Hastings Communications and Entertainment Law Journal

Volume 6 | Number 1 Article 5

1-1-1983

Eliminating the Network/Cable Cross-Ownership Ban: Does a Free Market Protect the Marketplace of Ideas

Noy S. Davis

Eliminating the Network/Cable Cross-Ownership Ban: Does a Free Market Protect the Marketplace of Ideas?

By NOY S. DAVIS*

I
Introduction

In 1982, the Federal Communications Commission (FCC or Commission) proposed the elimination of its rule prohibiting ownership of cable systems by the broadcast networks.[1] The Commission noted that before adopting the network/cable cross-ownership rule, it had not systematically analyzed the network owners' possible behavior, or the potential effects of cable system cross-ownership on the communications industry.[2] In fact, the Commission did not propose such a comprehensive analysis until 1978 when it assembled a special, multidisciplinary staff (special staff) to review and study all of the Commission's network regulations.[3] The special staff's final report, issued in 1980, included a discussion of the network/cable cross-ownership prohibition.[4] Shortly after the special staff released its report, the FCC's Office of Plans and Policy (OPP) began a study of the cable ownership rules, which also included consideration of the network/cable cross-ownership

* Member, Third Year Class. A.B., University of California, Davis, 1981. The author would like to thank Professor John Diamond, Hastings College of the Law, and C.R. Okumoto, for their valuable support and encouragement.

1. Amendment of the Commission's Rule Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Networks in Docket No. 82-434; FCC 82-323, 47 Fed. Reg. 39,212 (1982). The FCC's rule prohibiting ownership of cable systems by the broadcast networks provides: "§ 76.501 Cross-ownership—(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: (1) A national television network (such as ABC, CBS, or NBC)." 47 C.F.R. § 76.501 (1982).

2. 47 Fed. Reg. at 39,215. For the FCC's initial adoption of the prohibition, *see* Second Report and Order in Docket No. 18397, 23 F.C.C.2d 816 (1970).

3. *See* In re Commercial Television Network Practices, 69 F.C.C.2d 1524 (1978).

4. *See* FCC NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT, at III-161 (Oct. 1980) (available from FCC).

prohibition.[5] This report was issued in 1981.[6] Nine months later, the Commission announced its proposal to eliminate the prohibition.[7]

Although not adopted pursuant to any comprehensive analysis, the network/cable cross-ownership prohibition stemmed from economic and first amendment considerations as part of the Commission's public interest mandate.[8] In proposing to eliminate the prohibition, however, the Commission did not adequately address the first amendment concerns that prompted the rule's adoption. This note briefly discusses the economic and first amendment considerations that led to the Commission's initial adoption of the rule and examines the reasons the Commission has proposed for its elimination. In addition, it reviews the reports made by the OPP and the special staff. This note focuses on the FCC's inadequate consideration of the first amendment concern that the public be provided with information and ideas from diverse and antagonistic sources.[9] The note concludes that a separate market analysis is necessary to determine whether first amendment concerns are being promoted by a network/cable cross-ownership ban and suggests a framework in which to examine the necessity for the prohibition in light of the first amendment considerations.

II
Reasons for the Adoption of the Prohibition

When the network/cable cross-ownership prohibition was

5. *See* FCC Initiates Staff Study to Reassess Cable TV/Telephone Company Cross-Ownership Ban (CC Docket No. 78-219, released October 22, 1980). The Commission instructed the staff to examine the network/cable cross-ownership ban as well as other cable ownership restrictions.

6. *See* OFFICE OF PLANS AND POLICY STAFF REPORT, FCC POLICY ON CABLE OWNERSHIP (Nov. 1981) (available from FCC).

7. 47 Fed. Reg. 39,212 (1982).

8. Memorandum Opinion and Order in Docket No. 18397, 39 F.C.C.2d 377 (1973). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (first amendment considerations); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978) (economic/antitrust policy).

9. *See* Associated Press v. United States, 326 U.S. 1, 20 (1944) (In holding that the application of the Sherman Act to a combination of publishers in restraint of trade in news did not abridge the first amendment rights of the press, the Court noted that "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.").

originally adopted, the Commission did not detail the reasons underlying its adoption. Its discussion centered on the reasons for the co-located broadcast station/cable system ownership ban that was adopted in the same order.[10] However, an examination of the broadcast network system indicates a possible reason for the cross-ownership prohibition.

The broadcast networks package programming for national television distribution through a series of affiliated broadcast stations across the country. The affiliated stations sell air time to the networks by contract. The networks receive their revenues from advertisements aired during the broadcast of network programming on these affiliated stations.[11] Thus, while the networks may not own their affiliated stations, they have a direct monetary interest in the number of viewers watching the programming of their affiliates, at least when network programming is being broadcast.[12] The network/cable cross-ownership prohibition may have been adopted to prevent any conflicts of interest that the networks might have if they were allowed to own cable systems in areas where they had affiliates.

The Commission did explain its adoption of the prohibition three years after its ruling[13] when it reaffirmed its commitment to the network/cable ownership ban as well as the co-located broadcast station/cable ban.[14] The FCC stated:

> Our adoption of these provisions—designed to foster diversification of control of the channels of mass communications—was guided by two principal goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas.[15]

The Commission did not explain precisely what it meant by these statements. However, a review of statutory and case law sheds light on their meaning.

In the Communications Act of 1934, Congress established the Federal Communications Commission to enforce the regula-

10. *See Second Report and Order*, 23 F.C.C.2d 816. The co-located broadcast station/cable system ban prohibits a single person/entity from owning both a cable system and a broadcast station that service a particular geographic area.

11. *See* B. COMPAINE, WHO OWNS THE MEDIA 102-03 (1979).

12. *Id.*

13. *See Memorandum Opinion*, 39 F.C.C.2d 377 (1973).

14. *Id.*

15. *Id.* at 391.

tions of the Act.[16] Included in the Act was the requirement that the FCC generally encourage the larger and more effective use of radio in the public interest.[17] This public interest standard has been found to encompass the presentation of vigorous debate of controversial issues of importance to the public.[18] In *Red Lion Broadcasting Co. v. FCC*,[19] broadcasters challenged the fairness doctrine that the Commission had promulgated "in the public interest."[20] In holding the fairness doctrine constitutional, the Supreme Court noted that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."[21] The Court went on to state that first amendment considerations require the preservation of an uninhibited marketplace of ideas, in which truth will prevail, and not monopolization of the market.[22] The Court apparently believed that a competitive economic market insures an uninhibited marketplace of ideas.[23]

Antitrust policy, which the Commission may take into ac-

16. *See* 47 U.S.C. § 151 (1981).

17. 47 U.S.C. § 303 (1981). The vagueness of the public interest standard has been the subject of much controversy, as evidenced by the lack of any such standard in the initial rewrite of the 1934 Communications Act. *See* H.R. 13015, § 101, 95th Cong., 2d Sess. (1978). For a discussion of this controversy, *see* Minow, *The Public Interest*, FREEDOM AND RESPONSIBILITY IN BROADCASTING 15 (J. Coons ed. 1961); E. KRASNOW, H. TERRY & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 18 (3d ed. 1983). However, Congressional delegation of regulatory authority to the FCC "as the public interest, necessity and convenience requires" has been upheld. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (reviewing challenge by citizens' groups to FCC policy of not considering changes in entertainment programming when ruling on an application for license renewal or transfer); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943) (affirming dismissal of suits to enjoin enforcement of FCC chain broadcasting regulations); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940) (deciding question of federal court's authorization to review FCC's acts); New York Central Securities Corp. v. United States, 287 U.S. 12, 24 (1932).

18. *See Red Lion*, 395 U.S. 367.

19. *Id.*

20. The fairness doctrine requires, inter alia, that broadcasters maintain balanced programming of controversial issues. There is an affirmative duty to discuss controversial issues of public importance as well as to provide balanced coverage of all issues discussed. The rule can presently be found at 47 C.F.R. § 73.1970. The fairness doctrine is discussed in R. LABUNSKI, THE FIRST AMENDMENT UNDER SIEGE 15-18 (1981), and in Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 663, 664 (1975).

21. 395 U.S. at 389-90.

22. *Id.* at 390.

23. For a more detailed discussion of this argument, *see* text accompanying notes 119-23.

count under its public interest mandate,[24] also calls for the maintenance of a competitive market, not on the basis of free speech, but for economic reasons. A competitive economic market is generally believed to keep costs and prices to a minimum, while a monopolized market generally results in increased prices and lesser output.[25] Therefore, competition is necessary to maximize consumer welfare because it keeps costs and prices low.[26] The cable/network cross-ownership prohibition thus was designed to prevent economic monopolization and to preserve an uninhibited marketplace of ideas by increasing the diversity of control of the channels of communication.[27]

III
FCC Reports

A. The Special Staff Report

In 1978, the FCC assembled a special staff to study the issues involved in its rules regarding the broadcast networks.[28] Two years later, the staff issued its final report which included a discussion of the rule limiting the ownership of cable systems by the broadcast networks.[29] The report indicated that cost savings would result from network ownership of cable systems.[30] Furthermore, the report found that this common ownership may not have any adverse effect on competition in any market.[31] The staff suggested:

> [T]he Commission should . . . identify a threshold of ownership concentration among the nation's cable systems below which the dangers of market power and cable network foreclosure are slight and then permit any firm to acquire cable franchises as long as its acquisitions do not push the firm's

24. *National Citizens Comm.*, 436 U.S. at 795. *See, e.g.*, United States v. Radio Corp. of America, 358 U.S. 351 (1959); *National Broadcasting Co.*, 319 U.S. at 222-24.

25. *See* 1 E. KINTNER, FEDERAL ANTITRUST LAW §§ 1.11, 1.12 (1980); W. BAUMOL, ECONOMIC THEORY AND OPERATIONS ANALYSIS ch. 16 (4th ed. 1977); J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS ch. 11 (2d ed. 1980). *Cf.* R. POSNER, ECONOMIC ANALYSIS OF LAW ch. 9, 10 (2d ed. 1977).

26. *Id.*

27. *See* 47 Fed. Reg. 39,212.

28. *Id.* at 39,213.

29. *See* FCC NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT, at III-161 (Oct. 1980) (available from FCC).

30. *Id.* at III-163.

31. *Id.*

cable system aggregate ownership above that threshold.[32]

Thus, in determining whether or not the prohibition should be eliminated, the staff emphasized the economic effects of eliminating the rule and viewed the national level as the relevant economic market.

B. The OPP Report

In 1980, the FCC directed its Office of Plans and Policy to study the Commission's rules on cable ownership.[33] The OPP issued its report in November 1981.[34] The study found that the local video market in which cable operates is "workably competitive."[35] The OPP never explicitly defined what it meant by "workably competitive;" however, it did state that "[a] workably competitive environment helps consumers to obtain services they desire at prices near production costs."[36] In addition, the OPP stated:

> [A]s long as there is the possibility of new entry to the industry, the persistence of abnormally high profits may mean that the success of existing firms is attributable to superior management or control over unique resources. Such a result is workably competitive, even if there is only a small number of firms.[37]

Apparently a workably competitive environment—one in which consumers obtain services at prices near production costs[38]—may nonetheless yield abnormally high profits to the firms providing the services. This seems to be a contradiction in terms. How can a firm obtain abnormally high profits if the prices charged are near production costs? This paradox can be resolved if the production costs are defined not in terms of the servicing firm's *actual* costs, but rather, in terms of the *average* production costs of firms that provide the same type of service. High prices and high profits are not synonymous; thus a very efficient firm may have higher profits than a less efficient firm even though it is charging the same or, perhaps, even

32. *Id.*

33. *See* FCC INITIATES STAFF STUDY, *supra* note 5. The Commission instructed its staff to examine its ownership restrictions, including the network/cable cross-ownership restriction.

34. *See* OFFICE OF PLANS AND POLICY STAFF REPORT, *supra* note 6.

35. *Id.* at 4.

36. *Id.* at 38.

37. *Id.* at 34.

38. *Id.* at 38.

lower prices.[39]

The OPP's report focused primarily on the economic reasons for eliminating the prohibition. It included a lengthy market analysis of cable television both as a market in itself[40] and as part of the entire video programming market.[41] The OPP concluded that in both these markets, cable was workably competitive.[42]

In discussing the first amendment concerns of the cross-ownership prohibition, the OPP asserted that competition in the marketplace of ideas closely parallels competition in the economic marketplace.[43] Furthermore, the study stated:

> Numbers of gateways to media are but one component of media access; increased organizational efficiency is also important, and could result in lower priced, more accessible communications paths to the public. A workably competitive solution to access that considers costs as well as numbers is an essential element in promoting First Amendment principles.[44]

The OPP thus viewed the first amendment as aimed primarily at access to the channels of communications.[45]

IV
Proposal to Eliminate the Prohibition

On August 27, 1982, the Commission issued a *Notice of Proposed Rule Making*[46] in which it proposed to eliminate its rule prohibiting the common ownership of cable television systems and national television networks. In its proposal, the Commission first reviewed the reasons which prompted the adoption of the rule,[47] and then discussed the subsequent reconsiderations

---

39. For a more complete discussion of this point, *see* W. NICHOLSON, INTERMEDIATE MICROECONOMICS AND ITS APPLICATION ch. 7 (2d ed. 1979).

40. OFFICE OF PLANS AND POLICY STAFF REPORT, *supra* note 6, at 5.

41. *Id.*

42. *Id.* at 38.

43. *Id.* at 44.

44. *Id.*

45. This emphasis on less expensive access is unfounded, as will be shown in the discussion of the public's first amendment rights, *see infra* text accompanying notes 84-95.

46. 47 Fed. Reg. 39,212 (1982). FCC regulations, in accordance with the Administrative Procedure Act, 5 U.S.C. § 553 (1982), outline the procedures to be followed when the FCC decides to adopt or change a rule. These regulations, with certain limited exceptions, generally require that the FCC give notice of proposed rule changes or additions by publication of a "Notice of Proposed Rule Making" in the *Federal Register*. *See* 47 C.F.R. § 1.412 (1982).

47. 47 Fed. Reg. at 39,213.

of the rule by the special staff and the OPP.[48] After noting the conclusions of the special staff and OPP, the Commission discussed its reasons for eliminating the cross-ownership prohibition, which indicated a reconsideration of the economic foundations for the rule.[49] In this regard, the Commission's reasons for eliminating the ban are consistent with those of the special staff and the OPP.

Although the Commission acknowledged the rule's goals to be increased competition in the economic marketplace and in the marketplace of ideas,[50] the Commission stated:

> It appears, however, that the rule reflected three basic beliefs: (1) the networks' interest in maximizing the audience for their television broadcast programming would prompt them to restrict the amount and diversity of competing programming supplied by their cable television systems; (2) the networks, by refusing to carry the programming of rival networks, would hinder the development of new cable networks, thus limiting network competition at the national level; and (3) cable ownership would increase the already dominant position of the networks as suppliers of television to the viewing public, thereby limiting the diversity of voices in the video marketplace.[51]

The Commission did not state how it arrived at its conclusion that the rule reflected these beliefs. However, a review of the order in which the Commission announced the prohibition[52] somewhat clarifies the matter. The first two "basic beliefs" noted above were cited by the Commission in 1970 as arguments advanced by parties opposed to network ownership of cable systems.[53]

In discussing the first of these beliefs—the networks' interest in maximizing their broadcast programming audience—the Commission noted that competition in the cable franchise market as well as the local video markets had increased since the prohibition was adopted in 1970.[54] The Commission then

48. *Id.*

49. *Id.*

50. *Id.* at 39,212.

51. *Id.* at 39,215.

52. *Second Report and Order*, 23 F.C.C.2d 816 (1970).

53. As previously noted, in adopting the prohibition, the Commission did not explicitly state the reasons underlying its decision. Its discussion centered upon the reasons for the adoption of the co-located broadcast station/cable system ban which was adopted in the same report. *See id.* at 819.

54. The cable franchise market was discussed in OFFICE OF PLANS AND POLICY STAFF REPORT, *supra* note 6, at 35. The cable franchise market consists of the firms competing for a cable franchise in a particular locale. The OPP argued that the cable

stated its belief that "the number and quality of video delivery system competitors will increase in the near future. . . ."[55] Due to the increase in competition which had already occurred and the likelihood of additional increases in the future, the Commission reasoned that cable operators would not limit output because, in so doing, they would not be able to effectively compete.[56] In applying this analysis to broadcast network owners of cable systems, the Commission found that the broadcast networks likewise would not limit output in any cable systems they might own.[57]

In discussing the second belief—that broadcast networks would hinder the development of new cable networks in order to limit national level network competition—the Commission again concluded that network owners would not limit the output of their cable systems. The Commission argued that the "network cross-owners' presumed conflict between broadcast-delivered and cable-delivered programming is even more remote than that of local station [broadcast and cable] cross-owners."[58]

The third basic belief which the Commission discussed—

---

franchise market was "contestable"—the market had some of the attributes of a natural monopoly (usually there is only one cable company in a particular city)—but that the sellers were nonetheless without monopoly power. Contestability theory holds that the sellers are without monopoly power (the power to raise prices above the competitive level by decreasing the supply on the market in order to obtain increased profits) because "potential entry or competition *for* the market disciplines behavior almost as effectively as would actual competition *within* the market." Bailey, *Contestability and the Design of Regulatory Antitrust Policy*, 71 AM. ECON. REV. 178 (1981). The OPP argued that cable franchise markets are contestable at three stages: (1) when franchises are first awarded; (2) when franchises are up for renewal; and (3) when technology has changed to the point that the incumbent's sunk capital stock does not protect it from entry by other competitors into the market. *See* OFFICE OF PLANS AND POLICY STAFF REPORT, *supra* note 6, at 35. The OPP's characterization of the cable franchise market as contestable is questionable, however. A contestable market requires "free and easy entry and exit." *See* Bailey, *supra*, at 178. Considering the large investment which cable requires and the non-transferability (in terms of location) of the cable wires, free and easy entry and exit in the market is doubtful. Contestability theory is discussed in Bailey, *supra*, at 178, and in Baumol, Bailey, and Willig, *Weak Invisible Hand Theorems on the Sustainability of Prices in a Multiproduct Monopoly*, 67 AM. ECON. REV. 350 (1977).

55. 47 Fed. Reg. at 39,216.

56. *Id.*

57. *Id.* at 39,215, 39,216.

58. Since local broadcast station and cable system cross-ownership is prohibited, (*see* 47 C.F.R. § 76.501(a)(2) (1982)), the Commission apparently believes that the network cross-owners' presumed conflict between broadcast-delivered and cable-delivered programming is so much more remote as to not require retention of the ban.

that broadcast network ownership of cable systems would limit diversity of voices in the video marketplace—bears a striking resemblance to the first amendment considerations for the rule as they have been discussed in various cases.[59] However, in proposing to eliminate the prohibition, the Commission did not treat it as such. After concluding that this third rationale did not support a continuation of the rule, the Commission stated: "Our public interest mandate requires us to consider not only the economic welfare of the public, but also 'necessarily invites reference to the first amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources.' "[60]

The Commission did not analyze the effect of eliminating the prohibition on this first amendment goal. In its discussion of the first amendment concern, it "invite[d] comment on whether promotion of this goal makes desirable a lower level of concentration [of ownership] than economic considerations alone would suggest."[61] It went on to state that rules dispersing ownership of media outlets do not necessarily guarantee greater diversity of program content or advance the welfare of individual viewers.[62] The Commission believed that whether such rules do result in diversity of programming depends on the financial costs which the ownership rules imposed. In discussing the costs of the network/cable cross-ownership ban, the Commission expressed its concern that "significant efficiencies which might result from vertical integration between a network and a cable television system are being foregone as a result of the cross-ownership prohibition."[63] The Commission concluded that the strongly competitive nature of the cable network and local video marketplaces makes any limiting of diversity of programming by broadcast network cross-owners highly unlikely.[64]

The Commission's first amendment discussion, thus, was

59. These first amendment considerations are discussed *infra* in text accompanying notes 72-82.

60. 47 Fed. Reg. at 39,217.

61. *Id.*

62. *Id.*

63. *Id.* Vertical integration results when a firm involved in one stage in the production of a certain product or service becomes involved in other stages of its production. This occurs, for example, when the networks which package programming purchase cable systems which distribute that programming to the public. *See* W. BAUMOL, *supra* note 25.

64. 47 Fed. Reg. at 39,217.

very similar to that included in the OPP report. Both relate their economic market analyses to first amendment concerns.[65] However, before the validity of such a relation can be evaluated, the first amendment concerns involved in the prohibition must be analyzed more precisely.

V
First Amendment Concerns

The first amendment prohibits governmental restraint of the right of free speech.[66] Statutory and case law have further defined the limits of this constitutional right of free speech, while new communications sources[67] have raised new constitutional questions.[68] When Congress created the FCC to regulate the radio communications as the "public convenience, interest, or necessity requires,"[69] it recognized the applicability of the first amendment to these new media sources.[70] However, the question remains as to whose free speech rights are to be protected.

Broadcasters have argued that the first amendment protects their use of their allocated frequencies to broadcast continuously whatever they choose, and to exclude whomever they choose from using that frequency.[71] However, the United States Supreme Court has rejected this argument. In *Red Lion Broadcasting Co. v. FCC*,[72] the broadcasters argued that the Commission's "fairness doctrine"[73] was inconsistent with the public interest standard of the Communications Act[74] and that the doctrine violated the first amendment.[75] Although the Court recognized the broadcasters' first amendment interests, it found for the FCC, stating that the fairness doctrine en-

65. *See supra* text accompanying note 43.

66. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

67. "New communications sources" refers to media developed since the first amendment was adopted in 1789, and includes radio, television and motion pictures.

68. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (first amendment is applicable to expression by means of motion pictures).

69. 47 U.S.C. § 303 (1981).

70. In the Communications Act of 1934, Congress forbade the Commission from "interfer[ing] with the right of free speech by means of radio communication." 47 U.S.C. § 326 (1981).

71. *Red Lion*, 395 U.S. at 386.

72. 395 U.S. 367 (1969).

73. *See supra* note 20.

74. *See* 47 U.S.C. § 303 (1981).

75. *See Red Lion*, 395 U.S. at 385.

hanced rather than harmed first amendment values by promoting "the presentation of vigorous debate of controversial issues of importance and concern to the public. . . ."[76]

Similarly, in *Mt. Mansfield Television, Inc. v. FCC*,[77] the Second Circuit ruled on whether the FCC's prime time access,[78] syndication,[79] and financial interest[80] rules violated the first amendment rights of the broadcasters.[81] In deciding the prime time access question, the court stated:

> [W]hile the rule may well impose a very real restraint on [broadcasters] in that they will not be able to choose . . . the programs which *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public.[82]

The first amendment considerations implicated in the prime time access rule are also involved in the network/cable cross-ownership prohibition. Both the prime time access rule and the network/cable cross-ownership ban are founded on the same statutory grant of authority.[83] Both seek to further the public interest in encouraging diversity of viewpoint and programming by increasing the number of parties controlling the channels of communication. Therefore, a first amendment evaluation of the network/cable cross-ownership ban must include consideration of the rights of the public.

The public's first amendment right has been characterized as

---

76. *Id.* at 389.

77. 442 F.2d 470 (2d Cir. 1971).

78. The Prime Time Access Rule limits the number of hours of network programming that can be shown between 7:00 p.m. and 11:00 p.m. (except in the Central Time Zone where the restriction applies from 6:00 p.m. to 10:00 p.m.) to three hours. *See* 47 C.F.R. § 73.658(k) (1982); *Mt. Mansfield*, 442 F.2d at 473.

79. The syndication rule prohibits networks from "sell[ing], licens[ing], or distribut[ing], television programming to television station licensees within the United States for non-network television exhibition . . . or sell[ing], licens[ing], or distribut[ing], television programming of which it is not the sole producer for exhibition outside the United States . . . ." 47 C.F.R. § 73.658 9 (j)(i). *See* note 80, *infra*, for the recent decision by the FCC to repeal this rule.

80. The financial interest rule prohibits networks from "acquiring any financial or proprietary rights or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network . . . ." 47 C.F.R. § 73.658 (j)(ii). The FCC has tentatively decided to repeal both the syndication and financial interest rules. Tentative Decision, Amendment of Syndication and Financial Interest Rules, BC Docket No. 82-345, 48 Fed. Reg. 38020 (adopted Aug. 4, 1983).

81. *Mt. Mansfield*, 442 F.2d at 476.

82. *Id.* at 478.

83. *See* 47 U.S.C. § 303 (1981).

the right to receive "the widest possible dissemination of information from diverse and antagonistic sources."[84] The Commission has recognized this right.[85] Nonetheless, it still proposes to eliminate the ban, stating that "such rules [prohibiting cross-ownership] do not necessarily guarantee greater diversity of program content or advance the welfare of individual viewers."[86] The Commission evidently views diversity of programming as a first amendment goal. Certainly such diversity is within the realm of the "widest possible dissemination of information."[87] However, the term "diversity of programming" does not adequately describe the public's first amendment right.

The term "diversity of programming" confuses the concern that the public should hear differing views on critical issues with the general desire to allow the public to have a variety of entertainment and other programming available. It is with the former issue that the courts have been primarily concerned because free speech considerations touch at the heart of our democratic system. As the Supreme Court has noted, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."[88] Diversity of speech is vital to this scheme because, as Judge Learned Hand once observed, "[r]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[89] Thus diversity of viewpoint is the paramount consideration involved when examining the public's first amendment right.

Moreover, in *Red Lion*,[90] the Court noted:

> The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. 'Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually

84. Associated Press v. United States, 326 U.S. 1, 20 (1945).
85. 47 Fed. Reg. at 39,217.
86. *Id.*
87. *See Associated Press*, 326 U.S. at 20.
88. Garrison v. Louisiana, 379 U.S. 64, 74-5 (1964).
89. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).
90. 395 U.S. 367 (1969).

> believe them who defend them in earnest, and do their very utmost for them.'[91]

Therefore, the first amendment requires true diversity, i.e., that beliefs be advanced by those who hold them. This, in turn, necessitates that access to the channels of communication be open or that the channels of communication be controlled by those with diverse views.

Although the courts have recognized the public's right to diversity, they have not upheld any claims of an individual right of access to broadcast time. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[92] the Court found that neither the Communications Act,[93] which includes reference to the first amendment,[94] nor an independent first amendment claim requires broadcasters to air paid editorial announcements.[95] The FCC had rejected the claims of the Democratic National Committee and the Business Executives' Move for Vietnam Peace that "responsible" individuals and groups are entitled to purchase advertising time to comment on public issues, even though the broadcaster has complied with the fairness doctrine.[96] The Court sided with the FCC, but split on the reasoning regarding the independent first amendment issue.[97] It is the Court's treatment of the first amendment as it relates to the Commission's public interest requirement, however, that makes the *CBS* case so important. In this regard, *CBS* indicates a change from *Red Lion*.

In *Red Lion*, the Court emphasized the position of broadcasters as proxies or fiduciaries for the public.[98] In *CBS*, the

91. *Id.* at 392 n.18 (quoting J. MILL, ON LIBERTY 23 (R. McCallum ed. 1947)).

92. 412 U.S. 94 (1973).

93. 47 U.S.C. § 303 et seq.

94. *National Citizens Comm.*, 436 U.S. 775.

95. *CBS*, 412 U.S. at 94.

96. *Id.* at 97.

97. This note does not address the issue of whether the FCC's proposed elimination of the network/cable cross-ownership prohibition constitutes governmental action which abridges the public's first amendment rights as those rights are considered independently of the Commission's public interest mandate. However, the Court's lack of a unified view regarding the independent first amendment issue is worth noting. Chief Justice Burger, who wrote the opinion of the Court, believed that a broadcaster's refusal to sell air time did not constitute governmental action under the first amendment. *Id.* at 119. Two of the Justices who concurred in other parts of the Chief Justice's opinion assumed governmental action but found that the broadcaster's refusal to air the editorial advertisements did not violate the first amendment. *Id.* at 147. The dissenters found that there was in fact governmental action. *Id.* at 173.

98. 395 U.S. at 389-90.

Court added a new dimension to this discussion of the broadcaster's public interest role.[99] The Court embarked on a lengthy discussion of the broadcaster's journalistic freedom and discretion to edit materials.[100] At least one commentator has pointed out that this concern underscores the Court's belief that the broadcaster's first amendment interests[101] must be considered in any FCC public interest regulation.[102] Indeed, the Court in *CBS* maintained that governmental power under the Communications Act of 1934 can only be asserted when the public interest outweighs the broadcaster's journalistic interests.[103] In determining the necessity or desirability of the FCC's cross-ownership prohibition, one must therefore balance the public interest against the broadcaster's journalistic discretion.

The broadcaster's interest in journalistic independence and discretion is not directly involved in the network/cable cross-ownership prohibition because this method of protecting the public interest does not regulate programming content. In fact, the constitutionality of ownership restrictions has been firmly established by the Supreme Court.[104] In *FCC v. National Citizens Committee for Broadcasting*,[105] which was decided after the *CBS* case, the Supreme Court was faced with determining the validity of an FCC order forbidding the common ownership of a radio or television broadcast station and a daily newspaper located in the same community.[106] The Court upheld the FCC order as "a reasonable means of promoting the public interest

99. For a good discussion of the broadcaster's public interest role, *see* Minow, *supra* note 17.

100. *CBS*, 412 U.S. at 117-20.

101. In *CBS*, these first amendment interests were termed journalistic discretion and editorial powers. *Id.*

102. *See* 47 U.S.C. § 303 (1981); *See* Bollinger, *Elitism, The Masses and the Idea of Self-Government* in CONSTITUTIONAL GOVERNMENT IN AMERICA 99, 104-5 (Collins ed. 1980).

103. *CBS*, 412 U.S. at 122.

104. *See, e.g., National Citizens Comm.*, 436 U.S. 775 (FCC regulations barring formation or transfer of co-located newspaper/broadcast station combinations); United States v. Storer Broadcasting Corp., 35 U.S. 192 (1956) (FCC rules limiting multiple ownership of standard, FM, and television broadcast stations); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (FCC's "chain broadcasting" regulations prohibiting any organization from operating more than one broadcast network and barring any network from owning more than one standard broadcast station in the same community).

105. 436 U.S. 775 (1978).

106. *Id.*

in diversified mass communications."[107] This and other cases involving media ownership restrictions[108] indicate that the Court has found no constitutional impediment to the Commission's imposition of rules restricting ownership. Such rules are, therefore, permissible. However, the question of whether the Commission could be *required* to restrict ownership in certain instances has not been brought before the Court. Although it is unlikely that the Court would require the FCC to maintain such a restriction, given the Court's general deference to FCC determinations,[109] retention of the prohibition may still be desirable precisely because the public's interest outweighs the broadcaster's interest. A framework within which these interests and the desirability of the ban should be evaluated is outlined in the following section.

VI
Analysis of the Cross-Ownership Ban

In determining whether the cross-ownership prohibition is desirable, two separate analyses are necessary: one that focuses on whether economic considerations require retention of the rule, and a second centered upon first amendment concerns. As has already been noted, the FCC has been primarily concerned with the economic factors in analyzing whether the cross-ownership ban should be retained.[110] Discussion of the

107. *Id.* at 802.

108. *See supra* note 104.

109. The Administrative Procedure Act outlines the appropriate scope of review of agency action and, in pertinent part, provides: "The reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1983). This "arbitrary and capricious" standard of review is a highly deferential one, Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976), which presumes the agency's action to be valid, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971); NAACP v. FCC, 682 F.2d 993, 997 (D.C. Cir. 1982); Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981). Though a reviewing court is to be "searching and careful" in its inquiry to ensure that the agency has articulated a "rational connection between the facts and the choice made," Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962), it cannot substitute its judgment for that of the agency, *Overton Park*, 401 U.S. at 416. Furthermore, while the level of review is not to be perfunctory, it is relatively narrow and designed only to ensure that the agency's decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors. *National Citizens Comm.*, 436 U.S. at 803, 814-15.

110. *See supra* text accompanying notes 28-32 (FCC Special Staff Report), notes 33-45 (FCC OPP Report), and notes 46-49 (FCC proposal to eliminate the network/cable cross-ownership ban). However, it is not within the scope of this note to evaluate the

first amendment considerations for the rule has been minimal and insufficient. The insufficiency of the Commission's analysis of the first amendment considerations for the rule is readily apparent from an examination of the Commission's reasoning in adopting and in subsequently proposing to eliminate the ban.

A. FCC Approach

When the prohibition was first adopted, the Commission noted the pervasive influence of the broadcast networks and the high incidence of media cross-ownership in various markets throughout the country.[111] Apparently the Commission made the determination that network ownership was so widespread as to warrant a total ban on cable cross-ownership. As the Commission later stated:

> Having grappled over the years with the problems of cross-media control of radio and television stations, by national broadcast networks, and by newspapers and other broadcast stations . . . , we had become increasingly persuaded, first, that cross-media control is generally undesirable . . . ; second, that the evidence of previously developed electronic mass media indicated that, in the absence of regulatory prohibition, considerable cross-media control of cable television could be expected . . . ; and, third, that cross-media control of cable would become increasingly difficult to halt and reverse as cable grew if its growth were not accompanied by early-imposed regulations designed to foster diversification of control.[112]

Thus, in adopting the prohibition, the Commission was attempting to diminish the concentration of control over the channels of communication by restricting the ownership of the emerging medium of cable. This focus on the channels of mass communications *is necessary* if one is attempting to promote the first amendment goal of presenting a diversity of viewpoints so that truth will ultimately prevail.[113]

In adopting the ban, the Commission was also attempting to increase the number of firms in the communications market in order to promote economic competition.[114] The promotion of

---

validity of the FCC's assertion that economic factors indicate that the cross-ownership ban should be eliminated. *See* 47 Fed. Reg. at 39,217-18.

111. *Second Report and Order*, 23 F.C.C.2d at 819, 820.

112. *Memorandum Opinion*, 39 F.C.C.2d at 391.

113. *See Red Lion*, 395 U.S. 367.

114. *See Memorandum Opinion*, 39 F.C.C.2d at 391.

competition is usually desirable because it keeps prices near cost.[115] However, in some situations, such as where large scale production results in cost savings, fewer, though larger, firms may result in lower prices.[116] Thus, economic considerations may suggest that a market with fewer, larger firms is desirable. The FCC's current contention that network ownership of cable systems would result in lowered costs[117] suggests that the video services market is one where fewer, larger firms are economically preferable. In addition, the OPP finding that cable franchise markets are workably competitive based on a contestability theory[118] indicates that a one firm cable market may not be undesirable for economic reasons.

These findings, however, directly conflict with the FCC's traditional notion that diversity of ownership results in increased diversity of viewpoints and programming.[119] Greater diversity of viewpoint would seem to require the FCC to attempt to increase the number of firms in the market. The FCC, in proposing to eliminate the prohibition, did not explicitly address this problem. The Commission simply stated that diversity of ownership does not necessarily increase diversity of viewpoints and programming.[120] The Commission's bland assertion that diversity of ownership does not result in diversity of viewpoints and programming, after years of asserting the contrary, is, at the very least, unconvincing.[121]

By questioning the general proposition that diversity of ownership yields diversity of viewpoints, the FCC is creating serious problems for itself. As stated previously, the FCC is required as part of its public interest mandate to promote diversity.[122] If the Commission contends that diversity of ownership does not result in diversity of viewpoints and programming, it must find some other method of protecting the public interest.[123] In promoting diversity, the Commission can-

115. *See* BAUMOL, *supra* note 25.

116. *Id.*

117. *See* 47 Fed. Reg. at 39,217.

118. *See supra* note 54.

119. *See* In re Simon Geller, 90 F.C.C.2d 250 (1982) (discussing diversification of ownership of media of mass communications); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). *See also*, B. COMPAINE, *supra* note 11.

120. 47 Fed. Reg. at 39,217 (emphasis added).

121. *See supra* note 119.

122. *See supra* text accompanying notes 66-70.

123. It may be that deregulation is the method with which the Commission chooses to implement the public interest. *See, e.g.*, Report and Order (Proceeding Terminated)

not censor material[124] or abridge broadcasters' editorial rights too extensively.[125] Thus, direct regulation of program content by the Commission in order to promote the interests of the public would be problematic to say the least.

Another possible interpretation of the Commission's present position is that it is merely qualifying the view that diversity of ownership yields diversity of viewpoints. The FCC may accept the general proposition that diversity of ownership increases the likelihood that different viewpoints and programs will be made available to the public. However, it may believe, as the OPP has recently suggested, that there is a threshold of diversity of ownership beyond which any increases in such diversity will only result in minimal increases in diversity of viewpoints and programming.[126]

Nevertheless, either interpretation of the FCC's position regarding the relationship of diversity of ownership to diversity of viewpoints and programming requires it to make a separate first amendment analysis of the market, without considering economic factors, to determine whether any limitations on ownership are necessary.

B. First Amendment Analysis

In a first amendment analysis, the proper delineation of the market should include the broad spectrum of products constituting the mass communications services. Economic analyses would suggest a different delineation of the products to be considered in the market based upon consumer behavior patterns in substituting the products.[127] For example, an economic analysis of cable and broadcasting would suggest that the proper market to examine is the video services market[128] because viewers tend to interchange the various television serv-

---

in BC Docket No. 79-219, RM-3099, RM-3273, 84 F.C.C.2d 968 (1981) (FCC deregulation of radio); Further Notice of Proposed Rule Making in CC Docket No. 79-252, 84 F.C.C.2d 445 (1981) (FCC deregulation of telecommunications services). However, at the very least, an analysis of the communications services with the first amendment goal in mind is necessary to determine whether the first amendment concerns implicit in the public interest mandate are being met.

124. 47 U.S.C. § 326.

125. *See CBS*, 412 U.S. at 110.

126. *See* OFFICE OF PLANS AND POLICY STAFF REPORT, MEASUREMENT IN HOME VIDEO MARKETS 23 (Dec. 23, 1982).

127. *See* United States v. E.I. Du Pont De Nemours & Co., 351 U.S. 377, 393 (1956). *See generally* sources cited *supra* in note 25.

128. The video services market refers to services offering television programming in

ices. Such a market description would not include consideration of radio services (AM and FM band) or newspapers. However, in evaluating the product market for first amendment purposes, radio and newspapers must be included because different information and viewpoints can be conveyed to the public through these media as well.

In addition to determining the various media that should be considered in a first amendment analysis, the FCC must also define the geographical boundaries of the communications market. The Commission has expressed its belief that the national level may be the appropriate level of inquiry for consideration of the first amendment concerns.[129] This, however, may not be sound. The first amendment is concerned with the diversity of viewpoints and programming available to the individual viewer. The idea behind the first amendment goal of diversity of viewpoints is that from the multitude of views, the viewer/hearer can decipher the truth.[130] Thus, the diversity of viewpoints available to the particular *individual* is important for the first amendment purposes. This necessitates an examination of diversity at the local level.[131]

Whether the Commission is rejecting, or merely qualifying, the view that increasing diversity of ownership results in increasing diversity of viewpoints, it is now apparently left with no alternative but to conduct an *actual* evaluation of the programming available to viewers and listeners in the various

---

the home and would include broadcast television, cable, direct broadcast satellite, pay television and low power television, as well as home video programs.

129. 47 Fed. Reg. 39,212.

130. *See* Minow, *supra* note 17.

131. Since its inception, the FCC has recognized and emphasized the importance of radio as a local medium. As the Commission noted in discussing its rule requiring broadcasters to ascertain and discuss issues of concern to its community of license,

> Ascertainment grew out of two concepts of the role of radio. The first is that radio is a local medium, where stations are licensed to a community and are obligated to program primarily to that community. The second is that each station should attempt to provide 'well balanced' programming so that all segments of the community obtain the benefits of the licensee's ability to utilize a public resource—radio frequency. The concept of localism was part and parcel of broadcast regulation virtually from its inception.

Further Notice of Proposed Rulemaking, 84 F.C.C.2d at 994. Indeed, the Commission further noted that the concept of localism can be inferred from the Communications Act, Section 307(b), which provides, in part: "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution to each of the same." *Report and Order*, 84 F.C.C.2d at 994.

markets in order to protect first amendment interests.[132] However, such a content-based evaluation is precisely the sort of regulation that some commentators have found so onerous and unconstitutional.[133] By apparently rejecting the indirect method of promoting diversity of viewpoints through ownership restrictions, the Commission will have to undertake the difficult task of promoting the public's first amendment rights, while not abridging the editorial rights of the communications operators.

VII
Conclusion

The Commission's proposal to eliminate the network/cable cross-ownership prohibition requires both an economic and a first amendment analysis to determine the effect of the rule's deletion. The two analyses are necessary because the economic goal of minimizing prices for customers does not necessarily result in the preservation of an "uninhibited marketplace of ideas in which truth will ultimately prevail."[134] The Commission did not conduct a first amendment analysis before proposing to eliminate the rule. Rather, the Commission contended that increasing the diversity of ownership of the channels of communication would not necessarily result in any increase in diversity of viewpoints or programming.[135] Before such a contention can validly be made, however, the level of diversity of viewpoints present in today's programming must be analyzed and evaluated. In this regard, the Commission should consider information available over the radio, through the various television services, and in newspapers. Furthermore, the analysis should focus on the information available to the individual in his or her local area. The local area focus is required because the aim of the first amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[136] In order for truth to prevail, *each* member of the public must have access to the various differing views.

---

132. *See supra* note 125.

133. *See* KRASNOW, TERRY & LONGLEY, *supra* note 17; D. PEMBER, MASS MEDIA LAW 391 (1977).

134. *See Red Lion*, 395 U.S. at 390.

135. 47 Fed. Reg. at 39,217.

136. *See Red Lion*, 395 U.S. at 390.

Once the level of diversity of the various markets is examined, the necessity for the prohibition can be determined. The FCC may be correct in asserting that the network/cable cross-ownership ban is unfounded. However, a more precise examination of the diversity of information in various markets across the country is necessary before the validity of the FCC's assertion can be determined. An evaluation of the diversity of viewpoints conveyed through the wide spectrum of communications services in particular locales throughout the country would indicate whether the first amendment goal is being met and, consequently, whether the cross-ownership prohibition is unnecessary. Only by examining the diversity of viewpoints available in geographic areas with communications channels owned by differing numbers of distinct entities and individuals can the Commission's assertion that diversity of ownership does not necessarily yield diversity of viewpoints be accurately evaluated.