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THE CONSTITUTIONAL CONSIDERATIONS OF MULTIPLE MEDIA OWNERSHIP REGULATION BY THE FEDERAL COMMUNICATIONS COMMISSION*

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I. INTRODUCTION

Historically the licensing of press ownership has been a sensitive issue¹ and the ownership of broadcast stations by newspapers has been an especially volatile one in recent years. Although restrictions on the freedom of the press are often viewed with hostility by the American public, the duties imposed upon the Federal Communications Commission require it to implement some restrictions on that freedom. This year the Commission issued a new rule changing

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1. The licensing of press ownership has long been a troublesome issue in England. Indeed, John Milton, in a famous essay, denounced parliamentary abuses and overrestrictiveness in licensing procedures. J. MILTON, *AREOPAGITICA* (1644).

licensing procedures regarding cross-ownership of broadcast stations by newspapers.²

The early history of the broadcast industry in this country and its unique nature have provided the justification for licensing regulation. In summarizing broadcasting's unique nature, Professor Glen O. Robinson has characterized the broadcast industry as a highly influential media utilizing publicly owned airwaves to which access is technologically limited.³ Because there are a limited number of available channels and because it is in the public interest that they be put to their fullest and most effective use,⁴ the control of a broadcast channel is considered a "privilege" held in trust for the public.⁵ These considerations are the basis for the Commission's power to impose regulations on the broadcast industry which no government agency could impose on the print media.⁶

2. Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975) (Second Report and Order) [hereinafter cited as Multiple Ownership].

3. See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 151 (1967) [hereinafter cited as Robinson].

Four arguments have traditionally been presented to describe the perceived unique nature of the broadcast industry: First, unlike other communications media, the means of broadcast communications are publicly owned. They are part of the "public domain" administered in trust for the public by the Commission. Second, the use of the airwaves is a privilege, not a vested right. The broadcasters receive their privilege only so long as they serve the public interest. Third, electronic media are uniquely influential. The public impact of electronic media, especially television, is so great as to warrant special attention. Finally, there are a finite number of channels, thereby limiting access to the airwaves. *Id.*

4. FCC, REPORT ON CHAIN BROADCASTING (1941):

With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.

Id. at 81.

5. See Robinson, *supra* note 3, at 151.

6. The principle that the federal government may not interfere with the content of printed media has been limited only in cases of pornography, sedition, and libel. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) (libel); *Roth v. United States*, 354 U.S. 476 (1957) (pornography); *Schenk v. United States*, 249 U.S. 47 (1919) (sedition). Traditionally, government interference with the press has been considered inconsistent with first amendment policy. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This concept was recently reaffirmed in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Supreme Court held that a Florida statute, FLA. STAT. ANN. § 104.38 (Supp. 1974), which required newspapers attacking the personal character of a political candidate or

In spite of the justifications for some limited regulation of the broadcast media, the actions taken by the Commission have continually evoked controversy.⁷ In recent years a particularly disputed issue has been ownership of broadcast stations by newspapers. The controversy generated by this issue resulted in the Commission's opening of Docket 18110 in 1968 with the intent of using the docket as a vehicle for the establishment of clearer standards and procedures for reviewing multiple ownership. During this proceeding, the Commission received various opinions through written comments and hearings. It used the information in an attempt to develop a coherent policy consistent with the first amendment principles regarding freedom of the press. The docket culminated in the issuance of the Commission's order on January 31, 1975.

In order to understand the issues raised by Docket 18110 it is first necessary to understand the often competing first amendment principles with which the Commission must deal, the early history of the broadcasting industry, and the Commission's prior attempts to deal with the problems of cross-ownership. After discussing these areas, this article will go on to analyze the various positions taken by contributors to Docket 18110 and to critique the position ultimately taken by the Commission in its order of January 31.

A. Principles of Restraint

Congress created the Federal Communications Commission when it passed the Communications Act of 1934.⁸ This Act imposed a duty on the Commission to protect the public interest by providing for the rapid and efficient utilization of wire and radio communications nationally and around the world.⁹ This public interest standard

nominee to afford an equivalent amount of free space to that candidate for reply, was unconstitutional. In his concurring opinion, Justice White said, "Liberty of the press is in peril as soon as the government tries to compel what is going into a newspaper." 418 U.S. 241, 261 (1974) (White, J., concurring). See also 2 Z. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947).

7. For examples of how cross-membership has evoked litigation in the past see notes 55—68 & accompanying text *infra*. The controversy surrounding cross-ownership policies was largely responsible for the opening of Docket 18110 in 1968. See notes 89—90 & accompanying text *infra*.

8. 47 U.S.C. §§ 151—609 (1970).

9. Virtually all the Commission's determinations are explicitly directed to be in the public interest. See, e.g., *id.* §§ 201(a) (orders common carriers to furnish service), 309(a) (considerations in evaluating license applications), 319(c) (license issuance). Similarly, the courts have consistently viewed the Commission's man-

contemplated fostering first amendment policies, a task which puts the Commission in the position of having to balance two often competing goals of the first amendment. The first of these two goals is that the government should exercise restraint in imposing any restrictions on freedom of the press.¹⁰ It is well settled that the first amendment provides substantial protection for the broadcast media from governmental interference.¹¹ This protection springs from the proposition that any governmental interference with the broadcasting industry constitutes a restraint on free speech and freedom of the press, and "any attempt to restrict those liberties must be justified by clear public interest"¹² In spite of its recognition that the broadcast media was so protected, Congress determined that some limited form of government supervision was required. This determination resulted in the enactment of the Radio Act of 1927¹³ and the Communications Act of 1934.¹⁴ That these provisions for regulation of the broadcast media were justified by clear public interest is obvious from a cursory glance at the early history of the

date as one of protecting the public interest. See, e.g., *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942).

10. See, e.g., *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954) ("Broadcasting and television are entitled to the protection of the First Amendment") 110 F. Supp. at 389. Cf. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (motion pictures protected by first amendment in same manner as radio and newspapers).

11. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943). Since it is clear that the first amendment protects the broadcast media, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), the government generally may not censor or limit the content of editorial broadcasts and news reports. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969). However, some government control of broadcast content exists, specifically in the application of the equal time and fairness rules. 47 U.S.C. § 315 (1964). These regulations ensure equal treatment of all candidates for a particular elective office. In theory, anyone who desires to disseminate an idea in print can do so. However, this is not true in the electronic media. With a finite amount of "air time" and a limited number of broadcast frequencies, access to the broadcast media is tightly controlled. In order to promote first amendment idea diversity, the Commission has promulgated its regulations concerning equal time and fairness. *Columbia Broadcasting Co. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-14. See, e.g., *Fairness Doctrine*, 2 P & F RADIO REG. 2d 1901, 1904 (1964); Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961). While this is not content control per se, the equal time and fairness rules suggest an exception to the limitations on governmental interference.

12. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

13. Act of Feb. 23, 1927, ch. 169, §§ 1-3, 44 Stat. 1162 (repealed 1934).

14. 47 U.S.C. §§ 151-609 (1970).

radio industry in this country.

Prior to the Radio Act of 1927, new radio stations were free to operate on any frequency without regard to existing stations or the public interest.¹⁵ Often several stations operated on a single broadcast frequency, thereby causing the airwaves to become so cluttered with various signals that no information reached the public. This chaotic situation necessitated the coordination and optimum utilization of available frequencies and facilities, and, when it enacted the Radio Act of 1927, "Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential."¹⁶ As the communications media developed, however, it became apparent that it would be necessary for the Commission to protect and promote a second goal of the first amendment. This second goal of freedom of the press is that the press should present diverse viewpoints.¹⁷

B. Principles of Diversity

It was recognized by Thomas Jefferson that a free society needed not only freedom of the press¹⁸ but a press that presented varied viewpoints.¹⁹ Jefferson believed that a democratic electorate must be well informed in order to make intelligent and rational decisions. The first amendment embodies the theory that the best vehicle for the edification of the people is a free press through which diverse views emanate.²⁰

In his famous analysis of American government, Alexis de Tocqueville drew a sharp distinction between the effect of America's free press and that of France's government-controlled press. He stated, "Freedom of the press is the guarantee of liberty; the sovereignty of the people presumes every citizen has powers of discrimination between various opinions and drawing inferences there-

15. See J. HERRING & G. CERROSS, *TELECOMMUNICATIONS, ECONOMICS AND REGULATION* 239-86 (1936) (history of federal regulations of radio communication). See also L. WHITE, *THE AMERICAN RADIO* 126-54 (1947).

16. *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

17. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

18. Letters from Thomas Jefferson to James Madison, Dec. 20, 1787, July 31, 1788, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 436, 450 (A. Koch & W. Peden eds. 1944) [hereinafter cited as Koch].

19. Letter from Thomas Jefferson to Charles Dufief, April 19, 1814, in KOCH, *supra* note 18, at 635.

20. For evidence that this view persists to this day see note 37 *infra*.

from."²¹ De Tocqueville recognized that the essential aspect of a free press which makes democracy work is the dissemination of a variety of opinions and ideas.²² Justice Holmes reiterated this concept in *Abrams v. United States*:²³

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.²⁴

From this it is clear that concomitant with freedom from governmental interference, people of different views must be assured access to the press. Without this assurance, the press can be dominated by a few, thereby weakening democracy and promoting oligarchy. Judge Learned Hand articulated the need for wide access to the press in *United States v. Associated Press*²⁵ wherein he argued that "the dissemination of news from as many different sources, and with as many different facets and colors as is possible" is "one of the most vital of all of our general interests."²⁶ He went on to state:

That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.²⁷

In this case, Learned Hand was faced not with governmental suppression of news, but with a large private concern arbitrarily using its power to restrict the flow of news to the public.²⁸

Early statesmen and scholars, like Jefferson and de Tocqueville, recognized the possibility of governmental suppression of diverse views, but they probably did not contemplate the advent of the

21. A. DE TOCQUEVILLE, *AMERICAN INSTITUTIONS AND THEIR INFLUENCE* 181—82 (1851).

22. *Id.*

23. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (distribution of seditious pamphlets during war with Germany not protected by the first amendment).

24. *Id.* at 630.

25. 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) (cooperative news association bylaws restricting the distribution of news reports violative of Sherman Antitrust Act).

26. *Id.* at 372.

27. *Id.*

28. *Id.* at 368—70.

electronic media or undue private control of the media. When Jefferson and de Tocqueville lived, access to printing facilities was widespread and inexpensive. Today, acquiring and starting a broadcast facility is a multi-million dollar undertaking. Technological complexities also limit entry into the electronic media market. The Federal Communications Commission was thrust into this industry while it was in its infancy and has had the difficult task of balancing the two first amendment goals as it has monitored and regulated the industry through its maturation. A primary means of fulfilling its statutory duties has been through the use of its licensing power.

II. COMMISSION LICENSING POLICIES REGARDING DIVERSITY PRIOR TO RULING IN DOCKET NO. 18110

When Congress created the Federal Communications Commission in 1934 to regulate "interstate and foreign commerce in communication by wire and radio,"²⁹ it delegated broad and general powers to the Commission without providing more guidance than that the Commission act in the "public convenience, interest, or necessity."³⁰ These broad powers were granted in order to provide the Commission with the flexibility necessary to cope with the complex and evolving field of telecommunications and broadcasting.³¹

A. *The Issuance of New Licenses*

Almost from its inception, the broadcasting industry has moved

29. Communications Act of 1934, 47 U.S.C. § 151 (1970).

30. *Id.* § 303. See also *id.* §§ 201(a), 309(a). Amendments to the Act continued to emphasize that the Commission's determinations were to be guided only by the "public interest" standard. See, e.g., 47 U.S.C. §§ 319(c), 360(b) (1970). The courts have consistently viewed the mandate of the Commission as one of protecting the public interest. See, e.g., *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942); *WOKO, Inc. v. FCC*, 109 F.2d 665, 667 (D.C. Cir. 1939).

31. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968) (Commission has authority under the Communications Act to regulate newly-developed community antenna television systems); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) ("Congress was acting in a field of regulation which was both new and dynamic. . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers"); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting"); *American Broadcasting Co. v. FCC*, 191 F.2d 492, 498 (D.C. Cir. 1951) ("The purpose of Congress in establishing the Commission was to set up an expert agency capable of coping with the ever-changing and constantly-increasing problems of a booming industry").

toward concentrated ownership.³² When television entered the broadcasting field, newspaper owners had the expertise, the resources, and the economic interest to establish stations and therefore were among the first to receive licenses.³³ Recognizing the potential for consolidation of the media industry,³⁴ the Commission passed rules regulating the issuance of licenses where multiple ownership was involved.³⁵ Although broadcasters are subject to antitrust litigation,³⁶ the multiple ownership rules did not contemplate an

32. See FCC REPORT ON CHAIN BROADCASTING 5 (1941). Less than three years after the first broadcasting station was established, the first broadcast network was formed. *Id.*

33. 32 CONG. Q. 660—61 (Mar. 16, 1974).

34. *Id.* at 661.

35. Multiple ownership may be defined as ownership of more than one broadcast facility—standard broadcast stations, frequency modulated (FM) stations, VHF or UHF television stations—by the same individual or company. See, e.g., 47 C.F.R. § 73.35(a) (1974).

The Commission's regulations do not focus rigidly on the issue of ownership. Rather, they concentrate on ownership, operation, or control, direct or indirect. For example, Notes 1 and 2 to § 73.35 treat ownership of voting stock as a factor to be considered, but define "control" as "not limited to majority stock ownership, but includ[ing] actual working control in whatever manner exercised."

The Supreme Court upheld this exercise of the Commission's powers in *United States v. Storer Broadcasting Corp.*, 351 U.S. 192 (1956):

This Commission, like other agencies, deals with the public interest. . . . Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret [the Act] as barring rules that declare or present intent to limit the number of stations consistent with a permissible "concentration of control."

. . . We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole.

Id. at 203—04 (citation omitted).

36. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court recognized that the commercial control and selective distribution of news reports by a major cooperative news service violated the Sherman Anti-Trust Act. The basis of the Court's holding was that the Associated Press was ultimately depriving the public of information from diverse sources by excluding certain newspapers from receiving its news service reports. Writing for the majority, Justice Black stated that the first amendment rested

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 nongovernmental combinations a refuge if they impose restraints upon that

antitrust analysis; antitrust actions are solely within the purview of the Justice Department.³⁷ The Commission, however, has focused on the license applicant's market control, in terms of amorphous public interest policies, in establishing specific multiple ownership rules.³⁸

The first half of the multiple ownership rules is designated the "7-7-7 Rule."³⁹ This rule prohibits ownership of more than seven AM,⁴⁰ seven FM,⁴¹ or seven television stations⁴² as a per se "concentration

constitutionally guaranteed freedom.

Id. at 20.

From this it is clear that implicit in the policy behind the first amendment is the desire not merely for numerous voices, but for numerous voices espousing diverse and even antagonistic ideas.

37. The Communications Act did not confer power on the Commission to resolve antitrust questions. See *United States v. Radio Corp. of America*, 358 U.S. 334 (1959):

Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that the Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.

Id. at 346.

38. While the Commission cannot enforce the antitrust laws, see *United States v. Radio Corp. of America*, 358 U.S. 334, 339—46 (1959) (legislative history of Communications Act and authority of Commission reviewed), its administrative regulations have reflected economic policy considerations, see Robinson, *supra* note 3, at 73. The courts have acknowledged that the potentially adverse effects of concentrated media ownership are within the scope of Commission authority. For example, the Supreme Court in *National Broadcasting Corp. v. United States*, 319 U.S. 190 (1943), upheld the Commission's chain broadcasting regulations, 47 C.F.R. §§ 73.131—138 (AM) (1967). Chain broadcasting refers to the simultaneous broadcasting of an identical program by two or more connected stations. The purpose of these regulations was to restrict exclusive dealing practices between networks and their affiliate stations and to prevent undue concentration of control by networks over local or regional stations. The regulations in effect restrained economic competition. Similarly, the Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), upheld the Commission's rules concerning multiple ownership. 47 C.F.R. §§ 73.35 (AM), 73.240 (FM), 73.636 (TV) (1967). These regulations placed a maximum limit on common ownership of, interest in, or control over, radio and television stations.

Cases such as these have left little doubt that economic concentration and ownership diversity may be considered in Commission licensing. The rationale behind the first amendment and the unique role of broadcasting make it clear that these factors should be considered.

39. 47 C.F.R. §§ 73.35(b), 73.240(a)(2), 73.636(a)(2) (1974).

40. *Id.* § 73.35(b).

41. *Id.* § 73.240(a)(2).

of control contrary to the public interest."⁴³ If a party owns fewer than seven of any one type of station and seeks an additional license, the Commission still may deny the license "if the grant of such license would result in a concentration of control inconsistent with public interest, convenience, or necessity."⁴⁴

The second half of the multiple ownership rules is known as the "duopoly rules."⁴⁵ These rules prohibit the granting or renewing of a license to any party that directly or indirectly owns, operates, or controls one or more of the same type of broadcast station or a television station in the same area.⁴⁶ The "same area" is defined by the Commission as an overlap of ground wave contours.⁴⁷ This prohibition of airwave overlap results in an orderly distribution of a finite number of frequencies, and is also intended to avoid a local concentration of ownership inconsistent with "the public interest, convenience, or necessity."

The standard of "public interest, convenience, or necessity" has never been and probably cannot be defined concretely. The Commission, supported by the courts, has applied this flexible standard on an ad hoc basis and thus has evolved the skeletal guidelines of its powers. In an early case, *FCC v. Pottsville Broadcasting Co.*⁴⁸, the Commission denied issuance of a radio license to Pottsville on the basis of inadequate financial standing and insufficient local interest. The Supreme Court, in upholding the Commission's action, dissolved a writ of mandamus issued by the circuit court ordering the Commission to reconsider Pottsville's request for a license.⁴⁹ The Court held that the public interest standard must be sufficiently flexible to allow the Commission to establish rules as the broadcasting field evolves,⁵⁰ and stated that "[i]nterference by the

42. *Id.* § 73.636(a)(2). No more than five television stations may be in the VHF band. *Id.*

43. *Id.* §§ 73.35(b), 73.240(a)(2), 73.636(a)(2).

44. *Id.*

45. *Id.* §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (1974).

46. *Id.*

47. *Id.*

48. 309 U.S. 134 (1940).

49. 98 F. 288 (D.C. Cir. 1938).

50. As the Court put it:

Perhaps the most striking characteristic of this [growth of governmental supervision over economic enterprise] has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the

courts is not conducive to the development of habits of responsibility in administrative agencies."⁵¹

In applying its rules regarding multiple ownership of radio stations, the Commission has enumerated several factors to be considered in determining whether concentration has reached a prohibitive level: the size, extent, and location of areas served; the number of people served; the classes of stations involved; and the extent of other competitive service to the areas in question.⁵² These considerations exemplify the Commission's interpretation⁵³ of its congress-

judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.

309 U.S. at 142—43 (footnote omitted).

51. *Id.* at 146.

After this rebuke, the D.C. Circuit again tried to circumscribe the Commission's powers in *WOKO, Inc. v. FCC*, 153 F.2d 623 (D.C. Cir. 1946). The Commission had refused to renew WOKO's license after learning that the beneficial owners of the station had been concealed from it; the court reversed on the ground that the misrepresentation of ownership did not warrant

the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established and satisfactory radio station and of imposing upon its corporate owner the entire loss of its good will and the serious impairment of the value of its capital assets.

Id. at 633.

Once again the Supreme Court reversed:

We cannot say that the Commission is required as a matter of law to grant a license on a deliberately false application . . . nor can we say that refusal to renew the license is arbitrary and capricious under such circumstances. It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. *But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter.*

FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946) (emphasis added).

52. 47 C.F.R. §§ 73.35(b), 73.240(a)(2), 73.636(a)(2) (1973).

53. See *Newark Broadcasting Corp.*, 11 F.C.C. 1269 (1947). "Congress intended . . . leaving it to the discretion of the Commission to achieve equality on a case-to-case basis as a matter of its sound judgment and in the light of the relevant factors." *Id.* at 1271 (footnote omitted).

sional mandate to "provide a fair, efficient, and equitable distribution of radio service to each of the [several states and communities]."54 This policy is as broad as the public interest standard. However, by enumerating local factors in its regulations, the Commission has attempted to establish boundaries to the broad authority delegated to it by Congress.

Local concentration has been an important consideration, but it has not in itself always been dispositive. In *FCC v. Allentown Broadcasting Corp.*,⁵⁵ the Easton Publishing Company and the Allentown Broadcasting Corporation, two companies located in different cities, had applied for the same frequency. Both companies could not operate on that frequency because "mutually destructive interference" would result, nor would the station receiving the license be able to "render service to the other's community."⁵⁶ The hearing examiner awarded the license to the Allentown Broadcasting Corporation, despite the fact that Allentown already had three stations. The Commission reversed, finding that there was a greater public need for additional television service in a community with only one existing station than in one with three.⁵⁷ The court of appeals reversed and remanded the case to the Commission. One ground for the remand was that the Commission's decision would result in the acquisition of a concentration of control by the Easton Publishing Company.⁵⁸ Although Allentown had three stations, the Easton Publishing Company controlled the local newspaper and was the licensee of the only television station and one of the two FM stations in Easton. The court of appeals held that this concentration of control, as well as other factors, compelled it to find that the record did not contain substantial evidence to support its finding that "the ability of the applicants to serve their communities was about equal."⁵⁹ The Supreme Court reversed the court of appeals,

54. 47 U.S.C. § 307(b) (1970). See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), wherein the Court stated that

the Act does not essay to regulate the business of the licensee. . . . [T]he broadcasting field is open to anyone, provided there be an available frequency . . . if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

Id. at 475.

55. 349 U.S. 358 (1955).

56. *Id.* at 359.

57. *Id.* at 359-60.

58. *Allentown Broadcasting Corp. v. FCC*, 222 F.2d 781, 784 (D.C. Cir. 1954).

59. *Id.*

clearly upholding the Commission's power to give more weight to public need than to concentration of control.⁶⁰

B. *Renewal of Existing Licenses*

In 1969, the broadcast industry was shocked when the local concentration criterion, among others, resulted in the Commission's denying renewal to incumbent licensee WHDH and granting the license to a challenger contrary to the hearing examiner's recommendations.⁶¹ The *WHDH* case represented the first time that a renewal had been denied where the incumbent station's record was "within the bounds of average performance."⁶² Moreover, even in cases of poor performance, only lighter sanctions, such as shorter or conditional license terms, had been imposed in the past.⁶³ In *WHDH* the Commission held a comparative hearing and employed a balancing test pursuant to its *Policy Statement on Comparative Broadcast Hearing*⁶⁴ examining the diversity of the applicant's ownership,

60. Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece. The distribution of a second license to a community in order to secure local competition for originating and broadcasting programs of local interest appears to us to be likewise within the allowable area of discretion.

349 U.S. at 362.

The Commission has delegated the authority to make initial license determinations to an administrative law judge in some instances. These determinations are reviewable by a Review Board. The Commission itself acts as a final appeal board within the administrative process. See 47 C.F.R. §§ 0.201—,204, 0.341—,365 (1974).

61. *WHDH, Inc.* 16 F.C.C.2d 1 (1969), *aff'd sub nom.* *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

62. *Id.* at 10—11. See also *Citizens Communication Center v. FCC*, 447 F.2d 1201, 1207—08 (D.C. Cir. 1971). See generally Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969) [hereinafter cited as Jaffe]. Cf. Goldin, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970) [hereinafter cited as Goldin].

63. See Goldin, *supra* note 62, at 1021—23.

64. 1 F.C.C.2d 393 (1965) [hereinafter cited as *1965 Policy Statement*]. While the *1965 Policy Statement* originally did "not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license," *id.* at 393 n.1, the Commission had begun to apply its standards to renewal proceedings in *Seven (7) League Productions, Inc. (WIII)*, 1 F.C.C.2d 1597 (1965). The *1965 Policy Statement* saw the comparative process as valuable in fulfilling two related objectives:

[F]irst, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society,

the integration of that ownership with the active management, and its ascertainment and fulfillment of community needs.⁶⁵ The Commission thereupon decided to grant the license to Boston Broadcaster, Inc. (BBI) upon finding that BBI's merits outweighed those of WHDH and the other challengers.⁶⁶

In considering these several factors on a comparative basis in *WHDH*, the Commission expressly departed from its previous practice, as stated in *Hearst Radio, Inc. (WBAL)*,⁶⁷ of evaluating only the incumbent licensee's ascertainment and fulfillment record and granting renewal if the record was meritorious.⁶⁸ Such a departure from previous policy aroused fears in licensees that they also would be denied renewal for failing to meet the new amorphous standards of public service. The Commission's reasoning in the *WHDH* case

and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities. Equally basic is a broadcast service which meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share.

1 F.C.C.2d at 394 (footnote omitted).

65. Before reaching this stage, one challenger was disqualified for failing to meet two requirements unrelated to the comparative issues. 16 F.C.C.2d at 6—7.

66. The Commission did not consider the past broadcast record of WHDH in the comparative evaluation. 16 F.C.C.2d at 11. This was not done because the Commission found that the station's performance was "within the bounds of average performance," *id.* at 10, and therefore, as the *1965 Policy Statement* provided, properly excludable. *Id.* at 9. Rather, the Commission rested its decision on the facts that granting the license to either challenger would greatly increase media diversity, *id.* at 12—13; that both challengers had substantially greater integration of ownership with management than did WHDH, *id.* at 13; and finally, that an unauthorized transfer of control by WHDH, while not in itself dispositive, unfavorably entered into the comparative evaluation, *id.* at 17—19.

67. 15 F.C.C. 1149 (1951).

68. Excellent performance as a licensee will be given favorable consideration where we find a reasonable likelihood that such performance will continue. . . . Moreover, in a comparative proceeding of the type before us, we must give serious consideration to the high degree of probability of continuation of existing desirable performance as against paper proposals which, on the basis of the record before us, we are not convinced can be fulfilled.

Id. at 1175.

In comparison, in *WHDH* the Commission stated:

[A] past record within the bounds of average performance will be disregarded, since average future performance is expected Thus, while a renewal applicant must literally run on his record and such record is the best indication of its future performance, that record is meaningful in the comparative context only if it exceeds the bounds of average performance.

16 F.C.C.2d at 9 (footnote omitted).

was loudly criticized by the broadcasting industry as setting forth general policy when the case was built on *ex parte* evidence and a unique factual situation.⁶⁹

The industry applied pressure on the Commission and Congress for a clarification of licensing policy and received an immediate response.⁷⁰ In 1970 the Commission issued a policy statement on comparative hearings involving incumbent renewal applicants which returned to the Commission's previous practice as described in *Hearst*.⁷¹ In it, the Commission pointed out two reasons for favoring incumbents: first, if the licensee had been "substantially attuned to meeting the needs and interests of its area,"⁷² it could point to performance, whereas a challenger presented mere promises; and second, the policy clarified the station's responsibilities—if the licensee showed substantial performance it could expect renewal, thus contributing to predictability and stability in the industry which was also in the public interest.⁷³ The Commission defined

69. See Goldin, *supra* note 62, at 1015—17 n.12, suggesting that *WHDH* was not a drastic departure from past Commission practices but rather a case which involved special circumstances. Among these special circumstances were the previous misbehavior of *WHDH*'s chief executive officer and an unauthorized transfer of control. *Id.*

70. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970) [hereinafter cited as *1970 Policy Statement*]; S. 2004, 91st Cong., 1st Sess. (1969).

71. See *1970 Policy Statement*, *supra* note 70.

72. *Id.* at 425.

73. The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service. Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. The broadcast field thus must have stability, not only for those who engage in it but, even more important, from the standpoint of service to the public.

We believe that these two considerations call for the following policy—namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been

“substantial” rather ambiguously as solid or strong ascertainment and fulfillment of the community’s needs throughout the license period.⁷⁴ The Commission also found this policy fair to challengers since it allowed them to judge their chances for successful challenges more realistically.⁷⁵

The 1970 *Policy Statement*, however, did not withstand court challenge. The challenging applicants in *Citizens Communications Center v. FCC*⁷⁶ contended that the Commission exceeded its authority by depriving them of a full hearing on their application in violation of section 309(e) of the Communications Act of 1934.⁷⁷ Noting that the 1965 *Policy Statement* did not expressly apply to renewal hearings, the court nevertheless cited with approval the application of the various *WHDH* factors in the renewal hearing.⁷⁸ The court then held the 1970 *Policy Statement* to be an obvious

characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.

This is not new policy. It was largely formulated in the leading decision in this field, *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951), where the Commission, in favoring the existing licensee, stated that where a choice must be made between an existing licensee and a newcomer, a grant will normally be made to the existing station if its operation has been meritorious, and that a good record may outweigh preferences to a newcomer on such factors as local residence and integration of ownership and management. The *WBAL* policy was followed in *In re Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963), and cited with approval in recent actions

Id. (footnote & citation omitted).

74. *Id.* at 425 n.1, 426.

75. As the Commission interpreted the Statement:

The policy says to all interested persons, “The act seeks to promote not just minimal service but solid, substantial service; if at renewal time, a group of you believe that an applicant has not rendered such service, you may file a competing application”

The policy is thus fair to the broadcaster and to the new contestant, and above all it serves the listening and viewing public.

Id. at 428—29.

76. 447 F.2d 1201 (D.C. Cir. 1971).

77. *Id.* at 1210—15, discussing *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945) (where two or more applications for permits or licenses are mutually exclusive, one full comparative hearing must be conducted).

78. 447 F.2d 1212—13.

contravention of the Communications Act in that it created a summary procedure which would deny the applicant a full hearing.⁷⁹

In spite of *WHDH* and the court's holding in *Citizens Communication Center v. FCC*, it is clear that to a great extent Commission policy has favored incumbent license holders in renewal proceedings.⁸⁰ Moreover, an amendment to the Communications Act, section 310(b),⁸¹ precludes the Commission from holding comparative hearings on whether the public interest, convenience, and necessity will be served when a license holder transfers, assigns, or in any way disposes of the license to another party. This provision effectively permits a license to be sold with routine approval; the license subsequently will be renewed routinely with almost no evaluation of performance.⁸² Since 1960, only 21 challenges have been made⁸³ to the over 900 television station licenses now held.⁸⁴ Of these, one challenge and one renewal were granted, four challenges were dismissed, and fifteen challenges are still pending.⁸⁵ The dispositions of these challenges indicate why license holders are rarely disenfranchised—the expense of a challenge is high⁸⁶ and the probability of the challenge being successful is low.

C. *The Need for Balancing*

The historical tendency of the Commission to protect incumbent license holders contrasts with its recognition of the problems inherent in cross-ownership exemplified by the multiple ownership rules regarding new licenses, and makes it clear that the Commission

79. *Id.* at 1211–12. “The proposition that the 1970 Policy Statement violates Section 309(e) . . . is so obvious it need not be labored.” *Id.* (footnote omitted).

80. See *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951):

So viewed it is manifest that the Commission can not disregard the record of a licensee . . . [W]e must give serious considerations to the high degree of probability of continuation of existing desirable performance as against paper proposals

Id. at 1175.

See generally Jaffe, *supra* note 62.

81. Act of July 16, 1952, ch. 879, § 8, 66 Stat. 716, amending 47 U.S.C. § 310(b) (1970).

82. See Jaffe, *supra* note 62, at 1694.

83. Data as of March 31, 1973. See *Hearings on H.R. 12993 Before The Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess., pt. 2, at 860 (1974).

84. *Id.*, pt. 1, at 314.

85. *Id.*, pt. 2, at 680.

86. *Id.*, pt. 1, at 163.

must promulgate new rules regulating license renewal which more effectively balance the competing desires for a minimum of governmental interference and for an assurance that diverse views will be represented. The problem with balancing these interests is potential for governmental abuse in any ownership regulation. This is apparent from the Commission's broad mandate to act in the public interest⁸⁷ and the absence of any clear limit on its regulatory power.⁸⁸ The question of whether a proposed exercise of ownership control is beyond constitutional limitations can be resolved only by balancing the desire for diversity of ideas and the desire to avoid either undue governmental interference or a precedent which might lead to it. Commission regulations focus on diversity while attempting to avoid regulation of content, although the fairness doctrine is in effect content regulation. In upholding the constitutionality of the equal time and fairness rules in *Red Lion Broadcasting Co. v. FCC*,⁸⁹ the Supreme Court was more concerned with the need for providing access to persons with diverse views than with any desire to leave the electronic media completely unregulated. Thus, some governmental regulation of conduct and ownership of the electronic media industry is constitutionally permissible. The question of permissibility then becomes one of degree; both first amendment policies must be considered to reach the desired balance. It was in the hope of developing rules regulating the renewal of existing licenses that would be more responsive to these considerations and that would clarify past licensing procedures that the Commission opened Docket 18110.

III. PROPOSALS SUBMITTED FOR DOCKET 18110

In 1968, after years of ambiguity in its license renewal policy, the Commission announced its intent to establish clearer procedures and standards for reviewing multiple ownership.⁹⁰ The proceedings which followed this announcement, Docket 18110, began on March 27, 1968, and terminated on January 28, 1975. Varied and distinct opinions on first amendment principles as well as on economic theory were presented to the Commission in the form of written comments and hearings.⁹¹

87. 47 U.S.C. § 307(b) (1970).

88. See Robinson, *supra* note 3.

89. 395 U.S. 367 (1969).

90. Notice of Proposed Rule Making, 33 Fed. Reg. 5315 (1968).

91. In its Order, the Commission noted the public's response:

While all parties recognized that the twin policies of the first amendment and the antitrust laws required diversity of views in the media, they differed widely on the extent to which such diversity presently existed and the extent to which the government should attempt to promote further diversity.

The National Association of Broadcasters (NAB) and the American Newspaper Publishers Association (ANPA), relying on the first amendment, advocated a policy of restraint.⁹² The Department of Justice, also relying on the first amendment (as well as antitrust considerations), advanced a theory for virtually absolute prohibition of cross-ownership.⁹³ Other parties advanced a policy which would balance the first amendment principles of restraint and diversity, thereby emphasizing the Commission's concept of the public interest as it relates to diversity policy.⁹⁴

At one end of the spectrum, NAB and ANPA predictably argued for a strict interpretation of the first amendment's prohibition of governmental interference with the media.⁹⁵ That the federal government may not interfere with the content of printed media has been long established and strictly upheld, the most recent example being *Miami Herald Publishing Co. v. Tornillo*.⁹⁶ Asserting that tampering with ownership may be tantamount to the tampering with content forbidden by the first amendment,⁹⁷ NAB and ANPA

As could be expected, our proposal generated a great deal of interest and provoked a sizable number of filings. Most were directed to the question of newspaper-broadcast ownership, with most parties opposing rule changes but a number supporting them. Some approached the issues from the point of view of anti-trust economic analysis; others stressed the diversity of viewpoint aspect.

Multiple Ownership, *supra* note 2, 50 F.C.C.2d at 1047—48. Close to 200 parties filed Comments and Reply Comments in response to The Further Notice of Proposed Rule-Making in Docket 18110, 22 F.C.C.2d 339 (1970). See *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1090—92 (App. A.). Several petitions for review have been consolidated in *National Citizens Committee for Broadcasting v. FCC*, Case No. 1064, *petition for review filed*, (D.C. Cir., Jan. 28, 1975), *amended*, Jan. 31, 1975.

92. See notes 91—101 & accompanying text *infra*.

93. See notes 102—15 & accompanying text *infra*.

94. See notes 116—21 & accompanying text *infra*.

95. See, e.g., *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1050, 1071.

96. 418 U.S. 241 (1974) ("a right of reply" statute creating a misdemeanor violation for a newspaper's refusal to afford political candidates equal space to answer criticism and attacks on their record held violative of first amendment's guarantee of a free press). See also note 6, *supra*.

97. "ANPA claims we are attempting to inhibit a newspaper owners' [*sic*]

argued that this first amendment consideration precluded the adoption of a multiple ownership rule which required divestiture of existing cross-owned combinations and which precluded the issuance of a license if cross-ownership would result.⁹⁸

This argument is essentially a first amendment domino theory. Governmental inroads on press freedom occur as a result of extensive regulation; increasing that regulation tends to breed further inroads. Not only is this true as an abstract proposition, runs the argument, but it is particularly true where such an extension is unwarranted. To support the contention that the increasing regulation is unwarranted, the industry argued that the mass media do not have the all-encompassing influence popularly ascribed to them,⁹⁹ and that adequate diversity already exists.¹⁰⁰ In short, even if the extension of governmental regulation did not in fact lead to increased governmental intrusion, such an unwarranted extension could only result in an overall "chill" which could effectively inhibit the media.¹⁰¹

freedom to publish by preventing him from having an interest in broadcast stations." *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1050. The Commission, however, correctly observed that the courts consistently have upheld its power to regulate ownership pursuant to its public interest mandate. *Id.* at 1049—50. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding Commission's authority to promulgate regulations limiting one person to ownership of 5 VHF television stations, 7 AM, and 7 FM radio stations); *Iacopi v. F.C.C.*, 451 F.2d 1142, 1147 (9th Cir. 1971) (deferring to Commission's determination that network divestiture of cable television would increase competition and foster independent sources of television programming); *General Telephone Co. v. United States*, 449 F.2d (5th Cir. 1971) (upholding Commission's rule prohibiting telephone companies from owning cable systems in their service areas).

The opponent's argument was further undercut by the fact that the Commission "grandfathered" all cross-ownership combinations except in a few egregious cases. This was not prohibition of broadcast station ownership by newspapers. *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1050.

98. This contention of ANPA and NAB treated both newspapers and broadcasting as part of the press protected by the first amendment. *Compare id.* at 1050 with *id.* at 1071. See also notes 10, 11 & accompanying text *supra*.

99. See G. LITWIN & W. WROTH, *THE EFFECTS OF COMMON OWNERSHIP ON MEDIA CONTENT AND INFLUENCE* 1-1 (1969). This study was prepared for NAB. See also *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1073—74.

100. See *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1071. The opponents further asserted that there had been a long-term trend of increased diversity. See *id.* at 1060—61.

101. See *id.* at 1071. Moreover, NAB and other parties argued that the proposed rule was of a magnitude unprecedented in the history of any governmental agency,

Cross-ownership, moreover, was actually advanced as a source of diversity on two grounds. Since commonly owned media have larger news staffs, they function more independently and are less reliant on wire services and networks for news than singly owned media.¹⁰² Furthermore, absent cross-ownership, some outlets could be financially unable to sustain operations.¹⁰³ Destruction of cross-ownership thus would be counter-productive to diversity policy.

In response to the Justice Department's antitrust argument, NAB contended that freedom of the press outweighs the dangers of economic concentration, and that mere economic concentration is not necessarily a violation of the antitrust laws.¹⁰⁴ In any event, they argued, the Commission's major responsibility is to implement communications policy rather than economic policy; economic considerations should be secondary.¹⁰⁵

B. *The Economic Position Favoring Diversity*

At the other end of the spectrum, the Justice Department advo-

particularly since it was not based on a violation of the law nor was it promulgated pursuant to an express statutory authorization. *See id.* at 1070.

102. *See* G. LITWIN & W. WROTH, *THE EFFECTS OF COMMON OWNERSHIP ON MEDIA CONTENT AND INFLUENCE* 5-1 (1969). Two related arguments were 1) that professionalism in journalism transcended employee-employer loyalties and resulted in independent staffs; and 2) that the Fairness Doctrine, 47 U.S.C. § 315 (Supp. II. 1972), ensured that stations would not present only one viewpoint. *See Multiple Ownership, supra* note 2, 50 F.C.C.2d at 1059—61. Commissioner Robinson, concurring in part and dissenting in part, observed in response to this second argument that "[i]t is odd, to say the least, to hear from an industry that has often stated its dislike for (and active opposition to) the Fairness Doctrine that we may rely on that doctrine to ensure diversity." *Id.*, 50 F.C.C.2d at 1119 n.13 (Robinson, Comm'r, separate opinion).

103. Other economic hardship arguments were that "needed capital" as well as "fresh talent and creativity" would be driven away by the imposition of another burden on the broadcast industry and that the value of both newspapers and television stations would decline. *See Multiple Ownership, supra* note 2, 50 F.C.C.2d at 1067—68.

104. *See* G. LITWIN & W. WROTH, *THE EFFECTS OF COMMON OWNERSHIP ON MEDIA CONTENT AND INFLUENCE* 6-12, -14 (1969).

105. The Commission, while arguing that the multiple ownership rules rested on the "twin goals of diversity of viewpoints and economic competition," in fact weighed the diversity aspect of communications policy more heavily than the economic competition aspect. *See Multiple Ownership, supra* note 2, 50 F.C.C.2d at 1074, 1079—81. But the Commission's acceptance of the diversity aspect of the first amendment as primary failed to give adequate consideration to the other first amendment requirement—that the press be free from governmental intrusion. *See* notes 116—21 & accompanying text *infra*.

cated divestiture of cross-owned media and prohibition of future cross-ownership licensing. Its reasoning was based largely on the assertion that economic competition would bring about diversity of ideas. The advertising market was utilized as the yardstick for competition.¹⁰⁶ The major premise of the economic position is that television and newspapers are the most important local advertising centers and therefore the most commercially important media.¹⁰⁷ Cross-ownership in this context leads to a monopoly of the local advertising market that results in a monopolization of the dissemination of local news.¹⁰⁸

The economic position, therefore, concluded that there is sufficient interchangeability (cross-elasticity) of demand between newspaper and television advertising to justify divestiture of cross-owned stations. The premise of cross-elasticity of demand for advertising presents the crux of the economic position¹⁰⁹—that the elimination of economic competition between cross-owned newspapers and television stations will ultimately result in a reduction in the competition of ideas. The more highly concentrated this combined advertising market, the more likely it is that there will be a reduction of competition for advertising. The Justice Department further argued that this lessening of competition might also result in higher advertising costs and hence ultimately higher consumer costs.¹¹⁰ Divesti-

106. "Newspaper and television advertising is, truly, the 'lubricant of commerce.'" DEPARTMENT OF JUSTICE, SUPPLEMENTAL COMMENTS ON FCC DOCKET No. 18110, at 4 (May 15, 1974) [hereinafter cited as DOJ COMMENTS].

107. See *id.* at 5.

108. As the Commission noted:

Daily newspapers tend to be much larger enterprises than television stations. Radio stations are significantly smaller than either. . . . The Department of Justice points to a Roper study that indicated that the public principally relied on newspapers and television stations for their news. On this basis they would give little weight to other media sources.

Multiple Ownership, *supra* note 2, 50 F.C.C.2d at 1057.

109. Compare *id.* at 1056, with *id.* at 1122—23 (Robinson, Comm'r, concurring in part & dissenting in part). Interchangeability or "line of commerce" precedents, however, are far from clear. Compare *United States v. Continental Can Co.*, 378 U.S. 441 (1964) (glass and metal containers held a single line of commerce) with *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (copper and aluminum conductors held not a single line of commerce).

110. See *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1057—58. See also J. Rose, *Credible and Incredible Evidence*, Stanford Research Center in Economic Growth, Memorandum No. 109 (1971); Lago, *The Price Effects of Joint Mass Communication Media Ownership*, 16 ANTITRUST BULL. 789 (1971).

ture and refusal to grant future licenses were therefore justified to prevent undue concentration of the media.

The key difficulty in applying economic principles to broadcast-newspaper cross-ownership lies in determining the relevant economic market. The Justice Department urged that the "relevant market" in terms of advertising be defined as "those media which (1) can realistically be considered as outlets for the expression of views for local issues and (2) can realistically be viewed as sellers of advertising to local advertisers."¹¹¹ A simple comparison of the number of commonly owned media to the total number of publications would be inadequate because all sellers or voices are not equal; thus, the Commission should look to each seller's share of market revenue.¹¹² The Justice Department, however, realized that the FCC could not easily undertake an extensive "relevant market share" economic analysis and therefore recommended that a Grade B contour of airwave overlap be used to determine the relevant market.¹¹³

The other problem involved in applying economic principles to the cross-ownership issue lies in the Commission's jurisdiction to enforce and apply the principles of the antitrust laws. While it is well-established that the FCC cannot enforce the antitrust laws directly,¹¹⁴ the Justice Department argued that the principles of antitrust law should be applied as indicative of undue media concentration, and that the Commission should be required by its public interest mandate to promote economic competition as a means of increasing diversity.¹¹⁵ Since newspapers are subject to antitrust regulation¹¹⁶ and the Commission has the power to regulate ownership pursuant to the public interest standard,¹¹⁷ the Justice Department argued for "dissolution of [all] existing co-located daily newspaper-television station combinations within a reasonable period of time."¹¹⁸

111. DOJ COMMENTS, *supra* note 102, at 2.

112. *See id.* at 22—23, *citing* United States v. Phillipsburg Nat'l Bank, 399 U.S. 350 (1970); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363—65 (1963).

113. DOJ COMMENTS, *supra* note 102, at 25—26.

114. *See* United States v. Radio Corp. of America, 358 U.S. 334 (1959); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

115. *See Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1059.

116. The Supreme Court early stated that the press in its commercial aspect is subject to the Sherman Act. *Indiana Farmer's Guide Co. v. Prairie Co.*, 293 U.S. 268 (1934).

117. *See* note 35 *supra*.

118. DOJ COMMENTS, *supra* note 102, at 21.

This recommendation presumes that cross-ownership per se results in a lack of competition leading to inadequate diversity and that only varied ownership will achieve a competitive market promoting diverse views. This economic approach, however, presents only one aspect of the public interest standard.¹¹⁹ It ignores the importance of the first amendment's prohibition of undue governmental regulation in much the same way that NAB's and ANPA's argument based on that prohibition ignores the first amendment's command to promote diversity.

C. *A First Amendment Balancing Position*

The Justice Department and the broadcast industry thus utilize differing approaches to further their conflicting interpretations of first amendment goals—promotion of diverse viewpoints and freedom from undue governmental interference. This conflict is not irreconcilable; preferably, these policies may be balanced.¹²⁰

119. "In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give understandable content to the broad statutory concept of the 'public interest.'" *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960—61 (D.C. Cir. 1968) (citation omitted).

120. CENTER FOR GOVERNMENTAL RESPONSIBILITY, ARGUMENTS ON FCC DOCKET NO. 18110 at 217—225 (July 24, 1974). At the oral argument the Center for Governmental Responsibility submitted the following as a proposed amendment to 47 C.F.R. § 73.636 (1973):

73.636 Multiple Ownership

(a) No license for a television broadcast station shall be granted or renewed to any party (including all parties under common control if):

(3) Such party owns or controls directly or indirectly, through separate or subsidiary corporations or otherwise, one or more daily newspaper publications as defined in 15 U.S.C. § 1802(4) (1970) which operates in the relevant market unless:

(a) there is one or more daily newspaper or broadcast stations in the relevant market under different ownership and with market strength relatively equal to or greater than the existing daily newspaper or television broadcast outlet or proposed television broadcast outlet of the party seeking licensing;

(b) there is no challenge to the existing license or there is only one applicant for a license;

(c) there is a finding of fact that a challenger cannot continue to independently operate a broadcast outlet.

(4) The divestiture of facilities required by section (3) shall be accomplished not later than the first license renewal date of such station following five (5) years from the effective date of section (3).

This proposed amendment would have precluded cross-ownership where licens-

The impact of concentrated ownership on diversity of ideas, rather than economic competition, should be the primary policy concern in licensing.¹²¹ On the other hand, the broadcast media is not freed from regulation by the first amendment,¹²² particularly in cross-ownership situations where great potential exists for restricting the number of viewpoints presented to the community.¹²³ The diversity policy of the first amendment thus requires the Commission to take some affirmative steps to reduce potentially harmful concentrations of media ownership.

A balancing approach suggests that in markets where sufficient inter-media competition exists cross-ownership should not be prohibited. Many larger cities have all three major television networks, some non-affiliated stations, many radio stations, and several daily newspapers. Except hypothetically where they are all cross-owned by the same party, at least two parties still compete for advertising and create the possibility for diversity of ideas. In such large markets, then, the Commission should be obligated to follow the first amendment policy of minimal regulation since diversity already exists. Only in the smaller markets where all broadcast facilities and newspapers are owned by one party would the concentration be sufficiently egregious for the Commission to require divestiture or prohibit licensing.

Even in those situations, the balancing approach requires certain caveats. No divestiture should be required should the present owner be unable to sell the broadcast facility at a fair price or if the community be financially unable to support a separate broadcast facility and newspaper. Parties excepted under these caveats would be subject to future divestiture if market conditions changed. This balancing approach prevents the over-regulation that would result were all or a majority of the cross-owned stations forced to divest with no consideration of existing diversity.

The same rationale applies to future licensing. If a modicum of competition exists, cross-ownership should be allowed. Only in a case where the local dissemination of news might be monopolized should the duopoly rules require a per se denial of a license. Mere

ing resulted in ownership of the only television and only daily newspaper by the same party in the relevant market. The proposal would not have prohibited cross-ownership if there were a competing newspaper or television station to provide a divergent source of information to the community.

121. See notes 18—28 & accompanying text *supra*.

122. See notes 36 & 116 & accompanying text *supra*.

123. See notes 32—35 & accompanying text *supra*.

cross-ownership, without more, does not justify an absolute prohibition of licensing where some substantial media competition exists. Whenever cross-ownership does in fact contravene the public interest the Commission should deny renewal or refuse licensing. The Commission should, however, be more explicit as to precisely which practices it would consider harmful to the public interest to avoid industry uncertainty.¹²⁴

This balancing position would implement first amendment diversity policy while at the same time minimizing interference with the industry. Thus, while promoting competition this position would give effect to both first amendment policies.

IV. DOCKET 18110: THE COMMISSION'S NEW RULE

On January 28, 1975 the Commission terminated Docket 18110 by amending the Commission's existing multiple ownership regulations, in particular the duopoly rules.¹²⁵ The new rules incorporate newspaper ownership as an additional trigger to the operation of these rules.¹²⁶

The new rules prohibit the acquisition by a daily newspaper¹²⁷ of a television or radio station, the specified contours of which encompass the community in which the newspaper is circulated.¹²⁸ Mere ownership or control, direct or indirect, of a daily newspaper thus will be sufficient to preclude a party's acquisition of a broadcast

124. One of the major concerns throughout the proceeding was with industry stability. The high cost of investing in a broadcast facility was thought to be prohibitive unless there were some assurances that challenges could not be made frivolously and that the Commission would not extend its regulatory scheme so as to impose serious burdens. *See, e.g., Multiple Ownership, supra* note 2, 50 F.C.C.2d at 1066—68.

125. *Multiple Ownership, supra* note 2, 50 F.C.C.2d at 1046. The "7-7-7" rule remained the same. *See id.* at 1076 & App.F at 1099. The Commission continues to feel that splitting AM-FM radio combinations would cause too great a disruption in the broadcast industry and remove necessary support from new stations. It consequently has not prohibited these combinations. *See id.* at 1054—55. But it reached the opposite conclusion with respect to newspaper support of broadcast outlets.

126. *Id.* at 1076.

127. Note 10 to each amendment defines a "daily newspaper" as "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." The note excludes college newspapers from this definition. *Id.*, App.F at 1101, 1103, 1106.

128. *Id.*, App.F at 1099, 1101, 1104, *amending* 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1).

license in the same market. The rules require, moreover, that a broadcast licensee which acquires such a daily newspaper dispose of its broadcast station within one year or by the time of its next license renewal date, whichever is longer.¹²⁹

In addition, while most existing cross-owned media combinations will be unaffected,¹³⁰ a few combinations, controlling the only broadcast facility (AM or FM radio station or television station) and the only daily newspaper in the same area as of January 1, 1975, are required to sell one of the media by 1980.¹³¹ The impact of the divestiture requirement on existing licenses is therefore narrower in scope than the impact of the rules on future efforts to achieve cross-ownership. The prohibition on future cross-ownership is absolute, while divestiture was limited to a few cases of "literal" monopoly in relatively small markets. Even where divestiture was ordered, furthermore, the Commission provided for a waiver under certain circumstances.¹³² It is necessary, however, to note that existing combinations will be subject to the new rules if they attempt to sell their combinations;¹³³ a purchaser cannot acquire a cross-owned combination in contravention of the new rules even though a current owner could continue to hold it.

The approach taken by the Commission results in a *per se* rejection of future cross-ownership to promote competition, in contrast to the previous *ad hoc* approach. Opponents say the new position is "competition for competition's sake."¹³⁴ Commissioner Robinson called this sort of regulation a "structural" approach, one which "looks toward promoting a market conformation hospitable to diversity and competition," while a "behavioral approach relies on regulatory standards to enforce norms of competitive conduct."¹³⁵ As Commissioner Hooks pointed out, nothing evil had previously been presumed from cross-ownership¹³⁶ but, whether evil or not, the Com-

129. *Id.* at 1076 & n.25. The Commission hereby adopted the rule it had proposed in its Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339, 346 (1970).

130. *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1080—81.

131. *Id.* at 1084, App.F at 1099, 1101—02, 1104. This result was accomplished by an addition to each of the multiple ownership sections: 47 C.F.R. §§ 73.35(c), 73.240(c), 73.636(c).

132. *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1085. See notes 150—155 & accompanying text *infra*.

133. *Id.* App.F at 1100—01, 1102—03, 1105 (note 8 to each amended section).

134. See *id.* at 1114—16 (Robinson, Comm'r, concurring in part & dissenting in part).

135. *Id.* at 1117 n.12.

136. *Id.* at 1109 (Hooks, Comm'r, concurring in part & dissenting in part).

mission has now concluded that certain combinations violate the public interest standard.

As the Commission stated in its conclusion: "The multiple ownership rules rest on two foundations: the twin goals of diversity of viewpoints and economic competition."¹³⁷ Using these goals to emphasize diversity in the new rule, the Commission thus rejected the arguments of NAB and ANPA that adequate local diversity in media ownership currently exists. The actual impact on current ownership, however, appears minimal in larger markets. The Commission's order will affect only seven television stations¹³⁸ and a slightly greater number of radio stations¹³⁹ over the next five years, and some of those may well escape divestiture through the waiver provisions.¹⁴⁰

A. *First Amendment Diversity Policy in the Commission's Order*

While the Commission generally recognized the need for restraint in extending its regulation of the media, the basic thrust of the Order seems to be that "this country can ill afford a monopoly on the expression of views of issues of local concern."¹⁴¹ First amendment diversity policy dominated the Order. All traditional cases supporting the policy for diversity of viewpoints were cited.¹⁴² The divestiture requirements may be subject to waiver, but even the waiver exceptions emphasize the necessity for sustaining diversity.¹⁴³ The Order noted that all the participants agreed upon the desirability of diversity; the differences between them arose either from differing views on whether adequate diversity presently existed or on the best approach to obtaining satisfactory diversity.

The Commission insisted that its new policy varied from the Justice Department's economic approach when it stated that the Justice Department

place[s] a greater emphasis on public policies underlying the need to preserve competition than on diversity aspects and for their argu-

137. *Id.* at 1074.

138. *Id.*, App.D at 1098.

139. *Id.*, App.E at 1098.

140. "Five years from now, I think we may find that no divestitures at all have taken place." *Id.* at 1127 (Robinson, Comm'r, concurring in part & dissenting in part). See notes 150—155 & accompanying text *infra*.

141. *Id.* at 1083.

142. See, e.g., *id.* at 1048—49, 1050.

143. See *id.* at 1085—86.

ments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area. The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility.¹⁴⁴

What seems to be missing from the Commission's order, however, is a serious consideration of the need to minimize governmental regulation. For example, while cases relating to restraint were cited in his opinion, when Commissioner Robinson argued for the first amendment policy favoring diversity he stated:

According to this argument, the First Amendment would be offended by a rule that "discriminates" against the owners of newspapers—i.e., that prohibited to newspaper owners a right permitted to other orderly citizens—the right to be a Commission licensee.

The short answer to this submission is that it is not newspaper owners that are being aimed at—it is monopolies or oligopolies: and these the First Amendment does not protect. Indeed, it may be argued that the First Amendment itself is against the creation and subsistence of such strong redoubts of economic and social power.¹⁴⁵

Resolving the cross-ownership problem by linking it only to the first amendment's mandate of diversity fails to weigh adequately the consideration of keeping governmental regulation at a minimum. While a statement as sweeping as Commissioner Robinson's could be aimed at many economic entities, economic classifications and analyses in and of themselves do not resolve the first amendment problems of promoting diversity and minimizing governmental interference with the media.

B. Economic Considerations

The Commission recognized that it lacks jurisdiction to enforce the antitrust laws and that it need not consider economic concentration as a factor absent a showing of abuse.¹⁴⁶ In fact, the Commission observed that it could only view undue concentration as a possible violation of the public interest standard in licensing proceedings.¹⁴⁷

144. *Id.* at 1079 (footnote omitted).

145. *Id.* at 1118—19 (citation omitted).

146. *See id.* at 1078—79, 1088—89.

147. *Id.* at 1078—79.

The Commission thereby recognized the distinction between anti-trust and first amendment types of diversity:

[W]e have analyzed the basic media ownership questions in terms of this agency's primary concern—diversity in ownership as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly antitrust approach.¹⁴⁸

However, the Order also evinced a concern that the two “goals of diversity and competition” might produce an unwanted result where forcing diversity would result in the loss of all stations to a given section of the public.¹⁴⁹

The major economic considerations in the antitrust argument dealt with the monopolization of the relevant product market—advertising—and the definition of the relevant geographic market—the area in which cross-ownership would be considered monopolistic.¹⁵⁰ These considerations will be relevant in future licensing proceedings, and the Commission will examine allegations of economic monopolies which might warrant action under the Sherman Act on an ad hoc basis in those remaining circumstances where monopolization arguments might still be raised.¹⁵¹ Furthermore, in renewal proceedings for co-owned stations which are not divested, antitrust considerations will constitute a valid basis for further hearings if economic monopolization might warrant action under the Sherman Act.¹⁵²

While economic analysis was contained in the Commission's Order, it is clear that the new duopoly rules were not based primarily on that analysis. Furthermore, there was no indication that proof of economic concentration would be necessary to invoke the new cross-ownership prohibitions in future license proceedings. In fact, it was made clear that the mere possibility of monopolization of viewpoints inherent in a newspaper's proposed ownership of a broadcast outlet by itself would be deemed sufficient to preclude that ownership. Therefore, while economic theory may bolster the

148. *Id.* at 1079.

149. *Id.* at 1074. Commissioner Robinson, a proponent of more divestiture than required by the Order, discussed at length the economic consequences of concentration and its relationship to diversity, but conceded that promotion of economic diversity alone might not be a sufficient justification for Commission action. *See id.* at 1116 (Robinson, Comm'r, concurring in part & dissenting in part).

150. *See* notes 106–13 *supra*.

151. *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1080 n.29.

152. *Id.*

Commission's conclusion and be an ad hoc factor in renewals, economic analysis need play no part in future license proceedings when the fact of potential cross-ownership is proved.

V. FUTURE OF CROSS-OWNERSHIP POLICY AFTER DOCKET 18110

Two pressing questions remain in the wake of the Commission's Order: first, how will divestiture of the affected stations be administered; and second, how will future comparative hearings treat the issue of cross-ownership for those stations not compelled to divest?

The Commission recognized that "[d]ivestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest."¹⁵³ In July of 1974, 79 co-located newspaper-television combinations existed, of which seven are now slated for divestiture.¹⁵⁴ No comparative hearings regarding those co-owned stations which are being subjected to divestiture will be held since such hearings would subject those stations to the unfair burden of opposing challenges when they are slated to lose their licenses anyway.¹⁵⁵ Sympathy has been expressed by certain Commissioners for those stations which have been required to divest,¹⁵⁶ since the "[divestiture] rules are not in the least premised on the existence of improprieties in the operations of the media holdings."¹⁵⁷ Thus, careful scrutiny can be expected on the waiver requests which undoubtedly will be submitted. Additionally, the Commission recognized that if in a given case divestiture would in fact operate contrary to the major thrust of its Order and actually reduce diversity of viewpoints, then it should be applied in that case.¹⁵⁸ Four specific conditions for waiver were established: 1) total inability to sell the station; 2) inability to sell at a fair price; 3) financial inability of the community to support separate ownership and operation of the newspaper and television station; and 4) disservice to the public interest.¹⁵⁹

As a specific example of waiver, the Commission recognized that not all instances in which the only daily newspaper owned the only

153. *Id.*

154. *See id.* at 1080 n.29 & App. D at 1098.

155. *Id.* at 1088—89.

156. *Id.* at 1108 (Reid, Comm'r, concurring), 1112—13 (Washburn, Comm'r, concurring).

157. *Id.* at 1085.

158. *Id.*

159. *Id.*

local radio or television station were "true monopoly situations."¹⁶⁰ For example, although only one station might be licensed in a city—such as in Norfolk, Virginia—stations licensed in other nearby cities might also be considered local when they respond to that community's problems. In Norfolk's case it was said that true diversity exists in fact. The presence of such bases for waiver makes it likely that protracted proceedings will ensue over the divestiture of the affected licensees; while results cannot be predicted, leniency may well be the practice.¹⁶¹

The future of existing co-owned stations not affected by divestiture is still somewhat uncertain.¹⁶² The Commission stated that "the weight to be given the factor of diversity in comparative renewal hearings remains to be determined."¹⁶³ Commissioner Lee in his concurring opinion stated:

[B]ased on my prior experience, the Commission should give little weight to this issue in a comparative hearing against an existing TV licensee. As the Commission stated (at paragraph 129) any overall restructuring of the industry it deemed necessary has been done in this docket. To permit restructuring at renewal time would permit to be done indirectly what the Commission has refused to do directly.¹⁶⁴

Commissioner Lee's interpretation, however, is subject to question. In its conclusions, the Commission noted that it prefers that commonly-owned stations avoid presenting a monolithic structure.¹⁶⁵ Paragraph 131 condemned monolithic cross-ownership, *i.e.*, print and media outlets that are "mirror images of one another, speaking with one voice."¹⁶⁶ The Commission endorsed efforts by commonly-owned media to ensure maximum competition by such devices as "separate editorial and reportorial staff."¹⁶⁷ Two Commissioners specifically discussed the desirability of separate staffs in the continuing co-owned stations.¹⁶⁸ Apparently, operational sep-

160. *Id.* at 1081.

161. *See* notes 134 & 150 *supra*.

162. Uncertainty is further fostered by the diversity of opinions of the Commissioners: Commissioners Lee, Reid, Washburn and Quello, concurring and issuing statements; Commissioners Hooks and Robinson concurring in part & dissenting in part and issuing statements.

163. *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1088.

164. *Id.* 50 F.C.C. 2d at 1107.

165. *Id.* at 1089.

166. *Id.*

167. *Id.*

168. *Id.* at 1111—12 (Hooks, Comm'r, concurring in part & dissenting in part),

aration will be an important factor in a cross-owned licensee's favor in future comparative hearings.

VI. SHORTCOMINGS OF THE NEW RULE

The Commission's Order fails to address several issues. First, it appears that while the Commission extensively employed the first amendment policy of diversity, it omitted from its analysis and Order the equally important first amendment policy of minimal governmental regulation. While it appears that the Commission's divestiture provisions adopt the proposed balancing approach,¹⁶⁹ insufficient consideration was given to the continuing policy of restraint contained in that same proposal. In fact, the Commission's Order allows for larger intervention in future licensing procedures than is actually necessary to ensure diversity. Future combinations should not be excluded when other media outlets exist. The Commission recognized the validity of this concept in its divestiture provisions but not in its restrictions on future licensing.

Furthermore, the Commission has effectively "grandfathered" a select number of co-owned stations.¹⁷⁰ While adequate diversity actually exists in these stations, they have nonetheless received special treatment over future potential licensees who might wish to enter a market with similarly sufficient competition. In such a situation, both the present and the potential licensee would exist in the same climate of diversity. The new duopoly rules therefore discriminate against a readily ascertainable class of potential licensees.

The Commission's ruling, moreover, still appears to sustain uncertainty as to various classes of ownership. Those seeking future licenses, of course, can rely upon the fact that they cannot acquire additional licenses in the same market. However, all current owners of co-owned stations are existing in a state of limbo. Those stations slated for divestiture remain uncertain as to how the waiver provisions will be interpreted. Similarly, co-owned stations not subjected to the divestiture provisions may expect future challenges relating to the fact of their co-owned status—especially if they have not adhered to the Commission's guidelines concerning separation of operations. Predictability and stability would be increased if the Commission formalized these guidelines in such a manner that co-

1112 (statement of Comm'r Quello).

169. See notes 120—24 & accompanying text *supra*.

170. *Multiple Ownership*, *supra* note 2, 50 F.C.C.2d at 1050, 1080—86.

owned stations could act accordingly.¹⁷¹

One crucial aspect of licensing policy considered during oral arguments and throughout the pendency of Docket 18110 was not addressed in the final Order. No reference was made to the establishment of different types of ownership than currently exist. Commissioner Hooks pointed out that the order in no way directly promotes new or minority types of ownership and asserted that the Commission should have addressed itself more directly to the qualifications of new station owners to assure real diversity in the form of media ownership by minority groups.¹⁷² Increased minority ownership is an important consideration in diversity policy; a systematic search for diverse ideas must particularly encourage minority views.

VII. CONCLUSION

Promoting the dissemination of diverse ideas with a minimum of governmental interference is the goal of the first amendment in protecting free press and free media. This goal is implicit in the public interest mandate of the Communications Act of 1934. A precise balance between restraint and diversity in first amendment policy appears impossible, but the process of decision should reflect both, with deference to restraint where possible. The Commission's Order in Docket 18110 failed to strike such a balance; any future action regarding cross-ownership would benefit by an increased recognition of the importance of restraint.

171. Uncertainty is furthered by the fact that the Commission is conducting a rulemaking proceeding to determine the importance of diversification as a factor in a comparative renewal hearing. See Further Notice of Inquiry in Docket No. 19154, 31 F.C.C.2d 443 (1971). This proceeding was necessitated by *Citizens Comm. Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), which struck down the Commission's 1970 *Policy Statement*, *supra* note 70. See *Multiple Ownership*, *supra* note 2, at 1087—89. Pending resolution of this issue in the rulemaking proceeding, the Commission views it solely as a matter of its discretion:

In the light of *Citizens Communications Center*, whatever policy is developed will take into account diversification as a factor that must be considered in a comparative renewal hearing. Also in the light of that case, the weighing of factors lies within the substantive discretion of the Commission, and the weight to be given the factor of diversity in comparative renewal hearings remains to be determined. Until such time as a new policy is formulated in Docket No. 19154, of necessity, under *Citizens Communications Center*, the factor of diversification must be considered in comparative renewal hearings, but the weight to be given that factor will be a matter within the discretion of the Commission.

Id. at 1088.

172. *Id.* at 1111 (Hooks, Comm'r, concurring in part & dissenting in part).