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Federal Communications Commission v. National Citizens Committee for Broadcasting: The Ultimate Media Hype

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By Raymond L. Yasser*

Introduction

Multiplicity of ownership may well be, as E.B. White suggested,[1] a prerequisite to a reliable and useful press in a democratic society. However, unless there is a radical change in the law in this area, that necessary multiplicity may continue to be "more dream than reality."[2]

On June 12, 1978, the United States Supreme Court decided *Federal Communications Commission v. National Citizen's Committee for Broadcasting.*[3] The Court held that future "newspaper broadcast combinations" could not be created but that established combinations would escape divestiture.[4] In refusing to disturb the concentration[5] of control of informa-

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[1] White, *What E.B. White Told Xerox*, Colum. Journalism Rev. (Sept./Oct. 1976) at 53.

[2] Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, 273 (D.C. Cir. 1974).

[3] 436 U.S. 775 (1978).

[4] *Id.* at 779.

[5] This harmful concentration of control can take a number of forms. "Cross-ownership" must be distinguished from multiple or group ownership. Cross-ownership in this context denotes control of both print and broadcast facilities; multiple and group ownership refers to owning more than one facility of the same type: two television stations, for example. For a generally pro-industry discussion of the multiple broadcast ownership problems, see P. Cherington, L. Hirsch & R. Brandwein, Television Station Ownership (1971).

This article will deal primarily with cross-ownership problems, although some discussion of the problems of multiple ownership as it relates to the broader heading of media concentration will also be included.

For documentation of the concentration phenomena, see Howard, *Cross-Media Ownership of Newspapers and TV Stations,* 51 Journalism Q. 715 (1974); Sterling, *Trends in Daily Newspaper and Broadcast Ownership, 1922-1970,* 52 Journalism Q. 247 (1975); Comment, *Concentration of Ownership of the Media of Mass Communication: An Examination of New FCC Rules on Cross Ownerships of Co-Located Newspapers and Broadcast Stations,* 1975 Emory L.J. 1121, 1121-23. *See generally* H. Levin, tional sources, the Court left intact more than 104 combinations of print/broadcast media, affecting over 60 million Americans.[6] Such a result is bound to have an adverse effect on the flow of information to citizens of those affected communities, for it is clear that "the fewer voices you have in a community, the less chance you have of diversity and dissent."[7] It is not surprising that this questionable decision has escaped close scrutiny by the "mediacrats"[8] who were its primary

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BROADCAST REGULATION AND JOINT OWNERSHIP OF MEDIA (1960); B. RUCKER, THE FIRST FREEDOM (1968); Gormley, *How Cross Ownership Affects News Gathering*, COLUM. JOURNALISM REV. 28 (May/June 1977); Johnson and Hoak, *Media Concentration: Some Observations and the United States' Experience*, 56 IOWA L. REV. 267 (1970).

[6] Gormley, *supra* note 5, at 28.

[7] The statement was made by Nicholas Johnson, former FCC commissioner. *See* Carmady, *Challenging the Media Monopolies*, N.Y. Times, July 31, 1977, § 6 (Magazine), at 24. *See also* Johnson, *The Media Barons and the Public Interest*, ATLANTIC MONTHLY, June 1968 at 39.

[8] Credit for the term "mediacrats" belongs to Kevin Phillips, author of MEDIACRACY: AMERICAN PARTIES AND POLITICS IN THE COMMUNICATIONS AGE. (1st ed. 1975). The mediacrats are indisputably powerful and influential.

> There is no longer any doubt. Television's 1976 presidential debates, the advent of Rupert Murdock, Jimmy Carter's dial a president show, and success of the Great Gannett Money Machine have done it. As of mid-1977 the issue of media power has come of age. Lingering attempts to dismiss "the media" as an illegitimate issue born of hit and run politics and improper English have all but drowned in the rising tide of national debate and concern over "the media" as the decade's most notable economic, cultural, and political phenomena.

Phillips, *Busting the Media Trusts*, HARPERS, July, 1977, at 23.

The Washington Post, Time, Inc., CBS, ABC, RCA (Parent of NBC), and several major book publishers are all numbered among America's 1,000 largest corporations. Phillips, *supra* at 32.

To get some idea of the extent to which one of these companies can make its presence known in a given community, consider the Washington Post Co. The Company speaks with five tongues in Washington, D.C. The multi-tongued Company owns and operates a newspaper (The Washington Post), a television station (WTOP-TV), a radio station (WTOP), a major news service (Los Angeles Times-Washington Post), and a major news magazine (NEWSWEEK). The Company, it can confidently be asserted, plays a huge role in shaping the capital's collective consciousness. Phillips, *supra* at 30.

To get some idea of the extent to which one of these companies can make its presence known nationally, consider the following facts about CBS, The New York Times, and Time, Inc. from the article *America's Press*, U.S. NEWS AND WORLD REPORT, August 15, 1977, at 27:

CBS is a broadcast company that expanded into publishing. It owns five television stations (in New York, Los Angeles, Philadelphia, Chicago, and Saint Louis), seven AM radio stations, and seven FM radio stations. CBS is also into book publishing. It owns Holt, Rhinehart and Winston, Popular Library Paperbacks, Gold Metal Paperbeneficiaries."[9] This article is a chronicle of the history of this curious decision and a critical analysis of its impact.

backs, Crest Paperbacks, Winston Press, BFA Educational Media, W.B. Saunders (Professional Books), and Neisa (Latin American and Spanish books). It also publishes monthly magazines, including FIELD AND STREAM, ROAD AND TRACK, CYCLE WORLD, WORLD TENNIS, SEA, PICKUP, VAN AND FOUR WD, MECHANIX ILLUSTRATED, and WOMEN'S DAY. In addition CBS publishes about 55 magazines that appear annually and semi-annually.

The New York Times Company is a newspaper publisher that has expanded into magazines, books, and broadcasting. The New York Times publishes the following newspapers: International Herald Tribune (Paris) (one third-ownership); the New York Times; six dailies in Florida: Gainesville Sun, Lakeland Ledger, Ocala Star-Banner, Leesburg Daily Commercial, Palatka Daily News, Lake City Reporter; and three dailies in North Carolina: Lexington Dispatch, Hendersonville Times-News, Wilmington Star News. In addition, the New York Times Company publishes four Florida weeklies. The company also publishes the following magazines: FAMILY CIRCLE, AUSTRALIAN FAMILY CIRCLE, GOLF DIGEST, GOLF WORLD (United Kindgom), TENNIS (United Kingdom), TENNIS, and US. It owns WREG-TV in Memphis and WQXR-Am radio in New York City. The New York Times Co. owns Arno Press, Inc., Cambridge Book Co., and Quadrangle New York Times Book Co.

Time, Inc. is a magazine publisher that expanded into books, newspapers, and broadcasting. Time, Inc. publishes TIME, FORTUNE, MONEY, SPORTS ILLUSTRATED, and PEOPLE. It owns Little, Brown and Co., Time-Life Books, New York Graphic Society, and is part owner of publishers in Germany, France, Spain, Mexico, and Japan. The acquisition by Time, Inc. of the Book of the Month Club is pending. Time, Inc. publishes 17 weekly newspapers in Chicago suburbs. It owns WOTV (Grand Rapids, Michigan), Manhattan Cable TV, Home Box Office, Time-Life Films, and it possesses a TV production division. *America's Press,* U.S. NEWS AND WORLD REPORT, August 15, 1977, at 27. These companies, it can modestly be asserted, play a huge role in shaping our country's collective consciousness.

A non-partisan study of the 1976 Ford-Carter presidential debates conducted by Notre Dame psychology professor Lloyd Sloan helps illustrate the tremendous influence wielded by the communications media over the public's political perceptions. Professor Sloan divided his test subjects into three groups. One group watched only the October 6 debate. Another watched that debate and the post debate commentary on CBS. The third watched the debate and the ABC post debate segment. Professor Sloan recorded an overall shift of 20% in favor of Ford among those in the group watching only the debate. The group watching the debate and the CBS commentary shifted 27% for Carter. The group watching the debate and the ABC commentary shifted 22% for Carter. Phillips, *supra* at 30.

[9] Such convenient silence is not a novel behavior pattern. In 1975, when the FCC adopted a set of cross-ownership rules disliked by the powers of the communications industry, news coverage of the decision was scanty. One study of eighteen major cross-owned daily newspapers found that only ten mentioned the ruling at all. Only three noted the relationship with local broadcast stations. Gormley, *supra* note 5, at 42.

Stephen Barnett, a law professor at the University of California at Berkeley, has termed news coverage of the entire FCC hearing and rule-making process a "media blackout." Barnett, *The FCC's Nonbatttle Against Media Monopoly,* COLUM. JOURNALISM REV. 44, 47 (Jan./ Feb. 1973).

I. THE PROBLEM OF CROSS-OWNERSHIP[10]

The current trend in this country is toward greater concentration of control[11] of the means of communications in the hands of fewer and fewer people. An exemplary study[12] found that one of every six television stations was involved in a cross-ownership relationship with a local newspaper.[13] This phenomenon has concerned a number of thoughtful writers,[14] and statements by the Supreme Court indicate that it is aware of the problem.[15]

The concentration of media ownership also has been a matter of serious concern to legislators, both Democrats and

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[10] For general discussions of the problem, *see* H. LEVINE, *supra* note 5, at 74-86. A popularly-written account of the controversy, with a pro-industry slant, is contained in M. SEIDEN, WHO CONTROLS THE MASS MEDIA (1974). *See also* Johnson and Hoak, *supra* note 5.

[11] It is important to note that technical ownership is not as important a consideration as actual working control. In other contexts, the FCC has recognized this distinction. *See, e.g.*, notes 1 and 2 to 47 C.F.R. § 73.35 (1974) ("actual working control in whatever manner exercised"; ownership of 51% of the stock not necessary to bring the multiple ownership regulations into effect).

[12] Howard, 51 JOURNALISM Q. 715, 717 (1974).

[13] The concentration of ownership of newspapers and broadcasting stations is even more alarming when considered against the background of a continuing decrease in the number of independent newspapers. After pointing out in 1973 that newspaper chains were buying up their independent competitors at the rate of 62 per year, journalist Ben H. Bagdikian went on to say "[a]t this rate (allowing for leap years), the last independent will disappear at 10:48 p.m. on June 7 eleven years hence—appropriately a Thursday, a fat advertising day, and also appropriately, in the year 1984." Bagdikian, *The Myth of Newpaper Poverty*, COLUM. JOURNALISM REV. 20 (March/April 1973).

It has been asserted that a pattern of blatant violations of the antitrust laws is the single most important factor in this demise of daily newspapers in this country. See Barnett, *Media Monopoly and Democracy*, THE NATION, Jan. 15, 1973, at 79. *See also* Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968).

[14] *See, e.g.*, Bagdikian, *The Media Monopolies*, PROGRESSIVE 31 (June, 1978).

[15] *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249 (1974).

> Claims of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. . . .
>
> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

Republicans, liberals and conservatives.[16] The Federal Communications Commission's (FCC) refusal to act decisively against media concentration,[17] despite near-unanimous condemnation on the part of everyone except those with vested interests in the present system, is a tribute to the lobbying finesse[18] and political clout[19] of the communications industry.

Excessive concentration of control of communications has two different types of adverse effects: informational and economic. The combined impact of these consequences creates enormous power for cross-owners, and generates distrust among the public.

A. *Informational Restraint*

It is eminently reasonable to assume that "ownership of the media affects the content of the media":[20] owners inevitably will exercise a measure of control, intentional or unintentional, overtly[21] or subtly, over content. One astute commentator has pointed out several ways in which cross-ownership can affect adversely news reporting and editorializing because of the owner's self-interest.[22] First, the cross-owner's financial in-

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[16] *See, e.g.,* Barnett, *supra* note 9, at 44 (quoting 1969 statements by both Spiro Agnew and Hubert Humphrey).

[17] For an interesting discussion of the intensely political nature of decision-making at the FCC, including a number of revealing case studies, see E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION (1973).

[18] For an entertaining and enlightening description of industry lobbying tactics, see B. COLE AND M. OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE, 36-49 (1978).

[19] Concern about the excessive concentration of political power in the communications industry is not a new concern. During the debates on the Radio Act of 1927, Congressman Luther A. Johnson of Texas pointed out, "When . . . a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them." 67 CONG. REC. 558 (1926).

[20] Johnson and Hoak, *supra* note 5, at 267.

[21] A classic example of overt owner control which adversely affects the public interest was detailed in Barnett, *supra* note 9, at 49. After Robert Kennedy's assassination, a San Francisco newspaper columnist wrote a column urging the newspaper's readers to complain to the FCC about television violence. Because of the newspaper's affiliation with a local television station, the column was censored. It is interesting to note during a license renewal proceeding of the television station involved, the hearing examiner struck the columnist's testimony on the ground that such inquiry into newspaper editorial policies would violate the first amendment. *Id.*

[22] Barnett, A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation at 17-18, *filed in* FCC Docket No. 18110 (Sept. 23, 1974).

terest will prevent any criticism by one of his outlets against another. Second, given the family ties between the outlets, neither will be willing to correct any abuses of the other. Finally, to the extent his outlets reflect his viewpoints, the public will be exposed to similar treatment of news.

One massive study[23] of 214 newspapers and television stations in 77 cities found that cross-owned newspapers were more likely to engage in practices that result in less diversity of coverage.[24] These practices include: (1) sharing of carbon copies of stories scheduled for publication between newspaper and television station news departments; (2) transfer of newspaper reporters or editors to the news department of a cross-owned television station; and (3) the utilization of the same physical plant for both the newspaper and television station. The same study found that "cross-ownership contributes to news homogeneity by aggravating an already disturbing tendency for reporters to cover stories because other reporters are covering them—the familiar problem of 'pack journalism.'"[25] Even if such practices are not "abuses," they "nevertheless [belie] assurances by owners of newspaper-television combinations that their news staffs [function] separately and independently."[26]

Other not-so-innocuous practices can affect adversely the flow of information in a community where cross-ownership exists. Consider San Francisco a few years ago, where

> Hearst stations considered the interest of Hearst newspapers in selecting controversial programs. Proposed materials of "doubtful" or "political" complexion were subject to check-

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[23] Gormley sent questionnaires to 349 managing editors and news directors of both cross-owned and separately owned newspapers and TV stations (214 responded). He then visited ten cross-ownership cities and interviewed forty-four news executives and reporters. He also evaluated 9,335 news stories to compare the coverage overlap of cross-ownership and separately owned sets of newspapers and TV stations. For the complete study, *see* W. Gormley, THE EFFECTS OF NEWSPAPER-TELEVISION CROSS-OWNERSHIP ON NEWS HOMOGENEITY (Institute for Social Research, University of North Carolina, 1976).

[24] Gormley found that "common ownership of a newspaper and a television station in the same city does tend to restrict the variety of news available to the public—and, further, that the homogenizing effects of cross-ownership are most noticeable in smaller cities." Gormley, *supra* note 5, at 39.

[25] Gormley, *supra* note 5, at 30.

[26] *Id.*

up and consultation between both ends of the radio-newspaper empire. For example, Hearst newspaper and radio officials co-operated to secure the cancellation of a nightly [pro-Union] program over KYA (San Francisco), apparently because Hearst's *San Francisco Examiner* feared that the program would hurt its advertising accounts.[27]

The situation in Bluefield, West Virginia, is another classic example of the concentration of ownership of the communication media. In that town, one family controlled every media outlet except one AM radio station.[28] Similarly disturbing is the case of Topeka, Kansas. In that city, Stauffer Publications owns the only daily newspapers, the only commercial VHF television station, and WIBW-AM-FM radio stations.[29] Cross-ownership in Topeka has resulted in distrust of anything that appears in the press. "People here don't trust the papers because they know they're the only ones."[30]

A further adverse effect caused by the informational restraint of media concentration is a legitimate fear of the political power which can be exerted by those concentrations. One thoughtful article[31] has summarized this concern succinctly:

> In our modern society, political power has more and more come to be measured in terms of access to the mass media. The prevention of excessive concentrations of political power in the hands of a few individuals is an important reason for preventing media concentration. The excessive power of the media in the United States is demonstrated by their ability to obtain passage for essentially any single piece of legislation they desire in Congress. Exercising a faucet-like control of information given to the people, the media influence and control legislation, candidates, and political ideas. The effects are felt from the United States Congress and Pres-

[27] Levin, *supra* note 5, at 29-30 (footnotes omitted). In another incident, a newspaper reporter for the Chronicle alleged that he was told to downplay an exposé which might have offended local politicians because an affiliated broadcast station had cable TV interests in the area—which were vulnerable to political pressure. Zuckman and Mason, *The Great Cross-Media Ownership Controversy*, 60 A.B.A.J. 1570, 1573 (1974).

[28] Elliot, *Single Control of TV, Newspaper in One City Faces Increasing Fire*, Wall St. J., July 23, 1974 at 1, col. 1.

[29] Pincus, *Quality News: What Difference Does Ownership Make?* THE NEW REPUBLIC, May 18, 1974, at 15.

[30] *Id.* at 16.

[31] Johnson and Hoak, *supra* note 5, at 276.

> ident down through local politics. The media can determine the issues for national debate, choose the spokesman, control the time allocated to them, and indicate their positions. Even more insidious than their power to promote certain issues is the power to exclude others—all with little accountability to the people affected by their decisions.[32]

It is clear that an increase in the number of voices would be a desirable step toward the vigorous, wide-ranging public debate that is an integral part of a democratic society.

B. *Economic Impact*

The second disadvantage inherent in cross-ownership is the adverse antitrust effect. The economic abuses cited by critics of cross-ownership involve competitive advantages available to owners of newspaper-broadcast combinations in local marketplaces. It has been argued that many newspaper acquisitions of broadcast stations were violations of the antitrust laws from the outset and thus FCC approval and renewal of such licenses was and is illegal.[33] But the Commission has taken the position that it is not responsible for enforcing "antitrust or other laws relating to unfair trade practices" though it may "take cognizance" of such statutes in applying its "public interest" standard.[34]

Although some industry spokesmen have suggested that any divestiture necessary should be left to the Antitrust Division of the Justice Department, this approach "is a poor alternative to incorporation of antitrust considerations into FCC regulations. The FCC maintains at least periodic scrutiny over broadcast media through its licensing procedure, and all acquisitions and mergers involving a broadcast outlet are subject

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[32] *Id.* at 275-76.

[33] Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 Nw. U. L. REV. 159, 186-87 (1971). *See also* Comment, *Antitrust-"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, 47 N.C. L. REV. 794 (1967).

[34] Sakes Tarzian, Inc., 23 F.C.C.2d 221, 222 (1970). For the Supreme Court's statement on the issue, *see* United States v. Radio Corp. of America, 358 U.S. 334 (1959) (while FCC does not have power to resolve antitrust issues, it may consider antitrust policy in its determination of the "public interest" standard in a particular case).

to FCC public interest scrutiny."[35]

There are several ways that cross-owners can assert their economic power in the local market to gain an unfair advantage over competitors. For example, the television station owned by the *Kansas City Star* refused to accept advertising from merchants who had not purchased advertising space in the parent newspaper.[36] Similarly, the *Bloomington Courier Tribune* in Indiana offered "Certificates of Broadcast Credit" to merchants who purchased a specified amount of newspaper space. The certificates entitled their holders to reduced rates for valuable advertising time on the three broadcast stations owned by the newspaper's parent company.[37] In both cases, and many others,[38] newspapers that owned broadcast stations were able to use unfairly their more powerful bargaining position with local advertisers to gain an advantage over their journalistic competitors in the quest for vital advertising revenues.[39] The antitrust problems underlying cross-ownership, when considered with the more significant negative effects on the free flow of information, make it imperative that some action be taken to sever these combinations.

II. FEDERAL COMMUNICATIONS COMMISSION V. NATIONAL CITIZEN'S COMMITTEE FOR BROADCASTING

A. *Background*

The Federal Communications Commission has said, almost from its inception, that it deemed it important to prevent

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[35] Comment, *Media Cross-Ownership—The FCC's Inadequate Response,* 54 TEX. L. REV. 336, 345 (1976). *See also,* Barrow, *Antitrust and the Regulated Industry, Promoting Competition in Broadcasting,* 1964 DUKE L.J. 282, 283.

[36] Kansas City Star Co. v. United States, 240 F.2d 643, 656 (8th Cir.), *cert. denied,* 354 U.S. 923 (1957).

[37] Sakes Tarzian, Inc., 23 F.C.C.2d 221 (1970).

[38] *See generally* Comment, *Diversification and the Public Interest: The Administrative Responsibility of the FCC,* 66 YALE L.J. 365 (1957).

[39] A related abuse concerns the refusal of newspapers which hold television properties to carry or carry in full the listings of competing television stations. One bankrupt UHF station in the Dallas-Fort Worth area claimed that three local media cross-ownerships refused it equal program listings, in some denying it any newspaper listing at all. Comment, *supra* note 35, at 363-64. The resulting antitrust suit was subsequently settled for $535,000: *see* Healy, *Station Owner Awarded One-Half Million for Papers' TV Listing Ban,* EDITOR & PUBLISHER, Feb. 9, 1974, at 9.

concentration of media control.[40] The Commission has sought to achieve diversity in the critically important marketplace of ideas by regulating media ownership. All television and radio broadcast stations must be licensed by the Federal Communications Commission,[41] such licensing being determined by whether the "public interest, convenience, and necessity" will be served thereby.[42] The policy of the Commission has been that diversification of ownership serves the "public interest, convenience, and necessity" because it results in the airing of diverse viewpoints.

However, despite an early case that seemed to indicate that cross-ownership was not in the public interest,[43] "[b]y 1941, of 111 cities having one newspaper and one radio station, in 87 the newspapers owned or controlled the broadcast facility. And as of June 30, 1941, 43 of 99 FM applications had been filed by newspapers."[44]

Although "[i]n the early 1940's, the Commission considered adopting rules barring common ownership of local newspapers and radio stations,"[45] in 1951 the Commission decided not to adopt a *per se* rule and instead to consider the matter on a case-by-case basis when licenses were issued or renewed.[46]

[40] For a brief history of FCC cross-ownership policy, *see* R. BUNCE, TELEVISION IN THE CORPORATE INTEREST, 46-51 (1976). *See also* Kielbowiez, *Discrimination or Discriminating Licensing: FCC Policy and Newspaper Ownership of T.V. Stations, 1945-1970,* 30 ADMIN. L. REV. 423 (1978).

One of the earliest court tests of the FCC's authority was National Broadcasting Co. v. United States, 319 U.S. 190 (1934), which arose as the broadcasting networks challenged the validity of FCC regulations designed to promote more diverse programming, if not diversity of ownership, among local radio stations.

[41] 47 U.S.C. § 301 (1970).

[42] 47 U.S.C. §§ 307(a), 309(a) (1970).

[43] Port Huron Broadcasting Co., 5 F.C.C. 117 (1938).

[44] Toohey, *Newspaper Ownership of Broadcast Facilities,* 20 FED. COM. BAR J. 44, 47 (1966). For a discussion of the historical pattern of the trend toward cross-ownership and its causes, *see* LEVIN, *supra* note 5, at 39-73. *See also* Sterling, *Newspaper Ownership of Broadcast Stations, 1920-1968,* 46 JOURNALISM Q. 227, 228 (1969).

[45] FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 781 n.4 (1978).

[46] *Id.* However, diversification of ownership has not been the only factor relevant to the public interest, convenience, and necessity. Factors that are taken into account when considering applicants for a license have included the extent to which local ownership is integrated with management, proposed programming, past broadcast record, and the character of the applicant. In this regard, the Commission attempts to obtain "the best practicable service to the public." Policy statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965). *See, e.g.,* FCC v. Allentown

In pursuit of diversification, the Commission has been willing to order divestiture, and its inherent power to do so to implement sound policy has not been questioned seriously.[47] Divestiture[48] is consistent with the notion that a licensee has no vested right to its license beyond the typical three year term.[49] To say that the Commission has the power to order divestiture is merely another way of saying the Commission has the power to license or not to license, which authority it clearly possesses.

The Commission began a formal rulemaking procedure in 1970 "to consider the need for a more restrictive policy toward newspaper ownership of radio and television broadcast stations."[50] The Commission proposed rules "that would eliminate

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Broadcasting Corp., 349 U.S. 358 (1955), in which this consideration was raised, although it was not a decisive factor.

Despite a 1951 FCC policy statement that antitrust violations would be a consideration in determining license fitness, the Commission almost immediately approved a license transfer to a party with 198 pending antitrust actions. Perry, *Current Antitrust Problems in Broadcasting*, 27 OHIO ST. L.J. 1, 6-7 (1966).

[47] Congress has, however, seen fit to grant a tax break to licensees forced to effectuate FCC policy. A 1944 amendment to the Internal Revenue Code permits licensees who are forced to divest to defer capital gains by treating the transactions as involuntary conversions. Revenue Act of 1943, § 123, 58 Stat. 44 (1944), 26 U.S.C. § 112(m); now 26 U.S.C. § 1071. (1970). *See* H.R. REP. No. 1079, 78th Cong., 2d Sess. 49 (1944).

[48] A prime example of the success of industry spokesmen in setting the terms of debate is the constant use of the term "divestiture" by the Commission in the Second Report & Order. "Divestiture," according to the FCC, "is a harsh remedy, one to be reserved [sic] only where the need is overwhelming and the evidence unambiguous." Second Report & Order, at 1083. But "divestiture," in this context, is, as Chief Judge Bazelon noted, a misnomer:

> It implies that the broadcaster has that which the Communications Act specifically states he does not have—an interest in the license beyond its expiration date—and that he is being forcibly deprived of a vested right. A licensee must apply for renewal every three years and the Commission is to grant renewal only if it finds it is in the public interest to do so.

National Citizens Comm. v. FCC, 555 F.2d 938, 962 (D.C. Cir. 1977).

Throughout the hearings, the Commission seems to have accepted as given that cross-owners had a right to renewal of their broadcast licenses. This assumption was fatal to those who sought a break up of the combinations.

[49] FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (license not a property right); 47 U.S.C. §§ 301, 304, 307, 309 (h) (1970). Section 304 specifically provides that applicants for licenses must sign waivers of any claim to the use of a particular frequency. Section 309(h) provides that every license must contain a statement that the license is subject to the condition that no right to use the designated frequency beyond the term of the license vests in the licensee.

[50] FCC v. Nat'l Citizen's Comm. for Broadcasting, 436 U.S. 775, 783 (1978). The FCC's rule-making activity provoked a great deal of discussion. *See* Mills, Moynahan,

all newspaper-broadcast combinations serving the same market, by prospectively banning formation or transfer of such combinations and requiring dissolution of all existing combinations within five years."[51] The Commission pointed out that the most significant aspect of the problem was the common control of television stations and newspapers of general circulation, since the public looks to these two sources for its news and information on public affairs.[52]

The Notice of Proposed Rulemaking stirred a hornet's nest. The newspaper broadcast industries activated their powerful lobbying machinery into high gear. By the time the hearings were half completed (1973), one industry organization alone spent more than $300,000 for cross-ownership defense by hiring former FCC Commissioner Lee Loevinger to represent it in the hearings.[53] Such a blitzkreig could well be expected to result in a mismatch for an agency criticized for its inadequate staff and resources.[54] Newspaper or broadcast interests predictably opposed the formulation of any rules in the area. The Antitrust Division of Justice Department and a handful of public interest groups,[55] led by the Washington-based National Citizens Committee for Broadcasting,[56] filed comments favoring the formulation of rules which would bar cross-ownership.

Perlini & McClure, *The Constitutional Considerations of Multiple Media Ownership Regulation by the Federal Communications Commission,* 24 AM. U. L. REV. 1217 (1975); Note, *The Power of the FCC to Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification,* 75 MICH. L. REV. 1708 (1977); Note, *Diversity Ownership in Broadcasting: Affirmative Policy in Search of an Author,* 27 U. FLA. L. REV. 502 (1975); Comment, *A Primer on Docket 18110: The New FCC Cross-Ownership Rules,* 59 MARQ. L. REV. 584 (1976); Comment, *supra* note 35; Comment, *supra* note 5.

[51] FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 784 (1978) (citing Further Notice of Proposed Rulemaking (Docket No. 18110), 22 F.C.C.2d 339, 346 (1970)).

[52] *Further Notice of Proposed Rulemaking,* 22 F.C.C.2d 339, 344-46 (1970).

[53] *See* Barnett, *supra* note 9, at 45.

[54] *See* Johnson & Dystel, *A Day in the Life: The Federal Communications Commission,* 82 YALE L.J. 1575, 1623 (1973).

[55] For general discussions of public interest groups active in the communications field, *see* B. COLE and M. OETTINGER, *supra* note 18, and D. GUIMARY, CITIZENS' GROUPS AND BROADCASTING (1975).

[56] The National Association of Broadcasters is the industry lobbying group repsenting more than 4,000 radio and television stations with a $3,000,000 annual budget and a staff of about 100. Its office is only a few blocks from the FCC. E. KRASNOW & L. LONGSLEY, *supra* note 17, at 34.

On January 31, 1975, the Commission finally acted.[57] In short, the Commission rules were of surprisingly limited effect.

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[57] Amendment of §§ 74.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report & Order (Docket No. 18110), 50 F.C.C.2d 1046 (1975). [hereinafter cited as Second Report & Order]. *See generally,* Note, *The Power of the FCC to Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification,* 75 MICH. L. REV. 1708 (1977). Comment, *supra* note 35; Comment, *A Primer on Docket 18110: The New FCC Cross-Ownership Rules,* 59 MARQ. L. REV. 584 (1976).

An interesting sidelight to this whole affair is the dilatory tactics undertaken by the communications industry lobby which repeatedly requested, and was granted by the FCC, delays which extended the proceedings from 1968 to 1975. *See* Barnett, *supra* note 9, at 44-46. It has been suggested that one objective of this delay was to postpone a decision until the expiration of the term of FCC Commissioner Nicholas Johnson, an outspoken foe of cross-ownership. *Id.* at 46. Johnson's term expired in June 1974; the report on cross-ownership was released in January 1975.

From the time that the Further Notice of Proposed Rulemaking was issued in 1970, the Commission deferred all renewal challenges based upon claims that cross-ownership was not in the public interest. The cases deferred include: Chronicle Broadcasting Co., 40 F.C.C.2d 775 (1973) (San Francisco); Radio Ohio, Inc., 38 F.C.C.2d 721 (1973) (Columbus, Ohio) *aff'd in* Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974); Scripps-Howard Broadcasting Co., 31 F.C.C.2d 1090 (1971) (Memphis, Tenn.); Evening Star Broadcasting Co., 27 F.C.C.2d 316 (1971) (Washington, D.C.) *aff'd in* Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972); Midwest Radio-TV, Inc. 24 F.C.C.2d 625 (1970) (Minneapolis-St. Paul); Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970) (Salt Lake City); Federation of Citizens Ass'ns, 21 F.C.C.2d 12 (1969) (Washington, D.C.).

In *Columbus Broadcasting Coalition,* the challengers maintained that the long delay in promulgating a rule justified the court's stepping in to decide the case on the merits rather than further deferring to the Commission's repeated decisions to defer. The court agreed that four years was a long time but it also recognized that the problem was complex. The challengers were denied rehearing *en banc* but five of the nine active judges joined in an opinion which chastized the Commission for not acting, stating "we expect the Commission to issue its cross-ownership policy within the year; if it is not, [we are] presently of the view that this Court must eventually rule on its *de facto* policy." 505 F.2d 320, 330 (D.C. Cir. 1974). The rules were finally promulgated early the next year.

The Anti-trust Division of the Justice Department was pressuring the FCC to bring the matter to a conclusion. The Department claimed that in Des Moines, one company received 100% of the newspaper advertising revenues and 37% of the local television advertising revenues. In St. Louis, two cross-owners received 80% of the area's available advertising revenues.

It is interesting to note that the impetus for the promulgation of cross-ownership rules by the FCC originated not with that agency, but with the Justice Department. In August 1968, the Department filed a twenty-six page memorandum with the Commission calling for a rapid end to cross-ownership combinations in single markets. *See* Sterling, *supra* note 44.

A former FCC Commissioner turned lobbyist for the broadcast industry, Lee Loevinger, has strongly attacked the Justice Department's activism in this field. "[W]hat the Department of Justice is doing in this instance is abusing legal process, or, if you

The rules did ban the future creation of co-located newspaper-broadcast combinations by prohibiting a newspaper owner from acquiring a license for a co-located broadcast station, either by transfer or by original licensing. Furthermore, any broadcast licensee who acquired a daily newspaper in the same market was required to dispose of it within a year or by the time of its renewal, whichever came later.[58] The rules, however, "grandfathered" the existing combinations, meaning that almost all already existing combinations were undisturbed. Divestiture for existing combinations was considered appropriate only in those "egregious" cases in which one entity had an "effective monopoly in the local marketplace of ideas,"[59] by possessing simultaneous control over the local daily paper and the broadcast stations.[60] As a practical matter, this meant that only eight television/newspaper combinations and ten radio/newspaper combinations in the nation's smallest markets[61] were ordered to divest.[62]

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prefer, trying to blackmail the FCC into following the course that the Department of Justice thinks it should follow. And I submit that this is improper." Loevinger, *Antitrust and Regulated Industries: Collision Course?: Communictions,* 43 ANTITRUST L.J. 359, 366 (1974). Other broadcast industry partisans have referred to Justice Department personnel interested in promoting diversification as "mad dogs." Zuckman & Mason, *supra* note 27, at 1570. More objective observers would say that the Justice Department is merely responding to fill a vacuum created by the FCC's failure to move expeditiously. *See generally,* B. COLE & M. OETTINGER, *supra* note 18.

Even Congress was growing impatient. *See, e.g.,* H.R. 12993, 93rd Cong., 2d Sess. (1974) (requiring FCC not to consider ownership of other stations unless the Commission has adopted rules prohibiting such ownership interests); H.R. REP. No. 961, 93d. Cong., 2d Sess. (1974); S. REP. No. 1190, 93d. Cong., 2d. Sess. 14-15, 22 (1974) (action required on Docket No. 18110 by end of calendar year). *See also* 30 CONGRESSIONAL QUARTERLY ALMANAC 714-17 (1974) for a summary of Congressional action.

[58] Second Report and Order at 1074; 1099-1107.

[59] *Id.* at 1080-81.

[60] The rules provided that divestiture was required only where there was common ownership of the sole daily newspaper published in a community and either (1) the sole broadcast station or (2) the sole television station. Radio and television were thus accorded a little bit different treatment in that the presence of a television station would exempt a radio-newspaper combination but the presence of a radio station would not exempt a television-newspaper combination. *Id.* at 1080-84.

[61] It has been pointed out that "[t]he stations and newspapers in these localities are likely to be small, marginal operations where independent ownership may not be possible." Note, *supra* note 50, at 512. A cynic might suggest that the real reason divestiture was to be required of the smaller combinations is that they lacked the power to dominate the FCC's deliberations as completely as did their larger brothers.

[62] The Commission was compassionate enough to provide for waivers of both the

On petitions for reconsideration, the Commission reaffirmed its rules and policies.[63] In so doing, the Commission rejected industry arguments that no rules in this area were appropriate and at the same time rejected the arguments of the Justice Department and the National Citizens Committee for Broadcasting that the divestiture order was far too narrow. The Commission, in walking this line, maintained simultaneously that commonly owned media do not provide diversity (thus justifying some rules) and that the diversity goal should yield if it caused excessive disruption or hardship (thus justifying the narrow divestiture order).[64] The Commission had adopted the rhetoric of opponents of cross-ownership, while tailoring its actions to conform with newspaper-broadcast industry desires.

The order was appealed to the United States Court of Appeals for the District of Columbia.[65] Appeals came from all directions,[66] but one has to believe that the industry appeals were mostly cosmetic. After all, the divestiture order affected only minor combinations in small cities and the prospective ban was, for all practical purposes, purely academic.[67] The court, in an extraordinary opinion, affirmed the prospective

prospective ban and the divestiture requirement in exceptional cases. Second Report and Order at 1076 n.24, 1077, 1085. In fact, waivers were granted *sua sponte* to one television-newspaper combination in Hickory, North Carolina, and one radio-newspaper combination in Brookfield, Missouri, leaving only 16 affected combinations nationwide. Under the rules, absent a waiver, divestiture had to occur by January 1, 1980. *Id.* at 1084-86.

[63] Memorandum Opinion and Order, 53 F.C.C.2d 589 (1975).

[64] *Id.* at 592.

[65] Nat'l Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).

[66] *See generally* Comment, 82 DICK. L. REV. 193 (1978); Comment, 1978 WIS. L. REV. 269 (1978). A literal race to the courthouse door had followed the FCC's announcement. The NCCB, anxious to have the appeal heard in Judge Bazelon's District of Columbia circuit, had their notice of appeal stamped at 2:48 p.m. on January 31, 1975, within minutes of the official announcement. The Odgen Newspapers of Wheeling, West Virginia were close behind, with their notice of appeal being stamped in the Fourth Circuit shortly after 3:00 p.m. *See* BROADCASTING 70 (Feb. 10, 1975).

[67] The National Association of Broadcasters, the group which is roughly to the broadcasting industry what the American Newspaper Publishers Association is to the newspaper industry, admitted to the Commission that "a prospective ban would be purely academic." Brief for Petitioner, at 35 n.2, National Citizens Comm. v. FCC, 555 F.2d 938 (D.C. Cir. 1977). As Commissioner Robinson observed: "[I]n most of the markets involving newspaper-television station ownership, the stations have been commonly owned since the time of the original license. There was no reason to believe that voluntary dissolutions would occur with any regularity in the future." *Id.*

ban but vacated the rules dealing with existing combinations, holding that a broader divestiture was required under law.[68]

B. *The Supreme Court Opinion*

1. *The Prospective Ban*

The Supreme Court reversed the court of appeals and reinstated the rules as the Commission had adopted them. With respect to the rule prohibiting future cross-ownership, the Court rejected several arguments by the media petitioners. The Court first noted that the Commission had not exceeded its statutory authority, as had been argued.[69] The Court then rejected the argument that evidence was needed which would indicate that the Commission's rules would in fact lead to diversity. Agreeing with the court of appeals, the Court noted that the rules were a rational method of achieving diversity despite the inconclusiveness of the record.[70] Similarly, the Court rejected the argument that the Commission had based its rules on a diversification policy to the exclusion of other factors. The Court noted that the Commission's "change in policy was a reasonable administrative response to changed circumstances in the broadcasting industry."[71] The Court also rejected constitutional arguments made by the broadcasting industry. Noting that "there is no 'unabridgeable First Amendment right to broadcast,'"[72] and the "physical limitations of the broadcast spectrum,"[73] the Court found "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest.'"[74] In response to the contention that the regulations "unconstitutionally conditioned the receipt of a broadcast license upon forfeiture of the right to publish a newspaper,"[75] the Court noted that this kind of prohibition does not violate the first amendment since the regulations are not "content related" and its purpose "is to

[68] Nat'l Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 966 (1977).
[69] 436 U.S. at 793-94.
[70] *Id.* at 796.
[71] *Id.* at 797.
[72] *Id.* at 799 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)).
[73] 436 U.S. at 799.
[74] *Id.*
[75] *Id.* at 800.

promote free speech, not to restrict it."[76] Moreover, newspapers are not "'singled out' for more stringent treatment than other applicants;" they are treated in the same "fashion as other owners of the major media . . . [are] . . . treated under the Commission's multiple-ownership rules."[77]

2. *The Divestiture Rules*

In "reinstat[ing] the portion of the Commission's order that was invalidated by the Court of Appeals,"[78] the Court reiterated the Commission's reasons for not ordering sweeping divestiture:

> [T]he stability and continuity of meritorious service provided by the newspaper owners as a group would be lost; owners who had provided meritorious service would unfairly be denied the opportunity to continue in operation; "economic dislocations" might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming, and local ownership of broadcast stations would probably decrease.[79]

The Court was unwilling to find "that the Commission acted irrationally in concluding that these public interest harms outweighed the potential gains that would follow from increased diversification of ownership."[80]

The validity of these arguments is highly questionable. The Court agreed with the Commission that the stability and continuity of the service provided by the newspaper owners would be lost because divestiture would disturb continuity of operation. The new owners "would lack the long knowledge of the community and would have to begin raw."[81] Yet absolutely no evidence appeared in the trial record to indicate that divestitures would result in disruptions harmful to the public interest. First, it appears that hold-overs in high level management usually smooth the transition period.[82] Moreover, as the court

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[76] *Id.* at 801.
[77] *Id.*
[78] *Id.* at 803.
[79] *Id.* at 804.
[80] *Id.* at 805.
[81] *Id.* at 807, quoting from Second Report and Order at 1078.
[82] Commissioner Robinson made this observation during the course of the proceed-

of appeals noted, the Commission regularly approved license transfers. If harmful disruptions do accompany changes in ownership, how could the Commission justify its routine approval of voluntary transfer?[83] Neither the Court nor the Commission bothered to cite any evidence to the effect that new licensees would be inferior to existing licensees. In fact, if the record indicated anything, it was that new owners were more responsive to community needs.[84] There was simply no evidence in the record to support the contention that divestiture posed a threat of harmful disruption. The position of the Court and the Commission amounts to no more than continuity for continuity's sake.

The concern of the Court and the Commission that owners who had provided meritorious service would be denied unfairly the opportunity to continue in operation indicates a profound misunderstanding of the licensing scheme. A broadcaster has no vested right to its license beyond its three year term. It is difficult to discern the unfairness in failure to renew a license if the public interest required that the license be awarded to someone else. The reference of the Court and the Commission to "legitimate renewal expectancies" which "should not be destroyed without good cause"[85] is a gratuitous introduction of a notion not present in the statutory scheme.[86] It indicates that private rather than public interests are being protected. The solicitude expressed for licensees who have personally profited from owning broadcast stations is either incredibly naive or

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ings. Second Report and Order at 1128.

[83] From 1969-1973, the Commission approved 165 voluntary television transfers, many without even a hearing. It nowhere appears that the Commission was genuinely concerned about the possibility of disrupted services in this context. *See generally* FCC ANNUAL REPORTS [1969-1973] at 130, 143, 147, 167, 201.

[84] *See, e.g.*, the testimony of James Alexander, Executive Director of FACT, Inc. New Haven Conn., and the testimony of Nancy Schmidt, Chairwoman, St. Louis Broadcast Coalition Brief of Nat'l Citizens Comm. for Broadcasting at 36, FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978). Additionally, in the one known instance where a newspaper license was replaced, the new licensee performed superlatively, airing locally produced shows in prime-time and receiving accolades for its programming. *See, e.g.*, Koch, *WCVB: Carrying the Torch*, 29 ACCESS MAGAZINE 12 (1976).

[85] 436 U.S. at 805 (quoting in part Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970)).

[86] *Cf.* Bennett, *supra* note 33, at 188-89 (disparaging reliance argument).

reflects a conscious desire to serve the industry. In either case, in the context of a regulatory scheme that encourages diversity, the Court and the Commission should have been concerned about the extent to which the existing licensees were preventing new competitors from entering the market.

The Court and the Commission each expressed concern that broad-scaled divestiture "might" result in economic dislocation which in turn "might" prevent new owners from obtaining working capital to maintain the quality of local programming.[87] This theory assumes that, because of high interest rates, new owners would have to devote a substantial portion of revenues to debt service, leaving insufficient working capital to finance local programming.[88] That these not-so-mighty "mights" would be offered with a straight face by the Commission as a reason for limiting divestiture is surprising; that they should be accepted by the Court is shocking. Not only is it highly speculative to say that divestiture *might* result in economic dislocation, which *might* result in owners getting less capital, which *might* result in the impairment of local programming; these possibilities lack any support whatsoever in the record.[89] Moreover, if the concern is legitimate, why has the Commission expressly refused to consider it in the renewal transfer contexts?[90]

Furthermore, the FCC itself had pointed out that the eco-

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[87] 436 U.S. at 804.

[88] *Id.* at 804 n.22.

[89] Interestingly enough, this speculation first arose when the Commission summarized the broadcaster's allegations. *See* Second Report and Order at 1078. It somehow became the Commission's view.

One study found that cross-ownership played an insignificant role in preventing newspaper and broadcast station failures. H. LEVIN, *supra* note 5, at 97. The cross-owned stations are generally older and more stable, which may be explained by the fact that newspaper owners were among the first to move into this new field and selected the most profitable choice locations. *Id.* at 94. "The vast majority of cross-owned stations are VHF network affiliates, a lucrative position that newspapers acquired because of their early entrance into the community broadcast markets. Consequently, although only eleven to twelve percent of the television stations are cross-owned, they account for eighteen percent of the total daily television audience." Comment, *supra* note 35, at 340. *See also* R. BUNCE, *supra* note 40, at 42-45.

[90] As a matter of policy, the Commission, until this time, steadfastly refused to look at the amount or percentage of revenue a licensee reinvested into public service broadcasting as an element of the public interest. *See, e.g.,* Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 737-38 (D.C. Cir. 1976).

nomic loss to divestees could be minimized by having divestiture occur over a five year period, allowing them to exchange stations, thus reducing cross-ownership (although the level of multiple ownership would remain high) and allowing the sellers to take advantage of already existing significant tax advantages.[91] The FCC could also, as it has previously done, condition a license renewal on the proviso that the station be sold within a stated time.[92]

The final concern of the Court and the Commission was that across-the-board divestiture would probably result in the decrease of local ownership of broadcast stations. In support of this concern, both the Commission and the Court pointed out that "roughly 75% of the existing co-located newspaper-television combinations are locally owned."[93] Yet neither the Court nor the Commission indicated to what extent these local owners actually participated in the operation of the station. Since the Commission has long taken the position that local ownership is insignificant unless the local owners actually participate in the day-to-day operation of the station,[94] it is surprising that the Commission and the Court expressed such deep concern for bare local ownership. Additionally, nothing in the record indicated, as the court of appeals had astutely noted, that local entrepreneurs will not find television an attractive investment.[95] Since the Commission routinely approves voluntary sales to absentee buyers,[96] this concern for local ownership is perhaps not genuine. Nonetheless, the Court concluded that it was reasonable for the Commission to consider the decrease in local ownership as one of several factors militating against divestiture of combinations that have been in existence for many years.[97]

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[91] Further Notice of Proposed Rulemaking, Docket 18110, 22 F.C.C.2d 339, 347-48 (1970).

[92] *See, e.g.,* Melody Music, Inc., 2 F.C.C.2d 958 (1966).

[93] 436 U.S. at 808.

[94] 1965 Policy Statement, 1 F.C.C.2d at 395.

[95] 555 F.2d at 964.

[96] *See, e.g.,* Petitioner's Brief at 33, FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 755 (1978).

[97] 436 U.S. at 809.

Professor William Gormley has pointed out drawbacks in the local ownership goal which the FCC thought so worthy of protection:

The net result was that the Court found nothing in the Communications Act, the first amendment, or the Commission's own policies that would require the Commission to presume that its diversification policy should be given controlling weight.[98] This finding was made even though the commission order had stated: "If our democratic society is to function, *nothing can be more important* than insuring that there is a free flow of information from as many divergent sources as possible."[99] According to the Court, such a presumption was inconsistent with the Commission's policy of giving foremost importance to the more general goal of providing the best practicable service to the public.[100]

Prior to this case, whenever the Commission was confronted with the problem of weighing diversity against other considerations comprising the best practicable service goal, diversity won. In fact, in *McClatchy Broadcasting Co. v. F.C.C.*,[101] the Commission chose an applicant who would help to achieve diversity rather than one who was superior in all other respects.[102] *McClatchy* was totally consistent with the policy that diversity was the single most important factor in selecting a licensee, while ranking past broadcast record a weak sixth. Nonetheless, the Court here glibly concluded that the diversification goal did not take precedence over the unfounded fears of interrupted service, economic dislocation, and decreased local ownership.

As for the limited divestiture order itself, the Court re-

> [E]ven if local ownership is generally desirable, local ownership and cross-ownership may be a particularly pernicious combination. Perhaps local owners do take a more active personal interest in the management of their properties than absentee owners, and perhaps they have stronger beliefs about the community's needs. But these factors increase the probability that if the owner's properties include both a newspaper and a television station, such personal priorities will be stamped on two major media as a result.

Gormley, *supra* note 5, at 40.

[98] 436 U.S. at 809.

[99] Second Report and Order at 1079 (emphasis added).

[100] 436 U.S. at 809-10.

[101] 239 F.2d 15 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918 (1957).

[102] *But cf.* Busterna, *Diversity of Ownership as a Criterion in F.C.C. Licensing Since 1965,* 20 J. BROADCASTING 101 (1976) (if an applicant whose licensing would promote divestiture has other demerits, the Commission will award the license to another applicant).

quired divestiture in the most "egregious cases" or those of "effective monopoly." "Some line had to be drawn"[103] and this was as good a place as any, since it is "hardly unreasonable for the Commission to confine divestiture to communities in which there is common ownership of the only daily newspaper and either the only television station or the only broadcast station of any kind encompassing the entire community with a clear signal."[104] Under the Commission's Court-approved scheme, only those combinations that constitute "effective monopolies" are forced to divest. Yet the standard for defining "effective monopoly" bears no reference to antitrust law, but rather to whether there is any other media voice in the community.[105] Under this approach, which grandfathers any combination that has less than 100% control of the market, every combination except some in the very smallest markets are grandfathered. Ironically, perhaps tragically, certain licensees required to divest are not really as concentrated as some which are grandfathered.[106] The point is subtle but it can not be overlooked: a combination which provides 400,000 people with almost all their news is surely more egregious than one which provides a small community with all its news.[107] The Commission approach, which requires divestiture only of "effective monopolies," and which defines effective monopolies as those which have 100% of the market, is irrational because it fails to achieve the goal of putting diversified views in the marketplace of ideas in any significant fashion.[108] The limited divestiture scheme is,

[103] 436 U.S. at 814.

[104] *Id.* at 814-15.

[105] Under the Sherman Act, for example, a 76% monopoly has been determined to be prima facie monopolistic. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956).

[106] *See, e.g.,* Petitioner's Brief at 47, FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (which compares, for example Albany, Georgia, with Elkhart, Indiana, and points out that the more egregious combination is grandfathered).

[107] At least this quality is so according to criteria developed by the Rand Corporation for measuring concentration of control. Thus, for example, in Chronicle Broadcasting Co., 40 F.C.C.2d 775, 782 (1973), the Commission found that 10% of the population of the San Francisco market, or over 400,000 people, received their information exclusively from the grandfathered Chronicle media outlets even though there were other media voices in the city. Petitioner's Brief at 47, FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

[108] NCCB suggested that a 30% concentration should warrant divestiture; Commissioner Robinson was willing to adopt a similar standard; the court of appeals

in substance, a token concession to the importance of diversity. The few combinations which may have to divest[109] will have but little effect on the serious national problem of increasing concentration of ownership of the communications media.

CONCLUSION

The notion that the FCC should strive actively to promote diversification of ownership, it appears, is a dead or at least moribund letter. The Court, in stating that diversification of ownership will be only a "secondary factor"[110] in the licensing scheme, has relegated a critically important policy to a position whereby it can be neutralized by reference to such considerations as the need for continuous service, the need to avoid economic dislocation, and the desire to maintain high levels of local ownership.

Since it so clearly appears that the Commission is unwilling to rethink its divestiture policy, and since the Court has spoken, the only chance for a rational communications law policy[111] is with Congress. One would hope that Congress, which is currently redrafting the Communication Act, will respond by resurrecting diversity prior to the arrival of 1984.[112]

However, there are practical difficulties in the way of such reforms. The domination of the FCC by the communications industry which has a vested interest in perpetuating the current cross-ownership system has already been discussed. Many

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thought that this type of approach would be feasible on remand. Brief for Nat'l Citizens Comm. of Broadcasting at 48 n.64, FCC v. Nat'l Citizen's Comm. for Broadcasting, 436 U.S. 755 (1978).

[109] It appears, moreover, that these divestitures may never take place, given the fact that the Commission has already granted two waivers and appears to be quite willing to grant more.

[110] 436 U.S. at 809.

[111] For a thought-provoking discussion of various alternatives to the current television broadcast structure, see R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973).

[112] Although the Supreme Court's decision was a major defeat to opponents of media monopoly, their struggle is continuing. NCCB Chairman Nicholas Johnson has indicated his group will continue to challenge selected individual cross-ownerships at license renewal time in a kind of "guerilla warfare." BROADCASTING 28 (June 19, 1978). The first target of this case-by-case strategy reportedly will be Atlanta, where the Cox newspaper chain owns the morning and evening newspapers, a TV station, AM and FM radio stations, and cable TV. *See* Washington Post, June 13, 1978, § A, at 8, col. 3.

observers have pointed out the enormous power held by this particular special interest group over Congress itself, whose members' fortunes rise and fall with the ebb and flow of publicity, good or bad.

> Most of our politics is still state and local in scope. And, increasingly, in many states and local communities, congressmen and state and local officials are compelled to regard that handful of media owners (many of whom are out-of-state), rather than the electorate itself as their effective constituency.[113]

"The real lobbying power of broadcasters does not lie in the amount of money they may contribute to campaigns, nor even in the power of their editorializing or formal endorsements. The power lies in the discretion of the broadcaster . . . ."[114]

With such power concentrated in the hands of a few, it is little wonder that the tendency is to avoid doing anything that will upset that powerful few. Ending cross-ownership will not end that power, but it will disperse it, and be a step toward controlling it. For a politician whose constituency is located in a state or region dominated by such "media barons,"[115] to move toward divestiture will require no small measure of moral and political courage. But just such courage is necessary to fulfill the broad purposes of the first amendment[116]—to encourage the continued airing of a multiplicity of viewpoints on the issues of our time.

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[113] N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 52-55 (1970). *See also* E. KRASNOW & L. LONGLEY, *supra* note 17, at 55-56.

[114] B. COLE AND M. OETTINGER, *supra* note 18, at 41.

[115] *See* Johnson, *The Media Barons and the Public Interest: An FCC Commissioner's Warning*, THE ATLANTIC, June 1968, at 51.

[116] "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).