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ANTITRUST AND THE FCC: THE PROBLEM OF NETWORK DOMINANCE

BERNARD SCHWARTZ †

In a memorandum submitted last year, Professor Schwartz, then chief counsel of the House Legislative Oversight Subcommittee, asserted that the Federal Communications Commission had failed to implement antitrust laws and policies, and that its dereliction constituted a breach of its statutory obligation to protect the public interest. This Article, at least in part, documents and substantiates that charge. Starting from the premise that monopoly in mass communication is inconsistent with the public interest, Professor Schwartz marshals evidence tending to show that in recent years the Commission has acquiesced in the growing dominance of the huge radio and television networks, despite a well defined congressional policy against excessive concentration in broadcasting. The author's stormy six months in Washington, and the program for further investigation and reform of the commissions which resulted from them, are the subject of his recently published book, The Professor and the Commissions.

Administrative law, almost more than any other branch of the law, well exemplifies Cardozo's famous statement that the law has its periods of ebb and flow. Twenty years ago, the administrative process was seen by its proponents as the great hope in our governmental system. Through it they hoped to work a progressive modification of the economy and the society, comparable, at the very least, to the great English Reform Movement of the last century. Many of them, in fact,

† Professor of Law, New York University Law School. B.S.S., 1944, College of the City of New York; LL.B., 1944, New York University; LL.M., 1945, Harvard University; Ph.D., 1947, LL.D., 1956, Cambridge University.

went even further and saw in administration the ultimate supplanter of private industry, which would take over the role of economic leadership in the "public interest."¹

The twenty years that have elapsed have served to demonstrate how exaggerated these hopes were. The grand vision of the 1930's has been succeeded by a mood of doubt among those informed about the operation of the great federal agencies. There has been, in fact, a widely expressed skepticism about the impartiality of agency proceedings, particularly in the Federal Communications Commission.² There can be little doubt that public concern about the FCC bears a direct relationship to the disclosure of improprieties in that commission made during the 1958 hearings of the House Legislative Oversight Subcommittee.³

Most of the public concern with the FCC's work has focused upon the Commission's comparative television decisions—*i.e.*, those deciding which among two or more competing applicants shall be awarded television licenses.⁴ It would, nevertheless, be a mistake to assume that it is only in the field of television licensing that the FCC has been deficient. In a noted article of a few years ago, Professor Huntington dealt with what he termed the "marasmus" of one of the great federal regulatory commissions.⁵ It is most unlikely that the pathological condition from which such an agency suffers will be reflected in only one aspect of its work. Instead, as Huntington showed, such commission's illness permeates all phases of its operations.

The primary symptom of the administrative marasmus of which Huntington wrote is the agency's passivity in protecting the public interest. More and more, the sick Commission fails to give effect to the public interest, whose vindication was the principal reason for the creation of the agency itself. Instead, in such a commission, the public tends ever-increasingly to become identified with the interest of the dominant groups in the regulated industry.⁶

1. See Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954).

2. Thus, a recent headline in the *New York Times* read: "F.C.C. Prestige at Record Low." N.Y. Times, Nov. 16, 1958, § 4, p. 8, col. 1.

3. Even before these disclosures were made, close students of the FCC had expressed uneasiness. See, *e.g.*, Jaffe, *The Scandal in TV Licensing*, Harper's, Sept. 1957, p. 77.

4. *Ibid.*

5. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952). "Marasmus" is defined as a "gradual and continuous wasting away of the bulk of the body from some morbid cause." *Id.* at 470 n.11.

6. See SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* ch. 5 (1959), for a detailed treatment of this theme.

In the FCC, as already indicated, most of the public attention has been focused upon the improprieties revealed in the Commission's television licensing decisions. Comparable in importance to them, however—at least in its impact upon the public interest—has been the Commission's failure to implement antitrust laws and policies. In a memorandum submitted on January 4, 1958 by the present writer as chief counsel of the Legislative Oversight Subcommittee, it was asserted that in recent years, the Federal Communications Commission had failed to give effect to antitrust considerations.

"In a number of cases the Commission has refused to consider possible antitrust violations on the part of applicants before it on the ground that it can act only if there has been a final adjudication by a court of such violation. The subcommittee should publicly explore the question of whether the commission's approach in these cases is justified."⁷

As it turned out, the Oversight Subcommittee, diverted as it became by political and other considerations, never did adequately explore the antitrust aspects of the FCC's work. Yet few phases of the Commission's operations are of greater practical importance; for the FCC's actions in this area will, in large part, determine the extent to which there is undue concentration of ownership and control in the field of broadcasting—a concentration which itself is of great consequence in a system dominated by the philosophy underlying the first amendment.⁸

In the present Article, this writer will try to present some of the materials which led him to assert, in his already-referred-to subcommittee memorandum, that the FCC had failed to give effect to antitrust policies. Such presentation should be of value, not only in the light of the current popular concern with the FCC, but also for what it may tell us of the actual operation of an important federal agency. In this area of its work, we shall see, there is a wide variance between what the FCC is supposed to do and what it really does.

NBC-WESTINGHOUSE CASE

The FCC's disregard of antitrust policies can hardly be better illustrated than through an examination of the so-called *NBC-Westinghouse* case. This case arose out of an exchange of television stations

7. N.Y. Times, Jan. 23, 1958, p. 14, col. 5.

8. "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" *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

between the National Broadcasting Company and the Westinghouse Broadcasting Company. In 1953, Westinghouse had purchased Station WPTZ-TV in Philadelphia for \$8,500,000—at that time the highest priced TV station sale in history. Less than two years later, NBC sought to acquire the station. After some months of negotiations, an agreement was entered into in May 1955, under which Westinghouse exchanged its Philadelphia station for an NBC-owned TV station in Cleveland, plus a payment of \$3,000,000 by NBC.⁹ The exchange required approval of the FCC, which the Commission granted without hearing at the end of 1955.¹⁰

A year later, in December 1956, the Department of Justice filed a civil antitrust complaint, praying that the court adjudge the exchange agreement to be in violation of the Sherman Act¹¹ and revoke NBC's license to operate the Philadelphia station. The district court, in a 1958 decision, held that the Government's suit could not be entertained.¹² The FCC, said Chief Judge Kirkpatrick, has primary jurisdiction to determine whether an exchange of television stations violates the antitrust laws. In approving the instant exchange agreement as in the "public interest,"¹³ the Commission must necessarily have determined that there was no antitrust violation. Such an FCC determination can only be challenged under the appeal provisions of the Communications Act. It cannot be attacked in a subsequent antitrust action by the Government.

The merits of Judge Kirkpatrick's application of the primary jurisdiction doctrine do not concern us here. What is of moment for purposes of the present Article is the basic factual assumption upon which the district court decision was grounded. This is the assumption that the FCC had fully heard and considered the antitrust aspects of the case. "The FCC," asserted Judge Kirkpatrick, "requested and obtained from the parties all of the information which the Government now has and on which it bases this suit. The FCC was under a duty to pass upon the issues presented by this evidence. The . . . FCC decided all issues relating to the exchange which it could lawfully decide."¹⁴

What actually happened in the FCC in the *NBC-Westinghouse* case is basically inconsistent with the assumption that antitrust factors

9. Radio stations in Philadelphia and Cleveland were also involved in the exchange.

10. National Broadcasting Co., 13 P & F RADIO REG. 374 (1955).

11. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952).

12. United States v. Radio Corp. of America, 158 F. Supp. 333 (E.D. Pa. 1958).

13. 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1952).

14. United States v. Radio Corp. of America, 158 F. Supp. 333, 335-36 (E.D. Pa. 1952). Judge Kirkpatrick's decision was reversed by the Supreme Court on February 24, 1959. 79 Sup. Ct. 457 (1959). The reversal does not, however, alter the substance of our discussion.

were adequately considered by the Commission. When the FCC received the application for approval of the NBC-Westinghouse exchange agreement, its staff, in accordance with its usual practice, made a routine investigation into the facts and circumstances surrounding the transaction. In the course of its inquiry into the case, the FCC staff found some disturbing things.

In the first place, the staff reports to the Commission indicated that coercion had been brought upon Westinghouse by the representatives of NBC. The Philadelphia station had an NBC affiliation, which could be withdrawn almost at will.¹⁵ As a memorandum from the Chief of the FCC Broadcast Bureau put it, "The vital force of a major network affiliation hung constantly over these negotiations, exerting its own pressure without ever expressly coming to the forefront."¹⁶ The staff reported that NBC had convinced Westinghouse that it (NBC) could acquire another television station in Philadelphia if Westinghouse did not agree to the NBC proposal. This would mean the end of the NBC affiliation for the Westinghouse Philadelphia station.¹⁷ In addition, there was at least a veiled threat that, unless it signed, Westinghouse might lose a valuable NBC affiliation in Boston and fail to obtain one for which it was then negotiating in Pittsburgh. The president of Westinghouse aptly characterized the action of the NBC representatives as a "muscling job."¹⁸ In the conclusion of the Broadcast Bureau Chief's memorandum, Westinghouse "was compelled by the combination of the value of the network affiliation and the availability of another station to which NBC could take its connection, to go along with this transaction which it did not seek and did not want. . . ." ¹⁹

But the FCC staff found more than evidence of coercion by NBC in this case. In addition, it informed the Commission that the NBC acquisition of the Philadelphia station would present a serious problem

15. Affiliation contracts, under the relevant FCC regulation, can run for no longer than two years. 47 C.F.R. § 3.133 (1958). The importance of the NBC affiliation in the instant case is shown by the fact that, of the total \$8,500,000 paid by Westinghouse for the Philadelphia station in 1953, \$5,000,000 was expressly paid for the NBC affiliation. See House Comm. on the Judiciary, Antitrust Subcomm., *Report on Television Broadcasting*, H.R. REP. No. 607, 85th Cong., 1st Sess. 97 (1957) (hereinafter cited as *Report on Television Broadcasting*).

16. FCC Interoffice Memorandum to the Commission From Chief, Broadcast Bureau, Sept. 26, 1955, reprinted in *Hearings Before Antitrust Subcommittee No. 5 of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 22, at 3193, 3194 (1957) (hereinafter cited as *ANTITRUST SUBCOMMITTEE REPORT*).

17. Westinghouse itself had stated in a letter to the FCC that "it could only be concluded by Westinghouse that this would spell the end of an NBC affiliation with the Westinghouse Television Station WPTZ in that market at the expiration of the current agreement." Westinghouse Reply, Nov. 10, 1955, reprinted in *id.* at 3338, 3340.

18. Quoted in *id.* at 3120.

19. *Id.* at 3195.

of concentration. "This demonstration of network power," said the memorandum already quoted, "and the readiness to employ it to gain wanted ends, merits consideration in relation to the other problems in this case—concentration of control and overlap."²⁰ NBC already owned television stations in New York City and Washington and had applications pending for stations in Buffalo, N.Y., and New Britain, Conn. If the FCC were to grant these NBC applications, it would give that company a substantial grip on the Middle Atlantic area. To give NBC in addition a Philadelphia channel would result in what the FCC staff termed a concentration of control greater than that which exists anywhere in this country.²¹ "It was and still remains the position of the Chief, Broadcast Bureau," declared that official in another memorandum to the Commission, "that the Philadelphia acquisition cannot be considered except in relation to the attempts, by NBC, to make additional acquisitions of broadcast properties in New Britain and Buffalo. So considered, the aggregation of stations contemplated by the New Britain, Buffalo, and Philadelphia applications presents a serious problem of area concentration."²²

These staff memoranda clearly appeared to raise serious questions for the FCC to consider before deciding whether to approve the NBC-Westinghouse exchange: 1) Did the pressure by NBC on Westinghouse to sell the more profitable Philadelphia station for a less profitable Cleveland station—through the threat of removing its network affiliation—constitute duress? 2) Did the apparent withholding of the NBC affiliation for Westinghouse's Pittsburgh station, until the Philadelphia-Cleveland exchange was agreed to, constitute a tie-in arrangement contrary to the public interest?²³ 3) Is it consistent with the public interest for a major network to use the leverage of network affiliation to enhance its own competitive position as a broadcaster? 4) Is area concentration as great as that involved in this case consistent with the public interest?²⁴

The staff memoranda, at the least, indicated a need for further FCC inquiry into the case. In the apt statement of the chairman of a House subcommittee to the FCC head, "You certainly had danger

20. *Ibid.*

21. *Id.* at 3196.

22. FCC Interoffice Memorandum to the Commission From Chief, Broadcast Bureau, Dec. 16, 1955, reprinted in *id.* at 3197, 3201.

23. Compare Commissioner Bartley, dissenting in National Broadcasting Co., 13 P & F RADIO REG. 374 (1955).

24. According to the memorandum from the Chief of the FCC Broadcast Bureau, *supra* note 16, "If any area concentration, short of duopoly, is to present a problem for the Commission, this would seem to be it." ANTITRUST SUBCOMMITTEE REPORT 3196.

signals flashed upon you, and I think—I say this with every degree of attempt to be fair to you, Mr. Chairman and your colleagues—I think those danger signals were sufficient to give emphasis to the need for some sort of inquiry into these operations.”²⁵ But the FCC voted to approve the exchange without any hearing at all on the matter.²⁶ One can hardly help but feel, as did a congressional committee which studied the case, that, “in light of all the evidence before the Commission, its failure to order a hearing . . . was improvident, to say the least.”²⁷

The later complaint filed by the Department of Justice against NBC and its parent corporation (Radio Corporation of America) alleged that defendants had violated section 1 of the Sherman Act²⁸ by combining and conspiring to obtain television ownership for NBC in five of the eight largest markets in the country “by the unlawful use of the power of the defendant NBC, as a network, to grant to or withhold from nonnetwork station owners, NBC network affiliation for their television stations.”²⁹

Certainly the facts and circumstances surrounding the NBC-Westinghouse exchange, so far as they were revealed to the FCC in its own staff memoranda, appeared to raise serious antitrust questions. In such a case, it would seem that the least the Commission ought to have done before deciding whether to approve the exchange was to consult fully with the Antitrust Division of the Department of Justice. In the words of the House Antitrust Subcommittee, effective liaison between the FCC and the Antitrust Division is a prime essential in a case like this: “The specialized experience of those charged with antitrust enforcement must be made available to the Commission with respect to antitrust problems that arise in connection with regulatory activity. Failure of such liaison may result in inadequate consideration of antitrust principles.”³⁰

The FCC did, it is true, notify the Antitrust Division, in August 1955, of the pendency of the proposed station exchange and also made its staff reports on the case available.³¹ But that was the total extent of its liaison. By December 27, 1955, Stanley N. Barnes (then the

25. *Id.* at 3124.

26. It did send a so-called § 309(c) letter (48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309(c) (1952)) to NBC and Westinghouse asking for their views on certain aspects of the exchange. This is, however, hardly an adequate substitute for a full hearing. The NBC and Westinghouse replies are reprinted in ANTITRUST SUBCOMMITTEE REPORT 3312, 3338.

27. *Report on Television Broadcasting* 107.

28. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952).

29. Reprinted in ANTITRUST SUBCOMMITTEE REPORT 3204.

30. *Report on Television Broadcasting* 95.

31. See ANTITRUST SUBCOMMITTEE REPORT 3131.

head of Antitrust) concluded that there were serious antitrust questions in the case. On that date, he sent a letter to the FCC in which he asserted: "There appears to be a serious question as to whether or not the proposed transfer is unreasonably restrictive, and thus violative of the Sherman Act."³² He also stated that the Antitrust Division was undertaking a preliminary investigation and that "it is not anticipated that this inquiry will take a considerable amount of time."³³

In light of Judge Barnes' statement, it would not seem unreasonable for the FCC to have waited until the results of the Antitrust Division's preliminary inquiry were communicated to it. But the Commission had already voted, on December 21, to approve the NBC-Westinghouse exchange.³⁴ Since the Barnes letter was sent almost a week after that date, it is clear that the FCC's "liaison" with Antitrust did not even include the elementary step of informing that Division of its contemplated action in the case. When the Barnes letter was delivered to the office of the FCC chairman on the morning of December 27 by special messenger, all the same, it was not too late for the Commission to consider it, since its December 21 decision had not yet been made public. It seems, however, that the Barnes letter was "lost" in the FCC until the decision approving the exchange was made public on December 28.³⁵ Actually, the members of the Commission did not receive copies of the letter for another week.³⁶ Even then, it is true, the FCC could have acted, for, under the Communications Act,³⁷ it has power on its own motion to revoke any order made by it without hearing. Yet it was certainly much harder for the Commission, in effect, to repudiate its own decision after it had been publicly announced.

That the FCC failure to have available to it the views of the Antitrust Division before it decided the *NBC-Westinghouse* case was unfortunate appears to be an understatement. The opinion of the agency endowed with specialized experience in the field that an antitrust violation might well be involved in the station exchange should, even without more, have put a warning finger to the lips of the Commission before it articulated its decision. The Antitrust Division doubts, expressed in the Barnes letter, should, at the least, have induced the FCC to hold a hearing in which it could fully explore the matter.

32. Judge Barnes' letter is reprinted in *id.* at 3132.

33. *Ibid.*

34. See *id.* at 3133.

35. *Ibid.* It is to this incident that Anthony Lewis of the *New York Times* referred, in a recent address, when he said, "The Communications Commission 'loses' a letter from the Department objecting to a station transfer on antitrust grounds." See 104 CONG. REC. 7254 (daily ed. May 6, 1958).

36. ANTITRUST SUBCOMMITTEE REPORT 3137.

37. 48 Stat. 1085, 1094 (1934), as amended, 47 U.S.C. §§ 309(c), 403 (1952).

In addition, it has since been revealed that the Antitrust Division's conclusion of a probable antitrust violation was based upon materials which the FCC itself did not have. As Judge Barnes himself put it, when asked by a congressional committee whether the view expressed in his December 27 letter was based solely on documents made available to him by the FCC, "No, sir; I do not think that that is a fair conclusion, by reason of the fact that we have certain documents that I am sure they did not have. We had certain reports or interviews with individuals which, by the very nature I am almost certain that they did not have."³⁸ We do not, of course, know what the information was that Judge Barnes referred to here. But it certainly seems clear that the FCC, in summarily approving the exchange, deprived itself of the opportunity to obtain, through hearing, a complete picture of the facts and circumstances in the case.

One familiar with the *NBC-Westinghouse* case cannot help but conclude, as did the House Antitrust Subcommittee which investigated the FCC's action in the matter,

"that in approving the NBC-Westinghouse exchange of 1955 without a hearing, without consideration of the specific antitrust histories of the applicants and their parent corporations, and without maintaining adequate liaison with the Antitrust Division of the Department of Justice, the Federal Communications Commissions fell short of performance fully protecting the public interest."³⁹

In hearings of the House subcommittee just quoted, the members of the FCC were questioned about their actions in the *NBC-Westinghouse* case. Their answers provide a privileged insight into the mental processes of the commissioners in antitrust matters, such as students of the administrative process are rarely fortunate enough to obtain. And what the FCC members revealed about their reasons for acting as they did has, to say the least, disturbing implications for one concerned with the enforcement of antitrust policies by the Commission.

During the House hearings, the then chairman of the FCC, George C. McConaughy, was asked why the Commission had not held a hearing to determine whether the allegations of coercion made in its staff memoranda were well founded. He replied that the Commission had been convinced that there was no need for hearing by the answers made by NBC and Westinghouse to FCC letters informing them of the allegations of duress:⁴⁰ "We got the replies to those from

38. ANTITRUST SUBCOMMITTEE REPORT 3150.

39. *Report on Television Broadcasting* 108.

40. See note 26 *supra*.

both Westinghouse and from the National Broadcasting Co. and those replies indicated to a majority of the Commission that there was no duress in this transaction. That is the reason it was approved.”⁴¹

The substantial evidence of coercion developed in the FCC staff reports was, in other words, negated in the Commission’s minds by the mere fact that the parties alleged to have been involved did not admit such coercion.⁴² “You accepted the letter on its face value?” Mr. McConnaughey was asked. “We certainly did,” was the FCC chairman’s reply.⁴³

It should, nevertheless, be obvious that, if there was actual duress, the parties involved would be the last persons frankly to avow it—especially in a formal letter, without questioning and cross-examination. The one who had been guilty of coercion would certainly not admit it if he could help it, especially since it might reasonably be assumed that such a confession would ipso facto result in punitive measures by the Commission.

It was just as unrealistic to expect the party who had yielded to the coercion readily to acknowledge as much in its formal letter to the FCC. If the threat of the loss of NBC affiliation had actually forced Westinghouse to part, against its will, with a TV station worth millions, the same NBC influence would surely have continued while the case was pending in the FCC.

An even more disturbing element than the administrative naivete which the foregoing illustrates emerges from the testimony of Commissioner John C. Doerfer, who became FCC chairman in 1957. Doerfer denied that the *NBC-Westinghouse* case raised any problems of undue concentration, and went on to say, “Concentration does not frighten me under those circumstances. . . . If the competitive principles of this country do not take care of that situation, then we are hopelessly sunk.”⁴⁴ In any case, the problem of concentration was not really the concern of the FCC. The Commission’s duty was to ensure that the public received comparable television fare, and here the public would have “just as much television, before or after, in the same area. . . . What you had was a change of ownership. You may have some difference with respect to local programming, but the public wasn’t being hurt.”⁴⁵ Asked whether it would disturb him if the record revealed at every turn a dominant position of one or two com-

41. ANTITRUST SUBCOMMITTEE REPORT 3122-23.

42. Neither the NBC nor Westinghouse letters, it should be noted, contained express denials of coercion. See *id.* at 3312, 3338.

43. *Id.* at 3126.

44. *Id.* at 3152.

45. *Id.* at 3151-52.

panies in television, Doerfer replied that it would not, and explained, "Somebody has to be dominant. Somebody is big. . . . [D]ominance is just the natural result of the ebb and flow of business relations from day to day. . . . [W]hen you are talking about dominance, there is always somebody that is dominant."⁴⁶

ANTITRUST POLICIES AND THE PUBLIC INTEREST

This expression by one uniquely situated to affect decisions raises serious questions about the FCC's performance of its statutory duty to give effect to the antitrust laws.⁴⁷ It is, of course, true that the FCC has no authority directly to enforce the Sherman Act and other antitrust laws as such.⁴⁸ At the same time, it is clear, as the FCC chairman himself conceded in 1956, that the Commission "has the obligation . . . to maintain a system of broadcast compatible with the antitrust laws. . . ." ⁴⁹ The FCC's obligation in this respect results directly from the provisions of the Communications Act.

There is, in the first place, the underlying policy of the Congress which induced it to set up a system of governmental regulation in the field of broadcasting. In enacting the Communications Act, the Supreme Court has informed us, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."⁵⁰ More recently, the chairman of the Senate Committee on Interstate and Foreign Commerce has stated the obligation that this imposes upon those charged with implementing the congressional policy. The Communications Act, he said, repudiates the notion of a governmentally-operated monopoly of the air waves.

"But when a monopoly of this sort, too great for the Government to operate, is entrusted to those presumed to be best qualified—from among many who are willing to assume it, and to be held accountable for its use or abuse—there results a continuing responsibility upon both the Congress and its administrative arm, the FCC, to insure that private monopoly does not occur where Government monopoly is avoided."⁵¹

46. *Id.* at 3154.

47. 48 Stat. 1087 (1934), 47 U.S.C. § 313 (1952).

48. Except for its limited authority, thus far never exercised, to enforce § 7 of the Clayton Act against "common carriers engaged in wire or radio communication or radio transmission of energy." 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1952).

49. ANTITRUST SUBCOMMITTEE REPORT 3113.

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

51. PLOTKIN, *TELEVISION NETWORK REGULATIONS AND THE UHF PROBLEM* iii (Comm. Print 1955) (hereinafter cited as PLOTKIN).

One who compares the Communications Act with other regulatory statutes, like the Interstate Commerce Act, notes immediately that the FCC, unlike the ICC,⁵² is not given power to grant any antitrust immunity to broadcasters. On the contrary, the Communications Act expressly declares that "all laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to . . . interstate or foreign radio communications."⁵³ It also provides that, in antitrust cases, the court may, as an additional form of relief, direct the revocation of broadcast licenses held by a party found guilty of antitrust violations. And the FCC is expressly directed to refuse a license to any person whose license has been revoked by a court in any antitrust proceeding.⁵⁴

The basic statutory standard under which the FCC exercises regulatory authority over broadcasting is in particular that of "public convenience, interest, or necessity."⁵⁵ In applying the public interest touchstone in particular cases, the Commission must of necessity consider the impact of its action upon antitrust considerations. In Justice Frankfurter's words in a leading case, "Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce."⁵⁶ On the contrary, in a field such as broadcasting, the promotion of antitrust policies is a vital part of regulation in the public interest. "Monopoly in the mass communication of news and advertising," the Court of Appeals for the District of Columbia has declared, "is contrary to the public interest, even if not in terms proscribed by the antitrust laws."⁵⁷

The Congress intended the field of broadcasting to be basically one of free competition.⁵⁸ Indeed, the FCC has gone so far as to assert

52. The Interstate Commerce Act provides expressly that "any carriers . . . participating in a transaction approved or authorized . . . are relieved from the operation of the antitrust laws. . . ." 24 Stat. 380 (1887), as amended, 49 U.S.C. § 5(11) (1952). See the comparable provisions of the Shipping Act, 39 Stat. 733 (1916), 46 U.S.C. § 814 (1952), and the Civil Aeronautics Act, 52 Stat. 1004 (1938), as amended, 49 U.S.C. § 494 (1952).

53. 48 Stat. 1087 (1934), 47 U.S.C. § 313 (1952).

54. 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 311 (1952).

55. 48 Stat. 1083, 1086, 1088 (1934), as amended, 47 U.S.C. §§ 307, 312, 316 (1952).

56. *National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

57. *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950).

58. In *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940), the Court said, "The act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted."

that "Congress conceived as one of the Commission's major functions the preservation of competition in the radio field."⁵⁹ If a licensee or an applicant is engaged in monopolistic or other practices which unduly restrain competition, the FCC must take that into account in applying the "public interest" criterion.

It is thus clear that, as the chairman of the FCC recently acknowledged, "the Commission has a unique responsibility to conform its regulatory activities with the letter and spirit of the antitrust laws. . . ." ⁶⁰ The reason why this is true was well stated by the FCC in its 1941 *Report on Chain Broadcasting*, in a passage that was later quoted with approval by the Supreme Court:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest."⁶¹

Perhaps the clearest court decision affirming the power of the FCC to give effect to antitrust policies under the "public interest" standard is *Mansfield Journal Co. v. FCC*.⁶² The Commission there had determined that it was contrary to the public interest to grant a broadcast license to a newspaper company which had attempted to suppress competition in advertising and news dissemination. The newspaper claimed that the Commission could not thus consider its competitive activities and, in effect, enforce the antitrust laws through its licensing powers. The court completely rejected this contention. According to it, the FCC's application of antitrust policies in this case was "a sound application of what has long been the general policy of the United States."⁶³ Nor did the availability of the specific remedies

59. No. 9572, 1 P & F RADIO REG. (pt. 3) 91:495, 91:500 (1951).

60. ANTITRUST SUBCOMMITTEE REPORT 3114.

61. FCC, REPORT ON CHAIN BROADCASTING 46, 83 (1941), quoted in *National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

62. 180 F.2d 28 (D.C. Cir. 1950).

63. *Id.* at 33.

provided under the antitrust laws bar the Commission from acting as it did.

"The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to be applicable to questions arising in the proper discharge of its duties." ⁶⁴

LICENSING

One of the striking things about the FCC's action in the already-discussed *NBC-Westinghouse* case was the failure of the Commission to consider the antitrust history of the parties involved. Both NBC and Westinghouse, as well as their parent corporations, had been sued many times in antitrust actions.⁶⁵ Indeed, at the time the Commission was considering the proposed exchange of television stations, there was pending an important antitrust suit brought by the Department of Justice against the Radio Corporation of America (NBC's parent corporation) for alleged monopolization of trade and commerce in radio-television research, patent holding and patent acquisition, and the issuance and exchange of radio-television patent licenses.⁶⁶ During the House Antitrust Subcommittee hearings on the *NBC-Westinghouse* case, the FCC chairman was asked expressly whether the Commission had specifically considered the antitrust suits filed and the cases decided against the parties. "I don't think so," replied the FCC head.⁶⁷ No reason was given for the Commission's failure to do so. As the House Subcommittee put it, "Commission failure to consider these matters remains unexplained." ⁶⁸

The FCC's non-consideration of the antitrust history of the parties in the *NBC-Westinghouse* case was contrary to what the Commission itself has publicly professed to be its policy. The FCC chairman himself, in his prepared statement before the Antitrust Subcommittee, said, "[W]e have recognized that in individual licensing proceedings, we can and must consider the past antitrust histories of potential applicants in determining whether the grant of a license to such applicants would serve the public interest." ⁶⁹

64. *Ibid.*

65. See *Report on Television Broadcasting* 104, for a comprehensive list of these actions.

66. *Ibid.* See text accompanying note 215 *infra*.

67. ANTITRUST SUBCOMMITTEE REPORT 3236.

68. *Report on Television Broadcasting* 105.

69. ANTITRUST SUBCOMMITTEE REPORT 3181.

In 1950, the FCC, acting on its own motion, held a public proceeding in which the Department of Justice and a number of private parties participated. The purpose of the proceeding was to explore the question of what policy the Commission should adopt in licensing cases where one or more applicants had violated laws of the United States other than the Communications Act. Most of the parties who presented argument on the question had, at one time or another, been the subjects of antitrust actions and most of the argument was directed to cases involving applicants with antitrust histories. In 1951, the FCC issued a report on the matter in which it articulated the general policies which it would follow in such cases.⁷⁰ In it the Commission emphasized the relevancy of antitrust violations to its consideration of whether a particular applicant was qualified to serve the "public interest." The FCC report in question declares,

"It is important that only those persons should be licensed who can be relied upon to operate in the public interest, and not engage in monopolistic practices. When passing upon applications of persons who have engaged in monopolistic practices, . . . the Commission must be concerned as to whether such persons would also engage in monopolistic practices in radio if given a license. Their conduct . . . is obviously a matter which the Commission must consider in determining whether they possess the requisite qualifications of a licensee."⁷¹

As more recently explained by the FCC chairman, this 1951 report

"clearly stated that antitrust considerations were relevant to the public-interest determination to be made by the Commission, and would be considered on their individual merits whenever a significant issue as to possible antitrust problems appeared to be presented."⁷²

The approach thus laid down by the FCC in its 1951 report is clearly sound. In the words of the *Mansfield Journal* case,

"[C]ertainly, in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station, which reaches into the homes of so many people, it is appropriate that the Commission examine pertinent aspects of the past history of the applicant."⁷³

70. Report on Uniform Policy as to Violation by Applicants of Laws of the United States, No. 9572, 1 P & F RADIO REG. (pt. 3) 91:495 (1951).

71. *Id.* at 91:500.

72. ANTITRUST SUBCOMMITTEE REPORT 3181.

73. 180 F.2d at 33.

If an applicant has, in his past operations, acted in a manner inconsistent with the antitrust laws, it is difficult to see how a grant of his application can be deemed in the public interest.⁷⁴ "It is essential in a free society," Attorney General Rogers asserted a few years ago, "that access to a medium of communication as influential as television be limited only by the public interest. . . . It is also essential that those granted access to that medium compete without restraint, so that there will be a maximum of competition in the dissemination of ideas."⁷⁵ An applicant whose past activities indicate that he will hinder the working of competition in broadcasting has hardly shown that he is qualified to operate a station in the public interest.

Under the Communications Act, an applicant's "character" is subjected to scrutiny by the FCC.⁷⁶ That word should be given its commonly understood meaning and is broad enough to embrace involvement in practices contrary to the antitrust laws.⁷⁷ "There can be no doubt," the Supreme Court has affirmed, "that competition is a relevant factor in weighing the public interest."⁷⁸

In the 1950 proceeding which led to the FCC report already referred to, on the Commission's policy in dealing with applicants who had violated the antitrust laws and other federal statutes, it had been argued that the Commission could act against monopolistic practices only through its rule-making power—not through decisions in individual licensing adjudications. This argument, said the FCC report, "misses the point of the discussion."⁷⁹ Rule-making deals with an abuse only after it has developed. In the Commission's words,

"[T]here are many other monopolistic practices against which there are no rules. And while, in the course of time, where such practices are discovered the Commission can adopt rules which might prevent recurrence of these monopolistic practices, the fact remains that these monopolistic practices might exist for a long period of time before they are discovered or corrected."⁸⁰

As the famous second *Chenery* case⁸¹ well shows, both rule-making and adjudication are basic weapons in the administrative armory.

74. See *Alladin Radio & Television*, 9 P & F RADIO REG. 1, 37 (1953).

75. *Hearings Before the Senate Committee on Interstate & Foreign Commerce: Television Inquiry*, 84th Cong., 2d Sess., pt. 2, at 404 (1956) (hereinafter cited as *Television Inquiry*).

76. 48 Stat. 1084(b) (1934), as amended, 47 U.S.C. § 308(b) (1952).

77. Paraphrasing *Mester v. United States*, 70 F. Supp. 118, 122 (E.D.N.Y. 1947).

78. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953).

79. 1 P & F RADIO REG. (pt. 3) 91:500 (1951).

80. *Ibid.*

81. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Which should be used in a particular case is a matter resting entirely within the discretion of the agency concerned. In the situation under discussion, the FCC could act through rule-making or adjudicatory authority or both. In the past, it has exercised both types of power to deal with antitrust problems. Thus, it has promulgated rules dealing with so-called duopoly and multiple ownership to prevent certain types of excessive concentration in broadcasting.⁸² But it has also had to act in individual licensing cases. Indeed, as its 1951 report recognized, enforcement of antitrust policies in dealing with license applications is really the only way in which such policies can be effectively implemented by the FCC. Most antitrust practices cannot be dealt with in advance by the promulgation of rules. The licensing power of the FCC, on the other hand, hangs like a constant Damocles' sword over broadcasting.⁸³ It enables the Commission to resolve antitrust questions as they are dealt with generally in our law—through the "gradual process of judicial inclusion and exclusion."⁸⁴ It is through implementing the basic policy laid down in its 1951 report that the FCC can prevent monopolistic practices and excessive concentrations of control in broadcasting.

THE PHILCO CASE

In actual practice, the FCC has failed to apply the policy articulated in its 1951 report. This can be seen clearly in the Commission's decision in the recent *Philco* case.⁸⁵ The controversy arose out of the protest by the Philco Corporation of the Commission's grant without a hearing of the applications of the National Broadcasting Company for renewal of the licenses of its television and radio stations in Philadelphia.⁸⁶ Philco is not engaged in broadcasting. It is a manufacturer of radio and electronic equipment and, as such, it is in competition with Radio Corporation of America, the parent of NBC. Philco in its protest alleged that RCA had been receiving advertising advantages from NBC over the Philadelphia stations, and that NBC's so-called "option time" and "must buy" practices⁸⁷ as a network injured Philco as an advertiser seeking to use the television medium. Essentially, Philco's claim was that the trade practices of RCA and NBC (particu-

82. 47 C.F.R. §§ 3.35, 3.636 (1958).

83. At present, broadcast licenses are granted only for three-year periods. 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(d) (Supp. V, 1958); 47 C.F.R. §§ 3.34, 3.630 (1958).

84. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

85. *National Broadcasting Co.*, 15 P & F RADIO REG. 965 (1957).

86. These were the stations acquired by NBC in the already-discussed NBC-Westinghouse exchange.

87. See text accompanying notes 116-25 *infra*.

larly the network practices of the latter)⁸⁸ violated the antitrust laws and hence reflected adversely on the character qualifications of NBC as a licensee.

Philco's protest was dismissed by the FCC in a 1957 decision.⁸⁹ In the first place, said the Commission, Philco has no standing to intervene in NBC's license renewal proceeding. "The NBC Philadelphia station," reads the FCC opinion, "to the extent profitable, will aid NBC financially, and thus indirectly increase the profits of NBC's parent RCA, with which Philco is in competition in another line of commerce. But certainly this is not enough to give Philco standing, any more than it would give standing to a manufacturer of washing machines—a product of another subsidiary of RCA."⁹⁰ In addition, the Commission asserted that, on the merits, Philco had not raised any issues which required any hearing. It was not enough to allege that the practices of RCA and NBC violated the antitrust laws, or even to show that antitrust actions were pending against them.

"We reiterate the view which we have expressed on many occasions in the past, namely, that in circumstances such as those which pertain herein, the Commission will not act on unresolved complaints filed in the courts but will be guided by the determinations reached by said courts with respect to the allegations contained in said complaints."⁹¹

The FCC cannot, in other words, consider antitrust violations by an applicant before it unless a court has finally found the existence of such violations on his part.

The FCC's *Philco* opinion is most significant for what it tells us about the present Commission's attitude toward its regulatory tasks. According to the Court of Appeals for the District of Columbia, the Commission was wrong in holding that Philco did not have standing.⁹² The fact that a competing manufacturer was using the licensed facilities directly to obtain a preferential economic advantage over Philco gave Philco standing to file its protest.

The important thing for our purposes, however, is not the merits of the FCC holding on standing, but the fact that the possible lack of standing in Philco was actually irrelevant in determining whether the

88. Philco also attacked the patent practices of RCA, relying upon the fact that an antitrust suit by the United States had been brought against RCA. See text accompanying note 211 *infra*.

89. National Broadcasting Co., 15 P & F RADIO REG. 965 (1957).

90. *Id.* at 973.

91. *Id.* at 975.

92. *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).

Commission should consider the matters raised in the Philco protest. A regulatory agency like the FCC is not restricted to the neutral position of a court, and, as such, limited to the consideration of claims presented by parties properly before it. The Communications Act requires the FCC itself to determine whether the grant of a particular application will be in the "public interest." If the antitrust practices of an applicant reflect adversely on his character and ability to serve the "public interest," such practices must be fully considered by the Commission before it can decide whether to grant the application. That being the case, what difference should it make whether or not alleged antitrust practices are brought to the FCC's attention by one who has standing? For the Commission to refuse to consider such allegations because they are made by one without standing is for it to take an unduly passive view of its own continuing affirmative duty to vindicate the "public interest."

The same passivism is to be seen in that portion of the FCC's *Philco* opinion dealing with its inability to consider alleged antitrust violations on the part of an applicant unless there has been a court decision finding him guilty of such violations. The Commission's holding to this effect is contrary to the judicial authority on the subject. The claim that the FCC could not act without a court decision on an antitrust violation was expressly rejected by the Supreme Court in *National Broadcasting Co. v. United States*.⁹³ According to the Court there, conduct in violation of the antitrust laws is certainly relevant in consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity."

"A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. . . . Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the 'public interest,' merely because its misconduct happened to be an unconvicted violation of the anti-trust laws."⁹⁴

In the words of a recent FCC staff memorandum:

"The court definitely laid down that the FCC should challenge the qualifications of any broadcast licensee or applicant when it appeared said licensee or applicant could exercise monopolistic control to the extent that it constituted restraint of trade or unfair competition under the Sherman or Clayton antitrust Acts, and

93. 319 U.S. 190 (1943).

94. *Id.* at 223. See, similarly, *United States v. Radio Corp. of America*, 79 Sup. Ct. 457 (1959).

that such action could be taken by the FCC whether or not said licensee or applicant had been adjudged guilty by a Federal Court of violating one or more provisions of either of said Acts.”⁹⁵

For the FCC to assume, as it did in the *Philco* case, that it can act only after final court decisions is for it to confuse its regulatory duties with that of direct enforcement of the antitrust statutes. Whether or not an applicant's activities have resulted in antitrust convictions, they still impair his ability to meet the “public interest” criterion.⁹⁶ If the Commission refuses to consider antitrust violations until there are actual convictions, it is abdicating its authority fully to protect the public interest. As it was put by a federal court in a 1947 case,

“An inquiry which concerned itself only with convictions for felony or of crimes involving moral turpitude would be grossly inadequate. It might indeed be most inadvisable from the public viewpoint to entrust the operation of a radio station to a person unworthy of belief and evidencing disregard for regulatory laws, even though he had never been convicted of a felony.”⁹⁷

Thus, the fact that particular antitrust practices have or have not been adjudged legal or illegal in the courts should not be conclusive in the FCC license proceeding. “The Mansfield Journal,” said the court in the already-cited *Mansfield Journal* case, “has not been convicted of any such violations. But the statute does not for that reason place the Journal's past conduct with regard to monopoly and the antitrust laws beyond the consideration of the Commission.”⁹⁸ For the Commission not to consider such conduct is for it to fail to give full effect to the “public interest” criterion. That criterion itself, declared the chairman of the Legislative Oversight Subcommittee during a 1958 hearing, “authorizes the Commission to revoke or to refuse a license to anyone whose conduct in its judgment is in violation of the antitrust laws, even though such person has not been convicted of violation of the anti-trust laws.”⁹⁹

95. FCC, Summaries of the Parts and Chapters Constituting Report on Patent Misuses of the Bell System Holding Companies and the RCA 12 (Mimeograph 48731, 1957) (hereinafter cited as Patent Report).

96. See *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950).

97. *Mester v. United States*, 70 F. Supp. 118, 122 (E.D.N.Y. 1947).

98. 180 F.2d at 33.

99. *Hearings on the Federal Communications Commission and Patent Misuse Before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate & Foreign Commerce*, Stenographic Transcript, 85th Cong., 2d Sess., April 23, 1958, vol. 1, p. 6 (hereinafter cited as *Patent Hearings*).

For other recent FCC decisions similar to *National Broadcasting Co.*, 15 P & F RADIO REG. 965 (1957), see *New Britain Broadcasting Co.*, 13 P & F RADIO REG. 915 (1956); *ABC-Paramount Merger Case*, 8 P & F RADIO REG. 541, 575 (1954). See

NETWORKS AND NETWORK PRACTICES

The main beneficiaries of the FCC's permissive attitude toward practices that may violate the antitrust laws have been the broadcast networks. It is largely because the Commission has not vigorously enforced antitrust policies that the networks have been able to acquire their present position of dominance in broadcasting. Nor is "dominance" too strong a word to use in this connection. "The record," said the FCC in a 1941 report, "reveals at every turn a dominant position of the network organization in the field of radio broadcasting."¹⁰⁰ More recent studies reveal a similar situation with regard to television. According to a 1957 report of the House Antitrust Subcommittee,

"[I]t is clear that CBS and NBC have a dominant position in the industry, and therefore exercise vast influence over television broadcasting and determine in large measure what the American people may hear and see over their television sets. Moreover the networks have achieved that dominance and exercise that influence by using spectrum frequencies that are a precious natural resource belonging to all the people."¹⁰¹

More recently, an FCC staff study of network broadcasting referred to the "high degree of network concentration of control."¹⁰² The two major networks (National Broadcasting Company and Columbia Broadcasting System) in particular occupy a predominant position in television. Thus, during 1955, NBC and CBS and the nine stations they owned and operated accounted for some 42 per cent of the total business done by the television broadcast industry—an industry which then included some four networks and some 455 TV stations.¹⁰³

also United Television, Inc., 16 P & F RADIO REG. 259 (1957), where an application was approved without hearing despite the fact that the United States had instituted an antitrust action against the applicant. A dissent urged that the FCC should fully consider this as bearing on the applicant's qualifications to serve the public interest and that it should make no difference that the antitrust case was still pending and not decided.

With these decisions, compare Radio Fort Wayne, 9 P & F RADIO REG. 1221 (1954), where the FCC ruled against a comparative applicant for a TV channel largely because its principals were parties to the establishment of joint advertising rates between two newspapers. At the FCC hearing, they had announced their intention not to bring about the abandonment of these practices unless a court declared them to be illegal. According to the Commission, however, "whether the establishment and use of joint advertising rates by newspapers separately owned is legal or illegal is not here controlling, the Commission being concerned, primarily, with the conduct of the persons involved and the possible effect of such conduct upon the applicant's disposition to operate a broadcast station in the public interest." Radio Fort Wayne, *supra* at 1222k.

100. FCC, REPORT ON CHAIN BROADCASTING app. B (1941).

101. *Report on Television Broadcasting* 140.

102. FCC, Network Study Staff, *Network Broadcasting*, H.R. REP. No. 1297, 85th Cong., 2d Sess. 195 (1958) (hereinafter cited as *Network Broadcasting*).

103. *Report on Television Broadcasting* 34.

During the same period, the broadcast income of NBC and CBS constituted 95 per cent of all national network broadcast income. Of the 455 stations licensed in 1955, all but 38 had a network affiliation.¹⁰⁴

Especially revealing in this respect are the figures contained in the recent FCC staff study already referred to. The three networks now in existence account for close to 70 per cent of national television time sales, with NBC and CBS accounting for over 62 per cent.¹⁰⁵ Network concentration is particularly high in terms of what the study in question termed "one significant measure"—the proportion of network programs during prime evening hours on television stations throughout the country.¹⁰⁶ During the three prime evening hours¹⁰⁷ subject to network option, the three networks account for close to 80 per cent of the total programs carried by commercial TV stations.¹⁰⁸ The proportion is over 90 per cent in the case of the basic stations of the NBC and CBS networks. In actual fact, the networks frequently account for virtually the entire viewing audience during the prime evening hours in a large number of markets throughout the country.¹⁰⁹ Summing up the situation, the FCC staff study asserts that,

"absent a major technological change in the nature of the television industry or in the form of telecasting, networking will continue to be characterized by a high concentration of control in the hands of a small number of firms enjoying substantial profits."¹¹⁰

Even more disturbing perhaps than the dominant position of the networks in broadcasting is the fact that they have acquired such position by practices which appear to violate the antitrust laws. Network operation in practice turns upon the contractual relationships between the networks and the stations affiliated with them. Though each network owns and operates a limited number of television stations, located in the top markets of the country,¹¹¹ the network organization itself depends primarily upon some 200 affiliated stations. Network affiliation is eagerly sought by stations and is essential to successful commercial operation in this country.¹¹² In 36 of the top 50 markets

104. *Ibid.*

105. *Network Broadcasting* 181-82, 205, 637.

106. *Id.* at 205, 637.

107. 7:30-10:30 p.m.

108. *Network Broadcasting* 205, 637.

109. *Id.* at 193.

110. *Id.* at 206, 637. That the profits involved justify the characterization "substantial" is shown by the fact that, in 1955, the broadcast income before tax of NBC and CBS equalled over 130% of their total property investment. *Report on Television Broadcasting* 29.

111. NBC owns 7 TV stations, CBS owns 6, and the American Broadcasting Company, 5. *Network Broadcasting* 42.

112. *Ibid.*

and in 80 of the top 100 markets, all commercial television stations are affiliated with one or more networks.¹¹³

The network-affiliate relationship is based upon an affiliation contract. The contracts in use by the three TV networks now in existence differ in details, but contain the following essential provisions:

1. A recognition of the affiliated station as the network outlet in a specified community, with the affiliate having the right of first call to all network programs in that community;

2. Agreement by the affiliate to option to the network certain enumerated hours during the broadcast day. During these option-time hours, the affiliate agrees to broadcast all commercial network programs offered to it, under certain designated conditions;

3. The rate at which the time of the affiliate will be sold to network advertisers and the compensation payable to the affiliate by the network for broadcasting network commercial programs;¹¹⁴

4. The undertaking by the network to deliver to the affiliate network programs, either "live," through transmission facilities leased from American Telephone & Telegraph Company, or on film;

5. A limitation of the contract to a term of two years—the maximum term permitted by the FCC;

6. A provision which permits termination by the network in the event the affiliate assigns the contract or undergoes a change in ownership.¹¹⁵

Of these common provisions in network affiliation contracts, the most striking is the second, which provides for so-called "option time." That term, as the head of the Antitrust Division has pointed out, "is industry shorthand for the contractual arrangements between a network and its affiliated stations by which the network has an option to require the stations to take network programs, with certain exceptions, for a specified number of hours each day."¹¹⁶ Under the contractual provision in question, the affiliate undertakes to broadcast during "network option time" all sponsored programs offered by the network, provided it is given not less than fifty-six days' notice by the latter. This enables the networks to pre-empt for their commercial programs nine hours a

113. *Report on Television Broadcasting* 22.

114. The latter is a specified percentage of the network time rate, usually ranging from 30 to 33⅓%. *Id.* at 79.

115. See *ibid.*; *Network Broadcasting* 42.

116. ANTITRUST SUBCOMMITTEE REPORT 4138.

day of the broadcasting time of almost all the television stations in the country, including the prime evening hours when the viewing audience is at its peak.¹¹⁷

According to the House Antitrust Subcommittee, the option-time provision in affiliation contracts may have the following effects:

1. It may permit a network to determine TV programming throughout the country, thus substituting the judgment of the network for that of the licensee to whom programming responsibility is delegated under the law;¹¹⁸

2. It may enable the network to prevent competing programs from having access to TV outlets during the best hours of the broadcast day;

3. It may place non-network advertisers at a competitive disadvantage with network advertisers in obtaining prime broadcast time;

4. It may deprive the public of opportunity to have access to the widest choice of programs that could be made available in a free competitive market.¹¹⁹

It is true that under the option-time provision, the affiliate has a limited right to reject network programs.¹²⁰ Such right is in practice, however, more theoretical than real, in view of the threat of affiliation cancellation by the network for station failure to broadcast network programs during option time. Nor is such threat of cancellation a mere theoretical deterrent. Evidence at the House antitrust hearings indicated that both NBC and CBS had in fact canceled affiliations because of insufficient clearance of network programs during option-time periods.¹²¹ Thus, as a 1955 Senate memorandum put it, "The significance of time clearances and cancellation provisions cannot be minimized. It is believed that they create an artificial and competitive advantage for the networks which helps to explain the dominant position they occupy in the industry."¹²²

Closely related to the option-time provision is the so-called "must buy" policy followed by the networks. This policy requires an advertiser, if he desires to use the network, to buy broadcasting time on a large number of television stations throughout the country. Thus, CBS requires advertisers to order as a minimum the five CBS-owned

117. *Report on Television Broadcasting* 87.

118. Compare FCC, *REPORT ON CHAIN BROADCASTING* 66 (1941).

119. *Report on Television Broadcasting* 88.

120. See note 173 *infra*.

121. *Report on Television Broadcasting* 89. But see *Network Broadcasting* 642.

122. *PLOTKIN* 30.

TV stations plus 51 designated affiliates.¹²³ NBC requires the advertiser to buy time on the seven NBC-owned stations plus 50 specified affiliated stations.¹²⁴

As already mentioned, "must buy" is closely connected with "option time." It is, indeed, the control which the option-time provision gives the networks over broadcast time that makes the must buy policy effective in practice. "There is reason to believe," in the recent words of the head of the Antitrust Division, "that television advertisers accept the network-picked package of TV stations because of the networks' control, via time options, of prime telecasting time."¹²⁵

Nor can it be doubted that "must buy" and "option time," taken together, greatly reinforce the dominant position of the network in broadcasting. These network practices can, to quote the same official again,

"unduly restrict the chance of the independent TV station competing with the network affiliate to sell his time to an advertiser already tied to the network affiliate. This power offers opportunity for special abuses in cities and towns having only 1 or 2 VHF television stations. There a network is obviously tempted to use the dominant position its affiliates may hold to force the sale of time on affiliated stations in more competitive cities via 'must buy.'"¹²⁶

That the temptation referred to is not only an academic possibility was shown dramatically in the 1956 testimony before a Senate committee by the head of an independent station in a highly competitive market.¹²⁷ His station, he said, is constantly faced with situations where an advertiser has acquired the national rights to a TV program and desires to have it broadcast in various cities.

"It has been our experience, however, that regardless of whether KTTV offers a more desirable time period at a lower cost per thousand than a particular network station in Los Angeles, we are told by the advertiser or his agency that despite the fact that the KTTV proposal is more attractive, the advertiser must place the program on the network station in Los Angeles or he will be deprived of the opportunity of placing the program on stations affiliated with that network in other cities."¹²⁸

123. *Report on Television Broadcasting* 85. According to *Television Factbook*, Fall-Winter 1957, p. 46, the CBS basic "must-buy" list now includes 58 stations.

124. *Report on Television Broadcasting* 85. According to *Television Factbook*, Fall-Winter 1957, p. 52, the NBC basic "must-buy" list now includes 58 stations.

125. ANTITRUST SUBCOMMITTEE REPORT 4131, 4139.

126. *Id.* at 4132, 4140. But see *Network Broadcasting* 647.

127. The market involved was Los Angeles, which has seven VHF television stations.

128. *Television Inquiry* 1496.

Manifestly, the network practices of "option time" and "must buy" present serious antitrust questions. Certainly there is a striking similarity between these network practices and the practices in the motion-picture industry which the Supreme Court in 1948 held violated the antitrust laws.¹²⁹ In *United States v. Paramount Pictures, Inc.*,¹³⁰ the Court outlawed so-called "block booking," which it defined as "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period."¹³¹

Paraphrased to fit "option time," the definition might read,

"The network time option is the network practice of agreeing or offering to transmit to a station one program or group of programs on condition that the station will also accept for broadcast another program or group of programs to be transmitted by the network at its option during specified periods of the broadcast day."¹³²

If the "option time" practice is thus similar to "block booking," it is, under the *Paramount* case, a per se violation of the Sherman Act. If anything, indeed, as a Senate memorandum points out, "option time" is a

"more virulent practice than block-booking for not only does it commit the station in advance to take a whole block of programming, but it is a combination or arrangement between the networks and their affiliates to oust the programs of important competitors in order to honor the option."¹³³

The Supreme Court's motion-picture decisions also appear to apply to the "must buy" practice. In *United States v. Griffith*¹³⁴ and *Paramount*, the Court considered the legality of "master" agreements between independent theater chains and film distributors, under which the theater chain was licensed to exhibit the distributor's films on a first-run basis in all of the theaters of the chain. Some of the theaters were in single theater towns, while others were in multiple-theater towns, where they competed with theaters owned by others. The

129. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Schine Theatres*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948).

130. 334 U.S. 131 (1948).

131. 334 U.S. at 156.

132. *Television Inquiry* 1542.

133. PLOTKIN 33.

134. 334 U.S. 100 (1948).

Supreme Court held such "master" agreements to be violative of the Sherman Act, declaring that

"they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators." ¹³⁵

Much the same can be said about the "must buy" policy of the networks. In any television market, the number of stations is limited. In some markets, the stations affiliated with the networks are the only stations in the market.¹³⁶ Said the Court in *Griffith*:

"A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors." ¹³⁷

This is as true in the field of television as in that of motion pictures. "Must buy," like the "master" agreements condemned in the motion-picture cases, "eliminate the opportunity for the small competitor [the independent TV station] to obtain the choice first runs [sponsored programs], and put a premium on the size of the circuit [*i.e.*, the network]." ¹³⁸

Moreover, the "must buy" practice clearly seems to come within the broad proscription of "tying arrangements" recently enunciated by the Supreme Court in *Northern Pac. Ry. v. United States*.¹³⁹ As stated there, "a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." ¹⁴⁰ In the *Northern Pacific* case, the railroad had sold and leased land on condition that the grantees and lessees ship over the railroad's lines all commodities produced or manufactured on the land. The Court held that these "preferential routing" clauses constituted tying agreements prohibited by the Sherman Act.

A network imposing its "must buy" policy is forcing the same kind of tying arrangement upon its advertisers. The network agrees to sell

135. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 154 (1948).

136. See *Television Inquiry* 1543.

137. 334 U.S. at 107.

138. *Television Inquiry* 1543.

139. 356 U.S. 1 (1958).

140. 356 U.S. at 5, 6.

one product (time on the affiliated stations in markets desired by the advertiser) only on the condition that the buyer also purchases the different (or tied) product (time on one or more stations on the network's "must buy" list).¹⁴¹ Advertiser acceptance of the "must buy" policy in these circumstances means that the network has used its network position as an economic lever to require the advertiser to take not only stations that he wants but also stations that he may not want.¹⁴² The "must buy" practice thus seems to fit squarely within the *Northern Pacific* definition of a tying arrangement.¹⁴³

What is particularly significant about the *Northern Pacific* decision is the Court's express recognition of the tying arrangement as a per se violation of the Sherman Act even though, in a given case, there is no monopoly power over the tying product. In its 1953 decision in *Times-Picayune Publishing Co. v. United States*,¹⁴⁴ the Court had implied the contrary, stating there that "the essence of illegality in tying agreements is the wielding of monopolistic leverage. . . ." ¹⁴⁵ The networks themselves had strongly relied upon the *Times-Picayune* case, asserting that, under it, the rule making tie-ins illegal per se did not apply to them because they did "not have the necessary dominance or leverage in any item to make a tie-in sale of it invalid under the rule." ¹⁴⁶

The *Northern Pacific* opinion clearly rejects the implication of *Times-Picayune* upon which the networks have relied. "While there is some language in the *Times-Picayune* opinion," says Mr. Justice Black, "which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product. . . ." ¹⁴⁷ The *Northern Pacific* opinion thus condemns tying arrangements, of the type involved in the network practices under

141. See *Network Broadcasting* 512. "Assume, for example, that an advertiser wants to sponsor a network program and wants that program to be carried by 70 stations affiliated with CBS or NBC, which he designates. Assume further that only 35 of these stations are on the must-buy list of the network. In this situation the advertiser, for the sake of getting the stations he wants, not only will have to buy far more than the minimum basic required group, he will have to buy time for some 25 stations which may be of little or no value to him." *Report on Television Broadcasting* 86.

142. *Ibid.*

143. See, similarly, *Network Broadcasting* 512, written before the Supreme Court's decision in the *Northern Pacific* case.

144. 345 U.S. 594 (1953).

145. 345 U.S. at 611.

146. Opinion and Memorandum of CBS Counsel, *Television Inquiry* 1971. See, similarly, ANTITRUST SUBCOMMITTEE REPORT 3531.

147. 356 U.S. at 11.

discussion, as wholly inconsistent with the fundamental principles of the antitrust laws.¹⁴⁸ Under *Northern Pacific*, "the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not."¹⁴⁹

Even before the *Northern Pacific* decision, the opinion that the "must buy" and "option time" practices violated the antitrust laws was expressed in congressional reports.¹⁵⁰ More recently, the same view was taken in an FCC staff study of network broadcasting.¹⁵¹ The Antitrust Division of the Department of Justice has also articulated concern at the antitrust problems involved in present-day networking. In testimony given in 1956 before a House subcommittee, the head of that Division called attention to "the striking similarity between TV industry structure and that movie pattern condemned in Paramount. . . . Networks' control over the nation's TV stations dwarfs the majors' power over theaters condemned in Paramount."¹⁵² At this hearing, the head of Antitrust stated that his Division was conducting an investigation into network practices. That investigation has now apparently been concluded. At a conference held on April 24, 1958, the head of Antitrust advised the FCC commissioners that the basic practices of the networks definitely violated the antitrust laws. Such violations, he said, came within the per se rule and hence must automatically be presumed to be prohibited restraints of trade.¹⁵³

THE COMMISSION AND THE NETWORKS

In its 1941 Chain Broadcasting report, the FCC declared that we in this country have

"rejected government ownership of broadcasting stations, believing that the power inherent in control over broadcasting is too great and too dangerous to the maintenance of free institutions to permit its exercise by one body, even though elected by or responsible to the whole people. But in avoiding the concentration of power over radio broadcasting in the hands of government, we must not fall into an even more dangerous pitfall: The concentration of that power in the hands of self-perpetuating management groups."¹⁵⁴

148. 356 U.S. at 10.

149. 356 U.S. at 11.

150. See PLOTKIN 33; *Report on Television Broadcasting* 86, 90.

151. *Network Broadcasting* 389, 524.

152. ANTITRUST SUBCOMMITTEE REPORT 4139.

153. N.Y. Times, June 1, 1958, p. 1, col. 1.

154. FCC, REPORT ON CHAIN BROADCASTING 72 (1941).

In the Chain Broadcasting report, the FCC found the danger referred to to be a very real one because of the dominance over broadcasting which had been attained by the major networks: "NBC and CBS now dominate this field; their ownership and operation of important radio stations and their restrictive long-term contracts with other stations enable them to maintain indefinitely their present monopolistic position."¹⁵⁵

Today, almost two decades later, the situation in television is, if anything, worse than it was in radio at the time the Chain Broadcasting report was made. Thus, the degree of network control over present-day TV seems much greater even than that which was condemned in the movie industry in the already-referred-to *Paramount* case. The Court in *Paramount* found that "the five majors in 1945 had interests in somewhat over 17 per cent of the theatres in the United States—3,137 out of 18,076."¹⁵⁶ In addition, "in the 92 cities of the country with populations over 100,000 at least 70 per cent of all the first-run theatres are affiliated with one or more of the five majors."¹⁵⁷ Compare this with the comparable figures for television: "As of 9 days ago," stated the head of the Antitrust Division in September 1956, "our evidence indicated there were 366 VHF television stations and 91 UHF stations—or a total of 457 commercial TV stations in this country. Of this 457, about 35 are independent stations with no network affiliation. From these statistics, it seems clear the networks own or are affiliated with more than 90 per cent of the television stations in this country."¹⁵⁸ Moreover, the three networks, as of July 1957, each covered almost 25 per cent of the country's population through their own owned and operated stations alone.¹⁵⁹ When we add to these statistics the fact, as discussed in a prior section,¹⁶⁰ that the networks' present position has depended upon practices which seem to violate the antitrust laws, we may well wonder what the FCC has been doing in this area since the Chain Broadcasting report.

Present Commission attitudes on specific network practices seem to be in harmony with the general disregard of antitrust principles which Mr. Doerfer's testimony, discussed above,¹⁶¹ illustrates. When in the course of a Senate hearing at the beginning of 1956 Mr. Doerfer was asked whether the "must buy" policy might not be in restraint of

155. *Id.* at 48.

156. 334 U.S. at 167.

157. *Ibid.*

158. ANTITRUST SUBCOMMITTEE REPORT 4139.

159. *Network Broadcasting* 184.

160. See text accompanying notes 129-53 *supra*.

161. See text accompanying note 44 *supra*.

trade, he answered that it might be, where "the sponsor wants to buy *more* than the network is willing to sell." But, he went on, "certainly not where a sponsor thinks that he can get 80 per cent of the people of this country by X dollars and the network comes along and says now we are going to make you spend a little more so that you get the 95 per cent of the country."¹⁶²

Later that year, in testimony before the House Antitrust Subcommittee, Doerfer elaborated on his position. "I thought it would be good public policy, would be doing this country a favor, if the network, regardless of the cost to them or to the advertiser, compelled them to program on some stations which the advertiser, for reasons of economy, decided to reject."¹⁶³ Doerfer disposed of the tying objection with the proposition that "if I go into a store and I want to buy a pair of pants and the fellow says I have got to buy the coat too, I do not necessarily construe that as an unfair trade practice."¹⁶⁴

This complete lack of understanding of the basic principles of antitrust is reflected in the Commission's operation. In the first place, the Commission has aggravated the antitrust problem, insofar as the networks are concerned, by its decision in the 1952 *ABC-Paramount Merger Case*.¹⁶⁵ The decision there approved the merger of the American Broadcasting Company network and United Paramount Theatres, despite the strong suggestion of the Attorney General that such a merger might substantially lessen competition in both the broadcasting and the motion-picture industries.¹⁶⁶ To the two major networks whose business practices and dominance were tainted with possible illegality under the antitrust laws, the Commission added a third network, many of whose principals had previously been found guilty of serious antitrust violations.¹⁶⁷

162. ANTITRUST SUBCOMMITTEE REPORT 3517. (Emphasis added.)

163. *Ibid.*

164. *Id.* at 3518.

165. 8 P & F RADIO REG. 541 (1952).

166. See ANTITRUST SUBCOMMITTEE REPORT 3246.

167. See the opinion of Commissioner Hennock, dissenting in *ABC-Paramount*, for the details of such previous violations. 8 P & F RADIO REG. at 631(37). The Commission avoided consideration of most of these violations by enunciating the principle that it would not consider antitrust histories further back than three years. *Paramount Pictures*, 8 P & F RADIO REG. 135 (1952). According to the Hennock dissent, this limitation "had the unfortunate effect of eviscerating the anti-trust issue." 8 P & F RADIO REG. at 631(38). *Paramount* had operated under a consent decree during the three years prior to the instant case. "As this would reasonably be expected to deter further violations . . . , evidence of post-1948 activities . . . should not be relied upon exclusively as indicative of a law-abiding disposition." *Ibid.*

It should be noted that the FCC has not applied the three-year limitation in other cases. See, e.g., *Westinghouse Radio Stations*, 10 P & F RADIO REG. 878 (1955).

The *ABC-Paramount* decision could at least be justified on the ground that it would strengthen ABC and enable it to compete more effectively with NBC and CBS.¹⁶⁸ One can disagree with the FCC approval of the merger and still recognize that a reasonable man might accept this justification. The same is not, however, true of the Commission's passivism in the face of network dominance. A commission which gave more than formal support to antitrust policies would not sit by idly while control over its regulated industry became ever more concentrated—especially if such concentration was effected by practices which themselves appear to violate the antitrust laws.

That the FCC can act directly against network practices is shown by the Chain Broadcasting Regulations¹⁶⁹ which it promulgated in 1941. In 1938, the Commission authorized an investigation to determine what special regulations applicable to networks were required in the public interest. After extensive investigation and hearings, the Commission promulgated its 1941 regulations.¹⁷⁰ They were based upon the proposition that, though the networks as such were not directly subject to FCC regulation, their practices deemed contrary to the public interest could be reached through the Commission's regulatory power over their affiliates. Hence, the Chain Broadcasting Regulations provided that the Commission would refuse to grant or renew the licenses of affiliates having contracts with networks containing any of the provisions specified in the regulations. Of course, the practical effect of the regulations was to outlaw the provisions in affiliation contracts which the Commission specified. As Chief Justice Stone put it in an important case,

"It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses."¹⁷¹

Though the Supreme Court upheld the power of the FCC to promulgate the Chain Broadcasting Regulations in 1943,¹⁷² they have not proved effective in practice. The regulations themselves were substantially weakened by the Commission before they were issued in

168. See ANTITRUST SUBCOMMITTEE REPORT 3241.

169. 6 Fed Reg. 2282 (1941).

170. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 193-96 (1943), for the history of the Chain Broadcasting Regulations.

171. *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 418 (1942).

172. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

their final form—largely because of vigorous network protests. Thus, the regulations as originally promulgated, outlawed “option time,” while those finally issued permitted that practice.¹⁷³ Above all, however, the Chain Broadcasting Regulations proved ineffective to curb the networks because the FCC seriously underestimated both the economic power of the networks and the practical realities of broadcasting. The Commission thought it could deal with improper network practices by trying to eliminate exclusivity of affiliation, limiting the terms of affiliation contracts, and permitting affiliates to refuse network programs under specified conditions. The realities of broadcasting have, however, made network affiliation all but essential for successful commercial operation of television stations.¹⁷⁴ Because of this, the affiliates are, in practice, as much under the control of the networks as they were before the FCC acted. The regulations may prevent the network from barring another station from taking the network’s programs that are rejected by the affiliate. But, since there is no provision requiring the network to offer programs to another station and there is practical pressure on affiliates to accept network programs, this does not really eliminate exclusivity of affiliation in practice. The same is true of the formal power given affiliates to refuse to accept network programs even during periods of “option time.” The dependence of the affiliate upon affiliation, as we have already seen,¹⁷⁵ makes the affiliate accept the network programs despite its theoretical right of rejection. Nor is the FCC limitation of affiliation contracts to two years any more effective. In reality, since most affiliates are utterly dependent upon their affiliations, they are completely tied to the networks, regardless of the formal terms of the affiliation contracts.

The inadequacies in practice of the Chain Broadcasting Regulations do not, all the same, alter the basic possession by the FCC of the power to deal by regulation with network practices. “We conclude . . .,” reads the Supreme Court’s 1943 opinion upholding the regulations, “that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting.”¹⁷⁶ That same power can

173. See *Report on Television Broadcasting* 91-92. Under the FCC regulations, affiliates must be given the right to refuse to broadcast programs which they reasonably believe to be unsatisfactory or unsuitable or contrary to the public interest and to substitute for network programs others of outstanding local or national importance. *Id.* at 87. As already pointed out, see text following note 120 *supra*, the rights of the affiliates in this respect are not exercised in practice.

174. *Network Broadcasting* 41.

175. See text following note 120 *supra*.

176. *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943).

be used today to correct the abuses involved in the current network practices.

But the FCC's power in this field is not limited to the promulgation of regulations which are aimed at abusive network practices. As emphasized earlier in this Article, the Communications Act expressly requires the Commission to exercise its licensing powers in accordance with its conception of "public interest" in particular cases. If the networks are engaged in practices which contravene the antitrust laws, it is difficult to see how the FCC can find that the grant or renewal of station licenses to them is in the public interest. In recent years, alleged antitrust violations by the networks have been raised before the Commission in licensing cases involving network-owned stations, both by private parties and FCC staff memoranda. The Commission has, nevertheless, avoided the issue by decisions like those in the already-discussed *Philco* case,¹⁷⁷ holding that it cannot consider antitrust matters in licensing cases unless there has been a court decision finding an applicant guilty of antitrust violations. This, we have stressed, is a wholly gratuitous limitation by the FCC on its powers in licensing cases. Under both the language of the Communications Act and judicial decisions, the Commission itself must determine whether practices on the part of its licensees are contrary to the "public interest." Nothing in the statute, to paraphrase the leading Supreme Court utterance on the subject,¹⁷⁸ lends support to the view that the Commission can avoid that determination merely because the practices in question happen to be unconvicted violations of the antitrust laws.

FCC AND PATENT MONOPOLY

The FCC passivism in the face of network dominance and network practices that appear to violate the antitrust laws is even more striking when we consider the patent history of the Radio Corporation of America, the parent of the NBC network. RCA's patent position in the field of broadcasting starts with a series of cross-licensing agreements made during 1920-23 between various companies of the Bell System¹⁷⁹ and the then major radio patent holding companies.¹⁸⁰ These agreements gave RCA a position of complete dominance in the manufacture and sale of radio broadcast receivers and tubes. In the

177. See note 89 *supra*. See also cases cited note 99 *supra*.

178. *National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

179. These were the American Telephone & Telegraph Co. and the Western Electric Co. See Patent Report 2.

180. These were the General Electric Co., the Radio Corporation of America and the Westinghouse Electric & Manufacturing Co. See *ibid*.

words of a 1923 report of the Federal Trade Commission on the radio industry,

"There is no question that the pooling of all the patents pertaining to vacuum tubes has resulted in giving the Radio Corporation and its affiliates a monopoly in the manufacture, sale and use thereof. With such a monopoly, the Radio Corporation apparently has the power to stifle competition in the manufacture and sale of receiving sets." ¹⁸¹

Section 13 of the Radio Act of 1927 authorized the Federal Radio Commission (the forerunner of the FCC) to refuse a license to any person adjudged guilty by a court of monopolizing radio communications directly or indirectly through the control of the manufacture or sale of radio apparatus.¹⁸² In 1928, a federal court found that RCA had been using the patent position conferred upon it by the 1920-23 agreements in a manner that violated the antitrust laws.¹⁸³ RCA had issued a package license for broadcast receivers, which required the licensees to install RCA tubes in each receiver manufactured and sold under the licenses. According to the Court of Appeals for the Third Circuit, the provision concerning tubes in the package licenses was an illegal tying arrangement under section 3 of the Clayton Act.¹⁸⁴ "This contract or understanding between the defendant and the licensees," the court declared, "has actually resulted in the monopoly of the radio tube business by the defendant." ¹⁸⁵

In 1931, the Federal Radio Commission conducted a proceeding to determine whether or not the licenses of NBC should be revoked because of RCA's violation of the Clayton Act. In a three-to-two decision, the Commission held that RCA's particular offense in requiring licensees to employ RCA tubes for receivers made by them did not constitute monopolization of *radio communications* and hence it did not have the power to revoke NBC's licenses under section 13 of the 1927 Act.¹⁸⁶ Thus RCA's antitrust violation had no effect insofar as serving to disqualify it or its subsidiary from meeting the "public interest" criterion.

In 1930, the Government brought a civil antitrust action against the companies involved in the 1920-23 cross-licensing agreements,

181. Quoted in *Patent Hearings* 24.

182. Act of Feb. 23, 1927, ch. 169, § 13, 44 Stat. 1167.

183. *Radio Corp. of America v. Lord*, 28 F.2d 257 (3d Cir. 1928).

184. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1952).

185. *Radio Corp. of America v. Lord*, 28 F.2d 257, 261 (3d Cir. 1928).

186. *Radio Corp. of America*, P & F RADIO REG. Digest M-201 (Federal Radio Comm'n, June 24, 1931).

including RCA. This action terminated in consent decrees of 1932 and 1935.¹⁸⁷ According to recent testimony of the FCC patent counsel, however, these decrees did not really alter the dominant patent position of RCA in the broadcast field.¹⁸⁸ By 1939, indeed, an RCA brochure was able to state that "practically all domestic manufacturers of broadcast receivers" were operating under RCA licenses.¹⁸⁹ In an FCC staff memorandum of May 27, 1939, it was pointed out that RCA would acquire complete patent control over television receivers should it acquire a certain patent owned by the Farnsworth Company.¹⁹⁰ At a Senate hearing the next year, this view was confirmed by the president of RCA himself. He stated that the DuMont Laboratories had no invention that RCA needed in its TV system, but that the Farnsworth Company did have such patents, and that the industry would need licenses under the Farnsworth patents as well as those of RCA for the manufacture of TV broadcast equipment.¹⁹¹

On November 21, 1945, the FCC adopted technical standards for black and white television broadcasting which could be met only by equipment manufactured under the RCA and Farnsworth patents.¹⁹² Despite warnings by its patent staff that this could lead to an RCA patent monopoly over television,¹⁹³ no patent questions were permitted by the FCC during the proceedings and no testimony whatever was adduced respecting patent control of the equipment required under the standards to be promulgated.

In 1947, RCA purchased the unrestricted right to sublicense and retain royalties on all Farnsworth TV receiver broadcast patents. "This," asserts a recent FCC staff memorandum, "placed complete patent control in RCA of receivers for black and white transmission of TV broadcast stations operating pursuant to FCC technical standards. After RCA's purchase of these sublicensing rights it soon realized a complete monopoly in the business of licensing others to manufacture and sell TV broadcast receivers." ¹⁹⁴

In 1948-1950, the patent staff of the FCC conducted investigations which led to memoranda informing the Commission of RCA's patent position in the television field. In 1949, RCA had 87 licensees that were building video receivers under the patents it owned or could

187. Patent Report 6.

188. *Patent Hearings* 30.

189. *Ibid.*

190. See Patent Report 12.

191. *Id.* at 13.

192. FCC No. 6780 (Nov. 21, 1945). See Patent Report 14.

193. *Ibid.*

194. *Id.* at 14-15.

sublicense.¹⁹⁵ This constituted practically all of the companies¹⁹⁶ then engaged in the manufacture and sale of TV receivers. The information revealed by its staff led the Commission to enlarge its proceeding for the formulation of technical standards for color television, which it held during 1949-1950, in order to ascertain the patents and inventions owned and controlled by the parties to the proceeding.

The patent information revealed during the 1949-1950 proceeding indicated that RCA had complete patent control over the dot sequential color system which it proposed. The Columbia Broadcasting System, on the other hand, had no such control over the field sequential system which it proposed.¹⁹⁷ This was one of the main factors which led the FCC, in September 1950, to adopt technical standards for color transmissions pursuant to the CBS system.¹⁹⁸

The CBS system, however, had the basic defect of noncompatibility, *i.e.*, it could not be received at all on the black and white sets in the hands of the public. The CBS system could, all the same, be made compatible through the attachment of inexpensive tuning brackets on the black and white receivers.¹⁹⁹ In its report adopting the CBS system, the FCC proposed that future black and white sets sold to the public should be equipped with such tuners, which would enable them to receive the CBS system color transmissions in black and white.²⁰⁰ At that time, practically all TV receiver manufacturers were operating under RCA patent licenses. It is not surprising perhaps that these licensees refused to adopt the FCC proposal with regard to tuners. As the Commission put it in its *Second Color TV Report*, the manufacturers who have responded—and these manufacturers represent the greatest part of the manufacturing capacity of the television industry—have indicated that they are unable or unwilling to meet the requirements as to brackets set forth in the Commission's first report.²⁰¹ We do not know whether any pressure was brought upon them by their licensor; but we do know that their refusals effectively "killed" the CBS color system which the FCC had adopted. As a practical matter, a noncompatible system could not succeed unless tuning brackets such as the Commission had proposed were attached to black and white receivers.

195. *Id.* at 16.

196. Except for two manufacturers.

197. Patent Report 17.

198. Second Color Television Report, 1 P & F RADIO REG. (pt. 3) 91:441 (1950).

199. See First Color Television Report, 1 P & F RADIO REG. (pt. 3) 91:265, 91:301 (1950).

200. Second Color Television Report, *supra* note 198, at 91:443.

201. *Ibid.*

In 1953, RCA and NBC filed a petition with the FCC for substituting RCA's system and technical standards for TV color transmissions; the petition claimed that the CBS system had been rendered "sterile."²⁰² "This," says a recent FCC staff memorandum, "was correct in that RCA and its TV receiver patent licensees had so decreed in 1950, when they refused to promote standards for TV receiver tuning brackets which would make such receivers capable of accepting and reproducing CBS color system transmissions in black and white, and thus be compatible with both color and black and white transmissions."²⁰³

On December 17, 1953, the FCC adopted the substitute technical standards for color TV advocated by the RCA petition.²⁰⁴ The Commission did so without holding any hearing and without consideration of any patent issues. This was true despite the fact that the Commission's own patent adviser had submitted memoranda to it indicating the serious antitrust consequences of its acting without considering patent matters.²⁰⁵ In addition, in October 1953, the then head of the Antitrust Division had written to the FCC chairman asking that his Division be advised of the patent holding positions of the parties interested in the proposed color standards, so that it could determine whether such patent positions had antitrust implications.²⁰⁶ The FCC chairman replied by letter refusing the patent information sought, stating that there was no warrant for delaying the adoption of the proposed system in order first to secure detailed patent information of the type requested.²⁰⁷

By its approval of the December 17, 1953, color TV standards, the FCC, in effect, adopted a color TV system over which one company had all but complete patent control. The Commission's action in this respect was a striking confirmation of a 1958 assertion before a congressional committee by William H. Bauer, who served as patent adviser to the FCC for over twenty years, that, in recent years, "the FCC majority has voted hands-off as to patent monopolistic practices."²⁰⁸

The FCC's summary action in adopting the RCA-system color TV standards was completely contrary to its publicly professed policy in patent matters. Said the Commission in a letter to the head of the Senate Interstate and Foreign Commerce Committee in 1949,

202. Patent Report 21.

203. *Ibid.*

204. FCC No. 10637 (Dec. 17, 1953). See Patent Report 23.

205. See *Patent Hearings* 50-51.

206. Patent Report 23.

207. *Ibid.*

208. *Patent Hearings* 49.

"The Commission has no control over manufacturers as such. However, with reference to manufacturers who are either licensees or applicants for licenses, the Commission can and does consider their activities with respect to any monopolistic patent control they may exercise or any activities which constitute restraint of trade or unfair competition within the meaning of the Sherman or Clayton Act in order to determine the qualifications of such persons to operate a radio station in the public interest. . . . If it should turn out that any one company or group of companies are in a position to acquire or exercise monopoly control in the industry as a result of patents held by them, we would refer the matter to the Department of Justice for appropriate action under the antitrust laws, or, if the manufacturer were a licensee, or an applicant for a license, the Commission would consider such facts in determining whether the manufacturer was qualified to operate a radio station in the public interest. Or the Commission could take both steps."²⁰⁹

In actuality, the FCC in recent years has taken neither step. This has been true even though Mr. Bauer, the Commission's own patent adviser, sent constant reports urging the FCC to take action both in cases involving the promulgation of new standards and in cases involving applications for new licenses or renewals filed by NBC, RCA's subsidiary.²¹⁰ The FCC, so far as can be determined from analysis of its files, flatly refused to give any consideration to these reports.

The Antitrust Division, on the other hand, to which copies of the Bauer memoranda had been sent, used them as a starting point for the working up of both civil and criminal antitrust actions against RCA.²¹¹ These actions, which were directed against RCA's patent position and practices, were concluded in October 1958 with a consent decree and the imposition of a substantial fine.²¹²

Had the FCC itself taken action to deal with the RCA patent position, particularly in color television, these antitrust suits might not have been necessary. Just before the Commission adopted the RCA color system at the end of 1953, Stanley N. Barnes (then head of the Antitrust Division) personally went to see the FCC chairman and strongly urged that the Commission hold a public hearing on the patent situation, which, said Barnes, presented serious antitrust questions.²¹³

209. Reply by Commission to Questions of Senate Interstate Commerce Committee, 1 P & F RADIO REG. (pt. 3) 91:125, 91:128, 91:130 (1949).

210. See *Patent Hearings* 50.

211. *United States v. RCA*, Civil No. 97-38, S.D.N.Y., filed Nov. 19, 1954; *United States v. RCA*, Crim. No. 155-107, S.D.N.Y., filed Feb. 21, 1958.

212. N.Y. Times, Oct. 29, 1958, p. 1, cols. 2-3.

213. The author has seen a memorandum of this meeting.

Just as in the already-discussed *NBC-Westinghouse* case, however, the views of the Antitrust Division carried practically no weight in the FCC.

CONCLUSION

Mention has already been made of the Chain Broadcasting report and regulations promulgated by the FCC in 1941. Despite the fears of the networks,²¹⁴ in deference to which the prohibition against "option time" was dropped,²¹⁵ networking has prospered under the regulations.²¹⁶ If anything, in fact, network dominance in the field of television today is greater than it was in radio in 1941.

Yet, as so often happens, administrative apathy, at least when it becomes this gross, calls forth its own cure in the form of congressional inquiry and prodding. Under the urging of a key congressional study,²¹⁷ sometimes referred to as the Plotkin memorandum, prepared for the Senate Commerce Committee in 1955,²¹⁸ the FCC applied for and received sufficient appropriations to finance a comprehensive study of the network problem.

The study, which was conducted during 1955-1957 by a specially appointed staff under the direction of Dean Roscoe L. Barrow, urges far-reaching changes in the FCC's passive approach toward the networks. In the first place, it urges the definite outlawing by the Commission of both "option time" and "must buy." Both network practices "should be prohibited through a Commission regulation."²¹⁹ According to the study, the network practices in question appear to be illegal under the antitrust laws;²²⁰ their elimination would permit competitive forces in broadcasting the freer play which the Congress intended them to have. "Adoption of the recommendations should result in a greater degree of competition in broadcasting, programming which is more responsive to community needs, and a more nearly nationwide service. The viewing public would have available a wider variety of television service and a more varied program fare."²²¹

But the Barrow report does not stop with the prohibition of the network practices in question in its recommendations. In addition, it urges a limitation upon the right of the networks to own stations. This

214. See PLOTKIN 34.

215. See *Report on Television Broadcasting* 91.

216. PLOTKIN 34.

217. PLOTKIN.

218. Copies were sent to both the FCC and the Attorney General.

219. *Network Broadcasting* 398, 527, 658, 659.

220. *Id.* at 527, 658-59.

221. *Id.* at 666.

would be accomplished by amendment of the FCC's so-called multiple ownership rule. Under the Commission's present regulations, networks and other multiple owners are permitted to own up to seven television stations.²²² In its Chain Broadcasting report, the FCC had referred to the serious effect of network station ownership upon competition in broadcasting. Such ownership, it asserted, has permitted the networks to "bottle up" the best broadcast facilities.²²³ Indeed, it stated that if "the question were presented as an original matter at this time, the Commission might well reach the conclusion that the business of station operations and network operation should be entirely separated."²²⁴

The ownership of stations by the networks appears to present the same type of antitrust problems that the ownership of theater chains by the motion-picture companies raised in the already-referred-to *Paramount* case.²²⁵ "Ownership of a large number of stations by a single interest," declared the head of the Antitrust Division in 1956 congressional testimony, "raises real antitrust problems. Such owners would be in a position to use tactics similar to those of the Griffith, Schine & Crescent motion-picture circuits by capitalizing on mass purchasing power and by combining their outlets in single-station markets."²²⁶ This is especially true where the networks themselves are large multiple owners. Said a federal court in 1957: "[I]t is desirable for local television stations and network organizations to be independent of each other, and thus to assure that networks can freely compete for affiliation with local stations and local stations freely compete for network affiliation. . . ."²²⁷

The Barrow report stated that, in its opinion, "that pattern of television station ownership which is most in the public interest is one television station to each licensee."²²⁸ It did not, however, go so far as to advocate that the FCC do more than seek such a pattern "in the long run."²²⁹ For the present, it recommended only that the Commission prohibit the ownership of more than three VHF stations in markets which are within the twenty-five largest markets in the country.²³⁰ Its primary impact would be on the network multiple owners, which now own stations in the major markets.²³¹ In actuality,

222. 47 C.F.R. §§ 3.335, 3.636 (1958). This can include up to 5 VHF stations.

223. FCC, REPORT ON CHAIN BROADCASTING 67 (1941).

224. *Ibid.*

225. See note 129 *supra*.

226. ANTITRUST SUBCOMMITTEE REPORT 4122.

227. *Sunbeam Television Corp. v. FCC*, 243 F.2d 26, 28 (D.C. Cir. 1957).

228. *Network Broadcasting* 592.

229. *Ibid.*

230. *Id.* at 596.

231. *Ibid.*

this impact would not be very great and the report goes on to urge that the Commission itself "should review from time to time the ownership of stations by networks . . . and if it is found that a network can be divested of additional stations without endangering the network's program service, such divestiture should be required."²³²

The Barrow recommendations are now under consideration by the FCC itself. Though one may feel that, in some respects (as on the problem of network ownership of stations), they do not go far enough, it cannot be doubted that their adoption and implementation by the FCC would do much to bring the Commission into line with the basic spirit of our antitrust laws and policies. Certainly such action by the FCC would constitute a major step toward resolving the problem of network dominance.

But there is another major piece of unfinished business for the Commission in the antitrust field.²³³ That is for it to abandon the unsound policy laid down in the *Philco* case²³⁴ and to exercise its affirmative duty to determine whether licensees who have engaged in practices that restrain competition meet the "public interest" criterion. The Commission should not abdicate its statutory duty merely because an applicant's conduct may happen to constitute an unconvicted violation of the antitrust laws. Nor is it a valid argument that the FCC, in following its statutory duty here, would be imposing too harsh a penalty upon licensees and applicants. Essentially the same argument was rejected by the Supreme Court in *FCC v. WOKO*.²³⁵ The denial of a radio license, said Justice Jackson, is not an improper penalty: "It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact."²³⁶

Administrative suggestion, in the form of the Barrow study, congressional inquiry, and professional comment, such as this Article represents, however, can only point the way; they cannot force a reluctant Commission into a course of action which is distasteful to it. And if, as seems likely, the Barrow recommendations descend into the bureaucratic limbo prepared for them,²³⁷ the evil of network dominance will persist uncontrolled.

232. *Id.* at 598.

233. Compare *Patent Hearings* 59.

234. National Broadcasting Co., 15 P & F RADIO REG. 965 (1957).

235. 329 U.S. 223 (1946).

236. 329 U.S. at 228.

237. Thus the FCC has recently rejected the Barrow recommendation that option time be outlawed. By a 4-3 vote, the Commission approved option time as "reasonably necessary for successful network operation." N.Y. Times, March 9, 1959, p. 58, col. 1.

One who recalls the sanguine hopes of the 1930's might be prompted to ask: What went wrong with the regulatory commissions? The FCC is a clear example of a regulatory agency that has assimilated the "public interest" to that of the dominant members of the regulated industry. Opinions may differ, to be sure, on the reasons for the FCC's benevolent attitude toward the networks. Some may point to the all-pervasive pattern of fraternization and favor-giving between networks and commissioners brought out in the hearings of the Legislative Oversight Subcommittee. Others may emphasize the dependence of FCC commissioners and staff upon the industry for future economic opportunities.²³⁸ Still others may assert, in Herblock's recent words, "There are cases where words are superfluous. As somebody once said, 'The milk-wagon horse knows where to stop.' " ²³⁹

It may well be that, in this respect, the experience of the FCC is far from unique among federal regulatory agencies. To borrow from the language of a Senate subcommittee report of a few years ago, perhaps the problem is most neatly put this way:

"A subtle malady which is apparently institutional rather than personal in its incidence is the tendency of the independent regulatory commissions not to die, but to fade away; with advancing age they tend to become the servants rather than the governors of the industries which they regulate." ²⁴⁰

238. See note 35 *supra*.

239. BLOCK, HERBLOCK'S SPECIAL FOR TODAY 246 (1958).

240. SUBCOMMITTEE OF SENATE COMM. ON LABOR & PUBLIC WELFARE, ETHICAL STANDARDS IN GOVERNMENT 60 (Comm. Print 1951).