

## NETWORK TELEVISION RATE PRACTICES: A CASE STUDY IN THE FAILURE OF SOCIAL CONTROL OF PRICE DISCRIMINATION

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RECENT Federal Trade Commission proceedings have forcefully called attention to the fact that the rate structures for the purchase of national network television time discriminate strongly in favor of large advertisers and against companies with smaller budgets.<sup>1</sup> Further examination of network television rates reveals that they also have substantial "tying" effects — that is, they limit the freedom of advertisers who buy "prime" network time to allocate the rest of their advertising budgets among other networks and media. Both price discrimination and tying arrangements are likely to have important anti-competitive effects either in the industry in which they are found or among the customers of that industry. As a result of these effects, television rate structures may not only be at cross purposes with a central objective of the Federal Communications Act — to achieve a television industry which best serves the public interest — but may also be having an adverse effect on competition in industries which rely heavily on television advertising.

Because of their possible anticompetitive effects, both price discrimination and tying arrangements are generally subject to the most stringent standards under the antitrust laws. Thus questions are posed whether the Federal Communications Commission in guarding the public interest is exercising appropriate surveillance over this feature of network rate structures and whether these rate structures involve violations of the antitrust laws.

The discriminatory and tying effects of network rate structures are masked both by their own intricacy and by the complexity of the television industry. This study will (1) briefly describe the structure of the television industry, (2) examine in detail the network rate structure itself, (3) call attention to its anticompetitive tendencies (a) within the industry and (b) in the economy as a whole, (4) consider the applicability of the antitrust laws, and (5) examine the authority of the Federal Communications Commission to deal with the problem.

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1. Procter & Gamble Co., 3 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16673 (FTC 1963) and General Foods Corp., 3 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 17161 (FTC 1964). Each proceeding is discussed in Part III B of this study.

## I. THE STRUCTURE OF NETWORK TELEVISION

*Licensed commercial television stations.* There were, in 1963, some 581 commercial television stations licensed by the Federal Communications Commission.<sup>2</sup> These stations serve more than 50 million households — over 90 per cent of the nation's total.<sup>3</sup>

The typical television station is "on the air" for 15.5 hours a day.<sup>4</sup> FCC regulations seem to require commercial television broadcast stations to remain on the air on a year-round basis.<sup>5</sup> The Commission does not place a maximum on the number of hours a station may broadcast each day or week. However it does have minima. Following a 36 month trial period the minimum requirement becomes two hours each broadcast day in each of the seven days of the week and not less than 28 hours total.<sup>6</sup> These requirements do not apply to noncommercial educational broadcast facilities.<sup>7</sup>

The Commission, however, has shown a willingness to change the minimum requirements if they impose a financial burden on the licensee<sup>8</sup> and has refused to give weight to promises of longer hours of operation in comparative proceedings so long as the proposed schedule of operation is not "totally inadequate."<sup>9</sup>

A broadcast station's success as a commercial venture depends on its ability to fill its broadcast hours with attractive programming, and to sell the time to advertisers. These two factors are interrelated; popular programming attracts the large audiences sought by advertisers, and advertisers provide the funds necessary for attractive programming.<sup>10</sup> Stations obtain program material from several sources: (1) A network supplies its affiliates with programs and commercials for which it has contracted with national advertisers. The network also provides its affiliates with a certain number of unsponsored or sustaining

2. 29 FCC ANN. REP. 80 (1963). Much of the information in this section is derived from JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 14-28 (mimeo ed. 1964), and the sources there indicated. Some of it is based on conversations with people in the industry, to which there has been no attempt to cite.

3. TELEVISION FACTBOOK 38a (1964).

4. JONES, *op. cit. supra* note 2, at 14-29.

5. 47 C.F.R. § 73.651 (1965). Daily and weekly minima imply that a station must remain on the air year-round.

6. 47 C.F.R. § 73.651(a)(1) (1965).

7. 47 C.F.R. § 73.651(b) (1965).

8. For an example of FCC relaxation of minimum hours for standard broadcast licensees see 20 Pike and Fischer Radio Regulation [hereinafter cited as P.&F.R.R.] 1531 (FCC 1960).

9. Enterprise Co., 9 P.&F.R.R. 818u (FCC 1955) (balanced programming more important than hours of operation); Radio Wisconsin, Inc., 10 P.&F.R.R. 1224 (FCC 1955); WORZ, Inc., 12 P.&F.R.R. 1157 (FCC 1957); Petersburg Television Corp., 10 P.&F.R.R. 567 (FCC 1954) (hours not a basis for preference although it reflects favorably on applicant who proposed 24 hour programming); Sacramento Broadcasters, Inc., 10 P.&F.R.R. 615 (FCC 1955) (four hour per week difference not a basis for preference). See also NTA Television Broadcasting Corp., 22 P.&F.R.R. 273 (FCC 1961) (educational television station not disadvantaged in a comparative hearing because of refusal to operate on Saturday).

10. JONES, *op. cit. supra* note 2, at 14-29.

shows which help provide program continuity. Networks also sell to affiliates and independent stations rights to use films or tapes of network programs at some date after their original presentation. News and public affairs programs supplied by the networks are largely network produced. Most other network programs are acquired from independent producers, typically on film; increasingly the networks have taken a financial interest in such material.<sup>11</sup> (2) Independent producers supply program material. Some of the program material is sold directly to stations which in turn sell sponsorship or participations to advertisers. Most of the independently produced programming, however, is sold to networks; some is sold to advertisers who offer it to the network or the station.<sup>12</sup> (3) Advertisers occasionally supply their own program material to individual stations. In such situations, they purchase station time from national sales representatives employed by the stations.

National sales representatives also handle sales to national or regional advertisers of participations in programs the station has acquired from other sources and "spots"<sup>13</sup> before and after other programs. Most local advertisers are handled directly by the station.<sup>14</sup> Network affiliates usually derive the bulk of their income from the sale of spot time between network programs, time which is made valuable by adjacency to those programs.

*UHF* The amount of radio spectrum space which can be assigned to television is limited and in turn the number of stations is limited.<sup>15</sup> But these limitations are important only if television broadcasting is confined to the

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11. House Comm. on Interstate and Foreign Commerce, *Television Network Program Procurement*, H.R. REP. No. 281, 88th Cong., 1st Sess. 97, 98, Table 4-A at 124 (1963).

12. *Id.* at 120.

13. In the television industry the term "spot" has acquired several different although overlapping meanings. Here the term refers to commercials which are not accompanied by programming. This type of spot advertising is said to have less value than participations or sponsorship. It is a well known fact that television audiences decrease in size in the between-program commercial break. This type of advertising also lacks sponsor identification with a particular program. Another meaning of "spot" refers to all non-network sales of station time. The national representatives who sell spot time usually receive a percentage commission from the stations involved. In some cases they are retained on a flat fee basis.

14. Most television stations maintain differential rates for local advertisers. Local advertising rates are far lower than national advertising rates even though the time which is sold is essentially of the same quality. One explanation for the differential has been the double commission a station must pay for time sold nationally; a fifteen percent advertising agency commission, and a fifteen to twenty percent national sales representative commission. This differential is also present in the newspaper industry.

The double commission explanation is, however, not adequate since the cost of selling is borne by the national advertising representative. Occasionally national advertisers attempt to get local rates either through co-operative advertising schemes or by using their market positions to demand the greater discount. See *Now a Push for Guaranteed Circulation*, Broadcasting, October 8, 1962, p. 31 (Sealtest attempting to use market power to purchase spot time at local rates and to get special continuity discounts).

15. House Comm. on Interstate and Foreign Commerce, *Network Broadcasting*, H.R. REP. No. 1297, 85th Cong., 2d Sess. 199 (1958). Hereinafter cited as NETWORK BROADCASTING.

relatively narrow Very High Frequency (VHF) band of the radio spectrum, the first to have been fully developed technologically and to date the most important vehicle of commercial television. The Federal Communications Commission has repeatedly recognized the impossibility of building an adequately competitive television broadcast industry within the technical limitations of VHF. Since the early 1950's, it has encouraged the development of the UHF broadcast band, which includes 70 television channels and which permits the assignment of twelve UHF channels in a single location without electrical interference.<sup>16</sup> Combined use of UHF and VHF would greatly increase the number of television stations which could be licensed in an individual community and would bring about a commensurate increase in interstation competition. It would also encourage the formation of additional television networks. Increasing the number of independent stations would make it easier for advertisers to put together an independent "network" of stations in each important market willing to accept the program. The quality and amount of independent programming would be likely to increase because the cost could be distributed over a greater number of stations.

Until recently UHF technology was not as advanced as VHF technology.<sup>17</sup> UHF reception was inferior, the range of UHF stations was limited, and most receivers were not equipped to receive UHF programming.<sup>18</sup> At first the Commission followed a policy of intermixture of UHF and VHF licenses.<sup>19</sup> When that policy failed because of the competitive weakness of UHF, "deintermixture" became the policy.<sup>20</sup> Communities were designated as either all UHF or all VHF and the licenses in the communities were reassigned accordingly.<sup>21</sup> Later, the Commission asked Congress for the power to require set manufacturers to produce receivers designed for "all channel" reception. Subsection (s) was added to section 303 of the Communications Act in 1962,<sup>22</sup> and under its authority the Commission ordered the production of "all-channel" receivers.<sup>23</sup> New UHF licenses were granted in all-VHF communities.<sup>24</sup>

16. *Ibid.* For a summary of the Commission's efforts to expand the use of UHF, see Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578 (1962). See also Albany-Schenectady-Troy (the deintermixture case) 15 P.&F.R.R. 1501, 1511 (FCC 1957); Option Time, 34 FCC 1103 (1963).

17. NETWORK BROADCASTING at 32; Note, 75 HARV. L. REV. 1578, 1596-97 (1962).

18. NETWORK BROADCASTING at 32. See also TELEVISION FACTBOOK 38a (1964) for comparison of UHF and VHF set production.

19. Sixth Report and Order, 1 P.&F.R.R. 91601 (FCC 1952).

20. Second Report on Deintermixture, 13 P.&F.R.R. 1571 (FCC 1956).

21. The attempt at deintermixture was only partially carried out. See, e.g., Channel Assignment in New Bedford, Mass., 21 P.&F.R.R. 1691 (FCC 1961) (deintermixture of Hartford, rejected with possibility of reconsideration; New Orleans Deintermixture case, 15 P.&F.R.R. 1603 (FCC 1957); see generally Note, 75 HARV. L. REV. 1578, 1586-87 (1962).

22. 76 Stat. 150 (1962), 47 U.S.C. § 303(s) (1962).

23. 47 C.F.R. §§ 15.65, 15.66 (1965).

24. The abandonment of deintermixture was a congressional condition for the passage of the All-Channel Receiver Bill. See H.R. REP. No. 1559, 87th Cong., 2d Sess. 18-26 (1962); S. REP. No. 1526, 87th Cong., 2d Sess. 13-19 (1962).

Although UHF technology is now substantially improved, to date UHF broadcasters have not made much commercial headway. Network affiliation is typically available to them only where no VHF outlet covers the same market.<sup>25</sup> The lack of network programming deprives them not only of the national advertising revenue that goes with it, but also of the large audiences which stimulate spot time sales to both local and national advertisers. As will be noted, some of the networks' rate policies have intensified these problems.

*The networks.* Network affiliation is highly prized by stations, and all but a very few are affiliated with at least one of the three networks. Stations lacking network affiliation are less profitable than affiliates and their failure rate is higher.<sup>26</sup> The networks select affiliates on the basis of their ability to provide the widest possible coverage without substantial duplication. A typical affiliation agreement, limited to a two year term,<sup>27</sup> provides that (1) the affiliate will have first call in its community on all of the network's programs; (2) the station's time will be sold to network advertisers at a specified "network hourly rate" and the station will receive a percentage of that rate as compensation;<sup>28</sup> (3) the network will supply "sustaining" programs to the station, live or on film; (4) the first five hours of network programming each week are to be carried by the affiliate without compensation; (5) the network will arrange for the interconnection of the station with the network and the delivery of the program material.<sup>29</sup>

A network affiliate which is offered network programming and advertising may refuse to carry or "clear" the program,<sup>30</sup> may offer to clear it at a different time, or may accept it. Despite the number of alternatives legally open to affiliates, the networks obtain a high rate of station acceptance for their programs.<sup>31</sup>

25. 29 FCC ANN. REP. 69 (1963); NETWORK BROADCASTING at 222.

26. NETWORK BROADCASTING at 207.

27. 47 C.F.R. § 73.658(c) (1965).

28. The station is paid thirty percent of its "network rate" for programs past the first five hours. This system of station compensation seriously complicates network rate structures because of the arbitrary distinction the networks draw between "rate" differences and "discounts." Station compensation is based on "rate," and "discounts" are "absorbed" by the network.

Station owners are acutely aware of shifts in compensation caused by the network discount systems and have battled with the networks to get a larger share of overall revenue. See A Downswing in TV Compensation, *Broadcasting*, February 17, 1964, p. 46; A Bigger Cut for Network Affiliates, *Broadcasting*, February 24, 1964, p. 56 (Station owners argue that network owned stations receive a lion's share of the compensation).

29. Each network charges advertisers a "networking" or "network distribution charge" in addition to its billing for time and program. The charge ranges from \$3,600 per quarter hour to \$1,750 per hour depending on the time period and the network. It covers services required for film or video tape origination, recorded repeat broadcast, transcontinental cable, shipping to affiliates, and other distribution costs.

30. 47 C.F.R. § 73.658(e) (1965).

31. See Application of Section 3.658(a) and (b), 24 P.&F.R.R. 513 (FCC 1962). "Option time" clauses in affiliation contracts are now prohibited by FCC regulation.

Most programs are today produced under contractual arrangements with the networks. Program ideas may come from advertisers, advertising agencies, independent writers or the producers themselves. If a network likes an idea, it may advance money for the development of a script. If the script is accepted, the producer may enlist the services of a production company to produce a pilot film or films, again probably with network financing. By this point the network is likely to have secured for itself the first and second network run, as well as "syndication" rights which give it participation in both foreign and domestic "off-network" distribution proceeds.<sup>32</sup>

The primary function of the networks, however, is as a sales agent, arranging for the interconnection of television stations to provide simultaneous broadcast of programs and commercials, selling time on the interconnected facilities to national advertisers and arranging the sale of programming to advertisers to fill the noncommercial segments of the time sold. Almost all network income comes from these sales of time and programs. Major network expenses are the cost of arranging the interconnection of affiliates, the cost of maintaining a news and public affairs department, and the cost of administration. Payments to affiliated stations are on a percentage basis. If the station is not sold to the advertiser as part of the desired network it receives no compensation.<sup>33</sup> Payments to program sources are added to the advertiser's bill. Costs run high: the program material for a full hour variety show typically costs about \$150,000, and a half-hour horse-opera costs about \$60,000, exclusive of network time;<sup>34</sup> full network "prime" evening time runs in the range of \$150,000 per hour, computed by adding the "network hourly rates" of the individual stations which carry the program and commercials.<sup>35</sup>

Each network owns five VHF television stations, the maximum permitted by FCC regulations.<sup>36</sup> These outlets are all in the areas of greatest population concentration; the five outlets of each network can reach about 25 per cent of the nation's receivers.<sup>37</sup> Their hourly network time rates are also the highest, averaging around \$5,000 per hour.

"One-program networks." Occasionally advertisers form their own "networks" to carry programs which have been rejected by the three networks.<sup>38</sup>

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Before the regulation networks obtained contractual rights to the use of an affiliate's prime time for network programs. *Option Time*, 34 FCC 1103 (1963). See discussion in text *infra* at notes 258-64.

32. A. Mueller, *The Network Role in Television Program Participation*, J. SCREEN PRODUCERS GUILD, Nov. 1964, p. 8.

33. See note 28 *supra*.

34. See HANDY GUIDE TO THE ADVERTISING BUSINESS 14, (Advertising Publications, Inc., 4th ed. 1964).

35. See, e.g., CBS Television Network Rate Card No. 16, effective June 15, 1963.

36. See Amendment of Multiple Ownership Rules, 18 Fed. Reg. 7796, 9 P.&F.R.R. 1563 (FCC 1953); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

37. *Option Time*, 34 FCC 1103, 1125 (1963).

38. The networks have from time to time rejected high quality programming on the ground that it pulls down overall network ratings. Several large advertisers, most notably

To avoid the cost of live interconnection the stations receive the programs in advance of broadcast on film or videotape. In a very limited number of cases interconnected networks are formed to carry live special features such as sporting events, often of a regional nature. One serious limitation to the development of "one-program networks" is the cost of cable facilities for live interconnection. Under an "eight-hour" rule in the AT&T tariff schedule the rental of cable facilities for less than eight hours of continuous use is very substantially higher than rental rates for equal facilities for a longer period.<sup>39</sup> Another important limitation is that unless programming costs are distributed over a large number of stations they cannot be made competitive with network program costs in relation to the number of receivers reached.<sup>40</sup> Thus, in addition to the relatively few independent stations which might be interested, a certain number of affiliated stations must run the independent program instead of clearing the network offering. As will be noted, the rate policies of the networks tend to penalize and inhibit this kind of independent action.<sup>41</sup>

*Advertisers.* More than 13 billion dollars were spent on all forms of advertising in 1963, about 16 per cent of which—some \$2,062,000,000—was spent on television programs and commercials, including time, program costs and advertising agency commissions.<sup>42</sup> Purchases of network time are made by a relative Xerox Corporation, have purchased time on independent stations to get the programs on the air.

39. The average "hourly rate" under contract service for connecting New York and Boston for one hour daily would amount to \$1,075.62 as compared with a charge of \$7,018.50 per hour on an occasional use basis. The rates are such that a network broadcasting less than two hours daily would incur as high a monthly service charge as a network telecasting eight hours of consecutive programs. See NETWORK BROADCASTING at 201-02.

40. Broadcasting, Sept. 30, 1963, p. 52.

41. See discussion in text *infra* at notes 78-80.

42. The following tabulation indicates the source and recipients of the revenues:

<i>Source</i>	(millions)	
Network time sales .....	\$ 521.5	(30.6%)
National and regional time sales .....	539.5	(31.5%)
Local advertiser time sales .....	242.5	(14.2%)
Talent and programs .....	322.5	(18.9%)
Sundry revenues .....	80.3	( 4.7%)
	1706.3	
 <i>Participation in Revenue</i>		
Major networks (and stations) .....	754.2	(44.1%)
Other stations .....	732.0	(42.9%)
Representatives and agents .....	220.1	(13.0%)
	1706.3	

JONES, *op. cit. supra* note 2, at 14-34. See also 29 FCC ANN. REP. 85-89 (1963). Figures do not include advertising agency commissions or the cost of advertiser-produced programs.

tively small number of advertisers. In 1956, for example, only about 350 companies purchased network time, the top fifty accounting for about 75 per cent of the gross time charges.<sup>43</sup> During the same year, 4,400 advertisers were in the spot television market and the top fifty accounted for 45 per cent of gross time billings. Since the list of the top 100 network advertisers partially duplicates the list of the top 100 spot advertisers it is safe to assume that fewer than 100 advertisers are responsible for a major portion of all forms of television advertising.<sup>44</sup>

For the most part, users of network television make their purchases through advertising agencies.<sup>45</sup> Multi-product firms may employ several agencies, each agency charged with servicing one or more products. The advertising agency is responsible for developing a campaign strategy and a theme for the advertising program. As a natural consequence of its role in preparing advertising material, the agency usually plays a large role in developing an overall product marketing plan. It decides where advertising should be placed, produces the actual advertising material, sends insertion orders, checks on the proper insertion and forwards a bill to its clients. In return for the agency's service the networks pay a 15 per cent commission.<sup>46</sup> Several agencies have recently dropped the commission system and bill the advertiser directly for professional services rendered.

In deciding on a specific advertising program for a product, the agency must first select the "target market." Most frequently the market selected is a demographic one. Amounts are budgeted for advertising in newspapers, magazines, network television, spot television, network radio, spot radio and outdoor displays. The amounts are then allocated to particular publications and broadcast services. The most important single factor in media selection for mass produced consumer goods is the cost of placing a given commercial message before a given number of potential customers. The estimate of this average cost for television is based on viewer surveys. A television program with a high rating is likely to be more "efficient" in that it will attract a larger number of viewers per dollar outlay. Ten years ago the most desirable form of television advertising was thought to be the sponsored program — a single advertiser identified his product with the program and made use of all the time for commercials which it afforded. More recently, the theory has been accepted that full sponsorship of a single program resulted in circulation duplication: the same viewers watched the program from beginning to end and the effectiveness of the subsequent commercials was less than that of the first. This approach

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43. JONES, *op. cit. supra* note 2, at 14-33.

44. *Ibid.*

45. See generally DUNN, *ADVERTISING, ITS ROLE IN MODERN MARKETING* (1961); KIRKPATRICK, *ADVERTISING, MASS COMMUNICATION IN MARKETING* (1959); BROWN, LESSLER & WELBACHER, *ADVERTISING MEDIA* (1957).

46. The commission system has historical roots in the advertising industry. It is generally recognized as one of the anomalies of the industry, since the commission is paid by the media, *i.e.*, it is deducted from the bill submitted to the advertiser.



argues that the most efficient advertising method is to scatter single minute commercials through the entire evening schedule of the network with the highest overall rating. More recently still, network officials have predicted a switch back to full program sponsorship and the advantages of product identification with a certain show.<sup>47</sup>

## II. TELEVISION NETWORK RATE AND DISCOUNT STRUCTURES

With striking uniformity all advertising media offer volume discounts. From law reviews to *Life Magazine*, from the *New York Times* to small-circulation weeklies, from the Mutual Broadcasting System radio network to single small radio stations, the advertiser who buys large quantities of time or space on a regular basis pays a lower rate than his smaller competitor.<sup>48</sup> Network television, however, has developed the discount rate structure to its most sophisticated level. Before examining the details of the discounts it will be useful to look more carefully at the commodity to which they apply.

The television networks' basic commodities, network time and programming, are sold both separately and in packaged units. When the advertiser contracts separately for time and program, the program charge is based on cost and rating,<sup>49</sup> and remains fixed regardless of the number and identity of stations used. The price of network time is, in theory, based on the network rate cards. Program price is subject to bargaining between advertiser and network; large advertisers may well be able to drive the best bargains.

If time and programming are sold as a package, advertisers pay a flat sum for a "commercial minute."<sup>50</sup> The purchase price includes all network charges. "Package" deals are most common in the sale of expensive programs which no advertiser cares to sponsor alone and in the sale of time left over at the end of the selling period for the forthcoming season.

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47. Information in the foregoing paragraph was derived largely from interviews with television network sales executives, March and April, 1965.

48. A full page in the *Columbia Law Review* on a yearly (eight issue) basis is \$250; one half page in a single issue is \$30. The *New York Times* general advertising rate for a single insertion is \$2.50 per agate line; the lowest retail advertising rate, available to users of 20,000 agate lines in one year, is \$0.97 per agate line. On a 52 insertion contract basis a single page in *Time* magazine costs \$14,870; if purchased in half column segments on a single insertion basis a full page would cost \$19,020. See *Columbia Law Review Rate Card*; *New York Times General Rate Card No. 71*, Nov. 5, 1964; and *New York Times Retail Store Advertising Rate Card*, Nov. 10, 1964; *Time Magazine Rate Card No. 57*, Jan. 1, 1965.

49. Television ratings purport to indicate the number of people watching a particular television program. The ratings are based on studies of a small, select sample of viewers. The rating company then projects the results of its study to get national figures. See House Comm. on Interstate and Foreign Commerce, *Evaluation of the Statistical Methods Used in Obtaining Broadcast Ratings*, H.R. REP. No. 193, 87th Cong., 1st Sess. (1961).

50. Under the National Association of Broadcasters' *Good Practice Code*, a network is limited to six "commercial minutes" each hour during prime time. The term "commercial minute" refers to the time and program cost for one-sixth of an hour. In non-prime time the limitations are relaxed and network program segments are sold in fifteen minute packages, each one carrying three commercials.

When time and programming are sold separately under a sponsorship system, the advertiser may tailor his purchase to meet his needs; he can bargain for the day and hour of his program and for the stations which will carry his message. The package system is less flexible in that advertisers must accept the day, hour and station line-up selected by the network, and must take their commercial minutes during the programs which the network has decided to sell on a participation basis. The cost of participations in the case of "left-over"<sup>51</sup> time is usually the subject of hard bargaining between the networks and the advertisers through their agencies.

The basic rate structure for network time and the available discounts are set out in rate cards published by each network.<sup>52</sup> The rate cards apply only to the separate sale of time for sponsored programs,<sup>53</sup> and network time rates are based on the applicable rates of participating stations. One hour of "prime" or Class "A" time — between 6 and 11 — is the basic unit for price calculations. Time adjacent to prime time is priced at 50 per cent of the prime time rate; daytime is priced at roughly one-third of the prime time rate.

The networks' rate structures immediately raise antitrust questions because certain discounts seem to be analytically indistinguishable from practices traditionally regarded as anticompetitive. The most important such feature of the rate structures of each of the television networks is that they give very substantial price discounts to advertisers whose dollar (or unit) volume of purchase of network time during a year (or other period) is large. The systematic price discrimination inherent in volume discounts<sup>54</sup> of this type, unless there are cost considerations which fully justify the discriminatory treatment, are thought usually to present a likelihood of injury to competition in two impor-

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51. Some programs are sold at the outset as participation programs. At the end of the selling season each network usually has a few shows which have not been sold. These are packaged and sold at "bargain basement" prices.

52. The rate cards on which this study has been based are: ABC-TV Rate Card No. 10, effective April 1, 1961 (a new rate card has been issued this year which is not substantially different from the one used); CBS Television Network Rate Card No. 16, effective June 15, 1963; and NBC Television Network Rate Guide, Winter-Spring, 1965, issued Dec. 15, 1964.

53. Network officials claim that separate purchase of program and time under the rate card yield roughly the same net price as "package minute" purchases to advertisers of the same size. Time sold on a "bargain basement" basis is of course less costly.

54. Professor Corwin Edwards distinguishes between "quantity" discounts — those based on the amount of a product bought in a single purchase — and "volume" discounts — those based on cumulative purchases during a stated period. EDWARDS, *THE PRICE DISCRIMINATION LAW* 208-10 (1959). The former are somewhat more likely to have some relation to costs. This definitional distinction is not always made in the opinions or in legal writing, although it is useful. We use the term "volume" discount throughout, in part because "dollars" and "time" seem more appropriately described in those terms and in part because the important network discounts are cumulative in nature. Note, however, that the lower rate for a one-hour period than for four quarter-hour periods bears some similarity to a "quantity" discount, as do, to a lesser degree, continuity elements when a sponsor buys the same program, time and network line-up for a number of weeks.

tant respects.<sup>55</sup> First, customers who are discriminated against are thought to be weakened in their ability to compete effectively with their favored rivals; here, network volume discounts which substantially favor the largest advertisers may give them a decisive advantage over their smaller competitors. And second, the seller doing the discriminating may thereby buttress his market position vis-à-vis actual and potential competitors by making it more difficult for them to secure any part of the business of many of his buyers; network volume discounts may in this way handicap marginal competitors or potential entrants in network television, "spot" advertising, independent program production, and other media. Volume discounts also interfere with the freedom of even the favored party to allocate his purchases among competing suppliers in relation solely to their relative merits.

The network discounts also produce tying effects of a kind regarded as anti-competitive in antitrust analysis. Tying arrangements require that the buyer or lessee of one product (the "tying" product) also take from the seller some other product (the "tied" product), or give an advantageous price on the tying product to a purchaser who takes the tied product.<sup>56</sup> The most obvious tying effects in television rate structures stem from discounts which tend to force advertisers who wish to buy prime evening time to take marginal day time and summer hours as well, and to take all or most of the stations in the network. In general, "tie-ins," like volume discounts, interfere with the freedom of the buyer to arrange his purchases of the "tied" product in terms of the relative merits of competing sellers. They may also distort or impair competition in the markets for the products involved. Competing producers of the "tied" product are deprived of opportunities to sell their output on the basis of its relative price and quality. And actual and potential producers of the "tying" product may find that the "tie-in" has the effect of reducing the price of the "tying" product in such a way that a competitor must produce and sell both it *and* the tied product if he wishes to compete on equal terms. This fact may give the well financed incumbent a competitive advantage over the marginal firm.<sup>57</sup> The special importance of this effect in the television industry will be noted after an examination of the classes of discounts which make up the heart of the networks' rate structures.

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55. The economic theory of price discrimination is extensively considered in MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 135-68 (1952), but without special treatment of volume discounts. See also Clemens, *Price Discrimination and the Multiple Product Firm*, 19 *REV. ECON. STUDIES* 1 (1951); DEAN, *MANAGERIAL ECONOMICS* 508-09 (1951); Dam, *The Economics of Price Discrimination: Herein of Three Regulatory Schemes*, 31 *U.CHI. L. REV.* 1 (1963). Cf., the legal-economic treatment in EDWARDS, *THE PRICE DISCRIMINATION LAW* 208-70 (1959).

56. See generally Bowman, *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 *HARV. L. REV.* 50 (1958).

57. Price discrimination as a barrier to the entry of new competitors is considered in BAIN, *BARRIERS TO NEW COMPETITION* 27 (1956).

By and large, the three major networks' discount structures are sufficiently different to require separate description. However, in certain basic features they are nearly the same. For each network, purchases of time in segments smaller than one hour are priced on the basis of varying percentages of the hourly rate. On ABC and CBS, for example, one-sixth of an hour — the time entitling the advertiser to one commercial minute<sup>58</sup> — costs one-fifth as much as the applicable hourly rate. Thus the advertiser buying time in a one-hour block has a 16-2/3 per cent price advantage over the purchaser of a single commercial minute. NBC's rates create an even greater price differential; one quarter hour costs two-fifths as much as the hourly rate.

Although none of the networks describe this "less-than-hourly" rate basis as a discount, the rate has a volume discount effect which will be most strongly felt by single-product firms whose advertising budgets preclude full-hour sponsorships.

To assure that these rate advantages as well as the discounts to be discussed are not transferable, each network insulates segments of its market. No two advertisers may purchase time jointly to take advantage of discounts; no time may be purchased as a unit by an agent and then resold. However, a multi-product firm, even though working through a number of different advertising agencies and marketing products which are functionally dissimilar, may combine advertising for all its products to take full advantage of the discount structure. A network advertiser may also use different commercials on different stations in the line-up which has been ordered. For example, a company which markets coffee in the East and soap in the West may purchase the entire network, supplying the entire country with the same program but using coffee commercials in the East and soap commercials in the West.

Each of the networks also has a minimum time purchase or "must buy" requirement. On ABC an advertiser must purchase a minimum of \$90,000 worth of station time for each Class "A" hour. The hourly minimum is reduced in proportion to the lower rates for other time periods. An order for one hour of daytime on ABC must total at least \$30,000 worth of station time. NBC puts its larger minimum figure in more flexible language. Its rate card reads:

In order to serve the public interest in having NBC television programs available on a national basis and to maintain the network function as an effective national advertising medium, orders for NBC Television Network facilities are subject to acceptability of the station lineup ordered. Consistent with the foregoing objectives, a station lineup order shall be deemed acceptable if the Class A hourly rates of the stations ordered total \$100,000 or more.<sup>59</sup>

The current CBS rate card is equally flexible; it reserves the right to reject orders which the network deems too small.

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58. See note 50 *supra*.

59. NBC does mitigate the impact of its "must-buy" requirement by providing that it will consider "for individual approval" orders for station lineups of less than \$100,000. See NBC Television Network Rate Guide, *supra* note 52.

Minimum purchase requirements have a tying effect. They encourage advertisers who want network time to order all or most of the stations with the highest rates, including the five stations owned by each of the networks. Use of the large stations is in effect "tied" to use of network time. The five NBC-owned stations, for example, have a combined Class "A" hourly rate of \$25,400, slightly over one-fourth the required minimum order. The 56 stations next highest in price have a combined rate of \$75,285. The remaining 101 interconnected affiliates have a combined rate of \$40,465. In theory it would be possible for an advertiser to order a station line-up which would include almost all the stations in the NBC network but omit a number of stations with high network hourly rates and because of the omission not meet the minimum dollar requirement.

The NBC minimum requirements also have the effect of foreclosing the use of network television to advertisers not interested in the Eastern time zone. The rate total for NBC stations in the Central, Mountain and Pacific zones is \$75,980; this is \$24,020 short of the NBC minimum. Conversely it is possible for an advertiser to purchase the network without including the Pacific or Mountain regions. The combined rate for stations in the Eastern and Central zones on NBC is \$122,360.<sup>60</sup>

In addition to the minimum gross time requirements and the volume discount effect inherent in the hourly rate structure, each network has an elaborate system of special discounts described in the rate cards. Different terminology and formulae are used to define classes of available discounts and methods of discount calculation, but all three systems appear to be similar in objective and effect.

*ABC Rate Card.* ABC's discounts are expressed as percentages to be subtracted from the gross rate calculated by adding the time segment rates of ordered stations.

First, a "dollar volume" discount is effective for gross time purchases of more than \$100,000 annually. The discount begins at 2 per cent and increases through twelve brackets to 15 per cent for purchases of \$5,200,000 and over. Since it increases in proportion to the dollar value of network time purchased and is not a function of any other variable, it is analytically a straight volume discount.

In addition to straight volume discounts ABC offers "time period" discounts. Full "time period" discounts are available to "every week" advertisers purchasing 52 commercial minutes in a 26-week period. Smaller minima are

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60. The beer industry provides a striking example of the exclusion of regional manufacturers from network television. Beer is for the most part a regional business. Only five of the several hundred brewers market their products nationally. In 1960 brewers spent \$50.2 million on television advertising. Most of the advertising was in the form of spots on individual stations. \$43.4 million of the total went toward spot television and \$6.8 million went toward network television. The five brewers engaged in national distribution accounted for almost \$4.4 million of the network total. Kroeger, *Keeping Up With The New Generation, Television Magazine*, May, 1961, pp. 55, 86.

prescribed for the fourteen week summer season, for daytime hours, and for "alternate week" advertisers.<sup>61</sup> Advertisers who earn a "time period" discount on periods other than daytime may take it on daytime as well, but not vice-versa. "Time period" discounts can be substantial for periods other than prime time in the winter season, on which no discount is allowed. "Every week" discounts range from 4 per cent to 12 per cent in the winter period depending on the time period of the program, and from 36 per cent to 48 per cent in the summer period. "Alternate week" discounts are half the "every week" discounts.<sup>62</sup>

The "time period" discount is a volume discount conditioned on continuity. The minimum purchase requirement provides the volume discount element. The discount tends to "tie" daytime to preferred time by selling daytime at a greater discount to those who have satisfied the volume and continuity requirements in preferred time slots. The fact that the lower rates for summer and daytime are expressed in terms of discounts rather than network hourly rates provides an incentive for affiliates to use network daytime programs and to stay with

61. Because different minima are prescribed for daytime, the rate card includes provisions for purchases including daytime and other time. It reads:

An advertiser who fulfills the minimum requirement for every week time period discount in groups A, B, and C [time groupings] will earn every week time period discounts on concurrent Group D purchases; however, purchases in Group D may not be used to fulfill the requirements for time period discounts in Groups A, B, and C. An advertiser who fulfills the minimum requirement for alternate week time period discounts in Groups A, B, and C may earn every week time period discounts on Group D purchases provided he fulfills separately the minimum requirement for alternate week discounts in Group D during the concurrent period.

ABC Television Network Rate Card No. 10, p. 4, *supra* note 52.

62. The following is the table for ABC time period discounts:

#### TIME PERIOD DISCOUNTS

Group	Time Period	Applicable Time Period Discounts			
		Every Week		Alternate Weeks	
		Winter	Summer	Winter	Summer
A	6:00 to 8:00 P.M. Mon. thru Fri.	12%	48%	6%	24%
	6:00 to 7:30 P.M. Sat. and Sun.				
B	8:00 to 8:30 P.M. Mon. thru Fri.	4%	42%	2%	21%
	10:00 to 11:00 P.M. Sun. thru Sat.				
C	7:30 to 10:30 P.M. Sat. and Sun.	0%	36%	0%	18%
	8:30 to 10:30 P.M. Mon. thru Fri.				
D	All Class C and Class D time periods	12%	40%	6%	20%

the network over the less attractive summer months. Although the network retains a higher percentage of receipts during the lush hours and seasons, affiliate income tends to be stabilized throughout the year.

An advertiser whose time purchases in a discount year<sup>63</sup> are in excess of \$5,200,000 may elect to take an "overall" discount in lieu of "dollar volume" and "time period" discounts. Prime time is eligible for a 25 per cent discount, special programs 15 per cent, and all other purchases 30 per cent. Once an advertiser passes the \$5,200,000 mark he may elect to take the "overall" discount on purchases which have qualified him for it, and to take other applicable discounts on additional purchases if the other discounts are larger. The "overall" discount is a slightly refined form of volume discount. It comes into effect at the upper end of the "dollar volume" discount scale and gives a special premium to the largest advertisers. Advertisers below the minimum purchase requirements are encouraged by the "time period" discount to concentrate purchases in the less-favored hours and seasons. The largest advertisers are freed to pattern their purchases as they choose and still receive larger discounts than their smaller competitors.

In addition to the other discounts on the rate card a "daytime premium" discount is allowed to all purchasers of time between 11 a.m. and 5 p.m., ranging from 1 per cent for the purchase of 52 quarter-hours<sup>64</sup> to 5 per cent for 260 or more quarter-hours in a discount year. The discount applies to the purchase of all time other than daytime. The "daytime premium" discount ties daytime to highly valuable prime time since it is available only to purchasers of time in both categories. The more daytime is purchased, the lower the price for prime time. This is a tying arrangement effectuated through a progressive unit volume discount.

ABC offers time on a number of its affiliates as a bonus for the purchase of the other affiliates. In a few cases the bonus is contingent on the inclusion of a particular station. For example, a purchaser of time on KVIP-TV, Redding, California, receives time on KVIQ-TV, Eureka, California, free of charge. Finally, a number of stations are offered at combination rates. For example, KOOK-TV, Billings; KXLF-TV, Butte; KFBB-TV, Great Falls; KID-TV, Idaho Falls; and KLIX-TV, Twin Falls, are sold at a combination rate of \$807.50 per Class "A" hour. If purchased individually their network rates would total \$950 per Class "A" hour. These are tying arrangements of the "block-booking" variety.<sup>65</sup>

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63. A discount year is established by an advertiser's first telecast, and runs for 52 consecutive weeks. ABC Network Rate Card No. 10, *supra* note 52, at 3.

64. Daytime is sold in quarter hour segments which carry three commercial minutes. See note 50 *supra*. Discounts involving daytime do in fact encourage its use. See *Networks Happy Daytime*, Broadcasting, August 5, 1953, p. 36.

65. The "block booking" type of "tie-in" came to attention in the antitrust prosecutions in the motion picture industry that eventuated in the *Paramount Pictures* litigation.

*CBS Rate Card.* The CBS network classification system differs slightly from that of the other networks. Class "A" prime time is between 6 p.m. and 11 p.m. The rate for all other time, with the exception of time on weekday afternoons and Saturday mornings, is 50 per cent of the Class "A" rates. "Week-day afternoon, Saturday morning" time rates are based on volume. Purchasers of 260 quarter-hour segments within a contract year pay 9.375 per cent of the Class "A" prime time rates. The rate increases through five brackets to 15 per cent of the Class "A" rates for users of 51 or fewer quarter-hours. Although this discount is in part simply a way of setting lower rates for less preferred time, it contains a progressive volume discount element.

CBS offers an "annual" discount of 10 per cent on all time charges continuing for 26 consecutive fortnights and which are the result of two separate sponsorships within each fortnight and, with certain exceptions, fall in the same time classification. A 5 per cent discount is allowed on charges which run for twenty-six consecutive fortnights if the other requirements for the 10 per cent discount have not been met.<sup>66</sup> The minimum continuity requirement results in a volume discount effect. The advertiser who cannot undertake so large a commitment is ineligible. Of course, the required commitment would be less for less desirable time, so it is not a straight dollar volume discount. The discount also ties summer time to more desirable time by requiring a full-year commitment.

Advertisers purchasing time in 26 week blocks are eligible for the CBS "station-hour" discount. The size of the discount is determined by the number of station-hours used each fortnight; four hours on a single station or a single hour on four stations would each constitute four station-hours. The discounts range through eight brackets applicable to each of five different time periods, and range from zero to 10 per cent for users of between 80 and 119 station-hours per fortnight and from 10 per cent to 20 per cent for users of 240 or

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United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948). Distributors refused to license individual feature films to exhibitors unless they took an entire "package" of films. The tying effects inherent in the network rate structures resemble more nearly block-booking than they do the type of tie-in in which the lessee of an office machine, for example, is required to buy certain classes of supplies for the machine from the lessor. See, *e.g.*, International Business Machines Corp. v. United States, 298 U.S. 131 (1936).

66. The other requirements for the 10% discount include using sponsorship units not less than one-quarter hour in duration for wholly sponsored time segments, or not less than twenty minutes in duration for shared-sponsorship night-time segments. Sponsorships in two different time classifications may be combined for discount purposes if the aggregate time with the lower rate is equal to or greater than the time in the time classification with the higher rate. The language of the CBS rate card on these points suggests that the "annual" discount applies to participations as well as to straight sponsorship. See CBS Television Network Rate Card No. 16, *supra* note 52.

A high percentage of advertisers who purchase participations are making their purchases on a year-round rather than a seasonal basis. See In-and-Out Participations Losing Ground, Broadcasting, July 29, 1963, p. 28.



more.<sup>67</sup> Again the minimum continuity requirement results in a volume discount effect and is reinforced by the progressive discounts available as more station-hours are used. Since moving up the brackets is not based on aggregate charges, however, it is not a straight dollar-volume discount, although the effect is the same.

CBS allows an "over-all" discount in lieu of "annual" and "station-hour" discounts to advertisers purchasing a weekly minimum of \$130,000 of station time, or averaging that amount in consecutive two-week periods during a discount year. The discount ranges from 20 to 30 per cent depending on the time period.<sup>68</sup> Like ABC's "overall" discount, this is a premium volume discount available to the very large advertisers only. It also tends to tie summer time to more desirable time by its requirement that purchases extend throughout the year.

The CBS "extended market plan" is designed to increase the use of certain stations not usually included in network orders. Additional discounts are given on the purchase of time on these stations. The amount of the discount depends on the number of stations ordered: if ten are ordered, the additional discount is 5 per cent off the price of time on the stations involved after other discounts have been subtracted; if the entire group of stations is ordered, the additional discount on the group is 25 per cent. The primary effect of the discount is to encourage advertisers to take marginal stations by reducing the net cost of using them, without reducing the stations' rates. It also has a certain volume discount effect in that these stations will normally be considered only if the budget permits going beyond the more important population centers.

*NBC Rate Card.* NBC's discount schedule systematically takes into account the existence not only of "conventional sponsorship" but of the growth of importance of "package minute" and "participation" deals. Regularly sponsored series of "packaged minutes" are given equivalent values in determining the

67. The following table in the CBS rate card is used to determine the station hour discount:

Station Hours Per Fortnight	TIME PERIODS					All other
	6:00	7:30	8:30	9:00		
	to	to	to	to		
	7:30	8:30	9:00	10:30		
	p.m.	p.m.	p.m.	p.m.		
Less than 80	none	none	none	none	none	none
80-119	10%	7.5%	5%	none	5%	5%
120-139	15%	12.5%	10%	5%	10%	10%
140-159	16%	13.5%	11%	6%	11%	11%
160-179	17%	14.5%	12%	7%	12%	12%
180-199	18%	15.5%	13%	8%	13%	13%
200-239	19%	16.5%	14%	9%	14%	14%
240 or over	20%	17.5%	15%	10%	15%	15%

68. The overall discount does not apply to purchases in the weekday afternoon, Saturday morning category, or to any programs for which a special rate is in effect. There is, however, no indication as to whether purchases in these categories contribute to the necessary minimum purchase requirement.

availability of certain discounts.<sup>69</sup> As do the other networks, NBC measures discounts on the basis of the percentage of the full hourly rate paid rather than the fraction of the hour used.

A "line-up incentive" discount is given on gross time charges of a "conventional sponsorship" continuing for six consecutive fortnights, on a weekly or alternate-weekly basis. It is based on the aggregate gross prime-time rates of all stations ordered and on the time period used. The discount ranges from zero for a station line-up whose Class "A" rates total \$110,000 or less, to as much as 10 per cent for a line-up of \$140,000 and over. This discount is in part a straight volume discount, although eligibility is based not on the actual gross rate but on the aggregate prime time rates. The minimum continuity requirement adds slightly to the volume discount effect. However, it also ties time on marginal stations to time on large stations in the sense that when all or a large part of the network is purchased, the reduced rate on time on the more valuable stations produces the most substantial savings.<sup>70</sup>

An additional "fortnightly" discount is allowed advertisers who sponsor a program on a weekly basis for 13 consecutive fortnights or on an alternate week basis and also purchase three packaged evening minutes per fortnight for the same period. The discount is based on the aggregate percentage of the full network hourly rate ordered per fortnight. If 80 per cent of the full hourly rate has been used, the discount is 2 per cent; discounts range through nine brackets to 10 per cent for 240 per cent. These are progressive percentage volume discounts based on dollar equivalents.

An "annual" discount of 10 per cent is allowed on gross time charges of a "conventional sponsorship" which runs for 52 consecutive weeks in the same period and of the same duration each week. A 5 per cent discount is given for 52 weeks of alternate week sponsorship. This discount's continuity requirement

69. The applicable portion of the rate card reads as follows:

Contributory effect of packaged evening minutes: Each packaged evening minute (between 7-11 PM NYCT) contributes 20% to the aggregate percentage of the hourly rate per fortnight provided that it is part of a regularly sponsored series of minutes scheduled in the same program for a minimum of twenty-six weeks on a weekly or alternate weekly basis.

Three packaged evening minutes (between 7-11 PM NYCT) contribute to the establishment of Fortnightly or Comprehensive Discount entitlement and raise the Annual Discount from 5% to 10% when combined with an alternate weekly program sponsored on a conventional basis, provided that each such minute is a part of a regularly sponsored series of minutes scheduled in the same program over the entire term of the conventional sponsorship. Contributory effect of packaged daytime quarter hours and minutes: Each daytime quarter hour and minute (between 9 AM-6 PM NYCT) contributes to the aggregate percentage of the hourly rate per fortnight provided that each is a part of a regularly sponsored series of quarter hours or minutes scheduled in the same program for a minimum of twenty-six weeks on a weekly or alternate weekly basis.

Daytime Quarter Hour contributes 20%

Daytime Minute contributes 6-2/3%

NBC Television Network Rate Guide, *supra* note 52.

70. This discount also tends to favor advertisers using primarily the Eastern segment of the country and advertisers who use the most expensive stations on the network list.

results in both a volume discount and a tying effect, since an advertiser must purchase summer time to obtain the lower rates on more desirable time.

The advertiser may either add the "fortnightly" discount, the "line-up incentive" discount and the "annual" discount, or may elect to take a "comprehensive" discount. The "comprehensive" discount is allowed on conventional sponsorships which run for 52 consecutive weeks and which total at least 240 per cent of the full network hourly time rate each fortnight. An advertiser who sponsors a program on an alternate week basis for 52 weeks and who buys a minimum of three packaged minutes qualifies for the comprehensive discount if the total expenditure is over 240 per cent of the full network rate each fortnight. The size of the "comprehensive" discount is tied to the gross prime time rates of stations ordered and to the time period for which they are ordered. If the line-up ordered is \$110,000, the "comprehensive" discount in the 6-8:30 period will be 24 per cent and the discount in the 8:30 to 9 p.m. period will be 21.5 per cent. No "comprehensive" discount is allowed for other periods. If the line-up is \$140,000 or more, the comprehensive discount in the 5-8:30 period is 30 per cent and is 25 per cent in the 9-10:30 p.m. period.<sup>71</sup> Maximum "comprehensive" discounts are available only if the advertiser uses substantially all of the network. The rate for 157 stations in prime time is \$140,150. The full network adds but five stations for a total rate of \$141,150. The "comprehensive" discount is another premium volume discount for very large advertisers. Unlike the comparable ABC discount, it does not, however, free the large volume purchaser from the compulsion exerted by lesser discounts. It ties summer time to more desirable time by its 52-week requirement. It ties prime time to use of marginal stations by allowing discounts on it only as the advertiser adds stations to the "basic" network; it also ties marginal stations to the more desirable outlets.

Under the NBC "program extension" plan, advertisers who use a select group of additional stations receive a dividend based on the number of stations in the plan which are used. If less than \$1,200 worth of time on the select

71. The following discount table is used by NBC to calculate comprehensive discounts and station lineup discounts:

Value of Ordered Station Lineup Based on Gross Class A Hour Rates	Group I 6:00-8:30 P.M.*		Group II 8:30-11:00 P.M.*		Group III Mon.-Fri. 9:00-10:30 P.M.*		Group IV Sat.-Sun. 9:00-10:30 P.M.*	
	Line up Disc.	Compre. Disc.	Line up Disc.	Compre. Disc.	Line up Disc.	Compre. Disc.	Line up Disc.	Compre. Disc.
Less than \$110,000	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
\$110,000 to \$114,999	4.0	24.0	1.5	21.5	0.0	0.0	0.0	0.0
\$115,000 to \$119,999	5.0	25.0	2.5	22.5	0.0	20.0	0.0	20.0
\$120,000 to \$124,999	6.0	26.0	3.5	23.5	0.5	21.0	0.5	21.0
\$125,000 to \$129,999	7.0	27.0	4.5	24.5	1.5	22.0	1.0	22.0
\$130,000 to \$134,999	8.0	28.0	5.5	25.5	2.5	23.0	1.5	23.0
\$135,000 to \$139,999	9.0	29.0	6.5	26.5	3.5	24.0	2.0	24.0
\$140,000 and over	10.0*	30.0	7.5	27.5	4.5	25.0	2.5	25.0

group of stations is used, there is no "dividend." If more than \$2,000 worth of time is used the stations are thrown in free.

It should not be assumed that the rate cards define the only or most substantial discounts which may be obtained. Each card carefully denies that it constitutes "an offer" or "commitment," the rate being "subject to change without notice." The CBS rate card explicitly notes:

The CBS Television Network has in effect special rates applicable during certain time periods and for certain programs, as well as an adjusted base rate for the benefit of purchases in Class A time in excess of 180 aggregate minutes per fortnight in Class A time. Information regarding these rates is available on request.<sup>72</sup>

Even limiting attention to the rate card discounts, however, their uniform effect is to give substantial advantages to advertisers able to deploy large advertising budgets over full-hour time purchases, full-network station line-ups and full-year advertising — or at least purchases of substantial blocks of consecutive weekly time.

The combinations under the various discount systems can yield great differences between the cost of a marginal "commercial minute" to a large user and to a one time user. To devise an extreme case, based on the ABC rate card, The Little Company may want a single commercial minute between 6 and 8 p.m. on a summer weekday. His cost for the full network would be 20 per cent of the full hourly rate. His competitor, Big Boy, advertising in full hour segments throughout the year, pays 16-2/3 per cent of the full hourly rate for the same "commercial minute," then deducts a 15 per cent "dollar volume" discount, a 48 per cent summer "every week" "time period" discount and a 5 per cent "daytime premium" discount for a net difference in cost of about 75 per cent. The inclusion of "bonus stations" and the cost advantage of combination rates might add one or two percentage points to the net difference in cost.

The preceding analysis has identified discriminatory volume discounts and tying arrangements in the television discount structure. Further inquiry is in order to suggest possible reasons why such practices are used by the networks.

*Volume discount effects.* Economic analysis does not provide a general theory to explain volume discounts. In the case of discount structures as complex as those in the network rate cards, it is likely that a number of factors are involved. Discounts which depend on the sponsorship of programs on a regular basis probably reflect some degree of real cost savings. Selling costs and other administrative service costs are doubtless less than directly proportional to time billings as the continuity of a sponsored program increases. Similarly, discounts which produce proportionately lower rates for full-hour sponsorship than for fractions of hours probably reflect to a degree real cost savings in dealing with larger units. A similar analysis would apply to discounts based on station line-ups. Some of the costs of putting a program and related commercials on a network hook-up — interconnection costs — are not directly

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72. CBS Television Network Rate Card No. 16, *supra* note 52.

proportional to the number of stations which carry them. Discounts which encourage the use of less desirable time, such as summer time, may produce real savings by encouraging fuller use of network facilities in periods when they would otherwise be underused.

Insofar as volume discounts precisely reflect real cost savings, they are not open to criticism. Three facts, however, stand out. Some of the most substantial discounts, such as ABC's straight "dollar volume" discount, have no discernible link to any plausible cost savings hypothesis because they are linked only to aggregate charges, regardless of how they were accrued. Second, several of the types of discounts which *might* be related to some plausible cost savings hypothesis are structured in such a way as to defeat any argument that their purpose is to reflect such savings. For example, the NBC "station line-up" discounts increase in a linear manner and are based on the stations' prime time network charges, while any theory of cost savings attributable to a larger line-up would certainly have to be related to numbers of stations — not their charges — and result in a flat rate beyond the minimum point at which fixed costs cease to be a factor. Another example is NBC's "comprehensive" discount. Although cost factors might arguably justify a somewhat lower average rate to a regular sponsor making a commitment for 52 consecutive weeks, this discount treats 52-week continuity as a minimum qualification and its size increases with total expenditures. Third, and most important, the discounts seem to be enormously larger than cost savings could possibly justify.

Thus other explanations must be sought. These require a short excursion into the economic theory of pricing under conditions of imperfect competition.

A television network, viewed as a supplier of an economic "good," may be thought of as a "multi-product" firm which offers an almost unlimited variety of very similar but slightly differentiated wares. Indeed, at least for the larger advertiser-buyer, the "product" — a "program-network time" package — may in effect be custom-made. The major variable components of the product are program (which the buyer may in some cases create or help design himself), time of day, season of the year, and number and identity of individual stations in the network.

Because each available combination of these components is, in some measure, unique and each may be regarded by different potential purchasers as having differing utility in carrying out an over-all advertising campaign, a situation exists in which there is a strong tendency for the price as well as the configuration of each package to be set through individual bargaining between buyer and seller. From the network's point of view, economic theory suggests that this form of "perfect" price discrimination<sup>73</sup> would result in maximum profits in the exploitation of its market position, neglecting the costs of administering such a regime. Prices would be discriminatory both in the sense that the prices of different packages would not bear the same relationship to their costs, and in that there would be no reason to expect that competing

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73. See MACHLUP, *op. cit. supra* note 55, at 138.

buyers would pay the same price for packages which would produce equivalent audiences.

But purely "personal" discrimination of this type may entail prohibitively high administrative costs in bargaining and contract negotiation, especially with hundreds of smaller advertisers. Furthermore, unless all network bargainers are superbly adroit, the actual results they achieve are likely to be less favorable than those which would result from application of a uniform formula which incorporates systematic discriminations. Also, because of the role of advertising agencies in bargaining for numerous advertisers, a relatively stable system must be used to prevent difficulties with advertisers who find themselves discriminated against. Such systems must, of course, reflect accurately the characteristics of the aggregate demand of the relevant segments of the market and be flexible enough to allow for individual adjustment by direct negotiations in unusual and important cases.

Not only in television, but, as we have noted, throughout the advertising industry rate cards invariably include large, systematic volume discounts. In addition to, and of much more importance than, whatever costs savings they may arguably reflect, one may suppose that a rate card evolves through experience in bargaining with advertisers and reflects roughly the range of price elasticities of demand of advertisers for time or space in the particular medium. These elasticities depend, in turn, on the available alternatives. A television network, for example, is in competition as a national advertising medium, in varying degrees, with other networks, "spot" time arranged with individual stations, radio, newspapers, magazines and outdoor advertising. Each of these provides an alternative to buying the product of a particular network. A large advertiser may be given lower prices, in the form of volume discounts, because he can work out "substitute" arrangements not equally available to smaller advertisers.

The competing television networks, of course, provide the closest substitute. The relatively high fixed costs and lower marginal costs which characterize network television — in part reflecting the fact that a network provides its affiliates with programming throughout the broadcast day every day in the year — give large advertisers a very strong bargaining position. The loss of a large advertiser to another network might substantially impair a network's chances in the all-important annual race for viewer ratings, in part because his support of costly, high-rated programs would be lost. This in turn would reduce the attractiveness of adjacent times. Smaller advertisers do not wield so potent a bargaining weapon.

Larger advertisers also may be better able to shift a part of their activity into effective "spot" advertising. One form of "spot" activity permits an advertiser to develop its own programming to be aired on independent stations and on whatever network affiliates can be persuaded to reject network programs. Another form is the purchase of "spot" time on network affiliates between network programs on a nationwide basis. Either alternative — in effect,

putting together a kind of "private network" — is more readily available to advertisers with substantial television advertising budgets than to smaller advertisers. An advertiser with a large budget is in a better position to produce programs which are comparable in quality to network programming. Only very high quality programs will attract affiliates away from the networks.

Finally, it may be suggested that volume discounts may simply reflect decreasing marginal utility to individual users of increasing quantities of the product, much as rates for electricity, for example, may be structured to reflect its different value in lighting, heating and industrial uses.<sup>74</sup> This suggestion fails to take account of the derivative nature of the demand for television advertising and the fact that the rate card discounts apply equally to companies which advertise numerous products or brands and those which advertise only one.

*"Tie-in" effects.* Many of the discounts which result in preferences for quantity buyers also, as we have noted, contain "tying" elements. They use graduated discount rates which become applicable to the most expensive (prime evening) time only if off-hour or off-season time is also purchased, if marginal stations are also used, or if "continuity" is maintained in program sponsorship. The time-cards do not say "You can use prime evening time *only* if you take marginal time or stations," as in a traditional tie-in, but "You will benefit from maximum discounts on all your time purchases only if you take marginal time or stations." Both restrict the free choice of the buyer.

Economic analysis suggests that tying is a sensible mode of maximizing profits, at least in the short run, only in rather special situations. It is usually more profitable — because less coercive — simply to price each of the "tied" elements as supply and demand dictate. A tie-in may be preferable, however, if increasing the price of the "tying" product is impossible because of some form of price regulation or undesirable because it would invite political or administrative intervention. A tie-in may also be tactically sound if a substantial price increase would tend to attract new competitors who would be less likely to enter if they were required also to deal in the "tied" commodity. In these cases the price of the "tied" product is set higher than the market would otherwise dictate to offset the artificially low price charged for the "tying" product.

Perhaps the most likely explanation for the presence of tying arrangements in the discount rate structures is that networks prefer to keep prime time rates artificially low in comparison with daytime and summertime rates. Or conversely, the networks wish to encourage use of daytime and summertime hours at rates which are somewhat higher than the market would seem to call for, and are willing to sacrifice short-run maximum profits on sale of evening time to accomplish this result. Instead of allowing prime time rates to seek their normal higher level — which increment the networks would share with

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74. See TROXEL, *ECONOMICS OF PUBLIC UTILITIES* 619-86 (1947); see generally GARFIELD & LOVEJOY, *PUBLIC UTILITY ECONOMICS* (1964).

stations on a percentage basis — the networks in effect “take” the difference the market would bear by arranging discounts to encourage use of time which is “overpriced.” The stations in turn get more return for staying with the network during these “off” periods than they could otherwise. Because all discounts are out of the networks’ share, they are foregoing immediate profit to produce this result, and at least some stations are getting somewhat more than their contractual share would be if market forces alone determined rate levels.

Another reason for a rate structure which results in the spreading of advertisers’ expenditures over less desirable time and stations might be suggested. Use of marginal facilities or times by those who buy evening time is encouraged. It might be urged that in this way cost savings are achieved by more efficient, even use of network facilities. But presumably the same result could be achieved, without expensive coercion, by simply reducing the rates for marginal times and stations.

One further tying effect must be mentioned, although it necessarily does not appear from our rate card analysis. There is a strong belief in important segments of the industry that the networks have tended to tie programs in which they have an interest to the sale of the most attractive evening time slots. This may be an effort to capture more of the value of the most attractive evening time for themselves by taking the profit on the program rather than sharing it with affiliates through the higher prime time rates the market would seemingly bear.<sup>75</sup>

### III. THE ANTICOMPETITIVE EFFECTS OF NETWORK RATE DISCOUNTS

There are four major markets in which the effects of a network’s discount system are most likely to be felt. First, as has been suggested by the immediately preceding discussion, an important impact is felt on competition within network television. Second, important effects are felt in the media most directly competitive or potentially competitive with network television for advertising; these are (a) “spot” advertising and (b) independent telecasting, including UHF. Remote effects may be expected on media less immediately competitive with the television networks, such as radio, newspapers, and magazines. Third, important effects are felt among independent program producers who increasingly find themselves foreclosed from markets for their product. Finally, perhaps the most far-reaching anticompetitive effects are those “indirect” ones which result from adding an important incentive to mergers and other measures leading to “conglomerate” size in industries for which television advertising is important.

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75. There is even a suggestion that network executives have taken a personal profit on programming “tied” to prime evening time. A stockholders derivative suit filed in New York Supreme Court on March 29, 1965 alleges that Mr. James Aubrey, subsequently fired as president of CBS, “conspired” to share in the profits of Richlieu Productions, Inc., a company that supplied programs to CBS. Both Aubrey and CBS have denied the allegation. *New York Times*, March 30, 1965, p. 93, col. 5.



### A. *Effects on Competition within the Television Industry*

*Anticompetitive effects: Network television.* The discussion in the preceding section considers how bargaining between advertisers and networks may have resulted in the discounts reflected in the rate cards. Another way of looking at the discount structures directs attention to their role as means of competitive rivalry. For example, a network which first establishes a margin of advantage over its competitors, by virtue of being there first or for some other reason, will find it advantageous to induce its largest customers to give it *all* their business, not only for the sake of immediate profits, but to seek to prevent them from patronizing potential or actual rivals.<sup>76</sup> A highly "progressive" volume discount structure is most effective in this respect; a marginal advertising dollar spent with the first organization will buy very substantially more time or space than it will if it is spent with the rival, assuming comparable rate structures. Thus a penalty that can be prohibitive in effect acts as a deterrent on any temptation to "experiment" with a new organization or to diversify by spreading an advertising budget among a number of competitors. Note also that the "second" firm, once having won some adherents, must in self-defense impose a parallel discount system. Both will now see the strategic advantage, too, in the barrier to the entry of further new competitors which their discount structures create.<sup>77</sup>

The volume discount system makes network television the least flexible of all advertising media. In other media it is possible to decrease the volume of advertising by eliminating a particular publication or broadcast station without substantially changing the average cost of other units of advertising in the media. Decreasing expenditures in network television, however, result in higher average costs of each unit in the medium. In addition, the present arrangements tend to discourage use of marginal times and stations by smaller advertisers who might be attracted to them by lower prices.<sup>78</sup>

The fact that large advertisers are under strong pressure to concentrate their entire television advertising budget on one network means that competition tends to be an "all-or-nothing" affair.<sup>79</sup> If a large advertiser whose several

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76. On the "mixed" purposes and effects of certain classes of business practice, see Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 *COLUM. L. REV.* 422, 459 (1965).

77. See note 57 *supra*.

78. That television network discount practices place the small business advertiser at a competitive disadvantage has been substantiated by testimony before the House Committee on Small Business. See H.R. REP. NO. 2571, 87th Cong., 2d Sess. 26-29, 30-36 (1963).

79. Preliminary reports on prime-time sales for the Fall 1965 television season support the general understanding that most firms tend to concentrate their advertising on a single network. On the basis of programs sold as of March 1, 1965, Procter & Gamble was the only advertiser to purchase time on all three networks. Four advertisers purchased time on two networks and nine others limited their purchases to a single network. Among the firms listing purchases to a single network was Bristol Myers, the nation's third largest advertiser. See *Broadcasting*, March 1, 1965, pp. 30-31.

For other examples of single advertisers concentrating advertising on a single network see *Humble Oil Buys Network TV Series*, *Broadcasting*, July 8, 1963, p. 32 (First pur-

major brands account for a substantial number of hours of time and programming on network X decides that the ratings of the network's programs generally may be slipping, it does not have the unpenalized alternative of switching one or more brands to network Y to "diversify" and moderate the risk; rather, the discount structure tends to demand an "all-or-nothing" move. Furthermore, one or two major moves of this kind may have sufficient impact on a network's programming and overall ratings to precipitate an exodus of critical dimensions. It seems likely that this "feast or famine" tendency provides a fertile soil not only for the well-advertised Madison Avenue ulcer but for forms of "wheeling and dealing" not entirely consistent with traditional standards of competition. Furthermore, one might suggest the hypothesis that this kind of market structure accentuates tendencies toward "wasteland" programming.<sup>80</sup>

*Anticompetitive effects: "Spot" television, UHF and other media.* As a national advertising medium, network television is in competition with "spot" television, independent stations, including UHF, radio, newspapers, magazines and outdoor advertising. Each medium has somewhat different characteristics which limit its interchangeability with each of the others.<sup>81</sup> Television network advertising is demographically unselective in comparison to magazines which are aimed at particular age and interest groups. Conversely, the specialty magazine does not reach network television's mass audience. Effective advertising in a particular medium is generally agreed to require a minimum purchase of network time totalling 4 million dollars concentrated on NBC; How Breck Found its Own TV Formula, *Broadcasting*, October 23, 1961, p. 26. (Case history of a decision to concentrate purchases on a single network and to stay out of spot market.)

80. "I invite you to sit down in front of your television set when your station goes on the air . . . and keep your eyes glued to that set until the station signs off. I can assure you that you will observe a vast wasteland." MINOW, *EQUAL TIME* 52 (1964) (Speech to the National Association of Broadcasters, May 9, 1961). Advertisers confronted with an "all or nothing" choice must weigh average network ratings heavily. Aware of the importance of average ratings, the networks may be unwilling to air programs which have a high cultural value but lesser popular appeal even though they are fully sponsored. They are fearful that such programs will pull down average ratings for an evening and for the entire schedule. The problem of average rating may tend to inhibit network willingness to experiment with new types of programs for much the same reason. See note 38 *supra*.

81. The technical differences between media limits competition between them to some extent. Newspapers deliver a printed message but are limited in their ability to use color or to offer large secondary audiences. Magazines offer high quality color reproduction and secondary readership, but lack the vocal impact of radio. Television and radio both have vocal impact but both are limited in time; if a commercial message is missed, it is lost. These differences tend to make inter-media comparisons difficult, and considerations other than cost play a large role. However, if the cost differential is sufficiently large or if the advertising money to be spent is in addition to the usual commitment, the competition between media comes into play. See generally, BROWN, LESSLER & WEILBACHER, *ADVERTISING MEDIA* (1957); DUNN, *ADVERTISING, ITS ROLE IN MODERN MARKETING* (1961); KIRKPATRICK, *ADVERTISING, MASS COMMUNICATION IN MARKETING* (1959).

mitment to that medium.<sup>82</sup> For example, one advertisement in one issue of a national magazine may not have enough impact to justify the expenditure. Thus a small advertiser usually cannot "efficiently" use all media. It is only after passing a certain minimum level of expenditure that additional funds may be equally effectively used elsewhere. But it may be precisely at this point that the volume discounts in network television take effect to inhibit multi-media operations.

In spite of somewhat different characteristics, the closest substitute for network television advertising is "spot" commercials on affiliated and independent stations, including, at least potentially, UHF stations. Shifts in use between network and "spot" advertising occur from year to year with changes in price and market conditions.<sup>83</sup> Thus, apart from their effect on competition between networks, volume discount rate structures most directly effect competition between the networks and the individual stations as sellers of "spot" time, and the development of UHF as a potential competitor. The same kinds of effects of network volume discounts which have been noted as present on the network level can be expected to be felt in varying degrees by the individual stations. Most important, the network discounts place a premium on concentrating television advertising budgets on network television vis-à-vis other media, including "spot" television and use of UHF facilities.

One additional impact is felt, however. The network discount structures reflect the fact that demand for television time is both highly seasonal and concentrated during the "prime" evening hours. Were it not for discrimination based on volume, continuity and time period, the price of prime time during the winter would be very much higher than it is now. Except for the "tying" effect of the network discounts, these higher prices would tend to lead to an increase in supply. This might take the form of new VHF stations in marginal areas, as well as new UHF stations furnished with attractive evening programming by new networks, special "evening" networks or independent program producers. Thus, advertising resources now coerced into supporting daytime and summer programs might find their way into increased program diversity during the hours of greatest viewer demand.

Put differently, the tendency of the present network pricing system is to create a barrier to the entry of new stations, particularly new UHF stations. The shortage of independent stations, in turn, inhibits the growth of new sources of programming for such independents, including the development of new network competition.

*Anticompetitive effects: Alternative program sources.* The preceding discussion has suggested that insofar as network discount practices inhibit the entry of new competition both at the network and independent station levels, they indirectly limit the market in which independent program producers compete.

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82. See BROWN, LESSLER & WEILBACHER, *ADVERTISING MEDIA* 114-49 (1957).

83. Network Representation of Stations in National Spot Sales, 27 FCC 697, 714-19 (1959), *reconsideration denied*, 28 FCC 447 (1960), *aff'd sub nom.* Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

There is here a self-reinforcing effect, because the shortage of available independent programming tends to put the independent station at the mercy of the networks and in turn discourages potential entrants, especially potential UHF licensees.

Independent program producers have also been injured by the networks' tendency to "tie" programming in which they have an interest to prime evening time.<sup>84</sup> This trend has been the subject of vociferous protest by independent program producers<sup>85</sup> and the problem is currently before the Federal Communications Commission.<sup>86</sup>

#### B. *Effects on Competition Outside the Television Industry*

*Stimulus to Mergers.* Probably the most important anticompetitive effect of network television's discount policies, for the economy as a whole, is the "artificial" stimulus to mergers which they provide. Appreciation of the significance of this impact requires analysis of the enormous wave of industrial mergers since World War II, and an understanding of the importance in some industries of advertising rate policies as an incentive to acquisitions and other modes of quick expansion.

The post-war wave of industrial mergers has been composed largely of "conglomerate" or "diversification" mergers rather than consolidations of competing firms or acquisitions for purposes of vertical integration.<sup>87</sup> Since 1950 the 200 largest manufacturing firms alone have acquired more than 2,000 concerns with combined assets of about \$17.5 billion, an amount equal to about 11 per cent of the total assets of the acquiring group.<sup>88</sup> In the last five years, about 70 per cent of such acquisitions have been "conglomerate" in nature. It has recently been estimated that if present trends continue, by 1975 the 200 largest corporations will control two-thirds of the total assets of American manufacturing corporations.<sup>89</sup>

Although it is clear that the current conglomerate merger movement is helping to bring about "substantial and potentially fundamental changes in the

84. House Comm. on Interstate and Foreign Commerce, *Television Network Program Procurement*, H.R. REP. No. 281, 88th Cong., 1st Sess. 103 (1963).

85. A. Mueller, *The Network Role in Television Program Participation*, J. SCREEN PRODUCERS GUILD, Nov. 1964, p. 3.

86. The FCC announced a notice of proposed rulemaking on March 19, 1965, *The New York Times*, March 20, 1965, p. 1, col. 4.

87. W. Mueller, *The Significance of Mergers Among Large Manufacturing Firms*, Revised Version of Paper given at the University of Connecticut, April 22, 1964, p. 1; W. Mueller, *The Scope of the Current Merger Movement*, Statement before Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, press release dated March 16, 1965, p. 27. For an extensive and careful analysis of conglomerate mergers, see Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

88. W. Mueller, *The Scope of the Current Merger Movement*, Statement before Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, press release dated March 16, 1965, pp. 31-34.

89. *Id.* at 33.

structure of our economy,"<sup>90</sup> it is less clear what the effects have been or will be on economic efficiency in the economy or on competition as a regulator of markets. Some economists have suggested that conglomerate mergers do not pose an important threat to the competitive forces in the economy.<sup>91</sup> Such mergers do not change the market share or rank of the acquiring corporation in any market, as do "horizontal" consolidations, nor do they threaten direct "foreclosure" of competitors from sources of supply or distributional outlets as do "vertical" acquisitions.

Two important types of conglomerates are "product extension" mergers, in which new but related products are added to the firm's line, and "market extension" mergers, in which operations are extended into new geographic markets or to new classes of customers.<sup>92</sup> Real economies are most likely in mergers of these types in which manufacturing methods of old and new products are related or distributional facilities or techniques can be joined.<sup>93</sup> In "pure" diversification mergers, economies are less likely and the business reasons tend to boil down to simple strategic advantages of size, resulting in money savings to the firm which are not likely to be reflected in commensurate social benefits.<sup>94</sup> Mergers which have the best claim to producing some degree of added efficiency are also most likely to have some anticompetitive effect. They remove from the scene those firms whose normal pattern of internal growth might most likely eventually bring them into direct competition with their acquirer; and vice-versa, they terminate the possibility that a likely entrant by internal expansion, the acquiring company, will add to the number of competitors in the market of the acquired firm. Thus "potential" competition is frustrated. In addition, in some cases the competition of smaller, undiversified rivals of the acquired firm or, probably more important, the entry of potential new competitors, may be impeded by strategic advantages of conglomerate size which are largely unrelated to efficiency. One which has recently received scrutiny is the practice of "reciprocity" in buying;<sup>95</sup> another may be provided by advertising volume discount rate structures which are the subject of this study.

90. *Id.* at 35.

91. See, e.g., Adelman, *The Antimerger Act, 1950-60*, 51 *AM. ECON. REV.* 236, 243 (1961); Stigler, *Mergers and Preventive Antitrust Policy*, 104 *U. PA. L. REV.* 176, 183-84 (1955); cf., Turner, *supra* note 87, at 1314-16.

92. These classifications are suggested in Commissioner Elman's opinion in *Procter & Gamble Co.*, 3 *TRADE REG. REP.* (1963-1965 Transfer Binder) ¶ 16673 at 2165 (FTC 1963).

93. See Hale & Hale, *More on Mergers*, 5 *J.L. & ECON.* 119, 128 (1962); Turner, *supra* note 87, at 1330.

94. See, e.g., Blair, *The Conglomerate Merger in Economics and Law*, 46 *Geo. L.J.* 672, 679-80 (1958); Edwards, *Conglomerate Bigness as a Source of Power in Business Concentration and Price Policy* 331 (1955); cf. Blake & Jones, *In Defense of Antitrust*, 65 *COLUM. L. REV.* 377, 395-98 (1965); Turner, *supra* note 87, at 1328-39.

95. *FTC v. Consolidated Foods Corp.*, 3 *TRADE REG. REP.* (1961-1963 Transfer Binder) ¶16182 (FTC 1962), *re'd*, 329 F.2d 623 (7th Cir. 1964), *order of the commission reinstated*, 380 U.S. 592 (1965). See also Turner, *supra* note 87, at 1386-93.

Whatever the economic facts, Congress was expressly concerned with the increasing fraction of industrial activity controlled by the largest companies, and sought to slow down the conglomerate merger trend when it strengthened the Clayton Act's antimerger provisions in 1950.<sup>96</sup> Thus the political and social objectives of antitrust<sup>97</sup> may call for a closer scrutiny of factors which encourage conglomerate mergers, entirely apart from speculation as to ultimate economic effects.

Two recent Federal Trade Commission proceedings — *Procter and Gamble Co.*,<sup>98</sup> and *General Foods Corp.*<sup>99</sup> — have forcefully called attention to the volume discount system of network television as an important incentive to certain classes of conglomerate mergers in consumer goods industries. In both cases the acquired and acquiring firms were distributors of consumer goods whose marketing strategies required large advertising outlays. And in each a substantial incentive for the merger was the volume discount rate structure of advertising media generally and, in particular, volume discounts in the sale of network television time.

Clorox merged with P & G in 1957. Clorox was the dominant manufacturer of household liquid bleach. At the time of the merger it had annual sales of slightly less than \$40,000,000, which represented 48.8 per cent of the national market.<sup>100</sup> The Commission found that Clorox was the only manufacturer of household liquid bleach marketing nationally, and that its industry dominance could be explained only by its advertising and promotional activities.<sup>101</sup> Its annual advertising expenditures were over \$3,700,000, amounting to around 10 per cent of total sales<sup>102</sup> and presumably a much greater fraction of total costs. \$1,150,000 of this amount was spent for television advertising. The price of Clorox was higher than the price of other liquid bleaches despite the identical chemical composition of all liquid bleaches and despite the presence of unused capacity in the industry.<sup>103</sup>

P & G was one of the nation's 50 largest manufacturers. In the packaged detergent field it sold 54.5 per cent of the national total;<sup>104</sup> however, it did not produce a line of household liquid bleach. In the year of the merger P & G spent over \$80,000,000 on advertising and was the nation's largest advertiser.<sup>105</sup> Before acquiring Clorox it studied its market position carefully and

96. See, e.g., MARTIN, *MERGERS AND THE CLAYTON ACT* 221-67 (1959); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 233-38 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 651-74 (1961).

97. See Blake & Jones, *supra* note 94 at 382-84.

98. 3 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16673 (FTC 1963).

99. 3 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 17161 (FTC 1964).

100. *Procter & Gamble Co.*, *supra* note 98, at 21562.

101. *Id.* at 21576.

102. *Id.* at 21563.

103. *Ibid.*

104. *Id.* at 21564.

105. *Ibid.*

concluded that it would be able to make more effective use of Clorox's advertising budget and that the merger would permit substantial marketing economies.<sup>106</sup>

In examining these economies, the Federal Trade Commission affirmed a hearing examiner's findings that substantial discounts are available to the largest users of advertising media.<sup>107</sup> P & G, it found, received the maximum volume discounts on television advertising as well as other media, and the merger had the effect of making Clorox eligible for the same discounts. For this reason, P & G could get at least 30 per cent more mileage out of the Clorox budget than Clorox had previously been able to get. In addition to discount advantages the Commission noted that a large multi-product firm can sponsor the most popular programs and include commercials for a variety of its products. As well, a large firm can run commercials for its different products in different sections of the country during a single commercial break. Clorox thus gained the advantages of network television while limiting its advertising activity to selected regional markets. The Commission was dubious as to whether advertising savings in these circumstances could properly be regarded as true economies of scale. Rather, it saw them as adding to the barriers to entry and as a threat to competition within the liquid bleach industry.<sup>108</sup> These were among the reasons for holding the merger illegal under Section 7 of the Clayton Act.

In the *General Foods* case, a Commission hearing examiner held the merger of General Foods and S.O.S., a manufacturer of steel wool, illegal under Section 7.<sup>109</sup> The examiner found that S.O.S. was one of two dominant steel wool manufacturers in the U.S. and that it had a yearly advertising budget of nearly \$2,000,000. As a result of the merger, S.O.S. was able to take full advantage of network television advertising, a medium which had previously been closed to it for reasons of cost. General Foods is one of the nation's largest television advertisers with annual network television advertising time charges in the neighborhood of \$20,000,000. Thus it was able to purchase longer commercial segments at lower net rates and use the S.O.S. budget more "efficiently." After the merger S.O.S. was able to enhance its market share until, in 1963, it accounted for 61 per cent of the steel wool market. In contrast, the

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106. *Id.* at 21565.

107. The findings summarized in this paragraph are discussed *id.* at 21576-77.

108. *Id.* at 21584. Subsequent to the FTC proceeding, it has appeared that large multi-product firms are able to find other uses of the power inherent in the huge advertising budget. In early 1964 Procter & Gamble requested that the National Association of Broadcasters Code be amended to prohibit "piggy-back" commercials, a term of art describing one minute commercials for several products of the same manufacturer. "Piggy-backs" are an effective vehicle for smaller advertisers who cannot afford larger purchases of network time; thus they are a competitive "answer" to the kind of television advertising available to the giant manufacturers. This information is contained in a letter from Helene Curtis Industries, Inc. to Procter & Gamble and the National Association of Broadcasters, Jan. 16, 1964 (available in the Columbia Law Library).

109. *General Foods Corp.*, *supra* note 99.

market share of Brillo, the other leading producer of steel wool, dropped to 37 per cent.<sup>110</sup> The hearing examiner concluded that in the light of the ruling of the Commission in *Procter & Gamble* the S.O.S.-General Foods merger was illegal.

These two cases illustrate the close relation of the discount rate structure of advertising media in general, and more particularly the discounts available to users of network television, to merger patterns in consumer goods industries. For most nondurable consumer goods the ratio of advertising costs to total costs is high.<sup>111</sup> A substantial part of the advertising budgets of most large consumer good manufacturers goes toward television advertising.<sup>112</sup> Small consumer goods manufacturers, effectively prevented from using network television, therefore may be at a substantial competitive disadvantage. Firms which can use television advertising for a number of products on a nation-wide basis are in the best position to take advantage of most of the rate differentials.

The dimensions of the discount system would appear as well to have a tendency to induce certain *kinds* of mergers. First, advertisers who market regionally are encouraged to merge with other regional marketers, or to merge into firms already marketing nationally. The merger will give the regional marketer access to network television by bringing his budget up to the minimum "must buy" requirement and will permit the combined firm to make use of the entire network and enjoy the discounts for "line-up" and "station hours." Second, seasonal goods manufacturers are encouraged to merge with other seasonal

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110. The benefits of the General Foods-S.O.S. consolidation must not have escaped Brillo's attention; in 1963 it merged with Purex Corporation, Ltd., which had experienced the impact of the P & G-Clorox merger.

111. Bain summarizes data for advertising costs in different classes of manufacturing industries in *INDUSTRIAL ORGANIZATIONS* 389-91 (1962). More detailed breakdowns are found in FTC, *REPORT ON DISTRIBUTION METHODS AND COSTS*, Part V, 5-16 (1944). For a thorough study of the extreme case of cigarettes, see TENANT, *THE AMERICAN CIGARETTE INDUSTRY* 163-72 (1950). Federal Trade Commission studies indicate that "the largest firms tend to spend greater absolute amounts on advertising than do their smaller competitors, but in so doing they bear lighter burdens and reap greater profits." W. Mueller, "Processor v. Distributor Brands in Food Distribution" in BAUM, *THE ROBINSON-PATMAN ACT* 139, 142 (1964). The growing importance of the discount problem is suggested by the fact that between 1947 and 1960 advertising expenditures in the food marketing industry increased by over 80% as a ratio to net sales. *Id.* at 140.

112. In 1960, for example, 44.6% of the total advertising budget for products categorized as "soaps and cleansers, drugs and toilet goods" was spent on network television and 32.2% on spot television. Tobacco manufacturers spent 45% of their advertising budgets on network television and 20% on spot television. 33.1% of advertising for products classified as "paper and plastics" was on network television and 16.0% on spot television. The reliance on television advertising was almost as great in the "foods and kindred products," camera and supplies, and home equipment categories. Exceptions to the pattern of television use are advertising budgets for alcoholic beverages, clothing and accessories, and tires and rubber products. Automobile manufacturers, although large users of television advertising, are even larger users of newspaper and magazine space. Yang, *Variations in the Cyclical Behavior of Advertising*, 28 *J. OF MARKETING* No. 2, p. 28, Table 3 (April, 1964).



goods manufacturers who have different peak seasons. The merged firm will be able to use television on a year-round basis and take advantage of "continuity" discounts. Third, smaller national multi-product firms are encouraged to merge with each other to become eligible for larger volume discounts and to make it economically feasible to "diversify" by advertising on more than one network or in other media. Such opportunities to "diversify" resulting from conglomerate mergers inure only to businesses with extremely large advertising budgets, who can freely use different media without loss of rate discounts.

In sum, the flexibility of network television as an advertising medium increases with the size of the advertising budget and the number of products to be promoted. A large multi-product advertiser can concentrate all its commercials for a particular product in a single market. Thus, it can keep acquired companies as regional divisions while giving them all of the advantages of network television. And it can use its bargaining position to negotiate for the most attractive time periods and the most effective programs.

Even a cursory examination of the recent history of acquisitions of the firms with the largest advertising budgets suggest that circumstances such as those present in the P & G-Clorox and General Foods-S.O.S. mergers are not unusual. Of the twenty largest network television advertisers, 18 have purchased or acquired by merger one or more important new consumer products or brand names since World War II.<sup>113</sup> Among them they account for at least seventy-five "product-extension" mergers during that period.

Procter and Gamble, the nation's largest advertiser<sup>114</sup> has, in addition to Clorox, purchased such brands as Spic n' Span cleaners, Duncan Hines foods, Charmin tissues and Folger coffee in recent years. The P & G acquisition in 1963 of J.A. Folger & Co., sellers of vacuum packed and instant coffees in western, midwestern and southern markets, is an interesting example of the influence of network television advertising in a merger. As a regional distributor, Folger was a large "spot" advertiser but not a large network advertiser. With the advantage of P & G's network discount preferences, it is to be expected that Folger "spot" activity will diminish, since its advertising can now

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113. This and information in the following paragraphs is based on the list of the top 100 network and spot TV advertisers, Advertising Age, April 6, 1964, p. 4, and on corporation descriptions and history as set out in Standard and Poor Corporations, Standard Corporation Index. (Hereinafter cited as S&P DESCRIPTIONS)

114. Among the company's present brand names are the following: *Soaps and detergents*: Ivory, Camay, Lava, Zest, Tide, Cheer, Dreft, Oxydol, Dash, Duz, Salvo, Joy Thrill, Downy, Comet, Cascade, Spic & Span, Mr. Clean and Clorox. *Food products*: Crisco and Crisco Oil, Big Top peanut butter, Jif peanut butter, Duncan Hines cake mixes, Fluffo shortening. *Toilet goods*: Crest, Gleem, Drene, Prell, Head and Shoulders, Lilt and Secret.

*Selected geographic area brands*: Stardust bleach, Charmin toilet tissue, Folger coffee, Top Job and Duncan Hines frostings. S&P DESCRIPTIONS, P-S, October-November 1964, p. 1847.

be fit less expensively into P & G's many national programs; this will give it a substantial advertising advantage over other regional brands of coffee.

General Foods Corporation, eighth ranking network television advertiser in 1963,<sup>115</sup> has purchased, in addition to S.O.S., such brands as Kool-Aid, 4-Seasons, Taffy, Hostess and Acadia Foods. Second ranking American Home Products Corporation<sup>116</sup> has acquired such brands as Easy-Off oven cleaner, Dennison Foods, Franklin Foods and Blue-Dew laundry items in recent mergers. Bristol-Myers Company,<sup>117</sup> (third), Lever Brothers,<sup>118</sup> (fifth), R. J. Reynolds Tobacco Company,<sup>119</sup> (sixth), Colgate-Palmolive Company,<sup>120</sup> (seventh) and Gillette Company<sup>121</sup> (ninth) have all acquired important new brands or

115. General Foods is one of the largest producers and distributors of food and grocery products. Coffees account for 35% to 40% of the company's sales. Other more important products are cereals, quick-frozen foods, flour, chocolate and cocoa products and dessert preparations. Some of General Foods Brand names are Maxwell House, Bliss, Yuban, Sanka and Maxim coffees. Birds-Eye frozen foods, Post's breakfast cereals, Baker's chocolate, Jell-O and D-Zerta desserts, Swans Down cake mixes and flours, Gaines pet foods, S.O.S. soap pads and others such as Log Cabin syrup, Minute Rice and Good Seasons. S&P DESCRIPTIONS, F-K, August-September 1964, p. 2843.

116. American Home Products Corporation is the second largest domestic manufacturer of pharmaceutical, nutritional and vitamin products. It also produces a variety of proprietary drugs, household specialties, food products, dentifrices and cosmetics. Among the company's more important brand names are Anacin, BiSoDol, Freezone, Preparation H, Infra Rub, Dristan, Heet, Aero, Black Flag, 3-in-One oil, Kwik-Lite, Griffin, Microsheen, Easy-Off, Woolite, Chef Boy-Ar-Dee, Dennison's and Gulden's. S&P DESCRIPTIONS, A-B, December-January 1964-65, pp. 9608-09.

117. Bristol-Myers Co. is a leading producer of proprietary drugs, toiletries and allied products and ethical drugs. Leading brand names include Ipana, Sal Hepatica, Vitalis, Score, Mum, Ban, Excedrin, Bufferin, Bromo Quinine, 4-Way Cold Tablets, No Doz, Fitch Dandruff Remover Shampoo, Ammens medicated powder, Lady Clairol, Silk & Silver, Sparkling Color and Loving Care. S&P DESCRIPTIONS, A-B, June-July 1964, p. 1702.

118. Lever Brothers Co., U.S.A., is a wholly owned subsidiary of Unilever, N.V., a Dutch corporation. Unilever, N.V., also owns a 98.8% interest in Thomas J. Lipton, Inc., a distributor of tea and soup mixes and owner of Good Humor ice cream. Some Lever Brothers brands are All, Breeze, Dove, Lux, Rinso, Lifebuoy, Surf, Swan, Spry, Wisk; Pepsodent and Stripe toothpastes; Imperial and Good Luck margarines. S&P DESCRIPTIONS, T-Z, October-November 1964, p. 4243.

119. R. J. Reynolds Tobacco Co. is the nation's largest tobacco manufacturer. It markets under brand names including Camel, Winston, Salem, and Cavalier cigarettes, Hawaiian Punch, King of the Islands and Cinch fruit juices. S&P DESCRIPTIONS, P-S, April-May, 1964, p. 2739.

120. Colgate-Palmolive Co. is one of the world's leading producers of toilet and laundry soaps, packaged detergents, cleansers, air deodorants, dentifrices, shaving preparations, shampoos and other toilet articles. The company's extensive list of brand names includes Palmolive, Cashmere Bouquet, Fab, Vel, AD, Ajax, Octagon, Florient air deodorant, Wildroot, Code 10, Congestaid, Wash 'n Dri tissues, No Moth and others. S&P DESCRIPTIONS, C-E, June-July, 1964, p. 3112.

121. The Gillette Co. is the leading producer of safety razors and blades and home permanent wave kits. The company also produces lather, brushless shaving creams, men's deodorants, ball point pens, and hospital and medical supplies. Its brand names include Gillette and Valet razors, Foamy shaving cream, Sun Up after shave lotion, Right Guard

products through substantial mergers. Of 1963's "big ten" network advertisers only fourth ranking General Motors Corporation has neither a recent history of acquisitions in consumer goods lines nor outstanding proposed acquisitions in such a field.<sup>122</sup>

Bristol-Myers Company, consistently one of the top network advertisers with gross time charges of \$31,137,000 and net time (after discounts) plus program charges of \$38,305,300 in 1963,<sup>123</sup> has long been active in "product-extension" mergers, having acquired Minit-Rub, Bristol Laboratories, Ammens powders, Luziers cosmetics, Grove proprietary drugs and Clairol products. In March, 1965, it announced its proposed acquisition of Drackett Company.<sup>124</sup> The merger will, if consummated, give Bristol-Myers the distinction of being the first large advertiser to acquire a firm also among the top one-hundred network advertisers; Drackett, a manufacturer of household goods, accounted for \$5,211,100 in gross time charges and \$6,727,600 in net time plus programming.<sup>125</sup> After the merger, their aggregate gross time charge will be just over \$36 million, almost exactly the same as those incurred in 1963 by American Home Products Corporation.<sup>126</sup> If the new firm does as well in manipulating discounts as does American Home Products, it will pay the networks only \$41.6 million, rather than \$45 million, the sum of their present separate payments, for "after-discount" time and programming. This would indicate a possible net savings of \$3.4 million annually in network advertising costs resulting from the merger.

The cigarette manufacturers, long near the top of lists of large network advertisers, are comparatively recent but eager entrants in the merger derby. Philip Morris, Inc.,<sup>127</sup> was the pathfinder. Long one of the twenty largest network advertisers, Philip Morris diversified into men's toiletry with the acquisition of A.S.R. Products (Pal, Gem, and Personna razors and blades, Ever-Ready brushes) in 1960 and Burma-Vita Company (Burma-Shave and other soaps and cosmetics) in 1963. In the same year, it also acquired Clark Brothers Chewing Gum Company.

R.J. Reynolds, sixth ranking network advertiser in 1963,<sup>128</sup> acquired Pacific-Hawaiian Products Company in that year, adding canned fruit juices (Hawaiian Punch, King of the Islands, Cinch), and bread and cake mixes to its ad-

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deodorant, Toni, Tonette, Silver Curl, Prom, Bobbi, Tame, Adorn, White Rain and Pamper hair shampoos, Hush deodorant, Deep Magic cleansing lotion and Paper Mate Pens and refills. S&P DESCRIPTIONS, F-K, April-May 1964, p. 3517.

122. See S&P DESCRIPTIONS, F-K, August-September 1964, p. 3035.

123. Top 100 Network TV Advertisers in 1963, Advertising Age, April 6, 1964, p. 64.

124. The New York Times, March 20, 1965, p. 31, col. 4.

125. Top 100 Network TV Advertisers in 1963, Advertising Age, April 6, 1964, p. 64.

126. *Ibid.*

127. Philip Morris is the fourth largest domestic cigarette manufacturer. Its brand names include Marlboro, Parliament, Philip Morris, Alpine, Benson & Hedges, English Ovals, Paxton, Bond Street, Revelation and Field and Stream. In 1954 the company acquired Benson & Hedges. S&P DESCRIPTIONS, P-S, April-May 1964, p. 2797.

128. Top 100 Network TV Advertisers 1963, Advertising Age, April 6, 1964, p. 64.

vertising budget. In January 1965, it announced its proposed acquisition of Penick & Ford, Ltd.,<sup>129</sup> owners of College Inn Food Products and Idaho Potato Starch Company, leading producers of starches, sugars, syrups and other consumer products under such brand names as My-T-Fine desserts, Cocomalt drink and Vermont syrup.

Recently, the American Tobacco Company, twelfth ranking network advertiser in 1963, proposed acquisition of Consolidated Foods Corporation, a leading producer and distributor of food products. If consummated, the acquisition would have added to American's advertising budget such brands as Sara Lee, Monarch, Richelieu, Booth, Red Diamond, Union Sugar, Hayden House, Signet and (temporarily) Gentry. However, when the Federal Trade Commission announced its intention to attack the merger, negotiations ceased.<sup>130</sup>

Finally, P. Lorillard Company and Liggett & Myers Tobacco Company, each regularly among the twenty-five largest network advertisers, have within the past year announced the acquisition of, respectively, Usen Canning Company, a major producer of cat food, and Allen Products Company, maker of Alpo dog food.<sup>131</sup> These moves, unlike several of those of their competitors, have not resulted in action by the antitrust enforcement agencies.

Of the very largest network advertisers, only General Motors and Gillette have been quiescent in merger activity in recent years. Gillette, however, was a pioneer. Its acquisition of the Toni Company in 1948 added highly advertised women's hair products (Toni, Prom, Bobbi, Tonette, Silver Curl, Tame, Adorn, White Rain and Pamper) and cosmetics (Hush deodorant, Deep Magic lotions) to its shaving lines; in 1955 it acquired Paper Mate pens, which also then became active in network television.<sup>132</sup> Its merger inactivity during the last decade may be supposed, as with General Motors, to stem from an acute case of antitrust sensitivity attributable to the near monopoly market shares of its main products in recent years.

Merger activity is by no means limited to the top 20 network television advertisers. Many smaller companies on the list of the top 100 have also been active.

In February, 1965, Pepsi-Cola Company announced a tentative plan to merge with Frito-Lay, Inc.,<sup>133</sup> a manufacturer of snack and convenience foods

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129. Wall Street Journal, January 25, 1965, p. 2, col. 2. The Justice Department unsuccessfully requested a preliminary injunction against the acquisition. Wall Street Journal, May 28, 1965, p. 7, col. 1.

130. Wall Street Journal, May 3, 1965, p. 26, col. 1. A distinctive feature of the proposed American-Consolidated merger was that Consolidated was already the subject of an antitrust action as the result of *its* merger activity. See *FTC v. Consolidated Foods Corp.*, note 95 *supra*.

131. S&P DESCRIPTIONS, L-Q, February-March 1965, p. 3339; April-May 1965, p. 3103.

132. Gillette has been the traditional sponsor for major sporting events including the World Series. As the cost of television time and game rights increased, Gillette was faced with the choice of enlarging its advertising budget through acquisition or losing a valuable sponsor identification. It chose the merger path.

133. Wall Street Journal, Feb. 26, 1965, p. 8, col. 3. For 1963 television advertising expenditures of these two companies see Advertising Age, April 6, 1964, p. 64.

including potato chips, pretzels and popcorn, as well as a line of specialty canned foods including chili, tamales, barbecued beef, spaghetti and meat balls and party dips. Some of the company's brand names are Fritos, Lay's, Cheetos, Ruffles, and several regional labels. In 1963, Pepsi and Frito-Lay had network gross time charges of \$2,466,700 and \$2,699,900, respectively. Assuming that both companies continue the same amounts of advertising the combined total will be \$5,166,600. The merger will place the combined company on the same network discount level as its most important competitor, Coca-Cola, which had gross time charges of \$5,770,000.

The foregoing factual material is far from constituting empirical "proof" of the proposition that network volume discount practices are the "cause" of acquisitions or mergers by large network television advertisers. In the first place, there has been no systematic demonstration that the rate of such activity is any higher for that group than for other companies of comparable magnitude. Also, even if merger activity were shown to be higher for that group, it may be that other factors — real economies or other money savings in sales or distribution of related consumer lines, for example — are common to most large network television advertisers. Nonetheless, the facts we have noted rather at random are consistent with what economic analysis would lead one to expect — that network television volume discounts will have an effect "at the margin" in the direction of encouraging larger, "balanced" advertising budgets, through acquisition and merger, as well as in other ways, in industries in which network television advertising plays a substantial role. Our suggestion is not that network volume discounts are often the central reason for a merger but that they provide an artificial incentive — unrelated to real economies and perhaps actually resulting in diseconomies — that may be important or decisive in an important class of situations.

*Barrier to Entry of New Competitors.* Not only do advertising discounts tend to eliminate competition by encouraging mergers in consumer goods industries, but they also tend to limit the entry of new competitors into these industries. It is well established that product differentiation and related large advertising outlays may constitute an important barrier to entry.<sup>134</sup> Other things being equal, large-scale entry into an industry is more difficult than entry on a smaller scale, as, for example, in a regional market.<sup>135</sup> But substantial advertising discounts, particularly in network television, are available, as we have shown, only to national concerns with large advertising budgets. A new, undiversified firm thus faces not only a barrier which represents real economies of scale in advertising (as well as in other aspects of production and distribution), but will be handicapped by advertising rate structures which

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134. BAIN, BARRIERS TO NEW COMPETITION 263-317 (1956). Federal Trade Commission studies lead to the conclusion that: "It seems probable that advertising-created and maintained product differentiation constitutes the chief barrier confronting prospective entrants in many grocery product industries." W. Mueller, *op. cit. supra* note 111, at 142. The grocery products industries are among the heaviest users of network television advertising.

135. *Id.* at 53-56, 93-110. See also, Blake & Jones, *supra* note 76, at 462-63.

will make its average per unit advertising costs much higher than those of its large competitors and higher than can be justified by any measure of real costs. Thus network television discounts are anticompetitive not only in their tendency to encourage consolidation but because they inhibit the normal development of new competitive forces in consumer goods industries. They are a double-barreled menace to the health of competition in those industries which must rely on network television advertising.

#### IV. PUBLIC CONTROL OF NETWORK TELEVISION RATE PRACTICES

##### A. *Application of the Antitrust Laws to Network Television Rate Practices*

Network discount practices raise at least two important antitrust questions: whether the discounts constitute price discriminations between customers and whether they constitute tying arrangements, either of which may be illegal because of the actual or likely effect on competition in any of several markets.

The legality of discriminatory treatment of customers involves consideration of three different statutes — the Robinson-Patman Act,<sup>136</sup> the Sherman Act<sup>137</sup> and the Federal Trade Commission Act.<sup>138</sup> Tying arrangements are similarly tested by three statutes — the Clayton Act,<sup>139</sup> the Sherman Act and the Federal Trade Commission Act.

*The Robinson-Patman Act.* The Robinson-Patman Act<sup>140</sup> resulted from the efforts of small retailers and their traditional "middlemen" suppliers to eliminate price concessions large chains often obtained from producers. The statute was not drawn in these terms, however, and has been applied not only, or even primarily, to chain store buyers, but much more generally and as an integral part of national antitrust policy to sellers whose discriminatory pricing practices threaten to injure competition either with their rivals or between their customers or purchasers at other distributional levels.<sup>141</sup>

136. 38 Stat. 730 (1914), as amended 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

137. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

138. 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958).

139. 38 Stat. 730 (1914), 15 U.S.C. § 13 (1958).

140. Section 2(a) provides, in relevant part:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale with the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

141. See generally, EDWARDS, *op. cit. supra* note 54, at 21-65; ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3-24, 36-40 (1962, Supp. 1964); Adelman, *The*

"Volume discounts" are a classic form of price discrimination. In *FTC v. Morton Salt Co.*,<sup>142</sup> the Supreme Court upheld the Commission in striking down a cumulative annual "standard quantity discount" system for the purchase of table salt. Although the discounts were available to all on equal terms, only five retail chains had purchased in sufficient quantity to earn the maximum (15.6 per cent) savings. These stores, because of the discounts, were able to sell at a lower price than their competitors. No further showing of likely injury to competition is required. Indeed, lower court decisions indicate that a showing of ability to under-sell competitors is not a necessary element of such a "secondary line" case,<sup>143</sup> at least in high turnover, low-margin retail markets.<sup>144</sup> No showing of loss of business is required since the Robinson-Patman Act requires only the probability of an injury to competition.

Where the product sold to competitors at discriminatory prices is an "ingredient" or component used in the production of an end-product, rather than itself resold without modification, a greater showing of probable injury to competition may be required. In *Minneapolis-Honeywell Regulator Co. v. FTC*,<sup>145</sup> the item was an automatic temperature gauge used by the purchasers in assembling oil burners. It was the single most expensive element in the burners, but the discrimination accounted for only some three to eight per cent of the final price of the burners. Other factors — manufacturing methods, service, overhead, distribution and advertising costs — were thought to break any causal relationship between cost and price. No sufficient likelihood of anticompetitive effect could be reasonably inferred.

Although *Minneapolis-Honeywell* may be an overly narrow reading of *Morton Salt*, network volume discounts will often come within even its narrower formulation. They are systematic, necessarily discriminatory in favor of large advertisers, and reach percentages much larger than those present in either of these two cases. For many non-durable consumer goods advertising budgets are far-and-away the largest cost item. Furthermore, sales of many such products can be shown to vary in almost exact proportion to advertising expo-

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*Consistency of The Robinson-Patman Act*, 6 STAN. L. REV. 3 (1953); Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222 (1955). The most complete study of the legislative history is in PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* 188-234 (1955).

142. 334 U.S. 37 (1948).

143. In Robinson-Patman Act parlance, a "secondary line" case is one in which the injury to competition alleged is in the "line of commerce" in which the buyer competes, i.e. the competition among retailers selling Morton Salt, or, in the network television situation, competition between P & G's present Clorox division and its competitors in the sale of liquid bleach. A "primary line" case alleges injury to competition in the market in which the seller — the party doing the discriminating — competes, i.e., competition in the network television "line of commerce."

144. *Standard Motor Products, Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Moog Indus., Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963).

145. 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

sure.<sup>146</sup> Thus a firm's ability to compete in the market may be much more critically affected by discriminatory advertising rates than by comparable percentage differences in direct costs of production. In addition, the impact on competition in the markets in which advertisers compete may go much further, as we have seen — network practices may tend to injure the competitive structure of these markets by stimulating mergers and other modes of concentration.

Not only is price discrimination illegal when competition in the customers' market is affected, but also when the discrimination threatens to impair competition in the seller's market.<sup>147</sup> If, as we have suggested, an important effect of the discounts is to inhibit entry of new networks or to reinforce the market position of a stronger network in relation to one which is weaker, or in relation to other competitive media, they are anticompetitive in "primary line" markets as well.<sup>148</sup>

None of the important affirmative defenses provided by the Robinson-Patman Act seems applicable to network volume discounts. All the important discounts are cumulative over varying periods of time and none are structured in such a way that a plausible "cost justification" defense could possibly be made.<sup>149</sup> And because the rate cards are "systematic," the "good faith meeting of competition" defense would not apply. One of the few settled principles with respect to this defense is that it is available only in cases where the discriminatorily low price is a response to an individual competitive situation rather than part of a systematic, preconceived pricing policy.<sup>150</sup>

The only apparent question with respect to applicability of the Robinson-Patman Act derives from the fact that that statute bears an imprint of its anti-chain store genesis: language describing its application in terms of discrimination with respect to "commodities . . . sold for use, consumption or resale . . ." Although the dictionary and common usage indicate that a "commodity" includes "any useful thing . . . ; anything bought and sold ; any article of com-

146. Tennant's study of cigarette marketing concluded that "[a]lthough we cannot get a precise measure of the advertising elasticity of demand, there can be no serious doubt that this elasticity is very high and that advertising expenditures are an extremely effective method of applying market pressure." See TENNANT, *THE AMERICAN CIGARETTE INDUSTRY* 169 (1950). Procter & Gamble's more recent experience with Comet brand cleanser is described in Procter & Gamble Co., *supra* note 98, at 21564. See also Bliven, *Annals of Business: And Now a Word from Our Sponsor*, *New Yorker*, March 23, 1963, p. 83.

147. See discussion in ROWE, *op. cit. supra* note 141, at 141-68, Supp. at 25-32. Rowe's discussion leans toward a rather restrictive interpretation of the Act's application to "primary line" situations.

148. See *supra* note 143.

149. See 38 Stat. 730 (1914), as amended 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958); *United States v. Borden Co.*, 370 U.S. 460 (1962); ROWE, *op. cit. supra* note 141, at 273-96, Supp. at 57-65.

150. 15 U.S.C. § 13(b) (1936); *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); ROWE, *op. cit. supra* note 141, at 215-55, Supp. at 44-56.



merce . . . ,"<sup>151</sup> the Federal Trade Commission early took the position that advertising space in a periodical was not a "commodity" within the meaning of the statute<sup>152</sup> and a lower Federal court has dismissed a claim of price discrimination on the grounds that radio advertising is not a commodity.<sup>153</sup> The Act's application to television advertising has recently been directly ruled upon. In *Columbia Broadcasting System v. Amana Refrigeration*,<sup>154</sup> CBS's suit on a contract relating to television programs was met with a counterclaim alleging *inter alia* that the CBS quantity discounts were in violation of Section 2(a) of the Act. The court correctly noted that the legislative history was inconclusive but held that the context of the term "commodity" in the Act required the conclusion that it did not refer to "a purchase by Amana of the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products."<sup>155</sup>

*Amana* is unpersuasive precedent because it ignores several interpretative problems. First, it fails to note that other sections of the Act appear to use the words "product"<sup>156</sup> and "goods, wares and merchandise"<sup>157</sup> as co-extensive with "commodity," indicating that any specialized, narrower interpretation of the latter term was not intended. Rather, familiar and convenient words were used with no apparent thought of excluding any class of commercial transactions which might contribute to the overriding evil. Of course, at the time of the legislation television did not exist and national advertising in general had not yet taken a decisive role as an instrument of competition. Second, the opinion does not examine carefully the history of the legislation in its Clayton Act<sup>158</sup> context. It is a misinterpretation of the competing interests and considerations which led to Robinson-Patman's complex provisions to suggest that Congress' sole concern was to protect the traditional system of small retailer distribution. The original section 2 of the Clayton Act, of which Robinson-Patman was an

151. WEBSTER'S NEW WORLD DICTIONARY 295 (Coll. ed. 1959).

152. In an informal, unpublished ruling. See 81 CONG. REC. APP. 2336-41 (1937) (remarks of Representative Patman), cited in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 n.27 (1953).

153. *Syracuse Broadcasting Corp. v. Newhouse*, 32 F.R.D. 29 (1962), *aff'd on other grounds*, 319 F.2d 683 (2d Cir. 1963).

154. 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1961).

155. 295 F.2d 375, 378. Another case has held that a lease of real estate does not fall within the "commodity" confines of § 2(a). See *Gaylord Shops v. Pittsburgh Miracle Mile Town & Country Shopping Center*, 219 F. Supp. 400 (W.D. Penna. 1953).

156. Section 2(d).

157. Section 2(c). Rep. Celler has commented on the difficulty, in principle, of distinguishing between the sale of commodities and non-commodities in this context. See Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549, 569-70 (1957).

158. 38 Stat. 730 (1914), 15 U.S.C. § 13 (1958). For further criticism of *Amana* see Loevinger, *The Role of Government in the Field of Advertising*, 26 A.B.A. ANTITRUST SECTION 180, 181-82 (Aug. 1964).

adaptation, was a response to uses of price discrimination through which smaller businesses of all sorts — including local and regional *producers* — were forced into consolidations with larger organizations. These considerations were not lost sight of in the legislative negotiations which preceded the Robinson-Patman Act.<sup>159</sup> Indeed, the main effect of the “primary line” injury provision is the protection of competition in *producers’* markets. These arguments were not carefully developed either in petitioner’s briefs before the Court of Appeals for the Seventh Circuit or in support of certiorari.

Finally, *Amana* is less than definitive because it was one of that unfortunate and disfavored class of cases in which a defendant in a suit for monies due on an executed contract seeks to convert the focus of the suit from simple adequacy of contractual performance to a complex antitrust issue of far-reaching consequences. Here, the original contract dispute was over \$32,114.17, which *Amana* by counterclaim converted into a \$9 million treble damage action. At that point, of course, the Tiffanies of the Wall Street and Washington antitrust bar were brought in by CBS, and they earned their fees well by reminding the courts that this was an inappropriate context in which to decide the fate of the rate structures of not only the television industry, but of radio and the newspaper and magazine industries as well. After all, very large matters were involved and this litigation could hardly provide the kind of information with respect to industry structure and economic effects which would presumably play a part in any Government antitrust proceeding. One may suppose that the courts were right in preferring to wait for a full-dress occasion. Commendable judicial caution, however, should not be regarded as now foreclosing a thoroughgoing examination of the fundamental issues involved.

It has been suggested that the requirement that the commodities involved be “of like grade and quality” also effectively prevents application of the Robinson-Patman Act to sales of television time.<sup>160</sup> The argument is that no two television programs are the same or reach the same audiences. But the discounts apply only to purchases of network time. The basic rate depends on which time category — class “A” or other — is purchased and what stations are taken. Each station’s class “A” hourly rate is based on the number of television homes within the station’s reception area.<sup>161</sup> If the rate making process is a fair one — and it is subject to FTC surveillance — any dollar’s worth of station time should be as nearly equivalent to any other dollar’s worth as careful negotiation can make it.<sup>162</sup> The “like grade and quality” requirement

159. See, e.g., EDWARDS, *op. cit. supra* note 54, at 31-33. Congressman Patman later expressed the view, however, that the statute was not intended to apply to “magazine or other advertising space.” PATMAN, *THE ROBINSON-PATMAN ACT* 75 (1938). This work, in spite of its impressive authorship, is necessarily somewhat less than definitive on matters of Congressional intent.

160. Section 2(a).

161. See NETWORK BROADCASTING at 415; see generally 408-20.

162. The *Amana* court agreed:

Although no two programs present the same artistic, educational or entertainment value to all persons it may well be that so-called prime time programs which

is not held to demand fungible products, or that nondiscriminatory prices be identical. Indeed, to reduce the price of a "premium" product to that of a "regular" product may give rise to an unlawful price discrimination.<sup>163</sup>

One problem, of course, in any departure from a narrow interpretation is that the Robinson-Patman Act presents both policy and technical difficulties in some applications. If the scope of "commodities" extends beyond retailers' stocks and physical components, lines presumably should be drawn somewhere this side of consumer and business services. But an appropriate decision in one case should not be withheld in the fear that courts in future cases will not be able to make equally appropriate distinctions. There is no special conceptual or other difficulty in applying the Act to advertising time and space, scarce commodities created solely to impart added values to other economic goods. The very limited precedent which goes in the other direction is not so well reasoned as to be persuasive.<sup>164</sup>

*Section 3 of the Clayton Act.* Turning to the "tying" effects of the networks' discount arrangements, Section 3 of the Clayton Act<sup>165</sup> must be considered. Section 3's usual application to tying arrangements has been in cases where the lease of a machine has been conditioned on the lessee's agreeing to buy supplies for the machine from the lessor. In the broadest sense these arrangements create a situation in which products do not compete on their own merits.<sup>166</sup> A violation of Section 3 requires only that "the seller enjoys a monopolistic position in the market for the 'tying' product, or [that] . . . a substantial volume of commerce in the 'tied' product is restrained."<sup>167</sup> The "sub-

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have demonstrated comparable audience drawing power would be of like grade and quality from a commercial standpoint to prospective sponsor-advertisers.  
(Dictum)

295 F.2d 375, 378.

163. See ROWE, *op. cit. supra* note 141, at 65-76, Supp. at 9-11; *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

164. If the discriminations are illegal under § 2(a), the enforcement agencies would, of course, also be able to proceed against the advertisers who "knowingly . . . induce or receive" the discrimination, under § 2(f) of the Act. See, generally, ROWE, *op. cit. supra* note 141, at 428-51, Supp. at 98-111.

165. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Section 3 provides, in relevant part:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States . . . , or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sales, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

166. See discussion in Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 433-36 (1965).

167. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-09 (1953).

stantial volume" requirement may be satisfied by a relatively small dollar amount and does not require a "market share" analysis.<sup>168</sup>

The network tie-ins are somewhat out of the ordinary in that they are not "absolute" requirements — rather, they merely give a substantial preference on prime time or other network time rates to purchasers who also take marginal time or stations. Section 3, however, specifically encompasses this variation; it defines the prohibited act: ". . . to lease or make a sale . . . , or fix a price . . . or discount from, or rebate upon, such price . . ." <sup>169</sup> And the first Supreme Court case applying this section to tying arrangements involved, among other kinds, comparable "tie-in discounts."<sup>170</sup>

The effects of the networks' tie-in discounts are precisely those which Section 3 seeks to prevent. In a recent opinion striking down a tying arrangement,<sup>171</sup> the Supreme Court noted that they (1) "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market," and (2) produce the result that "buyers are forced to forego their free choice between competing products."<sup>172</sup> The network discounts clearly tend to force most advertisers who buy winter season prime evening time on one network to "forego" buying afternoon or summer time from another network or, indeed, from spreading around their network time purchases in any category. They correspondingly tend to restrain competition by foreclosing actual and potential competitors from selling in those highly competitive submarkets. They may have an additional anticompetitive effect of a type that has to date not been discussed in the cases. By inhibiting the increase of prime evening time rates to levels the market would apparently bear in the absence of these gimmicks, they may serve to discourage the entry of new network or network-type competition and of VHF and other stations competitive with network affiliates.<sup>173</sup> This reinforces positions of market power held by the networks and their affiliated stations.

However, the word "commodity" appears again at the crucial moment in Section 3 of the Clayton Act, as it does in the Robinson-Patman provisions. The Section 3 usage, however, dates back to passage of the Clayton Act in 1914, without the intervention of any amendatory revision such as that wrought by the Robinson-Patman Act. Thus it is even more difficult to explain why a statute whose purpose was to buttress the Sherman Act, by striking down specific practices thought to be peculiarly harmful, should be given

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168. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 307-14 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

169. *Supra* note 165. (Emphasis added.)

170. *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922). The same case established that there need be no specific agreement not to use the products of a competitor where the "practical effect" is to inhibit such use. *Id.* at 457.

171. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

172. *Id.* at 6.

173. See text *supra* at note 81.

a much narrower scope of effectiveness with respect to the very practice they outlaw. Yet a District Court opinion<sup>174</sup> refused to apply Section 3 to a tie-in which obligated a mortgagor to buy insurance required by the mortgage from the lender, in part because neither "lease," "sale" nor "contract for sale" seemed to describe a mortgage or loan agreement. That court applied the statutory canon of *ejusdem generis* to limit the meaning of statutory language, rather than approach the statute from the view of legislative purpose. The court could not conceive of money as a commodity which is bought and sold, for a price, in the marketplace.<sup>175</sup> Perhaps because of this case and the less-than-overwhelming Robinson-Patman precedent noted earlier, the Department of Justice chose to bring its attack against morning-evening newspaper "unit" advertising contracts, essentially "tie-ins," under the Sherman Act, which contains no "commodity" term, rather than under Section 3. In its opinion in that case, *Times-Picayune Publishing Co. v. United States*,<sup>176</sup> the Supreme Court noted the Government's reluctance but expressed no opinion on the issue.<sup>177</sup>

The most persuasive argument against the broader interpretation of "commodities" in Robinson-Patman cases — that the Act presents great problems both as to its policy and administration — has no comparable force in respect of tying arrangements under Section 3. Such arrangements are comparatively rare and of lesser general economic importance than volume discounts. Although the Supreme Court may be guilty of hyperbole in asserting that "tying agreements serve hardly any purpose beyond the suppression of competition,"<sup>178</sup> it can hardly be urged that important economies would often be lost by applying to them the strictest antitrust standards;<sup>179</sup> on behalf of price discrimination, on the other hand, it is persuasively urged that in its less systematic forms it may promote the breakdown of otherwise rigidly uniform industry price structures.<sup>180</sup>

*The Sherman Act.* Section 1 of the Sherman Act<sup>181</sup> presents no "commodity" problem; it applies to restraints whose effects are felt in interstate commerce with respect to all goods and services. Furthermore, the Sherman Act's reach extends to both price discrimination and tying arrangements. Thus the "quantity discount" and "tying" effects of the networks' rate practices would both be relevant in a Sherman Act proceeding.

The problems in moving under the Sherman Act are (1) that a somewhat higher standard of proof of anticompetitive effect might possibly be required,

174. *United States v. Investors Diversified Services*, 102 F. Supp. 645 (D. Minn. 1951).

175. *Id.* at 647-48.

176. 345 U.S. 594 (1953).

177. *Id.* at 609, especially n.27.

178. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-06 (1949).

179. See Blake & Jones, *supra* note 166, at 439, n.64.

180. See, e.g., EDWARDS, *op. cit. supra* note 54, at 620-21.

181. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958). Section 1 provides, in relevant part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal. . . .

at least in the price discrimination aspects of the case, (2) that if the "quantity discount" and "tying" effects are thought to be sufficiently "mixed" with other commercial objectives, a "rule of reason" approach would open the doors to elaborate industry testimony, in justification of the system, which would be difficult to evaluate, and (3) that although the Supreme Court has subsequently taken a quite different approach to "tying" problems under the Sherman Act, the *Times-Picayune* case has never been explicitly repudiated and is arguably closer on its facts to the "tying" aspects of network discounts than more recent decisions.

None of these problems seems insurmountable. The greater showing of anti-competitive injury which the Sherman Act has required may be largely a thing of the past. The Supreme Court's most recent Sherman Act decisions reflect a strong tendency to assimilate the "stricter" Clayton Act standards into the Sherman Act.<sup>182</sup> In *Northern Pac. Ry. Co. v. United States*,<sup>183</sup> for example, the Government attacked Northern Pacific's "preferential routing" clauses which required all those who bought or leased land from it to ship all commodities produced or manufactured on the land over its lines, provided that its rates and service were equal to those of competing carriers. The action was brought under the Sherman Act, perhaps in part to avoid the "commodities" issue. The Court held that tying agreements

... are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.<sup>184</sup>

Northern Pacific's large landholdings were regarded "beyond any genuine question" as satisfying the "economic power" requirement. Whenever the control of the tying product constitutes "an effectual weapon to pressure buyers into taking the tied item,"<sup>185</sup> the Sherman Act may appropriately be applied. Thus it is difficult to see that any practical difference now remains between Clayton and Sherman Act standards in this area.

Neither does the "rule of reason" concern with appropriate commercial objectives seem likely ultimately to exonerate the network practices. The Court noted in *Northern Pacific* that "such nonanticompetitive purposes as these arrangements have been asserted to possess can be adequately accomplished by other means much less inimical to competition."<sup>186</sup>

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182. *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964) (mergers); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (tying arrangements); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953) (exclusive arrangements).

183. 356 U.S. 1 (1958).

184. *Id.* at 6.

185. *Ibid.*

186. *Id.* at 6, n.5. *United States v. Loew's, Inc.*, 371 U.S. 38, 49-50 (1962) leaves open the possibility that in "rare circumstances" the doctrine may be "inapplicable." To reconcile this statement with *Northern Pacific*, one must assume that some facts will result in an arrangement having "tying" effects not being treated as a tie-in. This may be the

Perhaps the only possibility of avoiding the strictness of the rule is the argument that the arrangements cannot appropriately be characterized as "tying arrangements." In *Times-Picayune* the Court was persuaded that advertising space in the evening paper and the morning paper, under single ownership and control, were not in fact regarded by advertisers as "separate and distinct products" to which the tying analogy could be properly applied.<sup>187</sup> There was no evidence that "advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans." The two readerships were the "selfsame 'product.'"<sup>188</sup>

The same problem was presented, and resolved in the opposite way, in the more recent Supreme Court decision in *United States v. Loew's, Inc.*,<sup>189</sup> where the defendants were held to have violated the Sherman Act in "block-booking" feature motion pictures in selling or licensing them for television exhibition. In answering the complaint that "successful pressure [was] applied to television station customers to accept inferior films along with desirable pictures,"<sup>190</sup> defendants argued that the films were "reasonably interchangeable" in television programming and that therefore block-booking and tying analysis was inappropriate.<sup>191</sup> This approach was unsuccessful. The Court also firmly denied the appropriateness of giving weight to one defendant's "rule of reason" argument — the business justification that it had secured financing only by agreeing to require purchasers to show a minimum number of its guarantor's spot commercials, thus necessitating large block sales. Citing *Northern Pacific*, the Court held that "tying arrangements, once found to exist in a context of sufficient economic power, are illegal 'without elaborate inquiry as to . . . the business excuse for their use.'"<sup>192</sup>

Characterizing the networks' discount practices as tying arrangements does not present the difficulties encountered by the Court in *Times-Picayune*. Even assuming the Court there had sound bases for treating readership of the morning and evening papers as homogeneous, which seems doubtful, network tie-ins are of much more distinct products. Evening and afternoon viewers of television, for example, constitute a substantially different market, as do viewers

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case where there is no other way to protect good will, *International Business Machines Corp. v. United States*, 298 U.S. 131, 140 (1936) (dictum), or to moderate risks in introducing highly technical new products. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567, *rehearing denied*, 365 U.S. 890 (1961). The tying arrangement employed by Jerrold Electronics (which survived the above-mentioned litigation) has subsequently been found illegal. See *Jerrold Electronics Corp. v. Westcoast Broadcasting Co.*, 341 F.2d 653 (9th Cir. 1965).

187. 345 U.S. 594, 613 (1953).

188. *Ibid.*

189. 371 U.S. 38 (1962).

190. *Id.* at 40.

191. Brief for Appellant C & C Super Corp., pp. 38-39, *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

192. 371 U.S. 38, 51-52 (1962).

in New York and in Dubuque. Furthermore, the morning and evening papers effected critical economies by leaving ad materials intact in page layouts from morning to evening editions. Network time tie-ins have no comparable claim to achieving economic efficiency.

Although price discrimination is less often dealt with under the Sherman Act, the Supreme Court has made it clear that contracts resulting in an "unreasonable discrimination" are condemned as Sherman Act restraints. In *United States v. Paramount Pictures, Inc.*,<sup>193</sup> defendant motion picture producers and distributors had "discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits" through contract provisions involving levels of rentals and other privileges. The "competitive advantages of these provisions [to the exhibitors] were so great . . . [as to constitute] an unreasonable discrimination. . . ."<sup>194</sup> The *Paramount* case involved joint activity among competitors, although the court did not couch its discussion in those terms. In *United States v. New York Great A. & P. Tea Co.*,<sup>195</sup> however, the Sherman Act was invoked against price discrimination in a situation in which no cartel features were present. The competitive advantage accruing to A & P from the price discriminations it obtained from its suppliers was held to be "an unlawful restraint in itself" under the Sherman Act, regardless of whether A & P was "in violation of the Robinson-Patman Act,"<sup>196</sup> even though no group action among the discriminators was alleged. It seems clear that price discrimination, like tying arrangements, may be illegal under the Sherman Act, regardless of Clayton Act limitations.

*The Federal Trade Commission Act.* Adopted in 1914 as a sister statute to the original Clayton Act, the Federal Trade Commission Act<sup>197</sup> is at once the least specific and the most all-embracing of the antitrust laws. Although its early interpretation was restrictive,<sup>198</sup> its proscription of "unfair methods of competition" has now been held by the Supreme Court to encompass not only acts condemned by the Sherman and Clayton Acts, but further "to stop in their incipiency acts and practices which, when full blown, would violate those Acts. . . ."<sup>199</sup> "Congress advisedly left the concept [unfair methods of competition] flexible to be defined with particularity by the myriad of cases from the field of business."<sup>200</sup>

193. 334 U.S. 131 (1948).

194. *Id.* at 159-60.

195. 173 F.2d 79 (7th Cir. 1949).

196. *Id.* at 88.

197. 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 41 (1958).

Section 5 provides that:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

198. *E.g.*, *FTC v. Gratz*, 253 U.S. 421 (1920).

199. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953).

See also *FTC v. Cement Institute*, 333 U.S. 683, 708-09 (1948).

200. *FTC v. Motion Picture Advertising Service Co.*, *supra* note 199, at 394.



The effect of Section 5 of the Act on a practice with tying and discriminatory effects — both strongly suspect in their “pure” forms under the Sherman Act — would be, certainly, strongly to encourage judicial support of a Commission finding that such a practice constitutes an “unfair method of competition.” This result should be forthcoming even though the court might believe, under a “rule of reason” test, that the anticompetitive effects were outweighed by justifiable commercial considerations. This is because the statute adds the “incipiency” element to already strict Sherman Act substantive standards.

Another effect of Section 5 is that, in addition to carrying stricter standards, it fills certain loopholes. In this function, it overcomes any limiting effect of a restrictive interpretation of the word “commodities” as it appears in the Robinson-Patman Act and Section 3 of the Clayton Act. The leading case for this proposition is *Grand Union Co. v. FTC*,<sup>201</sup> which also involved Section 2(d) of Robinson-Patman. That section prohibits the making of payments for sales services or facilities unless “proportionally” available to all customers. It applies only to *sellers*. Another section of the Act, 2(f), prohibits a *buyer* from knowingly inducing or receiving a discrimination *in price*. In *Grand Union* the buyer induced and received a non-proportioned payment for use of a facility. To avoid a defense grounded on a narrow interpretation of the term “price” the Commission proceeded against the buyer under Section 5 of the Federal Trade Commission Act, and its cease and desist order was upheld.<sup>202</sup> Subsequent similar orders prohibiting buyers from taking payments which would be illegal for a seller to grant under Sections 2(c) or 2(d) have also been upheld.<sup>203</sup>

The Court of Appeals opinion in *Grand Union* noted that the *transaction* involved was clearly illegal under Robinson-Patman. In effect, all the Commission had done was to use Section 5 to expand technical “jurisdiction” to include the buyer as well as the seller; this was a simple administrative expedient. No inference could arise from the statute that somehow buyers, although not sellers, were intended to be permitted to engage in transactions of this type. This argument, of course, would not be available for a use of Section 5 to extend the Robinson-Patman net beyond the “commodities” limitation; such an application would make illegal transactions now excluded, if only by scant precedent.

But the Court of Appeals in *Grand Union* limited its holding more narrowly than necessary. In *FTC v. Motion Picture Advertising Service Co.*,<sup>204</sup> the Commission had proceeded against respondent, a producer and distributor of advertising motion pictures, who had used “exclusive supply contracts” with

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201. 300 F.2d 92 (2d Cir. 1962).

202. *Ibid.*

203. *FTC v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965); *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Giant Food Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962); *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

204. 344 U.S. 392 (1953).

movie exhibitors, the effect of which had been to foreclose competitors from access to their exhibiting facilities. Section 3 of the Clayton Act, which is the only provision of the antitrust laws which deals explicitly with "exclusives," does not apply to such an arrangement because it is directed only against sellers or lessors. The facts also raised a very similar "commodity" question, because what respondent was buying was advertising time on exhibitors' screens. If the Clayton Act's real and supposed limitations of coverage defined the outer limits of the law, the transaction would have been beyond reach. The argument was made by respondent<sup>205</sup> but not treated by the Court, which held that the arrangement's foreclosing effects brought it "within the prohibitions of the Sherman Act and [it] is therefore an 'unfair method of competition' within the meaning of Section 5(a) of the Federal Trade Commission Act."<sup>206</sup> The Court has made it clear on other occasions that applicability of Section 5 does not turn on the niceties of statutory expression but on whether "purpose and practice . . . runs counter to the public policy declared in the Sherman and Clayton Acts . . . ."<sup>207</sup> For example, Section 3 of the Clayton Act was used by the Court as a source of public policy supporting the FTC's action under Section 5 against the "group boycott" plan which a trade association adopted to combat "style piracy" — this even though the association itself and many of its members were not sellers of any product and those most directly affected by the boycott were not "purchasers," a statutory term.<sup>208</sup>

Two recent Federal Trade Commission decisions confirm the view of that agency that Section 5 is not limited in its reach by possible narrow interpretations of Clayton Act terminology. In *Grand Caillou Packing Co.*,<sup>209</sup> it struck down rental discrimination in leases to canners of patented shrimp deveining machinery. The equipment was leased to Gulf Coast packers at one rate and West Coast competitors at a higher rate. The Commission applied Robinson-Patman policy in invoking Section 5 even though the relevant section of the anti-price-discrimination statute applies only to "purchases" and "purchasers," not to lessees.<sup>210</sup> Dissenting Commissioner Elman noted that "unfair practices in conflict with the policy of the Robinson-Patman Act may be suppressed under Section 5 of the Federal Trade Commission Act in a case where, as here, the Robinson-Patman Act is inapplicable for jurisdictional reasons. . . ."<sup>211</sup> The basis of his dissent was doubt that discrimination was present, at least in the sense of the central concern of the Robinson-Patman Act, favoring large buyers at the expense of their competitors.

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205. Brief for Respondents, pp. 55-60, *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

206. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953).

207. *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 463 (1941).

208. *Id.* at 464.

209. 3 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16927 (FTC 1964).

210. ROWE, *op. cit. supra* note 141, at 51-53, Supp. at 130.

211. *Grand Caillou Packing Co.*, 3 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16927, p. 21992 (FTC 1964).

Even more recently, in *Beatrice Foods Co.*,<sup>212</sup> the Commission held that Section 5 was appropriately applied to acquisitions of non-corporate firms — personal proprietorships and partnerships — although Section 7 of the Clayton Act applies only to acquisition of corporate shares or assets. Its opinion noted:

Had Congress deliberately limited Section 7 to corporations, determining that acquisitions involving persons and partnerships should not be governed by the same standards applicable to corporate acquisitions, we would hesitate to conclude that such acquisitions are to be tested in Section 5 proceedings under Section 7 standards. But no such Congressional intent is discernible. So far as appears, Section 7 was not made applicable to noncorporate acquisitions only because corporate acquisitions were in the forefront of Congressional concern and attention. . . .

It is well established that Section 5 reaches transactions which violate the standards of the Clayton Act though for technical reasons are not subject to that Act, unless such application of Section 5 would be an attempt to "supply what Congress has studiously omitted" [citing *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959)] or to "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act." [citing Report of the Attorney General's Committee to Study the Antitrust Laws, p. 149, n. 78 (1955) and *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962)] Applying Section 5 to noncorporate acquisitions effectuates, rather than circumvents or conflicts with, Congress' policy with respect to the prevention of anticompetitive acquisitions.<sup>213</sup>

The Supreme Court's most recent antitrust decision approves the view of the Commission, in a case in which it had applied Section 5 to business practices whose effect was the same as that of tying arrangements but which did not specifically fall within the terms of Section 3 of the Clayton Act. In *Atlantic Refining Co. v. FTC*,<sup>214</sup> the oil company had agreed to and had "sponsored" the sale of tires, batteries and accessory products of the Goodyear Tire and Rubber Company to its wholesale and retail outlets. It received a percentage commission in return for "promoting" such sales and "assisting" dealers in resale of the goods. The Commission not only enjoined the use of "direct methods of coercion" by Atlantic on its dealers, which phase of the case was not brought to the Court for review, but also prohibited the respondents from entering into any such commission arrangements.<sup>215</sup> The Court noted that the contract is "not a tying arrangement" nor does it "expressly require [purchases of Goodyear products] from its dealers."<sup>216</sup> However, the "central competitive characteristic" was the same — "the utilization of economic power in one market to curtail competition in another."<sup>217</sup> Because the Commission was warranted in finding "that the effect of the plan was *as though*

212. 3 TRADE REG. REP. ¶ 17244 (FTC 1965).

213. *Id.* at ¶ 22335-336.

214. 381 U.S. 357 (1965).

215. 33 U.S.L. WEEK 4507.

216. 33 U.S.L. WEEK 4507, 4510.

217. *Ibid.*

Atlantic had agreed with Goodyear to require its dealers to buy Goodyear products and had done so,"<sup>218</sup> the arrangement, having a "not insubstantial" effect on commerce, was illegal. The Court observed:

As our cases hold, all that is necessary in section 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the Act." But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of the antitrust laws was, we believe, entirely appropriate. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations [citing *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953)]. When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.

Although the Commission relied on such cases here, it expressly rejected a mechanical application of the law of tying arrangements.<sup>219</sup>

The Court also rejected contentions that the Commission should have applied a "rule of reason" analysis to the economics of the marketing arrangement:

But just as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale economic analysis of competitive effect. . . . [I]t is enough that the Commission found that a not insubstantial portion of commerce is affected [citing *United States v. Loew's, Inc.*, 371 U.S. 38, 45 n.4 (1962) and *International Salt Co. v. United States*, 332 U.S. 392 (1947)].<sup>220</sup>

Thus, Section 5 of the Federal Trade Commission Act both subsumes Sherman Act restraints, extending illegality to their merely "incipient" effects, and perfects the basic policy of the Clayton and Robinson-Patman Acts, by giving the Federal Trade Commission power to "hit at every trade practice, then existing or thereafter contrived, which restrain[s] competition. . . ."<sup>221</sup> It seems

218. *Ibid.*

219. *Ibid.* A different view was taken by the Eighth Circuit in deciding that the Commission had not appropriately applied Section 5 to a case involving Brown Shoe Company's "franchise store program." Brown had furnished significant merchandising, insurance, and accounting assistance to retailers who "concentrate" on Brown's lines of shoes, the franchise agreements containing a provision that the retailer shall have "no lines conflicting with Brown division brands . . ." The Court of Appeals reasoned that the plans were neither "opposed to good morals" nor constituted tying or exclusive dealing arrangements that violate the Sherman and Clayton Acts; therefore, Section 5 was inappropriately invoked. See *Brown Shoe Co. v. FTC*, 339 F.2d 45 (8th Cir. 1964). In seeking certiorari to the Supreme Court, the U.S. Solicitor General's petition urges that the Commission is not bound "by traditional concepts of commercial morality or the relatively specific criteria of the Sherman and Clayton Acts." *BNA A & TRADE REG. REP.*, May 11, 1965, p. A-10.

220. 33 U.S.L. WEEK 4507, 4510. See also *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964), applying Section 5 to practices not clearly within the confines of § 2(d) of the Robinson-Patman Act.

221. *FTC v. Cement Institute*, 333 U.S. 683, 693 (1948).

clear that discriminatory network rate practices should not be, and were not intended to be, immunized from its purview because of a narrow interpretation of a subsidiary word in one of Congress' three relevant enactments.

#### B. *The Regulatory Role of the Federal Communications Commission*

The Communications Act of 1934<sup>222</sup> gives the Federal Communications Commission the responsibility and authority, in the "public interest, convenience or necessity," to regulate "radio stations engaged in chain broadcasting."<sup>223</sup> Although the Act does not expressly authorize the Commission to make rules and regulations directly applicable to networks, it has successfully exercised surveillance over a variety of network practices through its control over the issuance, renewal and revocation of individual station licenses, including those of stations owned by the networks.

However, an important feature of the Act's philosophy is "that broadcasters are not common carriers and are not to be dealt with as such,"<sup>224</sup> and "thus the Commission is given no supervisory control of the programs, of business management or of policy."<sup>225</sup> The Communications Act, as viewed by the Supreme Court in *FCC v. Sanders Brothers Radio Station*,<sup>226</sup> enunciates a basic regulatory theme: the public interest requires a fully developed broadcast industry which offers listeners a wide variety of high-quality programs; the Commission is the guardian of that public interest; competition within an ordered broadcast spectrum is to be its regulatory tool. The Court noted:

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.<sup>227</sup>

Thus the assumption is that increasing the number of broadcast signals in a community and the number of available program sources will enable competitive forces to satisfy the program objectives.<sup>228</sup> In part because of technical limitations, the theory has never been fully tried, and the Commission has resorted to a degree of "public utility" type of regulation of station licensees. There is surveillance of stations' programming to ascertain if it is "balanced."<sup>229</sup> Licensees must give all significant groups reasonable access to the

222. 48 Stat. 1064 (1934), 47 U.S.C. § 151 (1958).

223. 48 Stat. 1082 (1934), 47 U.S.C. § 303(i) (1958).

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

225. *Id.* at 475.

226. 309 U.S. 470 (1940).

227. *Id.* at 475.

228. Levin, *Federal Control & Entry in the Broadcast Industry*, 5 J. L. & Econ. 49, 51 (1962).

229. FCC Interim Report on Responsibility for Broadcast Matter A 5-A 12 (1960).

airwaves.<sup>230</sup> Programming "in the public interest" is expected even at the sacrifice of maximum profits.<sup>231</sup>

In 1941 the Commission noted in its exhaustive Report on Chain Broadcasting that:

. . . [T]he fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.<sup>232</sup>

The Commission found eight network practices to be detrimental to the public interest and amenable to its regulation. It announced Regulations addressed to station licensees providing, generally, that no licenses, including renewal applications, would be granted to stations or applicants having specified relationships with networks. The network "abuses" were: (1) provisions in network affiliation agreements which prevented the station from broadcasting the programs of any other network (Regulation 3.101);<sup>233</sup> (2) provisions which bound the network not to sell programs to any other station in the affiliate's area even after rejection of a program by the affiliate (Regulation 3.102);<sup>234</sup> (3) five-year terms of affiliation (Regulation 3.103);<sup>235</sup> (4) "option time" provisions giving the network overly great control over licensee's programming (Regulation 3.104);<sup>236</sup> (5) provisions unduly limiting the freedom of licensees to reject network programs (Regulation 3.105);<sup>237</sup> (6) network ownership of more than one station in the same area or of any station in areas where the available facilities "are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing" (Regulation 3.106);<sup>238</sup> (7) a "network organization" maintaining more than one network (Regulation 3.107);<sup>239</sup> and (8) provisions preventing or hindering a station from fixing or altering its rates for the sale of time for other than the network's programs (Regulation 3.108).<sup>240</sup>

230. *Ibid*; FCC, Public Responsibility of Broadcast Licensees 39-40 (1946); S. 3171, 86th Cong., 2d Sess. and S. REP. No. 1539, 86th Cong., 2d Sess. (1960). See also Editorializing by Broadcast Licensees, 1 P.&F.R.R. 91:201 (FCC 1949).

231. Levin, *op. cit. supra* note 228, at 51, 58 n.21.

232. FCC, REPORT ON CHAIN BROADCASTING 4 (1941).

233. 47 C.F.R. § 73.131 (1965).

234. 47 C.F.R. § 73.132 (1965).

235. 47 C.F.R. § 73.133 (1965).

236. 47 C.F.R. § 73.134 (1965).

237. 47 C.F.R. § 73.135 (1965).

238. 47 C.F.R. § 73.136 (1965).

239. 47 C.F.R. § 73.137 (1965).

240. 47 C.F.R. § 73.138 (1965).

In promulgating the Regulations the Commission observed that:

The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. . . .<sup>241</sup>

A consideration cited by the Commission as supporting several of the Regulations was that an effect of the challenged practice was "to hinder the growth of new networks" or to "deprive the public of the improved service it might otherwise derive from competition in the network field." The Commission also noted that:

. . . although not charged with the duty of enforcing [the Sherman Act, the Commission] should administer its regulatory powers . . . in the light of the purposes which the Sherman Act was designed to achieve.<sup>242</sup>

In upholding the Commission's authority to exercise the power asserted by the Chain Broadcasting Regulations, the Supreme Court, in its opinion in *National Broadcasting Co. v. United States*,<sup>243</sup> agreed that:

. . . [T]he Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But . . . "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" [Citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940)]. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting."<sup>244</sup>

Section 313 of the Communications Act authorizes the Commission to withhold licenses from persons convicted of having violated the antitrust laws.<sup>245</sup> To the networks' contention that "this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade," the Court replied that Congress could "hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce."<sup>246</sup> Nor had the Commission acted *ultra vires* in explicitly taking antitrust objectives into account in applying statutory standards.

In considering whether the *NBC* case provides specific precedent for Commission action with respect to network volume discount practices it must be

241. FCC, REPORT ON CHAIN BROADCASTING 82 (1941).

242. *Id.* at 46.

243. 319 U.S. 190 (1943).

244. *Id.* at 218-19.

245. 48 Stat. 1087 (1934), 47 U.S.C. § 313 (1958).

246. 319 U.S. 190, 222-23 (1943).

noted, however, that all but two of the Regulations applied to and prohibited specific restrictions in affiliation contracts. The two exceptions were Regulation 3.106,<sup>247</sup> which simply announced an ownership restriction which would be followed in granting station licenses, and Regulation 3.107,<sup>248</sup> prohibiting affiliation with a network organization maintaining more than one network, which had been suspended by the Commission and was not considered by the Court.<sup>249</sup> Thus none of the Regulations considered by the Court were directed against network practices not directly reflected in the contractual relationship between networks and licensees.

Network discount structures have a direct impact on network affiliate negotiations and agreements. Although network discounts are subtracted from the network's share of time sales proceeds and do not directly affect station compensation, an effect of the discounts is to encourage the purchase of broadcast time on stations in large markets which have high network hourly rates. Thus they provide the networks with bargaining power in seeking to attract affiliates in large markets with too few stations to provide an affiliate for each network. They also favor large stations over small stations.

Recent Commission action with respect to different problems in network-affiliate relationships demonstrate its continuing concern with anticompetitive effects of the kinds inherent in volume discount rate practices. These actions stem from the Commission's voluminous Report on Network Broadcasting, issued in 1957.<sup>250</sup> One of the recommendations of the Report was that the networks be prohibited from representing stations other than their own in national spot sales.<sup>251</sup> The study found "the national spot field . . . is in direct competition with network television for the business of national advertisers" and that there was evidence of cooperation between network national spot sales units and networks "to equalize national spot and network rates [by] restraining competition between [them]."<sup>252</sup> The first direct result of the Report was an amendment to Section 3.658 of the Chain Broadcasting Regulations<sup>253</sup> to prohibit arrangements under which networks represented their affiliates in the sale of non-network time. The Commission concluded that such representations, first, gave the networks power to restrain competition for positions as national spot representatives, since they could influence the decisions of their affiliates and, second, tended to restrict competition between network and non-network time sales, since the networks would tend to manipulate national spot sales and rates to advance their conflicting interests as networks. These considera-

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247. *Supra* note 238.

248. *Supra* note 239.

249. The Commission, however, in 1944 reinstated Regulation 3.107, which is a more indirect control of a network business policy, and it has been in effect without challenge since. See 47 C.F.R. § 73.137 (1965).

250. NETWORK BROADCASTING, *supra* note 15.

251. *Id.* at 648-49.

252. *Id.* at 649.

253. 47 C.F.R. § 73.658 (1965).



tions also impinged upon the independence of station licensees.<sup>254</sup> This proceeding is directly relevant to the possibility of FCC action against volume discount rate structures because, first, it recognizes that encouraging competition between network time and station national spot sales is a reason for Commission intervention and, second, it sanctions direct intervention against network "business policies" on that ground alone. A volume discount structure so designed that advertisers interested in prime network time find it disadvantageous to order day time or time in a fringe period from the stations on their national spot representations seems to have similar anticompetitive effects.

The decision of the Court of Appeals for the District of Columbia Circuit in *Metropolitan Television Co. v. FCC*,<sup>255</sup> upholding the Commission's power to regulate the networks' spot time sales activities, indicates that the Commission does not interpret its authority in this area too broadly. The Court of Appeals rejected petitioners' contention that the amendment was invalid because it was based on a merely "potential" restraint rather than a violation of the antitrust laws.<sup>256</sup> Moreover, the decision upheld an "indirect" use of station licensing standards to force networks to carry out an "internal" change in a situation which was not in any way reflected in its affiliation agreements.<sup>257</sup> The change thus brought about was one of the most drastic known to the law of remedies, "divestiture" of otherwise perfectly usual contract and property rights. The basis for the Commission action was not "unreasonable," and therefore the order was upheld.

After receiving an opinion from the Department of Justice<sup>258</sup> that "option time," as previously limited by its Regulation 3.104, was in violation of the Sherman Act either as an "exclusive dealing" or a "tying" arrangement, the Commission reversed an earlier ruling and concluded that it was not essential to network operations.<sup>259</sup> It found option time provisions to have anticompetitive effects on four levels of the television industry: (1) Independent producers of programs were foreclosed from marketing their products to affiliated stations for use during option time periods. (2) Non-network advertisers unable to afford or use the full network were foreclosed from prime evening time on network affiliates. (3) Independent stations suffered from a lack of quality film from independent producers because there were not enough independent stations to support their productions. (4) National spot sales representatives could not offer station time on network affiliates to national advertisers wanting a selective market campaign.

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254. Network Representation of Stations in National Spot Sales, 27 FCC 697 (1959), reconsideration denied, 28 FCC 447 (1960), *aff'd sub nom.* Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

255. 289 F.2d 874 (D.C. Cir. 1961).

256. *Id.* at 876.

257. *Ibid.*

258. See reference to the opinion in Option Time, 34 FCC 1103, 1107 (1963).

259. Option Time, 34 FCC 1103, 1132 (1963).

The Commission noted:

One of the recent developments . . . is the drastic decline in the output of new, first-run syndicated film programming. In 1956, 28 or 29 new first-run film series were offered; in 1961-62 there were no more than 7 or 8. Ziv-UA and other opponents ascribe this to network policies and practices — not only the restriction on access to desirable time arising from the option time practice, but also the effect of increased network programming during nonoption hours . . . and, in particular, the trend toward hour-long network shows in evening hours.<sup>260</sup>

The Commission also noted the effect on competition between advertisers:

At the same time, the non-network advertiser — who in many cases (such as regional baking companies, etc.) may be able to afford the same prime time and quality programming with respect to the markets he is interested in, as his national, network-advertising competitor — is denied access to prime time and is thus at a competitive disadvantage. There are of course other forms of advertising available to him, such as spot announcements on individual stations, or even (especially with the increasing number of "participating" network shows) network time. But the number of "spots" available in prime time on individual stations is of course limited, and it may not be economically feasible or desirable for him to use network "spot" time, if he is interested in only relatively few markets. Thus, denied equal access to individual station time, he is likely to be at a disadvantage, at least in some cases, as compared to his national competitor.<sup>261</sup>

A footnote to the opinion points out that there are only 20 VHF stations in 14 major markets which are not affiliated. If the independents are too small in number to support their own programming they must resort to inferior network reruns.<sup>262</sup>

The Commission noted that if an affiliate refuses to clear a particular program the network can seek another station in the same market to act as an outlet; or the advertiser may accept the line-up of stations without the market, or another advertiser may be found. The key markets, the Commission notes, are always open to the networks; each network owns stations which guarantee access to 25 per cent of all television homes.<sup>263</sup> Finally, the Commission noted that not only option time, but any device having a like restraining effect, is contrary to the public interest and should be prohibited.<sup>264</sup>

The rationale of this decision is particularly relevant to the network volume discount problem because it recognizes that Commission regulation may be based not only on protection of the interests of station licensees, but also those of the independent program producers, national spot representatives and non-network advertisers necessary to the existence of effective competition with network television. In particular, the Commission's willingness to look outside the industry itself to consider effects on its "clienteles," the advertisers, estab-

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260. *Id.* at 1114.

261. *Id.* at 1116.

262. *Ibid.*

263. *Id.* at 1125.

264. *Id.* at 1132.

lished an important precedent directly related to the situation under examination here.<sup>265</sup>

CBS sought to avoid the effect of the option time prohibition by a provision in its affiliation agreements basing the amount of compensation paid to a station for each program on the number of network programs the station cleared during a specified period. Stations clearing substantially all network programs were to receive 60 per cent of the network rate while those clearing a small number of hours received as little as 10 per cent of the rate. In the first proceeding by the Commission against the "sliding scale" compensation plan the networks argued that the Commission was in effect attempting to fix their rates; they read the *NBC* case as prohibiting "rate-making."<sup>266</sup> The Commission said:

We believe that the CBS contention lacks substantial merit, since enforcement of a rule which has been sustained by the courts by an opinion with respect to the compliance of a particular agreement with that rule, is not the same thing as fixing or approving rates. It might just as well be argued that enforcement of the Sherman Act is a regulation of prices, a contention which has never been accepted by the courts.<sup>267</sup>

The Commission also noted the "tie-in" aspect of the plans:

Because of the 'tie-in' features of the plan, it also appears that the plan will work against stations developing and broadcasting local live programming as an alternative to network offerings.<sup>268</sup>

A very recent action also confirms the Commission's view that network practices having anticompetitive effects at several levels within and outside the industry fall within its jurisdiction. In addition, the action involves a network practice not directly related to the contract between a network and its affiliates. The action involves the Commission's request for comment on a proposed regulation to limit network control of programming.<sup>269</sup> After extensive hearings the Office of Network Study concluded that the networks were coming to dominate program production by acquiring an interest in most of the independently produced television programs.<sup>270</sup> It observed that the networks

through these activities, place themselves in a situation where very compelling economic motives arise to choose for network exhibition and

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265. The Commission's willingness to look at competitive problems outside the broadcast industry is underlined by its inquiry into the relationships between broadcast licensees and newswire services. On the complaint of licensees, the Commission has begun a study of the contractual terms demanded by newswire services, particularly the requirement that the contract run for a five year term. One of the stated objectives of the study is to "determine the effect of long term contracts with broadcasters on competition between newswire services and the development of other news sources, and the nature of the resulting detriment to the public interest embodied in the Communications Act." See *Contracts of Broadcast Licensees with Newswire Services*, 1 P.&F.R.R. 53:xi (FCC 1964).

266. *CBS Network Compensation Plan*, 24 P.&F.R.R. 513, 514 (FCC 1962).

267. *Ibid.*

268. *Id.* at 519.

269. *Supra* note 86.

270. H.R. REP. No. 281, 88th Cong., 1st Sess. 58 (1963).

thus to popularize those film series in which they have been able to acquire a right to share in continuing values from syndication and other values which may be created or enhanced through network exhibition.<sup>271</sup>

When the report was sent to the Commission on November 28, 1962, the letter of submittal said:

This report . . . concludes that the policies and practices of the networks in program procurement unduly restrict and restrain the competitive development of the market for independently produced network television programs.<sup>272</sup>

Should the proposed regulation be adopted, the Commission will again have intervened in an internal network business policy not directly related to the terms of affiliation agreements.<sup>273</sup>

Most of the problems which were discussed in the Report on Network Broadcasting are analytically related in some degree to network volume discounts. Yet the report did not consider the effects of network discounts and no recommendations about them were forthcoming. Instead the Commission has moved step by step to eliminate practices thought to be the cause of each problem the study presented. It outlawed option time, took the networks out of the spot sales business, prohibited sliding scale compensation, and supported legislation designed to encourage the use of UHF. It is now moving towards reducing network control of programming.

Despite the Commission's action the problems of network broadcasting in 1965 are largely the same as they were in 1955, and to some extent the situation has deteriorated. Affiliates still clear most network programs, UHF television is still largely undeveloped, independent program producers are still suffering, and independent "advertiser created networks" have not appeared to any significant degree.<sup>274</sup> In addition, we are becoming aware that the in-

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271. *Id.* at 103.

272. *Id.* at 11.

273. Another pending effort to regulate network policy indirectly grew out of the quiz program scandal. Proposed rules requiring an announcement of the nature and extent of coaching to which participants have been subjected would operate primarily against the networks and the program producers. See *Quiz Programs — Proposed Rules*, 1 P.&F.R.R. 53:ix (FCC 1960). For another example of FCC indirect regulation of non-licensees, see Proposed Amendments, 1 P.&F.R.R. 52:lxxi (FCC 1964).

274. The Dumont Television Network ceased operation in 1954. Since that time attempts to enter the network business have been limited to special network arrangements such as the Sports Network, and film syndication "networks" such as National Telefilm Associates. The failure of a new network to enter is in spite of the presence of numerous "multiple owners" who might be in an excellent position to attempt entry. Such large multiple owners as Storer Broadcasting and Westinghouse own five television stations in major markets which might serve as a nucleus for a new network. See generally, NETWORK BROADCASTING 170-207. Recently, however, there have been discussions exploring the viability of creating a fourth television network. It is not at all clear whether the promoters have considered the obstacles to the success of such a venture posed by the current network rate policies. See Doan, *A Fourth TV Network: — Maybe*, New York Herald Tribune, May 12, 1965, p. 23, col. 3.

dustry's rate practices may be having an unhealthy effect on other parts of the economy, particularly through mergers.

The foregoing Commission decisions suggest that, although it has steered very clear of directly or indirectly setting or even influencing the level of network advertising *rates*, as such, it has clear authority and precedent for action against a rate *structure* which has important anticompetitive effects. Were the Commission to investigate the problem of volume discounts and find as a matter of fact that the ills of network television are in part a result of those discounts, an appropriate regulation controlling them would be sustained by the courts. Commission action policing the network rate structure against discrimination in an effort to improve competition in the broadcast industry would be a move away from "common carrier" type of regulation and toward the original policy notions of the Communications Act discussed by the Court in *Sanders*. As long as the discriminatory network rate structure continues, it will be difficult to argue that competition has been given a fair chance to operate as the basic regulatory instrument of the broadcast industry.

The Commission has previously taken into account only in a very limited degree the effect of network practices on the health of competition in the broader markets in which advertisers compete. However, the Act's objective of controlling the use of the radio spectrum in the public interest and the courts' broad interpretation of Commission authority to consider anticompetitive effects in this regard, suggest that this basis for remedial action, too, is appropriate.

#### CONCLUSION

What would the effect be on network television if its present discount structure were outlawed as anticompetitive by action of the Federal Communications Commission or one of the antitrust enforcement agencies? First, it seems almost certain that any such action would be sustained in the courts. Indeed, those agencies may be open to some criticism for permitting such important and obviously questionable practices to remain so long unchallenged. But perhaps the full scope of the anticompetitive effects has only recently become apparent. Second, an answer to the economic question of what would happen to the structure of the television industry is more difficult. In part, the answer would depend on the scope and substance of the corrective measures which result from the ultimate Commission order or court decree. The forces of competition tend to order new arrangements largely through businessmen's trial and error. However, there would be a strong tendency for prime evening time rates to move substantially higher, and for day and summer time rates to move lower. Advertisers would tend to move parts of their activity more freely from network to network, and to and from other media, "diversifying" to a greater extent. Smaller firms which do not now find it feasible to use network television might be encouraged to use the less expensive day and summer time hours. Evening network television would probably lose some marginal users, at least until new station and network entry restored lower prime time rates.

There would be a tendency for networks and affiliates to downgrade their activity in those hours during which viewers are scarce, perhaps discontinuing some of it entirely, if FCC regulations and other factors permit. On the other hand, the higher prices for evening time would — if the obligation to operate when there are few viewers is sufficiently flexible — result in a better profit picture, which would create a substantial tendency for new channels to be developed, especially in UHF and in marginal areas. There would then be an economic stimulus for new networks or network-type arrangements, and new independent program producers, to come into existence to serve the new stations. These developments would provide existing affiliates with more alternatives in programming independently or through multiple affiliations. The new service facilities would also find entry less difficult because of the greater freedom of advertisers to experiment with their wares.

The networks may argue, as they have done in opposing past FCC actions, that the anticipated economic results are inconsistent with the continued existence of the present system of network television. This kind of assertion is difficult to disprove, but we may note that insofar as business organizations perform valued social functions, they tend to be highly adaptive to a changing legal milieu. The Commission's previous "restructuring" actions have not noticeably diminished the networks' ability to survive as profitable enterprises. Further, virtually all U.S. manufacturers and producers of goods manage to live with law which requires nondiscriminatory pricing in most situations. Nonetheless, perhaps it is the case that television networks are less viable than other businesses, and we should listen to the facts they care to adduce. Such information would clearly be relevant to the Federal Communications Commission in a rule-making proceeding. In an antitrust action, the Federal Trade Commission or court might find such information useful in framing a remedy, although economic "justifications" do not provide a substantive defense where anticompetitive effects are present. The expert knowledge of the Federal Communications Commission in these matters suggests that it might be the appropriate agency to evaluate such arguments.

In this connection, a comprehensive study of the socially useful economic functions performed by television networks would be helpful. This is a subject about which there is little public understanding and less than one would expect even in the specialized literature. One of the networks' important social contributions is the additional independent news services which they maintain and the system of station interconnection which they support. This system makes possible rapid dissemination of news and public affairs information as well as "live" coverage of important political, social and sporting events. Networks are also uniquely able to present "live" material of other types, such as entertainment programming, but very little of this now takes place; most entertainment programs are on film or videotape. It may be argued that networks also perform socially useful functions (1) in acting for many stations as a sales agent, which to some extent may simplify advertising agency work

in dealing with numerous national representatives (2) as a risk-taking entrepreneur in bringing together advertiser, program ideas and station time, and (3) in providing programming better than a competitive market would make available to marginal stations and in marginal times.

But none of these arguments can be given decisive weight without careful evaluation of the social costs involved in the system and the possibility that alternative systems would function more efficiently. Nor is it at all clear, for example, that network discretion should be substituted for decisions of the market with respect to allocation of income among stations and, through channeling advertising dollars, programming resources among broadcast time periods. Most important, if the present system of network broadcasting *necessarily* operates to injure competition in the markets in which advertisers operate, by discriminating in favor of size and encouraging mergers, perhaps there are alternative arrangements which do not.<sup>275</sup> These are questions as to which the most careful and imaginative industry and economic studies should be directed at once by the Federal Communications Commission. The most desirable form of relief in a proceeding against the television networks might depend also on questions regarding the legality of similar discriminatory rate structures in other advertising media. This would seem to argue in favor of parallel, co-ordinated study and action by the Federal Trade Commission.

In any event, relief for the economy is overdue, and its delay cannot fairly be attributed to any inadequacies which may exist in the applicable laws.

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275. It is the network role as "sales agent" for station time — not its role as supplier of programming — which is primarily involved in the anti-competitive effects we have discussed. It is at least theoretically possible that these roles could be separated. For example, Associated Press and United Press International supply news and features to newspapers without acting as a sales agent for their advertising space. Performing a comparable function, networks, instead of competing with each other to win advertisers, would compete for the custom of individual stations as members, subscribers or purchasers of program material. This would give stations more freedom with respect to programming, with which responsibility they are charged by law. It would also make the "ratings race" a localized affair, based on the nature and tastes of a particular community, arguably having less of a "lowest common denominator" effect.

We are not arguing in favor of transforming networks into station service organizations, but suggesting that the present system is not the only one which could perform the social functions that are desired, nor even necessarily the best, even apart from the legal problems it entails.