority over networks is derived from its licensing functions. Broadcast licensees bear the only direct legal responsibility for providing radio and television services.⁵⁸ A "network" is composed of a number of independent broadcast licensees which derive a substantial portion of their programming from a central source, the network corporation. All three of the major network corporations are licensees of radio and television stations, although the number of stations which they can own is limited by the Commission's multiple ownership rules.

Although network operations present a number of problems having implications under the antitrust laws,⁵⁹ recent developments have been concerned primarily with the role of the networks in the area of program production and distribution.

The network corporations procure programs, arrange for sponsorship, and offer a continuous, coordinated program schedule to their affiliated stations. Networks compensate their affiliates for carrying network programs and act as "sales agents" to create a national adver-

⁵⁶ Dkt. No. 15415, FCC 65-688, July 28, 1965 (First Report).

⁵⁷ See "Notice of Proposed Rulemaking," Dkt. No. 12782, FCC 65-227, March 22, 1965.

⁵⁸ "Report and Statement of Policy re Commission en banc Programming Inquiry," FCC 60-970, July 29, 1960; 25 F.R. 7291, 7295 (1960).

⁵⁹ See, e.g., Salant, Fisher & Brooks, "The Functions and Practices of a Television Network," 22 Law & Contemp. Prob. 584 (1957).

tising market. The network corporations and their affiliates are connected through common carriers which are required to file tariffs with the Commission. The type of affiliation contracts which licensees may execute with the networks is regulated by the Commission's chain broadcasting regulations, which permit affiliates to reject programs under certain circumstances.⁶⁰

In some cases, the networks produce programs and retain all rights of ownership. In other cases, the networks enter "co-production" agreements with independent producers. These agreements generally give the networks a number of rights, including the right to the "first run" of the program, a share in the profits derived from subsequent runs, and the right to engage in domestic and foreign syndication. In other cases network programs are brought to the market by independent producers at their own account and risk.

For some time, the Commission has been interested in an alleged increased control by networks over the production and distribution of programs. Between 1957 and 1964 the percentage of program hours accounted for by "independent" producers decreased from approximately 33 percent to 7 percent.

On March 22, 1965, the Commission announced proposed rules which would impose strict limitations on the right of networks to own programs and participate in program production.⁶¹ The proposed rules would also prohibit networks from engaging in the syndication and foreign sale of programs produced by "independents." The networks, however, would retain the right to syndicate programs produced solely by them. The proposed rules would prohibit the networks from offering a weekly evening program schedule in which more than 50 percent of the time, or a total of 14 hours per week, whichever is greater, is occupied by programs (exclusive of news and sustaining programs) which are produced by the network or in which it has "first run" rights.

The Commission said that it is not desirable for so few entities to have such a degree of power with respect to what the American public may see and hear over so many television stations. The concentration of power over program production in the networks has allegedly decreased the competitive opportunities of independent producers. The Commission said that there has been a steady decline in the number of new programs available for syndication and that financial participation by the networks in proposed programs is often a decisive factor in the selection of particular programs.

⁶⁰ 47 C.F.R. § 73.658 (1965).

⁶¹ "Notice of Proposed Rulemaking," Dkt. No. 12782, FCC 65-227, March 22, 1965.

The proposed rules raise questions as to the scope of the Commission's regulatory authority. In addition, it remains to be seen whether the factual assumptions underlying the rules will be supported by the evidence to be adduced in the current proceeding.

Multiple Ownership Rules

The Commission's multiple ownership rules are intended to promote diversification in broadcast services and programming and to prevent undue concentrations of economic power.⁶² The rules follow two distinct approaches to this problem. The "concentration of control" rules place absolute limitations on the ownership of broadcast facilities. They prohibit the common ownership of more than seven AM stations, seven FM stations, and seven television stations.⁶³ The common ownership or control of fewer stations is prohibited if an undue concentration of control is found to exist in light of such factors as the size and location of the area served, the number of people served, the classes of stations involved, and the existence of competition in the area.

In addition to the "concentration of control" provisions, the multiple ownership rules are intended to cope with purely local and regional problems involving an undue concentration of control. Prior to 1964, the standard broadcast rules prohibited the grant of a license to any party if

such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation.⁶⁴

In 1964, however, the foregoing rule was amended to prohibit specific levels of overlapping service. No license may now be granted to any person who directly or indirectly owns, operates, or controls one or more AM or FM stations if the grant would result in an overlap

⁶² The multiple ownership rules apply to all three broadcast services, *i.e.*, AM radio, FM radio, and television. 47 C.F.R. §§ 73.35, 73.240, 73.636 (1964).

⁶³ No more than five of the seven television stations may be in the VHF band. The Supreme Court has upheld the Commission's authority to place absolute numerical limitations on the number of stations which may be owned by one person. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

⁶⁴ 47 C.F.R. § 73.35(a) (1964). The FM and television rules prohibited the licensing of a station which would serve "substantially the same area" as another station owned or operated by the applicant. 47 C.F.R. §§ 73.240(a), 73.636(a) (1964). The FM and television rules did not contain the built-in waiver provision found in the AM section. In practice, however, the possibility of a waiver was at least theoretically available in FM and television cases prior to 1964.

of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations. The new television rule prohibits an overlap of the Grade B contours of the existing and proposed stations.

The Commission explained its purpose in adopting the new rules as follows:

The concept embodied in the rules is not complex: When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have "an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level." In this respect, the rules are based upon a view of the First Amendment to the Constitution similar to that of the Supreme Court in the *Associated Press* case—i.e., a notion that the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁶⁵

The Commission claimed that twenty years of experience with case-by-case adjudication had proved unsuccessful in preventing local and regional concentrations of power. The presence of undesirable overlap had allegedly become only one of a large number of evidentiary considerations contributing to the ultimate decision. The Commission concluded that the pattern of grants which had been developed through case-by-case adjudication did not represent "a desirable realization of our national multiple ownership policy." It also said that the results of case-by-case adjudication had not justified the effort expended and that the new rules would enable applicants to plan their proposals with a greater degree of foreknowledge of the Commission's requirements.

⁶⁵ "In the Matter of Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations," Dkt. No. 14711, FCC 64-445, June 9, 1964. (Footnotes omitted.) The 1 mv/m contour has generally been regarded as the normally protected contour for FM stations. For AM stations, unlike FM, the 0.5 mv/m contour had long been regarded as defining a station's "normally protected service area." Nevertheless, many applications were granted which resulted in an interference within the 0.5 mv/m contours. In choosing the Grade B contour to define the prohibited area of overlap in television service, the Commission said that the Grade B signals provide the only available service in many areas of the country. Ordinarily, Grade B television signals can be received only by the use of relatively complex antenna systems.

Shortly after announcing the new rules, the Commission turned to a special problem which involves an alleged concentration of control of VHF television stations. The Commission announced that it would require hearings on all future applications for a second VHF television station in any of the fifty "major markets." The Commission pointed to evidence which indicated that in recent years there has been an increase in the extent of multiple ownership and that the trend toward increased concentration of ownership is particularly evident in the VHF television service. For example, between 1956 and 1964 the number of multiple television station owners increased from 81 to 134, or from 23.3 percent to 40.9 percent of all station owners. During the same period, the number of television stations owned by multiple owners increased from 203 to 372, or from 43.4 percent to 65.7 percent of all stations. At the same time, the number of individually owned stations declined from 265 to 194.

In the ten largest markets, as defined by the American Research Bureau, there are forty VHF stations, of which thirty-seven are held by multiple owners, and the remaining three are licensed to companies which own daily newspapers in the same cities. The Commission concluded:

Briefly, our purpose is to prevent undue concentration of control in the broadcasting industry, and to encourage the development of the greatest diversity and variety in the presentation of information, opinion, and broadcast material generally. In our actions in this area, we are guided by the Congressional policy against monopoly in the communications field (e.g., as expressed in Section 313 of the Communications Act), and the concept (recognized by the Courts) that the broadcasting business is, and should be, one of free competition.⁶⁶

In June, 1965, the Commission instituted formal rule making proceedings on a proposed amendment to the multiple ownership rule which would prohibit the common ownership of three television stations or more than two VHF stations in the fifty largest markets.⁶⁷ Commissioner Hyde dissented, calling the Commission's investigation inadequate. He also challenged the Commission's contention that its statistics demonstrate a trend toward undue concentration.⁶⁸

⁶⁶ "Commission to Designate for Hearing Applications to Acquire Interests in a Second VHF Station in Major Markets." FCC 64-1171, Dec. 18, 1964.

⁶⁷ "Interim Policy Concerning Acquisition of Broadcast Stations," Dkt. No. 16068, FCC 65-548, June 21, 1965.

⁶⁸ Dissenting statement of Commissioner Hyde, "Interim Policy Concerning Acquisition of Broadcast Stations," Dkt. No. 16068, June 24, 1965.

CONCLUSION

Although the Supreme Court has said that the broadcast industry is one of free competition, the industry is not regulated by those competitive forces which the antitrust laws seek to preserve. The Communications Act provides that the antitrust laws shall be applicable to practices in the industry. However, the Federal Communications Commission has no direct enforcement authority under the Sherman Act. Enforcement of the antitrust laws is complicated by the fact that the Commission's "public interest" standard sometimes produces results which conflict with antitrust objectives.

Recent developments disclose a trend from adjudication toward the adoption of per se rules of illegality which are intended to regulate competition and, in some cases, to limit it. The Commission's adjudicative procedures are admittedly cumbersome. This, however, is a reason for improving those procedures, not for adopting per se rules which may result in inequities in individual cases.⁶⁹ A number of bills have been recently introduced in Congress calling for an examination of the antitrust laws by an independent commission which would report recommended changes to Congress.⁷⁰ The need for a national policy of competition in the broadcasting industry is clearly a problem which requires detailed analysis by such an agency.

⁶⁹ There is currently a trend in certain other federal agencies, such as the Federal Trade Commission, to abandon adjudication in favor of per se rules. See Elman, "Rule-making Procedures in the FTC's Enforcement of the Merger Law," 78 Harv. L. Rev. 385 (1964).

⁷⁰ The following bills have been introduced in the 89th Congress: S. 1305, H.R. 1575, H.R. 5303, H.R. 5584, H.R. 5667 1st Sess. (1965). See Address by Commissioner Jones, International Law Committee of Federal Bar Association, May 18, 1965.