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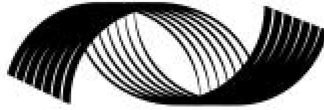

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The FCC Cross-Ownership Rules Should Be Repealed

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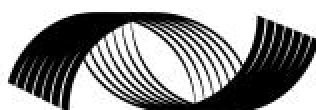

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Abstract

The Federal Communications Commission prohibits a business from owning a small newspaper and a small radio station or television station in the same town. I argue that the FCC's cross-ownership rules containing these prohibitions should be repealed because they do not have a useful economic justification.

The FCC Cross-Ownership Rules Should Be Repealed

Robert W. Hahn

A generation ago, most Americans waited in line for bank tellers, thought a long-distance phone call was a luxury, and learned of news either from a local newspaper or a handful of local television and radio stations. Automatic teller machines, wireless phones, and the Internet were fantasies. Federal and state governments regulated the ownership of banks, telephone companies, and broadcast stations with a strong arm, not permitting companies in one line of business to own much else.

Technology has changed, and so too has much of government law and policy regarding corporate ownership. The rules limiting the ownership of banks, telephone companies, and many other assets have been modified to allow for more competition.

One exception is a curious set of rules written by the Federal Communications Commission (FCC) over a quarter century ago to prohibit one company from owning both a newspaper and a broadcast station in the same market.[1] Strangely, one company may lawfully own every newspaper in town. And many companies may lawfully own more than one broadcast station. But if one company should try to own both one tiny daily newspaper and one weak broadcast station, that company would be violating current FCC rules.

The newspaper-broadcast ownership rules are triggered only if a newspaper owner attempts to purchase a broadcast station, or a broadcast station owner attempts to purchase a newspaper. The automatic trigger makes little sense. In this comment, I argue that the newspaper-broadcast ownership rules are not likely to serve a useful function, and therefore should be repealed.

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[1] Appendix A, *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order,* Docket No. 18110, 50 FCC 2d 1046 (1975).

Specifically, I consider the following five questions:

(1) Does the federal government have specific agencies with the authority and expertise to evaluate any competitive harm that might arise from the acquisition of one asset by a company?

(2) Should the government have multiple rounds of antitrust review for the acquisition of one asset by one company?

(3) Should the government categorically prohibit one class of business from ever owning a certain asset?

(4) Is there a clear and unambiguous distinction between promoting diversity in a market and protecting competition?

(5) Is there a mechanism to provide a basis for removing the rules?

1. Does the federal government have specific agencies with the authority and expertise to evaluate any competitive harm that might arise from the acquisition of one asset by a company?

The answer to this question is "yes."

The federal government has two agencies, the Department of Justice and the Federal Trade Commission, which enforce antitrust laws to protect consumers. They enforce laws prohibiting anticompetitive behavior, such as price fixing, and they review mergers for potential anticompetitive problems. Because they coordinate with each other, just one of these agencies reviews all major mergers for compliance with antitrust laws. Many states also have active antitrust agencies or departments that monitor and review proposed transactions to ensure the welfare of citizens in their states.

The federal agencies have large, professional staffs that review all mergers of any significant size. The professional antitrust staffs rely on fact-based market analyses, described in the FTC-DOJ Merger Guidelines, and developed in detail in numerous court cases.[2] The merger review process at the antitrust agencies is predictable based on well-established precedents. Merging parties have a burden to produce requested documents,

and the federal agencies have a burden to challenge mergers in court in order to block them. The federal antitrust agencies are concerned not merely with the measures of current competition in the market but with the ease of entry and exit in the market as well.

2. **Should the government have multiple rounds of antitrust review for the acquisition of one asset by one company?**

The short answer is "no." One agency with the relevant expertise is enough.

Yet, for some heavily regulated industries, such as electric utilities, banks, and telecommunications companies, a second, duplicative federal merger review takes place.[3] An additional review is conducted by the federal agency that regulates the industry, such as the Federal Energy Regulatory Commission, the Federal Reserve Board, or the Federal Communications Commission.

For the additional federal review, the merging parties have an obligation to produce requested information, but the reviewing agency has no obligation to go to court to block a merger. The agency can simply refuse to issue a required regulatory license. Businesses need these federal licenses to operate a federal bank, an electricity distribution company, or a radio station.

Unfortunately, these agencies do not have a well-defined merger review process that has been honed by decades of court precedent. Instead, they have an unpredictable process with unspecified standards.[4]

Moreover, a proposed merger can pass muster under federal antitrust law at the specialized antitrust agencies, but fail to pass another round of federal merger tests imposed by the regulatory agency--a form of double jeopardy. The multiple reviews also provide an opportunity for agencies to seek additional "rents" from the merging parties.[5]

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[2] See, e.g., Department of Justice and Federal Trade Commission, *1997 Horizontal Merger Guidelines*, 1997, which were based on previously published guidelines in 1984 and 1992. Available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html.

[3] The review by the FTC or the DOJ typically precedes the review by the regulatory agency.

[4] The Federal Communications Commission reviews mergers between broadcast station owners. The Commission has no rules to describe to the public how it evaluates such mergers. Recently, the FCC sought comment on how it should evaluate radio mergers. See "Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets" (MM Docket 01-317) and "Definition of Radio Markets," (MM Docket 00-244), *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, FCC 01-329, released November 9, 2001.

[5] McChesney, Fred S. 1997. *Money for Nothing: Politicians, Rent Extraction, and Political Extortion.* Harvard University Press: Cambridge, Massachusetts.

This double jeopardy imposes substantial costs on the unfortunate firms in the specialized industries that decide that they may want to merge. Even if all goes smoothly in the two stages of review, the merger is still delayed longer than it likely would be if it were reviewed by a single agency. The likelihood that all will go smoothly is also significantly reduced with two reviewing agencies involved. Delays and uncertain outcomes are costs to the merging parties that, in some instances, may cause them to avoid efficient mergers entirely.

The federal merger review process is discriminatory in that one set of merging firms faces one process, and similarly situated firms in certain specialized industries face an entirely different process. One set of firms faces a predictable process; the other an unpredictable process.

3. Should the government categorically prohibit one class of business from ever owning a certain asset?

Categorical prohibitions generally do not promote economic efficiency. The newspaper cross-ownership rule is no exception. From an economic perspective, it is impossible to construct efficient rules that categorically prohibit the joint ownership of two or more assets, based on either the characteristics of the assets or the characteristics of the market.

An inefficient ownership rule, such as the current newspaper cross-ownership rule, cannot be modified to be efficient based on a theory that there is a more efficient version of the rule, if only it can be properly calibrated. The rule makes no more sense if limited to large or small newspapers, or large or small broadcast stations, or large or small markets.

To the extent that there are anticompetitive concerns for the joint ownership of specific assets in a specific market, those transactions should be evaluated on a case-by-case basis. That is why the antitrust agencies, which review all types of mergers, refrain from using any blanket prohibitions based on either assets or markets.[6] Ironically, only agencies that are not specialists in merger reviews, such as the FCC, have such blanket prohibitions.

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[6] See *1997 Horizontal Merger Guidelines*.

To illustrate the point, consider two kinds of proposed mergers – one between two newspapers and a second between a newspaper and a local radio station. A merger between two newspapers in one market would be reviewed by just one antitrust agency, the FTC. That agency is competent, in my view, to render a decision that would protect the public interest from any possible abuse that might arise from the merger.

In contrast, consider a merger between a newspaper and a local radio station. Such mergers are proscribed by the FCC. The FCC rule is equivalent to holding that reviews by one, two, or a thousand federal agencies will be inadequate to protect the public from the harms that could arise from a merger between a newspaper and a broadcast station. No matter what economic efficiencies and consumer benefits may arise from such a merger, FCC rules prohibit it. The subtle and sophisticated antitrust analysis used to evaluate mergers in all other industries gives way to a rather unsubtle, blunt tool: the FCC's newspaper cross-ownership prohibition. Such a proposed merger is denied without considering the potential benefits to consumers.

4. **Is there a clear and unambiguous distinction between promoting diversity in a market and protecting competition?**

I believe the goal of promoting diversity is likely to be met when the government protects competition, and thus the distinction between the two is overdrawn.

The measures of "diversity" used by the FCC are difficult to distinguish from the measures of "competition" used by the antitrust agencies. In the end, the presence of diversity is difficult to distinguish from the presence of competition. Expansion of diversity is likely to be measured as expansion of competition as well. Ease of entry (and exit) into a market for competitive purposes is likely to be indistinguishable from ease of entry (and exit) for diversity purposes.

It is hypothetically possible to posit an example in which antitrust authorities would find substantial competition and entry in a market, but in which a diversity analysis would find diversity stifled. But it is difficult to point to an example in the real world.[7]

[7] One possible example is a typical small rural market that is not automatically reviewed by antitrust authorities. Even there, however, antitrust law allows private actions to block mergers.

5. Is there a mechanism to provide a basis for removing the rules?

The answer to this is "yes." Congress requires not one, but two biennial reviews of rules.

There is a general biennial review of all telecommunications rules under Section 11. That section potentially encompasses thousands of rules, but the Commission has not taken it seriously. In addition, Section 202 requires the FCC to review just its broadcast ownership rules, of which there are fewer than a dozen, once every two years[8]. Industry takes this section very seriously and comments vigorously.

Conclusion

The federal government has a well-organized, professional antitrust review process in place at the Department of Justice and the Federal Trade Commission to protect the American consumer. Multiple antitrust reviews do nothing to provide additional protection to consumers and do much to discourage otherwise efficient corporate restructuring. The government should not categorically prohibit one class of businesses from ever acquiring a specific asset. The FCC's diversity analysis does little if anything beneficial beyond what antitrust analysis provides.

Antitrust analysis is designed to distinguish between corporate restructurings that benefit consumers and those that harm consumers. The newspaper-cross-ownership rules, in the name of diversity, are likely to prohibit some transactions that would otherwise be efficient and beneficial to consumers.

When Congress asked the Commission to review its cross-ownership rules every two years, it was not an invitation to change the rule incrementally so that the biennial proceeding can be repeated forever. To the extent the current cross-ownership rules are inefficient, fiddling at the margins is not likely to make much difference. They simply should be repealed.

[8] Section 202, Telecommunications Act of 1996 – "FURTHER COMMISSION REVIEW—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."