ANTITRUST AND THE REGULATED INDUSTRY: PROMOTING COMPETITION IN BROADCASTING*

ROSCOE L. BARROW†

THE SWORD of Damocles is suspended over the head of the investor in a regulated industry. Business enterprises may be purchased or merged or industry practices may be established under the approving eye of one regulatory agency only to have the transaction or practice upset years later through an antitrust suit brought by another arm of government. Like the Fates, one arm of government may spin the thread of industrial life while the other severs it. The "unscrambling" of business enterprises and the discontinuance of long-standing industry practices involve substantial economic waste. The absence of trustworthy standards by which to determine whether the prospective transaction will withstand scrutiny by two agencies of government at different points in time contributes to the complexity of business judgment.

The overriding consideration in accommodating the antitrust laws to regulated industry is that the public interest be served. To the extent that the general good requires determination of the same matter by different agencies of government at different times, the interests of the business involved must be subordinated. Accordingly, a siguificant objection to conflicting courses of action by two agencies of government is that the action of one may undermine the action of the other with a resulting impairment of the public interest. However, in the interest of the individual investor or the business concerned, there is the legitimate objection that the business finds itself caught in the middle of conflicting tugs by two arms of government, one approving and the other restraining the trans-

* The substance of this article was presented on December 29, 1963, at the Round Table on *Antitrust in the Regulated Industry*, conducted at the annual meeting of the Association of American Law Schools, Los Angeles, California.

† Dean and Wald Professor of Law, University of Cincinnati College of Law. The author served as Director of the FCC Broadcast Network Study during 1955-1957 and Consultant to the Office of the FCC Commissioners from 1961 until July, 1963. The views expressed herein do not purport to represent the opinion of any member of the FCC or of its staff.

action or practice involved. Government in a democratic society should be administered with greater nicety and orderliness.

It is an anomaly that the antitrust and regulatory approaches should conflict, because the antitrust laws and regulatory statutes have a common purpose, to assure that business enterprise serves the public interest. Active competitive behavior is a strong discipline upon the free enterprise system, encouraging it to achieve optimum fruitfulness. The antitrust laws are designed to remove restraints upon competition which prevent free enterprise from operating in accordance with this basic philosophy. In a few areas of economic life, experience has shown that competition is wasteful, and here entry is limited and rates are controlled. As a substitute for the discipline of free competition, the regulatory agencies design controls to achieve the public interest, including controls designed to promote competition within the limitations of the restricted entry. Regulation should be substituted for the natural discipline of competition only where there is a demonstrated impairment of the public interest by the forces of competition, and even then the regulatory road should not be travelled beyond the border of such impairment.

Appropriate accommodation of the antitrust and regnlatory approaches is no simple matter. On the basis of a study of several industries, two authors concluded recently that true interventionist regulation must constantly expand; that adoption of the interventionist approach, allowing reasonable time for expansion, leaves no room for the antitrust approach; and that only if there is a practical barrier to this "mushroom" principle, such as a vast number of firms to be regnlated, should there be a mixture of antitrust and regulatory approaches.[1] This conclusion suggests that transactions approved by regnlatory agencies should be exempt from the antitrust laws. Express statutory exemption from the antitrust laws of some types of transactions approved by regulatory agencies has been granted.[2] On the other hand, Professor Carl Fulda, on the basis of

[1] Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 57 (1962).

[2] See, *e.g.*, Federal Aviation Act § 414, 72 Stat. 770 (1958), 49 U.S.C. § 1384 (1958); Federal Communications Act § 221 (a), 48 Stat. 1080 (1934), as amended, 47 U.S.C. § 221 (a) (1958), § 222 (c) (1), added by 57 Stat. 7 (1943), 47 U.S.C. § 222 (c) (1) (1958); Interstate Commerce Act § 5 (11), as amended, 54 Stat. 908 (1940), 49 U.S.C. § 5 (11) (1958), § 5a (9), added by 62 Stat. 473 (1948), 49 U.S.C. § 5b (9) (1958), § 22, as amended, 71 Stat. 564 (1957), 49 U.S.C. § 22 (1958); Federal Maritime Act § 15,

a study of the transportation industries, concluded that a fine mixture of antitrust action and regulation offers the best solution.[3] It may be noted that the express exemption approach and the mixture of antitrust and regulation approach are not diametrically opposed. The Supreme Court has advised that even where transactions approved by a regulatory agency have been exempted from the antitrust laws, the regulatory agency must weigh the effect of curtailed competition against the advantage in service resulting from the transaction and that, if the agency's conclusion is not supported by adequate evidence and findings, the transaction may be upset on grounds which take antitrust policy into account.[4] Where exemption from the antitrust laws has not been legislated, the accommodation of the competitive and interventionist approaches poses complex problems, the sound solution of which requires painstaking analysis.[5]

Accommodation of the antitrust and regulatory approaches to the promotion of competition in the regulated industries should vary, depending upon the nature and extent of the regulation of the industry concerned. The greater the decision-making freedom in the regulated industry, the greater is the scope of operation of the antitrust laws. In public utilities, where entry is limited to prevent wasteful competition and rates are regulated, the role of the antitrust laws is perforce narrower than in the open market. On the other hand, in the broadcasting industry, where entry is controlled solely because of the limited radio spectrum and rates are not regulated, the scope of application of the antitrust laws is broad.

The purpose of this article is to suggest a mode of accommodating the roles of the Department of Justice and the Federal Communications Commission in promoting competition in one regulated industry, the broadcasting industry. The suggested solution might well be adaptable to some other regulated industries.

39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1958); Webb-Pomerone Act § 2, 40 Stat. 517 (1918), 15 U.S.C. § 62 (1958); Clayton Act § 7, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

[3] FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 453 (1961).

[4] McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944).

[5] See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 261-93 (1955).

I

Encouraging Competition in Broadcasting Through the Regulatory Approach

In assaying the appropriate accommodation of the roles of the Department of Justice and the Federal Communications Commission in promoting competition in broadcasting, consideration should be given to the pervasiveness of the competitive element in the Commission's regulation of broadcasting.

The Federal Communications Act expressly makes the antitrust laws applicable to broadcasting and provides for the preservation of competition in broadcasting.[6] Further, it states that radio broadcasters shall not be deemed common carriers.[7] In its *Report on Chain Broadcasting* issued in 1941, the Commission recognized it

> should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the absence of Congressional action exempting the industry from the antitrust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity.[8]

In 1959, the Supreme Court in *United States v. RCA*[9] held that approval by the Commission of the transfer of a station, after considering and deciding all issues relative to the antitrust laws which were before it, did not foreclose the Department from bringing an antitrust suit to challenge the transfer. Since the antitrust and regulatory approaches to promoting competition are broadly applied in broadcasting, the area of potential conflict between the approaches is substantial.

The Commission implements the Federal Communications Act through three basic elements of policy: competition, diversification, and licensee responsibility. The Commission has encouraged competition in broadcasting by (a) promoting new entry into each com-

[6] 48 Stat. 1087 (1934), 47 U.S.C. §§ 313-14 (1958). The Supreme Court has recognized that broadcasting is an area of free competition, FCC v. Saunders Bros. Radio Station, 309 U.S. 470, 475 (1940); that in regulating in the "public interest, convenience and necessity," the Commission may consider antitrust policy, NBC v. United States, 319 U.S. 190, 222-24 (1942); and that the Commission may deny a requested action on the sole ground that the action would be incompatible with antitrust policy, United States v. RCA, 358 U.S. 334, 351-52 (1959), citing Mansfield Journal Co. v. FCC, 180 F.2d 28, 33-34 (1950).

[7] 48 Stat. 1082 (1934), 47 U.S.C. § 153 (h) (1958).

[8] FCC Report on Chain Broadcasting 46-47 (1941).

[9] 358 U.S. 334 (1959).

ponent of the industry and competition between units of each component, (b) preventing anticompetitive practices, and (c) forestalling concentration of economic control contrary to the public interest. Moreover, in actions taken to implement the other two basic elements of FCC policy, diversification and licensee responsibility, the competitive element is present in varying degree.[10]

The chain broadcasting rules were adopted to control certain industry practices which had been found contrary to the public interest because the practices were designed to restrict competition in broadcasting.[11] To the industry prophecy that the rules would result in the eventual destruction of the national program service, the Commission replied: "Radio broadcasting is a competitive industry. The Congress . . . has required the fullest measure of competition possible within the physical limitations."[12]

Similarly, the purpose of the FCC Broadcast Network Study conducted from 1955 to 1957 was to determine whether the relationship between television and radio networks and their affiliates and other components of the industry tended to foster or impede the development of a nationwide competitive broadcasting system.[13] All of the changes in industry practices recommended as a result of that study were intended to further the public interest in broadcasting through promoting competition between and among all components of the broadcasting industry, diversifying opinion and program sources, and protecting the freedom of the licensed broadcaster to exercise his responsibility.

New entry at the local level has been encouraged to the extent of disregarding contentions that the potential advertising revenue will not support the existing station and the proposed entrant at an economic level necessary to provide program service meeting the public interest standard.[14]

The deintermixture report and order in 1956 recognized that UHF stations could not compete with VHF stations and sought to

[10] The role of the competitive element in the FCC's regulation of broadcasting is analyzed in FCC NETWORK BROADCASTING, REPORT OF THE NETWORK STUDY STAFF TO THE NETWORK STUDY COMMITTEE 64-106 (1957). This report is hereinafter referred to as NETWORK BROADCASTING, and the pagination is to the reprint by the Committee on Interstate and Foreign Commerce, H.R. REP. No. 1297, 85th Cong., 2d Sess. (1958).

[11] FCC REPORT ON CHAIN BROADCASTING 88.

[12] *Ibid.*

[13] NETWORK BROADCASTING 1.

[14] Southeastern Enterprises, 22 F.C.C. 605 (1957); Voice of Cullman, 6 P & F RADIO REG. 164 (1950).

equalize opportunity by allocating frequencies in such manner that stations in the same community would either be all VHF or all UHF.[15] Similarly, the recent legislation authorizing the Commission to require that television receivers shipped in interstate commerce be capable of receiving all frequencies allocated to television broadcasting was intended to render UHF stations competitive with VHF ones.[16]

For an example of promotion of competition at the network level, one may refer to the early days of radio, when the Commission ordered NBC, which owned two radio networks, the Red and the Blue, to divest itself of one of the networks.[17] The Blue network was divested and became ABC. When ABC proved unable to compete with the established networks, the FCC approved the merger of ABC and United Paramount Theatres in order that ABC might obtain sufficient working capital to develop a competitive network.[18]

An example of action by the Commission to forestall undue economic concentration of control is the multiple ownership rule, limiting the number of television stations which the same interest may own to seven, not more than five of which may be in the VHF spectrum. The Commission has emphasized that these rules are intended to implement congressional policy against monopoly and to preserve competition.[19] Whether the ceiling is rightly placed is another matter.[20]

In evaluating an application for a license to broadcast, the Commission has recognized a duty to consider antitrust violations by the applicant.[21]

Under present circumstances, the principal competition with networks must come from the national spot system of broadcasting.

---

[15] FCC Docket No. 11532.

[16] 76 Stat. 150 (1962), 47 U.S.C. § 303 (s) (Supp. IV, 1963).

[17] Radio Corp. of America, 10 F.C.C. 212, 213 (1943).

[18] FCC Docket No. 10031, 8 P & F RADIO REG. 541 (1953).

[19] See, *e.g.*, FCC Docket No. 8967. See also FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

[20] The pattern of ownership of television stations in the largest, commercially desirable markets is one of very high concentration of multiple ownership. In bargaining with networks, national spot representatives, and independent program suppliers, multiple station-unit owners, acting for their group of stations as a whole, have been able to obtain more favorable terms than single station owners receive. The FCC Broadcast Network Study staff recommended that the FCC, in the long run, seek a pattern of ownership which looks toward one station to a customer. NETWORK BROADCASTING 533-600 (see especially 560-68).

[21] FCC Docket No. 9572, *Report on Uniform Policy as to Violations by Applicants of Laws of the United States* (1951).

Prior to 1959, CBS and NBC represented some of their affiliated stations in national spot sales. The Commission found that, as competitors of their affiliated stations for national television advertising and as competitors with the national spot system of television advertising, the networks had conflicting interests in their affiliates' national spot rates. It might be in the interest of the station to establish its national spot rate substantially lower than its network rate to attract national spot advertising. It was in the interest of the network, however, in protecting network rates, to set the national spot rate as high as the network rate. Thus, when a network represented an affiliated station in national spot television, the interest of the network was served by influencing the affiliated station to set a high, anticompetitive rate for national spot sales; and such price leadership served as an example to other affiliated stations.[22] Accordingly, the Commission prohibited network representation of affiliated stations in national spot sales.[23]

The FCC currently has under advisement the report of the Office of Network Study on Television Network Program Procurement which, in the light of findings that the networks have high concentration of control of television programming and that this concentration limits the opportunity of the national spot system to compete with the network system,[24] has recommended that networks be prohibited from owning an interest in programs for syndication in the national spot system and that the ownership by networks of programs broadcast over the networks in prime time not exceed fifty per cent.[25]

The Commission's prohibition of the option time practice, discussed hereinafter, was based on findings that the practice restrains competition contrary to the public interest.

Thus, most action taken by the FCC reflects to some degree the competitive element in broadcast regulatory policy. The competitive element is pervasive. However, it is accommodated with other basic elements of FCC policy, diversification and licensee responsibility.

In characterizing the competitive element in the regulation of

[22] FCC 59-1119 (1959), FCC Docket No. 1276.

[23] 47 C.F.R. § 3.658 (i) (Supp. 1963).

[24] FCC TELEVISION NETWORK PROGRAM PROCUREMENT 102-05 (1963). Pagination herein is that of the reprint of the House Committee on Interstate and Foreign Commerce, H.R. REP. No. 281, 88th Cong., 1st Sess. (1963).

[25] *Id.* at 117-18.

broadcasting as pervasive, it is not implied that the FCC has in every instance given appropriate encouragement to competition. Judgment will differ as to whether the FCC has in some instances soundly weighed the essentiality of an industry practice against the impingement of that practice upon the public interest and the antitrust laws.[26]

II

EXAMPLES OF CONFLICT BETWEEN THE DEPARTMENT AND THE COMMISSION IN APPLYING THE ANTITRUST AND REGULATORY APPROACHES TO BROADCASTING

To illustrate the need for accommodation of the antitrust and regulatory approaches in encouraging competition in broadcasting, three instances of conflict between the Department and the Commission can be cited.

A. The Option Time Practice

Time optioning received extensive study by the Commission's Broadcast Network Study staff, established in 1955.[27] This group concluded that time optioning restrained competition contrary to the public interest, that the practice was not necessary to the operation of healthy networks, and that the practice should be prohibited under the public interest standard. It concluded further that the practice contravened the antitrust laws.[28]

Following issuance of the staff report, the Commission held hearings thereon[29] and concluded by a four to three vote that time optioning was reasonably necessary to the successful conduct of network operations and, thus, was in the public interest.[30]

In accordance with an understanding between the Commission and the Department, the Commission submitted its ultimate findings on time optioning to the Antitrust Division and requested a formal

[26] For example, see STAFF OF SUBCOMM. No. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., THE ANTITRUST LAWS (Comm. Print 1959); *Hearings Before the Antitrust Subcommittee, House Committee on the Judiciary, Monopoly Problems in the Regulated Industries,* 84th Cong., 2d Sess., serv. 22, pt. 2, vol. 1, at 3309-40 (1956).

[27] The option time practice is discussed and analyzed in NETWORK BROADCASTING 279-401.

[28] For the antitrust analysis of the option time practice, see NETWORK BROADCASTING 379-89. See also FCC Docket No. 12285, *In the Matter of Study of Radio and Television Network Broadcasting,* at 3636-64 (1958) (testimony of Louis H. Mayo).

[29] FCC Docket No. 12285, *In the Matter of the Study of Radio and Television Network Broadcasting* (1958).

[30] FCC 58-37 (1958), FCC Docket No. 12285.

opinion on the antitrust aspects of the practice.[31] By letter of February 27, 1959, the Assistant Attorney General in charge of the Antitrust Division rendered a formal opinion to the FCC Chairman in which it was concluded that "viewed either as an 'exclusive dealing' or 'tying' device, the Commission's own findings require the conclusion that option time runs afoul of the Sherman Act."[32] The exclusive dealing analysis, in brief, was that time optioning predisposed or obliged affiliates to take network programs, thereby unduly restricting competition by independent program sources, nonnetwork advertisers, and independent stations and unduly restricting new network entry. The tying device analysis was that desired programs were tied to undesired programs, contrary to the principles established in *United States v. Paramount Pictures, Inc.*[33] and *Northern Pac. Ry. Co. v. United States.*[34] While finding that time optioning ran afoul of the Sherman Act, the Department did not file an antitrnst suit to prohibit the practice. On inquiry by the press, the Department explained that it would await disposition of the time optioning proceeding before the Commission.[35]

The case law relating to antitrust aspects of broadcasting handed down since this formal opinion was rendered does not derogate from the position that the option time practice "runs afoul" of the Sherman Act.[36]

---

[31] FCC 59-33 (1959), FCC Docket No. 12285. The understanding had heen that findings on both the "time optioning" and "must buy" practices would be submitted for opinion on the antitrust aspect. However, thereafter the "must buy" practice was voluntarily discontinued. Accordingly, the findings on "must buy" were not transmitted. Prior to 1957, CBS and NBC engaged in the so-called "must buy" practice, under which the advertiser, as a condition to using the network service, was required to purchase time from a "basic" group of stations designated by call letter. It was found that some advertisers were required under this practice to take some stations not desired and that, in exchange for the economic advantage of being placed on the "must buy" list, some stations accepted network programs which they would not otherwise have been disposed to carry. NETWORK BROADCASTING 523. Also, the practice was of doubtful legality under § 1 of the Sherman Act, since it was similar to the "tie-in" and "block booking" practices condemned in Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), and United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). NETWORK BROADCASTING 502-22. Following these findings and the recommendation that the practice be prohibited, CBS and NBC voluntarily discontinued the practice.

[32] FCC Docket No. 12285, FCC Document No. 70379 (Feb. 27, 1959).

[33] 334 U.S. 131 (1948).

[34] 356 U.S. 1 (1958).

[35] Broadcasting, March 9, 1959, p. 70.

[36] In United States v. Loew's, Inc., 371 U.S. 38 (1962), the Supreme Court held that block booking of copyrighted motion pictures for television exhibition was a tying arrangement in violation of § 1 of the Sherman Act. The Court emphasized that the fact that the block booking arose in the context of television, rather than

Although the Commission has stated that its regulation of broadcasting must be compatible with the antitrust laws, it did not choose to follow the formal opinion that time optioning violated the Sherman Act. Rather, it issued a notice of rule making, looking toward a further limitation of time optioning. Thereafter, it modified the option time rule so as to reduce the period subject to option from three to two and one-half hours in each of the four segments of the broadcast day, and it provided greater flexibility to the broadcaster in rejecting programs offered by the network during option time.[37] An appeal was taken from the Commission's decision, one basis being that time optioning violated the antitrust laws.[38] Thereafter, the Commission moved to remand the case for a review of its report and order in the option time matter,[39] and the motion was granted. After further notice of rule making,[40] the Commission, by a six to one vote, determined that time optioning was not essential to the operation of networks and prohibited time optioning on the ground that the practice restrained competition contrary to the public interest. The decision was not based, in whole or in part, on the antitrust laws.[41]

In putting to one side industry contentions that it was inappropriate for the FCC to reconsider the time optioning matter, the Commission stated that it must be free at any point in time to weigh

---

motion pictures, was not a basis for distinction. *Id.* at 48. In CBS v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961), it was held that the television "service" is not a "commodity" within the Clayton Act. However, the decision does not preclude a finding that option time is an unreasonable restraint, or even a per se violation, contrary to § 1 of the Sherman Act. United States v. CBS, 215 F. Supp. 694 (S.D.N.Y. 1963), involved a CBS compensation plan which had a strong clearance incentive in the nature of a substitute for option time. A motion for final judgment without trial was denied on the ground that a per se violation of the antitrust laws had not been established and that determination of the legality of the restraint should be reached on the basis of a trial. American Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848 (S.D.N.Y. 1963), involved a network requirement that the advertiser accept, as a condition to advertising over the network, a total of 130 stations or the financial equivalent thereof (the so-called "minimum buy" practice), whereas the advertiser desired only ninety-five stations. The network's motion for summary judgment was denied since the complaint alleged a possible tying arrangement under § 1 of the Sherman Act.

[37] FCC 60-1089 (1960), FCC Docket No. 12859.

[38] Times-Mirror Broadcasting Co. v. United States, Case No. 16068 (D.C. Cir. 1961).

[39] FCC 61-529 (1961), FCC Docket No. 12859.

[40] FCC 61-582 (1961), FCC Docket No. 12859.

[41] 28 Fed. Reg. 5501 (1963); FCC 63-497 (1963), FCC Docket No. 12859. The FCC denied three petitions for reconsideration of this report and order. FCC 63-802 (1963), FCC Docket No. 12859.

the restraining effect of a practice against its essentiality.[42] Insofar as the public interest standard is concerned, this is a sound doctrine. Broadcasting is a dynamic industry and, as circumstances in the industry change, the FCC has a duty to evaluate the changed circumstances in the light of the public interest standard. However, any such evaluation must be compatible with the antitrust laws. It may be noted that since the Commission's report and order on time optioning rely upon the public interest standard in prohibiting the practice rather than upon the antitrust laws, the door is left open to reinstate the practice in the event that changing circumstances warrant such action.

B. The NBC-Westinghouse Exchange of Stations

Another instance in which the Department and the Commission reached conflicting decisions in a broadcasting matter having antitrust aspects involved the transfer by Westinghouse Broadcasting Company of its station in Philadelphia to the National Broadcasting Company.[43] The FCC staff report pointed out that the importance to Westinghouse of NBC affiliation for its stations in Philadelphia, Boston, and Pittsburgh exerted pressure on Westinghouse in the negotiations with NBC. On the public interest level, the proposed exchange involved a problem of undue concentration of control by NBC of wholly owned stations in the middle Atlantic states, constituting a possible violation of the Commission's multiple ownership rules. On August 12, 1955, the Commission advised the Department of the proposed transfer and of the results of its investigation. Three members of the Commission favored approving the transfer without a hearing. However, the majority caused so-called section 309 (b) letters[44] to be sent to the parties. On the basis of the com-

[42] FCC 63-497, para. 61 (1963), FCC Docket No. 12859.

[43] The NBC-Westinghouse exchange of stations, including the conflicting positions of Department of Justice and FCC on the antitrust aspect, was the subject of extensive hearings by the Antitrust Subcommittee of the House Committee on the Judiciary. The Subcommittee's findings are reported in *Report on the Television Broadcasting Industry*, H.R. REP. No. 607, 85th Cong., 1st Sess. 97-108 (1957).

[44] Section 309 (b), as of the period of the NBC-Westinghouse exchange of broadcasting stations, provided that if it should be unable to find that the public interest, convenience, and necessity would be served by grant of an application, the Commission should advise the applicant and other known parties in interest of "the grounds and reasons for its inability to make such finding" and give them an opportunity to reply. Upon receipt of the responses, the Commission was required either to approve the application, if it was able to find that the grant was in the public interest, or to set the matter for public hearing if it still was unable to make such a finding. Act of July 16, 1952, ch. 879, § 309 (b), 66 Stat. 715.

ments so elicited and without further hearing, the Commission approved the transfer on December 21, 1955. On December 27, 1955, before this action had been made public, the Department notified the Commission that there was a "serious question" that the proposed transfer violated the antitrust laws and that the Department's investigation would soon be completed. On the following day, before the Department's letter had come to the attention of the Commission, the Commission's approval of the transfer was made public. The Department then filed an antitrust suit to challenge the transfer. It should be noted, however, that in this suit the Commission filed a pleading concurring in the Department's position that the Commission's grant to NBC was not res judicata on the antitrust aspect.

C. The CBS Compensation Plan

The third example relates to a compensation plan which Columbia Broadcasting System and some of its affiliates adopted in 1961. This plan had a strong clearance incentive factor and was thought by some to be a substitute for time optioning. Under the plan, the station received only ten per cent of the station rate for the first sixty per cent of hours cleared for network programs and sixty per cent of the station rate for each additional hour. The usual share received by the station for all hours cleared is thirty per cent of gross billings. Obviously, a broadcaster cannot clear time for the network for ten per cent of the station rate and operate profitably. Accordingly, the plan in effect deferred a portion of the payment for most of the hours cleared and imposed as a condition of payment of this portion the clearance of substantially all programs offered by the network. On October 25, 1961, the Commission advised CBS that the incentive plan restrained internetwork competition and interfered with the licensee's program responsibilities, and it asked for comments from CBS and its affiliates.[45] The Department investigated the antitrust aspects and decided to file an antitrust action. Conferences between the Department and the Commission were held in which, according to a trade journal account, the Commission advised that the contemplated antitrust action would not have an adverse effect on the Commission's consideration of the matter and that the Commission would withhold action until the court had

[45] FCC 62-586 (1962), FCC Document No. 20398.

ruled in the antitrust suit.[46] On April 12, 1962, the Department filed the antitrust suit. On May 29, 1962, the Commission found that the CBS compensation plan violated its rules and ordered that the plan be discontinued.[47] One commissioner dissented on the ground that the Commission should not act until the antitrust suit had been determined. It should be noted that in this instance both the Department and the Commission, while proceeding independently, were acting to prohibit the offending practice.

III

THE APPLICABLE LAW

The doctrine of primary jurisdiction is applied to determine whether a matter shall be considered by a regulatory agency before the matter comes under judicial scrutiny.[48] If Congress has vested primary jurisdiction of a matter in the regulatory agency, the courts withhold action until the agency has decided the matter.[49] Of course, enforcement of the antitrust laws is vested by Congress in the Department of Justice.[50] While some transactions approved by regulatory agencies are expressly exempted from the operation of the antitrust laws,[51] the exemption of actions approved by the FCC is limited to mergers of common carriers and does not apply to broadcasting.[52] Accommodation of the antitrust and regulatory approaches to the promotion of competition in broadcasting is governed largely by the decisions of the Supreme Court in *United States v. RCA*[53] and *California v. FPC*.[54]

The *RCA* case involved the transfer by the Westinghouse Broadcasting Company of its station in Philadelphia to NBC. The Commission, after considering and deciding all issues relative to the

[46] Broadcasting, April 16, 1962, p. 50.

[47] FCC 62-586 (1962), FCC Document No. 20398. Petitions to reconsider were disposed of, the Commission adhering to the position that the plan hindered the affiliate in substituting nonnetwork programs. FCC 63-500 (1963), FCC Document No. 35830; FCC 62-1143 (1962), FCC Document No. 26181.

[48] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 261-93 (1955); FULDA, *op. cit. supra* note 3, at 439-52.

[49] Texas & Pac. Ry. Co. v. Abilene Oil Co., 204 U.S. 426 (1907).

[50] 62 Stat. 909 (1948), 15 U.S.C. §§ 4, 25 (1958).

[51] See statutes cited note 2 *supra*.

[52] 48 Stat. 1080 (1934), 57 Stat. 5-6 (1943), 47 U.S.C. §§ 221 (a), 222 (b)-(c) (1958). See also letter from FCG Chairman to the Chairman, Senate Committee on Interstate and Foreign Commerce, Jan. 3, 1957, in *Hearings Before the Senate Interstate and Foreign Commerce Committee*, 84th Cong., 2d Sess., pt. 4, at 3116-18 (1956).

[53] 358 U.S. 334 (1959).

[54] 369 U.S. 482 (1962).

antitrust laws which were before it, approved the transfer. The Department then filed an antitrust suit to upset the transfer.[55] The Supreme Court, after carefully tracing the legislative history of the Federal Communications Act, held that the doctrine of primary jurisdiction did not foreclose the Department from bringing an antitrust suit against a transfer approved by the Commission, since the Federal Communications Act did not provide a pervasive scheme of regulation of broadcasting and did not give the Commission power to decide antitrust issues as such. In so holding, the Supreme Court reiterated advice it had previously given that the Commission, in acting in the "public interest, convenience, and necessity," may consider antitrust policy and that the Commission may deny a requested action solely on the ground that the action would be incompatible with antitrust policy.[56]

In *California v. FPC,* the Supreme Court had before it the question of whether a regulatory agency may take action which goes to the merits of the antitrust aspect of a transaction after an antitrust suit has been filed with respect to the same matter. That case involved the merger of two power companies under the Natural Gas Act, which contains no express exemption of actions by the FPC from the antitrust laws. Prior to the merger, the Department had filed an action alleging that acquisition by one of the companies of the other's stock violated section 7 of the Clayton Act. Motions by the companies to dismiss the antitrust action were denied. Thereafter the FPC notified the Department that it would not stay its proceedings and invited the Department to participate in the administrative proceedings. The Department declined to participate. The FPC carried forward its proceedings and authorized the merger, which was consummated. The Supreme Court held that the action by the FPC was invalid because it could not proceed to a decision on the merits when a suit under the antitrust laws challenging the validity of the proposed merger was pending. In so holding, the Supreme Court stated:

> Our function is to see that the policy entrusted to the courts is not frustrated by the administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted.... The converse should also be true, lest the antitrust policy whose enforce-

[55] See text at page 292-93 *supra*.
[56] United States v. RCA, 358 U.S. 334, 351-52 (1959).

ment Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission.[57]

As the dissent points out,

> The holding does not turn on any facts or circumstances which may be said to be peculiar to this particular case. It is not limited to the Federal Power Commission proceedings.... [T]he Court appears to lay down a pervasive rule... that seemingly will henceforth govern every agency action involving matters with respect to which the antitrust laws are applicable and antitrust litigation is then pending in the courts.[58]

There appears no reason why the decision would not be applied to all actions by the Federal Communications Commission relative to broadcasting in which the decision reached is incompatible with the antitrust laws, if antitrust litigation is pending in the courts. In fact, the Court drew an analogy to actions by the FCC, stating:

> Here,... [as in the *RCA* case], while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity,"... there is no "pervasive regulatory scheme"... including the antitrust laws that has been entrusted to the Commission.[59]

It appears that the Supreme Court intends for the doctrine to apply to any agency action if there is no express statutory exemption of the action from application of the antitrust laws and the statutory authority under which the regulatory agency acts does not authorize the agency to put into effect a "pervasive regulatory scheme."[60] Since broadcasting is an area of free competition and is not expressly exempted from the antitrust laws, it is clear that the doctrine of *California v. FPC* applies to broadcasting.

---

[57] California v. FPC, 369 U.S. 482, 490 (1962).

[58] *Id.* at 491.

[59] *Id.* at 485. Query whether the restraint on regulatory agencies imposed by the *RCA* and *California* cases extends to action of a regulatory agency which is *compatible* with the antitrust laws. For example, in the matter of the CBS compensation plan, after Department of Justice had filed an action alleging that the plan violated the antitrust laws, the FCC, while the suit was pending, found that the plan violated its rules and ordered that the plan be discontinued. It must be recognized that, even if such FCC action does not render an antitrust suit moot, the strength is drawn out of the suit when the defendant has been prohibited by regulation from continuing the practice. Yet, if the practice is offensive to the antitrust laws and against the public interest, the greater public interest seems served by permitting regulatory action, compatible with the antitrust laws, to be taken at the earliest feasible time.

[60] See Sobel, *Approved Mergers and Antitrust Laws*, 37 N.Y.U.L. REV. 735 (1962), relating to the applicability of antitrust laws to combinations approved under the Bank Merger Act, the Federal Power Act, and the Natural Gas Act.

IV

ACCOMMODATION OF THE ANTITRUST AND REGULATORY APPROACHES IN BROADCASTING

The existing relationship of the antitrust laws to the broadcasting industry is undesirable because it results, on the one hand, in long delay in obtaining requisite governmental approval or, on the other hand, in wasteful "unscrambling" of enterprises or the discontinuance of long-standing industry practices.

Under the *California v. FPC* ruling, the Federal Communications Commission, as has been shown, cannot proceed to a decision on the merits of a matter when a suit challenging the validity of the proposed transaction is pending. In a sense, this is inverted primary jurisdiction. This doctrine may result in long delay in action by the Commission, since some antitrust cases, through investigation, deliberation, and court proceedings, require several years to run their course. Meanwhile, the administrative process is "hamstrung," and the regulatory agency must hold in suspense an application for a permit or some other important action. Recognizing the merit of staying regulatory action the validity of which is questioned in a pending antitrust suit, procedures should be adopted under which antitrust litigation which holds up regulatory action will be expedited.

Under the *RCA* decision, the Department of Justice may upset a transaction which has been approved by the Commission and effectuated by the industry if the transaction is found to contravene the antitrust laws. Important economic decisions are made with an approving pat on the back by one hand of government while the other hand of government upsets the transaction. While a regulatory agency should not be permitted to frustrate enforcement power entrusted by the Congress to the Department, neither should two arms of government be so lacking in coordination.

The Commission and the Department have alleviated the difficulty to some degree through informal liaison. When the Commission determines that a matter before it seems to present an antitrust question, the Commission instructs its legal officers to advise the Department thereof and to inform the Department of developments.[61] However, the Commission does not deem itself obligated

[61] FCC letter, Jan. 3, 1957, *supra* note 52.

to withhold action on a matter which presents an antitrust question. Recognizing that rulemaking which approves an industry practice or transaction having an antitrust aspect may render prosecution of the antitrust suit more difficult, the Commission sometimes consults with the Department prior to taking final action in the rulemaking proceeding.[62] The Department, upon request by a regulatory agency, will advise it regarding the antitrust aspects of a matter before the agency. For example, upon the request of the Commission for advice regarding the antitrust aspect of the time optioning practice, the Department rendered a formal opinion advising that the practice ran afoul of the Sherman Act. Also, the Department may intervene in agency proceedings if the matter concerns competition in the public interest.[63]

Similarly, the Department may issue a "clearance letter" to a private party who requests review of a proposed transaction for possible antitrust violation. The "clearance" waives the Department's right to bring a criminal proceeding against parties who put into effect a proposed business transaction, but it does not prevent the Department from instituting civil proceedings.[64] It is clear that the Department does not intervene in many matters before administrative agencies, including the Commission, in which a possible antitrust violation may arise from the contemplated course of action.[65] For example, the Department did not intervene in any of the three matters heretofore discussed in section II,[66] all of which involved serious antitrust problems. Under existing law, the Commission is not required to give notice to the Department that an antitrust issue has arisen in a matter involving broadcasting, and the Department has no duty to intervene in such proceedings.[67]

One way of eliminating conflict between the Department and the Commission in promoting competition in broadcasting is to exempt the adjudicatory and rulemaking functions of the Commission from the antitrust laws. Statutory exemption of transactions approved by regulatory agencies has been enacted in several im-

---

[62] *Ibid.*

[63] VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 205 (1963).

[64] *Id.* at 206-07.

[65] See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 286-87 (1955).

[66] See text at pages 289-94 *supra*.

[67] United States v. RCA, 358 U.S. 334, 352 (1958).

portant business areas,[68] but the exemption approach has not thus far been extended to broadcasting.[69]

Exemption of transactions approved by regulatory agencies from operation of the antitrust laws should be carefully limited. Once the area is exempted from the application of antitrust laws, the discipline imposed by free competition is prevented and the necessity for a substitute discipline, regulation by the agency, is increased. While the *McLean* doctrine[70] cautions the regulatory agency, acting in an exempt area, to take into account the effect of the curtailed competition against the advantage in service resulting from the transaction, regulatory agencies are not geared to applying competitive principles to what they conceive of as an interventionist field.[71] Although the anticompetitive impact of an industry practice or transaction should be studied in the context of the circumstances in the industry, the antitrust laws encompass principles which should be developed uniformly in their application to the whole industrial-commercial complex. Exemptions undercut this growth and weaken the antitrust fabric. Moreover, the régulatory agencies tend to expand unduly the area to which the exemption applies.[72] It has been sometimes suggested that regulatory agencies become conditioned over a period of time to the point of view of the industry with which they are in continuing association. In some situations loss of objectivity may result in considering other points of view in the public interest, such as that represented by the antitrust laws. The public interest seems best served by limiting exemptions from the antitrust laws to those instances in which regulation is or should be so pervasive that there is little, if any, room for meaningful competition in any degree. In this vein, the Attorney General's National Committee to Study the Antitrust Laws stated:

This Committee, we repeat, endorses competition as the major rule in our private enterprise economy. We recognize that competition can be impaired either by conduct transgressing the antitrust laws or by government regulation fixing prices or rates or restricting freedom of entry. The Committee notes an apparent trend toward such government con-

[68] See statutes cited note 2 *supra*.

[69] FCC letter, Jan. 3, 1957, *supra* note 52.

[70] McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944); see also text at note 4 *supra*.

[71] For an amplification of this view, see ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 288-93 (1955) (views of Louis B. Schwartz).

[72] *Ibid.*

trol. We call attention to the fact that such regulation tends to beget further regulation.[73]

Exemption of broadcasting from the operation of the antitrust laws would be especially unwise. Broadcasting is an area of free competition. While broadcasting is regulated by the Commission, it is regulated with a view to promoting competition. The antitrust laws are expressly made applicable to broadcasting because it is an area of free competition. The Commission recognizes a duty to maintain a system of broadcasting which is compatible with the antitrust laws. Furthermore, in applying the public interest standard, the Commission encourages competition by prohibiting industry practices or degrees of concentration which, while anticompetitive in a degree which is contrary to the public interest, do not constitute violations of the antitrust laws. Accordingly, it would be highly inappropriate to extend the pattern of statutory exemptions to include the broadcasting industry.

It is submitted that the best approach to accommodating the roles of the Department and the Commission in promoting competition in broadcasting would be a "marriage" of the Department and the Commission. To avoid delay in obtaining approval of a transaction or "unscrambling" of a long-standing transaction or practice, a procedure should be adopted under which the Department would have a mandatory duty to intervene in any matter before the Commission involving an antitrust aspect. The intervention would be for the sole purpose of conducting the antitrust aspect of the hearing and, within a reasonable time after closing the record, of rendering a formal opinion as to whether the existing or prospective transaction, practice, or rule would contravene the antitrust laws. The Department would benefit from the expertise of the Commission in broadcasting matters, and this would be helpful to the Department in determining whether a particular course of action would constitute a violation of the antitrust laws. The Commission, where a violation of antitrust law was not established, would be aided by the Department's expertise in antitrust matters in weighing the antitrust factor with the others which comprise the public interest standard. In most instances the Department and the Commission should reach the same determination at the administrative level. Thus, delay occasioned by litigation would be avoided and the broadcaster or other

[73] *Id.* at 269.

component of the industry would know whether it was free to take a course of action without danger of later challenge by the Department. The industry would be saved the substantial economic loss which results from "unscrambling" complicated business enterprises and relationships.

In an exceptional case, the Department might conclude that the contemplated action was contrary to the antitrust laws and the Commission might conclude that the requested action was in the public interest and did not constitute a violation of the antitrust laws. In such a case, the business concerned would be on notice of the proximity of Scylla and Charybdis and, in the light of that knowledge, it could determine the wisdom of continuing on course. Moreover, with the benefit of the record already made, in the event of a disagreement between the Department and the Commission regarding the antitrust aspect, the Department would be prepared to file an antitrust suit promptly. While expediting statutes may often be of questionable merit, a difference of opinion between two arms of government provides a reasonable basis for expediting any such antitrust cases, and expedition should be provided by statute. Interested parties would thus be able to obtain a decision on the antitrust aspect prior to making a heavy investment in a risky venture.

The suggested statute might be drafted along the following lines:

> In any adjudicatory proceeding or rulemaking proceeding, the Commission shall ascertain, as early as the information before it permits, whether there is a reasonable possibility that the requested or proposed action might constitute a violation of the antitrust laws. Upon a finding that such reasonable possibility exists, the Commission shall inform the Department of the finding and the information on which the finding is based. In the event that the Department is of the opinion that a matter before the Commission involves a reasonable possibility of violation of the antitrust laws and the Commission holds a contrary view and does not report the matter to the Department, the Department shall have the right to intervene in the matter for the sole purpose of determining the antitrust aspect.
>
> Upon receiving such finding, the Department shall, within thirty days, or if further investigation by the Department is required, within ninety days, (a) intervene in the proceeding for the sole purpose of determining the antitrust aspect, or (b) notify the Commission in writing that it does not find a reasonable possibility of antitrust violation upon the information submitted to it. In the event that the Department does not intervene in the proceeding, this shall constitute a defense in any subsequent antitrust suit in the same matter by either the Depart-

ment or a private litigant, in the absence of substantial new evidence of antitrust violation or subsequently occurring facts constituting substantial evidence of antitrust violation. If the Department intervenes in the proceeding, it shall have the responsibility of conducting, with the cooperation of the Commission and its staff, the antitrust aspect of the hearing.

Upon completion of the hearing, the record shall remain open for ninety days for the receipt of a formal opinion from the Department on the antitrust aspect. Such opinion may conclude (a) that the contemplated action does not constitute a violation of the antitrust laws, or (b) that the Department is of the opinion that the existing circumstances or contemplated action, if permitted to continue or occur, would constitute a violation of the antitrust laws and the Department will within ninety days file an antitrust suit to prohibit the existing practice, or the contemplated action, should the Commission approve such action. In the event that the Department should find that there is no objection to the existing practice or proposed action on antitrust grounds, this finding shall constitute a defense to any antitrust action on the same matter brought by the Department or a private litigant, in the absence of substantial new evidence of antitrust violation or subsequently occurring facts constituting substantial evidence of antitrust violation.

If, after giving notice that it will not intervene, or if, after intervening and giving a formal opinion that the contemplated action would not constitute a violation of the antitrust laws, substantial new evidence of antitrust violation or subsequently occurring facts constituting substantial evidence of antitrust violation is obtained, the Department shall have authority to file a civil antitrust suit in the matter. However, such evidence shall not be competent in a criminal proceeding except as to a party who had knowledge of the evidence and withheld it.

In the event that the Department should find that the existing practice or contemplated action would contravene the antitrust laws and the Commission should authorize the continuance of the existing practice or initiation of the contemplated action, and in the event that the Department should thereafter file an antitrust suit to prohibit the existing practice or contemplated action, such suit shall be expedited and shall be given precedence on the federal court calendars over all antitrust suits not arising out of a transaction approved by, or a rule adopted by, a federal agency or department.

The suggested statute would recognize as a defense to an antitrust suit a formal opinion by the Department that it should not intervene because the circumstances do not show a reasonable possibility of violation of the antitrust laws or a formal opinion, rendered after the Department's intervention in the hearing, that on the basis of the hearing there is no indication that the existing practice or contemplated action would, if permitted to continue to occur,

constitute a violation of the antitrust laws. However, it is not contemplated that such a formal opinion would provide a defense where substantial evidence existed but was not submitted to or discovered by the Department in the initial determination or was not developed in the record of the hearing. It would be in the interest of the parties in such cases to bring out all the evidence in order to gain the benefit of the defense. If substantial evidence of antitrust violation existed and the Department lacked knowledge of it, an antitrust suit could thereafter be brought on the basis of such substantial newly discovered evidence. Similarly, the defense would not apply in situations where a transaction which was lawful when effected subsequently threatens competition due to changes in the industry or interindustry relationships. The Department must not be foreclosed from bringing an antitrust suit at any time that such changing circumstances result in the transaction's becoming a violation of the antitrust laws.[74] Nevertheless, the defense would provide a practical basis for action by the broadcasting industry. The substantial new evidence or subsequently occurring facts test would assure that in most instances the transaction would withstand scrutiny by the Department at a later time.

The suggested statute contemplates that the Department would have a reasonable time within which to make the initial decision whether it should intervene and a reasonable time after the hearing within which to render a formal opinion on the antitrust aspects. It may well be that the time intervals included in the suggested legislation, thirty days and ninety days, respectively, are too short.

The views of the Department, the Commission, and the industry regarding this suggested statute have *not* been obtained. It is not known whether they would oppose the suggestion. If not, they could unquestionably contribute substantial improvements to the proposed statute.

The Department already has manpower problems, and the suggested statute would require additional manpower for execution. However, if the suggestion has merit, it should be possible to persuade the Congress to provide funds for the additional personnel necessary to participate in the Commission hearings on matters having antitrust aspects. There would be a counter-balancing manpower saving because the Department would have made an investi-

[74] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

gation in connection with the administrative hearing and thus would have the benefit of the Commission's investigation and the record in the hearing.

The Department may well feel that it loses tactical control of antitrust litigation when the issue develops in an administrative proceeding before the Commission. The Department's hand in any subsequent antitrust action would be revealed in the administrative hearing. It is true that the issue may be forced at a time which is not propitious for successful antitrust prosecution. However, the thrust of federal procedure is in the direction of pretrial disclosure. It is believed, moreover, that any such considerations are outweighed by the importance of concurrent determination by the Department and the Commission of the antitrust aspect of the matter.

The suggested statute applies to rulemaking proceedings presenting an antitrust aspect, as well as to adjudicatory proceedings. The Department may have greater concern regarding intervention in a rulemaking proceeding than in an adjudicatory proceeding. The Department usually operates in the context of a concrete case. It may feel that it ties its hands as to future antitrust litigation if it renders a formal opinion that the conduct permitted by a proposed rule would not constitute a violation of the antitrust laws. Rulemaking proceedings normally involve one or more specific proposals. Hence, the Department would be able to limit its opinion to concrete proposals. Moreover, this possible objection is partially overcome by the preservation in the suggested statute of the Department's power to bring an antitrust suit where substantial new evidence of antitrust violation is found or develops. If new developments in the industry should render a practice which was valid when approved anticompetitive and contrary to the antitrust laws, the Department or the Commission would be free to reconsider the matter.

There would seem to be little basis for objection by the Commission to the suggested statute. Two cooks would not spoil this broth. While the Commission recognizes a duty to regulate compatibly with the antitrust laws, the Commission is not expected to be expert in antitrust matters. In terms of procedure and personnel organization, the Commission is ill equipped to evaluate antitrust fact elements in the public interest concept, but the Department is well equipped to provide the antitrust expertise. The antitrust

laws apply to broadcasting, and the Supreme Court has stayed the Commission's hand from the time of the filing of an antitrust suit regarding a matter before the Commission. If the Commission approves on public interest grounds a transaction which contravenes the antitrust laws, the transaction may thereafter be upset in an antitrust suit. The suggested statute would not place any additional limitation upon action by the Commission. It does not preclude approval by the Commission of a transaction after receiving a formal opinion from the Department that the transaction would contravene the antitrust laws. The suggestion would provide the Commission with the guidance of such a formal opinion. The opinion would be based upon a hearing in which the Department and the Commission have participated jointly, each benefiting from the expertise of the other. It is believed that an opinion rendered on the basis of a hearing record and after the substantial contact between the Department and the Commission which joint conduct of a hearing would entail would carry far greater weight with the Commission than an opinion not so based. Accordingly, it is believed that the Commission, after a period of experience under the suggested statute, would with rare exception follow the opinion of the Department on the antitrust aspect, at least where the opinion was based upon settled law.

The Commission is well equipped to consider facts in the public interest context and possesses expertise in broadcasting matters. Accordingly, it is questionable that the Commission should follow advice of the Department which is not based on settled law, if the Commission deems the proposed action to be in the public interest. In the event of such conflict, the Department could promptly bring the matter to issue in the courts under the suggested procedure for expediting antitrust suits when a prospective action by the Commission was being held in suspense.

The industry may well oppose the suggestion. The suggested solution would provide, in most instances, uniformity of the Department and Commission position with respect to the antitrust aspect of a transaction, and this uniformity would emerge at the administrative level. This would place the industry on firmer ground in determining whether it should embark upon a contemplated venture. The determination of the antitrust aspect would be made timely and would avoid the "unscrambling" of enterprises

or relationships with attendant economic waste. Unquestionably, industry desires such assurance. However, the broadcasting industry is accustomed to dealing with the Commission, and it may well feel that Commission waters are more salubrious than the climate in the Department. The industry may fear that the greater certainty provided by the suggested statute would be the certainty of a formal opinion that a desired course of action would "run afoul" of the antitrust laws. Given a choice between the existing situation and the suggested statute, it is quite possible that the industry would favor the *status quo*. The broadcasting industry would probably favor the express statutory exemption approach. However, as has been previously indicated herein, exemption from application of the antitrust laws is foreign to an area of free enterprise like broadcasting.

It should be remembered always that to have a marriage two parties must consent, and it is not certain that a "shot gun" marriage would be more harmonious here than it has proved to be in domestic relations. Moreover, in the light of the broadcasting industry's possible desire for the *status quo*, it may not be a marriage which is proposed but an eternal triangle.