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An Alternative Proposal to the FCC's Proposed Amendment: Broadcast Media Concentration Rules

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AN ALTERNATIVE PROPOSAL TO THE FCC's PROPOSED AMENDMENT: BROADCAST MEDIA CONCENTRATION RULES

I. INTRODUCTION

The Federal Communications Commission (hereafter the FCC or the Commission) is authorized by Congress to regulate broadcasting "in the public interest, convenience or necessity."[1] This vague phrase has historically been interpreted by the FCC and the courts as mandating regulation that will insure that a diversity of viewpoints flourish on the airwaves, as well as establishing the best possible service to each geographic location.[2] The inherent scarcity of available broadcast channels makes total diversity of viewpoints impossible.[3] Those licensed to broadcast are placed in an advantageous position over others unable to gain access to the airwaves. To achieve their definition of diversity, the FCC has enacted numerous regulations aimed at overcoming this inherent imbalance.[4] One such set of regulations

1. Communications Act of 1934, 47 U.S.C. § 303 *et. seq.* (1970).

2. *See generally*, CBS Inc. v. F.C.C., 453 U.S. 367, (1981); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476, 1476-1477 (1964), National Broadcasting Co. v. U.S., 319 U.S. 190, (1943), F.C.C. Report on Chain Broadcasting (1941).

3. Scarcity refers to the finite number of channels allocated on each broadcast band in each geographic area. It is one principal reason that the broadcast media does not receive the same absolute first amendment protection as the print media. Because of this inherent scarcity, government licensing is necessary in order to maintain order on the airwaves. Without scarcity, there would be no limit on channel availability, and therefore no cause for regulation.

4. One regulatory focus is content regulation such as the Fairness Doctrine and the Equal Time Requirements. 47 U.S.C. § 315 (1976). The Fairness Doctrine mandates balanced coverage by broadcasters of important public issues through two requirements. The first requires that broadcasters must devote a reasonable amount of broadcast time to discussing controversial issues of public importance. The second requires balanced coverage of these issues. If a broadcaster presents one viewpoint on an issue, it must afford reasonable opportunities for the presentation of opposing viewpoints. The Equal Time Requirements grant political candidates for the same public office equal opportunities for broadcast time. Both rules force the licensee to permit others access to its airspace under certain circumstances.

is the multiple ownership rules.[5]

Promulgated in 1953, the multiple ownership rules prohibit any party from being a stockholder, officer or director or otherwise holding any interest in more than seven stations within the same broadcast service[6] (i.e., seven FM, seven AM, and seven on-air television stations). The purpose of the multiple ownership rules (or the Seven Station Rule)[7] is primarily twofold. First, the FCC wanted to limit economic concentration in the industry via station ownership.[8] These regulations are founded on antitrust law principles and, as such, are basically economic in scope.[9] The economic goal is to prevent monopolies from developing which would prevent competition in the industry. The second purpose of the rule is to "maximize diversification of program and service viewpoints . . ." by diversifying ownership.[10] Diversity is a first amendment concept. The first amendment protects the rights of both the speaker and the listener in receiving the widest possible variety of ideas.[11] In broadcasting, these two interests often conflict. The Supreme Court has held that when the interest of the public outweighs the interests of the

5. In the Matter of the Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations. Report and Order. 18 F.C.C. 288, 294-295 (1953) [Cited hereafter as the Multiple Ownership Rules].

6. *Id.* at 295-297.

7. This Rule is also known as the 7/7/7 Rule or the 7/7/7/5 Rule. The number five in the latter refers to a 1954 amendment to the Seven Station Rule. This amendment kept the total television station ownership number at seven, but restricted total VHF station ownership to five. In the Matter of the Amendment of Section 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 F.C.C. 2797 (1954).

8. *Supra*, note 5, at 291-92.

9. Authority for enforcement of antitrust matters generally falls to the FTC and/or the Justice Department. The Communications Act is silent with respect to regulating station ownership concentration. Within the strict definition of antitrust law, the FCC has no authority. United States v. Radio Corporation of America, 358 U.S. 334, 343 (1959). However, the courts have held that the FCC has authority to regulate media concentration through ownership limitations. *See generally*, National Broadcasting Co., 319 U.S. 190 and United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). While partially based on antitrust principles, the 7/7/7 Rule is not antitrust law, per se.

10. *See supra*, note 5, at 291-292.

11. Red Lion Broadcasting 453 U.S. at 390; New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Diversity of available sources has been viewed as crucial to self-government. In the decision later upheld by the U.S. Supreme Court in *Associated Press* Judge Learned Hand wrote "[r]ight conclusions are more likely to be gathered out of a multitude of tongues. . . ." 52 F.Supp. 362, 372 (S.D.N.Y. 1943), Aff'd 326 U.S. 1 (1945).

broadcasters, the rights of the viewers and listeners are paramount over the rights of the broadcasters.[12] This purpose of the rule is geared toward protecting the public's right to receive a diversity of viewpoints. Thus, an odd mix of antitrust and first amendment principles is intertwined within the multiple ownership rules.

In September, 1983, the FCC issued for administrative comment a Notice of Proposed Rule Making (hereafter Notice) aimed at amending the Seven Station Rule.[13] The three major reasons cited by the Commission for proposing the amendment were the arbitrariness of the Seven Station Rule,[14] the changed circumstances in the broadcasting industry since 1953,[15] and the harm to diversity caused by the Rule despite its intended purpose.[16] The Notice did not cite a specific alternative to the Rule, but indicated a possible interim amendment in the numerical ceiling to fourteen on-air television stations and thirty-six radio

12. Red Lion Broadcasting, 453 U.S. at 390.

In *Red Lion*, the Court unequivocally held that the rights of viewers and listeners are paramount over the rights of broadcasters. The Court, in upholding the Fairness Doctrine (*see*, *supra*, note 4), stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." 453 U.S. at 390.

Four years later, the Court limited this domination of viewer/listener rights over broadcasters by acknowledging that broadcasters have significant journalistic discretion in deciding how to fulfill their public interest obligations. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 111 (1973). While this opinion did not overturn *Red Lion*, (and in fact established *Red Lion* as the major case in this field of law), the Court appeared to be pushing broadcasters and listeners/viewers into a more equal balance when determining continuing first amendment rights.

The Court further muddled this area of law in 1981 by ruling that the Equal Time Requirements (*see*, *supra*, note 4), entitle legally qualified candidates for federal elective office to purchase reasonable amounts of time from broadcast stations on behalf of their candidacies. Columbia Broadcasting, 412 U.S. at 394. The Court fell back on its reasoning from *Red Lion*, restating the *Red Lion* Court's preference of viewer/listener rights over broadcaster rights. CBS, Inc. v. F.C.C., 453 U.S. at 394. For an overview of these three decisions, *see* Polsby, *Candidates' Access to the Air: The Uncertain Future of Broadcaster Discretion*, SUP. CT. REV. 223 (1981).

13. In the Matter of Amendment of Sections 73.34, 73,240, and 73.636 of the Commissions's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations. General Docket No. 83-1009. Notice of Proposed Rule Making, Adopted September 22, 1983; Released: October 20, 1983 49 Fed. Reg. 49438 (Hereafter cited as NOTICE).

14. NOTICE at 48 Fed. Reg. 49442.

15. *Id.* at 49442-49445.

16. *Id.* at 49442-49443, 49445-49446.

stations (FM and AM combined).[17] The Notice also indicated that the ultimate goal was the complete elimination of all numerical limitations on station ownership.[18] According to the Notice, if the Seven Station Rule is eliminated, media concentration would be monitored by both the Federal Trade Commission (FTC) and the Department of Justice (DOJ).[19] These agencies would use traditional antitrust law in monitoring undue concentration in the industry.[20]

This Comment will review the reasoning behind the Notice, and criticize its potential impact if adopted. The Comment will then consider other factors that should be considered if the Seven Station Rule is to be amended and suggest alternative proposals to those indicated in the Notice.

II. Proposed Amendment To The Seven Station Rule

Because there is no specific alternative to the Seven Station Rule offered for comparison by the Commission, the Notice is best analyzed by reviewing its reasoning.[21]

The first argument is based upon changed circumstances in the broadcast industry since 1953.[22] This argument focuses on the increased number of on-air broadcast stations[23] and the recent advancement of broadcast alternatives to television such as cable, direct broadcast satellite (DBS), multipoint distribution service (MDS) and video cassette recorders (VCRs), among others.[24]

> We believe that the growth in the number of over-the-air stations since 1953 constitutes a fundamental change in the nature of the media market-place that of itself calls for a re-examination of our approach to national ownership limitations. Such action is consistent with the Commission's view that its rules and policies should be drawn

17. *Id.* at 49450-49452.
18. *Id.* at 49457.
19. *Id.* at 49446-49447.
20. *Id.*
21. *See supra* notes 17 and 18, and accompanying text.
22. Notice at 48 Fed. Reg. 49442-49445.
23. *Id.*, at 48 Fed. Reg. 49443.
24. *Id.* at 48 Fed. Reg. 49443-49444.

with an eye to the current market environment . . ."[25]

The FCC contrasts the "current market environment" to the 1953 market with the following evidence: The number of on-air television stations operating in 1953 was 199. That number has increased by 466 percent to 1,127 in 1983.[26] The number of FM stations has climbed 561 percent from 686 to 4,532.[27] The number of AM stations has increased by ninety-two percent from 2,458 to 4,720.[28] In addition, cable television has grown from an estimated 150 systems serving 30,000 subscribers in 1953 to approximately 5,000 systems with twenty-two to thirty-two million subscribers in mid-1983.[29] Cable now reaches[30] sixty percent of all television households, with thirty-five to thirty-nine percent subscribing in areas reached.[31] The subscription rate is predicted to rise to forty-five to fifty percent by 1985, and to sixty percent by 1993, according to the Notice.[32]

Other alternatives to on-air broadcasting which define the current market environment, according to the Notice, are the ninety-nine MDS systems, serving approximately 565,000 subscribers.[33] These MDS numbers are expected to expand significantly "as a result of recent Commission action reallocating certain spectrum for multichannel MDS service."[34] Nineteen STV

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25. *Id.* at 48 Fed. Reg. 49443.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. "Reach" is the equivalent of the total available market in a communications industry. Regarding cable, reach equals the total number of households having an opportunity to subscribe to at least one cable system.

31. NOTICE, at 49443.

32. *Id.*

33. *Id.*, at Fed. Reg. 49443-49444. "MDS" stands for Multipoint Distribution Service. An MDS system is a fixed station transmitting omnidirectionally to numerous fixed receivers with directive antennae. The information transmitted may consist of private television, high speed computer data, or other communications capable of radio transmission. The range of the transmission depends upon the power of the transmitter, the size and characteristics of the receiving antenna, and the existence of a line of sight path between the transmitter and receiver. The transmission is one-way, although the receiver may return communication through the simultaneous use of telephone lines. *See infra*, note 107.

34. 48 Fed. Reg. 49443-49444.

stations serve 985,560 subscribers.[35] Approximately 150,000 subscribers received service from satellite master antenna television (SMATV), with an expected growth to 500,000 subscribers by 1984.[36] Low power television and DBS are "expected to provide most Americans with additional viewing options in the near future."[37] Another suggested option is the video cassette recorders and video disc players.[38] Armed with this data, the Notice concludes that "the potential for such national ownership concentration as would tend to monopolize or threaten diversity is far less a matter of concern today than might have been the case in 1953 . . ."[39]

The second argument offered is the arbitrary nature of the numerical ceiling.[40] This arbitrariness is evidenced by the failure of the Seven Station Rule to account for factors such as the signal coverage of the individual station, the size of the population its programming reaches, or broadcasting frequency.[41] For example, an owner of a VHF station in New York City is on equal par with an UHF owner in Butte, Montana when tabulating station ownership under the Seven Station Rule.[42]

Another reason given as support for amending the rule is that "it may serve both to enhance the power of the three major (television) networks and to preclude the initiation of new over-the-air networks and programming."[43] Although further explanation is omitted from this section of the Notice, later discussion indicates that the inability of some group owners to own a sufficient number of stations to generate a base for quality program production prevents additional major national networks from forming.[44] Thus, the Seven Station Rule may actually limit diversification of program and service viewpoints.[45] The Notice suggests that a "relaxation" of the rule may allow group owners,

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*, *see infra*, note 106, and accompanying text.
39. NOTICE, at 48 Fed. Reg. 49442.
40. *Id.*, at 49442.
41. *Id.*, at 49442-49443.
42. *Id.*, at 52.
43. *Id.*
44. *Id.*, at 48 Fed. Reg. 49446.
45. *Id.*

other than the three major networks, to generate a sufficient amount of quality programming. This, in turn, may generate a sufficient base for competition on the same level as the three major networks.[46]

> By maintaining regulations which tend to interfere with development of additional programming, the Commission may inadvertently be strengthening the significant role of the three major networks in national program distribution. The Commission has recognized the historic role of owned-and-operated stations in development of the network system. It appears somewhat anomalous to prevent potential competitors from realizing the similar advantages which might be obtained through establishment of larger groups, so long as diversity is not harmed . . . In this regard, we note that an integrated firm can realize efficiencies that are not obtainable when programmers merely contract with stations for distribution."[47]

The Notice further notes that the implementation of the Seven Station Rule was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue economic concentration contrary to the public interest."[48] It states that ensuring diversity of ownership in sources of information has traditionally been viewed as serving first amendment goals.[49] However, such diversification "must give way, . . . if . . . 'public interest harms outweigh the potential gains that would follow' if the diversification-maximizing action were taken."[50] When such diversification hinders the best conceivable service to the American public, it must give way to different approaches. The Notice concludes this argument by stating, "proper review of national ownership policy involves separate consideration of . . . First Amendment and economic policy issues . . ."[51]

46. *Id.*
47. *Id.*
48. *Id.*, citing Multiple Ownership Rules, *supra*, note 5, at 292-293.
49. NOTICE, at 48 Fed. Reg. 49446-49447.
50. Id., at 48 Fed. Reg. at 49446 quoting FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 804-805 (1978).
51. 48 Fed. Reg. at 49446.

Economic policy issues are viewed in the Notice as derived from antitrust policy.[52] However, "[t]he Commission has historically considered such matters under the public interest standard without regard to whether an actual antitrust violation is involved."[53] If the deterrence of economic concentration is one purpose of the rule, then this concern is better left to antitrust law.[54] Since the FTC and the DOJ regularly perform such activities, further review by the FCC on national ownership policy would be duplicative.[55] The Notice suggests deferring national ownership-related antitrust matters to the DOJ and FTC on levels ranging from complete control being transferred to partial control being transferred, with the FCC and other agencies establishing a "formal liaison relationship."[56] Other antitrust problems, exclusive of ownership, could be delegated to the FTC and DOJ with an added option in civil matters of injunctive relief via private civil suit under the Clayton Act.[57]

As an alternative to deferring to other federal agencies, the Notice indicates that the Commission "may choose to pursue development of a methodology to assess economic concentration in the market(s) found relevant to national broadcast ownership."[58] The Commission "seeks a method of assessing concentration that could facilitate uniform treatment of ownership issues in all FCC-regulated media services."[59] An index would be developed and utilized to determine if any individual transactions might lead to unacceptable levels of media concentration.[60]

The Notice next addresses the first amendment ramifica-

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*, at 48 Fed. Reg. 49447.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* The Notice suggests using a DOJ index to compare concentration in broadcasting to concentration in other industries. It concludes that the broadcasting market is relatively unconcentrated in comparison to other industries such as breakfast cereal foods, refrigerators, and farm machinery. NOTICE, at 49446-47.
Another problem with using traditional market concentration analysis is defining the nature of the relevant market. NOTICE, at 49439. The Notice suggests the relevant market to be the national broadcast market (NOTICE, at 49445) with the merging of on-air television, radio, and other broadcast technologies as an inclusive within this market. NOTICE, at 48 Fed. Reg. at 49448.

tions of the national ownership policy. It cites the threshold issue regarding the first amendment and broadcasting as the "furthering of political discourse so that debate on public issues may be 'uninhibited, robust, and wide-open.' "[61] However, the Commission concludes that national ownership rules do not govern diversity of voices in any local community.[62] Thus, the question must deal with national political discourse, and the role of group owners as "gatekeepers" governing the flow of that discourse.[63] For the purpose of analyzing diversity of sources for national issue information, the Notice argues for consideration of non-broadcast sources such as newspaper and magazines. These organs also affect the national information flow, according to the Notice, and any FCC decision regarding diversification of broadcast ownership should include consideration of other sources of information.[64] "[T]he appropriate concern is with information availability, not with market share."[65]

In analyzing the question of diversity, the Notice notes that regulating national group owners may not solve the problem because even in national issues information is delivered locally.[66] While group owners can be viewed as national firms, the Notice expresses doubt about the "monolithic" control of information distribution.[67] The Notice concludes that "absent evidence to the contrary," these outlets for information should be seen as quasi-independent or totally independent information sources.[68] As such, questions on ownership concentrations restricting diversity should be viewed from the local level.

The Notice also cites the findings of the FCC's Office of Plans and Policy (OPP).[69] The OPP concludes "that the relevant context for diversity consideration is the local market, be-

61. NOTICE, at 48 Fed. Reg. 49449, citing Buckley v. Valeo, 424 U.S. 1, 14 (1976), and New York Times Co. v. Sullivan, 376 U.S. at 270.

62. NOTICE, at 48 Fed. Reg. 49449.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The Commission requested "any evidence that either local or national news which is locally originated by group owned stations represents the group's 'monolithic viewpoint.' " *Id.*

69. J. D. Levy and F. Q. Setzer, Measurement of Concentration in Home Video Markets, FCC Office of Plans and Policy, (December 23, 1983) (unpublished report).

cause '[t]he range of choices available to viewers depends on the number of outlets available at the local level.' Multiple ownership in outlets in separate markets does not limit that range."[70] The OPP regards national program delivery as merely a collection of local markets.[71] The OPP report concludes that if local markets are competitive, there is no need for national or regional ownership rules.[72]

The next issue cited is whether there is a relationship between diversity of ownership and diversity of viewpoints. Citing the Commission's prior Notice of Proposed Rule-Making concerning cross-ownership of cable and on-air broadcast systems,[73] this Notice states that increasing the number of owners does not necessarily increase the diversity of program content[74] and suggests that loosening the ownership restrictions may increase original programming development.[75]

The last consideration under diversity of sources is whether the three major national networks should be considered under separate standards,[76] and whether radio and television ownership concentration should be considered separately.[77] Request for comment on separate consideration for the national networks was based on the networks' programming dominance over prime-time viewing.[78] The Notice cited potential alternatives as "maintaining the present seven stations ceiling and creating a new ceiling based on net weekly circulation or reach of owned stations."[79] Regarding separate consideration of radio and television, the Notice suggested this as a compromise choice, only if

70. *Id.*

71. *Id.* at 45.

72. *Id.*, The OPP report contains no definition of a competitive or non-competitive market. It expressed some guidelines regarding the number of independent voices needed for a local market to be deemed competitive.

73. Amendment of Part 76, Subpart J, Section 76.50 of the Commission's Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 47 Fed. Reg. 39212 (September 7, 1982).

74. NOTICE, at 48 Fed. Reg. 49450.

75. *Id. See supra*, notes 43-47, and accompanying text.

76. NOTICE, at 48 Fed. Reg. 49450-49451.

77. *Id.*, at 49451.

78. *Id.*, at 49450.

79. *Id.*

the television rules were not amended to the degree suggested.[80]

III. Critique of the Notice

The first support offered by the Notice for amending the Seven Station rule is changed circumstances in the broadcast industry since 1953.[81] While there is no doubt that three decades have changed and expanded broadcasting, the weight placed by the Notice on these changes may be greater than actually warranted.

The Commission chose 1953 as its statistical year for measuring changes in comparison with the current market.[82] While 1953 appears to be a logical point for comparison since it is the year the Seven Station Rule was issued, it may also be a significantly misleading starting point. This is especially true when analyzing on-air television growth.[83]

A brief review of the burgeoning television industry and accompanying FCC regulation in the years prior to 1953 sheds light on the state of television growth at the time chosen by the Notice for comparison to current markets.

Commercial television began in earnest following World War II.[84] As a prelude to the expected interest in this new industry, the FCC allocated thirteen carrier frequencies on VHF to commercial television (later reduced to twelve).[85] By 1948, these 12 channels were proving to be insufficient. On September 30, 1948, the FCC imposed a freeze on the television licensing procedure in order to consider proper regulatory approaches to this

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80. *Id.*, at 49451. The Notice clearly expressed the alternative nature of separate considerations. It noted the Commission's intent "to reduce our national broadcast ownership restrictions, . . . to the maximum extent feasible . . . ." Separate considerations of radio concentration would only be considered if amendment to the television concentration rules were rejected.

81. Notice, at 48 Fed. Reg. 49442-49445.

82. *Id.*

83. This is not the case with radio. Commercial radio has existed much longer, and was far more entrenched than television in 1953. Radio did not experience a sudden increase in the number of licensed stations immediately after the Seven Station Rule was promulgated. Thus, choosing the year 1953 for comparison is justifiable in radio, whereas with television, this is not the case. See *infra*, notes 84-96, and accompanying text.

84. J. Greenfield, Television, The First Fifty Years, at 43 (1977).

85. *Id.*

quickly expanding industry.[86] At the start of the freeze there were 108 operating stations in the U.S.[87]

In July, 1952, the freeze was lifted, and the FCC began issuing licenses on both VHF and the newly adopted UHF frequency.[88] By the beginning of 1955, 567 television stations were authorized by the FCC, with 439 operating on the air.[89] These statistics are taken a mere three months after the 1954 amendment finalized the Seven Station Rule.[90] The number used for comparison to the current market in the Notice is 199 on-air stations as of 1953.[91] This selection fails to account for the immediate boom of licensing after the freeze was lifted in the period from 1952-1956. In fact, the cause for freezing the licensing procedure was the inability of the FCC supply to keep up with the demand for new licenses.[92] The Commission was undoubtedly cognizant that extensive growth in television licensing was imminent when the Seven Station Rule was promulgated, and this expected growth was considered when the Commission selected its numerical ceiling. By using a deflated number, the argument of changed circumstances is somewhat weakened. In addition, the Notice cites the number of on-air television stations as 1,127 as of June 30, 1983.[93] However, this number includes non-commercial stations.[94] As of November 30, 1983, 867 commercial television stations were operating, according to the FCC Daily Digest.[95] When compared with the 609 commercial stations with authority to broadcast by 1956, the Notice's claim of changed circumstances is greatly diluted (a percentage drop from 469% to approximately thirty percent increase).[96]

The Notice also neglects to account for other factors when arguing changed circumstances in the industry. For example, the

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86. 13 Fed. Reg. 5860 (1948).

87. DOCUMENTS OF AMERICAN BROADCASTING, 179 (Kahn ed. 1984).

88. Sixth Report and Order, 41 F.C.C. 148 (1952).

89. Broadcasting/Cablecasting Yearbook 1983, B-384 (1983). By the end of 1956, there were 609 commercial television stations authorized to broadcast by the FCC. FCC, 22nd Annual Report, at 116 (1956).

90. *Supra*, note 7.

91. NOTICE, at 48 Fed. Reg. 49443.

92. *Supra*, note 86.

93. NOTICE, at 48 Fed. Reg. 49443.

94. *Id.*, at n.57.

95. FCC Daily Digest, December 19, 1983.

96. FCC, 22nd Annual Report, at 116 (1956).

United States' population rose by approximately fifty percent from 1953 to the present.[97] Thus, while the percentage of on-air stations has risen, the number of viewers served has also risen. Depending on the starting point chosen for comparison, the population increase may actually be greater than the on-air station increase. This also weakens the Notice's changed circumstances argument.

The second prong of the Notice's claim for changed circumstances lies in the expansion of what can be termed new technology.[98] These new technologies are providing alternative news, entertainment, and commentary sources to traditional on-air television, according to the Notice.[99] The Notice cites the enormous growth of cable television since 1953 as its leading argument.[100] There is no doubt that cable television presently provides significant alternative sources of programming to a portion of the American public. Arguably, its growth potential is also positive. However, the Notice fails to discuss cable's inherent limitations.

Cable presently reaches approximately forty percent of the nation's television households.[101] The Notice cites optimistic growth figures for the coming years.[102] Yet no matter how large this forty percent figure looms in comparison to cable's past, the glaring fact remains that over 150 million Americans are without cable, so, as a means of communication, cable is nowhere near as significant in reach as on-air television for the majority of Americans. Also, cable does not have as large an impact on the American viewer as on-air television.[103]

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97. U.S. population at the end of 1983 was approximately 233 million. U.S. News & World Rep., March 5, 1984, at 13, citing United States Census Bureau. U.S. population in 1953 was approximately 159 million. *Historical Statistics of the United States*, U.S. Department of Commerce, Bureau of the Census, at A1-8.

98. Notice, at 48 Fed. Reg. 49-43-49444.

99. *Id.*

100. *Id.*, at 49443.

101. *Id.*

102. *Id.*, at n. 61.

103. A 1981 study by the Roper Organization shows that sixty-seven percent of the U.S. population turns to television as the source of most of its news. *A Short Course in Broadcasting*, Broadcasting/Cablecasting Yearbook at A-2 (1981). In February of 1981, eight-six percent of the households without cable television watched network affiliate stations. Only fourteen percent watched other on-air stations. During the same time, of the homes with cable services, sixty-five percent watched network affiliated stations. The

Another problem with using cable in comparison to on-air television is cable's prohibitive cost. To obtain cable services, an installment fee and refundable equipment deposit is generally required. In addition, a monthly entertainment fee is charged. The amount of this fee will depend on the level and amount of entertainment desired.[104] For many, cable costs prohibit service. For others who are able to afford basic cable services, the volume of service received is directly related to spending capability.

The Notice cites numerous new technologies such as MDS, STV, DBS and video recorders as other new alternatives to on-air television.[105] However, the statistics offered in the Notice reflect the minute impact these new technologies have had on the current market. With the exception of VCRs,[106] all of the new technologies suggested in the Notice combine for a total of one million subscribers.[107] Assuming that all of these subscribers are from different households and that each household contains four members, the total reach of the new technologies is less than two percent of the nation's population. The Notice includes these new technologies as viable alternatives to on-air television mainly because of potential future growth.[108] However, glowing prospects for growth may not exist. For example, STV is now available through nineteen stations.[109] This number is down from twenty-seven stations in the early 1980's. Subscription levels are also down. While this may not indicate a dying or stagnant industry, it also doesn't indicate rosy prospects for immediate impact on diversity of programming sources to the vast majority of Americans.[110]

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remaining percentage was divided among pay cable and other on-air stations. *Neilsen Television Index Estimates*, NEILSEN REPORT ON TELEVISION at 12 (1981).

104. BALDWIN & McCOY, CABLE COMMUNICATIONS, at 3, 126, 128, 130-33 (1983).

105. NOTICE, at 48 Fed. Reg. 49443-44.

106. VCR's are playback recorders. Their capacity as a source of communication is limited to regurgitating information, entertainment, etc. derived from other sources. VCR's do not exist as original sources or communicators of information. As such, including this product as an alternative source which is expanding diversity is improper.

107. NOTICE, at 48 Fed. Reg. 49443-44.

108. *Id.*

109. *Id.*

110. *Bloom is Off TV Rose*, BROADCASTING, September 5, 1983 at 36. Another alternative programming source suggested in the Notice, MDS, only adds one additional channel. The FTC has re-allocated spectrum for multi-channel MDS system, but only one experimental system is operating at this time. Even when fully operational, MDS only provides four channels, and can exist in very limited circumstances. Eight DBS licensees are authorized by the Commission, and high powered systems are not expected

Taking all the evidence offered in the Notice into consideration, there appears to be some level of "changed circumstances" in the industry since 1953. Most positively, this occurs in cable television. Those receiving cable have increased their diversity of available sources extensively. For example, some cable systems offer viewers more than twenty channels. Some of these systems include on-air stations from other cities, and all-new stations, as well as traditional television format. To the degree that cable has grown, the FCC's argument of changed circumstances is supportable.

Another strong argument for changed circumstances is the growth of the "new technologies." By taking these potential sources of diverse programming into consideration, the FCC appears to be regulating for future industry. Since any amendment to the Seven Station Rule will be controlling the future ownership policies of broadcasting, the Commission is looking in the proper direction for solutions. However, a closer review of these new technologies[111] shows that the FCC may be looking too far into the future for proper regulation of today's industry. If these technologies succeed in the future and provide expanded broadcasting sources, new amendments (and/or abolishment) of media ownership rules can be considered. Until substantial changes occur, these new technologies should be measured by their present impact, plus any reasonably conceivable growth over the next few years. The unstable nature of these new technologies, coupled with their inconsistent growth patterns, make regulation based on projected growth mere speculation.

The second argument offered in the Notice is the arbitrary selection of the number "seven" as the ceiling in the media concentration rules.[112] As discussed above, the FCC undoubtedly realized the arbitrariness of numerical ceilings when the Rule was promulgated in 1953. However, as the history of the Commission in the 1950's and early 1960's shows, alternative approaches to numerical limitations were rejected.[113]

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for several years. BROADCASTING, February 7, 1983 at 31, 37. No low-powered television stations are currently in operation and no license will be granted in urban areas for several years. 48 Fed. Reg. 27, 182 (1983).

111. *See supra* and *infra* notes 100-19 and accompanying text.

112. NOTICE, at 49442-49443.

113. Following the promulgation of the 7/7/7 Rule in 1953, several congressional

The overall choices in approaching the media concentration rules boil down to two categories: The first is total elimination of ownership rules, with concentration concerns being guided by antitrust laws administered by the DOJ and the FTC. The second choice is some standard based on a mathematical formula, such as a numerical ceiling like the one currently used or a formula based on a percentage of some measurable aspect of concentration, like the proposed Bricker Amendment.[114]

The FCC has indicated that total elimination of the concentration rules may be the long term goal of any amendment to the Seven Station Rule.[115] If the FCC removes itself from monitoring concentration, the services of other federal agencies will be needed to check the broadcasting industry under the antitrust laws.[116] This prospect presents some positive features. The media concentration laws are in part based on antitrust principles. Use of the antitrust laws to enforce the principles behind the media concentration rules appears to be a logical extension of the Rule. If true concentration exists in any broadcasting industry, or any combination of broadcasting industries, traditional antitrust laws could be applied. This might have the same effect on economic concentration in broadcasting as it does on economic concentration in other industries.

Momentarily assuming that use of antitrust laws does not ignore the diversity principles of the Seven Station Rule, several problems remain. One problem is drawing the proper guidelines to determine concentration using the antitrust law. The Notice suggests development of a methodology to assess economic con-

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studies were taken, aimed at limiting network control over the airwaves. One study, the "Network Monopoly" Report, or the Bricker Report (after Sen. John Bricker of Ohio) proposed dropping the 7/7/7 Rule in favor of a coverage limitation. The Bricker rule would forbid any single entity from owning television stations having coverage of more than twenty-five percent of the nation's population. (At the time owned and operated stations of NBC covered 23% of the nation's population, CBS covered 20% and ABC covered 29%.) This proposal never came to vote in Congress. The FCC also considered judging media concentration on a case-by case basis. This was also rejected. Several other investigations were made by both the FCC and Congress into methods of controlling the growing power of the networks. All of these proposals were rejected, and the 7/7/7 Rule remained. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COMM. BAR J. 1, 21-39 (1974).

114. *Id.*

115. NOTICE at 48 Fed. Reg. 49451.

116. *Id.*, at 48 Fed. Reg. 49446-47.

centration in relevant markets.[117] Markets considered relevant are geographic and product markets. The Notice cites the Herfindahl-Hirschman Index (HHI) presently used by the DOJ as a possible tool to measure economic concentration.[118]

There may be some difficulties in switching from antitrust principles to antitrust law. The principles govern the broad nature of antitrust: preventing concentration. The law is more specific and requires a well-defined market, one in which there is a direct relationship between a buyer and seller, and a price for the goods or service involved. In broadcasting, the broadcaster-advertiser relationship falls into a traditional market scenario. As such, regulation of these relations under antitrust law appears feasible. However, this broadcaster-advertiser relationship fails to include impact on the most important party — the viewer.

The economic impact on the viewer is difficult to discern. Although the viewer pays no direct fee for the service received, the general consuming public will eventually bear the cost of an imbalanced economic relationship between advertiser and broadcaster. Finding the proper index to measure such a nebulous relationship may prove difficult.[119] The Notice neglected to offer a reasonable index to measure the impact on the viewer of such transactions. Until a proper index is formulated, use of antitrust law may prove to be an inadequate protection for the viewer.

If such antitrust laws could be implemented to ensure the diversity principles entwined within the media concentration rules, a transition of this nature could solve the problem. How-

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117. *Id.*, at 48 Fed. Reg. 49447-48.

118. *Id.* Using the HHI, the Notice draws a favorable comparison between concentration in broadcasting and other industries such as refrigerators and breakfast cereals. This comparison is perhaps the best argument as to why antitrust laws are an inadequate measure of concentration in broadcasting. Economic control of the major sources of information dissemination in the U.S. could be dangerous to the diversity of information necessary for a functioning democracy. If the concentration levels of broadcasting are such that program and information alternatives dwindle, the options are not simple or readily available. The counter argument to this is that indices can be adjusted to reasonably measure economic concentration in broadcasting. Because of television's unique situation, more stringent controls could be adopted than are used in other industries.

119. *See, supra*, notes 58-60, and accompanying text.

ever, because antitrust laws are economically oriented, adaptation of these laws to first amendment principles is difficult. In fact, the focus on exchanging the numerical ceiling for antitrust law will bring economic concentration to the forefront of what had previously been a two-pronged regulatory focus. Replacing the Seven Station Rule with antitrust laws makes economic concentration the sole factor in regulating concentration in the industry. The issue of diversity of information sources, as a first amendment principle, becomes a secondary factor (if it remains a factor at all).

Rejecting or emasculating the first amendment impact on the media concentration rules goes against a half-century of regulatory policy.[120] The important issue in any change of broadcast regulatory policy is its impact on the viewers.[121] From a first amendment standpoint, this means the affect on the viewer's right to receive all possible information from a diverse marketplace of ideas.[122] Strong statistical support should unequivocally be established by the Commission to show that the viewers' first amendment rights are not impaired. This proposed change is primarily based on the alleged weakening of the scarcity rationale.[123] Given the weak statistical support offered by the Commission in the Notice for the end to scarcity,[124] such a radical departure from tradition may constitute blind deregulation under the guise of progress.

The vast majority of citizens receive much of their information through traditional on-air television sources.[125] Breaking this down further, most viewers receive information from stations on VHF.[126] VHF is thoroughly dominated by the three major networks and their affiliatees.[127] Contrary to arguments of-

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120. *See generally*, National Broadcasting Co. v. U.S., 319 U.S. 190; Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367; CBS, Inc. v. F.C.C., 453 U.S. 367.

121. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. at 390.

122. *Id.*

123. NOTICE, at 48 Fed. Reg. 49442-45.

124. *See supra*, notes 81-111 and accompanying text.

125. *See supra*, note 103.

126. *Id.* This information shows the dominance of the three networks in viewer audience share. The networks broadcast almost completely on VHF, *see infra*, notes 127-141, and accompanying text.

127. FCC, 45th Annual Report, 100-01 (1979). This cite notes the Television Financial Data. Of the 513 VHF stations listed, fifteen are network owned, 469 are network affiliated, and twenty-nine are independent.

fered in the Notice, statistics show that the three major networks control a large portion of the on-air television programming, including news coverage.[128] While other sources are available, they pale in comparison to VHF television in terms of viewer impact. If it were merely a matter of consumer preference for one set of equal competitors over another, the effect might be irrelevant. However, years of marketplace competition, partially nurtured by FCC regulation,[129] have placed the VHF medium and the three major networks above all other electronic media. To argue that scarcity has ended without analyzing the most dominant medium in the United States is negligent regulatory planning. Changes in the media concentration rules will have significant impact on viewer first amendment rights, and should not be blithely dismissed without further consideration. Because of the importance of first amendment considerations, antitrust law will likely prove an inadequate alternative.

If antitrust laws are inadequate standards, other non-arbitrary alternatives should be examined. The Notice indicates an interim step of fourteen television stations, and thirty-six radio stations is being considered.[130] These expanded numbers permit greater latitude in ownership, but absent any logical support for these new numbers, this solution seems as arbitrary as the Seven Station Rule.[131] Arguing that the Seven Station Rule is arbitrary, and replacing it with new and equally arbitrary numbers may not be sufficiently logical to support such a major change.

Another alternative is limiting ownership to a percentage of the total market. This was considered and rejected in the 1950's mainly because of administrative difficulties.[132] A percentage

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128. New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Volume I. Final Report: Network Inquiry Special Staff, F.C.C., October, 1980, at 228-30 (hereafter cited as NETWORK INQUIRY).

129. *See supra*, note 120.

130. NOTICE, at 48 Fed. Reg. 49450-52.

131. This is probably not the case in radio. The numbers for comparison in arguing changes in circumstances in radio do not suffer from the same deficiencies as those used by the Commission when comparing television. Radio has a larger number of stations available for commercial ownership than does television, making scarcity a smaller problem. Also, regional radio networks do not suffer the same competitive disadvantages as regional television networks when competing against national networks. Therefore, arbitrary numbers such as those suggested may not have the same stifling effect on radio as they would on television.

132. *See supra*, note 113.

reach alternative such as this would also be inherently arbitrary. As such, it assumedly would be rejected under the reasoning contained in the Notice.

The third reason offered in the Notice for amending the Seven Station Rule is that the Rule may actually limit diversity.[133] The reasoning offered is that the inability of group owners to own a sufficient number of stations "to generate a base for quality program production"[134] prevents additional major national networks from forming.[135] The conceptual idea of this reasoning can be broken down into an equation. To achieve diversity, national networks are necessary and for national networks to exist, ownership of numerous stations is necessary. While the need for competition among the major national networks corresponds with the concept of diversity, the need for owning numerous stations does not necessarily correspond with the concept of national networks.[136]

Herein lies the difficulty of analyzing the Seven Station Rule within strict ownership concepts. Ownership is merely one factor in determining the viability of national networks. A more important concept may be affiliation.[137] Since there are over 200

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133. NOTICE, at 48 Fed. Reg. 49442-43, 49446-47.

134. *Id.*, at 49446.

135. *Id.*

136. Any argument relating to diversity and ownership strongly implies that monopoly ownership equals monopoly viewpoint. In essence, it assumes that each station owner's viewpoint will necessarily be the viewpoint of the station. In making this assumption, the editorial powers of both station management and reporters are presumed secondary to those of the station owner. This presumption, while debatable, has its roots in the early history of the multiple ownership rules. The limitations on ownership were placed, in part, on the reasoning that station ownership equals station viewpoint, however, any analysis regarding editorial control over a station is best undertaken on a case-by-case bias. While it is arguable that both the station owners and their editorial boards will both have significant impact on station viewpoint, both the FCC and this article follow the presumption of owners having a stronger imput. A second prong of this issue is separating editorial and entertainment viewpoint within the same station. Both are likely to be influenced by separate groups or individuals within the same station (as well as the owner(s)). In some cases, the "viewpoint" may differ with each division within the station.

These factors tend to cloud any definition of each station's viewpoint. However, as with most business entities, the final decisions are made by, and are the responsibilities of the owners. In light of this ultimate decision-making power, the FCC's focus on ownership as representing the broad viewpoint of a station becomes clearer.

137. A general outline of network features is as follows: Each of the three existing networks owns, or is affiliated with a group of stations that collectively broadcast to markets containing virtually all viewers in the United States. Network programming that is

television markets in the United States, the Seven Station Rule

distributed to affiliates is typically shown at the same time by all affiliates operating within the same time zone. Approximately 85 to 100 hours of programming are made available by the networks to the affiliates. The networks sell advertising time within most network programs to national advertisers who want to have their advertising carried by all of the network's affiliates, although some commercial advertising time or network programming is left for sale by affiliates. Each network produces several of its own programs, and finances the production of virtually all other programs that it carries on a network basis.

A typical affiliate-network contract works as follows: Much of the programming is provided by the networks. The networks either produce it themselves, or purchase it from independent sources. The networks then purchase access time on the affiliate stations. The method used is either a direct cash payment to the affiliate or air time is made available during and between programming for direct sale by the affiliate stations to advertisers. In the alternative, the advertising is provided by the national networks to their affiliates, with a percentage of the earnings flowing from the networks to the affiliate. Time slots are created during and between programs for advertising which may be provided by the network, or may be sold by the individual stations. Earnings from the advertising are divided according to individual contract terms. Also, percentage of the time that must remain open to national advertising vary from contract to contract. In addition to advertising earnings, affiliate stations are compensated by the networks for carrying network programs. This often amounts to a substantial percentage of station revenue. The advantage of networking to both networks and the affiliates make involvement in this form of enterprise economically desirable. The first advantage is spreading the cost of program production over a larger number of stations. Once a program is produced for one station, no additional production costs are incurred when the program is shown on other stations. This does not necessarily guarantee a higher quality program, but it will generally prevent expensive production costs from derailing a project.

A second advantage is simultaneous transmission of programs within the same time zone. With simultaneous transmission, the size and composition of a potential audience that an advertiser can reach will be easier and more accurately predicted than if the same program was shown at different times.

Additionally, simultaneous transmission may help reduce distribution costs since it becomes possible to employ electronic interconnection. If the program is now shown simultaneously, three typical alternatives are possible. Separate prints of the program may be made and distributed. In the alternative, either the affiliate stations must tape the program for later use, or the network must make multiple feeds to the affiliate at different times. All the alternatives add expense to the dissemination of programming.

Another advantage of simultaneous transmission is facilitation of advance promotion of the program. The program can air simultaneously on all network affiliates, as well as appear in magazines, radio, newspapers, etc. on a national basis, thereby reducing production and distribution costs. Also, air time that ordinarily would be used to promote a program could be saved for sale to advertisers.

The next advantage is seen in all phases of advertising sales. Both the network and its individual affiliate stations sell advertising time. Having national network advertising as an option adds an attractive economic lure to the networks for the national advertiser (and, in turn the economic benefits to the networks of having top-dollar advertisers as customers). Transaction costs are lower than if an advertiser had to contact each station individually. Thus, the advertiser saves expenditures prior to purchase of national advertising time. Another benefit to advertisers is the ability to reach the entire country at once. Certain programs that are likely to draw exceptionally large national audiences will attract national advertisers hoping to impact upon a larger audience than is typically watching television at that time. NETWORK INQUIRY, at 228-29, 231-34, 446-52.

eliminates the possibility of outright ownership of a national network by an individual or corporate entity. In order for a commercial broadcaster to regularly broadcast its programming on a national scale, the formation of affiliate contracts with numerous independent stations is necessary. Although no strict definition of "national" network is employed, ABC, NBC and CBS all reach greater than ninety percent of the more than 200 television markets in the U.S.[138] These three networks have successfully established and maintained a sufficient number of affiliate stations to be considered national. The ownership limitations have only marginally obstructed this procedure. With these three networks operating under the current regulatory framework, it is apparent that the ownership limitations are not an absolute bar to national networking.

138. As of 1980, ABC had 203 affiliates, CBS had 198, and NBC had 212. 1980 Broadcasting/Cable Yearbook D-24, D-33, D-39. In addition, each network owns five stations. ABC reaches 98.1% of the nation's households, CBS reaches 96.5%, and NBC reaches 96.9%. 44 Fed. Reg. 36.63 (1978).

The three existing national networks own or affiliate with approximately 600 of these stations. That leaves about 270 stations available for affiliation with other group owners desiring national network status. Affiliates are not exclusively bound to any one network. The FCC has established several regulations governing network-affiliate relationships. A sampling of these regulations are as follows: Network affiliations contracts cannot bind a station to a network for more than two years. 47 C.F.R. § 73.658 (c) (1979). These contracts cannot bar affiliates from broadcasting programs of another network. 47 C.F.R. § 73.658 (a) (1979). Conversely, affiliates are not permitted to prevent other stations in the same geographic area from broadcasting network programs not taken by that affiliate. 47 C.F.R. § 73.658 (1979). The affiliate station has a right to reject network programs offered or contracted for if the the affiliate reasonably believes the program is unsatisfactory, unsuitable, contrary to the public interest, or if the station chooses to substitute programming it believes is of greater importance. 47 C.F.R. § 73.658 (e) (1979). Networks are not permitted to contract for any option time on the affiliate stations. 47 C.F.R. § 73.658 (d) (1979).

Even though the requisite number of stations are available, there is no guarantee that these stations will cover enough markets for national network status. For example, both New York City and Los Angeles will have several stations left over after three are owned or affiliated with ABC, NBC, and CBS. However, many smaller markets either do not have, or cannot support more than three stations. Therefore, if the three networks enter a smaller market though affiliation, others are likely to be excluded.

Also, because the three national networks have been successful for several decades, independent VHF stations almost always find the three national networks a more attractive package, both economically and in available programming. Having a greater number of stations available with which to spread programming costs increases the national network's ability to produce and distribute programming. This advantage brings economic benefit to all parties involved. This vicious cycle (a large number of affiliates available to distribute programming lead to lower cost of production and distribution which equals greater gain, makes networks more desirable to affiliates) keeps the networks in an unmatched position, and works to keep others out of the national network competition.

Alternatives to the Seven Station Rule based upon a strict ownership analysis are not likely to change things. For example, if the Seven Station Rule is amended to allow ownership of fourteen or twenty-one television stations, massive affiliation will still be necessary to achieve national status. If ownership limitations are completely abolished, then individuals could conceivable own their own networks. However, ownership of close to 200 stations by several entities would (or at least should) violate antitrust standards under the indexes offered in the Notice. Theoretically, ownership of that many television stations would be unallowable. No matter how the problem is approached, some form of affiliation will still be needed. Logically, it might be more productive to examine the network-affiliate rules as well as the ownership rules, if lack of diversity among the national networks is a problem.

IV. Alternatives to Total Elimination of the Seven Station Rule

The Commission notes the importance of national and regional networks in providing the best service to the public.[139] However, they generally ignore the large role national networking plays in determining the diversity of information available to the viewing public. This impact cannot be properly analyzed within the narrow confines of the station ownership rules if other factors such as frequency, network-affiliate relationships and program supply are not considered. The FCC should analyze potential changes in all of these components when considering amendment of the Seven Station Rule.

The success of the three networks at creating and maintaining their affiliate contacts has vaulted them to a position of prominence, while almost completely reducing competition on a national scale. Virtually every VHF licensed station in the United States is owned or affiliated with one of the three major networks.[140] All three networks broadcast predominantly on VHF.[141] The turnover rate among affiliate stations is minimal,

139. Notice, at 48 Fed. Reg. 49446.
140. *See supra*, note 127.
141. *Id.* The networks affiliate with approximately 600 stations combined, and the 1979 FCC Annual Report lists 484 of the 513 VHF stations in the U.S. as owned or affiliated with the networks.

and when any turnover occurs, the station invariably leaves one major network for another.[142]

FCC policy over the years has played a large role in creating this current scenario. In the post World War II years, the UHF frequency, although capable of containing five and one-half times as many channels per market than VHF, was rejected by the FCC in favor of VHF.[143] This was partly because of lobbying efforts by the leading radio networks that were seeking entrance into the television markets. The radio equipment of that era was easily adapted to VHF.[144] If VHF was chosen as the television frequency, enormous saving could be made on equipment, personnel training, and other expenses. The plan was to eventually move all television to UHF because of its superior channel-holding capabilities which would open television to a broader number of owners.[145] By 1948, the FCC, unable to keep up with demand for licenses using only VHF, initiated its license freeze.

During this freeze, the early television networks cemented their affiliation contacts. Since there were few licenses, those companies with prior networking experience in radio had a natural advantage over newcomers to the industry. There were also very few newcomers because the freeze began before commercial television moved beyond the experimental stage. Also, once the freeze was lifted four years later, the early networks were established bastions of the industry. The most economically lucrative arrangement for a new licensee was to affiliate with an industry leader. The economic benefits of networking advanced with each newly added affiliate, making changes in the arrangement economically disadvantageous. New network competition was virtually impossible. New licensees, faced with the choice of affiliating and sharing economic benefits with an established multimarket network or affiliating with a novice, limited-market network almost always chose the former.

142. NETWORK INQUIRY *supra*, note 129, at 163-167. The FCC Special Staff reviewed affiliate turnover during the period 1968-1977. A total of 46 affiliate stations left their network during these years. All moved to affiliation with another major network.

143. Geller, *A Modest Proposal for Modest Reform of the Federal Communications Commission*, 63 GEO. L.J. 705, 707-708 (1975), citing, Allocations Report of May 15, 1945, FCC No. 6651, at 99-100, 1 P&F Radio Reg. (Part 3) Sec. 91.67.

144. *Id.*

145. *Id.*

A second result of the freeze was the fate of UHF television. When the freeze was lifted, the FCC decided to allocate part of UHF to television.[146] One drawback to the delay was that in the interim, millions of television sets had been sold containing only VHF dials. In order to receive the new UHF stations, the viewing public would have to purchase either new sets or UHF adapters. The adapters were often of poor quality, which made clear UHF reception difficult.

The FCC next made the decision that sealed the fate of UHF. They decided to intermix stations of both frequencies within the same markets.[147] There had been demand to separate the two frequencies in order that new UHF stations would not have to compete with established VHF stations in the same market.[148] Many commentators and industry leaders felt UHF could not survive in direct competition with VHF, given the historical development of FCC policy.[149] These analyses were proved correct when the FCC intermixed the frequencies. UHF was doomed to an inferior status.[150]

This major network domination presents two problems to other networks seeking national status. The first can be termed a coverage handicap. This occurs if all of the commercial channels assigned to a given market are affiliated with some or all of the three national networks. There are no assignments available for affiliation with a potential entrant and that entrant is effectively closed out of a market.[151] The second problem is a technical handicap. If the only channel available for affiliation with a new entrant is a UHF station, and the three national networks are operating on VHF, the new entrant will be forced to compete using a technologically inferior station.[152] If either problem occurs in enough television markets, the new entrant will not be able to telecast nationally. Since the VHF stations are virtually

146. 41 F.C.C. 148, 154 (1952).

147. *Id.* at 205-209.

148. *Id.*

149. *See generally, The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578 (1962).

150. *Id.*

151. Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 SO. CALIF. L. REV. 875, 879 (1981).

152. *Id.*, at 879-880.

closed off to all but the three networks,[153] these handicaps alone end the possibility for a fourth national network under present conditions.

This vicious cycle has existed for the entire history of television in this county. The Notice acknowledges this problem as an affront to the FCC diversity principles.[154] It concludes that eliminating the media ownership rules would allow new entrants to gain a proper foothold by permitting ownership of a sufficient number of stations in which to create a base for quality programming. This, in turn, would make affiliation with these networks desirable.[155]In this analysis, the Notice overlooks the VHF/UHF handicap. The current VHF allocation supports only three national networks. Unless VHF allocation to television is expanded,[156] additional new networks would have to be formed entirely on UHF, an approach that has failed in the past and is likely to fail in the future. Those purchasing VHF stations would have the same advantage as those currently affiliating with VHF stations. The only change would be that networks would be owned instead of affiliated combinations. In addition, outright ownership of VHF networks by three entities completely destroys any notions of diversity currently enjoyed.

This emphasis on ownership, without consideration of other essential factors, is the basic failing of the Notice. If all the essential factors are considered together, and amending the Seven Station Rule is reviewed in context with amending other regulatory policy, perhaps the FCC goal of diversity through new national networks could be a reality.

V. Proposal

Television marketplace history has provided that no national network can compete without a significant number of

153. Network Inquiry, at 163-167.

154. Notice, at 48 F.2d Reg. 49442-43, 49446-47.

155. *Id.*

156. The FCC is allocated forty-eight percent of the VHF band. The remaining fifty-two percent is divided among other government agencies. Of the VHF allocation, the FCC has allocated 55.8 percent to television. 47 C.F.R. § 2.106 (1979). Thus, television occupies about twenty-five percent of the total VHF band. It is conceivable for the FCC to expand the VHF allocation to television. Such action would be at the expense of other groups occupying the band such as police and fire departments.

VHF channels. It is also evident that affiliates will never leave the three major networks for a novice network under the current regulatory system.[157] The failure of the FCC to numerically limit network affiliation with VHF licensed stations has led to an indirectly sanctioned monoplization of the national airwaves by three networks. By allowing indirect monopolization to persist, the FCC has allowed the principles behind the Seven Station Rule to be eroded. Alterations in the ownership rules merely perpetuate this monopolization under the guise of creating and supporting diversity.

As an alternative to the vague amendments of the Seven Station Rule offered in the Notice,[158] The FCC should consider the following alternative proposals. First, the FCC should numerically limit network affiliation with VHF stations. Second, the FCC should maintain the VHF station ownership limits at five, and expand the UHF ownership limit to a significant enough percentage of markets needed for developing and/or maintaining a national market.

The purpose behind the first proposal can be seen through the following example: The FCC numerically limits affiliation with VHF licensed stations to forty-five.[159] Assuming the three existing national networks own five VHF stations and affiliate with up to the new numerical limit, they would cover 150 out of the approximately 530 existing VHF stations. This is in comparison to the approximately 500 VHF stations currently affiliated with the three networks. This reduction would open approximately 340 VHF stations for affiliation with other group owners seeking the formation of a national network.

The second part of the proposal is offered as a buffer to the consequences of the first proposal. When the networks are restricted by the VHF affiliation limits, it will block approximately three-quarters of the markets necessary to telecast nationally. This gap must be compensated by UHF stations. Many markets

157. NETWORK INQUIRY, at 163-67.

158. *See supra*, notes 17 and 18, and accompanying text.

159. This number is used for strictly hypothetical purposes. If a proposal such as this is adopted, the numerical limits on VHF affiliation chosen by the FCC should allow any developing new networks to affiliate with a sufficient enough number of VHF stations to create the necessary base for national networking.

only support a few, if any, independent UHF stations. Thus, the possibility exists of networks needing affiliation into specific markets, and having an insufficient number of independent UHF stations available. If the UHF ownership limits are expanded, this problem could be alleviated by allowing networks to file for a UHF license in markets where affiliation is impossible.[160] This combination of the two proposals creates a situation where national networking can only be achieved through a mix of VHF and UHF stations.

Analysis of potential network competition must be done on both national and local levels. Nationally, the competitive balance would be fostered by numerical equality of stations on VHF. The prior monopolization would no longer be permitted and each network could conceivable have an effective base of fifty VHF stations. Also, each network would affiliate with roughly the same number of UHF stations. The technical imbalance among on-air stations currently stifling national competition would be partially alleviated. The inability of networks to maintain a quality base for programming is given in the Notice as a prime reason for the failure of new national networks to develop.[161] With numerical limits on this quality base (i.e., sufficient VHF stations), the vicious cycle which has prevented new national networks from forming will no longer be supported by regulatory indifference. The success or failure of new national networks will be determined to a larger extent in the marketplace.

Locally, the competitive balance in some markets might be drastically altered. One consequence of this Comment's proposed regulation is the "divestment" of numerous affiliation contracts by the three national networks. Their choice of which markets to maintain will undoubtedly vary. The impact on each individual market will be on whether the existing national networks maintain VHF affiliation or opt for ownership/affiliation

160. Opening up UHF ownership to established networks may help achieve a long standing FCC goal — bolstering UHF television. It has been difficult for independent UHF stations to survive in many markets. However, a UHF station in these same markets may have a better chance of survival if it receives the advantages of networking. Ownership is proposed over affiliation, because the networks can establish new stations via ownership, whereas affiliation requires existing stations.

161. NOTICE, at 48 Fed. Reg. 49446.

on UHF. For example, a market has three available VHF channels; if NBC maintains VHF affiliation, and CBS and ABC opt for UHF, NBC will probably start off with an advantage. Conceivably, two emerging networks would affiliate with the VHF stations, creating (at least) a five-station market. In the past, the two UHF stations would probably be weaker. However, if the two UHF stations have the benefit of affiliating with CBS and ABC, the prior UHF stigma may not automatically condemn these stations to second-class status. The public perception of UHF inferiority might change if familiar and popular network programming is broadcast on a UHF station. If this pattern occurs, the hypothetical local market would have five fairly competitive channels in the long run.

Another conceivable scenario would have all three networks maintaining their VHF affiliate ties in a local market. This would maintain the status quo and keep potential networks at the same technical disadvantage as experienced at present. However, if the existing networks maintain VHF contacts in one market, other markets would be blocked from VHF affiliation under the new proposal. Therefore, new networks would have technical superiority over all three current national networks in some markets.

In analyzing these consequences of such a drastic regulatory shift, the impact on three significant parties — the viewers, the individual stations, and the networks — must be reviewed. The most important group listed above is the viewer, for the essential premise of the Communications Act is to regulate broadcasting in the public interest.[162] One tenet of this philosophy is to provide the best possible service to each geographic locality.[163] Arguably, the three national networks provide quality service to each geographic locality under the current system. The three networks each cover most of the United States. Conceivably, these networks would occasionally be faced with the option to enter a small market by purchasing and operating a UHF station. If the network chooses to forego such a market, that market will be deprived of a significant programming option.

162. *See supra*, note 1.

163. This is regulated through the licensing procedure: "the Commission shall make such distribution of licenses . . . to provide a fair, efficient, and equitable distribution of radio service to each of [each radio market]." 47 U.S.C. § 307 (b) (1970).

However, this is unlikely for several reasons. First, if affiliation into these markets is currently economically desirable, ownership of a station may prove equally or substantially more lucrative. Also, entrepreneurs might be lured into purchasing a UHF station with the hope of affiliating with a national network. Independent station owners in the smaller markets are currently affiliating with the three networks, and, except for shifting frequencies, present circumstances would not be altered. The ultimate impact on the viewer is one of inconvenience, rather than deprivation of service.

The impact on the independent VHF stations will be more pronounced. Those not selected for continuing affiliation with their networks face the following choices: (1) remaining independent, (2) affiliating with a new network, (3) selling their station to a new network, or (4) seizing the opportunity to establish a separate national network. Alternatively, these stations could opt to remain with their network, and trade their VHF license for a UHF license.[164] By trading their frequency, a licensee is gambling that associating with a leading, established network is a wiser business choice than facing the new options by remaining on VHF. With any of these selections, the licensee will face a difficult business choice, one that would not exist without further regulatory tampering. The ensuing flux in the industry may render some previously successful businesses into economic losers.

The networks would also be placed in a forced transitory situation. For each, approximately three-quarters of their broadcast outlets will be shifted from VHF to UHF, with the attendant possibility of lower revenues and diminished status in the industry. The three major networks will also take the brunt of any regulatory change, since no other network will be forced to break off affiliate ties.

The justification for such radical changes lies in the basic premise of broadcast regulation. Broadcasters are licensees of the public trust who hold no ownership rights when granted a license. The success of the networks is partially due to this li-

164. If these proposals were adopted, some preference should be granted to VHF licensees shifting to UHF licenses.

cense system.[165] In fact, FCC regulation may perpetuate the three networks' superior status, contrary to the public interest in diversity of sources. The FCC determination that the public interest may be served better by numerous national networks supports policy aimed at diminishing the monopoly power of the three networks. Therefore, regulation reducing this control is conducive to promotion of the public interest standard.

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165. *See supra*, notes 143-151, and accompanying text.

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