DOCUMENT RESUME

ED 168 080 CS 502 423

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TITLE Local Media Concentration: Ad Hoc Challenges to Media Cross-Owners After "FCC v. NCCB."
PUB DATE Dec 78
NOTE 45p.; Paper presented at The Federal Trade Commission Media Symposium (Washington, D.C., December 14-15, 1978)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Broadcast Industry; Certification; Federal Government; *Federal Regulation; Legal Problems; *Mass Media; Newspapers; *Policy Formation
IDENTIFIERS Department of Justice; Federal Communications Commission; Federal Trade Commission; *Ownership

ABSTRACT

This paper explores some of the implications of cross-ownership of newspapers and other media in a single market and the role of the Federal Communications Commission (FCC), the Department of Justice, and the Federal Trade Commission (FTC) in enforcing national policy favoring a deconcentration of local mass media. It describes the history of FCC regulation of local media concentrations, looks at the potential harms and benefits of newspaper-broadcast media cross-ownerships, and proposes that the FCC distinguish between behavioral problems and structural problems. It further suggests that the Department of Justice should bring antitrust action for behavioral monopolistic activities of concentrated owners and that the FTC should look at local media concentrations under Section Five of the Federal Trade Commission Act. (TJ)

ED168080

Before The

Federal Trade Commission

Washington, D.C.

MEDIA SYMPOSIUM

December 14-15, 1978

LOCAL MEDIA CONCENTRATION:

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December 14, 1978

SS 024 223

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After FCC v. NCCB

I. INTRODUCTION

One irony of the Communications Act of 1934 is that a law that was enacted in part to temper media monopolies has instead fostered their growth. In many cities around the country one interest controls extremely large shares of the local advertising and outlets for effective mass communication. Shares of the market are sanctioned in newspaper-broadcast combinations that have been considered prima facie monopolistic in other industries. This is so despite a national need grounded in First Amendment as well as antitrust principle that the maximum diversity of information sources is essential to the public welfare.

In FCC v. National Citizens Committee for Broadcasting (NCCB),[1] the Supreme Court last summer affirmed the Federal Communications Commission rules barring future creation or acquisition of colocated newspaper broadcast combinations in the same market. While the Commission required divestiture where one party controlled the only daily newspaper and only television, or only radio station, in 16 tiny markets around the country, the agency with Supreme Court approval grandfathered the remaining cross-ownerships.

The Supreme Court left open, however, the question of the standard for hearing, leading towards denial of renewal or divestiture, in ad hoc challenges to individual concentrated media owners.

My thesis is that the FCC, the Department of Justice and the Federal Trade Commission each has an important role still to play in enforcing national policy favoring a deconcentration of local mass media. In describing these roles, I first look at the history of FCC regulation of local media concentrations, then take a closer look at the potential harms and benefits of newspaper-broadcast cross-ownerships. I conclude with a proposal for distinguishing at the FCC between behavioral problems, which should lead to sanctions which include denial or forfeiture of a license, on the one hand, and structural problems which should result in divestitures, on the other.

Similarly, I suggest that the Department of Justice should bring actions under its arsenal of antitrust laws in the federal court for behavioral monopolistic activities of concentrated owners. In addition I shall suggest that the Federal Trade Commission could look at local media concentrations under its broad authority under Section 5 of the Federal Trade Commission Act to prevent "unfair methods of competition," including anti-competitive structures. This should lead to a vigorous and competitive enforcement effort to foster vigorous and competitive mass media. This is most important in the mass media industry since, as the Supreme Court has observed, "Speech concerning public affairs is more than self-expression; it is the essence of self-government."[2] And, "the consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[3]

Simply because the FCC's rules do not break up existing cross-ownerships, then, does not mean that our national commitment to diversification of information sources need be diminished on a case-by-case approach.

II. A BRIEF HISTORY OF CHALLENGES TO LOCAL CONCENTRATIONS OF MEDIA CONTROL

A. The Broadcast Licensing Scheme

Under the Communications Act of 1934,[4] Congress delegated to the Federal Communications Commission the duty to license broadcasters for three-year renewable terms. When an applicant files for renewal, others can also apply to operate on that frequency. In such a case, or whenever there are mutually exclusive applications for broadcast facilities, the FCC holds a comparative hearing. It first determines whether any applicant is disqualified from operating a station on legal, technical, financial or character grounds. If more than one is basically qualified in these categories, the Commission then determines which is best qualified for the ensuing three year term.

In adopting this Act and its predecessor Radio Act of 1927, Congress debated the issue of monopolization of the broadcast frequencies.[5] As Mr. Justice Frankfurter observed, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."[6] It therefore provided, in addition to the "supple" and flexible public interest convenience and necessity standard,[7] the duty and authority within the Commission to (1) establish rules regulating "chain broadcasting" or networking, (2) "to encourage the larger and more effective use of radio in the public interest," and to distribute licenses "among the States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."[8]

B. Multiple Ownership Rules

In a series of rulemakings beginning in 1940 the FCC proceeded to limit broadcast ownership on both a local and national level. Thus, the Commission restricted one licensee to operation of only one FM radio,[9] one AM[10] and one commercial television frequency[11] per community. It limited to one the number of networks which an entity could operate in a single community, ordering in the wake a break-up of NBC's Red and Blue Networks.[12] These are generally known under the mishomer of "duopoly" rules.[13]

In the cases of FM and TV the duopoly standard was imposed prior to widespread licensing, and no one was in violation of the standard at the time of promulgation. In the cases of AM and networking, the Commission allowed licensees six months to comply by divestiture.[14]

The reasoning for duopoly prohibitions is twofold.[15] The underlyng interest in first amendment analysis is that the public's right to receive information necessitates the widest possible dissemination of information from diverse and antagonistic sources.[16] National antitrust policy, in addition, favors a competitive situation--here for the advertising dollar--especially in an industry where market entry is limited.[17] Thus in both the economic marketplace and the marketplace of ideas, national policy favors competitive local media, so that the flow of advertising, and other information essential to self-government and the search for truth, is unimpeded. In this connection, the Commission has been upheld in acting to prevent the possibility for monopolization or abuse rather than to await the feared result.[18]

Basically the same rationales have been used for nationwide limits on broadcasting stations,[19] for rules restricting (1) the networks from spot sales representation, for affiliates,[20] (2) television stations from owning local cable franchises,[21] (3) networks from owning cable systems,[22] (4) telephone companies from owning cable television systems,[23] and (5) in connection with other factors related to the adoption of the Prime Time Access Rules,[24] networks from owning syndication companies.[25]

Interestingly, in each of these cases the Commission required divestiture within a certain time limit for compliance with the new standards.[26] On the other hand, divestiture was not required where the Commission tightened its standards for measuring duopolies in 1964,[27] nor in the multiple ownership rulemakings from 1970 on.[28]

C. Ad Hoc Consideration of Diversification of Media Cross-Ownership.

While the FCC was considering its chain broadcasting and first multiple ownership (duopoly) rules, it also looked at the issue of newspaper ownership of radio stations.[29] It opted, however, for ad hoc consideration of the problem, rather than rules, stating its intention generally not to "permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as required of a licensee."[30]

Generally, however, the Commission has granted applications for media cross-owners where (1) they were within the specific multiple ownership rules, (2) where no likelihood of abuses could be shown, (3) where a monopoly situation would not ensue, and (4) where other non-media applicants were not also applying for the same frequency at the same time. Thus, in the cases where a frequency was available and only one applicant applied for authorization to operate on it, the Commission usually made the grant to qualified applicants who nevertheless owned local or nearby daily newspapers.[31] Similarly assignments and transfers of broadcast stations to existing local newspapers have mostly been approved, as have renewals.[32] But with a few notable exceptions[33] newspaper ownership became a crucial negative factor under the diversification criterion in contested comparative licensing proceedings.[34]

In comparative proceedings prior to 1965 newspaper ownership related in opposite ways. On the one hand, the newspaper often demonstrated local ownership, community involvement, service and familiarity. It showed journalistic experience, and it usually guaranteed financial qualification.[35] On the other hand combined ownership would lessen the diversity of information sources in the community, a constitutional factor at least since Justice Black's famous adage in Associated Press v. United States,[36] that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ."[37]

By 1965 the Commission's comparative licensing process, long in need of direction and consistency, finally received some. In its Policy Statement on Comparative Broadcast Hearings[38] the Commission stated as its two basic licensing criteria the "best practicable service to the public" and "diversification" of the media for mass communication. Although these criteria hardly resolved the dilemma of the countervailing characteristics inherent in media applicants for new licenses, nevertheless, by the time of the Policy Statement, a local daily newspaper had already been effectively barred from obtaining a new co-located broadcast license in a comparative proceeding.[39] The spectrum began to get saturated, television had become a dominant medium of communication and diversification had been steadily on the ascendant.[40]

The *Policy Statement*, however, raised a far thornier problem in a context for which it was not originally intended--that of license renewals, both with and without challenge from competing applicants. In *WHDH Inc.*[41] a comparative broadcast application proceeding involving a renewal applicant, albeit an incumbent holding only a four-month license, the Commission compared the applicants according to the *1965 Policy Statement*. While the *Policy Statement* stated on its face that it was not intended for the comparative renewal situation,[42] its application to this case was premised (on reconsideration) on the fact that the applicant had not held a regular three-year license.[43]

The incumbent, which was cross-owned by the *Boston Herald Traveler*, lost its licence then not because of specific abuse, but because the public interest would be better served by diversified ownership of the major media outlets in Boston.[44]

In *Midwest Radio-Television*[45] and *Chronicle Broadcasting Company*[46] the Commission designated hearings on the renewal applications of newspaper cross-owned television stations in Minneapolis-St. Paul and San Francisco. In both cases specific programming or antitrust abuses were alleged;[47] but in both cases issues were designated not only on the alleged abuses but also on whether the applicant possessed an undue concentration of control over local media of mass communication.[48]

In another significant development the Commission designated for hearing Frontier Broadcasting's application for a television station in Cheyenne, Wyoming, where it controlled the only newspaper, only television, only cable system and two of only three radio stations.[49] The case was resolved when the company voluntarily divested the TV station--one of the remedies contemplated by the hearing order.[50]

With Justice Department and citizen group pressure, the Commission finally decided to look again at the concentration issue in a broad rulemaking rather than by ad hoc decisionmaking. When it resolved a pending rulemaking in 1970 to bring local television-radio ownership within its duopoly rules, *i.e.*, one broadcast station to a market,[51] the agency concurrently issued a *Further Notice of Proposed Rulemaking*[52] to take into account newspaper-broadcast cross-ownership and the question of divestiture.

D. Docket 18110 and Interim Policy on Media Combinations

In the Further Notice in Docket 18110 the Commis proposed to require divestiture of all existing TV-radio and all co-located newspaper-broadcast combinations, as well as bar future such combinations. "It has now become clear" the Commission stated, "that the most significant aspect of the [concentration] problem is the common control of television stations and newspapers of general circulation. . . . The public looks primarily to these two sources for its news and information on public affairs."[53]

Chairman Dean Burch, in a concurring opinion, amplified the issue:

> Clearly, the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily newspaper. There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter.[54]

Meanwhile the agency was becoming more and more concerned about a piecemeal restructuring of the industry.[55] WHDH,[56] Chronicle,[57] Midwest[58] and Frontier[59] made the issue more acute by the month. By March, 1970, ad hoc adjudications were threatening the established broadcast interests not with a restructuring of the industry, but with forfeiture of multi-million dollar licenses as well.

Based in part on rules which generally bar undue concentrations of local control of mass media,[60] challengers had brought ad hoc cases before the Commission, usually seeking to alleviate an unique or peculiarly egregious local situation.[61] The Commission set a couple for hearing, addressing the specific abuses as well as more general issues of concentration. In <u>Chronicle</u>, for example, the parties gathered evidence not only on the charges that the parent company used KRON-TV's news and public affairs to gain competitive advantage in its quest for CATV franchises in outlying communities. They also gathered evidence on Chronicle's dominance over the means of obtaining information in the San Francisco Bay Area. The hearing examiner found, for instance, that 10% (or 400,000) of Bay Area residents receive their news exclusively from Chronicle outlets.[62]

But where cross-ownership was alleged to be per se contrary to the public interest, as in the D.C. Federation of Citizens Associations' letter complaint against the Washington Post's ownership of WTOP-TV, the Commission declined action stating that that issue would portend of an overall restructuring of the industry. This, it held, should be accomplished in a rulemaking.[63]

The rulemaking, then, came in the 1970 Further Notice in Docket 18110. The Commission proposed a newspaper ... o duopoly rule with divestiture. This would remedy both Commission's stated concerns about implementing effective diversification over local media control and the unstated objective of assuring worried media conglomerates that, at the least, they would not forfeit the value of their licenses, as WHDH had.

Any overall restructuring of the industry would have to await the five years that Docket 18110 dragged on. The court of appeals, faced with attacks on the Commission's policy of deferring ad hoc challenges to the rulemaking, waited patiently for four years. But a majority of the court finally told the Commission to act on the rulemaking within 40 days or have the individual cases judged on their merits.[64]

Rather than restructuring, however, the Second Report and Order in Docket 18110 grandfathered existing cross-owners in place, with minor exceptions.[65] Restructuring would have to await voluntary sales by media owners whereupon a new prospective duopoly rule would bar acquisition of newspaper broadcast or TV-radio cross-ownerships.[66]

This result would not serve the needs of cross-owners, however, who still feared losing their licenses in a comparative renewal context. And the Commission moved to protect those grandfathered by the rule. A rule that began as a sword to force divestiture ended up as a shield to [illegible] cross-owners.[67] Couched [illegible] the context o[illegible] renewals, the Commission declared that "absent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such [concentration of control] arguments would raise valid issues necessitating the designation of renewal applications for hearing.[68]

The Commission took note of none of the allegations raised in the petitions to deny which had been deferred to the rulemaking. Now the rulemaking would be used in effect to immunize existing licensees from ad hoc challenge. Any overall restructuring of the industry would be done through rulemaking, and that was essentially no restructuring.

This conclusion was strongly reinforced in a series of subsequent FCC actions:

(1) It rescinded a rule requiring television station divestiture of cable television systems in their service area.[69] Although this rule was in existence during the pendency of Docket 18110, assuring that TV-cable cross-ownerships would not be a problem for local communities in the future, the Commission based its subsequent rescission of the rule on its standard of "egregious"

concentration (no competing incoming signal to a newspaper-television or newspaper-radio absolute monopoly) from Docket 18110.

(2) The FCC terminated proceedings pending on newspaper-cable television cross-ownerships[70] and on conglomerate ownership of broadcast properties.[71]

(3) In denying reconsideration of Docket 1811[illegible], the agency declared that where new egregious monopolies were created from removal of signals which presently served to grandfather combinations, no divestiture would be required.[72]

(4) In a series of individual cases, the Commission dismissed pending petitions to deny individual license renewals of cross-owners, basing the decisions on the petitioners' failure to meet the abuse or Sherman Act standard.[73]

(5) In one case where a hearing was designated on alleged abuses,[74] and a strong Sherman Act showing made, the Commission declined to designate a general issue on undue concentration of control, stating:

> The Commission has neither the expertise nor the statutory authority to enforce the anti-trust laws in its regulation of the broadcast industry . . . [E]nforcement of the Sherman Act and similar Statutes rests properly with other federal agencies [illegible] with the expertise and jurisdiction over these matters.[75]

On appeal of Docket 18110 the D.C. Circuit reversed with a vengeance.[76] The Commission's prospective standard that cross-ownerships were contrary to the public interest could not be squared in the court's mind with an order that allowed existing ones to remain. As the Commission stated, "[I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run."[77] The court determined that a presumption for divestiture existed. The Commission accordingly misapplied the burden of proof in the proceeding by placing it on those favoring divestiture, to show specific abuse from continued existence of the combinations, rather than on the crossowners, to show how continuation would affirmatively serve the public interest in light of the Commission's generally contrary findings in the prospective aspect of the proceeding.[78]

Having reversed the entire rulemaking, the court's only attention to the Commission's ad hoc standard was in a single footnote. Noting that the Second Report "solidifies the position of existing combinations by making petitions to deny more difficult," the court of appeals ridiculed the agency's order on this score. "Without reasoned discussion," the court noted that the FCC had "abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest." Finally, the court quoted from the Commission's WGAL-TV decision where the FCC declined as inappropriate to duplicate the functions of other agencies in applying antitrust laws.[80]

The Supreme Court reversed, recognizing for the first time a "legitimate renewal expectancy" in broadcast licensing.[81] Basically another chapter of a book on deferral to administrative agencies reinforced by the recent Vermont Yankee Nuclear Power case,[82] and continued in the Pacifica case,[83] the unanimous reversal[84] found the FCC's concern for local ownership, economic disruption to the industry and continuity of ownership to legitimately outweigh the agency's future promotion of ownership diversification.[85] The Court's message to the courts of appeals was an unmistakable "Keep Out."

Yet Mr. Justice Marshall's opinion, continuing the footnote discourse, seems to have also differed with the ad hoc approach of the Second Report. Distinguishing between the comparative and non-comparative renewal situations, the Court first pointed out that diversification would remain a relevant comparative consideration in the former.[86] It then cited the FCC's stated standard for setting a renewal application for hearing absent a competing applicant, viz., "a sufficient showing . . . of specific abuses by a common owner or of economic monopolization of the sort that would violate the Sherman Act."[87]

Significantly, however, the opinion still proceeded further:

> The Order does not make clear the extent to which hearings will be available on petitions to deny renewal that do not allege specific abuses or economic monopolization. Counsel for the Commission informs us, however, that the Order was intended to "limit [ ] such challengers only to the extent that [the Commission] will not permit them to re-argue in an adjudicatory setting the question already decided in this rule-making, i.e., in what circumstances is the continued existence of co-located newspaper-broadcast combinations *per se* undesirable.88

This point was then emphasized elsewhere in the opinion where the Court observed that economic monopolization and specific abuses were not the sole grounds for renewal challenge.89

Thus the Court has left open the question of what standard should or must be applied for ad hoc media challenges. The limits were simply that forfeiture or divestiture of combinations *per se* could not be relitigated in the renewal context, but neither could petitioners be foreclosed from raising anything beyond specific programing abuses or Sherman Act violations. What then should the standard be, and where should these cases be heard? It appears that the Supreme Court's opinion in *FCC v. NCCB* has raised more questions on this particular score than it has resolved.

III. A CLOSER LOOK AT CROSS-OWNERSHIP

Earl[illegible] the underlying bases for crossownership rules: the dual grounds of antitrust policy in favor of deconcentration, especially where entry into the market is limited, and first amendment values in diversity of information sources. How important are these factors?

The Commission found them very important in adopting prospective rules, but emphatically less important than assuring that existing cross-owners could retain their current, sometimes concentrated positions. The question is, what should be done, if anything about existing concentrations of control over local mass media of communications?

Our first point of departure for analysis is the factual evidence of benefits or detriments from local newspaper-broadcast cross-ownerships, and other forms of local concentration. In a lengthy review of the evidence before the FCC in Docket 18110, Judge Bazelon described the 25 major studies submitted on (1) the effect of common ownership on station performance, (2) the effect on competition, (3) multiplicity and diversity of the media and (4) the economic consequences of divestiture.[90] He then methodically undercut each one, agreeing with the Commission that the studies were largely inconclusive.[91]

The Supreme Court's assessment differed not on the studies themselves, but on the conclusions the Commission could draw from them. It held, contrary to the Court of Appeals, that the "stability and continuity of meritorious service provided b the newspaper ... ers as a group wo... lost."[92] The Court referred to FCC findings that economic dislocations from high interest rates might prevent new owners from obtaining and airing quality programs, and that local ownership would probably decrease.[93] I could take issue with the evidentiary question of whether adequate evidence supports the idea that grandfathering will generally yield better service to the public. In fact, Professor Stephen Barnett has argued,[94] NCCB has argued,[95] and Professors William Gormley[96] and Robert Prisuta[97] have since shown the opposite to be true -- that tangible harm is likely from local cross-ownerships.

Dr. Gormley has found, for example, that cross-ownership increases news story overlap by 16.7%, that more than twice as many cross-owned TV stations never editorialize as non-affiliated stations, and that 9.3% of newspaper-owned television stations receive carbons of the newspaper's stories on an exclusive basis, compared to 1.1% of comparable non-affiliated stations.[98]

Dr. Prisuta has recently found that cross-owned stations are no more likely than non-affiliated stations to present public service programming, and that competitive markets are likely to lead to significantly more public service programming by stations in the market than in noncompetitive markets.[99]

Furthermore, we have seen examples in cross ownership situations of apparent newspaper preferences of the cross-owned TV station in program listings,[100] discrimination against political candidates,[101] news management to protect private business interests in other media enterprises in the area[102] cross-subsidizations,[103] lack of editorializing,[104] and anti-competitive abuses in a newspaper's refusals to deal with customers of a rival radio station.[105] While all of these allegations did not lead ultimately to license denials, in each case the allegations were sufficiently demonstrated to make out at least a prima facie case before the FCC.[106]

These tangible harms, then, from actual cases before the FCC and studies, demonstrate at the very least the potential for anticompetitive abuse, for which the consumer ultimately pays, or the potential for a limitation or abridgement of the public's first amendment interest in the free flow of information from antagonistic and diverse sources.

While these grounds were used to bar future cross-ownerships and break up egregious monopolies, the continuation of meritorious service and economic dislocation rationale provided the Commission with the impetus to grandfather all others. The Supreme Court's affirmance of the rules may have been ill-considered. But that is water over the dam. It is most unlikely that the question of <u>per se</u> rules will be revisited by the FCC in the foreseeable future.

Yet, in affirming the grandfather rules, the Supreme Court has specifically left "opponents of these combinations to their remedies in individual [or ad hoc] renewal proceedings."[107] And the question now is what remedies are available from [illegible] scrutiny of grandfathered cross-owners, not only by the FCC but by the Department of Justice and Federal Trade Commission as well?

IV. AD HOC CHALLENGES TO CROSS-OWNERS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

There are two basic and effective remedies attendant to license challenges at the FCC: forfeiture or divestiture of the license. And of course there is a world of difference between them -- often tens of millions of dollars per television license. In divestiture the owner is compensated for the license, despite the legal lipservice to public ownership of the airwaves. In forfeiture, whether by license denial or victorious competitive challenge, all is lost by the vanquished licensee save the resale value of plant, equipment and inventory.

The FCC paid such little attention to the issue of ad hoc challenges in the Second Report that it did not even distinguish between forfeiture and divestiture remedies in this context.[108] Nor did the courts on review.

Yet FCC case law certainly does so, particularly in the area of undue concentration of control. In Elyria-Lorain Broadcasting Co. (WEOL),[109] for example, the Commission designated the 1964 renewal applications for hearing of Elyria, Ohio's AM and FM radio stations, where it appeared that their common ownership with a local newspaper might constitute concentration of control contrary to the public interest. In setting the renewal hearing, however, the Commission specifically allowed for the possibility of divestiture.[110] Similarly in Frontier Broadcasting[111] the Commission included the possibility of divestiture in the designation order on undue concentration of the Cheyenne, Wyoming media market.

I submit that where there are behavioral abuses, monopolizations or anticompetitive actions by the licensee, the Commission should employ its gamut of sanctions up to and including denial of license. This would include both comparative and noncomparative renewals.

Where, however, the problem is basically a structural one, that is, where the degree of concentration of local media control has reached a serious point which is inimical to the public interest, then and only then should the Commission employ the divestiture remedy. This again should apply to both comparative and non-comparative proceedings, although under existing law it is questionable whether that can be done with comparative renewals. In 1973, however, Albert Kramer suggested a legislative amendment to the Senate which, in effect, would provide for the winning challenger's buy-out of the loser at a fair market, depreciated value.[112]

In this way, the Commission's stringent standards for ad hoc challenge to noncomparative renewals can be viewed as disqualifying factors which, if established, would warrant forfeiture. Yet the Supreme Court's allowance for additional challenges could also be met by less stringent criteria for the divestiture remedy, as apparently was the case prior to the adoption of the Second Report in Docket 18110.

A degree-of-concentration standard for [illegible] serves the law neatly. It is a similar approach to prima facie standards in the antitrust laws.[113] It [illegible] the [illegible] of relitigating Docket 18110 on a case-by-case basis since a newspaper-broadcast cross-ownership would not be per se prohibited. Rather, the Commission would set a degree of concentration, say 60%, which would raise a prima facie case of undue concentration. At that point, a hearing could be ordered which would delve into the following areas -- quoting from Elyria-Lorain:

> . . . the advertising practices of the stations and newspapers, with particular regard to any joint rates or discounts; the present and proposed staffs of the stations and newspapers, with particular regard to any employees, officers, or directors of the stations who are employees, officers, or directors of the newspapers; the extent to which the stations and newspapers rely on the same sources for material for broadcast or publication; the national, state, and local political districts served by the stations and newspapers; the market areas served respectively by the stations and newspapers; the other broadcast and media services available to the areas in question, with particular regard to (a) the amount of coverage these other services devote to local affairs of the communities primarily served by the applicant's stations and newspapers and (b) the extent to which these other services compete with the applicant's stations and newspapers for advertising revenues; and such other facts as will tend to demonstrate that the operation of WEOL AM & FM by Lorain County Printing will or will not result in concentration of control over local media contrary to the public interest.

Furthermore, as Professor Robert Bennett[114] and Glen Robinson have ably argued,[115] the FCC should apply Clayton Act Section 7 analysis to its licensing actions. While the new cross-ownership rules prohibit future acquisitions of colocated media, the Clayton Act applies to all mergers since 1950 which tend to have an effect of substantially lessening competition. Thus prior acquisitions could certainly enter into any renewal hearings looking towards divestiture.

Another approach would be to [illegible] grandfathered stations as waiver requests by members of the public from enforcement of the grandfathering rule. If the underlying goals, policies and reasons for the rules would be better served in a particular situation by nonapplication of the rule, then grandfathering should be "waived," and divestiture ordered over a reasonable period of time.[116]

For example, if a non-local owner with an average or poor broadcast record held a significant share of the local media market, and divestiture could be accomplished without severe economic hardship, then the grounds for grandfathering -- continuation of meritorious service and aviodance of disruption to the industry -- would not pertain in application to that licensee. In that case, the rule in Docket 18110 should not protect that licensee from divestiture. Perhaps a showing should also have to be made that the best practicable service to the public in that market is more likely from another licensee than the existing one, although that showing should not actually have to produce the other licensee.

The beauty of the ad hoc approach is that it does allow the excellent newspaper-broadcast combinations to remain where they are, serving the public. Yet it does not give the absentee owned, mediocre licensee a base on balls on the basis of someone else's batting average.

Another advantage is that it facilitates scrutiny of all aspects of concentration at one time. Thus, without violating the letter of the present cross-ownership rules, a licensee can own the only newspapers, only VHF television station, only two radio stations, only cable system, only movie theatres, only sound-trucks, only printing press, only billboards, only banks and virtually anything else, but still be grandfathered if there is but one incoming UHF television signal of primary strength in the market. Indeed, even if that UHF station later went out of business, the Commission's reconsideration order would not require divestiture.[117] Assuming no abuses and an inability to show intent to maintain or use monopoly power,[118] the Commission would do nothing under existing law.

While this is certainly an extreme hypothetical situation, the point is made. In an ad hoc degree-of-concentration approach, the Commission would be able to look at TV-radio-newspaper-cable-MDS-[119]and-other local combinations even though they did not violate the narrow focus of each duopoly rule.

The play of non-media aspects on concentration is particularly interesting. While the FCC has terminated and hidden its Conglomerate Inquiry Task Force Report,[120] its preliminary study indicated a basis for believing that conglomerates sometimes use their media properties for their own business purposes.[121] The Task Force found questionable in-house dealings by two of six licensees studied in a pilot study,[122] and the fact that the Commission still keeps the final Report secret six years after it was written, raises serious questions about just what is in it.

The crucial point here is that ad hoc scrutiny of local concentrations of control should be pursued and encouraged by the FCC, not effectively precluded. In the past, conglomerate ownership has caused the Commission grave concern, as in 1948 when the Commission even preferred a local newspaper owner over a competing, non-media applicant associated with the local industrial company that dominated the city.[123]

The next question which arises is how to view a cable system commonly owned by a concentrated local media entity. Does it expand the opportunity for alternative distribution of views, news and advertising, or does it further concentrate control of the media in that entity's favor? More broadly, what is the effect today of new technologies which promise to provide localities with a plethora of new voices, data services, and channels of communication? Should a TV station still be barred from owning, say, a multipoint distribution system (MDS)?

Certainly, as long as an entity has an interest in the audience tuning into one channel, whether it is its own television station, or to a lesser degree, a financial interest in a pay cable channel, the operator has a built-in conflict of interest from seeing that the number of local media outlets are maximized. It is important, then, either to separate the programming function from the home distribution function, or to maintain a clear feasibility for new entry by others into the local home delivery systems market.

This means that governmental entities should not allow existing media companies the opportunity to obtain dominant positions in new markets for local communications if there is limited entry into that market and an opportunity to preclude further expansion of services at a later time.

Thus broadcasters should not be cable operators, or even common carriers in the same localities. I am not sure that it makes sense, however, to preclude common carriers from cable television, particularly if they operate the cable system as a common carrier.

I must admit that inclusion of cable in a local newspaper broadcast concentration makes it difficult to define the percentage of media concentration held by that entity in the market. For, it cannot realistically be measured by control over advertising, nor strictly by control over channels. Perhaps a measurement of access to audiences would be the best approach.

Finally, there is something basically unfair about a concentrated owner's getting paid even by its competitors' audiences, as TV-owned cable systems do. This could be considered an unfair method of competition by the FTC under Section 5 of the Federal Trade Commission Act, a subject to which I now turn.

V. OTHER FORUMS FOR DIVERSIFICATION OF MEDIA OWNERSHIP

As the FCC stated in the WGAL Television case, it "has neither the expertise nor the statutory authority to enforce the antitrust laws ... [E]nforcement of the Sherman Act and similar statutes rests properly with other federal agencies entrusted with the expertise and jurisdiction over these matters." 124

The Supreme Court has held that FCC consideration and approval of an action such as a transfer of broadcast ownership does not preclude the Department of Justice from bringing an antitrust action in the courts for the same activity.[125] Presumably, this concurrent jurisdiction would apply as well to the Federal Trade Commission's enforcement of Section 5 of the FTC Act, or of Section 7 of the Clayton Act.

I am, of course, baffled as to why the FCC would establish a standard for its ad hoc consideration of concentration cases such as "economic monopolization under the Sherman Act" when it has neither the expertise nor authority to enforce it. But having ceded away this function, I believe it is incumbent upon the agencies with both the expertise and authority to enforce the antitrust laws to do so vigorously in the area of media conglomeration.

The Justice Department brought individual cases before the FCC prior to the <u>Second Report</u>,[126] but the "maddogs" of the Antitrust Division, as the then cross-owned <u>Washington Post</u> referred to them,[127] seem to have been muzzled in recent years.

Certainly the Department should continue to bring the egregious cases of monopolization before the FCC. Moreover, it could also begin to pursue these cases in local federal courts where discovery is more obtainable, the judiciary is more independent, and the process more decentralized.

Judge Warren Ferguson's Family Viewing Hour decision[128] has demonstrated that local judges can be as or better equipped to handle media cases than the FCC itself. In the areas of antitrust and the first amendment -- the two bases for media diversification -- the judiciary is more expert than the FCC. Finally, the FCC's track record for backlog in recent years suggests that even in a crowded court calendar, the time it takes to get to trial could conceivably be less in the federal courts.

But more to the essence of this conference, the FTC has a potential role in the regulation in local media concentration. For example, in 1969, the Trade Commission investigated certain allegations of monopolistic news practices on the part of the Washington Post and WTOP radio.[129] Indeed the closing of that investigation was cited by the station as a defense against a general charge that the company had an undue concentration of control of the D.C. media.[130] And The Commission has been involved in other cases involving advertising rate practices and alleged unfair methods of competition

Significantly, the agency's expertise is doubly applicable. The FTC's dual arms of enforcement parallel the dual goals of diversification -- competition serves the antitrust objectives, and consumer protection should promote the public's first amendment interest in diversity of information sources. The agency's expertise in advertising familiarizes it not only with the business of broadcasting, but with its customers as well. For the true consumers of broadcasting's product are the advertisers who buy public audiences from the stations.

The FTC's familiarity with market structures, unfair practices and other competition issues should enable it to view the role of a broadcast station in a local conglomerate, or certain competitive practices with greater clarity than the FCC.

More to the general issue of local media concentration, however, would be the ability of the FTC to order divestiture of certain media properties upon a finding of unfair methods of competition under Section 5 of the FTC Act.

In FTC v. Sperry and Hutchinson Co.[131] the Supreme Court held that a finding of "unfair methods of competition" or unfair acts or practices under Section 5 of the Act need not encompass acts which otherwise violate the letter or spirit of the anti-trust laws. "[U]nfair competitive practices [the Court held] were not limited to those likely to have anti-competitive con-sequences after the manner of the antitrust laws."[132] And the 1938 Wheeler-Lea amendment to the Act "charged the FTC with protecting consumers as well as competitors."[133]

The Court cited with approval the Commission's description of factors it considers in determining whether a practice is unfair despite its not being anticompetitive or deceptive. These include, inter alia,

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise ...;
>
> (2) whether it is immoral, unethical, oppressive or unscrupulous;
>
> (3) whether it causes substantial injury to consumers ... 134

And in L.G. Balfour Company v. FTC[135] the Seventh Circuit affirmed the Commission's order requiring divestiture by Balfour of a subsidiary which had the appearance of a competitor in the fraternity jewelry market, found to be in violation of Section 5 of the Act.

Obviously there are difficulties with applying Section 5 to media concentration cases. But the combination of a high degree of concentration, a general public policy for diversification and a particularly "oppressive" cross ownership could perhaps come within the guidelines for "unfairness" set forth above. It would be highly beneficial to consumers as well as competitors to diversify the sources for local information.

It may take additional acts, however, neither violative in and of themselves of the antitrust laws nor specific abuses by FCC standards, to find unfair methods of competition. I have suggested one inherent in TV-cable cross-ownership -- the payment of money to the concentrated owner in order to watch a competitor's channel. Certainly if the common owner is involved, as some are, in having a covenant passed in a subdivision that no outside antennas be allowed, the practice should be considered unfair. Joint advertising policies could fit within the definition. Or acquiring a cable franchise but not fully building it may qualify.

I can certainly do no more than to suggest that the flexibility of both Section 5 as a statute and the FTC as an administrative agency go far to recommend a close look by the agency at local media concentration.

In conclusion, I envision a vigorous effort of vigilance in the coming years by Congress, the FCC, the FTC, the Justice Department, competitors, customers, and members of the public on the activities of local media conglomerates. With that many watchdogs, let's hope that these entities, so important to our self-governance, will act responsibly, that they will provide the public with an unimpeded, clean and clear flow of information on all topics of public importance, that they will insure access to representative views and voices in their communities, and that they will make fools of their critics by making the job of a critic unnecessary.*

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*The author wishes to acknowledge, with appreciation, the help of Ms. Leslie Rosen, a UCLA law student, and Ms. Doris Davis, administrative assistant, in the preparation of this paper.

FOOTNOTES

1 ___ U.S. ___, 98 S.Ct. 2096 (1978) (hereafter, "NCCB").

2 Garrison V. Louisiana, 379 U.S. 64, 74-75 (1964).

3 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

4 48 Sta. 1064, 47 U.S.C. §§151 et seq. (1970). See 47 U.S.C. §§307(d), 309 (1970). Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945); Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C.Cir. 1971).

5 44 Stat. 1162, as amended, 48 Stat. 884. See remarks of Senator Howell at 67 Cong.Rec. 12503 (1926). See also 47 U.S.C. §313 (1970).

Apparently in 1934 Congress did not expect newspapers to be interested in radio ownership. As Senator Clarence Dill, father of the 1934 Act later stated,

> If I had dreamed that newspapers would acquire radio and television stations, I would have written a prohibition into the act. Certainly newspapers which occupy monopoly positions in a city should not be permitted also to own radio and television stations. This country cannot afford to have monopoly over public opinion any more than it can afford to have monopoly in industry.

Note, The Power of the FCC to Regulate Newspaper Broadcast Cross-Ownership; The Need for Congressional Clarification, 75 Mich.L.Rev. 1708, 1719, n. 54, citing Note, Antitrust - "Cross-Media" Ownership and the Antitrust Laws - A Critical Analysis and A Suggested Solution, 47 N.C. L.Rev. 794, 810, n. 97 (1967).

6 FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

7 Id., 309 U.S. at 138; 47 U.S.C. §§307-09 (1970).

8 47 U.S.C. §§303(i), 303(g) and 307(b) (1970).

9 Duopoly Rules, 5 Fed.Reg. 2382, 2384 (1940).

10 Duopoly Rules, 8 Fed.Reg. 16065 (1943).

11 Duopoly Rules, 6 Fed.Reg. 2284-85 (1941).

12 Report on Chain Broadcasting, Dkt. 5060, May 1941, aff'd, Nat'l Broadcasting Corp. v. United States, 319 U.S. 190.

13 Literally, duopoly would allow two entities to control the market. Here the Commission uses the word to prevent overlap of signals in the same service in the same market.

14 See FCC Ann. Report, 1945 at p. 12. At least 24 combinations had to divest.

15 E.g., FCC v. Nat'l Citizens Committee for Broadcasting ___ U.S. ___, 98 S.Ct. 2096, 2104 (1978) (hereafter, NCCB), citing Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476-77 (1964). See also Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 F.C.C.2d 306,310-14 (1970) (First Report and Order, Docket 18110), modified on other grounds, 28 F.C.C.2d 662 (1971).

16 See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945) (The first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...)

17 E.g., NCCB, supra n. 1, 98 S.Ct. at 2112.

18 Multiple Ownership of Standard, FM and Television Broadcast stations, 45 F.C.C. 1476, 1482 (1964), citing FCC v. RCA Communications, 346 U.S. 86, 96-97 (1953) ("The effects of competition or its absence ... are matters not readily susceptible of quantitative ascertainment.") See also Arkansas Oklahoma Broadcasting Co., 3 R.R. 479 (1946).

19 Multiple Ownership Rules, 18 Fed.Reg. 7796 (1953), aff'd United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

20 Metropolitan Television Corp. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

21 CATV, Second Report and Order, 23 F.C.C.2d 816 (1970); 47 C.F.R. §76.501 (1975). But see Cable Television Systems, Second Report and Order, 55 F.C.C.2d 540 (1975), appeal pending sub nom. National Citizens Committee for Broadcasting v. FCC, D.C. Cir.No. 75-1933 (Sept. 22, 1975), motion for remand pending (amendment of TV-cable cross-ownership standards to conform to standards established in Docket 18110, newspaper-TV-radio.) See generally, Dillon, The FCC's Rescission of the 1970 Television-Cable Cross-Ownership Rule, 26 Am.U.L.Rev. 688 (1977).

22

23 Gen. Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). However, the FCC has recently taken steps to reduce this prohibition in rural areas.

24 47 C.F.R. §73.658(k) (1977), upheld in Nat'l Ass'n of Independent Television Producers and Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975).

25 47 C.F.R. §73.658(j) (1977). See Iacopi v. FCC, 451 F.2d 1142, 1147 (9th Cir. 1971).

26 In the case of the multiple ownership rules setting national limits on stations, supra n. 19, only two licensees violated the new rules. Divestitures were considered on an ad hoc basis, and both were given three years to divest their excess stations. H. Howard, Multiple Broadcast Ownership: Regulatory History, 27 Fed.Com.B.J. 1, 15 (1974).

Congress has provided favorable tax treatment for licensees forced to divest because of the adoption of new ownership policies. 26 U.S.C. §1071 (1970).

27 Multiple Ownership, supra n. 18.

28 That is, the Further Notice of Proposed Rulemaking in Docket 18110, 22 F.C.C.2d 339 (1970), issued concurrently with the First Report and Order, supra, n. 15, looked to whether or not divestiture should be required for compliance with the general one-to-a-market standard established for broadcast ownership in the First Report. When the Commission declined to require divestiture in its Second Report, 50 F.C.C. 2d 1046, reconsideration, 53 F.C.C.2d 589 (1975), rev'd sub nom. Nat'l Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C.Cir. 1977), rev'd NCCB, supra n. 1, 98 S.Ct. 2096 (1978), it then rescinded divestiture orders in the local cable television proceeding. See n. 21, supra.

29 Newspaper Ownership of Radio Stations, Notice of Proposed Rulemaking, 6 Fed.Reg. 1580,3302 (1940). The record in this proceeding consisted of over 3500 pages and 400 exhibits of oral and written testimony from leading experts in the field.

See Note, The Power of the FCC to Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification, 75 Mich.L.Rev. 1708, 1723, n. 73 (1977), and sources cited therein.

30 Newspaper Ownership of Radio Stations, 9 Fed.Reg. 702-03 (1944).

31 E.g., Tri-State Broadcasting Co. v. FCC, 96 F.2d 564 (D.C. Cir. 1938). But see Mansfield Journal Co. v. F.C.C., 180 F.2d 28 (D.C.Cir. 1950).

32 According to the author's review of 14 transfers of broadcast stations to local newspapers prior to 1965, 13 or almost 93% were approved without hearing. E.g., Grants Broadcasting Co., 2 R.R.2d 657 (1964); Pacific Radio Corp., 5 F.C.C. 427 (1938). Compare Stephen R. Rintoul, 11 F.C.C. 108 (1945)(granted without hearing), with Miami Broadcasting Co., 1 R.R.2d 43 (1961)(designation for hearing where result would be common ownership of only newspaper and only radio station in city.)

Since 1965, transfers have also been approved, although less frequently. See, e.g., Joseph v. FCC, 404 F.2d 204 (D.C. Cir. 1968); Washington Star Communications, 54 F.C.C.2d 669 (1975) (hearing designated), ___ F.C.C.2d ___ (1976) (waiver of new cross-ownership rules for three year period).

In noncomparative renewals, challenges did not arise prior to 1965. Since that time, renewals have normally been granted without hearing. E.g., Stone v. FCC, 466 F.2d 316 330 (D.C.Cir. 1972); Hale v. FCC, 425 F.2d 556 (D.C.Cir. 1970) (question of undue concentration deferred to rulemaking in Docket 18110). But see Frontier Broadcasting Co., 21 F.C.C.2d 570 (1970), dismissed for voluntary divestiture, 35 F.C.C.2d 875 (1972); Midwest Radio-Television, Inc., 16 F.C.C.2d 943, 18 F.C.C.2d 1101 (1969), renewal granted, 24 F.C.C.2d 625 (1970); Chronicle Broadcasting Co., 16 F.C.C.2d 882 (1969), renewal granted, 40 F.C.C.2d 775 (1973); Elyria-Lorain Broadcasting Co., 6 R.R.2d 191 (1965).

In comparative renewal cases, the renewal applicant has always prevailed except in WHDH, infra n. ___, an unique case.

33 E.g., WIBC, Inc., 31 F.C.C. 835 (1961); Midland Broadcasting Co., 12 F.C.C. 611 (1948).

34 E.g., McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957); Loyola University, 12 R.R. 1017 (1956). From the author's review of the cases where one of the applicants was a local newspaper owner, approximately 75% of the grants went to non-newspaper applicants prior to 1965.

35 E.g., Capitol Broadcasting Co., 11 F.C.C. 859 (1947); Orlando Daily Newspapers, 11 F.C.C. 760 (1946). See generally, Mills Moynahan, Perlini, McClure, The Constitutional Considerations of Multiple Media Ownership Regulation by the Federal Communications Commission, 24 Am.U.L.Rev. 1217, 1224 (1975).

36 320 U.S. 1 (1945).

37 *Id.* at 20

38 1 F.C.C.2d 393 (1965).

39 *See supra*, nn. 30-34. *See also* H. Howard, *supra* n. 26, 27 *Fed.Com.B.J.* at 21.

40 *See generally*, H. Howard, *supra* n. 26.

41 WHDH, Inc., 16 F.C.C.2d 1 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C.Cir.), *cert. denied* 403 U.S. 923 (1971).

42 *Policy Statement*, *supra* n. 38, 1 F.C.C.2d at 393, n. 1.

43 WHDH, *supra* n. 41, 16 F.C.C.2d at _____.

44 However, the fact that the station never editorialized, in part because it wanted to protect against the allegation of using all of the co-owned media to advance a particular point, was used against the station.

45 *Supra*, n. 32.

46 *Supra*, n. 32.

47 Chronicle Broadcasting Co., *supra* n. 32, 16 F.C.C.2d at 883; Midwest Radio-Television, *supra* n. 32, 16 F.C.C.2d at 943, 945 (H. Rex Lee, concurring).

48 *Id:* *E.g.*, "Whether Chronicle Publishing Co., the parent of the licensee, has an undue concentration of control of the media of mass communications in the San Francisco Bay area."

49 Frontier Broadcasting Co., 21 F.C.C.2d 570 (1970).

50 Frontier Broadcasting Co., 35 F.C.C.2d 875 (1972).

51 Multiple Ownership, First Report and Order, Docket 18110, 22 F.C.C.2d 306 (1970).

52 Multiple Ownership, Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339 (1970).

53 *Id.* at 344.

54 *Id.* at 350 (Burch, Chairman, concurring).

55 *See* Federation of Citizens Ass'ns (D.C.), 21 F.C.C.2d 1214 (1969).

56 *Supra*, n. 41

57 *Supra*, n. 32

58 *Supra*, n. 32

59 *Supra*, n. 32

60 47 C.F.R. §§ 73.35, 73.240, 73.636 (1977). These rules, in setting national limits on the number of stations one entity can hold in each broadcasting service nationwide provide, in part, that no station license shall be granted if it would "result in a concentration of control ... [AM, FM or TV broadcasting] in a manner inconsistent with the public interest convenience and necessity." *Id.* at 73.35(b), 73.240(a)(2), 73.636(a)(2).

61 *E.g.*, Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C.Cir. 1974); Hale v. FCC, *supra*, n. 32.

62 Chronicle Broadcasting, *supra* n. 35, 40 F.C.C.2d at 782.

63 *Supra*, n.55.

64 Columbus Broadcasting Coalition v. FCC, *supra* n. 61, 505 F.2d at 330.

65 The Commission required divestiture within five years by most newspaper-broadcast combinations where one owner controlled the only daily newspaper and only TV or only radio station in the same city. For a fuller description and the wording *see* Multiple Ownership, Second Report and Order, *supra* n. ___ 50 F.C.C.2d at 1081-84, 1099-1107 (text of rules).

A few of the grandfathered cross-owners swapped stations pending or after the Second Report. *See*, *e.g.*, "WMAL-TV Fetches $100 Million, Trading Record," *Broadcasting Magazine*, April 4, 1977 at p. 28.

66 *See*, *e.g.*, Washington Star Communications *supra* n. ___. *But see* Field Communications Corp., ___ F.C.C.2d ___, 40 R.R.2d 1639 (1977) (acquisition of majority control of UHF chain by minority stock owner which also owns local newspapers in same towns as some of the TV stations transferred.)

67 "Housecleaning and Jawboning in Phase One of the Wiley Commission," *Broadcasting*, March 17, 1975, pp. 21-22.

68 *Second Report*, *supra* n. ___, 50 F.C.C.2d at 1088.

69 CATV, *supra* n. 21; Dillon, *supra* n. 21.

70 Cable Antenna Television Systems, First Report, supra n. 28.

71 Conglomerate Corporate Licensees, 40 Fed.Reg. 26586 (1975). This is particularly interesting in view of earlier precedent in a comparative hearing where the Commission preferred a local newspaper applicant over its rival for a new station in part because most of the directors of the rival were closely associated with the dominant, non-media company in the town. Midland Broadcasting Co., 12 F.C.C. 611 (1948).

72. Multiple Ownership, Reconsideration, Docket 18110 53 F.C.C.2d 589, 590-91 (1975), aff'd, NCCB, supra, n. 1, 98 S.Ct. 2086.

73 E.g., Syracuse Coalition v. FCC, D.C.Cir. No. 75-1308 (Slip Op. Oct 20, 1978); Stauffer Publications, 37 R.R.2d 660 (1976).

74 WGAL Television, Inc., 62 F.C.C.2d 527 (1976) (hearing designated on facts and circumstances surrounding the cross-owned newspapers' carriage of only its own station's daily listings and favoritism in the selection of cover stories and pictures for paper's weekly TV schedule booklet and use of a reverse slug in identifying the station in the newspaper.)

75 Id., 62 F.C.C.2d at 528-29.

76 Nat'l Cit. Committee for Broadcasting v. FCC, supra n. __ 555 F.2d 938 (D.C.Cir. 1977), rev'd, NCCB, supra n. 1.

77 Id. at 962, citing Second Report, supra n. 28, 50 F.C.C.2d at 1079-80.

78 NCCB v. FCC, supra n. 76, 555 F.2d at 962-67.

79 Id. at 966, n. 108.

80 Id.

81 NCCB, supra n. 1; 98 S.Ct. at 2117.

82 National Resources Defense Council v. Vermont Yankee Nuclear Power Corp., ____ U.S. ____, 98 S.Ct. 1197 (1978).

83 FCC v. Pacifica Foundation, ____ U.S. ____, 98 S.Ct. 3096 (1978).

84 NCCB, supra n. 1. Mr. Justice Brennan did not participate in the decision.

85 Id. 98 C.Ct at 2117-22.

86 Id. at 2108-09, n. 12.

87 Id. at 2109, n. 12.

88 Id.

89 Id. 98 S.Ct. at 2110 n. 13 ("Since we do not read the Order as foreclosing the possibility of a hearing upon a claim of specific abuses, and since the Commission itself is apparently of the view that the only issue foreclosed in petitions to deny is the question of whether newspaper broadcast ownership is per se undesirable, see n. 12, supra, we cannot say that the Order itself unreasonably limits the availability of petitions to deny renewal.") and at 2119 ("existing combinations will be subject to challenge by competing applicants in renewal proceedings, to the same extent as they were prior to the instant rulemaking proceedings" and "even in the absence of a competing applicant, license renewal may be denied if, inter alia, a challenger can show that a common owner has engaged in specific economic or programming abuses. See nn. 12 and 13, supra.") The latter quote supports the thesis in the text by the inclusion of the words "inter alia" which demonstrates that the Court had in mind some unspecified grounds for denial for cross-ownership beyond the abuse and monopolization standard set forth in the Second Report.

90 NCCB v. FCC, supra n. 76, 555 F.2d at 956-61

91 Id.

92 NCCB, supra n. 1 , 98 S.Ct. at 2117.

93 Id.

94 Barnett, "Cross Ownership of Mass Media in the Same City," Study submitted in Docket 18110, cited at NCCB v. FCC, supra n. 76 , 555 F.2d at 959, n. 71.

95 NCCB, supra n. 1 , Brief for Respondent NCCB at n. 32.

96 W.F. Gormley, Jr., The Effects of Newspaper-Television Cross-Ownership on News Homogeneity (U. No. Car. Press, Chapel Hill, 1976).

97 R. Prisuta, "The Impact of Media Concentration and Economic Factors on Broadcast Public Interest Programming, ___ J. of Broadcasting ___ (1977).

98 Gormley, supra n. 96, at pp. 112, 210-12.

99 Prisuta, supra n. 97 at ___.

100 WGAL-Television, supra n. __.

101 Western Connecticut Broadcasting Co., 47 F.C.C.2d 432, 433-35 (1974)

102 Chronicle Broadcasting, supra n.

103 Midwest Radio-Television, Inc , supra n. ___.

104 WHDH, Inc., supra n. ___.

105 Mansfield Journal Co. v. FCC, supra n. __.

106 The FCC's standard for designation of an application for hearing is a stringent one under 47 U.S.C. §309 (1970). See Bilingual Bicultural Coalition on Mass Media v. FCC, 492 F.2d 656, 659 (D.C.Cir. 1974); Hale v. FCC, 425 F.2d 556, 566 (D.C.Cir. 1970).

107 NCCB, supra n. 1, 98 S.Ct. at 2119.

108 Second Report, supra n. 28, 50 F.C.C.2d at 1080, n. 29 and 1088, ¶130.

109 6 R.R.2d 191 (1965).

110 Id. at 197-98.

111 Supra, n. 32.

112 Testimony of Albert H. Kramer in Hearings Before the Subcommittee on Communications, Senate Commerce Committee, 93d Cong., 2d Sess., Serial 93-93.

113 Cf., e.g., United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) (intent to maintain or use monopoly power inferred); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (proof of monopoly power switched burden to aluminum producer to prove it had not abused its power).

114 R. Bennett, Media Concentration and the FCC: Focusing With a Section Seven Lens, 66 Nw.U.L.Rev. 159 (1971).

115 Cf. Second Report, supra n. 28 at 1125-26.

116 In United States v. Storer Boradcasting Co., 351 U.S. 192 (1956) the Supreme Court affirmed FCC multiple ownership rules in part because applicants were protected by a waiver procedure. See also WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C.Cir 1969) ("the agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of exemption based on special circumstances ...")

117 Multiple Ownership, Reconsideration, supra n. 72, 53 F.C.C.2d at 590-91.

118

119 Multi-point distribution systems, licensed as common carriers.

120 Supra n. ___. The Commission has heavily censored the document upon release required under the Freedom of information Act.

121 Green, "Conglomerate Broadcasters Are Faulted in FCC Pilot Study, Wider Inquiry Slated," Wall Street Journal, August 11, 1970.

122 Id.

123 Midland Broadcasting Co., 12 FCC. 611 (1948).

124 WGAL-Television, Inc., 62 F.C.C.2d 527, 531.

125 United States v. Radio Corp. of America (1959).

126 E.g., Stauffer Publications Co., supra n. __.

127 McBee, ________

128 Writers Guild of America - West v. FCC, 423 F.Supp. 1064 (C.D.Cal 1976), appeal pending 9th Cir.No. 77-1058.

129 Fed'n of Citizens Ass'ns (D.C.), 21 F.C.C.2d 12 (1969).

130 Id.

131 405 U.S. 233 (1972).

132 Id. at 244.

133 Id.

134 Id. at 244-45, n. 5.

135 442 F.2d 1 (7th Cir. 1971).