Newspaper-Broadcast Combinations in the Same Community: How Much Divestiture for the Sake of Diversity?
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When profit potential from broadcasting was minimal or nonexistent, the Federal Communications Commission urged newspaper owners to pioneer the development of the industry—first in radio, then in television. Although the FCC generally favored diversity of ownership, there were few competent applicants for the airwaves, and newspapers provided strong journalistic traditions for the newly developing technology. Since then the Commission's policy favoring diversified ownership has never barred the granting or renewal of broadcast licenses to newspaper owners in the same community if the overall public interest is served.

In 1944 the FCC first proposed a rule to restrict cross-ownership of newspapers and radio stations in the same community to promote diversity of ownership. The Commission, however, ultimately decided that because of the "grave legal and policy questions involved," it would continue to resolve cross-ownership problems on a case-by-case basis. Ad hoc consideration continued until 1970, when because of the rapid development and maturity that broadcasting had experienced, the FCC again initiated rulemaking proceedings to consider whether one party should be permitted to own or control both a broadcast station and a daily newspaper in the same community. From these proceedings and as part of an ongoing concern with concentrated media control, the Commission proposed a ban of all newspaper-

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1. Hereinafter referred to as "Commission" or "FCC."
3. See text accompanying notes 57-64 infra.
5. Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339 (1970). The proposed rule required divestiture within five years and prohibited future acquisitions of broadcast outlets in order to limit one party's holding in any market to one or more daily newspapers, one television station, or one AM-FM combination. Id. at 346.
6. The FCC first initiated rules to combat media concentration by prohibiting one party from owning more than one FM radio station in the same area. This rule operated prospectively only. Rules Governing Standard and High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940). Later the FCC likewise prohibited future common ownership
of two or more VHF-TV stations in the same community. Rules and Regulations Governing Commercial Television Broadcast Stations, 6 Fed. Reg. 2282, 2284-85 (1941). When the FCC prohibited one party from owning or controlling two or more AM stations in the same community, Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943), approximately 20 owners were required to divest when on a case-by-case basis their ownerships were found to be anticompetitive. 11 FCC ANN. REP. 12 (1946).

In 1968 first notice was given of proposed rules limiting the common ownership of different broadcast services within the same market, e.g., restricting one party's ownership of a radio station and television station in the same community. Standard, FM and Television Stations, Multiple Ownership, 33 Fed. Reg. 5315 (1968). The FCC ultimately prohibited only prospectively the cross-ownership of VHF-TV and radio stations in the same market and permitted AM-FM combinations. Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970) [hereinafter cited as First Report and Order].

See text accompanying notes 77-80 infra for restrictions on cable ownership.

7. Second Report and Order, supra note 2, at 1090-94. The parties represented a broad spectrum of interests including combination owners, other broadcasters, and public interest groups.


9. Under the FCC's ruling, divestiture was ordered for 7 of 79 television-newspaper combinations in the same community. Thus 72 television-newspaper cross-ownership were left intact. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 946 n.18 (D.C. Cir.), aff'd in part and rev'd in part, 98 S. Ct. 2096 (1978). Divestiture was ordered for 16 of approximately 250 radio-newspaper combinations. Id. See [1977] BROADCASTING Y.B. A-45-49.

10. A station is considered to serve a community by encompassing the community with a city-grade signal. A city-grade signal, the most intense under the FCC rules, provides a clear signal to the entire community to which the station is licensed.

In order to understand the Commission's ruling, several other terms should be understood. "The word ‘control’ . . . is not limited to majority stock ownership, but includes actual working control in whatever manner exercised." 47 C.F.R. § 73.636 n.1 (1977). "Community" or "market" is defined by wave reach. See note 11 infra. "[A] daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication." 47 C.F.R. § 73.636 n.10. Noncommercial television stations and college newspapers are not subject to divestiture, and their presence in a community does not exempt co-located monopolies from the rules. 47 C.F.R. § 73.636(b) & n.10.

11. No newspaper-broadcast combination can be transferred in whole except by inheritance. A daily newspaper cannot be issued a broadcast license in the same community; if a broadcast licensee acquires a newspaper in the same city, it must divest itself of the station within one year. Second Report and Order, supra note 2, at 1074-76, 1099-107. This
Thus, in spite of its policy favoring diversity of media ownership, the Commission required divestiture in only the "most egregious cases." Breakup was not ordered in markets containing more than one daily newspaper and broadcast station because the concern for potential disruption to public service from divestiture outweighed the need for diversity in such markets. Had the record before the FCC revealed evidence of misuse or harm arising from cross-ownership in communities other than those served by only one daily newspaper and one broadcast station, the Commission may have required more divestiture.

The National Citizens Committee for Broadcasting, the Justice Department, the National Association of Broadcasters, the American Newspaper Publishers Association, and other media interests petitioned the D.C. Circuit challenging the FCC provision prohibits the formation or transfer of a combination if the only television station places a "grade A signal" over the city in which only one newspaper is published. A grade A signal is one that transmits a good picture 90% of the time at the best 70% of receiver locations. Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 515 n.12 (D.C. Cir. 1955). A grade A signal is weaker than a city-grade signal. See Second Report and Order, supra note 2, at 1075; W. GORMLEY, THE EFFECTS OF NEWSPAPER-TELEVISION CROSS-OWNERSHIP ON NEWS HOMOGENEITY 206 n.1 (1976). By defining a market in a particular way, the FCC can constrict or expand the effect of its multiple ownership order. The number of stations in a market increases if stations are defined by a grade A signal rather than by a city-grade signal. Thus, because the Commission's prohibition of future combinations defines the market by a grade A signal, rather than by a city-grade signal as required by the divestiture rules, fewer cities are likely to harbor media monopolies under the prospective rules. Although the Commission had been urged to employ grade A signals in determining the number of media outlets in a market for purposes of breaking up existing combinations, it chose to use the city standard because only a station encompassing a community with a city-grade signal could provide an "additional voice" on local matters. Second Report and Order, supra note 2, at 1082.

12. Second Report and Order, supra note 2, at 1080. "[T]he existence of a city grade television station is sufficient to exempt a radio combination from divestiture, but the existence of a city grade radio station does not exempt a television combination." National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 946 n.18 (D.C. Cir. 1977), aff'd in part and rev'd in part, 98 S. Ct. 2096 (1978). The difference is attributable to television's more powerful impact. Id.

13. Second Report and Order, supra note 2, at 1089. In addition, the Commission decided against granting a hearing in renewal application situations involving petitions to deny based on cross-ownership unless there is a showing of economic monopolization that may warrant actions under the Sherman Act. Id. at 1088. For a description of what may be required under the Sherman Act, see note 169 infra. The FCC deferred decision on the weight to be given the cross-ownership factor in license renewal hearings involving competing applicants for the same licenses. Second Report and Order, supra note 2, at 1088.

Some of the petitioners contended the Commission arbitrarily exceeded its authority by issuing the prospective ban and limited breakup order without individual hearings. Others argued that the FCC should have required across-the-board divestiture consistent with the "paramount public interest in diversification of media control." The Court of Appeals for the District of Columbia Circuit affirmed the Commission's prospective ban on the formation and transfer of newspaper-broadcast combinations, but vacated the provision grandfathering existing combinations and instead required the Commission to adopt a rule compelling divestiture in all cases of newspaper-broadcast cross-ownership in the same market, even if other independently owned newspapers or broadcast stations existed in the area. The court's decision gave "diversity of media ownership controlling weight," even though abuses from common ownership were not established.

The Supreme Court of the United States in FCC v. National Citizens Committee for Broadcasting (NCCB) consolidated six petitions appealing the D.C. Circuit's decision on various grounds. Essentially sustaining the FCC's limited divestiture

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18. 555 F.2d at 966 & n.112. Although the court of appeals did not affirm the Commission's order, the Commission's waiver requirements were approved. Temporary or permanent waivers from the ban would be granted after a hearing showing that the rules' purposes would be better served by continuation of the combination, or that sale of half of the combination would be impossible or possible only at an artificially depressed price. Second Report and Order, supra note 2, at 1085.

19. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 967, 969 (D.C. Cir. 1977). This statement was made by the court in response to an FCC motion for stay of mandate. The Commission sought the stay in order to allow the Supreme Court to consider the Commission's petition for a writ of certiorari. The court stayed its order requiring the FCC to mandate divestiture of all co-located newspaper-broadcast combinations, but did not stay the Commission's prospective ban. Id. at 970.


order and prospective ban of co-located cross-ownership, the Court found the D.C. Circuit had improperly elevated the significance of ownership diversity above other public interest factors.

This Comment will detail the Supreme Court’s discussion of diversity of ownership and other public interest factors impacting on proper regulation of cross-owned newspaper and broadcast media. After examining the relative importance of various competing policies, a balance will be recommended from which cross-ownership can be most effectively regulated in contemplation of the overall public interest.

I. BACKGROUND

A. FCC Regulation—The Public Interest Standard

"Before 1927, the allocation of [broadcast] frequencies was left entirely to the private sector, and the result was chaos." In response to this problem Congress enacted the Communications Act of 1934, establishing and empowering the Federal Communications Commission to regulate the broadcast media in the "public interest, convenience and necessity" and to "encourage the larger and more effective use of radio." The broad and flexible term "public interest" permeates the Communications Act, and is the general principle under which a multitude of FCC policies are subsumed, including those marshalling for and against preserving media ownership concentration. In particular, the Commission’s power to make rules forbidding the future formation or transfer of commonly owned newspapers and broadcast stations in the same community stems from its duties to determine eligibility standards in allocating broadcast frequencies and to enact rules preventing media concentration abuses.

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22. The Supreme Court affirmed the D.C. Circuit’s judgment upholding the Commission’s prospective ban of newspaper-broadcast combinations in the same community, but reversed the judgment vacating the Commission’s limited divestiture order. 98 S. Ct. at 2111.
26. Id. § 303(g).
27. See National Citizens Comm. for Broadcasting v. FCC, 555 F.2d at 947-49; Second Report and Order, supra note 2, at 1048.
1. The standard for judicial review

Before evaluating the precedent and reasoning surrounding the diversification issue, the standard for judicial review of administrative rulemaking must be considered in order to assess the weight that should be accorded the Commission's judgment. By providing the FCC with the broad and versatile public interest standard, Congress has allowed the Commission to consider "rapidly fluctuating factors" underlying the law and to establish rules as the broadcasting field evolves.29 "By specialization, by insight gained through experience, and by more flexible procedure,"30 the Commission can more adeptly weigh the policy factors of the public interest than any court. For these reasons the Commission has been granted broad power to enact regulations in furtherance of the public interest.31 Its policy determinations constitute the very "area where administrative judgments are entitled to the greatest amount of weight by the appellate courts."32 Therefore, serious doubt exists concerning the power of a court to supplant the FCC's assessment of public interest factors with "one more nearly to its liking."33

A reviewing court may not reverse the Commission unless it finds that the FCC rulemaking is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."34 An administrative regulation may be set aside as arbitrary or capricious only if the agency failed to make a "reasoned consideration [of] each of the pertinent factors,"35 and thus committed a clear error of judgment.36 Thus a court may reverse the FCC only if it finds

29. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138, 142-43 (1940). See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969) (quoting NBC v. United States, 319 U.S. 190, 219 (1943)), in which the Court stated that the FCC's mandate "to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'"
that there is no reasonable relationship between the public-interest factors and the Commission's decision.

2. **Public interest and the first amendment**

The public interest sometimes requires that the government deny an individual a broadcast license because broadcast spectrum space is scarce. The Supreme Court has affirmed the Commission's ruling that the public's interest in obtaining the optimal use of its limited airwaves is greater than the media's right to freedom from government interference. Although normally the first amendment is interpreted to prohibit government intrusion on free expression, recent decisions indicate that the Supreme Court continues to adhere to this "scarcity" rationale to justify affirmative government regulation of broadcasting.

The NCCB Court cited *Red Lion Broadcasting Co. v. FCC* and noted that the scarcity argument justifies government restrictions in spite of the first amendment. Although there is no express statutory language permitting the FCC to restrict newspaper publishers from owning broadcast stations, the Court noted that it is appropriate for the FCC to make extensive rules to codify its understanding of the public interest, especially to restrict increasing media concentration. In the Court's view, the first amendment right to free speech is not abridged since the

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37. NBC v. United States, 319 U.S. 190, 226 (1943): "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."


42. 98 S. Ct. at 2114. Interestingly, Chief Judge Bazelon in writing for the D.C. Circuit expressed his own view that because of new technology, including cable television, the scarcity argument may be lost. If so, "[a]lleviating scarcity would not only eliminate the need for promoting diversity, it would also presumably eliminate the need for all licensing save that necessary to prevent interference. . . . Broadcasting would no longer present unique problems requiring unique regulation." 555 F.2d at 950 n.31. See B. Owen, Economics and Freedom of Expression 107 (1975), reviewed by Posner, 86 Yale L.J. 567 (1977); Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213, 223. See generally R. Smith, The Wired Nation 7 (1972); Broadcasting, July 19, 1976, at 44.


44. 98 S. Ct. at 2111-13.
proposed regulations are intended to enhance—not limit—information diversity, and do not discriminate on the basis of the broadcasters' social or political views.\footnote{Id. at 2114-15. These rules may not amount to a first amendment abridgment, but might be limited by the general policy against government intervention. See text accompanying note 162 infra.} By encouraging various broadcast voices through promulgation of rules against multiple ownership,\footnote{"Multiple ownership" in this context refers to ownership of more than one broadcast facility—standard (AM) broadcast stations, frequency modulated (FM) stations, VHF or UHF television stations—by the same individual or company. See, e.g., 47 C.F.R. \(\S\) 73.35(a) (1977).} the FCC seeks greater message pluralism,\footnote{FCC v. National Citizens Comm. for Broadcasting, 98 S. Ct. at 2107-08.} thus contributing to "an uninhibited marketplace of ideas."\footnote{Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).} This diversity objective is consistent with the first amendment:

The 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, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.\footnote{Associated Press v. United States, 326 U.S. 1, 20 (1945).} Thus, government control is permissible to allay the "widespread fear that . . . the public interest might be subordinated to monopolistic domination in the broadcasting field."\footnote{FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).}

\section*{B. Diversity in Media Ownership Regulation}

\subsection*{1. Broadcast licensing}

Although in granting new broadcast licenses the Commission gives preference to applicants who add a new media owner to a community,\footnote{"[T]he 1965 Policy Statement promulgated the doctrine that in a comparative situation an applicant not associated with other media interests should be given preferential consideration of primary significance as against applicants having other interests . . . ." Hyde, FCC Policy and Procedures Relating to Hearings on Broadcast Applications in Which a New Applicant Seeks to Displace a Licensee Seeking Renewal, 1975 DUKE L.J. 253, 253 (emphasis added) (commenting on the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395 (1965) [hereinafter cited as 1965 Policy Statement]). Former FCC Chairman Rosel H. Hyde wrote that this policy elevated the "diversification criterion to equal status as 'service to the public.' " Id. at 263. See McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), cert. denied, 353 U.S. 917 (1957) (where all other factors were substantially equal between two new applicants, the FCC appropriately awarded the license to the one disassociated from other media interests).} diversity has not been accorded the same import-
ance in cases where an incumbent licensee seeks to renew a license for another three years. Historically, ownership diversity has often been neglected as a factor in license renewal hearings; rather, an incumbent's previous record has been emphasized because it has been regarded as a more reliable indicator of future service than a new applicant's untested proposals.

In 1969, however, the FCC caused a furor in the broadcast industry when for the first time it refused to renew the license of a broadcast station (WHDH) that had an "average" record of performance. Instead, the Commission granted the license to an applicant that would add to the diversity of control over mass communications media in the area and be more actively involved in the station's operation. Even there, however, the FCC gave diversity controlling weight only due to a unique factual situation. The action was challenged in Greater Boston Television Corp. v. FCC (WHDH). The D.C. Circuit affirmed the Commission's decision to give diversity prime consideration and noted that WHDH was treated as a new applicant only because "unique events and procedures ... place[d] WHDH in a substantially different posture from the conventional applicant for renewal of a broadcast license."

In response to the uncertainty caused by the D.C. Circuit decision in WHDH, the FCC promulgated a policy statement that essentially precluded consideration of diversity by permitting incumbent licensees to forgo comparative hearings if they can first show "substantial" previous performance. In Citizens

52. When the FCC adopted the policy in favor of diversity in new license proceedings, it noted that it was not attempting to deal with the somewhat different problems raised in comparative renewal proceedings. 1965 Policy Statement, supra note 51, at 393, n.1.


57. Id. at 849 (quoting WHDH, Inc., 17 F.C.C.2d 856, 873 (1969)). Over a 12-year period, WHDH had always been granted operating authorization for less than the normal three-year period. In view of the abbreviated nature of the WHDH tenure, the station was never considered a conventional applicant for renewal possessing "legitimate renewal expectancies." Id. at 849, 854.

58. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 425-26 (1970). Media interests had also encouraged Congress to combat the anticipated negative effects of WHDH. Senator John Pastore introduced legislation barring the FCC from considering a competitive application unless the incum-
Communications Center v. FCC the D.C. Circuit held that this statement did not conform to statutory authority. The court reasoned that by granting renewal to an incumbent upon a showing of substantial performance the FCC precluded challengers from receiving a hearing on their own applications, contrary to the express provision in the Communications Act requiring a full hearing if a substantial or material question of fact is presented by a competing application. However, in spite of the decisions in WHDH and Citizens Communications Center, the courts still allow for "legitimate renewal expectancies" and judge incumbent licensees "primarily on their records of past performance." In the eight years since WHDH the Commission has never granted a television license to a challenger when the incumbent has maintained at least an average record of past performance in the public interest. The FCC has recently taken the position that a record of meritorious service—and not diversity—may be controlling.

2. Rules restricting media ownership concentration

The concentration of ownership once afforded the media industry has been restricted in stages. The 1940 FM rule provided that in the future no person should own or control more than one station in the same market unless he shouldered the burden of bent failed to serve the public interest. S. 2004, 91st Cong., 1st Sess. (1969); see 115 Cong. Rec. 10632 (1969). Hearings were held on these new license renewal procedures, but the bill was dropped because the Communications Subcommittee did not report it out of committee that year. W. Gormley, supra note 11, at 26-27. Similar legislation was proposed in 1974. See note 65 infra.

59. 447 F.2d 1201 (D.C. Cir. 1971).
63. I. Krasnow, THE POLITICS OF BROADCAST REGULATION 204 (2d ed. 1978). Both the House of Representatives and the Senate passed license renewal bills in 1974 which would have granted incumbent licensees a presumption in favor of renewal if they were "substantially" responsive to local needs, regardless of diversity. The bills were not enacted because a conference committee was never assigned to "iron out" the differences between the House and Senate versions of the bill. W. Gormley, supra note 11, at 30-33.
64. See Broadcast Renewal Applicant, Comparative Hearing Process, 42 Fed. Reg. 19379 (1977) [hereinafter cited as 1977 Broadcast Renewal Policies]. The Commission recently did not award a preference to a challenger even though the incumbent owned both AM and FM stations in the same city as the television station in question. Fidelity Television, Inc. v. FCC, 515 F.2d 684 (D.C. Cir. 1975).
showing that competition would be fostered or a distinct service rendered. Existing FM combinations in the same city were grand-fathered.65

In 1941 the Commission promulgated rules restricting multiple ownership of both AM and FM stations66 in an attempt to strike a balance between the policies favoring diversity and economic competition and the need to avoid undue disruption of existing services.67 These chain-broadcasting68 regulations, sustained by the Supreme Court, were designed to curb abuses that the FCC had discovered and to limit the existing networks' inordinate control of the media.69 The rules required divestiture only where two AM stations were controlled by the same network in the same area, or where the available facilities were so few that the network had no competition.70 When the Commission later barred single parties from owning two AM broadcast stations in the same community, divestiture was required in twenty cases.71 At approximately the same time, the Supreme Court in Associated Press v. United States72 found the Associated Press' membership restraints illegal because they ultimately deprived the public of information from diverse sources, in violation of the Sherman Antitrust Act.73

In United States v. Storer Broadcasting Co.,74 the Supreme Court upheld the FCC multiple ownership rule limiting a licensee to five VHF television stations, and found a full hearing unnecessary unless it could be shown that in a particular case the rule

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65. See note 6 supra for an overview of the early multiple ownership rules, including those restricting ownership of FM stations.
68. Chain broadcasting refers to the simultaneous broadcasting of one program by two or more connected stations.
69. NBC v. United States, 319 U.S. 190 (1943). The record of monopolistic improprieties was strong. Id. at 217-18. The decision recognized apparent antitrust violations although the resolution of the case did not rely on antitrust policy. Id. at 191, 223.
71. When more strict standards were set for determining overlap of co-located stations, no divestiture was required. Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964).
72. 326 U.S. 1 (1944).
73. Id. at 12. The Associated Press abused its media concentration posture by excluding certain newspapers from receiving its news service reports. The wire service's members "pooled their economic and news control power and in exerting that power, have entered into agreements plainly designed in the interest of preventing competition." Id. at 16.
should be waived. The five-station limit was based on the Commission's experience in assessing concentration of media "coupled with a design to avoid undue disruption of existing station ownership."

In 1970 the Commission adopted an as-yet-unchallenged "one to a market" rule to prohibit a single party from gaining control of two or more full-time broadcast stations within a single community. This rule did not require divestiture of existing combinations, although it did prohibit the future sale of an existing combination to a single party.

Similarly, the FCC has restricted the ownership of cable television systems. The Commission effectively prevented telephone companies from providing cable television service to their telephone customers, and forbade the ownership or control of cable systems by national television networks or television broadcast stations in the same community. Although the Commission chose not to grandfather existing television-cable combinations as a matter of course, enforcement of this ruling has been liberally waived. In 1975 the FCC decided against establishing a rule to restrict newspaper publishers from owning cable systems because it found no abusive trends resulting from the cross-ownership.

II. DIVERSITY OF OWNERSHIP IN PERSPECTIVE

The FCC in the course of its rulemaking proceedings compared the extent of local programming, information diversity,

75. Storer Broadcasting Co. v. United States, 240 F.2d 55, 56 & n.3 (D.C. Cir. 1956) (on remand). In the few instances where the number limit was exceeded, the divestiture was dealt with on a case-by-case basis. Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C.2d 288, 292, 295 (1953).

76. First Report and Order, supra note 6, at 306.
77. 47 C.F.R. § 63.54 (1977).
78. 47 C.F.R. § 76.501(a) (1977). The original regulation was approved in General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).
public affairs programming, and advertising rates of newspaper-owned stations with the same characteristics of independently held stations and concluded as did the D.C. Circuit that the "record no more establishes that cross-ownership serves the public interest than injures it." Because of this inconclusive record, the Commission ruled that there was no overwhelming need for divestiture except in one-newspaper, one-broadcast communities where "competition and diversity are absent." The D.C. Circuit, however, asserted that "precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." The Supreme Court in effect upheld the FCC because it was "unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices" that supports a presumption that diversity should be given controlling weight in all circumstances.

A. Broadcast Licensing Procedures

Analysis of licensing disputes shows that the Commission has balanced several factors in deciding whether to grant or deny license renewals. While in awarding new licenses the Commission requires that ownership diversity be accorded "primary significance," as the Supreme Court noted this policy has never been applied directly in a comparative hearing for license renewal. Since the divestiture issue concerns only existing

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82. 555 F.2d at 956-61.
84. Second Report and Order, supra note 2, at 1088 n.29.
85. 555 F.2d at 966.
86. 98 S. Ct. at 2119-20.
87. Schwartz, Comparative Television and the Chancellor's Foot, 47 Geo. L.J. 655, 660-61 (1959). The factors listed by Schwartz include: (1) local ownership, (2) integration of ownership and management, (3) past performance, (4) broadcast experience, (5) proposed programming and policies, and (6) diversity of the media of mass communication. Schwartz criticizes past FCC inconsistency and political favoritism and advocates administrative changes—including controlled competitive bidding for broadcast licenses—without recommending greater emphasis for diversified ownership.
88. 1966 Policy Statement, supra note 51, at 394. Full-time participation in station operation by owners and "past performance" are only of "substantial importance," thus apparently of less merit. Other factors do not warrant an affirmative preference and are considered only if on petition by one of the parties the factor is studied and reveals a substantial difference between applicants for a new license. Other factors include proposed program service, efficient use of frequency, and applicant character. Id. at 393-400.
89. 98 S. Ct. at 2120.
media owners, the policy relating to license renewals, rather than new applications, should apply.

In license renewal proceedings the "relative weight" to be afforded the evidence once entered "will depend on the facts of the particular case." 90 Diversity has never been the overriding factor, but merely one of several factors in the successful applicant's favor. 91 The Commission considers the anticipated contribution of the owner to station operations and proposed programming, and generally accords central importance to the incumbent's past performance. 92 The diversification factor assumes a greater significance only if a license renewal would perpetuate a serious monopoly, 93 documented abuses, 94 or a violation of existing media ownership rules. 95 Thus, the Commission clearly does

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91. For example, in Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951), the Commission was upheld in finding that a combination of ownership diversity, integration of local ownership and management, and familiarity with local conditions served as the basis for granting a radio license. See Chicagoland TV Co., 11 F.C.C.2d 119 (1967).


93. The Commission's refusal to renew a television broadcast station in Frontier Broadcasting Co., 27 F.C.C.2d 486 (1971), was upheld because of Frontier's extreme media monopoly in Cheyenne, Wyoming. The family-owned corporation owned the town's only television station, the only full-time AM radio station, an FM radio station, the only cable television system, and the only daily newspaper. Id. at 486. In Chicagoland TV Co., 11 F.C.C.2d 119 (1967), diversity was of "reduced significance because of the multiplicity of other services available" in the Chicago area. Id. at 137. Although the successful applicant already owned a powerful radio station and a monthly newspaper, it was awarded the license because of its financial capability, integration of ownership and management, and superiority in coverage and service contour.

94. Because a radio license applicant, the owner of the only newspaper in town, had in the past used exclusive advertising contracts, boycotts, and other monopolistic methods in attempting to destroy the existing radio station in the area, his application was denied. Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1960).

95. Citizens TV Protest Comm. v. FCC, 348 F.2d 56 (D.C. Cir. 1965) (Commission abused discretion in granting license for television station without a hearing where result was common ownership of a community antenna television system and local television
not ipso facto grant "controlling weight" to ownership diversity in renewal hearings. Although as a general rule diversity must be accorded some importance, its weight relative to other factors depends upon the particular situation. 88

B. Other Multiple Ownership Rulings

Despite the absence of an affirmative showing of abuse arising out of common ownership, the D.C. Circuit reversed the Commission and set down a virtually irrebuttable presumption against cross-ownership. 87 The D.C. Circuit cited several FCC regulations in an attempt to support its statement that "diversity is central to the Communications Act." 88 These regulations, however, are direct attempts at increasing information diversity, not merely ownership diversity, by curbing documented abuses. 99

The Supreme Court found the FCC's ruling to be consistent with both the Commission's previous rulings and with court decisions. 100 When the Court sustained the Commission's regulations against chain broadcasting in NBC v. United States, 101 it recognized that diversity was a significant factor in the public interest, but required divestiture only upon a showing of the network's misuse of commonly owned media. NBC's exclusive arrange-

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87. 555 F.2d at 963.
88. 555 F.2d at 948 n.26.
89. For example, the licensing policies for AM and FM stations have been designed to control such network abuses as (1) affiliation exclusivity, (2) territorial exclusivity over network programming, (3) contractual ties with networks for excessively long periods, (4) unlimited network preemption of local station time, (5) restrictions on station rejection rights, (6) network organization ownership of more than one station in an area, (7) "dual" network operation, and (8) network control of station advertising rates. See 47 C.F.R. §§ 73.132, .139, .232, .239-.240, .242 (1977); 42 Fed. Reg. 16,421-22 (1977). Diversity is not the central aim of the regulation that requires flexibility in program arrangements and calls for local programming during specific evening hours. 47 C.F.R. § 73.658 (1977). The regulation emphasizes local programming geared to local issues. Here the FCC concern is not that networks present amply diverse views, but rather that the views be well-suited to local needs. A decision also cited by the D.C. Circuit, Metropolitan Television Co. v. FCC, 289 F.2d 874, 876 (D.C. Cir. 1961), upheld the prohibition of network sale of nonnetwork time. The court found an abuse because this type of network control restricted the individual licensee's independence. Since this abuse can exist even though every single affiliate is separately owned, it is clear that information diversity and not ownership diversity was the controlling consideration for this court.
100. 98 S. Ct. at 2120.
101. 319 U.S. 190 (1943).
ments were found to prevent the airing of others’ ideas and programs in an area served by a network affiliate, while network regulation of advertising rates severely restricted economic competition. Thus across-the-board breakup of AM station ownership or control was ordered only because concentration of ownership and monopolistic abuse were serious.\(^\text{102}\)

Although no two AM stations controlled by the same network in the same community were allowed to continue, this does not apply today to newspaper-broadcast combinations. Because the national network provides a major part of programming for local stations, the potential damage to the public interest is much greater in the chain-broadcasting context than in the area of local newspaper-broadcast combinations. Community newspaper-broadcast combinations do not monopolize one branch of the media and do not wield nationwide control. In \textit{Associated Press}, as in \textit{NBC}, the Supreme Court relied on a finding of abuse in ordering a stop to practices “plainly designed in the interest of preventing competition.”\(^\text{103}\)

In contrast, a pattern of monopolistic abuse has not been demonstrated in the cross-ownership of newspapers and broadcast stations. There exists no evidence of an effort to censor or monopolize ideas or to obtain unfair commercial advantage over competitors.\(^\text{104}\) Most studies testing the possible harm to the public interest resulting from newspaper-broadcast cross-ownership have found no significant difference between individually and cross-owned stations.\(^\text{105}\) A recent comprehensive study of past research found most of the allegations concerning the positive or

\begin{itemize}
  \item \(^{102}\) The “chain broadcasting” decision recognized apparent antitrust violations, but did not employ antitrust principles to resolve the case. NBC v. United States, 319 U.S. at 191, 221-23. The Justice Department would find it substantially difficult to show that newspaper-broadcast combinations have violated the antitrust laws. Leuchter, \textit{supra} note 83, at 344-45, 370; see Bennett, \textit{Media Concentration and the FCC: Focusing With a Section Seven Lens}, 66 Nw. L. Rev. 159, 187 (1971). The Justice Department, however, unsuccessfully urged the court of appeals to reverse by giving antitrust policy “prima facie effect.” 555 F.2d at 965 n.107. The court of appeals was correct in denying this argument’s validity. See \textit{McLean Trucking Co. v. United States}, 321 U.S. 67, 86-87 (1944). Moreover, “encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest.” FCC v. RCA Communications, Inc., 349 U.S. 86, 93 (1953).
  \item \(^{103}\) \textit{Associated Press v. United States}, 326 U.S. at 16.
  \item \(^{104}\) National Citizens Comm. for Broadcasting v. FCC, 555 F.2d at 959. This abuse could be manifested by a newspaper-broadcast combination’s one-sided treatment of stories in which it has an interest, a newspaper’s favored treatment to radio and television listings of its co-owned station, cut rates to those who advertise in both halves of a combination, and use of the same reporter and information by both the newspaper and broadcast station in order to tell a news story.
  \item \(^{105}\) These studies were summarized by the D.C. Circuit. \textit{Id.} at 957.
\end{itemize}
negative effects of media ownership concentration on media performance not proven.\textsuperscript{106} In the absence of evidence indicating that diversity of ideas or competition is restricted due to media concentration, the case for divestiture is weak or nonexistent.\textsuperscript{107} Thus the FCC was reasonable in concluding that divestiture is too drastic a remedy in most cases of cross-ownership. Although it is likely that evidence showing abuses of cross-ownership is difficult to collect, the mere possibility of impropriety is not a sufficient basis for ordering the separation of all co-located newspaper-broadcast combinations. Because newspaper-broadcast cross-ownership has not been shown to restrict information diversity, rules restricting cross-ownership would be only an indirect, speculative manner of insuring diversity of ideas.

C. Diversity of Ownership v. Diversity of Ideas

In treating the newspaper-broadcast cross-ownership issue, both the D.C. Circuit and the Supreme Court ignored the fact that the Commission’s “primary concern is diversity in programming service,”\textsuperscript{108} not simply diversity of ownership. While ownership in some circumstances carries with it the power to edit, alter, and select information,\textsuperscript{109} the amount and degree to which this power is actually used is undocumented. The FCC rationally concluded that because there was no evidence of a lack of program or information variety due to common ownership, it would order divestiture only in the most serious cases of ownership concentration where message pluralism is more likely to be restricted.\textsuperscript{110} In contrast, the D.C. Circuit based its decision to require divestiture in all cases on the unproven premise that the increase in the number of owners resulting from divestiture would increase the diversity of views receiving public airing.\textsuperscript{111} Admittedly, the pub-

\textsuperscript{106} W. Baer, supra note 79, at ix. A report made since the oral arguments before the FCC concerning the regulations indicates that cross-ownership increases to a small degree (16.7\%) the likelihood that co-located newspapers and broadcast stations will carry the same stories. Half of this story overlap is attributed to three factors: carbon-sharing (newspaper provides co-owned station with copies of all articles, and vice versa), cross-employment, and location of the station and newspaper in the same complex of buildings. The report’s author, however, does not recommend across-the-board divestiture. W. Gormley, supra note 11, at 210-11 & nn. 11-12.

\textsuperscript{107} See Amendment of Part 76 of the Commission’s Rules and Regulations Relative to Diversification of Control of Community Antenna Television Systems, 52 F.C.C.2d 170, 171 (1975).

\textsuperscript{108} Second Report and Order, supra note 2, at 1079 n.27, 1080.

\textsuperscript{109} Id. at 1050.

\textsuperscript{110} Id. at 1080.

\textsuperscript{111} 555 F.2d at 950. However, it is at least arguable that a co-located newspaper-
lic has a right implied from the first amendment to hear a wide range of ideas or messages.\textsuperscript{112} However, because the gains in message pluralism resulting from increased diversity of ownership are only speculative, the diversification argument is significantly weakened.

Other means for securing the public interest in diverse viewpoints already exist. For example, the “fairness doctrine” requires that radio and television broadcasters, as public trustees, provide coverage of issues of public importance and present both sides of the issues fairly.\textsuperscript{113} Similarly, the “equal time” provisions provide a safeguard for fair and diversified treatment of political campaigns,\textsuperscript{114} and the “prime time access rule” encourages “diverse and antagonistic sources of program service” during evening hours to “correct a situation where only three organizations control access to the crucial prime time evening television schedule.”\textsuperscript{115} These existing provisions promote diversity of information without the disadvantageous side effects of a rule requiring across-the-board divestiture.\textsuperscript{116}

D. Reduced Cross-Ownership and Technological Progress

The D.C. Circuit feared that should the FCC decision to grandfather the majority of existing newspaper-broadcast combinations be upheld, transfers of only a few co-located combinations would not realistically dissipate the concentration of ownership. Recently compiled statistics, however, indicate the court’s fears are unfounded. In 1950, 40.2\% of the nation’s commercial television stations were owned or controlled by local newspapers, while the percentage in 1975 was 10.4. In 1955 there were 127 such combinations; today there are only 65.\textsuperscript{117}

\begin{footnotes}
\item[112] The assumption that diversity of information is of first amendment importance is a logical twist of the amendment. The Bill of Rights was written to protect free speech from government infringement, but court decisions suggest that the government also must guarantee the citizen’s right to hear various and differing views. See Note, The Listener’s Right to Hear to Broadcasting, 22 STAN. L. REV. 863, 869 (1970).
\item[115] Mount Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971).
\item[116] See notes 120-50 and accompanying text infra.
\end{footnotes}
The argument that under the Supreme Court's ruling in NCCB the newspaper-broadcast concentration will persist is further diluted by the possibility that progress in technology may eliminate scarcity of broadcast space, thus weakening the justification for broadcast regulation and emphasis on diversity of ownership. Cable television, satellites, fine tuning, and other developments could make scarcity a bygone concern. These realistic possibilities for the future, some of which are beginning to materialize in the form of cable television, should serve to limit somewhat the concern over concentration of ownership.

III. POLICIES COMPETING AGAINST DIVERSITY OF OWNERSHIP

The Supreme Court recognized the Commission's ultimate goal of providing for the "best practicable service to the public" and found a rational basis for the Commission's cross-ownership rule in the FCC's belief that divestiture would often result in a decrease in local ownership and management, a disruption of continuity and stability of public service, and an increase in private economic losses. Although perhaps no one of these factors alone overrides diversification policy, together they substantially discredit diversity as a controlling factor.

A. Local Ownership

In various rulemaking proceedings the Commission has considered the extent to which a proposed rule will affect local ownership or control of broadcasting facilities. Such consideration is warranted by a belief that local control is likely to result in more community service and a keener awareness and coverage of local

The FCC's limited divestiture order would have broken up seven television-newspaper combinations. Six transfers proposed during the last year are now awaiting approval by the FCC, including two recently proposed in a "swap" between the Washington Post Company (WTOP-TV) and the Evening News Association (WWJ-TV) of Detroit. Broadcasting, Dec. 12, 1977, at 20. Although figures are not available, a similar trend exists for newspaper-radio combinations. Brief for Petitioner FCC at 8 n.14.

118. Economic realities, however, will not permit an unlimited number of broadcasters to operate successfully.

119. 96 S. Ct. at 2116-17.

120. In an effort to restrict national monopolies from inhibiting local control, the Commission limits one party to seven AM stations, seven FM stations and seven TV stations (five of which may be VHF). Television Multiple Ownership, 9 Fed. Reg. 5442 (1942). Networks proposing acquisitions of more than three TV stations in the top 50 markets have been required to show a compelling public interest to justify the purchases, although the Commission has always approved the license applications. W. Baer, supra note 79, at 19.
Thus the FCC often emphasizes the significance of local programming and participation of owners in management. The D.C. Circuit took a contrary position and suggested that local ownership offers no promise that station policy will be attuned to local needs. The likelihood, however, that local interests will be better served by local ownership is just as great as the probability that increased diversity of information will result from increased diversity of ownership.

At present seventy-five percent of all newspaper-broadcast combinations are locally owned. The Supreme Court approved of the Commission’s “rational prediction” that the many sales required by divestiture would be to outside interests, especially if widespread trading occurred among those required to divest. Proponents of divestiture suggested that decreases in local ownership be prevented by providing local groups the first opportunity to purchase a divested station, or requiring multiple bids. These requirements, however, would probably violate section 310(b) of the Communications Act. Although local ownership may not be a concern in every case, across-the-board divestiture should not be ordered without consideration of this factor.

122. 1977 Broadcast Renewal Policies, supra note 64, at 19381. See, e.g., United States v. Midwest Video Corp. 406 U.S. 649 (1972) (upheld rule requiring cable television systems to originate some local programs); Simmons v. FCC, 169 F.2d 670 (D.C. Cir.) (power increase and frequency change denied because of applicant’s failure to tailor programs to local needs), cert. denied, 335 U.S. 846 (1948); 47 C.F.R. § 73.658 (1977) (regulation requiring local television programming geared to local issues).
124. 555 F.2d at 963. The court observed that no evidence was presented showing that local owners are involved in daily management, especially since most newspapers and broadcast stations have separate management. Id. at 964. The Supreme Court, however, pointed out that separate management “does not foreclose the possibility that the common owner participates in management” of one or the other. 98 S. Ct. at 2117 n.23.
125. 98 S. Ct. at 2119.
126. Second Report and Order, supra note 2, at 1078. See note 117 supra. Figures do not exist to show the number of recent transfers that have resulted in decreased local ownership.
127. Second Report and Order, supra note 2, at 1069.
128. 47 U.S.C. § 310(b) (1970). This section provides that a transfer cannot be approved except upon a finding that the “public interest, convenience, and necessity will be served thereby.” The Commission, however, may not consider whether the public interest might be better served by a transfer to a person other than the proposed transferee.
B. Continuity and Stability of Public Service

The FCC has always regarded the need to preserve continuity of public service as a limitation on the applicability of its multiple ownership rules. Thus most of its rules operate prospectively only, and when divestiture is ordered, it is "coupled with a design to avoid undue disruption of existing station ownership." The court of appeals questioned the significance of the disruption-to-service factor because of its apparent inconsistency with the Commission's practice of routinely permitting existing broadcasters to assign their licenses to others. Although license assignments are allowed, the FCC has expressed great concern at the high rate of license turnover and now requires a hearing to approve license transfers during the first three-year license term. Furthermore, as the Supreme Court pointed out, "[t]he question of whether the Commission should compel proven licensees to divest their stations is a different question from whether the public interest is served by allowing transfers by licensees who no longer wish to continue in business." The resultant forced broadcasting may then be continuous, but probably not "worth preserving."

Licensees need time to fully implement the proposals made in their original license applications in order to "gain a better understanding of the program needs and desires of the community, and to adjust programming to such needs and interests." The Supreme Court's decision protects the public's interest in being served by those stations that have demonstrated a long

129. See note 6 supra.
130. Storer Broadcasting Co. v. United States, 240 F.2d 55, 56 n.3 (D.C. Cir. 1966). These rules prohibiting one party from owning more than seven AM stations, seven FM, and five VHF-TV stations were set so as not to be "unduly disruptive." Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953). The 15 VHF stations owned and operated by the three networks serve markets reaching one-third of all television households in the United States and generate one-sixth of the advertising revenue reported for all stations. W. BAER, supra note 79, at 46. See also NBC v. United States, 319 U.S. 190, 206-07 (1943), in which the Supreme Court, in affirming the chain-broadcasting regulations, implicitly approved the Commission's decision against requiring extensive divestiture.
131. 555 F.2d at 964.
133. 98 S. Ct. at 2121.
134. Id. (quoting Brief for Petitioner FCC at 38, FCC v. National Citizens Comm. for Broadcasting, 98 S. Ct. 2096 (1978)).
term commitment to broadcasting and have learned to meet the special needs of the community.\textsuperscript{136} This concern is well represented by an amicus curiae statement filed by the State of Utah in support of the FCC's petition for certiorari. The statement maintains that through divestiture Utah citizens would be deprived of a quality station, with the possibility that the successor would not meet the same high standards.\textsuperscript{137}

\textbf{C. Prevention of Economic Loss}

Private economic loss can be a factor when shown to have an adverse effect on service to the public.\textsuperscript{138} For example, the threat of economic ruin to an existing station, with the resulting loss of service to the public, has caused the Commission to deny applications to add media facilities in a particular community.\textsuperscript{139} Divestiture could force the demise of newspapers held in combination with broadcast stations where the newspapers are operating on a marginal budget.\textsuperscript{140} Thus, grandfathering the majority of existing combinations is consistent with the policy of the Newspaper Preservation Act, in which Congress chose not to require the separation of newspaper combinations in order to prevent a decline in the total number of newspapers serving the public.\textsuperscript{141} If grand-

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\item 138. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d at 964.
\item 139. The D.C. Circuit upheld the Commission's denial of an application for the introduction of a CATV system into a rural area in Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1973). The court agreed with the Commission that the existing local broadcast station could better serve local needs and its possible demise would result in a loss of vital service, thus depriving the community of free television. No increase in diversity of competition or ideas could outweigh the local service factor. Thus the Commission was correct in using a "net effect" test, instead of concentrating solely on diversity. \textit{Id.} at 365-66. Similarly, the D.C. Circuit allowed an existing radio station to contest the application for a second station in the area on the grounds that the market could not support both. Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958). The overabundance of economic competition would have affected the quality of service to the public because one financially stable station can better meet the public need than two competing diverse voices that are both financially weak. \textit{Id.} at 443.
\item 140. The Boston Herald died from financial difficulty shortly after the Commission forced it to divest its wholly owned subsidiary, WHDH-TV. Second Report and Order, \textit{supra} note 2, at 1107. Divestiture appears more likely to result in the demise of newspapers than of broadcast stations. \textit{Id.} at 1067, 1107.
\item 141. Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1976). If a newspaper can show that it would fail without financial backing from its co-owned station, the Commission would grant waiver. Second Report and Order, \textit{supra} note 2, at 1085. This may have met the concern for the viability of the newspapers, although the burden of showing the need for waiver was left with the newspaper publisher.
\end{itemize}
fathering were permitted for this reason, it would be in deference to private economic interests although in consideration of the overall public interest.\textsuperscript{142}

In addition to private financial concern, a financially stable station is less subject to pressure from advertisers and others to alter information\textsuperscript{143} and more able to adequately represent the minor as well as the dominant forces in a community.\textsuperscript{144} Economic stability also better enables existing owners to contribute to the development of new and varied media sources, such as UHF.\textsuperscript{145}

\textbf{D. Summary}

Because the Commission has acquired the appropriate power from Congress and has developed significant expertise over the years in assessing policies relevant to broadcast media, its decisions should be given great deference. As the D.C. Circuit said in \textit{WHDH}, "Avoiding concentration of control in communication is such an important objective that the Commission must be accorded discretion in choice of measures for its fulfillment."\textsuperscript{146} Thus, the reviewing court must leave the "FCC to consider diversification of control in connection with all other relevant factors and to attach such significance to it as its judgment dictates."\textsuperscript{147}

The D.C. Circuit did not defer to the FCC’s judgment.\textsuperscript{148} The
Supreme Court, however, found sufficient rational support for the FCC's conclusions to uphold the Commission's determination that the public interest is best served by preserving existing newspaper-broadcast combinations except in the "egregious" cases of one-newspaper, one-broadcast communities. The FCC gave extensive consideration to a variety of public interest factors relative to diversity of ownership, including the absence of facts showing abuse from newspaper-broadcast cross-ownership, the trend toward decreased cross-ownership, the impact of diversity of ownership on message pluralism, the benefits of local ownership and management, and the potential disruption to private interests and public service. In view of the fact that diversity of ownership has never been considered the overriding element in determining the public interest, the Commission rationally concluded that it should not be given "controlling weight."

IV. IMPLICATIONS OF THE RULE PROHIBITING CO-LOCATED CROSS-OWNERSHIP

A. Benefits of the Rule

The FCC rule as approved by the Supreme Court restores certainty to a troubled area of broadcast regulation. Media owners had often complained of the inability to predict the impact of the diversification-of-ownership factor in licensing proceedings. The rule, however, now clearly identifies those owners to be divested. To preserve this certainty, diversity should not be considered a controlling factor in denying license renewal. The Supreme Court wisely recognized, and thereby assured those owners not divested under the rule, that "diversification of ownership will be a relevant but somewhat secondary factor" in renewal proceedings.

Furthermore, because diversity will be controlled by rule, those owners to be divested should not suffer substantial eco-

149. 98 S. Ct. at 2121-22.
150. Second Report and Order, supra note 2, at 1069.
151. See 1977 Broadcast Renewal Policies, supra note 64, at 19380.
152. Both the Commission and the D.C. Circuit prefer rulemaking. See, e.g., Stone v. FCC, 466 F.2d 316, 331 (D.C. Cir. 1972); Hale v. FCC, 425 F.2d 556, 560 (D.C. Cir. 1970). The FCC's position is further apparent from its recent recommendation that comparative license hearings to select between two or more applicants be abolished. 1977 Broadcast Renewal Policies, supra note 64, at 19383. Moreover, had Congress been successful in its attempts to enact legislation precluding a comparative hearing if an incumbent could show substantial performance, see notes 58, 63 supra, it would have effectively barred diversification from being considered in an adjudicatory procedure.
nomic loss from divestiture. Under the rule divested owners can sell their licenses to the highest bidder, subject to routine approval by the Commission. Had diversity been made a determinative factor in a license proceeding denying renewal, however, deposed licensees could not have sold their licenses. Their license equity would have been entirely lost, not as a result of a failure to achieve a certain standard of broadcast quality, but because the Commission decided they controlled too much media in the same community.

A rule, regardless of whether it requires limited or across-the-board divestiture, also avoids the extensive time and delay inherent in ad hoc consideration of diversity. Some adjudication, however, may still be necessary if parties marshal sufficient evidence to merit waiver of the general ownership restriction since the FCC appears unwilling to grant waiver without a hearing.

B. Allocation of the Burden of Proof

Because available data pertinent to the decision in NCCB was inconclusive, the allocation of the “burden of proof [should] generally determine the outcome in the tug-of-war between the media and the ‘public interest.’” The FCC’s ruling, sustained by the Supreme Court, places the burden of proof on those desiring cross-ownership only if certain policy considerations indicate that extraordinary emphasis can be given diversity.

For example, the Commission rationally concluded that diversified ownership is more desirable when it can be achieved without disruption. Even though the benefits of diversity are speculative, prohibiting the future acquisition or transfer of newspaper-broadcast combinations in the same community is appropriate because it presents no risk of disruption harmful to local ownership or existing broadcast service. In light of these other policy considerations, those desiring to acquire newspaper-

154. Second Report and Order, supra note 2, at 1085.
155. See Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971).
156. The waiver criteria are broad enough that media interests may often successfully challenge the general rule. Mills, supra note 143, at 1248-49.
159. Amendment of Sections 73.34, 73.240 and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 53 F.C.C.2d 589, 592 (1975).
broadcast combinations in the future must shoulder the burden of showing that a potential newspaper-broadcast combination should be exempt from the prohibition of cross-ownership.

Similarly, diversity is a more compelling consideration in serious cases of media monopolization. In situations where one party owns the only broadcast station and the only daily newspaper in a community, that party must demonstrate how the monopoly serves the overall public interest. Divestiture can only be avoided through temporary or permanent waiver if the party can show that (1) the station or newspaper cannot be sold for its estimated value, (2) divestiture of one of the two facilities would force the other out of business, or (3) the public interest is better served by allowing the combination's continued existence.  

In situations where the concentration of ownership is not as significant and there exists no evidence of abuse arising from newspaper-broadcast cross-ownership, the presumption would be in the media owners' favor, requiring the government to show harm to the public interest in order to force divestiture. Although the FCC has the right to regulate media ownership, a policy favoring freedom from government intervention should control where sufficient intermedia competition exists and no abuses are found. This is consistent with past FCC multiple ownership rules ordering divestiture, which have grandfathered existing media combinations in the absence of abuse or potentially harmful media concentration, leaving the government with the burden of showing that a particular media concentration harms the public interest and should be broken up.

V. **Recommendations for Future Regulation**

The FCC's ruling is rational and was appropriately upheld by the Supreme Court. The remainder of this Comment, however, will recommend possible future modifications of the ruling based

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160. Second Report and Order, supra note 2, at 1085. The court of appeals commented favorably upon the Commission's waiver rules. 555 F.2d at 966 & n.112.

161. In W. BAER, supra note 79, perhaps the most comprehensive and unbiased of the studies, it is noted that across-the-board regulatory prohibitions generally require substantial case evidence or enough samples with matched controls to determine that the conduct to be prohibited is representative of the entire set of parties to be regulated. Here, the "body of case evidence has not shown that group or cross-media owners influence their media outlets or otherwise behave differently from other media owners." Id. at 143. Another study concluded that only a limited divestiture order is appropriate. OPTIONS FOR FEDERAL ACTION, supra note 158, at 39-42. Contra, Leuchter, supra note 83, at 370.

162. Mills, supra note 143, at 1240-41.

163. See notes 6, 65-71 and accompanying text supra.
upon a finer balance between diversity of ownership and other public interest factors. In addition, alternative means will be suggested for promoting diversity of ideas without divestiture.

A. Modifications to the FCC's Divestiture Rule

Although the Commission was correct in limiting divestiture to the most egregious cases, more consideration should be given to the method of determining which combinations should be divested. A study made after the FCC ruling showed that location of the station studio had a greater impact on coverage of local issues than broadcast contours or wave reach. In light of the Supreme Court's recognition that local control and programming are factors of some significance, the Commission should consider the study's recommendation that newspaper-broadcast cross-ownership be eliminated on the basis of broadcast studio location rather than wave reach.

Because UHF-TV and radio stations are generally weaker in influence than both VHF-TV and newspapers, they are less likely to dominate a community's media market and should thus be less subject to divestiture. This argument applies particularly to radio because research indicates that the public looks to television and newspapers for its news and information on public affairs, while "[o]ther broadcast services and other printed publications are substantially less significant in this respect." Thus a radio or UHF station subject to divestiture under the FCC rule should be allowed a waiver under relaxed standards since such broadcast services do not have a significant impact on the applicable media market.

B. Alternative Means of Promoting Diversity of Ideas

1. Petitions to deny without a Sherman Act violation

The Commission appropriately grandfathered most

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164. See 98 S. Ct. at 2119.
165. W. GORMLEY, supra note 11, at 232-41. Thirty-nine combinations would be unaffected if newspaper-television cross-ownerships were divested in cities served by only one or two local stations. Id. at 240.
166. Second Report and Order, supra note 2, at 1063.
167. First Report and Order, supra note 6, at 344. The Roper study showed that 59% of the people surveyed depend on television, with newspapers a close second, and other media far behind. Id.
168. See OPTIONS FOR FEDERAL ACTION, supra note 158, at 38 n.1. In its order the FCC granted two waivers without a specific request. Second Report and Order, supra note 2, at 1085. The Commission's discussion indicates an inclination to grant waiver if a radio or UHF station is involved. See id.
newspaper-broadcast combinations, but may have erred in its refusal to consider petitions to deny these combinations a license renewal except upon a showing of possible Sherman Act violations.169 This leaves too onerous a burden for the Commission itself and for other parties desiring to obtain a broadcast license. Although divestiture should be limited in the absence of misuse by cross-owned media, the Commission and outside parties should be able to expose unduly restrictive news and programming policies in an adjudicatory hearing even though they do not constitute a violation of the Sherman Act.170 The FCC has required monopolies to divest "where the circumstances present a spectre of specific abuse . . . or the great likelihood thereof,"171 and should continue this policy by requiring hearings on petitions to deny licensing that present substantial evidence of abuse, even though an antitrust violation does not exist. Because antitrust actions are lengthy and only marginally effective in combating harmful concentration, such a rule could accelerate elimination of media misuse. If more than a mere allegation of monopolistic misuse is shown, the cross-owner should be subject to the burden imposed by an adjudicatory hearing on the matter.

2. Rules requiring operational separation

In establishing media ownership policy, the ultimate goal is a marketplace containing a substantial number of differing ideas. A broad selection of ideas would more assuredly exist through rules requiring the operational separation of commonly owned newspaper-broadcast combinations, rather than through divestiture rules that only indirectly affect message pluralism and at the same time reduce local ownership and interrupt public service. Although the Commission commended conscientious joint owners for their efforts to assure operational separation, it did not require grandfathered combinations to be operationally separate.172 One

169. Section 2 of the Sherman Act prohibits "monopolization" if a "censurable act" created or maintained the monopoly. It would be difficult to argue that the filing of an original license or a license renewal constitutes a censurable act, especially when the license or renewal has been granted by a government agency. S. Barnett, Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R. Markle Foundation, A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation 4 (Sept. 23, 1974).

170. Second Report and Order, supra note 2, at 1110 (Hooks, Commissioner, concurring in part, dissenting in part).


172. Second Report and Order, supra note 2, at 1089. However, Commissioners Quello and Hooks urge the policy's adoption. Id. at 1112 (concurring statements).
party urged the FCC to adopt a rule mandating that commonly owned newspapers and broadcast stations maintain separate advertising sales staffs, separate editorial and reportorial personnel, and fair program listings for all television stations, while avoiding combination rates and discriminatory advertising rates for advertisers who use competitive media. Such a rule should be promulgated by either the FCC or Congress with the additional stipulation that news staffs conduct entirely independent research and make no special arrangements to share completed stories.

Allegations that a broadcast licensee is violating these rules may best be made in petitions to deny license grants or renewals. The Commission should be able to challenge a cross-owner's license at any time if substantial evidence exists showing practices that may be violative of these proposed standards. This policy could negate any adverse consequences of cross-ownership and forestall government intervention through across-the-board divestiture without being construed as a restriction on speech or content. Furthermore, the rules would not create the unnecessary disruption, reduced local ownership, and economic dislocation that would likely result if strict divestiture were mandated. Licensees could anticipate the bases for potential challenges to license renewal, and would naturally strive to meet well-defined minimum standards. Should cross-owners violate these rules, they could then be expected to shoulder the burden of defending against a petition to deny licensing.

3. Other means

Diversity of ideas can be encouraged without denigration of other public interest concerns through various means not already discussed. FCC regulations are appropriate when needed to prevent harm to a substantial public or governmental interest, but the restriction should be no greater than required to protect that

173. Id. at 1112 (quoting proposal of Marcus Cohn embodied in letter from Marcus Cohn to the Broadcast Bureau (July 26, 1974)).

174. The Commission is presently considering regulations treating combination rates and joint sales practice. Second Report and Order, supra note 2, at 1089 n.49.

175. Cf. note 106 supra (news story overlap among cross-owned facilities in part caused by sharing of employees and news stories).

176. The rules would only assure a certain method of conduct without restricting content in violation of the first amendment.

177. See Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n.35 (D. C. Cir. 1971).
interest.\textsuperscript{178} Congress could further subsidize development of UHF and cable television systems\textsuperscript{179} or institute rules encouraging technological advances in other ways.\textsuperscript{180} Broadcasters, as public trustees, could be required to lease air time, just as cable television operators must provide an "access" channel.\textsuperscript{181} Increased enforcement of the fairness doctrine and equal time provisions could promote diversity of ideas without requiring the separation of co-located newspaper-broadcast combinations.

VI. CONCLUSION

Congress created the FCC to regulate broadcast media in order to promote the best practicable service to the community with due regard to media owners' first amendment rights. The courts, consequently, may not intervene unless the administrative decision is arbitrary. In elaborating on the Supreme Court's decision in \textit{NCCB}, this Comment shows that the FCC and the courts have never accorded diversity of ownership controlling weight in broadcast licensing procedures, and media ownership rules have only required divestiture upon a showing of monopolistic abuse or serious concentration of ownership. Furthermore, because the broadcast spectrum can be expanded through technology and since the total number of newspaper-broadcast combinations is naturally decreasing, total divestiture seems a harsh remedy, especially if divestiture is only marginally effective in promoting the ultimate goal, diversity of ideas. Rules promoting diversity of control through divestiture should also be limited in consideration of their potential adverse effects on local ownership, continuity and stability of public service, and private economic viability. In consideration of these policies and the precedent against granting diversity controlling weight, the Commission's limited divestiture order was rationally supported, and hence correctly sustained by the Supreme Court. The best regulatory approach to common ownership of newspaper and broadcast media in the same community is a rule that requires separation

\textsuperscript{178} Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (1977).

\textsuperscript{179} Options for Federal Actions, \textit{supra} note 158, at 30 n.1. The "creation of additional types and methods of broadcasting is our best hope for more representative programming—publicly supported broadcasting, community antenna (CATV), and perhaps subscription TV." Jaffe, WHDH: \textit{The FCC and Broadcasting License Renewals}, 82 HAW. L. REV. 1693, 1700 (1969).

\textsuperscript{180} Cf. United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Burger, C. J., concurring) (arguing that the advent of cable television calls for a congressional reexamination of the Communications Act).

\textsuperscript{181} Options for Federal Action, \textit{supra} note 158, at 30 & n.1.
of only those combinations that represent serious local monopolies or clearly misuse their media concentration posture. Because of divestiture's detrimental impact, operational separation, technological advances, and other alternatives should be encouraged as more direct means of promulgating a marketplace of diverse ideas.

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