Back to Index

FCC 68-135

In the Matter of AMENDMENT OF SECTION 73.636(a) OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF TELEVISION BROADCAST STATIONS.

Docket No. 16068

February 7, 1968 Adopted

JUDGES: BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING AND ISSUING STATEMENTS; COMMISSIONER COX DISSENTING; COMMISSIONER LOEVINGER CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER WADSWORTH JOINS.

OPINION:

REPORT AND ORDER

1. The twofold purpose of the Commission's multiple ownership rules is to promote maximum competition among broadcasters and the greatest possible diversity of programming sources and viewpoints. The rules appear in sections 73.35, 73.240, and 73.636. These sections govern multiple ownership of stations in the standard, FM, and television broadcast services respectively. Each section is divided into two main parts: (1) The so-called "duopoly" or "overlap" portion which provides limitations on the common ownership or control of broadcast stations in the same broadcast service which serve substantially the same area, and (2) the "concentration of control" portion which proscribes the grant of a license for an AM, FM, or TV station to any party if the grant "would result in concentration of control" in the particular broadcast service "in a manner inconsistent with public interest, convenience or necessity."

2. The concentration of control part sets forth a number of specific factors that will be considered by the Commission in determining whether a particular grant would result in a concentration of control contrary to the public interest. In this regard, the AM and FM rules state:

> In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question.

The TV rule uses the identical language except for the absence of the words "classes of stations involved."

3. The concentration of control portions go on to state that although the aforementioned factors will be considered in determining whether the grant of a license would result in undue concentration of control, in any event such a concentration will be deemed to exist if the grant would result in a party's having an interest in more than a specified maximum number of stations in each service. That maximum is seven AM stations, seven FM station, and seven TV station, no more than five of which may be VHF.

4. The present proceeding deals with a proposed amendment to the concentration of control portion of the multiple ownership rule pertaining to television broadcast stations (sec. 73.636(a)(2)).

5. In a "Public Notice" issued December 18, 1964 (F.C.C. 64-1171, *29 F.R. 18399, 3* Pike & Fischer, R.R. 2d 909), the Commission, citing figures, expressed its concern over the marked increase in multiple ownership of television stations in recent years, especially of VHF stations in the largest markets where the number of viewers is greatest and where diversity of interests and viewpoints should be maximized. Pending further study of the matter it announced an interim policy as follows:

> Absent a compelling affirmative showing, we will designate for hearing any application filed after December 18, 1964 for the acquisition of a VHF station in one of the top 50 television markets, if the applicant or any party thereto already owns or has interests in one or more VHF stations in the top 50 markets; we shall treat likewise any application to acquire interests in two or more VHF stations in these markets if the applicant now has no interests in VHF stations in these 50 markets. We are adopting this policy because, under presently existing circumstances, we cannot normally make the required finding that grant of an application for a second VHF station in the top 50 markets will serve the public interest without giving the proposal the detailed scrutiny of a hearing.

6. Subsequently, on June 21, 1965, after further study of the matter, the Commission released a "Notice of Proposed Rulemaking and Memorandum Opinion and Order" in the instant docket (F.C.C. 65-547, *30 F.R. 8166, 5* Pike & Fischer, R.R. 2d 1609) which proposed adoption of an amendment to the concentration of control portion of the TV multiple ownership rule which provided for ownership of not more than three TV stations or more than two VHF stations in the top 50 television markets.

7. At the same time, the Commission terminated the interim policy expressed in the December 18 public notice and substituted therefore a new interim policy as follows:

> Absent a compelling affirmative showing to the contrary, we will designate for hearing any application filed after June 21, 1965, for a new television station, assignment of license, or transfer of control, the grant of which would result in the applicant or any party thereto having interests in violation of those set forth in proposed Section 73.636(a)(2)(ii) in the attached Appendix (the Appendix referred to is the same as

the Appendix attached hereto and mentioned at the end of paragraph 6 above). Divestiture will not be required, but commonly owned stations in excess of the number set forth in the proposed rule which are proposed to be assigned or transferred to a single person, group, or entity will be designated for hearing. However, no hearing wil be designated in any of the foregoing situations which involve applications for assignment or transfer of control filed in accordance with Section 1.540(b) or 1.541(b) of the Commission's rules, or applications for assignment or transfer of control to heirs or legatees by will or intestacy if the assignment or transfer does not create common interests which would be proscribed by the above-mentioned section in the attached Appendix.

The new interim policy was published in a "Public Notice" released on June 21, 1965 (F.C.C. 65-548, *30 F.R. 8173, 5* Pike & Fischer, R.R. 2d 271), the same date on which the notice of proposed rulemaking and memorandum opinion and order was released in this proceeding. The latter document, in addition to proposing an amendment of section 73.636 of the rules, disposed of petitions for reconsideration of the December 18 interim policy.

8. The Commission now has before it for consideration comments filed in response to the notice herein. It also has under consideration the petitions for reconsideration mentioned in the previous paragraph which the notice announced would be considered as comments herein without prejudice to the filing of other comments by the parties who had filed petitions for reconsideration. n1

n1 Comments were filed by the following parties: American Broadcasting Cos., Inc., Columbia Broadcasting System, Inc., National Broadcasting Co., Inc., General Electric Broadcasting Co., Inc., Metromedia, Inc., Newhouse, Broadcasting Corp., Plains Television Corp., Springfield Television Broadcasting Corp., Storer Broadcasting Co., 10 television stations (filing jointly), Westinghouse Broadcasting Co., Inc., and the Council for Television Development (more than 100 television stations). The comments for the Council included a research report by United Research, Inc., and independent research organization. In addition relevant comments were considered from the following: Petition for reconsideration filed by Meredith Broadcasting Co.; petition by 99 Television stations for relief from the interim policy of Dec. 18, 1964; petition of the council for television development for relief of the interim policy of June 21, 1965; and petition to rescind by WLAC-TV, Inc.

9. The notice, after having presented statistics showing that there is an apparent trend toward more VHF stations coming under group ownership in the largest markets and a corresponding decline in the number of single-station owners, stated that the Commission was concerned that under the present limitation of five VHF stations per owner there might be a continuation of the trend. It also expressed concern that the future growth of UHF -- which has its greatest immediate potential in the largest markets -- might follow the VHF pattern. The proposed rule was designed to counter the apparent VHF trend and to prevent the development of a similar trend in UHF. n2

n2 Paragraph 11 of the notice explains why the top 50 market concept was chosen:

"The Top-Fifty-Market Concept. We are proposing the 50-market cutoff for three reasons. These are (a) the substantial degree of ownership concentration reached in these markets; (b) the high proportion of the total population resident in these areas and consequently the very large audiences reached by the individual VHF stations; and (c) the availability of ample economic support for individual, local ownership of both VHF and UHF stations in these markets."

10. The notice of proposed rulemaking (par. 19) asked that parties focus their comments upon the question of need for the changed rules and the appropriateness of the specific rule proposed. In arguing need, or lack of need, for a new rule, parties may submit programming showings in a manner which seeks to demonstrate that the programming was made possible solely by virtue of a multiple ownership situation which could not arise under the proposed rule. Parties opposing the proposed rule should concentrate primarily upon the question f public benefits which may be ascribed to multiple ownership in excess of the level proposed herein. In short, the issue posed is not as between multiple ownership and single ownership, but as between the present level and a more limited degree of such ownership.

11. Elsewhere in the notice (pars. 16-18) comments were requested on six specific questions, as follows:

Is the existing ownership limit, the one proposed here, or some other regulation, best suited to present circumstances?

Whether or not the present list of evidentiary factors (in sec. 73.636) should be expanded to include other factors, such as the overall effect on a local competitive situation of an added multiple owner, the nature of any distinctive program service a multiple owner may seek to offer, etc.

Is multiple ownership necessary for a licensee to undertake program production in competition with networks and other program suppliers? If so, what degree of multiple ownership is necessary?

Will the proposed rule have any effect on the possibilities for establishment of a fourth television network?

Is there any necessary correlation between a licensee's ability to present "quality" programming and multiple ownership? If there is any such correlation, is it strong enough to outweigh the strong policy considerations favoring the widest possible diversity of ownership?

Given the fact that we propose no compulsory divestiture of existing stations, what long-term increase in diversity of ownership may the proposed rules be expected to accomplish? More specifically, what increases in the number of individual owners in the top fifty markets may be expected as a result of assignments and transfers and the growth of UHF?

12. The Commission has studied all of the comments filed. Only one -- filed by Springfield Television Broadcasting Corp. -- expressed the view that there was an undue concentration of control in television broadcasting. However, Springfield believes that the proposed rule would be ineffective without the further requirement of divestiture. All other parties expressed the view that there was no undue concentration of control and opposed the proposed rule.

13. We have of course arrived at a decision in this matter upon the basis of our examination of the comments and our continuing experience in the broadcast field. Based thereon, we are of the opinion that the proposed rule should not be adopted and that the proceeding should be terminated.

14. First, we note that since the institution of the instant rule making proceeding many new UHF stations have been activated in the major markets. This has lowered the previous degree of concentration of station ownership in these markets and the development of UHF is providing as many separate owners and separate viewpoints as would have occurred with a more restrictive multiple ownership rule in the absence of these stations. n3 Equally important, it is observed that insofar as UHF stations are concerned, an absence of the type of restriction proposed in the rule herein may well serve to make for a more rapid development of such stations and enhance the chances for development of a fourth commercial TV network. It would significantly contribute to the entry of persons who have the know-how and the financial resources to enter into and carry on UHF television broadcasting during this most crucial period. n4 Indeed, this consideration of possible benefits to television service through entry of the multiple areas, although not as critical as in the UHF area, is also relevant to the public interest judgment to be made in this field with respect to VHF operation.

n3 Since the end of 1964 when we first adopted an interim policy limiting ownership in the larger markets, there has been a sharp increase in UHF activity in these markets. The number of UHF stations in operation has doubled -- today there are 39 commercial UHF stations on the air as compared with 20 at the end of 1964. In addition, there are presently 67 outstanding construction permits for UHF stations in the top-50 markets as compared with 38 at the end of 1964. These are additional actual and potential voices in these markets beyond the 197 VHF stations.

n4 We note that during 1966 in the top-50 markets there were 29 UHF stations on the air (excluding WHCT, the pay TV station at Hartford, Conn., and KSAN-TV, in San Francisco, Calif., which is a satellite with no revenues). Of these, 8 were profitable and 21 operated at a loss. The total revenues for the 29 stations were $13,326,696 and the overall loss was $9,667,281.

15. We have determined that the proposed modification of our rules should not be adopted, and that the problem of concentration in the top-50 markets should continue to be dealt with upon the basis of case-by-case consideration within the standards of the present multiple ownership rules. While there are of course the benefits of predictability in the adoption of a specific limit for the 50 largest markets, we believe that the greater flexibility permitted by an ad hoc approach is preferable. We already have a standard in the rules limiting total ownership and control by any one party, and will continue carefully to scrutinize every acquisition, whether in the top 50 markets or in other communities, to prevent undue concentration.

16. Thus, "* * * the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest * * * (par. 10, report and order on Multiple Ownership, docket *No. 8967, 18 F.C.C. 288, 291-2, 9* Pike & Fischer, R.R. 1563, 1568 (1953)). Under section 310(b) of the Communications Act, every applicant is therefore required to establish that a grant of its application would serve the public interest, taking into account the benefits and any detriments involving undue concentration.

17. In particular, in light of the special problems concerning the top 50 markets set forth in the notice of proposed rulemaking herein, we will expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two VHF stations) in those markets. The compelling showing should be directed to the critical statutory requirement of demonstrating, with full specifics, how the public interest would be served by a grant of the application -- that is, the benefits in detail that are relied upon to overcome the detriment with respect to the policy of diversifying the sources of mass media communications to the public. However, within the total limits now contained in the rules, we believe the ad hoc approach will better enable us to deal with particular situations in particular communities than would a new fixed limit. Our conclusion in this respect is further reinforced by the present critical phase of UHF development and the need to have the flexibility to take action which on balance promotes the public interest in this vital area upon which the Congress and the American people, through purchase of all-channel receiver sets, have staked so much.

18. In the notice (par. 20) we stated that oral argument would be held in this matter after comments had been received, because such argument would be appropriate and helpful. However, in view of the comments filed it is obvious that there will not be conflicting points of view presented in oral argument and that it would therefore serve no useful purpose. Accordingly, we dispense with such argument.

19. In view of the foregoing, It is ordered, That the interim policy set forth in the public notice of June 21, 1965, Is terminated.

20. It is further ordered, That the rule proposed in the notice of proposed rulemaking and memorandum opinion and order released June 21, 1965, in this proceeding Is not adopted and this proceeding Is terminated.

FEDERAL COMMUNICATIONS COMMISSION, BEN F. WAPLE, Secretary.

CONCURBY: LEE

CONCUR:

CONCURRING OPINION OF COMMISSIONER LEE LOEVINGER REGARDING MUTIPLE OWNERSHIP OF TELEVISION STATIONS IN WHICH COMMISSIONER JAMES J. WADSWORTH JOINS

The issue before the Commission now is whether to impose a new rule limiting the number of television stations which any single licensee may acquire in the top-50 markets to three, no more than two of which may be VHF stations. It is not proposed to divest the holdings of any licensee from acquiring more than that number of stations, as permitted under present rules, but the proposed rule would prohibit any other licensee from acquiring more than the specified number of television stations.

The Commission has long been concerned with multiple ownership in the broadcasting field, and for many years has sought to prevent concentration of control of broadcasting facilities. The first formal Commission proceeding in this field was 30 years ago, in 1938, when the Commission initiated the Chain Broadcasting Investigation. This culminated in a report in 1941 which found that the networks then in operation (NBS and CBS radio networks) impeded competition, stated that no additional licenses would be granted the networks, and held that the networks would be required to divest stations where they owned more than one AM station in a market. However, no specific numerical limitation was put on station ownership.

The first FCC rule specifically limiting multiple ownership was adopted by the Commission on June 21, 1940, when it prohibited ownership by one person of two or more FM stations with overlapping service areas, and, in effect, limited any licensee to six FM stations.

On April 30, 1941, the Commission adopted a rule limiting television station ownership to three for a single licensee. In 1944 NBC, which had three television licenses, petitioned for amendment of the rule and pleaded that a larger number of stations was necessary to permit the development of television networks and national programs. On May 16, 1944, the Commission amended its rules to permit one licensee to hold five television licenses.

On November 23, 1943 the Commission adopted a rule prohibiting the common ownership of AM stations with overlapping service areas, but not limiting the number of stations that might be owned by a single licensee.

In 1948 the Commission instituted a rulemaking proceeding which proposed a rule limiting one licensee to the ownership of seven AM, six FM and five TV stations. There were extensive comments and intensive staff study and analysis. The possibility of differentiating between VHF and UHF, as well as numerous other kinds of limitations were all considered. On November 7, 1953, the Commission adopted a report and order which established a limitation of seven AM, seven FM and five TV licenses which might be held by one person, *9 R.R. 1563 (1953).* On September 17, 1954, the Commission amended the rules to permit the ownership by a single licensee of seven TV stations of which no more than 5 might be *VHF, 11 R.R. 1519 (1954).* At the time of adopting this last amendment, the Commission considered a wide range of proposals for limiting television holdings, including limitations based on population, area or region, differentiation between VHF and UHF, and other possibilities. The Commission stated that the 1954 amendment was adopted in order to promote the development of UHF and because a nationwide system of broadcasting requires some multiple ownership of stations. The rules as amended in 1954 have remained in effect without change as to the limits of ownership. (Cf. *Multiple Ownership Rules, 2 R.R. 2d 1588 (1964), 3 R.R. 2d 1554, 1937 (1964).)*

On December 18, 1964, the Commission issued a public notice stating that in recent years "there has been a marked increase in the extent of multiple ownership, especially in television" and particularly in *VHF. 3 R.R. 2d 909 (1964).* The notice stated that the Commission was conducting an overall review of the problem of concentration and diversification and that, as an interim policy, it would designate for hearing any application for the acquisition of a VHF station in one of the top-50 television markets if the applicant owned one or more stations at the time of application, unless there was "a compelling affirmative showing." On June 21, 1965, the Commission adopted another public notice, modifying the interim policy and proposing a new rule on the subject. The proposed rule would prohibit acquisition of more than three television stations or more than two VHF television stations in the 50 largest television markets, as well as the long standing limitation of more than seven television stations, of which no more than five are VHF, in any markets. *5 R.R. 2d 271, 1609 (1965).* The notice stated that the new interim policy of the Commission would be to require a hearing on any application for acquisition of a license which would result in any party having more licenses than would be permitted under the proposed rule, but that no divestiture of existing licensees was proposed. Voluminous comments and material having been submitted, nearly all in opposition to the proposed rule, and the Commission having had more than 2 yeas of experience and observation with the interim policy, the issue now before us is whether the proposed rule should be adopted.

There will probably be those who argue that any Commissioner who voted for the 1964 and 1965 notices must, to be consistent, vote for adoption of the proposed rule. The basic concern with multiple ownership and concentration of control remains, and the facts have not changed greatly since 1965. However, my position is that voting to propose a rule, or institute a rulemaking proceeding, does not involve any commitment as to the position to be taken on adoption of the rule. On the contrary, I believe, as I have often stated, that the Commission should institute rulemaking proceedings, gather evidence, consider arguments and make as full an analysis as possible before reaching any conclusion, rather than after it has decided. Although it has been argued that the Commission should exercise its judgment on the merits before proposing rulemaking (see dissenting statement of Commissioner Johnson, A.T. & T. etc., F.C.C. 2d (1968), F.C.C. 68-73, 68-74), I emphatically reject that position. I believe that the spirit, and probably the letter of administrative due process, as well as basic principles of rational decisionmaking, require hearing and considering the evidence and the arguments before reaching a judgment rather than afterwards. While I still believe the present subject warranted reexamination and reconsideration after the passage of a decade since adoption of the multiple ownership rules, I do not consider my self bound or in any degree constrained by the institutional opinion which accompanied initiation of the present proceedings.

Thus I am compelled to make an analysis of the television market structure and the objectives which we seek to achieve within that market. There is no real dispute that our objectives are competition and diversity of ownership. The television market is a peculiarly complex one, not altogether analogous to the conventional industrial model. Competition in the television station market has at least three aspects: For advertising, for audience, and for product or programming. The three are interrelated as programs are the means of attracting audience, and advertisers seek those stations which have the largest audience. Competition for audience is altogether local as stations cannot, within the terms of their licenses, reach more than specified areas within relatively close range of their stations. Competition for advertising is both local and national. By and large network advertising simply goes to network affiliated stations, and there is little opportunity for competition between stations. There is competition for national nonnetwork advertising in the several local markets, and there is competition among stations for local advertising. There is some competition for programs, but not very much. The great spectacular programs with much audience appeal are mostly national programs carried by the networks. There is competition among the networks for such programs, but individual stations are simply unable to compete in this field. What competition there is between stations with respect to programs is in the effort to produce or secure more attractive local or special programs.

The most obvious economic fact about television programming is that it is inordinately expensive. It is reported that an hour television network show costs about $200,000. Newsweek, January 22, 1968, page 94. The Ford Foundation has given the Public Broadcasting Laboratory $12,600,000 with which it will produce some 52 shows of about 2 hours each. This comes to a cost of over $240,000 per show, and it is reported that the actual out-of-pocket expenses, exclusive of overhead, administration and similar costs, come to about $90,00 per show. Variety, January 12, 1968, page 17. ABC, the smallest of the three national television networks, has announced significant cutbacks in public affairs and other programming since it lost the financial support promised by its proposed merger with ITT. Within the last year an effort has been made to start a fourth national television network, which has failed financially with only 1 month of operations. Television markets are the metropolitan areas and so far there has been no indication that smaller communities can even support television stations. It is well known to the Commission that television costs are increasing. At the same time, the advertising revenue which supports television operations has apparently reached a plateau. National non-network advertising revenue, the largest single revenue source, was nearly 2 percent less in 1967 than in the previous year. Local advertising, which amounts to less than half of national in amount, increased only 1 percent during the same period. Broadcasting, January 29, 1968, page 40. These facts warn that we should carefully examine the probable economic consequences before undertaking to make any changes which might affect the ability of television stations to survive or compete.

The conventional wisdom of economic analysis and antitrust policy favors growth of enterprises through internal expansion, rather than through merger. *Brown Shoe Co. v. United States, 370 U.S. 294, 345,* footnote 72 (1962). However, as a practical matter, there is no such possibility for television stations. The technical parameters of operation limit the range of reception, and these are fixed, as is the geographical location. Therefore, each station has a limited local market within which it can attract only a share of the audience determined in large part by the number of other stations assigned to that market by the Commission. The amount of advertising that any station can accept is likewise limited by the amount of time available. The Television Code of the National Association of Broadcasters establishes limits for the amount of commercial time any station may carry, and the Commission favors compliance with the code. So television stations do not have the possibility of growth through internal expansion that is open to most other businesses.

In the television market, vertical integration means the expansion into program production. Most, if not all, television stations now engage in this activity to some extent; but the cost of program production constitutes an economic barrier to extensive activity of this kind by any enterprise without very large capital resources. The real problem is where the resources to engage in program production are to be secured.

Conglomerate merger with a large company outside the broadcasting field is not foreclosed by any F.C.C. rules or precedents. But the nature of the opposition to the attempted merger by which ABC sought to strengthen its competitive position will certainly deter, and probably prevent, other potential merger partners from exposing themselves to similar attacks. Big business is notoriously, and rightly, themselves to similar attacks. Big business is notoriously, and rightly, reluctant to invite such attack, and small business would be small help in financing television program production.

Thus, as a practical matter, the only method of expansion (beyond the normal growth of the market itself) available to television stations is a kind of horizontal expansion by acquisition of or merger with stations in other local markets. This does not necessarily imply that there should be no check or limits on such expansion by television broadcasters. It does imply that limits on television expansion must be analyzed and examined within a different frame of reference than the one applied to ordinary unregulated markets.

Existing F.C.C. rules do impose a very specific and rigid limit on the number of broadcasting licenses any licensee can hold. A single licensee can hold no more than 7 television licenses of which no more than 5 can be VHF, and no two of the licensed stations held by one licensee can be in the same market or have overlapping service areas. Thus each market is assured of as many separate television voices as there are television stations in that market under present rules. These rules have been in effect since 1954 so we have had an opportunity to observe what has happened under them. In fact, this proceeding was instituted because of Commission concern with what appeared to be a tendency toward increasing concentration in television station ownership in the top-50 markets in the period from 1956 to 1964. However, as comments in this proceeding have pointed out, the data cited in the Commission notice were misleading because they purported to show concentration in the top-50 markets by statistics which included among "multiple owners" all licensees with one station in the top-50 markets and an interest in any other television station in any other market, whether it was in the top-50 markets or in some smaller market. Thus, the data on which the Commission originally acted analyzed the situation in the top-50 markets on the basis of statistics which related in part to those markets and in part to other markets. This is clearly an erroneous mode of analysis.

In any event, the objectives we are seeking in our concern with broadcasting economics are diversity and competition -- the number of separate voices speaking in each community or market. In this proceeding, for purposes of analysis and convenience, we have grouped the top-50 markets and consider them together. In this frame of reference our primary concern must be with numbers, rather than with ratios or percentages, and as we are dealing with relatively small numbers the ratios are likely to be misleading.

Based on the best available data I can obtain, which is in part from material filed in this proceeding and in part from F.C.C. records, the following are the changes in television station ownership that have taken place in the top-50 markets since 1956.

Top-50 Television Markets: Changes in Ownership Interests 1956-1968

	1956	1968
(A) Total number of authorized television station has increased from	151	to 264
(B) Number of VHF television stations has increased from	130	158
(C) Total number of separate television station owners has increased from	104	163
(D) Number of separate VHF station owners has increased slightly from	88	91
(E) Total number of owners of single stations in the top-50 markets has increased from	78	125
(F) Number of owners of single VHF stations in the top-50 markets has decreased very slightly from	65	63
(G) Total number of multiple station owners has increased from	26	38
(H) Number of multiple VHF station owners has increased from	26	38

(I) The category "multiple station owners" includes all licensees owning 2 or more stations in the top-50 markets and is not by itself a measure of concentration

In sum, during the last 12 years under the present rules, both the number of television stations and the number of station owners has increased substantially in the top-50 markets. The same development has taken place in all national broadcasting markets as a group, and in the filed of radio as well as television. Without going into detail, from 1956 to 1968 the number of authorized television stations in the United States increased from under 600 to more than 1,000 (including VHG, UHF, commercial, and educational stations), the number of AM stations increased from less than 3,000 to more than 4,200, and the number of FM stations increased from under 600 to approximately 2,400 (including educational stations).

The term "concentration," in economic or legal discourse, means the market share held by a limited number of the firms in any given market. While a variety of measures are used to indicate concentration, the most commonly used measure is the market share of the leading four firms in a market. Ratios based on other relatively small numbers are not uncommon, and some quite sophisticated methods of calculating concentration in a market have been suggested. See Michael O. Finkelstein and Richard M. Frigedberg, "The Application of an Entropy Theory of Concentration to the Clayton Act," *76 Yale L.J. 677 (March 1967).* However, the term loses all significant meaning when it is used to refer to numbers and ratios of the size involved in the top-50 market analysis with which we are now concerned. By any generally accepted test, there has been no increase in concentration of television station ownership in the top-50 markets up to the present time. On the other hand, without attempting to impose some arbitrary mathematical test, it is self-evident from the figures cited above that in the top-50 markets there has been a very substantial increase in the numbers of television stations and in the numbers of separate enterprises -- in short, in the number of separate voices in the markets under examination here.

The point within the broadcasting field at which there is economic concentration is television network operation. There are only three national television networks. But it is as clear as anything can be in this uncertain field that there are only three television networks because there is inadequate advertising revenue, programming, and audience demand to provide economic support to more than three networks, if that many. It is a cliché in the television industry that this is still a two-and-a-half network economy. Current events are giving us an unfortunate demonstration of the truth of that cliché.

The most realistic hope for increasing the number of television networks and the number of substantial national program sources is to encourage the growth of more strong enterprises engaged in television station operation. The present multiple ownership rules are far more likely to do that than the proposed new rule.

Some of the difficulties in this field are suggested by the action of the President in asking and of the Congress in voting to establish the Corporation for Public Broadcasting, to provide another source of programs that will be socially and culturally beneficial to the country, even if not economically profitable. It would be inconsistent for the Government to impose new and more stringent limitations on the development of private enterprise in television while at the same time establishing a corporation to use Government funds for the purpose of providing programs which private enterprise is unable to provide economically, in part because of such limitations imposed by the Government.

There is a maxim taught in medical schools that is relevant here. An axiom of medical practice is "Primum non nocere" -- first, and above all, do no harm. If you cannot help the patient, at least do not administer medication or treatment that will hurt him. It seems to me that this principle should be equally applicable in the field of regulatory action. Before we impose new rules we should be reasonably sure that they will improve the situation, or at least not make it any worse. With respect to achieving competition and diversity in television programming, the proposed rule appears likely to make matters worse rather than better.

As the data set out above demonstrate, there is no evidence of increasing concentration in television station ownership in the top-50 markets.

On the contrary, there have been growing numbers of both stations and owners during the last 12 years under the present rules. We do know that there is concentration in television network operation and in the number of national television program sources. This is due in large part to the very large and increasing cost of television program production and distribution which precludes any but large and financially strong enterprises from engaging in such an undertaking. Accordingly, if we are to have any hope of developing new sources of television programming in the private sector we must permit the development of financially strong enterprises in the television field.

The proposed rule would impose no handicap on the present networks, or other large multiple owners, as they would not be divested of their present station holdings. The proposed rule would prevent any new enterprise from acquiring as many stations as the networks now have and it would break up multiple holdings in the event that any licensee undertook to sell or transfer his licenses. This would, obviously, affect only the financially weak among the present multiple owners. The large and financially strong will not be forced or tempted to sell their holdings; the financially weak may do so. Thus the proposed rule would tend to perpetuate the present network oligopoly and protect the present multiple owners against new or increased competition, while preventing or discouraging the growth and expansion of smaller enterprises in the television filed and the entry of strong new enterprises. Thus it appears to me that the proposed rule is likely to do significant harm to the cause of diversity and competition in the field of television broadcasting without countervailing benefits. The present rules on multiple ownership were developed in a series of proceedings extending over a number of years and involving full consideration of all the arguments now before us. These rules have been effective in preventing concentration of station ownership and there is no showing of a need to make the present rules more stringent. Accordingly, I conclude that the proposed rule is unwarranted and unwise, and vote against adoption of the proposed rule and for termination of the present proceeding.

DISSENTBY: BARTLEY; JOHNSON

DISSENT:

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

It seems strange indeed that a bare majority of this Commission will, after admitting that the comments filed offered "very little * * * in response to the specific questions raised," insist on terminating this highly significant proceeding without benefit of the oral argument provided for therein. Does the majority feel that it would be less informed after oral argument?

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Few issues before this Commission have greater impact on the American people than who is to control the radio and television stations of this nation.

I dissent to the majority's termination of the Commission's only proceeding dealing with multiple station ownership and its implications for a free society. I also disagree with the return to ad hoc consideration -- another way of saying case-by-case avoidance of these most significant issues.

The majority is terminating this 3-year-old proceeding with nothing to show for its efforts, except complacent acquiescence in matters as we find them -- the status quo, sometimes defined as "the mess we're in now."

In discussing the proposed rule, it should be clear what very significant questions of broadcast ownership are not being addressed.

We are not concerned here with the ownership of broadcast properties by companies engaged in nonbroadcast activities -- problems which were suggested in the ITT-ABC merger.

We are not concerned with the problems of cross-ownership of communications media -- that joint ownership of newspapers, magazines, programming sources and networks, cable television systems, book publishers, and broadcast stations.

We are not concerned directly with the ownership of broadcast properties (or other communications media) in a single market or region. (The Commission's rules prohibit ownership of stations with overlapping signals -- the so-called "dupoply rule.")

In December of 1964 the Commission issued an interim policy indicating that applications for acquisition of VHF stations in the top-50 markets would be designated for hearing if the result would be that one owner would have more than one VHF station in such markets.

The majority said: We do not believe that this degree of multiple ownership concentration in the largest population centers is desirable. While we do not now propose a divestiture of existing interests, we have determined that the trend toward concentration in the VHF service is sufficiently serious to require the immediate adoption of an interim policy.

3 P & F R.R. 2d 910-911 (1964). And in June of 1965 rulemaking was begun to bar the prospective acquisition of more than three television stations in the top-50 markets (no more than two of which could be VHF's).

In the notice of rulemaking the Commission majority said: It is axiomatic that American industry generally should be effectively competitive and that undue concentrations of power should be avoided * * *. Basic competitive principles are particularly important in the licensing of broadcast stations: First, because we are dealing with the most influential of all communications media; and second, because we are required for technical reasons to limit and control entry into the broadcast field.

5 P & F R.R. 2d 1611 (1965). And even today the majority notes that: "The twofold purpose of the Commission's multiple ownership rules is to promote maximum competition among broadcasters and the greatest possible diversity of programming sources and viewpoints."

PARAGRAPH 1. With this consistent set of statements and a factual situation that has, if anything, become worse over the past 3 1/2 years, it is hard to understand why the majority abruptly ends these proceedings.

The most valuable television stations in American today are those in the top-50 markets, and they are increasingly owned, not by local residents, but by large, often publicly-held, conglomerate industrial enterprises. These are the television stations that sell for $10 to $20 million each, and that attract commensurate annual advertising revenues. Each has within its signal area between 1.5 and 20 million viewers. Thus, three stations in such markets would enable the owner to reach as many as 40 million persons; seven stations could reach 90 million.

The television industry earns an average 100-percent annual return on investment in tangible property. These near-monopoly profits are made possible through the use of public property -- spectrum space. No individual is entitled, as a matter of legal or moral right, to more than one piece of such rich pie. Our commission of office does not impose upon us the obligation to serve such private interests; we have sworn to serve the public interest.

This Commission has long purported to start from the premises that diversity of control of broadcasting and local ownership of broadcast properties are desirable. Thus, the question before us ought to be, "How is the public's interest served by having a nonresident, corporate, multiple owner control one of the major sources of news, opinion and entertainment for a city of millions?" We have not addressed that question.

These questions are important. As Congressman John Dingell has said recently:

> Clearly the Commission had a congressional mandate to take a strong stand against common ownership of broadcast facilities. For the history of the Communications Act of 1934 reveals unequivocally that local control and management, that diversity of ownership were

paramount considerations when this legislation was enacted.
114 Cong. Rec. H389-390 (daily ed. Jan. 25, 1968).

It is sometimes urged that a multiple owner may be the only entity willing to undertake operation of a local radio or television station. But for the multiple owner, it is argued, the Community will have no programming service at all. But that argument can scarcely be made in communities with the financial strength of the largest metropolitan areas in this country.

The majority offers no arguments why multiple ownership should be encouraged as serving the public interest. It only points to two reasons why the proposed rule should not be adopted: UHF development might be impeded and establishment of a fourth network might be hindered. However, even if the potential good from the rule could be counterbalanced by such potential harm there is little evidence that either effect would result from adoption of this proposed rule. In its footnote 3 the majority says: "Since the end of 1964 when we first adopted an interim policy limiting ownership in the larger markets, there has been a sharp increase in UHF activity in these markets." This scarcely supports the view that the policy has been inhibiting to UHF growth. And in footnote 4 the majority notes that of the 29 UHF stations in these markets, 21 operated at a loss in 1966 -- which may suggest that UHF entry in these markets is growing about as fast as it can. In any event, there is little evidence that multiple owners enter UHF faster than anyone else. The hoped-for fourth network is merely a part of the majority's goal of improvement in growth of UHF. There is no evidence that group ownership would increase the chances for that network. The last to try (Overmyer) recently disposed of his construction permits. And although some multiple owners in these markets do a significant amount of independent programming today, they are few.

The majority's reliance on the shibboleth "benefit to UHF" is not unusual. This Commission has hung so many decisions on the UHF peg that one wonders if the day will come when the whole hat react will come tumbling down from its own weight. Restrictive CATV rules are to benefit UHF. Increased consumer costs of all-channel sets are to benefit UHF. Large chunks of spectrum are denied to other potential users in order to benefit UHF. The ITT-ABC merger was justified, in part, as a benefit to UHF. And now the demise of the top-50 rule will hopefully benefit UHF. It is almost a knee-jerk reaction.

As a substitute for further consideration the majority offers a continuation of the interim policy:

> In light of the special problems concerning the top-50 markets set forth in the Notice of Proposed Rulemaking herein, we will expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two VHF stations) in those markets.

paragraph 18. This is the same "compelling public interest showing" that a Commission majority has so far found to justify waiving the hearing requirement in every case brought to the Commission under the previous interim policy. Thus a majority found that a compelling public interest showing for doing violence to the rule was made when WGN of Colorado, Inc., acquired a VHF in Denver, Colo.; WKY Television Systems acquired a UHF in Milwaukee, Wis.; Storer acquired a UHF in Boston, Mass.; Kaiser acquired a UHF in the Boston, Mass., market; Capital Cities sold a VHF station in Providence, R.I., and acquired a VHF in Houston, Tex.; Kaiser acquired a UHF in Cleveland, Ohio; Baldwin-Montrose Chemical Co. acquired VHF's in Minneapolis, Minn., Los Angeles, Calif., and Portland, Oreg.; the Newhouse communications group acquired a minority interest in a UHF in Denver Colo.; American Viscose acquired six UHF's in top-50 markets; and ITT was to have acquired VHF's in New York, Chicago, Los Angeles, Detroit, and San Francisco. In each case the interim policy required a compelling public interest showing. Past experience indicates that this requirement is demonstrably meaningless. The Commission's policy with regard to multiple ownership will be what is now in its rules, and no ad hoc determinations will tighten those standards. Seven AM's, seven FM's and seven TV stations, of which five can be VHF's -- so long as no signals overlap -- can be acquired by any multiple owner regardless of how many millions of Americans he influences.

It also seems strange to me that the majority would express its lack of interest in ownership questions at the very time others in government are evidencing renewed interest. The Special Investigations Subcommittee of the House Interstate and Foreign Commerce Committee recently held hearings on one of the transfer cases where the majority found that a "compelling public interest showing" had been made. The Department of Justice intervened in the ITT-ABC merger on grounds that the merger was anticompetitive. In any case, it seems irresponsible for the FCC at anytime to refuse to consider the problems on anything more than an ad hoc basis.

Within the past i weeks we have been asked a number of questions about our ownership rules and practices by the Chairman of the House Committee on Interstate and Foreign Commerce, Mr. Staggers. Included are:

> What studies has the Commission made to determine whether group ownership of broadcasting licenses enhances competition? Is it in the public interest to encourage group ownership of UHF stations? Is it in the public interest to encourage a network of UHF stations? If so, what competitive protection would be afforded non-network UHF licensees? Has the Commission determined that multiple ownership is a solution to the high cost of originating TV programs?
>
> If so, submit a copy of its pronouncements supporting such a determination. Has the Commission determined that a single, independent UHF station cannot produce worthwhile TV programs in competition with local network affiliated or independent VHF licensees?

I believe these questions are deserving of better than the brush-off represented by the Commission's action today.

There are several immediate steps the Commission could take to further its understanding of multiple ownership problems. We ought to hold oral argument in this case, with elements of the staff instructed to participate and put forward the strongest case possible for the rule -- and to subject the position of those who have commented to searching scrutiny. I think that much might be learned by such an adversary proceeding. The Commission's standard for ownership structure is "maximum competition" and "greatest possible diversity." One of the questions raised in this proceeding is what the public gets in return for permitting one owner to acquire a number of profitable properties -- in contract to promoting maximum diversity by limiting multiple ownership. Hopefully, all would acknowledge that the economic self-interest of the multiple owners -- clearly powerful spokesmen within the broadcasting establishment -- are not, alone, the equivalent of a public interest basis for our present course. The majority, or course, says nothing about whether multiple owners presently provide better programming, competition to networks, support for UHF, or any other substantial public benefits. The evidence presented in the written record of this proceeding is, at best, mixed.

As is often the case when the Commission is making seat-of-the-pants judgments, the Commission refers to its continuing experience in the broadcast field -- sometimes referred to as "accumulating insight." This is the ultimate justification for whatever we do. I would be more confident in the Commission's exercise of that judgment if I thought it were really committed to confronting the implications of media ownership that are woven into the very fabric of the society our Government was established to preserve. An oral hearing on this matter would be a slight step in that direction. I regret our inability to take it.