a diversity of ownership have clearly gone by the boards. Religious programming by the major faiths has long since given way to "paid religion," air time purchased by evangelical and fundamentalist showmen to raise money for their electronic ministries. Educational and cultural programming have been abandoned with impunity to public television and such cable networks as A&E, Bravo, The Learning Channel, and Mind Extension University.

But some social issues persist and, if anything, have been heightened rather than resolved by market forces. Sex and violence, which have haunted television since the 50s, remain such a problem that Congress has once again called upon the industry to police itself or risk some manner of intervention by government.[56]

Public outrage over television's exploitation of the child market has revived regulatory activity in that sphere and led to Congress passing the Children's Television Act of 1990,[57] requiring stations to provide programs that nourish the minds of the young. Only a few years after cable was deregulated, Congress, responding to the din of complaints from their constituents over poor service and constant rate increases, ordered the FCC to re-regulate the industry and impose price controls.

While Americans readily accept their political designation as consumers, they cannot help behaving at times as citizens. And when they do, Congress and the FCC will always respond. Regulation has a future.

56 The latest attempt from Capital Hill to "crack down" on and regulate television violence and sexually oriented programs comes in the form of high tech solution known as the "V-chip" (also known as violent-screening circuitry). The V-chip is a microchip which would allow viewers (particularly parents of young children) to block out objectionable programs. The device is actually installed inside a television set and "reads" an electronic rating system. The V-chip is then able to block out programs which are rated as violent or sexually explicit.

57 Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified in scattered sections of 47 U.S.C.).

OWNERSHIP REGULATORY POLICIES IN THE U.S. TELECOM SECTOR

HENRY GELLER*

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Since the early 1940s, the United States has had multiple ownership policies in the telecommunications ("telecom") sector. The main focus of these policies has been the broadcasting field, because until recently telephone was a common carrier monopoly sector, and because other electronic media like cable television have arrived on the scene in full force only in the last two decades. This paper, therefore, first will address the broadcast field, and then will turn to cable television, telephone ("telco"), and related matters. It will trace the history of the regulatory pattern, describe its present status, and then set out views and some predictions.

As will be developed, great change is in the offing for the telecom field because of the dynamic nature of the technology and the convergence with the digital computer sector. The focus here, however, will be on policy issues in the near term—that is, the next five to ten years.

In treating these issues, the emphasis will be on the Communi-

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cations Act of 1934,[1] as amended, and its implementation by the Federal Communications Commission ("FCC" or "Commission"). In addition, all of these electronic fields come under the antitrust laws. Except for the telephone sector, however, where there will be a brief discussion of the divestiture of AT&T,[2] antitrust has not played as large a role in ownership regulation as have FCC regulatory rules, and thus receives less attention.

I. Multiple Ownership Regulation in the Broadcast Field

A. *Radio*

1. FCC Actions, 1940-1983

> [The] initial multiple ownership rules prohibited the issuance of a license to [any person or entity] already possessing a license in the same broadcast service unless the applicant could demonstrate that the issuance of the license (1) would have a pro-competitive impact, and (2) would not result in the concentration of control of broadcasting facilities in a manner inconsistent with the public interest.[3]

This is a broadly worded test that should have resulted in some hearings to determine whether or not a particular acquisition met the test; there were no such hearings. The history of FCC regulation in this field (and generally) is that broad, "mushy" standards are not implemented—only firm, objective standards are successful.

In 1940, the Commission adopted absolute limits on the common ownership of FM radio (six stations)[4] and television (three stations,[5] raised to five in 1944),[6] and then, in 1946, limited AM radio to seven stations.[7] In 1953, the FCC retained the same broad test—denying an acquisition if the resulting concentration conflicted with the public interest—but again put the real "bite" in the

1 Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-610 (1988 & Supp. V 1993)).

2 *See infra* part IV.

3 *See* Review of TV Broadcasting Regulations, Further Notice of Proposed Rule Making, 10 F.C.C.R. 3524, 3526-27 ¶ 2 (1995).

4 Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940) (codified at former 47 C.F.R. § 3.228).

5 Rules and Regulations Governing Experimental Television Broadcast Stations, 6 Fed. Reg. 2282, 2284-85 (1941) (codified at former 47 C.F.R. § 4.226).

6 Rules Governing Broadcast Services Other Than Standard Broadcast, 9 Fed. Reg. 5442 (1944) (codified at former 47 C.F.R. § 4.226).

7 Sherwood B. Brunton, 11 F.C.C. 407, 413 (1946) (finding the transfer of an AM station to CBS, the owner of seven AM stations—six of them 50,000-watt clear channel stations—would result in "a concentration of control of broadcasting facilities" that would not be in the public interest).

numerical limits: seven AM, seven FM, and five television stations.[8] There was a twofold rationale for so limiting national ownership—to promote diversity of ownership in order to diversify the sources of information coming to the American people, and to safeguard against undue concentration of economic power.[9]

The latter of these grounds is of much less importance, and is more the province of antitrust regulation. Thus, in its *Notice* leading to a 1984 revision, the Commission stated that its "principal concern in implementation of its policy of diversification of ownership has not been the enhancement of economic competition but, rather, the advancement of diversity in sources of information to further First Amendment values."[10] In a 1975 report,[11] the FCC found that separate ownership of co-located newspapers and broadcast stations was required in the public interest:

> If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. . . . [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.[12]

The Supreme Court affirmed, stressing that the public interest standard "necessarily invites reference to First Amendment principles . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.' "[13] This diversification principle commonly is referred to as the *Associated Press* principle. Congress also has stressed the importance of the diversification principle, even in the case of low power television, where thousands of so-called

8 Amendment of Multiple Ownership Rules, 9 Rad. Reg. (P & F) 1563 (1953). The limit on television stations was raised to seven, with no more than five to be in the VHF band. Amendment of Television Broadcast Stations Multiple Ownership Regulations, Report and Order, 43 F.C.C. 2797 (1954).

9 Amendment of Multiple Ownership Rules, 9 Rad. Reg. (P & F) at 1568.

10 Multiple Ownership of AM, FM and Television Broadcast Stations, Notice of Proposed Rule Making, 48 Fed. Reg. 49,438, 49,449 ¶ 51 (1983).

11 Amendment of Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, Second Report and Order, 50 F.C.C.2d 1046, 1079 (1975).

12 *Id.* at 1079-80.

13 FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)); *see also* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) (holding that such hearings had as a "primary objective" the "maximum diffusion of control of the media of mass communications," because "diversification of control is a public good in a free society, and is additional[ly] desirable where a government licensing scheme limits access by the public to the use of radio and television facilities").

"beltway" stations are possible.[14]

Three points with respect to diversification require a brief discussion. First, the objective is to diversify *ownership or control*. Thus, it is a structural effort to diversify the sources of information coming to the electorate; it is not aimed at diversifying programming or viewpoints. Other regulations, such as the Prime Time Access Rule[15] or the fairness doctrine,[16] have been directed to that purpose.

Second, the diversification principle cannot be met by the chain owner's claim that it will allow station managers editorial autonomy. This claim is speculative and difficult to check; in any event, it is the owner that selects the key station managers and that can (and probably will) select those who reflect generally the owner's philosophy or views.

Third, the limits in the rule are rather arbitrary. As the FCC has noted, however, attempts to take into account factors such as, among others, population and geographical location, have been "unsatisfactory or unworkable."[17] The rule limits have worked precisely because of their certainty, and never have been waived.[18]

The foregoing discussion addressed national ownership limits in radio. The FCC very early addressed duopoly, the common ownership of more than one station in a particular area. It proscribed FM duopolies in its 1940 rule[19] and AM duopolies in 1943.[20] The rationale for this proscription is the *Associated Press* principle.[21] Thus, the FCC stated in its *First Report on Multiple Ownership*:

> A proper objective is the maximum diversity of ownership that

14 Thus, in its amendments to the Act authorizing the use of lotteries, 47 U.S.C. § 309(i)(3)(A), Congress explicitly required that preferences be given to promote the *Associated Press* principle. It specified that when the lottery is "used for granting licenses . . . for any media of mass communications, significant preferences will be granted to applicants . . ., the grant to which . . . would increase diversification of ownership of the media of mass communications," including to any applicant controlled by minority groups. *See* H.R. REP. No. 765, 97th Cong., 2d Sess. 40-45 (1982).

15 47 C.F.R. § 73.658(k) (1993) (limiting to three hours the amount of time a major network can program in prime time, and proscribing the use of off-network programming by a network affiliate in the top fifty markets).

16 *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the personal attack and political editorializing rules).

17 Multiple Ownership of Broadcast Stations, Notice of Proposed Rule Making, 48 Fed. Reg. at 49,440 ¶ 10.

18 Storer Broadcasting Co. v. United States, 240 F.2d 55 (D.C. Cir. 1956); Multiple Ownership of Broadcast Stations, Notice of Proposed Rule Making, 48 Fed. Reg. at 49,453 (dissenting statement of Commissioner Rivera).

19 *See* Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382 (1940) (codified at former 47 C.F.R. § 3.228).

20 *See* Rules Governing Standard and High Frequency Broadcast Stations, 8 Fed. Reg. 16,065 (1943).

21 *See supra* text accompanying notes 13-14.

> technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.[22]

The duopoly rule dealt only with ownership of stations in the same service—FM, AM, or television. The FCC, relying again on the diversification principle, in 1970 adopted its one-to-a-market rule, barring common ownership or control of more than one broadcast station in the same area.[23]

2. FCC Actions since 1983

In 1984 the FCC substantially revised its national ownership limits.[24] A new deregulatory FCC had come on board, and, citing the explosive growth and change in the electronic mass media market,[25] it sought wholly to deregulate this area by eliminating the national ownership limits. Under pressure from the interested congressional committees, the FCC was forced to abandon its complete deregulation, and instead adopted a limit of twelve stations in each service.[26] At the same time, the Commission stressed the need to retain duopoly limitations, stating that "the appropriate geographic market for diversity analysis is primarily local and our local multiple ownership rules, which are unaffected by the *Report and Order*, are the rules which are designed to promote diversity in that geographic market."[27]

The Commission returned to the radio rules in 1991,[28] and

22 Rules Relating to Multiple Ownership of Standard, FM and TV Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, 311 (1970).

23 *Id.*; *see also* Amendment of Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order, 28 F.C.C.2d 662 (1971) (permitting formation and transfer of AM/FM combinations).

24 Amendment of Section 73.3555 Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 100 F.C.C.2d 17 (1984), *reconsideration granted in part*, Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985).

25 Multiple Ownership, Report and Order, 100 F.C.C.2d at 18 ¶ 4.

26 Multiple Ownership, Report and Order, 100 F.C.C.2d 17 (1984), *reconsideration granted in part*, Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985).

27 Multiple Ownership, Memorandum Opinion and Order, 100 F.C.C.2d at 100; *see also* Multiple Ownership, Report and Order, 100 F.C.C.2d at 58 (separate statement of Commissioner Patrick).

28 Revision of Radio Rules and Policies, Notice of Proposed Rule Making, 6 F.C.C.R. 3275 (1991).

adopted major revisions in its 1992 actions.[29] While it again noted the "dramatic increase in competition and diversity in the radio industry over the last decade,"[30] it took particular note that radio broadcasters were subject "to increasingly severe economic and financial stress."[31] In the face of this threat, the FCC found it necessary to revise the ownership rules "to obtain the substantial efficiencies that common ownership can provide," such as the opportunity to combine administrative, sales, programming, promotion, and production, and the sharing of studio space and equipment.[32] It pointed out that silent stations do not contribute at all to diversity, and that in any event, the large number of radio stations ameliorated any concern about further relaxing the ownership rules.[33]

The Commission accordingly allowed a single entity to own an attributable interest in up to eighteen AM and eighteen FM stations.[34] The Commission also modified its local ownership rules to permit a single entity to own an increased number of stations within a local radio market, with a twenty-five percent cap on the combined audience share of all owned stations.[35] The Commission permitted, without any restriction, joint venture agreements that do not involve time brokerage or joint programming arrangements. These arrangements, it stated, benefit the industry without jeopardizing diversity or competition.[36] The Commission restricted unattributable time brokerage (also called local marketing agreements, or "LMAs") to fifteen percent of the brokered station's weekly broadcast hours; any agreement exceeding that limit would result in ownership attribution to the broker, and thus could run afoul of the local ownership rules.[37]

29 Revision of Radio Rules and Policies, Report and Order, 7 F.C.C.R. 2755 (1992), *reconsideration granted in part*, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 F.C.C.R. 6387 (1992), *further reconsideration*, Second Memorandum Opinion and Order, 9 F.C.C.R. 7183 (1994).

30 7 F.C.C.R. at 6387. The FCC cited the increase to over 11,000 radio stations, 1500 television stations, and cable's serving 64% of homes nationwide, many of which receive television music channels. *Id.*

31 *Id.* The FCC noted that "[b]etween 1985 and 1990, the growth rate of radio station revenues dropped nearly in half to, on average, six percent. . . . Operating profits, on a per station basis, have fallen dramatically. . . . More than half of all radio stations lost money in 1990, and almost 300 stations are currently silent." *Id.*

32 *Id.* at 6388.

33 *Id.*

34 After two years, this limit was increased to 20 stations, with three more allowed if the entity held a non-controlling interest in stations controlled by minorities or small businesses. *Id.*

35 Thus, in markets with 15 or more stations, a single entity can own up to two AM and two FM stations, subject to the above 25% cap. *Id.*

36 *Id.*

37 *Id.*

B. *Television*

As noted, the FCC in 1984 raised the national ownership limit to twelve, but imposed a maximum aggregate national audience reach of twenty-five percent,[38] because a rule grounded solely on the number of stations would not take into account the market size of the stations. This twenty-five percent limit prevents a group owner from owning stations in each of the twelve largest markets, and, in light of some present holdings,[39] is the more binding constraint on group acquisition of stations.

In 1991 the FCC issued a *Notice of Inquiry* to determine whether it should revise the above multiple ownership rules so that television stations could better respond to the tremendous changes that were occurring in the video market.[40] In 1992, the FCC issued a *Notice of Proposed Rulemaking*,[41] and in January 1995, it issued a *Further Notice of Proposed Rule Making*.[42] The *Further Notice* contains an exhaustive analysis of broadcast television's relevant markets—the delivered video programming market, advertising markets, and the video program production market—and a diversity analysis of television broadcasting. It then considers and makes recommendations as to the national ownership rule, the local ownership rule, the radio-television cross-ownership rule, and LMAs.

On national ownership, the FCC tentatively concluded that liberalization of the national limits "would not have an adverse impact upon competitiveness of the markets for delivered video programming, the market for advertising, or the video program production market."[43] The Commission noted that the current national levels of industry concentration were low by antitrust standards.[44] Most important, the report stated that "relaxing the national ownership limits will not increase the concentration of broadcast TV ownership within a local market."[45]

38 These limits are raised to 14 stations and 30% if two or more of the stations are controlled by minorities. *See* 47 C.F.R. § 73.3555(d)(1)(i) & (d)(2)(i) (1993).

39 None of the top 25 television group owners has reached the 12 station limit but several, like ABC, clearly are restricted by the 25% audience limitation. *See* Television Broadcasting Rules, Further Notice of Proposed Rule Making, 10 F.C.C.R. at 3561 n.111.

40 Review of the Policy Implications of the Changing Video Marketplace, Notice of Inquiry, 6 F.C.C.R. 4961 (1991). The inquiry was prompted by apparent trends described in a staff working paper, FLORENCE SETZER & JONATHAN LEVY, BROADCAST TELEVISION IN A MULTICHANNEL MARKETPLACE (FCC, OPP Working Paper No. 26), 6 F.C.C.R. 3996 (1991).

41 Review of Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking, 7 F.C.C.R. 4111 (1992).

42 Television Broadcasting Rules, Further Notice of Proposed Rule Making, 10 F.C.C.R. 3524.

43 *Id.* at 3566-67 ¶ 98.

44 *Id.* at 3562 ¶ 89 (using the antitrust Herfindahl-Hirshman-Index ("HHI")).

45 *Id.* at 3566-67 ¶ 98.

Similarly, the FCC concluded that raising the national limits would not have an adverse effect on diversity.

> Within the United States, the most important idea markets are local. For an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local broadcast market. For that individual, whether or not some of those views are also disseminated in other local broadcast markets does not affect the diversity to which he is exposed. Accordingly, national ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.[46]

The Commission therefore continued to propose revisions in the 1991 Notice, i.e., permitting common ownership of eighteen, twenty, or twenty-four stations and raising the audience to thirty or thirty-five percent. Further, the FCC advanced a new proposal eliminating the numerical station limit and allowing the audience reach limit to increase by some fixed percentage, such as five percent every three years, until it reached the final limit of fifty percent.[47]

In the local ownership area, where the Commission's concern with diversity is most acute,[48] the FCC's Further Notice is much more cautious about relaxing current rules. It tentatively proposed only to decrease the prohibited overlap contour from Grade B to Grade A, "a substantially more realistic and accurate measure of a station's core market."[49] It requested comments on whether to permit common ownership in local markets, such as UHF/UHF or UHF/VHF combinations, where such joint ownership would not reduce the number of independent suppliers below critical levels.[50]

As to the one-to-a-market rule,[51] the FCC proposed to either eliminate the rule—and thus rely on the local ownership rules to ensure diversity and competition at the local level—or to codify the present waiver process. As to LMAs, the FCC proposed to treat

[46] *Id.* at 3567 ¶ 99 (quoting Multiple Ownership, Report and Order, 100 F.C.C.2d at 37).
[47] Television Broadcasting Rules, Further Notice of Proposed Rule Making, 10 F.C.C.R. at 3568 ¶ 101.
[48] *See supra* quotation accompanying note 46.
[49] Television Broadcasting Rules, Further Notice of Proposed Rule Making, 10 F.C.C.R. at 3574-75 ¶ 117.
[50] *Id.* at 3576-78 ¶¶ 120-23.
[51] This rule provides that a entity cannot own both a radio and TV station in the same local market. The FCC amended the rule in 1989 to permit waivers as long as the combination was in one of the top 25 markets and 30 separately owned licensees remained after the combination, or if the waiver request involved a failed station. *See id.* at 3578 ¶ 124.

them in television in the same way as it has done in radio, using the same fifteen percent benchmark for attributing duopoly.[52]

Views and predictions. It would be sound policy to relax the national ownership limits in light of the great changes in the video distribution market and the clear trend for even greater competition and fractionation as a result of cable channel expansion, Direct Broadcast Satellite ("DBS"), telco entry, and other telecom developments. Furthermore, it is clear that there will be further relaxation of the television national ownership limits; the FCC is moving to do so, a move that has the full support of Congress. In legislation in the 103d Congress, the Congress signalled its belief that such changes should occur,[53] a signal which has been repeated in proposed legislation in the 104th Congress, with the addition of an explicit requirement to move the national television audience limit to thirty-five percent.[54]

The process of drafting telecom legislation will continue in both houses, making it impossible to describe definitively at this point. As indicative of the far reaching reform favored by the Republican side, special mention should be made here of the Chairman's Draft of Senator Larry Pressler, Chairman of the Senate Committee on Commerce, Science and Transportation. On February 1, 1995, he released a draft of the Telecommunications Competition and Deregulation Act of 1995. In section 207, the draft repeals the local cable-TV broadcast station ban[55] and all the ownership restrictions in 47 C.F.R. § 73.3555 of the FCC rules,[56] thus repealing the local newspaper-broadcast ban,[57] the one-to-a-market rules, and all broadcast duopoly and national ownership restrictions.[58] Such sweeping and drastic reform, in my view, is

[52] *Id.* at 3583-84 ¶ 138. The FCC is also reviewing its attribution rules that are the base for application of multiple ownership requirements. Review of Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rule Making, 10 F.C.C.R. 3606 (1995). The current rules for voting stock attribution are five percent and, in the case of institutional investors, ten percent. *Id.* at 3530 ¶ 8. In its review, the FCC seeks to promote capital investment while at the same time dealing realistically with holdings or financial arrangements that involve substantial control or influence.
[53] *See* S. 1822, 103d Cong., 2d Sess. § 701 (1994).
[54] S. 652, 104th Cong., 1st Sess. § 207(b) (1995).
[55] *See* discussion *infra* part II.
[56] 47 C.F.R. § 73.3555 (1995).
[57] *See* discussion *infra* part II.
[58] Through inadvertence, the draft fails to repeal the national network-cable TV ownership restriction, because that restriction is not in § 73.3555. It should be noted that Senate Commerce Committee Republican members and Senate Majority Leader Robert Dole signed off on the draft and indicated their support in a "Dear Colleague" letter, stating that it was a "good starting point for the debate to follow in the 104th Congress." *Pressler Releases Telecom 'Discussion Draft'; VDT Applications Would Undergo One-Year Freeze*, TELECOMMUNICATIONS REP., Feb. 6, 1995, at 1.

misguided.

Most importantly, such reform is unsound policy as regards the duopoly aspect. The FCC is right to stress the importance of diversifying the sources of information—the *Associated Press* principle[59]—at the local level. While it may not be a violation of the antitrust laws for one entity to own two television stations in a single area with ten or more stations, it certainly would mean that the government was not diversifying the sources of information, especially on local issues, available to the people in that area.

The FCC would strongly oppose the elimination of the duopoly rules. So also did the Democratic Committee leaders, with the result being that Senate Bill 652 emerged from the Senate Commerce Committee with only a requirement for the review of multiple ownership limits and the above noted increase of the national audience percentage to thirty-five percent.[60]

Significantly, and equally as important as the merits, the broadcasters have considerable "clout," and in the television area, a majority do not want the sweeping relaxation sought by Senator Pressler and other Republicans. Thus, at a recent National Association of Broadcasters ("NAB") Board Meeting, the Board supported a more modest proposal than the FCC's eventual fifty percent limit. It sought an increase only to a thirty percent audience cap, because network affiliates feared giving the networks too much power to acquire stations.[61]

Further, while some stations favor repeal of the duopoly restriction, thus facilitating LMAs, many others strongly oppose this move on the ground that "television LMAs create an unlevel playing field in the market because the opportunity is not available to all the players [and] the one station that's able to do an LMA can exert leverage in programs deals and advertising sales not available to others. . . ."[62] They argue that LMAs are "de facto duopolies, which are supposed to be forbidden in the TV business."[63] Several program distributors also oppose relaxation of this restriction.[64]

In sharp contrast to the dispute among television stations, the

59 *See supra* text accompanying notes 11-14.

60 *See* S. 652 § 207.

61 *See* Kim McAvoy, *NAB Board Supports 30% TV Ownership Cap*, BROADCASTING & CABLE, Jan. 23, 1995, at 9; *see also TV Dereg: Too Much of a Good Thing*, BROADCASTING & CABLE, Feb. 6, 1995, at 6-7 (stations opposing Chairman Pressler's draft proposal because it "would upset the broadcast market and harm many stations," because "repeal of all ownership limits would only enhance the networks' market power"). Naturally, the networks strongly favor elimination of the ownership restrictions.

62 *Broadcasters Battle Over LMAs*, BROADCASTING & CABLE, Feb. 6, 1995, at 8-9.

63 *Id.*

64 *Id.*

NAB Radio Board would like to see all radio ownership rules relaxed or eliminated, leaving antitrust regulation as the governing regime.[65]

In light of the above noted broadcaster opposition and the opposition of the FCC in view of its long held position on the importance of the local diversification policy, it is likely that the television national ownership limitation will be raised—at most to thirty-five percent, perhaps with a promise to reevaluate it at appropriate intervals—and that the duopoly rule, including the fifteen percent LMA benchmark, will be retained, with only some minor adjustment such as use of the Grade A contour. In radio, while there are no FCC proceedings pending, there may well be further relaxation—either by the Congress or the FCC, and both at the national and local levels, with the latter restricted to markets with some specified large number of stations, e.g., those with twenty or more.

II. LOCAL CROSS-OWNERSHIP OF TELEVISION BROADCAST STATIONS AND NEWSPAPERS OR CABLE TELEVISION

In 1975, in order to promote the *Associated Press* principle, the FCC found that separate ownership of co-located daily newspapers and broadcast stations is required in the public interest.[66] Earlier, in 1970, the FCC barred ownership of cable systems by television broadcast stations in the same market.[67] Congress codified the latter proscription in the Cable Consumer Protection Television Act of 1984 ("1984 Cable Act"), section 613(a).[68]

While there have been occasional efforts to remove these restraints, they are not in dispute as much as the broadcast limitations,[69] and there is no FCC proceeding pending that addresses them. As noted, however, Senator Pressler's draft would have repealed these restrictions, and the issue may be raised again if the industries involved press for relief. In my view, such relief would be most unsound policy.

First, we are again dealing with diversity on the all-important local level. Further, for their information, people rely heavily on

65 McAvoy, *supra* note 61, at 10; Kim McAvoy, *NAB Presses for Radio Dereg*, BROADCASTING & CABLE, Apr. 3, 1995, at 14.

66 *See supra* quotation accompanying note 12; *see also* 47 C.F.R. § 73.3555(d).

67 Amendment of Rules Relative to CATV, Second Report and Order, 23 F.C.C.2d 816 (1970), *reconsideration denied*, Memorandum Opinion and Order, 39 F.C.C.2d 377 (1973); Cross-Ownership Restrictions, 47 C.F.R. § 76.501 (1993).

68 47 U.S.C. § 533(a) (1988).

69 *See* discussion *supra* part I.

television,[70] the daily newspaper, radio, and cable television, which increasingly is providing local cable news channels and local cable originations.[71] It follows that these principal sources of local information should be in different hands if the underlying basis of the First Amendment, as set forth in *Associated Press,* is to be maintained.

Second, there is growing competition for local advertising between cable and broadcasting. And third, the entity, whether newspaper, cable system, or television station, has full opportunity to acquire the other medium outside its local area. Thus, broadcast licensees have extensive cable holdings, and newspapers can and do own broadcast stations outside their localities. Significantly, even though grandfathered, the Washington Post and the Detroit News swapped stations in order to be in compliance with the spirit of the rule.[72]

In 1970, the FCC also barred cable ownership by broadcast television networks.[73] In 1992, the FCC modified this rule to permit network-cable cross ownership, provided that the combination does not exceed (i) ten percent of the homes passed by cable nationwide, and (ii) fifty percent of the homes passed in an Area of Dominant Influence ("ADI") by cable systems that are owned by the network.[74] The Commission stated that it would review these structural retrictions in three years to determine the necessity of retaining them.[75]

In my view, that review should end in their elimination. Even absent the structural limitations, however, in light of the present prices of cable systems, there probably will be little movement by the networks into cable. Rather, the networks largely have decided to enter cable by providing national cable programming channels.

The networks also are barred by the FCC from operating two separate network programming services, like the former Red and Blue NBC networks.[76] This provision is outmoded in light of the many cable and DBS networks now in existence, with many more in the offing. There is some movement now to eliminate the

[70] Television Broadcasting Rules, Further Notice of Proposed Rule Making, 10 F.C.C.R. at 3555 n.101.

[71] *Id.* at 3555-56 ¶ 69.

[72] As noted, Senator Pressler's draft proposals as to these two restrictions were also blocked by the Democratic opposition, and thus are not reflected in S. 652 as it goes to the floor.

[73] CATV Rules, Second Report and Order, 23 F.C.C.2d 816; 47 C.F.R. § 76.501(a)(1).

[74] Amendment of Rules to Eliminate the Prohibition on Common Ownership, Report and Order, 7 F.C.C.R. 6156, 6168 (1992).

[75] *Id.* at 6174 ¶ 30.

[76] *See* 47 C.F.R. § 73.658(g).

rule.[77]

III. Cable Ownership Restrictions

Section 11(c)(2) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") requires the FCC to place limits on the number of subscribers that one entity can reach, because of congressional concern about increasing horizontal concentration in cable. Congress found that this increase had the potential to create entry barriers for new programmers and to reduce the number of available media voices.[78]

Accordingly, the FCC in 1993 adopted a subscriber limit prohibiting any one entity from having an attributable interest in cable systems that in the aggregate reached more than thirty percent of cable homes passed nationwide. In order to encourage diversity, it allowed the ownership of additional cable systems reaching up to thirty-five percent of homes passed, provided such additional systems are controlled by minorities.[79] It stated that it would review these limits every five years to determine their continued reasonableness under prevailing market conditions.

A district court ruled that this subscriber limit provision of the 1992 Act is unconstitutional on its face.[80] The FCC stayed the effective date of its regulation until final resolution of the appeal of the district court's ruling. In my opinion, the district court's ruling is mistaken under settled First Amendment jurisprudence, and will be reversed. Senator Pressler's draft did not seek repeal of the national subscriber limitation.

Section 11 of the 1992 Act also required the FCC to deal with the issue of vertical integration, the common attributable ownership of both a cable system and program networks. It did this by prescribing reasonable limits on the number of a cable system's channels that can be occupied by a video programmer in which the cable operator has an attributable interest. Congress thus sought to reduce the ability of operators to favor their affiliated programming services.

[77] *See* Christopher Stern, *Faster End for Fin-syn?*, Broadcasting & Cable, Apr. 10, 1995, at 77.

[78] Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(4), 106 Stat. 1460, 1460 (1992) (codified at 47 U.S.C. § 521(a)(4) (Supp. V 1993)).

[79] Implementation of Horizontal and Vertical Ownership Limits, Second Report and Order, 8 F.C.C.R. 8565 (1993).

[80] Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 10 (D.D.C. 1993), *appeal filed sub nom. Time Warner Entertainment Co. v. FCC*, No. 93-5290 (D.C. Cir.)

In its *Second Report and Order*,[81] the FCC adopted rules permitting an operator to carry programming supplied by affiliated programmers on not more than forty percent of the system's activated channels. This forty percent limitation struck an appropriate balance, the Commission stated, between increasing diversity through vertical integration and reducing the ability of such operators to unduly favor their affiliated programming. Again, the Commission allowed leeway—two addditional channels or an increase to forty-five percent—to encourage the carriage of additional video programming if it is controlled by minorities.

Section 11 also required the FCC to determine whether cable and other multichannel distributors should be subject to limitations on the degree to which they could participate in video program production. The Commission noted the above provisions, and also other requirements in section 19 of the 1992 Act, prohibiting a video programmer affiliated with a cable operator from discriminating against a multichannel video programming distributor and limiting the ability of programmers that are vertically integrated with cable operators to enter into exclusive licenses with cable operators. It found, on the basis of the provisions of sections 11, 12, and 19, that there was no need to impose limits on participation in video programming production.[82]

Section 11 amends section 613(a) to provide that a cable operator may not hold a license to offer Multichannel Multipoint Distribution Service ("MMDS") or Satellite Master Antenna TV ("SMATV") service that is separate and apart from its franchised cable service in any portion of the franchise area served by the cable system. The FCC had adopted rules in 1991 barring local cross-ownership of cable and MMDS, and it simply amended those rules to more fully reflect the nuances of the 1992 Act.[83] The FCC adopted new rules implementing the cable/SMATV cross-ownership provision[84] and revised the rule on January 30, 1995 to better reflect the legislative history.[85]

Views and predictions. Congress was dealing with a difficult issue in this area of vertical integration. Allowing vertical integration certainly has brought strong diversity benefits such as C-SPAN, The

81 Horizontal and Vertical Ownership Limits, Second Report and Order, 8 F.C.C.R. at 8576 n.35.

82 *Id.* at 8608 ¶ 106.

83 *Id.* at 8567-68 ¶¶ 3-5.

84 *Id.* at 6846; 47 C.F.R. § 76.501(e)(2).

85 Implementation of Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 F.C.C.R. 4654, 4660-67 ¶¶ 15-32 (1995).

Discovery and Learning Channels, HBO, and Showtime. On the other hand, such vertical integration, combined with large Multiple System Owners' ("MSOs'") holdings as in the case of Tele-Communications Inc. ("TCI") and Time Warner, has clear drawbacks.

The FCC's *1990 Cable Report*[86] points up these drawbacks. For example, in 1985 NBC sought to enter the general cable news market as a competitor to CNN. When TCI, the country's largest cable operator, refused to let NBC compete with CNN, NBC was forced to develop CNBC, a consumer news and business channel. NBC did gain carriage, but its chairman testified that "a number of large MSOs insisted as a condition of carriage that CNBC not become a general news service in direct competition with CNN, which is owned in part by TCI, Time Warner, Viacom, and other MSOs."[87]

In 1993, in seeking retransmission consent, CBS tried to get MSO acceptance for a competing news channel and ran into a stone wall. At a 1994 conference, Rupert Murdoch, chairman of the News Corporation (Fox), stated: "I would have liked to start a news channel, but [TCI President John] Malone and [Time Warner Chairman] Gerald Levin would not give me the time of day."[88]

In my view, Congress struck a good balance. It permitted the vertical integration for its benefits to the consumer in substantially greater programming diversity, and at the same time, especially through the provision that makes the vertically integrated programming available to competitors like DBS and the telcos, took steps to alleviate the problems caused by vertical integration. It is only strong competition to cable that fully and effectively will solve the horizontal/vertical problems such as those exemplified by the

86 Competition, Rate Deregulation and Policies Relating to the Provision of Cable Television Service, Report, 67 Rad. Reg. 2d (P & F) 1771, 1802-03 ¶¶ 121-23 (1990).

87 *Id.* at 1802 ¶ 120; *see Hearings on Media Ownership, Diversity and Concentration Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 609-10 (1989) (testimony of Robert Wright, Chairman, NBC).

88 Joe Flint, *Summit Sees Bright Future for Info Highway*, BROADCASTING & CABLE, Jan. 17, 1994, at 8 (noting that "TCI and Time Warner have ownership interest in Turner Broadcasting's CNN"). A week later, in another interview in the same magazine, Murdoch stated:

> There are at least four companies, perhaps five, that would like to start a 24-hour news channel. The only one that's made a serious effort has been CNBC. It is now getting distribution, but it had to limit itself to business news. They were very limited, and still are. But so long as they can't be sure of distribution, they're never going to get the chief executives or the chairmen of these companies to take the risk and make that investment.

Don West & Joe Flint, *The Wonder's Still in the Wireless*, BROADCASTING & CABLE, Jan. 24, 1994, at 22.

above case involving a competing 24-hours news channel.[89] This clearly is a First Amendment horror story: the underlying premise of the amendment is that the American people receive information from sources as diverse as possible, yet the cable industry structure restricts the American people to a single 24-hour news channel. A pervasive telco broadband common carrier system, with a requirement to serve all comers indifferently, is much needed as a First Amendment safety valve as we enter the next century.

As an interim measure, Congress should make the commercial leased channel provision of section 612 more effective. This provision, which requires the larger cable systems to set aside ten to fifteen percent of their channel capacity for commercial leasing, so far has been a failure because of its onerous conditions.[90] In the 1992 Act, Congress failed to eliminate the conditions and simply added a paragraph authorizing the FCC to determine the operator's maximum rates and to establish reasonable terms for leased use. Congress would have been better advised to delete the constraining conditions and require a cable operator to engage in last-offer arbitration if no agreement on terms was reached after a stated brief interval;[91] the programmer, after posting a bond, would then gain immediate access, which is essential for success.

In sum, competition in facilities will eventually solve the problems in this area, and make unnecessary the thirty percent ownership limitation and leased access requirements. In the meantime, these provisions serve a useful purpose, and significantly, the Pressler draft does not seek their repeal.

That may be because, as a practical matter, they do not interfere with the consolidation within the cable industry that now is occurring. The pattern that has emerged in the 1990s is for the small cable companies to sell out to the larger ones like TCI and Time Warner. The reason for such sales is twofold: 1) the industry faces increased competition, especially from telco entry, and 2) the cable industry wants not only to meet the telco competition, but also to provide competition to the telcos in the delivery of voice

[89] In a September 1993 American Enterprise Institute Study, D.H. Waterman and Andrew A. Weiss conclude that the "issue upon which policy makers must focus . . . is not vertical integration but the sources of market power at the facilities level." D.H. WATERMAN & ANDREW A. WEISS, AMERICAN ENTERPRISE INSTITUTE, VERTICAL INTEGRATION IN CABLE TELEVISION 94 (1993).

[90] *See* Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?*, *in* The Annenberg Washington Program, *Cable Television Leased Access: A Report of the Annenberg Washington Program, Communications Policy Studies, Northwestern University* (1991).

[91] In last-offer arbitration, the arbitrator chooses between the final offers of the two parties, forcing them to be realistic and thus closely simulating the market bargaining process.

and data. On both counts, considerable investment in facilities—such as fiber optics and opto-electronics—and geographic scope are needed. The smaller companies have difficulty raising the necessary investment funds or are reluctant to "bet[ ] the ranch on telephony."[92] They thus sell to the larger MSOs.

Further, to compete with the telcos, the cable systems seek to "cluster" their holdings in the same geographic area "to approximate what the telephone companies already have."[93] The Federal Trade Commission ("FTC") raised questions about this regional concentration but then recognized the necessity of such "clustering" if cable is to compete successfully with telco, and permitted the mergers to go forward without challenge.[94]

The merger/"clustering" pattern readily can be achieved within the FCC's thirty percent benchmark, and will run its course over the next few years.[95] It does raise concern among public interest advocates, especially if cable rate regulation is removed, as is proposed in the Pressler draft.[96]

IV. TELCO OWNERSHIP LIMITATIONS

The restrictions here stem from two governmental actions: the 1984 Cable Act provision barring the telcos from engaging in cable television operations in the same area as their telco service, and the provisions of the Modified Final Judgment ("MFJ") that led to the divestiture of AT&T.

A. *The 1984 Cable Act Limitation*

In 1966, the FCC adopted rules barring telcos from engaging in cable television operations in their service areas and requiring divestiture of cable systems owned by telcos that were in conflict

[92] Elizabeth Corcoran, *Time Warner to Buy Cablevision Industries*, WASH. POST, Feb. 8, 1995, at C1-2.

[93] *Id.* (statement of Time Warner Cable official). Time Warner's Chairman Gerald M. Levin stated that after all the deals were done, three-quarters of all of its subscribers would be located in 33 large clusters of at least 100,000 subscribers each. *10 Million Subscribers Traded; Time Warner Crests Cable Deal-Making Wave, Buying Cablevision Industries*, COMMS. DAILY, Feb. 8, 1995, at 1. Alan Gerry, Chairman of the seller Cablevision Industries, stated that it could never have achieved similar clusters on its own: "Convergence requires greater critical mass and tighter subscriber clusters to compete successfully than [Cablevision Industries] has on its own." *Id.*

[94] *See* Don West & Harry Jessell, *The Way Uphill: How Cable's Making it on the Infohighway*, BROADCASTING & CABLE, Nov. 28, 1994, at 36, 40.

[95] Since January 1994, in at least 30 major deals, "systems with 10.1 million subscribers changed hands in transactions valued at [an] estimated $19.8 billion," with TCI and Time Warner the largest participants. *10 Million Subscribers Traded*, *supra* note 93, at 2.

[96] Corcoran, *supra* note 92, at C2.

with the rule.[97] In 1984 Congress essentially codified the FCC rule in the Cable Communications Policy Act of 1984,[98] prohibiting telcos from providing video programming to subscribers in their service areas, except in specified circumstances, such as sparsely populated rural areas. Telcos could build systems for lease back to the cable operators, as was done in Washington, D.C. The telcos also can provide video dialtone ("VDT")—a common carrier broadband gateway available to all comers.[99] The 1984 restriction bars the direct involvement of telcos in the selection and control of video programming over their facilities.

As a matter of policy, the FCC believes that the restriction should be lifted,[100] and is joined in that view by the Clinton Administration, including the Departments of Justice and Commerce.[101] Further, the telecom reform bills in the 103d Congress also opted to remove the restriction, as did Senate Bill 652 in the 104th Congress.[102] As discussed below, however, legislation in this contentious area never is sure.

The telcos have sought relief in the courts, and, in a series of decisions that commenced in 1993,[103] have succeeded in winning every case on the merits. The courts have declared the provision violative of the First Amendment, largely on the ground that, since the complete ban on telcos' participation in the provision of video programming in their service areas is "an unnecessarily severe means of achieving the government's objectives,"[104] the statute fails to meet the constitutional requirement that it be narrowly tailored.

It therefore appears most likely that the telcos will be allowed to provide video programming—in addition to VDT—over their facilities, subject to conditions such as the use of a separate subsidiary.

This means that unless there is a drastic shift, government policy is aimed squarely at a two-wire world. For although telcos will

97 *See* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

98 Cable Communications Policy Act of 1984, § 613(b), 98 Stat. 2779, 2785 (1984) (codified at 47 U.S.C. § 553(b) (1988 & Supp. V 1993)).

99 Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781 (1992).

100 *Id.*

101 *See* Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 914 n.8 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995).

102 S. 652, 104th Cong., 1st Sess. § 203 (1995).

103 *See, e.g., Chesapeake & Potomac Tel. Co.*; 830 F. Supp. 909; Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994).

104 US West, Inc. v. United States, 855 F. Supp. 1184, 1193 (W.D. Wash.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994).

be allowed to provide video programming, neither telcos nor cable operators will be permitted to buy out one another in the same service area. Other than in rural areas,[105] both the Antitrust Division and the FCC would block such buy-outs because the clear governmental policy is to spur competition and thus break the two local bottlenecks—the local loop of the local exchange carrier ("LEC") and the coaxial drop of the cable industry. Buy-outs remove the main competitor to LECs and cable systems.

Senate Bill 652 would repeal the present bar in section 612(b) on telcos' rendering cable television service in the same local area.[106] The Administration has expressed great concern about this repeal because it would result in "the absence of a ban on mergers between or acquisition of cable TV providers and telcos in the same service area."[107] While such a ban, with exceptions for rural areas or situations where the cable or telco is a failing operation, is clearly desirable, its absence is not fatal. In repealing the ban, Congress, for solid policy reasons and in recognition of the court cases, is simply permitting telco entry into cable television in the same area. It is not authorizing telco (or cable) buy-outs in flagrant derogation of competition and the antitrust laws. Stated differently, unless Congress affirmatively permits such acquisitions by exempting them from the application of antitrust law, the Department of Justice, as shown by the conditions it has insisted upon in permitting mergers to go forward, would move to bar these buy-outs.

It should be acknowledged, however, that this competitive policy has been criticized as thwarting the goals of the National Information Infrastructure ("NII"). Thus, in their recent article, several futurists, who have the ear of Speaker Gingrich, argue that "forcing a competition between the cable and phone industries" is wholly wrong, and that the Government should be promoting collaboration.[108] John Malone, the TCI Chairman, has echoed this collaboration theme, in answering the question of "how many wires down the street?":

105 Such areas are now defined as having populations of 10,000 or less. S. 1822 in the last Congress would have raised that figure to 50,000, which would permit buy-outs in roughly half the cable communities in the country. *See* Edmund L. Andrews, *Broad Deregulation Sought In Cable and Phone Services*, N.Y. TIMES, Feb. 2, 1995, at D19.

106 S. 652, 104th Cong., 1st Sess. § 203 (1995).

107 *Gingrich Says House Telecom Vote Likely in May or June; Pressler, Gore Battle over Alleged Veto Threat*, TELECOMMUNICATIONS REP., Apr. 10, 1995, at 1. This concern was expressed by Vice President Gore to Senator Pressler. *Id.*

108 Esther Dyson et al., *Cyberspace and the American Dream: A Magna Carta for the Knowledge Age*, *in* PROGRESS AND FREEDOM FOUNDATION, FUTURE INSIGHT (Aug. 1994).

> First of all, that depends on whether or not the overbuilding continues. If you are talking about fiber to the node and coaxes to the home, there is either going to be one, which will belong to cable, or there will be two, which will belong to cable and telephony. There is the possibility at some point there may be unity, i.e., you build one system and the two entities compete over that one. Because that would be very capital-efficient. It would really lower the breakeven point for both people. That is a possibility that has been talked about and I think it will come into sharp focus when people see how capital-intensive this whole thing is and what kind of economic results you get.
>
> If it's just an overbuild it's going to have the same fate as all historic overbuilds did: twice the capital, half the revenue and double the operating expense. This is not that lush a business; the results won't be there. I think in the smaller rural markets the model will be one wire, jointly owned with competition on that wire.[109]

But this suggestion has been made before; just as the international carriers have long cooperated in building the trans-oceanic fiber optic cables, with each having an indefeasible right of use ("IRU") and competing with one another, so too could cable, telco, and perhaps the power companies join to obtain economies of scale in the construction of the broadband highway into the home or local business, with each then competing over that single wire. It would appear that no industry is really interested in advancing this notion; rather, each seeks to get there "fastest" with the broadband wire and associated equipment, software, and "killer applications."

In my view, there will be no congressional provision authorizing general in-region buy-outs by exempting them from application of antitrust law. The only possible relief will be to raise the rural exemption for such buy-outs to communities with a population of less than 50,000, instead of the present 10,000 figure.

The long term future of this governmental two-wire policy depends on technological and market developments that cannot now be predicted. Thus, Dr. Robert Crandall, after setting out four alternative scenarios for the development of new broadband networks, concludes "This futuristic exercise simply confirms that all forecasts about the future structure of the telecommunications infrastructure are extremely risky. Economists cannot predict the future very well when technology is changing slowly; interposing the rapid technical change currently gripping the telecommunications

109 West & Jessell, *supra* note 94, at 44.

sector makes any predictive exercise impossible."[110]

One possible scenario, at least during the early stages of of the two-wire regime, is that the telco and cable television reach an equilibrium in their competition with each other. Each has its own solid base of operation, and can therefore afford to enter the other's field to gain some market share. (This would favor cable, as ten or twenty percent of a $100 billion market is much better than a similar share of a $23 billion market.) Duopolies are not noted for fierce price wars and seem to engage more in marketing strategies. Of course, the duopoly might face growing competition from DBS and other wireless broadband operations.

B. *The MFJ*

The 1982 MFJ imposed three restrictions on the divested Regional Bell Operating Companies ("RBOCs"): they could not engage 1) in manufacturing of telecom equipment, 2) in interexchange ("IX") long distance service, or 3) in information services. The latter restriction was removed as a result of judicial actions, chiefly at the appellate level.[111] Senate Bill 652 provides for lifting the manufacturing restriction at the time that the RBOC is permitted to engage in IX operations.[112]

The most contentious issue involves relief as to the IX restriction. The legislation would afford such relief as part of a letting in-letting out process. Competition to the RBOCs (indeed all LECs) would be enabled and facilitated through a series of conditions to be met on a specified time schedule, thus allowing the RBOCs fully to enter the IX field. The new Congress has indicated that it will probably follow the same path, adding, based on Senate Bill 652,[113] that the letting in process will have a definite time-table ending in roughly two years, which in turn should affect the time-table for the letting out process.[114]

The IX carriers strongly oppose this approach, and argue that the RBOCs should have to demonstrate the existence of significant local competition before such relief is granted. While the aim is to pass the telecom reform legislation in the fall of 1995, it is not clear whether any breakthrough will occur in light of this strong opposi-

110 Robert W. Crandall, *The Economic Impetus for Convergence in Telecommunications*, *in* INSTITUTE FOR INFORMATION STUDIES, CROSSROADS ON THE INFORMATION HIGHWAY: CONVERGENCE AND DIVERSITY IN COMMUNICATIONS TECHNOLOGIES 15 (1995).
111 *See* United States v. Western Elec. Co., 993 F.2d 1572 (D.C. Cir. 1993).
112 S. 652 § 222.
113 *Id.* § 221.
114 *See id.*

tion. If legislation is not passed in 1995, passage in 1996, an election year, is dubious.

V. Foreign Ownership Restrictions

Since the Radio Act of 1927, an ownership restriction has limited alien ownership of radio licenses to no more than twenty percent. The twenty percent alien ownership benchmark was continued in section 310(b) of the Communications Act of 1934. The provision was fashioned at the behest of the military in order to curb alien activities against the nation in light of possible hostilities. There is a provision in section 310(b)(4) permitting an alien holding company to own more than twenty-five percent of a radio licensee, if the FCC does not find that such a holding is inconsistent with the public interest.

This latter provision has never been utilized explicitly in fields like broadcasting.[115] In my view, the FCC should have responded to the great changes—especially in the global communications market—by adopting a new policy, under which the Commission would allow alien ownership under section 310(b)(4), provided that the foreign country involved affords comparable reciprocity to our United States entities. Such reciprocity has been required in allowing holdings meeting the twenty percent benchmark, such as in the case of British Telecom and MCI.

On February 7, 1995, the FCC did propose new rules to govern cases such as Sprint's pending application to sell a twenty percent ($4.2 billion) stake in its company to France Telecom and Deutsche Telekom. The FCC asked whether, when deciding under section 310(b)(4) if the public interest justifies an indirect foreign ownership in excess of the twenty-five percent benchmark, it should consider the availability of effective opportunities in the foreign applicant's markets for United States entities to provide the same or similar communications services the foreign applicant

[115] There is now an extraordinary controversy pending at the FCC involving this section and the acquisition by the Australian-based News Corporation in 1985 of the Metromedia stations—now the Fox Network. There is no question but that the News Corporation, which also supplied all the money for the acquisition, has *de jure* control of the Fox stations. Fox argues that Rupert Murdoch, who became an American citizen at that time, has *de facto* control, and that this consideration, plus the public interest in promoting a fourth network, established the necessary public interest basis for permitting the acquisition under § 310(b)(4). But while the FCC did approve the transfer, it never made any finding that it was acting under the public interest standard of § 310(b)(4). There was then no precedent for such an action, and it is not clear today whether the Fox transfer constitutes such a precedent. The FCC investigation is not yet completed, so no conclusion can be drawn at this time.

seeks to provide.[116] The Commission also asked for comment on other factors that it should consider in its section 310(b)(4) public interest analysis, such as the openness of the country's other communications markets. The Commission also specifically noted that it traditionally has a heightened concern for foreign influence over, or control of, broadcast licensees.

Senate Bill 652 provides in section 106 that in the common carrier field, the restrictions in section 310(b) would not apply if the FCC determines that the foreign country provides "equivalent market opportunities" to United States companies; if reciprocity in the foreign market failed to materialize, there would be a "snap-back" procedure calling for termination of the United States license. Questions have been raised as to this recission, which might actually deter foreign investment.[117]

On the House side, the telecom subcommittee Vice Chairman Oxley has introduced a bill to repeal section 310(b), and Chairman Jack Fields has indicated that revision of the section will be included in the House legislation.[118] It is clear, therefore, that there is a good chance for very substantial reform of section 310(b). As stated, I believe that such reform is sound and long overdue, and indeed, should be extended to the broadcast area.

Conclusion

Because of the extraordinarily dynamic technology, and the market response to that technology, government policy, especially as to ownership restrictions, must be in flux, subject to adjustment to meet the changed market conditions.[119] The convergence of industries in this digital information age will continue, and with that there will be the merger proposals, some with enormous scope such as the failed Bell Atlantic-TCI merger, some more modest like the US West-Time Warner consortium. In addition to the merger option, the present uncertainties lead to many strategic alliances or joint ventures involving multimedia companies, chiefly to share financial risk, gain implementing know-how or technology, or enhance opportunities for faster or more assured entry to new markets. The joint ventures between the telcos and the film producers fall into the latter category. The list of mergers, alliances, and joint ventures stemming from this convergence pattern is large and

[116] Market Entry and Regulation of Foreign-affiliated Entities, Notice of Proposed Rulemaking, 10 F.C.C.R. 5256 (1995).
[117] *See Pressler Releases Telecom 'Discussion Draft'*, *supra* note 58, at 26-27.
[118] *Id.*
[119] *See, e.g.*, Crandall, *supra* note 110.

grows larger each month.[120]

Government policy is based on fostering open entry and all-out competition, and certainly recognizes the value of alliances,[121] joint ventures, or mergers to well position United States companies in this era of global competition. But clearly antitrust standards must be met, and there can be anticompetitive detriments, some large enough to block the merger or combination. Generally, however, the pattern that has emerged is for the Justice Department, or the FTC, to allow the combination to go forward because of the overall greater competitive thrust it provides, but with conditions to ameliorate any detriments, such as divestiture of one of the partner's holdings in the same region as the other partner.[122] In the communications field, FCC competitive and diversity policies—the latter especially at the local level—are pertinent and will continue to be applied.

The foregoing discussion has focussed on policies in this area for the next five to ten years. At some point early in the next century, all of these policies will, of course, require drastic revision or repeal in light of the digital revolution.[123] With the inevitable digital revolution and its convergence of media ("bits are bits"), there will be no way to distinguish among the media.[124] A newspaper, a broadcast station, or a cable programmer all will be engaged in electronic publishing. But the transition period to that digital future must reflect sound multiple ownership policies.

Addendum

The foregoing discussion was prepared before any final committee or floor action. Since then, the Senate passed Senate Bill 652 by a vote of eighty-one to eighteen, and the House Commerce

120 For a recent partial list, see Richard P. Adler, *Introduction* to INSTITUTE FOR INFORMATION STUDIES, CROSSROADS ON THE INFORMATION HIGHWAY: CONVERGENCE AND DIVERSITY IN COMMUNICATIONS TECHNOLOGIES xiii-xiv (1995).

121 Indeed, the FCC, through pushing the process, did much to foster a "Grand Alliance" among the contestants to establish a high definition television, or HDTV, standard. *See* Edmund L. Andrews & Joel Brinkley, *The Fight for Digital TV's Future*, N.Y. TIMES, Jan. 22, 1995, § 3, at 1, 6.

122 *See, e.g.*, *DoJ Clears the Way for Nextel, Motorola in SMR Deal*, TELECOMMUNICATIONS REP., Oct. 31, 1994, at 12; *DoJ Files Suit, Decree Allowing AT&T-McCaw Merger*, TELECOMMUNICATIONS REP., July 18, 1994, at 18; *Justice Says Consent Decree Regarding TCI/Liberty Merger Will Protect Telcos' Access to Programming*, TELECOMMUNICATIONS REP., May 2, 1994, at 22.

123 As Moore's Law continues to operate (the number of transistors on a chip doubling every 18 months), the computer (or telecomputer) will become the dominant means of receiving all information, including video. NICHOLAS NEGROPONTE, BEING DIGITAL 37-57 (1995). We will then have the great convergence of previously separate industries. *See* INSTITUTE FOR INFORMATION STUDIES, CROSSROADS ON THE INFORMATION HIGHWAY: CONVERGENCE AND DIVERSITY IN COMMUNICATIONS TECHNOLOGIES (1995).

124 See NEGROPONTE, *supra* note 123, at 54-58.

Committee adopted House Bill 1555, with floor action expected in late July of 1995.[125] The attached appendix sets out, in outline form, the multiple ownership provisions of these two bills. The issues in this area cannot be said to be settled, as there still is considerable controversy to be resolved, both on the House floor and in the ensuing conference between the House and the Senate.[126]

Some brief comment is in order. First, while some of the predictions in this article so far have been borne out, several have not. It seems clear that this article underestimated the sweeping deregulatory thrust of the Republican majority—especially in the House—and the political clout of the industries seeking relief from multiple ownership restrictions, and overestimated the influence of the Democratic minority, the Administration, and the FCC. The bottom line is that the diversification—the *Associated Press* principle—so important at the local level, has been set back to a significant extent by the legislative proposals in their present form. Antitrust action, while still possible, is aimed at the prevention of monopoly or the stifling of competition, and thus is unlikely to take up the slack of affirmatively promoting diversification or competition. The Administration, however, has threatened a Presidential veto if the ownership provisions are not largely withdrawn.[127]

125 Christopher Stern, *Dereg Rolls in Senate: 81-18*, BROADCASTING & CABLE, June 19, 1995, at 6; *House Vote on Telecom Bill Expected in July; Senate May Debate Its Measure Next Week*, TELECOMMUNICATIONS REP., May 29, 1995, at 1.

126 *See* Christopher Stern, *Prospect: Clinton Will Sign Telcom Reform Bill*, BROADCASTING & CABLE, June 26, 1995, at 10.

127 *See* Edmund L. Andrews, *Clinton Enters Battle Over Telecom Bill*, N.Y. TIMES, Oct. 28, 1995, at 33 (describing letter sent by President Clinton to Senator Ernest F. Hollings, the ranking Democrat on the Senate Commerce Committee).