Att'y

Monday 2/1/71

2:00 STEVE

Mr. Zapple's office called to say they are releasing both their letter and ours to people upon request.

Justice

February 2, 1971

To: Mr. Scalia

From: Tom Whitehead

Any reason we should get involved?

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. Mr. Whitehead			
2. [signature]			
3.			
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

This is the letter on non-network access to Presidential speeches which I mentioned on the telephone the other night. I sent it to you earlier in the month, but apparently you did not receive it.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
D. I. Baker			1/28/71

CTW

DIBaker:dtc

January 6, 1971

Honorable Clay T. Whitehead
Director
Office of Telecommunications
Policy
Room 749
1800 G. Street, N.W.
Washington, D. C.

Re: Non-Network Access to Presidential Broadcasts

Dear Tom:

The Westinghouse flap of two nights ago squarely raises the problem of access to Presidential broadcasts for non-network affiliates. It was resolved on this occasion when CBS was persuaded to back down at the eleventh hour. Of course, the same thing may well happen in the future, and again it is likely to come up at the last minute. Therefore, it seems to me to be a problem which you (and we) should be concerned about now.

First, it is clear under established antitrust law that the networks controlling the White House pool must give access to all broadcasters on equal and non-discriminatory terms. This represents a particular application of the fifty-year old rule that those controlling an essential joint facility must give access to that facility to all in the trade on equitable and non-discriminatory terms. See U.S. v. Terminal RR Ass'n, 224 U.S. 383 (1912)(requiring equal membership in terminal railroad controlling a vital bridge) and Associated Press v. U.S., 326 U.S. 1 (1945)(requiring equal access in the nation's largest news gathering organization). This rule is clear and well established. It would cover both flat refusals to allow access to Presidential speeches and various other discriminatory arrangements (such as grants of delayed broadcast rights).

Secondly, beyond the legal question, denials of access would seem to be adverse to the interests of the White House. When the President goes on the air, he has a general interest in obtaining maximum exposure; clearly, denials of access reduce that exposure, since such denials necessarily result in any excluded stations carrying other competing programming during the Presidential broadcast.

I would think that the best and simplest way to resolve this problem is for the White House to make clear to the networks that equitable access is an essential element in the White House pool arrangements; this could presumably dispose of the question. The next best solution would be some sort of rule-making by the FCC. Direct antitrust relief is probably not workable, since any illegal refusal is likely to come up at the eleventh hour and then it would be too late to get judicial machinery cranked up and an injunction issued.

We are obviously interested in the whole subject here, since the conduct involved such a clear antitrust violation. Therefore, I would like to be kept posted on your thoughts as to how the problem might be resolved, as well as any affirmative developments.

Sincerely yours,

DONALD I. BAKER
Deputy Director of Policy Planning
Antitrust Division

Justice

February 8, 1971

To: Peter Flanigan

From: Tom Whitehead

I think this clarifies the situation regarding the Justice Department's letter on Comsat pretty well, and as far as I know, it does not cause Justice any problems.

Attachment - Letter to Sen. Pastore dated 1/26/71 - incoming

cc: Mr. Whitehead

CTWhitehead:jm

18 FEB 1971

Mr. R. C. Stover
MOQ 219, Dam Neck
Virginia Beach, Virginia 23461

Dear Mr. Stover:

As the President's principal adviser in telecommunications policy, I have been requested to reply to your letter of January 12.

I understand the concern you have expressed, and am pleased to be able to report that the newspaper clipping you sent was in error. President Nixon is not seeking AT&T sale of Comsat, and this Administration has not endorsed such a proposal. Following Senator Gravel's press release on this subject, I issued the enclosed press release to clarify the situation. I hope this answers your questions.

The President very much appreciates your support and the time you have taken to bring this matter to his attention.

Sincerely,

SIGNED

Clay T. Whitehead

Enclosure

cc: Mr. Whitehead
Mr. Doyle

SEDoyle/AScalia/ec/12Feb71

12 January 1971

R.C. Stover
MOQ 219, Dam Neck
Virginia Beach, Va. 23461

Nixon Seeks AT&T Sale Of Comsat

WASHINGTON (UPI) —The Nixon administration Thursday endorsed a proposal to force American Telephone & Telegraph Co. (AT&T) to give up all its financial interest in Communications Satellite Corp. (Comsat).

Sen. Mike Gravel, D-Alaska, has said he will introduce a bill early in the 92nd Congress that would require AT&T to sell all its Comsat stock, currently valued at $140 million and making the giant telephone firm the largest Comsat share holder.

The legislation also would strip AT&T of its voice in the selection of three members on the board of directors of Comsat, which is a semipublic corporation set up to build communications satellites and ground transmission equipment.

The President
The White House
Washington, D.C. 20501

Dear Mr. President,

You probably will never see or know the contents of this letter but, because of my concern, I have decided to go to the top this time. If the above newspaper article is accurate, it strikes me as revolting and not indicative of a free enterprise system. AT&T is an enterprising, non-inflationary corporation and is a source of considerable tax revenue. Without their management and expertise, I seriously doubt that our satellite program would have been as successful. Now, after coming under fire by the FCC, AT&T must come under fire by the President and Congress. This is almost as absurd as is the game of political footsies and enduring honeymoon that exists

between the labor unions and the politians who lack the intestinal fortitude to crack down on the organized promoters of strikes, greed, inflation and a poor balance of payments. Rather than be assaulted by Congress, AT&T should be consulted as to how to achieve balanced budgets. If AT&T or the people of this country were to manage their finances as exampled by the government, there would not be a bank in this country from which they could receive credit or a loan. Incidentally, despite your reported optimism, I fail to see any evidence that inflation is under control or being arrested. I firmly believe that the day has already come and gone when some form of wage and price controls should have been implemented. You rationalize against resorting to wage and price controls yet there is no reluctance to intervene with AT&T or admonish the steel companies when they are forced to raise their prices in order to afford the high cost of labor and curtail dwindling profits.

In closing, I wish you success on your welfare reform plans. In certain salient respects, the present program can be compared to that of Social Security, i.e., both programs are federally sponsored, neither program can pay for itself, both have inequities, and they serve as incentives not to work or to save for a rainy day.

Respectfully yours,

R. C. Stover

R.C. STOVER

3/9/71

Don Baker's

Charles River Bridge speech given to Mr. Scalia

Justice Dept

Wednesday 3/17/71

6:55 Do you want me to reschedule the meeting with Don Baker and Mr. Scalia which had to be cancelled when you were working on your speech and he had to go out of town (2/26).

Or has that all gone by the board?

✓ Yes

Friday 2/19/71

MEETING
2/26/71
12 noon

4:40 We have scheduled a meeting with Don Baker
" and Mr. Scalia for Friday (2/26) at 12 o'clock
to discuss the paper he gave at the Bar Association
meeting.

Thursday 2/18/71

2:15 Don Baker stopped by to leave you the attached copy of a speech he gave at the Federal Bar Association today -- this is roughly as given -- no final text issued yet.

Also mentioned that he had had a call from the press concerning the Gravel matter -- and thought you may be getting some calls from reporters.

Thought you might want to talk with him and he'd tell you what he said to the press. Will be back in his office shortly -- in case you plan to call.

THE ANTITRUST ROLE IN COMMUNICATIONS

In recent years, antitrust has become a matter of more frequent concern in the field of communications as in other regulated industries. This is in part the result of our efforts at the Department of Justice (we all like to claim credit for our works). But in greater part it is the result of a pervasive dissatisfaction with the regulatory process itself - dissatisfaction with traditional regulation as a means of efficiently and equitably allocating our national resources. This dissatisfaction is written in large type across the pages of reports by presidential commissions, the Council of Economic Advisers, private research organizations, scholars, muckrakers, and others - by authors with as different perspectives as George Stigler and Ralph Nader. Most of these critics want less regulation and more competition.

Where does the Department of Justice fit into this picture? First, we are the executive agency charged with enforcing the competitive mandate of the antitrust laws. These laws are broadly applicable in the field of communications - and the Department has brought some important cases over the years including the 1949 AT&T case and the second RCA case, decided by the Supreme

Court in 1958. Secondly, the Department has served within the government as an advocate for the underlying competitive policies behind the antitrust laws; in this role as advocate, we have participated in executive advisory bodies (including the 1968 Communications Task Force) and have appeared before the Federal Communications Commission in a variety of rule-making and adjudicatory proceedings. Finally, the Department is involved in certain appellate review proceedings, where the United States is a statutory respondent as well as the Commission; here our primary role is as a guardian of procedural fairness, and competitive policies are often not at issue.

Competition is the general rule in this country. Antitrust represents a national commitment to the policy. It rests on the premise that competition will generally produce the greatest abundance of goods and services at the lowest prices - a premise now supported by three quarters of a century of evidence. It is based on the fact that the competitive marketplace is uniquely able to reward innovation and efficiency - and to punish their opposites. Competition is not necessarily perfect - but it does have the same virtue that Churchill claimed for democracy: it is better than all those other systems that have been tried from time to time.

Needless to say, competition will not work in all circumstances - and we at the Department recognize this - but the exceptions are relatively few. Accordingly, the Federal Government has resorted to direct regulation in two basic types of situations where competition is not fully satisfactory.

The first involves a natural monopoly situation, where competition simply would not work in economic terms. Local public message telephone service is an obvious case in point. The economies of scale are so great that direct competition would be "a costly and idle gesture." Here therefore regulation is employed to approximate the classic marketplace goal of efficient service to the public.

The second type of situation is where competition does not secure some specifically defined social goal. Thus we regulate banks because we accept bank solvency as an overriding social goal, and we regulate securities markets to insure full disclosure to the investing public and continued confidence in our capital markets. Regulatory supervision is directed to these specific goals. Neither scheme implies a general elimination of competition. The Supreme Court made this clear in its Philadelphia National Bank and Silver decisions: antitrust is only excluded to the extent necessary to make the specific regulatory scheme work.

Broadcasting regulation is another case in point. We regulate this important industry to avoid a spect problem - radio interference. Spectrum is limited and wide-open competition would - as the experience of the 1920s showed - produce chorus of signals reminscent of an oriental bazaar. Therefore, first the Radio Commission and then the FCC were set up to ration this scarce resource and thereby avoid interference. This scheme does not exclude competition from the business of broadcasting - a point the Supreme Court has emphasized on several occasions.

Antitrust and communications policy can meet in at least two types of situations. The first is where the Commission is asked to pass on some practice (or merger) which would be illegal under the antitrust laws, absent some overriding regulatory justification. Carterfone offered a good example: the "foreign attachment" tariffs would normally constitute an illegal tie-in under the Sherman and Clayton Acts, and the Department so argued in its amicus brief to the Commission. At the same time, we recognized an overriding need to preserve the technical integrity of the communications network; and therefore we asked whether this particular tariff was in fact necessary to that end. The Commission of course answered

"no" to this difficult technical question in its landmark 1968 opinion. The Carterfone-type case really involves the application of antitrust law in field subject to the Commission's jurisdiction: the antitrust court will (as the Fifth Circuit did in Carter's case) stay its proceedings for a reasonable period to enable to Commission to determine whether there is some particular justification for an anticompetitive restraint otherwise illegal under the antitrust laws.

Competitive policy and communications policy can also come into contact in a second type of situation where no even arguable antitrust violations are involved: this is where the Commission is considering entry policy. The current Specialized Carriers proceeding is a clear case in point - and so in a way are the various pending CATV proceedings. The ultimate question can be stated simply: will the "public interest" be served by allowing new entry into these new fields? In general, the Department has argued that it will - that competition will produce a greater variety of service to meet particular needs.

business to say, those with a vested interest in the status quo take a different tack: they use new competition as supposedly inviting, or even destroying, a carefully created "regulatory scheme." This is hardly surprising. Most established interests treat competition the way my children do green vegetables: no doubt a very good thing for others - but something for them to avoid if at all possible. Other values (such as discount) are quickly seen as being over-riding.

Competition can also be inconvenient for a regulatory commission. It disrupts nice "regulatory schemes" in favor of what the public wants and is willing to pay for. It also may reduce the Commission's bargaining leverage vis-a-vis the industry - since the threat of authorizing additional entry is not a potent club against an already competitive industry.

The most inconvenient aspect of competitive policy is that it makes us ask hard questions about the ultimate goals of regulation in a particular area. What exactly are the overriding communications goals to be protected against competition - against the choices of buyers and sellers? Let me illustrate the point by looking at the current CATV situation -- so appropriately called the "wire mire" by a law review editor of a few years ago. Cable systems do not use the scarce frequency spectrum, but they do pose on economic challenge for those who do. Of course, the challenge will only materialize if substantial numbers of television viewers are willing to pay a CATV operator something extra for wider programming choices and better picture quality. Whether the public will pay (or be given a chance to) is still an open question - but, if they do they are simply suggesting that they have a wider variety of tastes than are being conveniently accommodated in the limited spectrum allocated for television broadcasting. Of course, this challenge to status quo in broadcasting presents the Commission with a

George Stigler, of the University of Chicago, took this approach in a recent local debate with Manuel Cohen, former Chairman of the SEC: "There may be instances," he said, "in which the SEC, for example, has actually fostered competition in the industries for which it must answer to God, if not to man, and I hope that Mr. Cohen with his unrivalled knowledge can produce at least one instance. For every (or any) genuine instance that may be supplied, however, it will be ridiculously easy to supply five instances of the suppression of competition." Regulation and competition are rhetorical friends and deadly enemies: over the doorway of every regulatory agency save two should be carved: Competition Not Admitted." He then added, "The Federal Trade Commission's doorway should announce, 'Competition Admitted in Rear', and that of the Antitrust Division, 'Monopoly Only by Appointment'."

Needless to say, I do not take quite such a bearish view of the local regulatory scene. I do believe, however, that ~~for~~ regulation is generally a second best solution from the economic policy standpoint; and that non-competitive solutions should not

"hot" issue. But is there an overriding "communications" policy which would justify limiting this new competition? Do the Commission's responsibilities flow from spectrum shortage ~~with~~ and its allocation responsibilities? Or is its raison d'etre to maximize the use of the spectrum assigned for broadcasting? These fundamental issues have already been canvassed in the Department's briefs and I shall not repeat them here.

To summarize, antitrust and the competitive policies it embodies are important in the communications field for at least two reasons. First, antitrust is a body of law applicable to specific practices - such as the "foreign attachment" tariffs at issue in Carterfone. Secondly, competitive policies make us ask the hard ultimate questions of why we regulate particular activities - of why we have the government make choices rather than the public.

There are some - a growing number - who question whether the regulatory process can ever work well. These critics argue that an agency will nearly always reject competition against its industry. Professor

be accepted except when well defined, basic regulatory goals are at stake. The burden of showing that a non-competitive solution is necessary to the regulatory scheme should be always put on those who oppose competition. This does not mean passive regulation. It does mean that more imagination is needed in reconciling the fundamental needs of the regulatory scheme with the economic opportunities of the marketplace - the kind of imagination that the Common Carrier Bureau has shown us in the Computer Inquiry, ~~and~~ Carterfone, and Specialized Carriers inquiry to name a few. This is a genuine challenge requiring skill and courage. A regulated enterprise will usually present the Commission with the most anti-competitive solution arguably required to meet any regulatory goal. The issues involved will often be technical and difficult, and they can only be met by a commission and staff able to evaluate them critically and frame any less anticompetitive alternatives available.

The often-controversial efforts of the Department of Justice should be seen in this light. We serve as an advocate for competition - in communications as

elsewhere. We seek to maximize the role of competition as a means of promoting innovation and efficiency in regulated industries. In doing this, we are following a 1969 task force recommendation that the Department of Justice act as "the effective agent of the Administration in behalf of a policy of competition." This task force, headed by Professor Stigler, went on to emphasize, "The [regulatory] commissions should have the merits of competition pressed upon them. Competition is not a matter of all or none, and the fact of regulation should not exclude competition. . . ." */ We are following this recommendation and we hope that the message is getting through.

---

*/ Presidential Task Force, Report on Productivity and Competition (Stigler Report (Feb. 8, 1969) (5 Trade Reg. Rep. ¶50,250 at 55516).

PIERSON, BALL & DOWD
1000 RING BUILDING
WASHINGTON, D. C. 20036

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THOMAS C. FOX
RICHARD G. DUVALL
(ADMITTED MD. ONLY)

March 31, 1971

BY HAND

Dr. Clay T. Whitehead
Director
Office of Telecommunications Policy
Executive Office of the President
1800 G Street, N. W. - Room 749
Washington, D. C. 20504

Dear Tom:

You will recall a few weeks ago I mentioned the Antitrust Division's intervention in the KHJ case and their taking positions with respect to communication policy which I believed improper. You stated that this was probably a gray area for OTP, but that you would like to be informed on the matter. Enclosed is a memorandum on the subject.

Our hope would be that some way could be found to inform the Commission that the Antitrust Division's proposals for modification of national communication policies do not represent the views of the Administration.

I hope I may call you in the next week or two to get your reactions.

With kindest personal regards.

Sincerely,

PIERSON, BALL & DOWD

W. Theodore Pierson

WTP/jmm

Enc.

MEMORANDUM CONCERNING INTERVENTION
BY DEPARTMENT OF JUSTICE IN FCC
PROCEEDING INVOLVING RKO GENERAL, INC.

This memorandum will summarize briefly the action taken by the Antitrust Division, Department of Justice, in the pending proceedings before the Federal Communications Commission involving the application of RKO General, Inc. (RKO) to renew its license for Station KHJ-TV at Los Angeles, California.

Briefly stated, and so far as relevant here, this case involves the application of KHJ-TV, Los Angeles, California, for renewal of license and a competing application by Fidelity Television, Inc. for the same facilities. One of the issues in the case involves allegations that the licensee of KHJ-TV and its parent and associated companies had engaged in reciprocal trading practices in the early 1960's which the Department of Justice now contends violated the antitrust laws -- a contention which is contested by RKO. The Commission has a policy which is a score of years old dealing with the affects upon the qualifications of a broadcast licensee of past violations of antitrust and other laws. This long-established policy weighs such alleged violations not for the purpose of imposing penalties but for the purpose of determining whether reasonable inferences can be drawn that the licensee in untrustworthy as a "public trustee."

In this weighing process, the Commission considers not only the isolated instance of an alleged violation of law but the whole past conduct and performance of the licensee as a "public trustee." In this case, the Department of Justice has urged a radical modification of this policy by urging that, if the Commission finds that the conduct complained of violated the antitrust laws, as the Department claims, it should, without giving consideration to any other factors, deny the application for renewal.

The Department of Justice is taking this position even though in a civil suit in which it sought to establish the illegality of the reciprocal trading

practices engaged in by the licensee and associated companies it sought no further remedy than a consent decree in which the company agreed to cease such practices and accepted certain regulatory provisions with respect to the conduct of its business. Even though the statute authorizes it, the Department of Justice did not seek the penalty of forfeitures in that case.

The issue here is whether it is proper for the Antitrust Division of the Department of Justice, seemingly speaking for the Administration, to urge the Commission to reverse or ignore long-established communication policies with respect to license renewals. No challenge is made here to the propriety of the Division informing the Commission as to its interpretations of the antitrust laws. The licensee of KHJ-TV believes this latter action on the part of the Division to be entirely appropriate.

A more detailed description of the proceedings and the Department of Justice actions follows.

I.

Station KHJ-TV has been operated by RKO since 1951. When its application for regular renewal of its license for the three-year period December 1, 1965, through November 30, 1968, was filed, a newly formed corporation, Fidelity Television, Inc. (Fidelity) filed "on top" of RKO, that is, it sought a permit to construct a station on the same Channel 9 at Norwalk, California. Since the applications were mutually exclusive, a comparative hearing was required to determine whether a renewal of RKO's license or a grant of Fidelity's application would better serve the public interest. In the hearing which was held before a Hearing Examiner designated by the Commission, evidence under traditional criteria such as past performance, integration of ownership with management, broadcast experience, etc. was adduced.

On March 2, 1967, during the course of the hearing, the Department of Justice filed a complaint in the U. S. District Court for the Northern District

of Ohio (United States v. General Tire and Rubber Company, Aerojet General Corporation, A. M. Byers and RKO General, Inc.) in which it charged that the defendants had violated §§ 1 and 2 of the Sherman Act by engaging in systematic trade relations or reciprocity practices by which they used their purchases to increase their sales. This civil suit was considered by industry and the bar generally to be a "test case" to determine whether or not the Sherman Act precluded all reciprocal arrangements or attempts at arrangements between suppliers and customers to purchase each others' products.

The FCC proceeding was enlarged at Fidelity's request for the adduction of evidence concerning the alleged reciprocity practices of General Tire and its subsidiaries to the extent that such practices had any material bearing on RKO's stewardship of Station KHJ-TV. The record on this as well as all other matters before the Examiner was closed on August 26, 1968, and in his Initial Decision, rendered August 13, 1969, the Examiner recommended that Fidelity's application be granted over RKO's. Although he made findings and conclusions unfavorable to RKO with respect to its involvement in some reciprocity dealings, these practices were not held to disqualify RKO as a licensee, nor were they treated by the Examiner as a major factor in his preference of Fidelity over RKO.

More than 9 months after the issuance of the Initial Decision, the Department of Justice filed a motion with the FCC in which it sought limited intervention in the case. It stated that:

> "Prior intervention has not been sought by the Department because it would be wasteful and unnecessary for the Department to participate in a hearing in which the record was being adequately developed by parties already in the case. On the other hand, having now had an opportunity to review the record in these proceedings, and particularly the findings of the Examiner, we feel that it would materially assist the Commission for the Department of

Justice, as the executive antitrust enforcement agency, to make clear its opinion on the antitrust and related policy questions raised by the Examiner's findings on reciprocity."

The Department, without objection by any party, was granted leave to participate as amicus curiae. It thereupon filed a brief in which it set forth its views that reciprocal trade dealings, of the kind found by the Examiner, were illegal under the antitrust laws. It expressly disclaimed any opinion as to whether or not these findings were supported by the record but it contended that if the findings were sustained by the Commission, the latter necessarily must deny RKO's application for renewal of license to operate KHJ-TV. The essential rationale of the Antitrust Division's position was that an adverse finding with respect to the antitrust laws outweighed every other conceivable public interest consideration in favor of renewal of its license.

The Department's position was reiterated in a supplementary memorandum filed August 10, 1970, in which it contended that the Examiner's findings, if sustained, would constitute a per se violation of the Sherman Act. It urged, again, that RKO's application for renewal of its license to operate KHJ-TV must be denied. It went on to state that if the Commission concluded that Fidelity had established that it could substantially serve the public interest, it should receive the license. Otherwise, the Commission should institute a new proceedings open to all applicants, including RKO and Fidelity, to select a licensee to operate the station.

A consent decree was entered into by the Antitrust Division and General Tire and its subsidiaries in the antitrust case, which was approved by the Court in October, 1970, thus terminating the suit. Relief took the form basically of an injunction against the use of reciprocity in the future.[1/] No mention was

1/ The consent decree with the General Tire companies was similar in form to decrees entered into by the Department of Justice with a number of other companies (United States Steel, Republic Steel, LTV, PPG, etc.) for the same kind of alleged reciprocity practices.

made in the consent decree (or for that matter, at any previous point in the antitrust case) that there would be any forfeiture of RKO's licenses or any other punitive measures against it because of reciprocity.

Two conferences were held at RKO's request with representatives of the Antitrust Division who were asked to modify their presentation before the Commission so as to confine it to an expression of their legal opinion as to the legality or illegality under the antitrust laws of the reciprocal trade practices found by the Examiner. It was pointed out that it was unfair for the Department to single out RKO for additional punishment -- beyond that involved in the consent decree -- by seeking from another government agency what in effect is a forfeiture of a valuable property without compensation. The extreme position that RKO's renewal must be denied if the Examiner's findings on reciprocity are sustained would mean a loss to RKO of millions of dollars and years of effort in making KHJ-TV a strong non-network station in Los Angeles. Moreover, it was urged that, even if the factual findings of the Examiner on reciprocity should be sustained and even assuming arguendo that these activities violated the antitrust laws, the Department's stance that the violation outweighed every other public interest consideration was unsound. The Antitrust Division refused to modify its position. To the contrary, it implied that in oral arguments before the Commission en banc it would present the same recommendations as are contained in its written brief and supplementary memorandum.

RKO believes that the record before the Examiner does not support any findings of reciprocal arrangements or efforts which could be the predicate for any conclusion that it engaged in illegal conduct under the antitrust laws particularly in view of the state of the law on reciprocity in the early 1960's when the alleged dealings occurred. Even to this day there has been no court adjudication to support the Department's assertions that reciprocity of this kind is per se illegal. The appearance before the Commission of representatives of the Department of Justice, using the prestige of their offices, to urge that a

denial of RKO's renewal is mandatory because of antitrust violations is a serious and unfair burden to put upon a broadcaster. This is particularly so since it is certain that all but the most sophisticated and discriminating persons will regard the Department of Justice as speaking for the Administration in this matter on issues of national communication policy.

II.

The advocacy by the Antitrust Division of a denial of RKO's application is inconsistent with the role normally recognized by the Department as proper for it to play in Commission proceedings. The appropriate approach in accommodating the responsibilities of the Department of Justice with those of the Federal Communications Commission is contained in the following statement:

> "While enforcement of the antitrust laws is a matter for the Department of Justice, United States v. RCA, 358 U.S. 334 (1959), the appropriate relief in this particular administrative proceeding is a matter for the Commission to determine under the public interest standard of the Communications Act of 1934."2/

Moreover, the Department's position that the Examiner's findings on reciprocity, if upheld, ipso facto require denial of RKO's license is in conflict with the Commission's established policy as set forth in its Report on Uniform Policy as to Violation by Applicants of Laws of the United States. 1 Pike and Fischer RR (Part 3) 91:495-501 (1951). The Commission there stated:

> "[I]f an applicant is or has been involved in unlawful practices, an analysis of the substance of these practices must be made to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest.

2/ Letter, dated July 14, 1966, from Donald F. Turner, Assistant Attorney General, Antitrust Division, to Honorable Rosel Hyde, Chairman, Federal Communications Commission, commenting generally on the antitrust questions raised by network control of television programs in Docket No. 12782.

* * *

"Violations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit further examination. While this question as to character may be overcome by countervailing circumstances, nevertheless, in every case, the Commission must view with concern the unlawful conduct of any applicant who is seeking authority to operate radio facilities as a trustee for the public. This is not to say that a single violation of a Federal law or even a number of them necessarily makes the offender ineligible for a radio grant. There may be facts which are in extenuation of the violation of law. Or, there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest.

* * *

"A single transgression of law, particularly if unadvertently committed, might raise little question with respect to qualifications, whereas a continuing and callous disregard for laws may justify the conclusion that the applicant cannot be expected in the future to demonstrate a responsible attitude toward his obligations as a broadcast licensee." Id., at 497-98 (Emphasis added).

This long-established communication policy is what the Department of Justice seeks to reverse or have the Commission ignore.

The Department obviously regards as irrelevant the long history of RKO's unblemished observance, as a broadcaster, of the Commission's rules and regulations and the absence of any indication of wrongdoing other than the alleged reciprocity. If, as the Commission has stated, its purpose in evaluating violations of law is to enable it to determine whether the applicant can be expected in the future to demonstrate a responsible attitude toward its obligations as a broadcast licensee, it is apparent that the assessment of RKO's conduct can more reasonably be based upon its 25-year history as a licensee rather than on the isolated factor of reciprocal trade practices. This is particularly so in the instant case, in view of the unsettled state of the law on the entire subject of reciprocal dealings. Furthermore, putting aside the validity of

RKO's contentions that the sales to suppliers were not illegal -- at least not at the stage in the development of the antitrust laws which prevailed during the early 1960's when these alleged activities occurred -- the Commission can be assured by RKO's agreement to the proposed Final Judgment in the antitrust case that, so far as it is concerned, reciprocity is a thing of the past.

The Commission, in cases of other licensees involving misconduct much more reprehensible than anything that could conceivably be inferred from the instant record, has applied its policy on violations of law so that countervailing circumstances, particularly the licensee's contributions in the field of broadcasting, have been held to outweigh the improper conduct attributed to the licensee. For example, the conduct of which the General Electric Company and Westinghouse were found guilty several years ago was much more reprehensible than anything in the Examiner's findings against RKO. Nevertheless, their contributions in the field of broadcasting were deemed to be sufficient countervailing circumstances to warrant renewal of their licenses. General Electric Co., 2 R.R. 2d 1038 (1964); Westinghouse Broadcasting Co., 22 R.R. 1023 (1962). Similarly, NBC, after having been found to have utilized its network power coercively to acquire Philadelphia television stations, was granted a renewal of its license for that station over a competing applicant -- the only condition being that it thereafter divest itself of the station in exchange for the one in Cleveland which it had previously held. National Broadcasting Co., 37 F.C.C. 427, 448, 2 R.R. 2d 921, 947 (1964).

A denial of RKO's application, as urged by the Department, solely because of reciprocal trade practices allegedly engaged in prior to 1967 would have far-reaching ramifications on the stability of the broadcast industry. Licenses would be in jeopardy constantly because of activities which are reasonably believed consistent with the law and the public interest at the time they occur, but which later, due to developments in the law, are deemed illegal. Specifically, as to reciprocity, in view of the acknowledged widespread nature of reciprocity

in American business,[3/] it is a fair assumption that many broadcasters other than RKO have engaged in that practice under the belief that it was permissible. To subject their licenses now to forfeiture or even to imply that competing applicants can be assured of victory against incumbents who have practiced reciprocity would jeopardize the status of a broad spectrum of the industry.

If the Department's primary concern in intervening as amicus curiae was to make clear its concern that broadcast licensees be put on notice that reciprocal trade dealings are forbidden, the imposition of the extreme sanction against RKO is an unnecessarily harsh way to convey this message. If the Commission should agree with the Department on the need for warning broadcasters, it can issue an appropriate announcement or, with due process, a regulation, laying down suitable guidelines and concomitant safeguards to assure that such an "irrelevant" consideration as reciprocity does not influence an advertiser's judgment in the selection of a station to carry his advertising message. Furthermore, even if the Commission should decide to announce in this ad hoc adjudicatory proceeding, definitive views on the subject of reciprocity for future guidance of broadcasters, it can do so without accompanying them with the punishment against RKO of a denial of its license.

In summary, it should be a matter of legitimate concern for the present Administration that the Department of Justice has taken upon itself to participate in proceedings before the FCC in an effort to reverse established communication policy in a way which would be a disservice to the Government's interest in assuring fair and reasonable implementation of the Communications Act. In short, it is not enough for the Department to pay "lip service" to the concept

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3/ "Absent coercion, reciprocal dealing is generally considered to be legal, and has flourished in recent years. A trade relations association with an expected early membership of 200 trade relations men in all parts of the country was formed in December, 1962, and the American Management Association conducted seminars on 'Effective Management of the Trade Relations Function' in New York City and San Francisco in the spring of 1963." Hausman, Reciprocal Dealing and the Antitrust Laws, 77 Harv. L. Rev. 873, 879 (1964).

that the weight of any demerit that might be imposed upon RKO for having engaged in reciprocal trade practices is a matter exclusively in the hands of the Commission. It is wrong for the Department to press the Commission to give conclusive weight to a single item, even if it sincerely believes that enforcement of the antitrust laws would be enhanced. The real question before the agency which supposedly has the requisite expertise, is whether, on balance, notwithstanding a possible demerit for conduct inconsistent with the antitrust laws, the public interest would be better served by a grant of RKO's application of renewal of the KHJ-TV license than by awarding this channel to a newcomer such as Fidelity which, as the Examiner himself noted, "has no experience in the field of broadcasting, no contributions to the art, no proof through the school of experience of licensee answerability for stewardship, no proof through the same school of ability to stand the shock of adverse financial conditions, and no demonstrated ability to conceive and present programs of high quality" (Initial Decision, Conclusion 28).

Respectfully submitted,

PIERSON, BALL & DOWD

By _____

W. Theodore Pierson
1000 Ring Building
Washington, D. C. 20036

March 30, 1971

April 5, 1971

Speech 3/9/71
Justice
Chron

To: Don Baker

From: Tom Whitehead

Per our conversation.

Copy of Mr. Whitehead's EIA speech on 3/9/71

CTWhitehead:jm

Justice

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

Date: April 14, 1971

Subject: Embassy Radio Stations

To: C. T. Whitehead

In connection with your recent letters to FCC and Justice requesting comments on reciprocal arrangements with the Algerian Government, you asked why the letter to Justice should not be addressed to the Attorney General rather than the Assistant Attorney General, Internal Security Division.

This procedure has been followed since 1962 and is based on the coordination channel established at that time at the request of Justice.

If you desire to have Justice letters addressed to the Attorney General in the future, please advise.

W. Dean, Jr.

Justice

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

DIRECTOR

13 Apr 67

Mr. Robert C. Mardian
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Mardian:

The Algerian Government, through the Embassy of the Republic of Guinea, recently requested the Department of State to permit installation of a radio facility to provide service between Algiers and Washington.

Pursuant to the Director of Telecommunications Management's authorization of January 22, 1965, the United States and the Government of Algeria reached an agreement in principle in 1966 for the reciprocal operation of radio facilities. It was stipulated that in implementing this agreement the technical details for the Algerian radio facility must be agreed to prior to commencement of radio operations in Washington. Before any initiative was taken by the Government of Algeria in this regard, diplomatic relations between our respective governments were severed, and, until receipt of the current request, neither government made further effort to resume negotiations.

The Department of State has retained in place a back-up radio facility at its mission in Algiers and continues to have a major interest in establishing an authorization to operate this facility when an emergency need exists and commercial communications means are not available. The Department considers it to be in the continuing national interest to proceed with negotiation of the technical details relating to implementation of the previously concluded agreement in principle.

In light of the foregoing, and pursuant to the provisions of Section 305 of the Communications Act of 1934, as amended, the Department of State has requested that authorization again be granted for the Algerian Government to install and operate a radio transmitter in Washington, subject to negotiation of the necessary arrangements to permit implementation of reciprocal radio operations by the United States in Algiers.

Your views on this proposal are requested.

Sincerely,

Clay T. Whitehead

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

DIRECTOR

13 APR 1971

Honorable Dean Burch
Chairman
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Chairman:

The Algerian Government, through the Embassy of the Republic of Guinea, recently requested the Department of State to permit installation of a radio facility to provide service between Algiers and Washington.

Pursuant to the Director of Telecommunications Management's authorization of January 22, 1965, the United States and the Government of Algeria reached an agreement in principle in 1966 for the reciprocal operation of radio facilities. It was stipulated that in implementing this agreement the technical details for the Algerian radio facility must be agreed to prior to commencement of radio operations in Washington. Before any initiative was taken by the Government of Algeria in this regard, diplomatic relations between our respective governments were severed, and, until receipt of the current request, neither government made further effort to resume negotiations.

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In light of the foregoing, and pursuant to the provisions of Section 305 of the Communications Act of 1934, as amended, the Department of State has requested that authorization again be granted for the Algerian Government to install and operate a radio transmitter in Washington, subject to negotiation of the necessary arrangements to permit implementation of reciprocal radio operations by the United States in Algiers.

Your views on this proposal are requested.

Sincerely,

Clay T. Whitehead

OTP

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

Date: April 13, 1971

Subject: Algerian Radio Station in Washington

To: Clay T. Whitehead

Section 5 of E.O. 11556 delegates to you Presidential authority under the Communications Act of 1934 "to authorize a foreign government to construct and operate a radio station at the seat of government." Such authorization "shall be made only upon recommendation of the Secretary of State and after consultation with the Attorney General and the Chairman of the FCC."

State has so recommended in the case of Algeria, and the attached outgoing correspondence is to effect consultation with the Attorney General and the Chairman of the FCC.

This is the first such case since your tenure began. It differs from previous cases in that State was authorized by the DTM in 1965 to grant reciprocal radio rights to Algeria. A government-to-government agreement was concluded in 1966, but diplomatic relations were severed in 1967 before Algeria could install the station.

Because of the severance of relations, and based on a new request from Algeria through the Embassy of Guinea, State is again requesting that authorization be granted for Algeria to install and operate a station in Washington to communicate with Algiers.

Your signature on the letters to Justice and FCC is recommended.

W. Dean, Jr.

Attachments

UNDER SECRETARY OF STATE
FOR POLITICAL AFFAIRS
WASHINGTON

April 5, 1971

Dear Dr. Whitehead:

In a diplomatic note of February 3, 1971, the Embassy of the Republic of Guinea, Algerian Interests Section, informed the Department that the Algerian Government requests permission for the installation of a radio facility to provide service between Algiers and Washington.

Pursuant to the Director of Telecommunications Management's authorization of January 22, 1965, the United States and the Government of Algeria reached an agreement in principle on May 3, 1966, for the reciprocal operation of radio facilities. However, it was stipulated that in implementing this agreement the technical details for the Algerian radio facility must be agreed to prior to commencement of radio operations in Washington. Before any initiative was taken by the Government of Algeria concerning the technical details of its proposed radio facility, diplomatic relations between our respective governments were severed on June 6, 1967, and until receipt of the note of February 3, neither government had made any further effort to resume negotiations.

Since the Department has retained in place the back-up radio facility which it had installed at its mission in Algiers prior to the severance of diplomatic relations, it continues to have a major interest in establishing a standing authorization to operate this

Dr. Clay T. Whitehead,
Director of Telecommunications Policy,
Executive Office of the President.

facility when an emergency need exists and commercial communications means are not available. Accordingly, the Department considers it in the continuing national interest of the United States to proceed with the negotiation of the technical details relating to the implementation of the previously concluded agreement in principle.

Although, as noted above, approval was initially given in this case by the Director of Telecommunications Management in 1965, relations between the United States and Algeria have since been altered by the severance of diplomatic relations in 1967. Therefore, pursuant to the provisions of Section 305 of the Communications Act of 1934, as amended, the Department again requests that authorization be granted for the Algerian Government to install and operate a radio transmitter in Washington, subject to the negotiation of necessary arrangements to permit the implementation of reciprocal radio operations by the United States in Algiers.

Sincerely,

U. Alexis Johnson

5 MAY 1971

CWHITEHEAD/HINCHMAN:dc
Mr. Whitehead -2
Dr. Mansur
Mr. Hinchman
Mr. Owen

Same ltr to Attny. Gen. John N. Mitchell
Richard Hlems, DIA

MEMORANDUM FOR:

Honorable Melvin R. Laird
Secretary of Defense

My Office has been reviewing policy issues connected with the planning, construction, and operation of international communication facilities, working with staff from your Department and other agencies. These issues are of immediate concern to the Federal Communications Commission in its consideration of Docket 18875, which addresses the general policy to be followed. It also relates directly to action on the AT&T proposal for a new trans-Atlantic cable (TAT-6).

I have asked George Mansur, my Deputy Director, to coordinate the views of interested Executive Branch agencies in arriving at Administration recommendations to the FCC. I would like to invite you to designate a representative who can speak for your Department, to meet with Dr. Mansur and other agency representatives. I am enclosing the Executive Summary of our study of economic and technical considerations which I believe forms a useful framework for these deliberations.

The Department of State advises that for reasons of foreign policy an early action is desirable. The FCC and industry are also anxious to resolve this matter. Therefore, we would like to schedule a first coordination meeting for Friday, May 7, at 2:00 P.M., and complete the preparation of Administration recommendations by Friday, May 14.

Clay T. Whitehead

Encl.

5 MAY 1971

MEMORANDUM FOR DR. HENRY A. KISSINGER

Attached for your information is a draft summary of an OTP study concerning regulation of international communication facilities. This issue is currently under consideration by the Federal Communications Commission; it is of considerable interest to Federal agencies, the U.S. international communications industry, and certain European nations. Of immediate concern is a pending proposal by AT&T to lay a sixth trans-Atlantic cable (TAT-6).

The Secretary of Defense, in a letter to the FCC, has expressed "strong support" for the TAT-6 application. However, DOD has agreed that "existing facilities appear to be sufficient to satisfy existing and projected NCS priority circuits.... Therefore, the need for expansion of trans-Atlantic facilities must not be predicated on U.S. Government needs alone." The DOD has supplied no other justification for its support of the TAT-6 proposal. Also, while certain European nations have a special interest in seeing additional cable facilities established, these foreign relations implications do not seem of sufficient concern to dominate what is essentially a commercial regulatory matter.

We are soliciting the views of the Departments of State and Defense, as well as other interested agencies, in order to submit an Administration recommendation to the FCC shortly. I doubt this matter is of significant concern to you; but if you would like to be involved, you may want to have someone from your staff contact Walter Hinchman (x-5190), Assistant Director, OTP, who is handling this project.

Clay T. Whitehead

Attachment

cc:
Mr. Whitehead
Dr. Mansur
Mr. Hinchman
Mr. Owen

WHinchman/CTWhitehead:sbw 5/4/71

5 MAY 1971

CWHITEHEAD/HINCHMAN;dc
Mr. Whitehead -2
Dr. Mansur
Mr. Hinchman
Mr. Owen

MEMORANDUM FOR:

Honorable William P. Rogers
Secretary of State

My Office has been reviewing policy issues connected with the planning, construction, and operation of international communication facilities, working with staff from your Department and other agencies. These issues are of immediate concern to the Federal Communications Commission in its consideration of Docket 18875, which addresses the general policy to be followed. It also relates directly to action on the AT&T proposal for a new trans-Atlantic cable (TAT 6).

I have asked George Mansur, my Deputy Director, to coordinate the views of interested Executive Branch agencies in arriving at Administration recommendations to the FCC. I would like to invite you to designate a representative who can speak for your Department, to meet with Dr. Mansur and other agency representatives. I am enclosing the Executive Summary of our study of economic and technical considerations which I believe forms a useful framework for these deliberations.

We have been advised that your Department considers early action to be desirable for foreign policy reasons. The FCC and industry are also anxious to resolve this matter. Therefore, we would like to schedule a first coordination meeting for Friday, May 7, at 2:00 P.M., and complete the preparation of Administration recommendations by Friday, May 14.

Clay T. Whitehead

Encl.

(multiple ownership
mass media
Justice)

MAY 27 1971

Mr. Isadore A. Salm
General Manager
Radio Station KGNO - AM - FM
P.O. Box 1398
Dodge City, Kansas 67801

Dear Mr. Salm:

The President has asked me to respond to your letter of May 14, 1971, which questions certain rules proposed by the Federal Communications Commission regarding the multiple ownership of mass media.

If adopted, the proposals would generally prohibit the acquisition or creation of broadcasting-newspaper combinations in any community and would require that all such existing combinations be dissolved within five years. Numerous parties have filed supplemental comments, and the Commission has taken the matter under consideration.

This Office has been closely following developments with respect to these proposed rules. Last week the Department of Justice, as the Executive agency responsible for antitrust enforcement, recommended that the Commission reconsider them. That recommendation points out that in the major markets preservation of competition does not require dissolution of existing newspaper-radio combinations at the present time; and for smaller markets (below the top 100), it urges that the Commission review such combinations on a case-by-case basis. Under such a system, a truly competitive situation such as that which you suggest exists in Dodge City would presumably be undisturbed. Although, as you are aware, the FCC is an independent agency not subject to the control of the Executive Branch, we believe it will give considerable weight to the Justice Department recommendations.

I was pleased to receive your expression of views on this important subject, and I share your concern that high quality broadcasting be preserved. Please write me directly if I can be of any further assistance.

Sincerely,

Clay T. Whitehead

ENCL
Robinson/Scalia/hmy
5-25-71
cc: Mr. Whitehead - 2
Linda Smith
Ken Robinson
Subject File
Chron File

(Please return when signed)

Office of Telecommunications Policy
Route Slip

		To
5/24/71	Clay T. Whitehead	
	George F. Mansur	
	Nino Scalia	
	Will Dean	
	Walt Hinchman	
	Charlie Joyce	
	Jack Thornell	
	Frank Urbany	
	Steve Doyle	
	Bill Lyons	
	Brian Lamb	
	Linda Smith	✓
	Eva Daughtrey	
	Timmie White	
	Judy Morton	
	Elaine Christoff	

SUSPENSE: COB back May 25th, 1971

REMARKS:

to Ken Robinson -
cc Scalia

Mr. Scalia -

Due by COB
today - 5/25/71.

THE WHITE HOUSE

WASHINGTON

5/21/01
(Date)

TO: Tom Whitehead

FROM: PETER FLANIGAN

ACTION: DUE DATE: _____

_____ Prepare reply for Mr. Flanigan's signature

__X__ Direct reply

_____ Comments/recommendations

_____ Please handle

_____ Information

_____ File

REMARKS:

Many thanks.

THE PIONEER VOICE OF WESTERN KANSAS - SINCE 1930

RADIO STATION KGNO

AM - 5,000 Watts 1370 kc.
FM Stereo - 25,000 Watts ERP 95.5 mc

TW 672B

~~ERWOOD R. PARKS~~
~~General Manager~~

Telephone
316-227-3151

P.O. BOX 1398
DODGE CITY, KANSAS 67801

President Richard Nixon
The White House
Washington, D.C.

May 14, 1971

Dear Mr. President:

The Federal Communications Commission is considering adopting a rule which would require that KGNO (AM & FM) be sold because our three stockholders also own the Dodge City Daily Globe here in Dodge City.

Enclosed are copies of letters which we are submitting to the FCC for you in order that you may take such action as you feel appropriate on this proposed rulemaking.

We feel that this is a very real and immediate threat to radio stations and newspapers having common ownership in the same market, and that there is no harmful or undesirable effect on the public by common ownership. We also feel that such a rulemaking would be unfair and that in fact it would discriminate against radio station ownership associated with newspapers.

Your consideration and action on the matter will be greatly appreciated.

Thank you very much.

Respectfully yours,

THE DODGE CITY BROADCASTING CO.,INC.

by Isadore A. Salm

Isadore A. Salm
General Manager

encls.

PIONEER VOICE OF WESTERN KANSAS - SINCE 1930

RADIO STATION KGNO

AM - 5,000 Watts 1370 kc.

FM Stereo - 25,000 Watts ERP 95.5 mc

Telephone
316-227-3151

P.O. BOX 1398
DODGE CITY, KANSAS 67801

Federal Communications Commission
Washington, D.C. 20554

April 13, 1971

Gentlemen:

Please consider the attached letters in regards to Dockets 18110, 18891 and 18397.

There are fourteen copies of each for your purposes.

Thank you.

Respectfully submitted by:

THE DODGE CITY BROADCASTING CO., INC.

Juliet Denious

Juliet Denious, President

cc: Dow, Lohnes & Albertson

encls.

iliated with
odge City Daily Globe

THE GLOBE PUBLISHING CO.

SERVING SOUTHWEST KANSAS
SINCE 1878

AREA CODE 316 225-4151
P.O. BOX 820
DODGE CITY, KANSAS 67801

To the Members of the Federal Communications Commission
Washington, D.C.

Dear Sirs:

I am writing concerning the proposed rule covering the ownership of newspapers and radio stations.

We started our radio station KGNO in 1930. It was backed financially by the Globe Publishing Company and maintained by it in the early unprofitable years; but, from the first, KGNO had a staff entirely independent from the paper. They were highly competitive both in news and advertising, as they are today. In a short time the radio station was financially on its feet and entirely independent of the newspaper.

In future years, should such a rule become necessary, certainly the present existing stations owned by newspaper owners should be grandfathered (excluded) and this rule would involve only common ownership from that point forward.

It is my sincere hope that you will see fit to decide against the proposal.

Yours very truly,

Juliet Denious

(Mrs.) Juliet Denious
President of Globe Publishing Co.
Dodge City, Kansas 67801

AREA CODE 316 225-4151
P.O. BOX 820
DODGE CITY, KANSAS 67801

Federal Communications Commission
Washington, D.C.

Gentlemen:

Your proposal to prohibit common ownership of newspapers and radio stations in the same market seems most unreasonable to me as a stockholder in the Globe Publishing Company and the Dodge City Broadcasting Company.

Radio Station KGNO has been an added facility for the community initiated by the Dodge City Daily Globe in 1930 and encouraged through the years to exist independently. For many years now the radio station has succeeded in operating independent of the newspaper. Separate management and staff have been maintained, and advertising and news staffs are in direct competition with those of the newspaper.

I question the legality and the logic of your proposal and fail to find anything undesirable to the public in newspaper ownership of radio stations. In our case, which most certainly would be covered by the "grandfather clause", the relationship has been nothing but advantageous to our city and the surrounding area.

I request reconsideration of your proposal to adopt this rule change.

Sincerely,

Martha E. Muncy

Martha E. Muncy
Vice-Pres. Globe Publishing Co.

THE GLOBE PUBLISHING CO.
SERVING SOUTHWEST KANSAS
SINCE 1878

AREA CODE 316 225-4161
P.O. BOX 820
DODGE CITY, KANSAS 67801

May 13, 1971

Federal Communications Commission
Washington, D.C.

Dear Sirs:

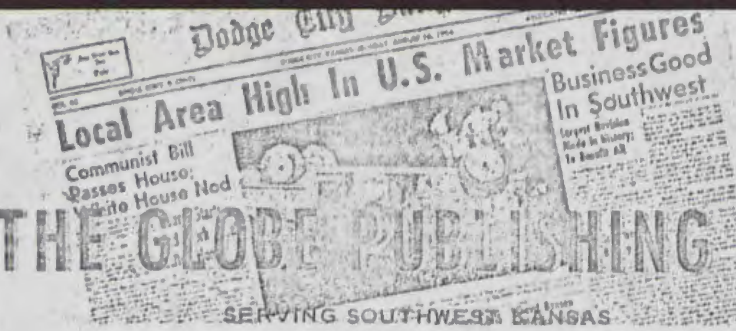
I am greatly concerned regarding the proposed rulemaking you have whereby it would be necessary for us to sell either the Dodge City Daily Globe or The Dodge City Broadcasting Company, as I am one of the stockholders in each of these two corporations.

I feel that this would be very unfair, as without the cross ownership of the newspaper, it would have been impossible for the Denious family to invest in and develop the radio station.

Through the years, people in this area have relied upon KGNO for public service, and particularly during times of emergency such as bad weather and storms, tornadoes and others. KGNO played a very important part in saving lives and property during the 1965 flood, and has received credit for helping save lives many times through the years. The immediacy of radio broadcasting has been very effective along this line, and such circumstances could not have been provided by newspaper along.

We have always provided an unlimited amount of public service time, not only during emergencies, but to help churches, schools and other worthwhile organizations, many of which have stated their gratitude by means of letter, certificates and plaques to the station.

As the wife of Jess C. Denious, Jr., who was president of the Globe Publishing Company and the Dodge City Broadcasting Company for sixteen years (until the time of his death in 1969), I had the opportunity to be present with him on many occasions and am fully aware of the separate manner in which the two companies operate, with separate management, separate staffs, separate news staffs and separate advertising staffs, and the competition has always been very keen between the two organizations.



THE GLOBE PUBLISHING CO.
SERVING SOUTHWEST KANSAS
SINCE 1878

AREA CODE 316 225-4151
P.O. BOX 820
DODGE CITY, KANSAS 67801

As a stockholder in both companies, I feel that it would not be fair to have such a rulemaking which would require that the Denious family sell either the newspaper or the radio station, as I do not believe there is any way in which cross ownership is anything but beneficial for our community.

Sincerely yours,

Jean Denious

Jean Denious, Secretary
The Globe Publishing Company
and The Dodge City Broadcasting Co., Inc.

TROHMAN ROBINSON
GENERAL MANAGER

THE GLOBE PUBLISHING CO.
SERVING SOUTHWEST KANSAS
SINCE 1878

AREA CODE 316 225-4151
P.O. BOX 820
DODGE CITY, KANSAS 67801

May 12, 1971

Federal Communication Commission
Washington, D. C. 20554

Gentlemen:

As general manager of the Globe Publishing Company, I would like to point out the unfairness of recent FCC proposed rulemakings in regard to cross ownership of newspaper-radio in the same market.

I have been associated with the Denious family and the Dodge City Daily Globe for over 40 years. I can well remenber the financial struggle KGNO went through in its early years. Mr. J. C. Denious, knowing full well what radio meant to Southwest Kansas kept KGNO on the air through financial support from his other interests.

Through the years thousands of dollars have been re-invested in KGNO properties, both AM and FM to bring the listening public better service.

The staffs of both KGNO and the Globe has always been a separate one competing for news and advertising revenue. Both always under separate management and independent editorial policies.

In a market the size of Southwest Kansas, with one other radio station, KEDD, cable TV, the three major network television stations, two additional daily newspapers from Hutchinson and Wichita, Kansas and numerous weeklies it is impossible to say that cross ownership of a small daily newspaper and one radio station can have a concentration of control.

I would suggest that this situation be treated as many other similar incidents and the grandfather clause invoked.

We at the Globe would welcome any investigation and challenge the commission to prove collusion of any kind, any time.

Sincerely,

DODGE CITY DAILY GLOBE

Trohman Robinson

Trohman Robinson, General Manager

TR/br

GLOBE EXPRESS
KGNO RADIO

THE PIONEER VOICE OF WESTERN KANSAS - SINCE 1930

RADIO STATION KGNO

AM - 5,000 Watts 1370 kc.

FM Stereo - 25,000 Watts ERP 95.5 mc

[illegible]

Telephone
316-227-3151

P.O. BOX 1398
DODGE CITY, KANSAS 67801

Federal Communications Commission
Washington, D.C. - 20554

May 12, 1971

RE: DOCS. 18110, 18891 and 18397

Gentlemen:

As general manager of The Dodge City Broadcasting Company, Incorporated, which has the same common ownership as the Dodge City Daily Globe, I am greatly concerned regarding the proposed rulemakings you are considering, particularly the rule which would prohibit common ownership of a newspaper and a radio station in the same city.

Although the National Association of Broadcasters made and has presented a sizeable study on the matter, I feel it important that you consider small market radio as well as the large markets, and respectfully submit some of the reasons why I feel that such rulemaking should not occur.

KGNO has been on the air faithfully serving the public in a broad capacity since June 30, 1930. During those early years, there would not have been radio to serve the Dodge City and surrounding communities had it not been for the realization which Mr. Jess Denious had for the need of radio to provide better service to the public. It was through the genuine interest of Mr. Denious and his family that radio was provided by means of finances from the newspaper and other interests of the family, even during the depression and the dirty thirties. When Mr. Denious died, the family continued the same unselfish policy of maintaining KGNO and improving the facilities and service for the benefit of the public.

In order to serve this area better, the Denious family invested sizeable money later in providing a new transmitter and building for the increase of power to 5,000 watts day and 1,000 watts night. They also had interest enough in the public to help provide television in this market with KTVC (Ensign, Kansas). In 1966, the family further invested in order to provide stereo sound in the community with KGNO-FM, which has been only a small contributor in revenue to the company up to this point. More recently, they helped get CATV service into Dodge City. However, due to recent feelings in Washington, the interests in both the TV station and CATV were sold (and I might add, the TV interests were sold at a financial loss).

(continued)

Mr. Denious nurtured KGNO during the depression years and the dirty thirties undoubtedly with the thought in mind of providing greater service to the public and of building an estate for his family. The rules permitted that upon which he based his decision. It would be grossly unfair to take that away from his family, which has continued ownership through the years.

Presently the owners of The Dodge City Broadcasting Company and the Globe Publishing Company are Juliet Denious (widow of Jess Denious), a daughter (Martha Muncy) and Jean Denious (widow of Jess C. Denious, Jr.). These three ladies have carried on, giving this station their unselfish backing not only financially, but continuing to serve the community in many other ways also.

The Dodge City Broadcasting Company and the Globe Publishing Company have completely separate management, completely separate staffs, and complete separation in regards to rate structures for the two companies, which compete for the advertising revenues and for news coverage just as other competitive media do. The two companies are also completely separate in regards to editorial policy, with the only direction of the stockholders being that editorial stands be for the betterment of the community.

To further make my point, I would mention the fact that at times there have been uncomplimentary remarks or criticism printed in the Daily Globe about broadcasts carried on KGNO, and there have also been times when broadcasts on KGNO have included uncomplimentary remarks or criticism about material printed in the Daily Globe. Certainly this would not have happened had their been collusion between the two companies.

There is also another fact which has bearing on the matter in regard to the potential for concentration of control, and that is the fact that there are a number of diverse voices available to the public in this market due to the many newspapers and other publications which come into this market, and the fact that many radio stations, television stations and now CATV are in this market. For example, there is a wide circulation of the Hutchinson News and the Wichita Eagle in this area, plus the Denver Post, the Kansas City Star (all daily newspapers); the local High Plains Journal and other weekly newspapers from county seat towns in our surrounding communities.

Locally, we are served by three television stations (the three major networks) and the CATV system, which imports TV stations from Denver and imports other FM stations.

Radio stations heard in this area include a competitive station here in Dodge City; two stations in Garden City; two stations in Liberal;a station in Pratt; one in Larned; one in Great Bend; one in Scott City; one strong station from Wichita; and some of the other more powerful stations from other major cities. Several of these stations compete with KGNO for advertising dollars.

(continued)

Considering the large number of diverse voices available through the sources stated, there certainly is not a possibility of concentration of control in news, editorials, rates, or service to the area served by this station.

In addition to news, farm information, weather, sports and entertainment provided separately by KGNO, the public has been served well by this station's very liberal policy of public service, and acting in the interest of public safety during times of emergency, such as severe storms, tornadoes, and the flood of 1965. There have been times when KGNO was credited with saving lives, such as one during our most recent blizzard. And on occasion, KGNO has been called upon to serve an even larger area than normal by use of our auxiliary power plant when other stations in Southwest Kansas were off the air due to power failure. This could not have been possible without the unselfish manner in which the Denious family has provided these facilities. It is also through this means that many schools in the area have learned to rely upon KGNO in times of storms in order to protect the lives of students during these severe weather conditions. This could not have been done by means of newspaper alone.

These things all add up to the fact that common ownership of the daily newspaper and KGNO in this market has not resulted in anything harmful or undesirable to the public, and indeed, the broadcast record of this station is a distinguished one. There has been a sizeable investment of time, money, and at times hardship by the Denious family in serving the public by developing the property into what it is today.

It would be grossly unfair and against the basic fair play of Americanism to take this away from the Denious family by means of the proposed rulemaking, which would in fact discriminate against ownership associated with newspapers. In my opinion, such a rule should only apply in cases where there is absolute evidence of a harmful or undesirable effect on the public, and that if such a rulemaking is needed, present common ownership of a newspaper and radio station in the same market should be exempt from the rule (grandfathered) until such a time as there would be real cause to divest ownership.

Having grown up on a farm near Dodge City, and now in my 28th year as an employee of The Dodge City Broadcasting Company, Incorporated, I am well aware of the separate manner in which this station and the Dodge City Daily Globe operate, and feel well qualified to point out the reasons I have stated and respectfully submit for consideration against the proposed rulemaking on divestiture of ownership.

Thank you.

Respectfully yours,

Isadore A. Salm

Isadore A. Salm
General Manager
The Dodge City Broadcasting Company, Inc.

CBS
Columbia Broadcasting System, Inc.
2020 M Street, N.W.
Washington, D.C. 20036
(202) 296-1234

Richard W. Jencks
Vice President, Washington

no answer necessary
Brian

Dear Tom:

I thought you would be interested in having the attached communication sent yesterday to CBS Television Network affiliates by Robert D. Wood, President of the CBS Television Network, commenting upon the proposed antitrust action by the Department of Justice against the three networks.

I would very much like to discuss with you the proposed lawsuits.

Sincerely,

Dick

The Honorable Clay T. Whitehead
Director
Office of Telecommunications Policy
Executive Office of the President
Washington, D. C. 20504

April 14, 1972

CTN-582-REV 3/71

TV - Q.S.T.

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc., 51 West 52 Street, New York, New York 10019 (212) 765-4321

Transmit Only to Stations Checked

No. TV .....

Date ...APRIL 13, 1972...

TO: CBS TELEVISION NETWORK AFFILIATES

THIS IS TO ACQUAINT YOU WITH A DEVELOPMENT IN WHICH YOU HAVE A VITAL INTEREST. EARLIER THIS WEEK COUNSEL FOR ABC, CBS, NBC AND VIACOM WERE SUMMONED TO A MEETING WITH THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE, AT WHICH THE GOVERNMENT ANNOUNCED ITS INTENT TO FILE ANTITRUST SUITS AGAINST ALL THE COMPANIES.

IN BRIEF, THE JUSTICE DEPARTMENT SEEKS TO (1) TRANSFER CONTROL OF NETWORK SCHEDULES, INCLUDING WHAT PROGRAMS ARE PUT ON THE AIR AND WHEN, TO ADVERTISING AGENCIES AND MOTION PICTURE PRODUCERS; AND (2) PREVENT THE NETWORKS FROM PRODUCING ANY TELEVISION ENTERTAINMENT PROGRAMS OR FEATURE FILMS.

IN THE FIRST INSTANCE THE DEPARTMENT WOULD BE SETTING THE CLOCK BACK TWENTY YEARS OR MORE TO THE DAYS WHEN ENTERTAINMENT IN BOTH TELEVISION AND RADIO NETWORKING WAS MAINLY SELECTED AND CONTROLLED BY ADVERTISING AGENCIES. BEYOND THAT IT WOULD REDUCE STATIONS AND NETWORKS TO MERE CONDUITS.

IN THE SECOND INSTANCE -- PREVENTING NETWORKS FROM PRODUCING ENTERTAINMENT PROGRAMMING OR FEATURE FILMS -- THIS IS THE SAME OBJECTIVE AS THAT OF THE SUIT BROUGHT IN 1970 AGAINST ABC AND CBS BY SEVEN MOTION PICTURE COMPANIES WHICH NOW SUPPLY OVER 50 PERCENT OF PRIME TIME TELEVISION ENTERTAINMENT PROGRAMMING, COMPARED TO THE CBS TELEVISION NETWORK'S 8.2 PERCENT. AS YOU KNOW, WE HAVE BEEN VIGOROUSLY CONTESTING THIS ATTEMPT BY THE MOTION PICTURE COMPANIES TO SUPPRESS COMPETITION, AND FOR THE SAME REASONS WE WILL REFUSE TO ACQUIESCE IN THE JUSTICE DEPARTMENT'S DEMANDS, WHICH WE BELIEVE HAVE NO MERIT, LEGALLY OR OTHERWISE.

- ☐ WCBS-TV
- ☐ BOD BP
- ☐ WRDW-TV AQ
- ☐ WMAR-TV AC
- ☐ WCSC-TV AP
- ☐ WBTV AJ
- ☐ WNOK-TV AN
- ☐ WTVD AI
- ☐ WBTW AL
- ☐ WINK-TV AZ
- ☐ WTVX BF
- ☐ WFMY-TV AG
- ☐ WNCT AK
- ☐ WJXT AS
- ☐ WTVJ BA
- ☐ WTAR-TV AF
- ☐ WDBO-TV AW
- ☐ WCAU-TV AA
- ☐ WTVR AE
- ☐ WBOC-TV AB
- ☐ WTOC-TV AR
- ☐ WTVT AX
- ☐ WTOP-TV AD

- ☐ KTXS-TV QW
- ☐ KFDA-TV QI
- ☐ WHMA-TV DK
- ☐ WAIM-TV DB
- ☐ WAGA-TV DC
- ☐ KTBC-TV EC
- ☐ WAFB-TV DQ
- ☐ KFDM-TV DZ
- ☐ WBMG-TV EX
- ☐ KBTX ED
- ☐ WCBI-TV DK
- ☐ WRBL-TV DF
- ☐ KZTV QN
- ☐ KDFW-TV EF
- ☐ WTVY BD
- ☐ KGBT-TV QQ
- ☐ KHOU-TV EA
- ☐ WJTV DN
- ☐ KLFY-TV DS
- ☐ KLBK-TV QJ
- ☐ WMAZ-TV DE
- ☐ WTOK-TV DL
- ☐ WKRG-TV DJ
- ☐ KNOE-TV DP
- ☐ WCOV-TV DG
- ☐ WWL-TV DR
- ☐ KOSA-TV QR
- ☐ KCTV QK
- ☐ KENS-TV QL
- ☐ KSLA-TV DW
- ☐ WSPA-TV DA
- ☐ WCTV BB
- ☐ KWTX ED

- ☐ KFVS-TV FP
- ☐ WDEF-TV FG
- ☐ KTVC XC
- ☐ KFSA-TV GG
- ☐ KLOE-TV GN
- ☐ KAYS-TV GN
- ☐ WHNT-TV FL
- ☐ KRCG-TV FW
- ☐ WJHL-TV FD
- ☐ KUHI-TV FF
- ☐ KCMO-TV FX
- ☐ WBIR-TV FE
- ☐ KTHV GI
- ☐ WREC-TV FK
- ☐ WLAC-TV FI
- ☐ KWTV GF
- ☐ KHQA-TV GB
- ☐ WDBJ-TV FB
- ☐ KTTS-TV FS
- ☐ KMOX-TV FR
- ☐ WIBW-TV GC
- ☐ KOTV GE
- ☐ KTVH GD
- ☐ KAUZ-TV GJ

- ☐ WTEN IB
- ☐ WABI-TV IP
- ☐ WNBF-TV IA
- ☐ WHDH-TV IK
- ☐ WBEN-TV IE
- ☐ WCAX-TV IR
- ☐ WSEE IW
- ☐ WTIC-TV IG
- ☐ WGAN-TV IN
- ☐ WPRI-TV IL
- ☐ WAGM-TV IQ
- ☐ WHEC-TV ID
- ☐ WDAU-TV IS
- ☐ WHEN-TV IC
- ☐ WWNY-TV IF

- ☐ WFBG-TV KC
- ☐ WWTV KX

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- ☐ WCPO-TV KN
- ☐ WJW-TV KI
- ☐ WBNS-TV KK
- ☐ WHIO-TV KL
- ☐ WJBK-TV KQ
- ☐ KDAL-TV LD
- ☐ WANE-TV KP
- ☐ WBAY-TV LA
- ☐ WHP-TV KB
- ☐ WARD-TV KD
- ☐ WKZO-TV LE
- ☐ WLYH-TV LI
- ☐ WJIM-TV KS
- ☐ KEYC-TV LN
- ☐ WLUC-TV KZ
- ☐ KGLO PC
- ☐ WCCO-TV LC
- ☐ KDKA-TV KE
- ☐ WKNX-TV KW
- ☐ WSBT NK
- ☐ WSTV-TV KF
- ☐ WTOL-TV KJ
- ☐ WSAU-TV LB
- ☐ WSBA-TV LG
- ☐ WKBN-TV KG

- ☐ WMT-TV NZ
- ☐ WCIA NP
- ☐ WCHS-TV NC
- ☐ WBBM-TV NL
- ☐ KRNT-TV PB
- ☐ WEHT NF
- ☐ WISH-TV NI
- ☐ WKBT NX
- ☐ WLFI-TV NJ
- ☐ WKYT NA
- ☐ KOLN-TV PF
- ☐ WHAS-TV NE
- ☐ WISC-TV NW
- ☐ WISN-TV NS
- ☐ WOW-TV PE
- ☐ WMBD-TV NQ
- ☐ WCEE-TV NB
- ☐ WHBF-TV NR
- ☐ KMEG PD
- ☐ KELO-TV PG
- ☐ WTHI-TV NG
- ☐ WDTV FC

- ☐ KGGM-TV QG
- ☐ KOOK-TV SB
- ☐ KXMB-TV XN
- ☐ KBOI-TV XK
- ☐ KXLF-TV SC
- ☐ KTWO-TV XI
- ☐ KFBC-TV XF
- ☐ KKTV XC
- ☐ KLZ-TV XD
- ☐ KDIX-TV XP
- ☐ KROD-TV QS
- ☐ KXJB-TV XQ
- ☐ KXGN-TV XW
- ☐ KREX-TV XB
- ☐ KRTV SD
- ☐ KID-TV XJ
- ☐ KXMC-TV XR
- ☐ KOOL-TV QC
- ☐ KRSD-TV XL
- ☐ KWRB-TV XG
- ☐ KBIM-TV QF
- ☐ KSL-TV XA
- ☐ KOLD-TV QD
- ☐ KMVT XE
- ☐ KXMD-TV SX

- ☐ KUAM-TV BURLINGAME RM
- ☐ KBAK-TV RA
- ☐ KVOS-TV RS
- ☐ KHSL-TV RG
- ☐ KECC-TV QB
- ☐ KIEM-TV RI
- ☐ KFRE-TV RB
- ☐ KOTI-TV RK
- ☐ KLAS-TV XS
- ☐ KLEW-TV RN
- ☐ KNXT QX
- ☐ KOBI-TV RK
- ☐ KMST SE
- ☐ KEPR-TV RN
- ☐ KOIN-TV RL
- ☐ KOLO-TV RJ
- ☐ KXTV RF
- ☐ KFMB-TV QA
- ☐ KPIX RE
- ☐ KCOY RC
- ☐ KIRO-TV RQ
- ☐ KXLY-TV RW
- ☐ KIMA-TV RN
- ☐ TVC(2)
- ☐ ALASKA SA

TV - Q.S.T.

CTN-582-REV. 3/71

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc., 51 West 52 Street, New York, New York 10019 (212) 765-4321

Transmit Only to Stations Checked

No. TV .....
Date .....

WE BELIEVE THE JUSTICE DEPARTMENT'S POSITION IS INCONSISTENT WITH THE ANTITRUST LAWS AND THE PUBLIC INTEREST, AND WE CANNOT UNDERSTAND WHY THE DEPARTMENT HAS CHOSEN THIS MOMENT IN TIME TO UNDERMINE THE "PRIME TIME ACCESS," "FINANCIAL INTEREST" AND "SYNDICATION" RULES OF THE FEDERAL COMMUNICATIONS COMMISSION.-- A COMPLEX REGULATORY STRUCTURE ADOPTED BY THE COMMISSION WITH THE SUPPORT OF THE JUSTICE DEPARTMENT AFTER AN EXHAUSTIVE PROCEEDING WHICH LASTED MORE THAN ELEVEN YEARS.

WE WILL KEEP YOU ADVISED OF FUTURE DEVELOPMENTS FOR, AS YOU CAN SEE THIS ACTION WOULD GO TO THE HEART OF YOUR OPERATIONS AS WELL AS OURS.

ROBERT D. WOOD, PRESIDENT, CBS TELEVISION NETWORK

- ☐ WCBS-TV
- ☐ BOD — BP
- ☐ WRDW-TV — AQ
- ☐ WMAR-TV — AC
- ☐ WCSC-TV — AP
- ☐ WBTV — AJ
- ☐ WNOK-TV — AN
- ☐ WTVD — AI
- ☐ WBTW — AL
- ☐ WINK-TV — AZ
- ☐ WTVX — BF
- ☐ WFMY-TV — AG
- ☐ WNCT — AK
- ☐ WJXT — AS
- ☐ WTVJ — BA
- ☐ WTAR-TV — AF
- ☐ WDBO-TV — AW
- ☐ WCAU-TV — AA
- ☐ WTVR — AE
- ☐ WBOC-TV — AB
- ☐ WTOC-TV — AR
- ☐ WTVT — AX
- ☐ WTOP-TV — AD

- ☐ KTXS-TV — QW
- ☐ KFDA-TV — QI
- ☐ WHMA-TV — DK
- ☐ WAIM-TV — DB
- ☐ WAGA-TV — DC
- ☐ KTBC-TV — EC
- ☐ WAFB-TV — DQ
- ☐ KFDM-TV — DZ
- ☐ WBMG-TV — EX
- ☐ KBTX — ED
- ☐ WCBI-TV — DK
- ☐ WRBL-TV — DF
- ☐ KZTV — QN
- ☐ KDFW-TV — EF
- ☐ WTVY — BD
- ☐ KGBT-TV — QQ
- ☐ KHOU-TV — EA
- ☐ WJTV — DN
- ☐ KLFY-TV — DS
- ☐ KLBK-TV — QJ
- ☐ WMAZ-TV — DE
- ☐ WTOK-TV — DL
- ☐ WKRG-TV — DJ
- ☐ KNOE-TV — DP
- ☐ WCOV-TV — DG
- ☐ WWL-TV — DR
- ☐ KOSA-TV — QR
- ☐ KCTV — QK
- ☐ KENS-TV — QL
- ☐ KSLA-TV — DW
- ☐ WSPA-TV — DA
- ☐ WCTV — BB
- ☐ KWTX — ED

- ☐ KFVS-TV — FP
- ☐ WDEF-TV — FG
- ☐ KTVC — XC
- ☐ KFSA-TV — GG
- ☐ KLOE-TV — GN
- ☐ KAYS-TV — GN
- ☐ WHNT-TV — FL
- ☐ KRCG-TV — FW
- ☐ WJHL-TV — FD
- ☐ KUHI-TV — FF
- ☐ KCMO-TV — FX
- ☐ WBIR-TV — FE
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- ☐ WLAC-TV — FI
- ☐ KWTV — GF
- ☐ KHQA-TV — GB
- ☐ WDBJ-TV — FB
- ☐ KTTS-TV — FS
- ☐ KMOX-TV — FR
- ☐ WIBW-TV — GC
- ☐ KOTV — GE
- ☐ KTVH — GD
- ☐ KAUZ-TV — GJ

- ☐ WTEN — IB
- ☐ WABI-TV — IP
- ☐ WNBF-TV — IA
- ☐ WHDH-TV — IK
- ☐ WBEN-TV — IE
- ☐ WCAX-TV — IR
- ☐ WSEE — IW
- ☐ WTIC-TV — IG
- ☐ WGAN-TV — IN
- ☐ WPRI-TV — IL
- ☐ WAGM-TV — IQ
- ☐ WHEC-TV — ID
- ☐ WDAU-TV — IS
- ☐ WHEN-TV — IC
- ☐ WWNY-TV — IF

- ☐ WFBG-TV — KC
- ☐ WWTV — KX

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- ☐ WCPO-TV — KN
- ☐ WJW-TV — KI
- ☐ WBNS-TV — KK
- ☐ WHIO-TV — KL
- ☐ WJBK-TV — KQ
- ☐ KDAL-TV — LD
- ☐ WANE-TV — KP
- ☐ WBAY-TV — LA
- ☐ WHP-TV — KB
- ☐ WARD-TV — KD
- ☐ WKZO-TV — LE
- ☐ WLYH-TV — LI
- ☐ WJIM-TV — KS
- ☐ KEYC-TV — LN
- ☐ WLUC-TV — KZ
- ☐ KGLO — PC
- ☐ WCCO-TV — LC
- ☐ KDKA-TV — KE
- ☐ WKNX-TV — KW
- ☐ WSBT — NK
- ☐ WSTV-TV — KF
- ☐ WTOL-TV — KJ
- ☐ WSAU-TV — LB
- ☐ WSBA-TV — LG
- ☐ WKBN-TV — KG

- ☐ WMT-TV — NZ
- ☐ WCIA — NP
- ☐ WCHS-TV — NC
- ☐ WBBM-TV — NL
- ☐ KRNT-TV — PB
- ☐ WEHT — NF
- ☐ WISH-TV — NI
- ☐ WKBT — NX
- ☐ WLFI-TV — NJ
- ☐ WKYT — NA
- ☐ KOLN-TV — PF
- ☐ WHAS-TV — NE
- ☐ WISC-TV — NW
- ☐ WISN-TV — NS
- ☐ WOW-TV — PE
- ☐ WMBD-TV — NQ
- ☐ WCEE-TV — NB
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- ☐ KMEG — PD
- ☐ KELO-TV — PG
- ☐ WTHI-TV — NG
- ☐ WDTV — FC

- ☐ KGGM-TV — QG
- ☐ KOOK-TV — SB
- ☐ KXMB-TV — XN
- ☐ KBOI-TV — XK
- ☐ KXLF-TV — SC
- ☐ KTWO-TV — XI
- ☐ KFBC-TV — XF
- ☐ KKTV — XC
- ☐ KLZ-TV — XD
- ☐ KDIX-TV — XP
- ☐ KROD-TV — QS
- ☐ KXJB-TV — XQ
- ☐ KXGN-TV — XW
- ☐ KREX-TV — XB
- ☐ KRTV — SD
- ☐ KID-TV — XJ
- ☐ KXMC-TV — XR
- ☐ KOOL-TV — QC
- ☐ KRSD-TV — XL
- ☐ KWRB-TV — XG
- ☐ KBIM-TV — QF
- ☐ KSL-TV — XA
- ☐ KOLD-TV — QD
- ☐ KMVT — XE
- ☐ KXMD-TV — SX

- ☐ KUAM-TV BURLINGAME — RM
- ☐ KBAK-TV — RA
- ☐ KVOS-TV — RS
- ☐ KHSL-TV — RG
- ☐ KECC-TV — QB
- ☐ KIEM-TV — RI
- ☐ KFRE-TV — RB
- ☐ KOTI-TV — RK
- ☐ KLAS-TV — XS
- ☐ KLEW-TV — RN
- ☐ KNXT — QX
- ☐ KOBI-TV — RK
- ☐ KMST — SE
- ☐ KEPR-TV — RN
- ☐ KOIN-TV — RL
- ☐ KOLO-TV — RJ
- ☐ KXTV — RF
- ☐ KFMB-TV — QA
- ☐ KPIX — RE
- ☐ KCOY — RC
- ☐ KIRO-TV — RQ
- ☐ KXLY-TV — RW
- ☐ KIMA-TV — RN
- ☐ TVC(2)
- ☐ ALASKA — SA

CBS
Columbia Broadcasting System, Inc.
2020 M Street, N.W.
Washington, D.C. 20036
(202) 296-1234

Richard W. Jencks
Vice President, Washington

Dear Nino:

I thought you would be interested in having the attached communication sent yesterday to CBS Television Network affiliates by Robert D. Wood, President of the CBS Television Network, commenting upon the proposed antitrust action by the Department of Justice against the three networks.

Sincerely,

Dick

Mr. Antonin Scalia, General Counsel
Office of Telecommunications Policy
Executive Office of the President
Washington, D. C. 20504

April 14, 1972

TV - Q.S.T.

CTN 582-REV 3/71

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc., 51 West 52 Street, New York, New York 10019 (212) 765-4321

Transmit Only to Stations Checked

No. TV .....
Date ...APRIL 13, 1972...

- ☐ WCBS-TV
- ☐ BOD BP
- ☐ WRDW-TV AQ
- ☐ WMAR-TV AC
- ☐ WCSC-TV AP
- ☐ WBTV AJ
- ☐ WNOK-TV AN
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(Cont.)

- ☐ WCPO-TV KN
- ☐ WJW-TV KI
- ☐ WBNS-TV KK
- ☐ WHIO-TV KL
- ☐ WJBK-TV KQ
- ☐ KDAL-TV LD
- ☐ WANE-TV KP
- ☐ WBAY-TV LA
- ☐ WHP-TV KB
- ☐ WARD-TV KD
- ☐ WKZO-TV LE
- ☐ WLYH-TV LI
- ☐ WJIM-TV KS
- ☐ KEYC-TV LN
- ☐ WLUC-TV KZ
- ☐ KGLO PC
- ☐ WCCO-TV LC
- ☐ KDKA-TV KE
- ☐ WKNX-TV KW
- ☐ WSBT NK
- ☐ WSTV-TV KF
- ☐ WTOL-TV KJ
- ☐ WSAU-TV LB
- ☐ WSBA-TV LG
- ☐ WKBN-TV KG

- ☐ WMT-TV NZ
- ☐ WCIA NP
- ☐ WCHS-TV NC
- ☐ WBBM-TV NL
- ☐ KRNT-TV PB
- ☐ WEHT NF
- ☐ WISH-TV NI
- ☐ WKBT NX
- ☐ WLFI-TV NJ
- ☐ WKYT NA
- ☐ KOLN-TV PF
- ☐ WHAS-TV NE
- ☐ WISC-TV NW
- ☐ WISN-TV NS
- ☐ WOW-TV PE
- ☐ WMBD-TV NQ
- ☐ WCEE-TV NB
- ☐ WHBF-TV NR
- ☐ KMEG PD
- ☐ KELO-TV PG
- ☐ WTHI-TV NG
- ☐ WDTV FC

- ☐ KGGM-TV QG
- ☐ KOOK-TV SB
- ☐ KXMB-TV XN
- ☐ KBOI-TV XK
- ☐ KXLF-TV SC
- ☐ KTWO-TV XI
- ☐ KFBC-TV XF
- ☐ KKTV XC
- ☐ KLZ-TV XD
- ☐ KDIX-TV XP
- ☐ KROD-TV QS
- ☐ KXJB-TV XQ
- ☐ KXGN-TV XW
- ☐ KREX-TV XB
- ☐ KRTV SD
- ☐ KID-TV XJ
- ☐ KXMC-TV XR
- ☐ KOOL-TV QC
- ☐ KRSD-TV XL
- ☐ KWRB-TV XG
- ☐ KBIM-TV QF
- ☐ KSL-TV XA
- ☐ KOLD-TV QD
- ☐ KMVT XE
- ☐ KXMD-TV SX

- ☐ KUAM-TV BURLINGAME RM
- ☐ KBAK-TV RA
- ☐ KVOS-TV RS
- ☐ KHSL-TV RG
- ☐ KECC-TV QB
- ☐ KIEM-TV RI
- ☐ KFRE-TV RB
- ☐ KOTI-TV RK
- ☐ KLAS-TV XS
- ☐ KLEW-TV RN
- ☐ KNXT QX
- ☐ KOBI-TV RK
- ☐ KMST SE
- ☐ KEPR-TV RN
- ☐ KOIN-TV RL
- ☐ KOLO-TV RJ
- ☐ KXTV RF
- ☐ KFMB-TV QA
- ☐ KPIX RE
- ☐ KCOY RC
- ☐ KIRO-TV RQ
- ☐ KXLY-TV RW
- ☐ KIMA-TV RN
- ☐ TVC(2)
- ☐ ALASKA SA

TO: CBS TELEVISION NETWORK AFFILIATES

THIS IS TO ACQUAINT YOU WITH A DEVELOPMENT IN WHICH YOU HAVE A VITAL INTEREST. EARLIER THIS WEEK COUNSEL FOR ABC, CBS, NBC AND VIACOM WERE SUMMONED TO A MEETING WITH THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE, AT WHICH THE GOVERNMENT ANNOUNCED ITS INTENT TO FILE ANTITRUST SUITS AGAINST ALL THE COMPANIES.

IN BRIEF, THE JUSTICE DEPARTMENT SEEKS TO (1) TRANSFER CONTROL OF NETWORK SCHEDULES, INCLUDING WHAT PROGRAMS ARE PUT ON THE AIR AND WHEN, TO ADVERTISING AGENCIES AND MOTION PICTURE PRODUCERS; AND (2) PREVENT THE NETWORKS FROM PRODUCING ANY TELEVISION ENTERTAINMENT PROGRAMS OR FEATURE FILMS.

IN THE FIRST INSTANCE THE DEPARTMENT WOULD BE SETTING THE CLOCK BACK TWENTY YEARS OR MORE TO THE DAYS WHEN ENTERTAINMENT IN BOTH TELEVISION AND RADIO NETWORKING WAS MAINLY SELECTED AND CONTROLLED BY ADVERTISING AGENCIES. BEYOND THAT IT WOULD REDUCE STATIONS AND NETWORKS TO MERE CONDUITS.

IN THE SECOND INSTANCE -- PREVENTING NETWORKS FROM PRODUCING ENTERTAINMENT PROGRAMMING OR FEATURE FILMS -- THIS IS THE SAME OBJECTIVE AS THAT OF THE SUIT BROUGHT IN 1970 AGAINST ABC AND CBS BY SEVEN MOTION PICTURE COMPANIES WHICH NOW SUPPLY OVER 50 PERCENT OF PRIME TIME TELEVISION ENTERTAINMENT PROGRAMMING, COMPARED TO THE CBS TELEVISION NETWORK'S 8.2 PERCENT. AS YOU KNOW, WE HAVE BEEN VIGOROUSLY CONTESTING THIS ATTEMPT BY THE MOTION PICTURE COMPANIES TO SUPPRESS COMPETITION, AND FOR THE SAME REASONS WE WILL REFUSE TO ACQUIESCE IN THE JUSTICE DEPARTMENT'S DEMANDS, WHICH WE BELIEVE HAVE NO MERIT, LEGALLY OR OTHERWISE.

TV - Q.S.T.

CTN-582-REV 3/71

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc., 51 West 52 Street, New York, New York 10019 (212) 765-4321

Transmit Only to Stations Checked | **No. TV** ..... **Date** .....

WE BELIEVE THE JUSTICE DEPARTMENT'S POSITION IS INCONSISTENT WITH THE ANTITRUST LAWS AND THE PUBLIC INTEREST, AND WE CANNOT UNDERSTAND WHY THE DEPARTMENT HAS CHOSEN THIS MOMENT IN TIME TO UNDERMINE THE "PRIME TIME ACCESS," "FINANCIAL INTEREST" AND "SYNDICATION" RULES OF THE FEDERAL COMMUNICATIONS COMMISSION.-- A COMPLEX REGULATORY STRUCTURE ADOPTED BY THE COMMISSION WITH THE SUPPORT OF THE JUSTICE DEPARTMENT AFTER AN EXHAUSTIVE PROCEEDING WHICH LASTED MORE THAN ELEVEN YEARS.

WE WILL KEEP YOU ADVISED OF FUTURE DEVELOPMENTS FOR, AS YOU CAN SEE THIS ACTION WOULD GO TO THE HEART OF YOUR OPERATIONS AS WELL AS OURS.

ROBERT D. WOOD, PRESIDENT, CBS TELEVISION NETWORK

- ☐ WCBS-TV
- ☐ BOD BP
- ☐ WRDW-TV AQ
- ☐ WMAR-TV AC
- ☐ WCSC-TV AP
- ☐ WBTV AJ
- ☐ WNOK-TV AN
- ☐ WTVD AI
- ☐ WBTW AL
- ☐ WINK-TV AZ
- ☐ WTVX BF
- ☐ WFMY-TV AG
- ☐ WNCT AK
- ☐ WJXT AS
- ☐ WTVJ BA
- ☐ WTAR-TV AF
- ☐ WDBO-TV AW
- ☐ WCAU-TV AA
- ☐ WTVR AE
- ☐ WBOC-TV AB
- ☐ WTOC-TV AR
- ☐ WTVT AX
- ☐ WTOP-TV AD

- ☐ KTXS-TV QW
- ☐ KFDA-TV QI
- ☐ WHMA-TV DK
- ☐ WAIM-TV DB
- ☐ WAGA-TV DC
- ☐ KTBC-TV EC
- ☐ WAFB-TV DQ
- ☐ KFDM-TV DZ
- ☐ WBMG-TV EX
- ☐ KBTX ED
- ☐ WCBI-TV DK
- ☐ WRBL-TV DF
- ☐ KZTV QN
- ☐ KDFW-TV EF
- ☐ WTVY BD
- ☐ KGBT-TV QQ
- ☐ KHOU-TV EA
- ☐ WJTV DN
- ☐ KLFY-TV DS
- ☐ KLBK-TV QJ
- ☐ WMAZ-TV DE
- ☐ WTOK-TV DL
- ☐ WKRG-TV DJ
- ☐ KNOE-TV DP
- ☐ WCOV-TV DG
- ☐ WWL-TV DR
- ☐ KOSA-TV QR
- ☐ KCTV QK
- ☐ KENS-TV QL
- ☐ KSLA-TV DW
- ☐ WSPA-TV DA
- ☐ WCTV BB
- ☐ KWTX ED

- ☐ KFVS-TV FP
- ☐ WDEF-TV FG
- ☐ KTVC XC
- ☐ KFSA-TV GG
- ☐ KLOE-TV GN
- ☐ KAYS-TV GN
- ☐ WHNT-TV FL
- ☐ KRCG-TV FW
- ☐ WJHL-TV FD
- ☐ KUHI-TV FF
- ☐ KCMO-TV FX
- ☐ WBIR-TV FE
- ☐ KTHV GI
- ☐ WREC-TV FK
- ☐ WLAC-TV FI
- ☐ KWTV GF
- ☐ KHQA-TV GB
- ☐ WDBJ-TV FB
- ☐ KTTS-TV FS
- ☐ KMOX-TV FR
- ☐ WIBW-TV GC
- ☐ KOTV GE
- ☐ KTVH GD
- ☐ KAUZ-TV GJ

- ☐ WTEN IB
- ☐ WABI-TV IP
- ☐ WNBF-TV IA
- ☐ WHDH-TV IK
- ☐ WBEN-TV IE
- ☐ WCAX-TV IR
- ☐ WSEE IW
- ☐ WTIC-TV IG
- ☐ WGAN-TV IN
- ☐ WPRI-TV IL
- ☐ WAGM-TV IQ
- ☐ WHEC-TV ID
- ☐ WDAU-TV IS
- ☐ WHEN-TV IC
- ☐ WWNY-TV IF

- ☐ WFBG-TV KC

- ☐ WCPO-TV KN
- ☐ WJW-TV KI
- ☐ WBNS-TV KK
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- ☐ WBAY-TV LA
- ☐ WHP-TV KB
- ☐ WARD-TV KD
- ☐ WKZO-TV LE
- ☐ WLYH-TV LI
- ☐ WJIM-TV KS
- ☐ KEYC-TV LN
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- ☐ KDKA-TV KE
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- ☐ WSBT NK
- ☐ WSTV-TV KF
- ☐ WTOL-TV KJ
- ☐ WSAU-TV LB
- ☐ WSBA-TV LG
- ☐ WKBN-TV KG

- ☑ WMT-TV NZ
- ☐ WCIA NP
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- ☐ WBBM-TV NL
- ☐ KRNT-TV PB
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- ☐ WISH-TV NI
- ☐ WKBT NX
- ☐ WLFI-TV NJ
- ☐ WKYT NA
- ☐ KOLN-TV PF
- ☐ WHAS-TV NE
- ☐ WISC-TV NW
- ☐ WISN-TV NS
- ☐ WOW-TV PE
- ☐ WMBD-TV NQ
- ☐ WCEE-TV NB
- ☐ WHBF-TV NR
- ☐ KMEG PD
- ☐ KELO-TV PG
- ☐ WTHI-TV NG
- ☐ WDTV FC

- ☐ KGGM-TV QG
- ☐ KOOK-TV SB
- ☐ KXMB-TV XN
- ☐ KBOI-TV XK
- ☐ KXLF-TV SC
- ☐ KTWO-TV XI
- ☐ KFBC-TV XF
- ☐ KKTV XC
- ☐ KLZ-TV XD
- ☐ KDIX-TV XP
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- ☐ KXJB-TV XQ
- ☐ KXGN-TV XW
- ☐ KREX-TV XB
- ☐ KRTV SD
- ☐ KID-TV XJ
- ☐ KXMC-TV XR
- ☐ KOOL-TV QC
- ☐ KRSD-TV XL
- ☐ KWRB-TV XG
- ☐ KBIM-TV QF
- ☐ KSL-TV XA
- ☐ KOLD-TV QD
- ☐ KMVT XE
- ☐ KXMD-TV SX

- ☐ KUAM-TV BURLINGAME RM
- ☐ KBAK-TV RA
- ☐ KVOS-TV RS
- ☐ KHSL-TV RG
- ☐ KECC-TV QB
- ☐ KIEM-TV RI
- ☐ KFRE-TV RB
- ☐ KOTI-TV RK
- ☐ KLAS-TV XS
- ☐ KLEW-TV RN
- ☐ KNXT QX
- ☐ KOBI-TV RK
- ☐ KMST SE
- ☐ KEPR-TV RN
- ☐ KOIN-TV RL
- ☐ KOLO-TV RJ
- ☐ KXTV RF
- ☐ KFMB-TV QA
- ☐ KPIX RE
- ☐ KCOY RC
- ☐ KIRO-TV RQ
- ☐ KXLY-TV RW
- ☐ KIMA-TV RN
- ☐ TVQ(2)

FOR IMMEDIATE RELEASE
FRIDAY, APRIL 14, 1972

The Department of Justice today filed civil antitrust suits charging that the three national television networks have used their control of access to air time to monopolize prime time television entertainment programming and to obtain valuable interests in such programming.

As a result, the suits allege, the viewing public, independent program suppliers, and advertisers have been deprived of the benefits of free competition in television programming.

Acting Attorney General Richard G. Kleindienst said that the complaints, charging Columbia Broadcasting System, Inc. (CBS), National Broadcasting Company (NBC), and American Broadcasting Companies (ABC) with violation of Sections 1 and 2 of the Sherman Act, were filed in federal district court in Los Angeles. Also named as a defendant is Viacom International, Inc., a former subsidiary of CBS which now owns CBS program syndication and distribution rights.

The suits seek to restore a competitive programming industry by prohibiting the networks from carrying network-produced entertainment programs, including feature films, and from obtaining financial interests in independently

produced entertainment programs. The networks would continue to exercise responsibility for programs they accept for broadcast.

The news, public affairs, documentary, and sports programs of the networks are not affected by the suits, nor do the complaints challenge the affiliation agreements between the networks and their local stations.

According to the complaints, the three networks spent more than $840 million for television programs in 1969 and received television broadcasting revenues in excess of $1.5 billion.

The suits are the result of an antitrust investigation which originated in the 1950s and was held in abeyance during an FCC hearing on network programming. The FCC inquiry, which began in 1959, resulted in an order in May 1969 aimed at making a limited amount of network time available to independent (non-network) program producers.

Acting Assistant Attorney General Walker B. Comegys, in charge of the Antitrust Division, said the suits allege that each network has used its control over access to prime evening air time (1) to exclude from network broadcast those entertainment programs in which the network had no ownership interest, (2) to compel outside program suppliers to grant the network financial interests in television programs which it accepts for broadcast, (3) to refuse to offer air time

to advertisers and other outside program suppliers seeking to have their own programs shown on the network, (4) to control the prices paid by the network for television exhibition rights to motion picture feature films, and (5) to obtain competitive advantages over other producers and distributors of television entertainment programs and of motion picture feature films.

The government's antitrust suits allege that the networks have obtained ownership interests in most of the prime time entertainment programs they now broadcast. In 1957, CBS had such interests in 49 percent of its prime time entertainment programs, NBC in 43 percent, and ABC in 31 percent. By 1967, these figures had increased to 73 percent, 68 percent, and 86 percent, respectively.

The effects of the violations, according to the complaints, are that ownership and control of network prime time television entertainment programs have been concentrated in the networks; competition in the production, distribution and sale of television entertainment programs has been restrained; and the viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

The suits also contend that recent network entry into motion pictures poses a danger to competition.

The complaints assert that the use of motion picture feature films in prime time has increased sharply in recent years, and that each network has arranged for the production of feature films. According to the complaints, only the three national television networks can assure television exposure to writers, actors, directors, producers and related talent. In addition, the complaints assert, the networks are in a unique position to assure themselves of television revenues for their feature films. As a result, according to the complaints, the networks enjoy important competitive advantages over other producers of feature films.

Bernard M. Hollander
Daniel R. Hunter
Aaron B. Kahn
Department of Justice, Antitrust Division
1444 U.S. Court House
Los Angeles, California 90012
Telephone: 688-2500

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	Civil Action No. Filed: (Equitable Relief Complaint for Violation of Sections 1 & 2 of the Sherman Act)

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant named herein and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. §4), amended, commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U.S.C. §§ 1, 2).

2. The defendant, National Broadcasting Company, Inc., whose West Coast studios and offices are in Burbank, California, transacts business within the Central District of California.

II

DEFINITIONS

3. As used herein:

(a) "Affiliate" means a television station which has an affiliation agreement with National Broadcasting Company, Inc., pursuant to which it receives television programs and advertising messages for broadcast, and receives compensation for the use of its time and facilities.

(b) "Prime evening hours" are the hours from 6:00 p.m. to 11:00 p.m. in the Eastern time zone of the United States.

(c) "Television entertainment programs" means all programs shown on television other than news, public affairs, documentary or sports programs.

(d) "Outside program supplier" means a producer or supplier of television entertainment programs other than a television network.

III

DEFENDANT

4. National Broadcasting Company, Inc. (hereinafter NBC) is hereby named as defendant. NBC is a corporation organized and existing under the laws of the State of Delaware. It is a subsidiary of the RCA Corporation. NBC owns and operates commercial television stations in five of the nation's leading television markets (New York City, Los Angeles, Chicago, Washington and Cleveland). NBC is engaged, among other things, in the operation of the NBC Television Network, which

furnishes television programs and related advertising messages to approximately 200 affiliates located throughout the United States and to the television stations which are owned and operated by NBC. NBC remits part of the revenues it receives from advertisers to its affiliates. NBC itself produces some of the programs broadcast on its television network. NBC also owns various financial interests in programs produced by others and broadcast on its television network.

5. Although NBC is primarily engaged in television and radio network broadcasting, it is also engaged in the following activities, among others:

(a) Manufacture of phonograph records;

(b) Manufacture of magnetic tape.

IV

TRADE AND COMMERCE

A. Interstate Commerce

6. Television programs and related advertising messages, filmed and live, are conveyed by program suppliers and networks across State lines to television stations throughout the United States, from which stations said programs are transmitted across State lines to viewers. A continuous stream of interstate commerce and the use of interstate means of communication results therefrom, including the collection and payment of fees, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

7. Commercial television programs are created and produced by television networks, outside program suppliers, television stations, and by motion picture studios, which supply feature films and other programs for television broadcast. In 1969, the three nationwide commercial television networks (NBC, Columbia Broadcasting System (CBS) and American

Broadcasting Companies (ABC)) spent more than $840,000,000 for television programs, of which NBC spent more than $310,000,000. In 1969, total television broadcasting revenues for the aforementioned three networks were in excess of $1,510,000,000, of which NBC received more than $570,000,000.

B. Television Programming

8. There are approximately 696 television stations in the United States which broadcast commercial television programs. Of these, about 200 stations have network affiliation agreements with NBC. During prime evening hours, when television viewing is at its peak, most of these stations depend upon NBC for virtually all of their television programming. A television program cannot reach the audiences of such stations during prime evening hours unless it is transmitted by NBC over the NBC Television Network.

9. The value of any television program to its producer, and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. The largest television audiences in the United States are readily available only to those producers whose programs are carried by the NBC, CBS or ABC television networks, and to those advertisers whose commercial messages are broadcast during said programs, and the right to broadcast such programs and commercial messages on any of these three television networks can be purchased only from them.

10. Many advertisers formerly were able to purchase air time from networks (including NBC) and to purchase television entertainment programs from outside program suppliers for broadcast during such air time. Such advertisers constituted a substantial market for outside program suppliers. Now,

however, the networks (including NBC) generally will not offer to sell air time to advertisers except for their commercial messages which are broadcast in conjunction with television entertainment programs already selected and placed in schedules by the networks. As a result, the three nationwide commercial television networks (NBC, CBS, and ABC) constitute the primary market for television entertainment programs.

11. Most of the prime time television entertainment programs broadcast on the NBC Television Network are programs which have either been produced by NBC itself or with respect to which NBC owns a right or interest in addition to a license to broadcast. In 1957, such programs constituted about 43 percent of the television entertainment programs broadcast on the NBC Television Network during prime time evening hours. By 1967, this figure had increased to 68 percent, or 74 percent if feature films are excluded.

12. The commercial value of a television entertainment program is not exhausted by its first network showing. Frequently thereafter a program is distributed to individual television stations in the United States for non-network broadcast. In addition, it may be distributed to foreign television stations while it is appearing over a domestic television network. The distribution of a television program to individual stations for non-network broadcast is known as syndication. NBC has obtained syndication and other valuable subsidiary program rights, as well as a share of the profits produced by such rights, with respect to a substantial number of television entertainment programs produced by others and broadcast on the NBC Television Network.

13. The use of motion picture feature films as prime time television entertainment programs has shown a marked increase in recent years. In the early nineteen sixties, the three nationwide

commercial television networks began using feature films in prime time. By the 1967-1968 season, each network carried motion picture feature films on two nights a week, generally from 9:00 to 11:00 p.m. EST, and feature films were thus available to television network audiences six nights a week. This practice has continued through the 1968-1969 and 1969-1970 seasons. In 1966, NBC contracted with MCA, Inc., for the production of motion picture feature films for exhibition on the NBC Television Network. In 1967, both CBS and ABC announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and for exhibition on their respective television networks.

14. The successful production of both television entertainment programs and feature films depends to a large degree on the utilization of skilled writers, actors, directors, producers and related talent. Only the three nationwide commercial television networks can assure such talent both television and theatrical exposure for the talent and its product. In addition, because of their control over access to their affiliates, the networks are in a unique position to assure themselves of nationwide television network revenues for feature films which they produce, after those films have completed theatrical runs.

V

OFFENSES CHARGED

15. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant NBC has engaged in a combination with its owned and operated television stations, the NBC affiliates and others, and has entered into contracts, in unreasonable restraint of trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours,

in violation of Section 1 of the Sherman Act.

16. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant NBC has engaged in a combination with its owned and operated television stations, the NBC affiliates and others to monopolize. has attempted to monopolize and has monopolized the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours, in violation of Section 2 of the Sherman Act.

17. Pursuant to said offenses, defendant NBC has used its control over access to the broadcasting time of the NBC Television Network during prime evening hours:

(a) To exclude television entertainment programs in which NBC has no ownership interest from broadcast on the NBC Television Network during prime evening time;

(b) To compel outside program suppliers to grant to it financial interests in television entertainment programs produced by them;

(c) To refuse to offer program time alone to advertisers and other outside program suppliers;

(d) To control the prices paid by NBC for television exhibition rights to motion picture feature films distributed by non-network motion picture distributors;

(e) To obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films.

18. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

VI

EFFECTS

19. The effects of the aforesaid offenses, among others, have been and are as follows:

(a) Ownership and control of television entertainment programs broadcast during prime evening hours on the NBC Television Network has been concentrated in defendant NBC;

(b) Competition in the production, distribution and sale of television entertainment programs, including feature films, has been unreasonably restrained;

(c) Competition in the sale of television entertainment programs to the NBC Television Network by outside program suppliers of said programs has been unreasonably restrained;

(d) The viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the offenses described in paragraph 15 of this complaint be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That the offenses described in paragraph 16 of this complaint be adjudged and decreed to be in violation of Section 2 of the Sherman Act.

3. That the defendant NBC be prohibited from obtaining any interest (except for the first-run right of exhibition) in television entertainment programs produced by others, including feature films.

4. That the defendant NBC be prohibited from engaging in syndication of any television entertainment programs.

5. That the defendant NBC be prohibited from transmitting for exhibition over the NBC Television Network any television entertainment programs, including feature films, produced by the defendant NBC or any other commercial television network, and from allowing any television entertainment programs produced by NBC to be transmitted over any other commercial television network.

6. That the defendant NBC be prohibited from using its control of access to the broadcasting time of the NBC Television Network, the NBC owned and operated television stations or the NBC affiliates, to foreclose competition or obtain an unfair competitive advantage in any other field.

7. That the plaintiff have such other relief by way of divorcement, divestiture, reorganization and injunction with respect to the business and properties of the defendant NBC as the Court may consider necessary or appropriate to dissipate the effects of the defendant's unlawful activities as hereinbefore alleged in this complaint, and to restore competitive conditions to the television entertainment program industry.

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8. That plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover the costs of this action.

RICHARD G. KLEINDIENST
Acting Attorney General

WALKER B. COMEGYS
Acting Assistant Attorney General

BADDIA J. RASHID

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Los Angeles, California 90012
Telephone: 688-2500

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. COLUMBIA BROADCASTING SYSTEM, INC. and VIACOM INTERNATIONAL, INC., Defendants.	Civil Action No. Filed: (Equitable Relief Complaint for Violation of Sections 1 & 2 of the Sherman Act)

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instistuted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. §4), as amended, commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U.S.C. §§1, 2).

2. The defendant, Columbia Broadcasting System, Inc., whose West Coast studios and offices are in Los Angeles, California, transacts business within the Central District of

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California.

3. The defendant, Viacom International, Inc., transacts business within the Central District of California.

II

DEFINITIONS

4. As used herein:

(a) "Affiliate" means a television station which has an affiliation agreement with Columbia Broadcasting System, Inc., pursuant to which it receives television programs and advertising messages for broadcast, and receives compensation for the use of its time and facilities.

(b) "Prime evening hours" are the hours from 6:00 p.m. to 11:00 p.m. in the Eastern time zone of the United States.

(c) "Television entertainment programs" means all programs shown on television other than news, public affairs, documentary, or sports programs.

(d) "Outside program supplier" means a producer or supplier of television entertainment programs other than a television network.

III

DEFENDANTS

5. Columbia Broadcasting System, Inc. (hereinafter CBS) is hereby named as a defendant. CBS is a corporation organized and existing under the laws of the State of New York. CBS owns and operates commercial television stations in five of the nation's leading television markets (New York City, Los Angeles, Chicago, Philadelphia and St. Louis).

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CBS is engaged, among other things, in the operation of the CBS Television Network, which furnishes television programs and related advertising messages to approximately 200 affiliates located throughout the United States and to the television stations which are owned and operated by CBS. CBS remits part of the revenues it receives from advertisers to its affiliates. CBS itself produces some of the programs broadcast on its television network. CBS also owns various financial interests in programs produced by others and broadcast on its television network.

6. Although CBS is primarily engaged in television and radio network broadcasting, it is also engaged in the following activities, among others:

(a) Production of motion picture feature films, through Cinema Center Films, a division of CBS established in March 1967;

(b) Manufacture, distribution and sale of phonograph records through CBS Records, a division of CBS, the largest producer, manufacturer and distributor of phonograph records in the United States;

(c) Publishing through Holt, Rinehart and Winston, Inc., a wholly-owned subsidiary;

7. Viacom International, Inc. (hereinafter referred to as Viacom) is hereby named as a defendant. Viacom is a corporation organized and existing under the laws of the State of Delaware. It is engaged, among other things, in operating the former television program syndication business of CBS and the CATV systems formerly owned by CBS. Viacom generated revenues in excess of $19,000,000 in 1970. Viacom was created by distributing Viacom shares to the shareholders of CBS. At the time of its formation Viacom was substantially

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owned by the same stockholders as the defendant CBS.

IV

TRADE AND COMMERCE

A. Interstate Commerce

8. Television programs and related advertising messages, filmed and live, are conveyed by program suppliers and networks across State lines to television stations throughout the United States, from which stations said programs are transmitted across State lines to viewers. A continuous stream of interstate commerce and the use of interstate means of communication results therefrom, including the collection and payment of fees, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

9. Commercial television programs are created and produced by television networks, outside program suppliers, television stations, and by motion picture studios, which supply feature films and other programs for television broadcast. In 1969, the three nationwide commercial television networks (CBS, National Broadcasting Company (NBC) and American Broadcasting Companies (ABC)) spent more than $840,000,000 for television programs, of which CBS spent more than $250,000,000. In 1969, total television broadcasting revenues for the aforementioned three networks were in excess of $1,510,000,000, of which CBS received more than $520,000,000.

B. Television Programming

10. There are approximately 696 television stations in the United States which broadcast commercial television programs. Of these, about 200 stations have network affiliation agreements with CBS. During prime evening hours, when television viewing is at its peak, most of these stations

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depend upon CBS for virtually all of their television programming. A television program cannot reach the audiences of such stations during prime evening hours unless it is transmitted by CBS over the CBS Television Network.

11. The value of any television program to its producer, and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. The largest television audiences in the United States are readily available only to those producers whose programs are carried by the CBS, NBC or ABC television networks, and to those advertisers whose commercial messages are broadcast during said programs, and the right to broadcast such programs and commercial messages on any of these three television networks can be purchased only from them.

12. Many advertisers formerly were able to purchase air time from networks (including CBS) and to purchase television entertainment programs from outside program suppliers for broadcast during such air time. Such advertisers constituted a substantial market for outside program suppliers. Now, however, the networks (including CBS) generally will not offer to sell air time to advertisers except for their commercial messages which are broadcast in conjunction with television entertainment programs already selected and placed in schedules by the networks. As a result, the three nationwide commercial television networks (CBS, NBC, and ABC) constitute the primary market for television entertainment programs.

13. Most of the prime time television entertainment programs broadcast on the CBS Television Network are programs which have either been produced by CBS itself or with respect

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to which CBS obtained a right or interest in addition to a license to broadcast. In 1957, such programs constituted about 49 percent of the television entertainment programs broadcast on the CBS Television Network during prime time evening hours. By 1967, this figure had increased to 68 percent, or 73 percent if feature films are excluded.

14. The commercial value of a television entertainment program is not exhausted by its first network showing. Frequently thereafter a program is distributed to individual television stations in the United States for non-network broadcast. In addition, it may be distributed to foreign television stations while it is appearing over a domestic television network. The distribution of a television program to individual stations for non-network broadcast is known as syndication. CBS has obtained syndication, and other valuable subsidiary program rights, as well as a share of the profits produced by such rights, with respect to a substantial number of television entertainment programs produced by others and broadcast on the CBS Television Network.

15. The use of motion picture feature films as prime time television entertainment programs has shown a marked increase in recent years. In the early nineteen sixties, the three nationwide commercial television networks began using feature films in prime time. By the 1967-1968 season, each network carried motion picture feature films on two nights a week, generally from 9:00 to 11:00 p.m. EST, and feature films were thus available to television network audiences six nights a week. This practice has continued through the 1968-1969 and 1969-1970 seasons.

16. In March 1967, CBS announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and

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for exhibition on the CBS Television Network. In effectuation of these plans:

(a) CBS has formed a new division, Cinema Center Films (initially, CBS Theatrical Films, Inc.), to engage in the production of feature films;

(b) CBS allocated an estimated $60,000,000 as its first year budget for the production of feature films;

(c) CBS has contracted with numerous individuals experienced in the production of, the creation of, and acting in, feature films;

(d) CBS has acquired from Republic Corporation a 70-acre film center (studios and facilities lot) in North Hollywood, California, for $9,500,000;

(e) CBS has produced more than 20 feature films;

(f) CBS has entered into a six-year distribution contract with National General Corporation (National General), a producer and distributor of feature films and owner and operator of the second largest chain of motion picture theaters in the United States, for exclusive distribution in the United States of all theatrical motion picture films produced by CBS.

In 1967, ABC also announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and for exhibition on the ABC Television Network. In 1966, NBC contracted with MCA, Inc., for the production of motion picture feature films for exhibition on the NBC Television Network.

17. The successful production of both television

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entertainment programs and feature films depends to a large degree on the utilization of skilled writers, actors, directors, producers and related talent. Only the three nationwide commercial television networks can assure such talent both television and theatrical exposure for the talent and its product. In addition, because of their control over access to their affiliates, the networks are in a unique position to assure themselves of nationwide television network revenues for feature films which they produce after those films have completed theatrical runs.

V

OFFENSES CHARGED

18. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant CBS has engaged in a combination with its owned and operated television stations, defendant Viacom, the CBS affiliates, National General Corporation and others, and has entered into contracts, in unreasonable restraint of trade and commerce in television entertainment programs exhibited on the CBS Television Network during prime evening hours, in violation of Section 1 of the Sherman Act.

19. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant CBS has engaged in a combination with its owned and operated television stations, defendant Viacom, the CBS affiliates, National General Corporation and others to monopolize, has attempted to monopolize and has monopolized the trade and commerce in television entertainment programs exhibited on the CBS Television Network during prime evening hours, in violation of Section 2 of the Sherman Act.

20. Pursuant to said offenses, defendant CBS:

(a) has used its control over access to the broadcasting

time of the CBS Television Network during prime evening hours:

(i) To exclude television entertainment programs in which CBS has no ownership interest from broadcast on the CBS Television Network during prime evening time;

(ii) To compel outside program suppliers to grant to it financial interests in television entertainment programs produced by them;

(iii) To refuse to offer program time alone to advertisers and other outside program suppliers;

(iv) To control the prices paid by CBS for television exhibition rights to motion picture feature films distributed by non-network motion picture distributors;

(v) To obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films; and

(b) has entered into a contract with National General, the owner and operator of the second largest chain of theaters in the United States, for exclusive distribution in the United States of all theatrical motion picture films produced by CBS.

21. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

VI

EFFECTS

22. The effects of the aforesaid offenses, among others, have been and are as follows:

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(a) Ownership and control of television entertainment programs broadcast during prime evening hours on the CBS Television Network has been concentrated in defendant CBS;

(b) Competition in the production, distribution and sale of television entertainment programs, including feature films, has been unreasonably restrained;

(c) Competition in the sale of television entertainment programs to the CBS Television Network by outside program suppliers of said programs has been unreasonably restrained;

(d) The viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the offenses described in paragraph 18 of this complaint be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That the offenses described in paragraph 19 of this complaint be adjudged and decreed to be in violation of Section 2 of the Sherman Act.

3. That the defendant CBS be prohibited from obtaining any interest (except for the first-run right of exhibition) in television entertainment programs produced by others, including feature films.

4. That the defendant CBS be prohibited from engaging in syndication of any television entertainment programs.

5. That the defendant CBS be prohibited from transmitting for exhibition over the CBS Television Network any

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television entertainment programs, including feature films, produced by the defendant CBS or any other commercial television network, and from allowing any television entertainment programs produced by CBS to be transmitted over any other commercial television network.

6. That the defendant CBS be prohibited from using its control of access to the broadcasting time of the CBS Television Network, the CBS owned and operated television stations or the CBS affiliates, to foreclose competition or obtain an unfair competitive advantage in any other field.

7. That the plaintiff have such other relief by way of divorcement, divestiture, reorganization and injunction with respect to the business and properties of the defendants CBS and Viacom as the Court may consider necessary or appropriate to dissipate the effects of the defendants' unlawful activities as hereinbefore alleged in this complaint, and to restore competitive conditions to the television entertainment program industry.

8. That plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover the costs of this action.

RICHARD G. KLEINDIENST
Acting Attorney General

WALKER B. COMEGYS
Acting Assistant Attorney General

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN BROADCASTING COMPANIES, INC., Defendant.	Civil Action No. Filed: (Equitable Relief Complaint for Violation of Sections 1 & 2 of the Sherman Act

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant named herein and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. §4), as amended, commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U.S.C. §§ 1, 2).

2. The defendant, American Broadcasting Companies, Inc., whose West Coast Studios and offices are in Los Angeles,

California, transacts business within the Central District of California.

II

DEFINITIONS

3. As used herein:

(a) "Affiliate" means a television station which has an affiliation agreement with American Broadcasting Companies, Inc., pursuant to which it receives television programs and advertising messages for broadcast, and receives compensation for the use of its time and facilities.

(b) "Prime evening hours" are the hours from 6:00 p.m. to 11:00 p.m. in the Eastern time zone of the United States.

(c) "Television entertainment programs" means all programs shown on television other than news, public affairs, documentary, or sports programs.

(d) "Outside program supplier" means a producer or supplier of television entertainment programs other than a television network.

III

DEFENDANT

4. American Broadcasting Companies, Inc. (hereinafter ABC) is hereby named as defendant. ABC is a corporation organized and existing under the laws of the State of New York. ABC owns and operates commercial television stations in five of the nation's leading television markets (New York City, Los Angeles, Chicago, Detroit and San Francisco). ABC is engaged, among other things, in the operation of the ABC Television

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Network, which furnishes television programs and related advertising messages to approximately 150 affiliates located throughout the United States and to the television stations which are owned and operated by ABC. ABC remits part of the revenues it receives from advertisers to its affiliates. ABC itself produces some of the programs broadcast on its television network. ABC also owns various financial interests in programs produced by others and broadcast on its television network.

5. Although ABC is primarily engaged in television and radio network broadcasting, it is also engaged in the following activities, among others:

(a) Production of motion picture feature films, through its wholly owned subsidiary, ABC Pictures Corporation and through ABC Circle Films, a new division or subsidiary organized in 1970;

(b) Motion picture exhibition through the largest motion picture theater chain in the United States, comprised of about 418 theaters in 31 states owned by ABC subsidiaries;

(c) Manufacture, distribution and sale of phonograph records through its wholly owned subsidiary, ABC Records, Inc.

IV

TRADE AND COMMERCE

A. Interstate Commerce

6. Television programs and related advertising messages, filmed and live, are conveyed by program suppliers and networks across State lines to television stations throughout the United States, from which stations said programs are transmitted across State lines to viewers. A continuous stream of interstate commerce and the use of interstate means of communication results

therefrom, including the collection and payment of fees, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

7. Commercial television programs are created and produced by television networks, outside program suppliers, television stations, and by motion picture studios, which supply feature films and other programs for television broadcast. In 1969, the three nationwide commercial television networks (ABC, Columbia Broadcasting System (CBS) and National Broadcasting Company (NBC)) spent more than $840,000,000 for television programs, of which ABC spent more than $275,000,000. In 1969, total television broadcasting revenues for the aforementioned three networks were in excess of $1,510,000,000, of which ABC received more than $410,000,000.

B. Television Programming

8. There are approximately 696 television stations in the United States which broadcast commercial television programs. Of these, about 150 stations have network affiliation agreements with ABC. During prime evening hours, when television viewing is at its peak, most of these stations depend upon ABC for virtually all of their television programming. A television program cannot reach the audiences of such stations during prime evening hours unless it is transmitted by ABC over the ABC Television Network.

9. The value of any television program to its producer, and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. The largest television audiences in the United States are readily available only to those producers whose programs are carried by the ABC, CBS or NBC television networks, and to those advertisers

whose commercial messages are broadcast during said programs, and the right to broadcast such programs and commercial messages on any of these three television networks can be purchased only from them.

10. Many advertisers formerly were able to purchase air time from networks (including ABC) and to purchase television entertainment programs from outside program suppliers for broadcast during such air time. Such advertisers constituted a substantial market for outside program suppliers. Now, however, the networks (including ABC) generally will not offer to sell air time to advertisers except for their commercial messages which are broadcast in conjunction with television entertainment programs already selected and placed in schedules by the networks. As a result, the three nationwide commercial television networks (ABC, CBS, and NBC) constitute the primary market for television entertainment programs.

11. Most of the prime time television entertainment programs broadcast on the ABC Television Network are programs which have either been produced by ABC itself or with respect to which ABC owns a right or interest in addition to a license to broadcast. In 1957, such programs constituted about 31 per cent of the television entertainment programs broadcast on the ABC Television Network during prime time evening hours. By 1967, this figure had increased to 86 per cent, or 93 per cent if feature films are excluded.

12. The commercial value of a television entertainment program is not exhausted by its first network showing. Frequently thereafter a program is distributed to individual television stations in the United States for non-network broadcast. In addition, it may be distributed to foreign television stations while it is appearing over a domestic television network. The distribution of a television program to individual stations for

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non-network broadcast is known as syndication. ABC has obtained syndication, and other valuable subsidiary program rights, as well as a share of the profits produced by such rights, with respect to a substantial number of television entertainment programs produced by others and broadcast on the ABC Television Network.

13. The use of motion picture feature films as prime time television entertainment programs has shown a marked increase in recent years. In the early nineteen sixties, the three nationwide commercial television networks began using feature films in prime time. By the 1967-1968 season, each network carried motion picture feature films on two nights a week, generally from 9:00 to 11:00 p.m. EST, and feature films were thus available to television network audiences six nights a week. This practice has continued through the 1968-1969 and 1969-1970 seasons.

14. In August 1967, ABC announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and for exhibition on the ABC Television Network. In effectuation of these plans:

(a) ABC has, through ABC Circle Films, and ABC Pictures Corporation, been engaged in the production of feature films;

(b) ABC allocated an estimated $30,000,000 as its 1967 budget for the production of feature films;

(c) ABC has contracted with numerous individuals experienced in the production of, the creation of, and acting in, feature films;

(d) ABC has produced more than 25 feature films;

(e) ABC has entered into a distribution contract with Cinerama, Inc., producer and distributor

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of feature films, whose principal stockholder also owns and controls one of the largest chains of motion picture theaters in the United States, for exclusive distribution in the United States of most theatrical motion picture films produced by ABC.

In 1967, CBS also announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and for exhbition on the CBS Television Network. In 1966, NBC contracted with MCA, Inc., for the production of motion picture feature films for exhibition on the NBC Television Network.

15. The successful production of both television entertainment programs and feature films depends to a large degree on the utilization of skilled writers, actors, directors, producers and related talent. Only the three nationwide commercial television networks can assure such talent both television and theatrical exposure for the talent and its product. In addition, because of their control over access to their affiliates, the networks are in a unique position to assure themselves of nationwide television network revenues for feature films which they produce, after those films have completed theatrical runs.

V

OFFENSES CHARGED

16. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant ABC has engaged in a combination with its owned and operated television stations, ABC Circle Films, ABC Pictures Corporation, the ABC affiliates, Cinerama, Inc., and others, and has entered into contracts, in unreasonable restraint of trade and commerce

in television entertainment programs exhibited on the ABC Television Network during prime evening hours, in violation of Section 1 of the Sherman Act.

17. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant ABC has engaged in a combination with its owned and operated television stations, ABC Circle Films, ABC Pictures Corporation, the ABC affiliates, Cinerama, Inc., and others to monopolize, has attempted to monopolize and has monopolized the trade and commerce in television entertainment programs exhibited on the ABC Television Network during prime evening hours, in violation of Section 2 of the Sherman Act.

18. Pursuant to said offenses, defendant ABC:

(a) has used its control over access to the broadcasting time of the ABC Television Network during prime evening hours;

(i) To exclude television entertainment programs in which ABC has no ownership interest from broadcast on the ABC Television Network during prime evening time;

(ii) To compel outside program suppliers to grant to it financial interests in television entertainment programs produced by them;

(iii) To refuse to offer program time alone to advertisers and other outside program suppliers;

(iv) To control the prices paid by ABC for television exhibition rights to motion picture feature films

distributed by non-network motion picture distributors;

(v) To obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films; and

(b) has entered into a contract with Cinerama, Inc., for exclusive distribution in the United States of most theatrical motion picture films produced by ABC.

19. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

VI

EFFECTS

20. The effects of the aforesaid offenses, among others, have been and are as follows:

(a) Ownership and control of television entertainment programs broadcast during prime evening hours on the ABC Television Network has been concentrated in defendant ABC;

(b) Competition in the production, distribution and sale of television entertainment programs, including feature films, has been unreasonably restrained;

(c) Competition in the sale of television entertainment programs to the ABC Television Network by outside program suppliers of said programs has been unreasonably restrained;

(d) The viewing public has been deprived of the benefits of free and open competition in the

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broadcasting of television entertainment programs.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the offenses described in paragraph 16 of this complaint be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That the offenses described in paragraph 17 of this complaint be adjudged and decreed to be in violation of Section 2 of the Sherman Act.

3. That the defendant ABC be prohibited from obtaining any interest (except for the first-run right of exhibition) in television entertainment programs produced by others, including feature films.

4. That the defendant ABC be prohibited from engaging in syndication of any television entertainment programs.

5. That the defendant ABC be prohibited from transmitting for exhibition over the ABC Television Network any television entertainment programs, including feature films, produced by the defendant ABC or any other commercial television network, and from allowing any television entertainment programs produced by ABC to be transmitted over any other commercial television network.

6. That the defendant ABC be prohibited from using its control of access to the broadcasting time of the ABC Television Network, the ABC owned and operated television stations or the ABC affiliates, to foreclose competition or obtain an unfair competitive advantage in any other field.

7. That the plaintiff have such other relief by way of divorcement, divestiture, reorganization and injunction with respect to the business and properties of the defendant ABC as the Court may consider necessary or appropriate to dissipate the effects of the defendant's unlawful activities as hereinbefore alleged in this complaint, and to restore competitive conditions to the television entertainment program industry.

8. That plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover the costs of this action.

RICHARD G. KLEINDIENST
Acting Attorney General

WALKER B. COMEGYS
Acting Assistant Attorney General

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NOV 24 1971

Ltr 11/24

Honorable Clay T. Whitehead
Director
Office of Telecommunications Policy
Executive Office of the President
Washington, D. C. 20504

Dear Mr. Whitehead:

This is in response to your October 29, 1971 request for our opinion concerning Comsat's right to exclusive ownership and operation of a new communications satellite system designed to improve international air traffic control.

In an October 15, 1971, letter to your General Counsel, we outlined several legal arguments to support the position of your Office that neither the Communications Satellite Act of 1962 nor the various INTELSAT agreements entitled Comsat to exclusive ownership and operation of the proposed system. Because of the limited time then available and because we were not appraised of Comsat's competing arguments, however, we were reluctant to conclude that those arguments conclusively permitted the new system to be adopted independently of Comsat.

Although we have still not been given Comsat's legal position, we feel after further reflection and research that the arguments in our earlier letter are sufficiently meritorious to preclude substantial legal doubts as to the soundness of the proposed system.

Sincerely,

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

Justice

WHR:RWW:jh OCT 15 1971 cc--Files
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Rec'd by Messenger at 3 p.m., 10-15-71

Honorable Antonin Scalia
General Counsel
Office of Telecommunications Policy
Executive Office of the President
Washington, D.C. 20504

Dear Mr. Scalia:

This is in response to your October 1, 1971, request for our views as to whether any entity other than the Communications Satellite Corporation (Comsat) can lawfully own and operate a new communications satellite system designed to improve international air traffic control. An Administration policy apparently calls for the new system to be developed and owned by the private sector. In addition to air traffic control the new system may serve other functions such as maritime navigation services and services to permit passengers on aircraft and ships to place and receive telephone calls in transit.

Your letter mentions that the Communications Satellite Act of 1962 and various agreements entered into by the United States as a participant in the International Telecommunications Satellite Consortium (INTELSAT) have been cited as forbidding control of the proposed system by any entity other than Comsat.

Since we have not been informed of the legal arguments upon which it is asserted that Comsat has been given a monopoly to operate all new satellite communications systems, including the proposed one, we are hesitant to conclude that that position is wholly untenable. In the limited time available we have developed significant arguments against the position. These are set forth in the sections which follow.

I

Communications Satellite Act of 1962

Title III of the Communications Satellite Act of 1967, 47 U.S.C. § § 701-44 (1970), establishes Comsat as a single entity to own and operate the communications system envisioned by the Act. Two provisions of the Act clearly indicate that Congress foresaw the eventual creation of additional satellite systems at some future time, but no express provision vests Comsat with the authority to own and control these new systems. Indeed, the Act and its legislative history infer that the creation of another entity is not precluded by the Act.

The savings provision in the preamble to the Act sets forth the policy of Congress regarding the establishment of additional systems:

> It is not the policy of Congress by this chapter . . . to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in the national interest. 47 U.S.C. § 701(d)(1970).

In the operative provisions, section 201(a)(6) expressly recognizes that other systems were contemplated for it declares that the government may utilize other systems under conditions parallel to the savings provisions of the above-quoted section. Section 201(a)(6) states:

> the President shall
>
> . . . .
>
> take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate

> communications satellite system is required to meet unique governmental needs, or is otherwise required in the national interest. 47 U.S.C. § 721(a)(6)(1970)(emphasis added).

Presumably, if the new system, as a factual matter, can be justified as in the national interest or required to meet unique governmental needs the 1962 Act expressly permits it.

Section 305(a) grants to Comsat the authority to "(1) plan, initiate, construct, own, manage, and operate . . . . a commercial communications satellite system . . . ." 47 U.S.C. § 735(a)(1)(1970). As first introduced, this section referred to systems. (H.R. 11040) This was changed to the singular by the Senate. This deliberate action and the Act's consistent use of the term system in lieu of systems is, in our opinion, an indication that the Act only intended that Comsat be given control over the single system then contemplated. Since the Act did foresee the eventual creation of additional systems but did not vest their control solely in Comsat, the subsequent creation of new controlling entities cannot be said to have been precluded by the Act.

Although we have not had the time to read all of the extensive legislative history of this Act, we believe that the record sufficiently reinforces this conclusion. It is true that the legislative history is replete with statements to the effect that the Act creates a private monopoly. These statements, however, clearly reflect the de facto, not the de jure consequences of the Act. For example, in House hearings FCC Chairman Minnow stated the universal assumption concerning why a monopoly was being created:

> [I]t is generally accepted that for the foreseeable future only one commercial space communications system will be technically and economically feasible. Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 10115, 87th Cong.,2d Sess., pt 2, at 400 (1962).

Although recognizing that at the time other systems were not technically or economically feasible, there is clear evidence of legislative intent that complementary or competing systems be legally permissible. Congressman Harris, the floor manager of the bill, stated the intent of section 102(d)(47 U.S.C. § 701(d), supra), as understood by members of the House Committee on Interstate and Foreign Commerce which reported the bill:

> [I]t was agreed that it was not the intent of the Congress by this Act to preclude the creation of an additional communications system or systems . . . . 108 Cong. Rec. 7523 (May 2, 1962)1/

1/ The complete statement of Congressman Harris came on an amendment to section 102(d) which he described as follows:

> Mr. HARRIS. Mr. Chairman, this is an amendment suggested by our distinguished Speaker of the House with whom I conferred on this legislation concerning two or three matters that we thought would strengthen it. I have not had an opportunity to discuss it with the committee, but paragraph (d) in the committee bill is a provision that was included at the outset and had to do with reserving the right to the Government to provide an additional system should it be determined in the public interest. But as the Clerk read a moment ago, it is approached in a negative way. In other words, as originally proposed, I assume at the council level in the administration, or somewhere along the line, I am not sure just where, this was a provision in various proposals and the committee did not disturb it. But it was agreed that it was not the intent of the Congress by this act to preclude the creation of an additional communication satellite system or systems, and so forth. I thought the suggestion made by our distinguished Speaker was very good, that we should take a positive rather than a negative approach.
>
> The amendment, therefore, is that that Congress reserve to itself the right to provide an additional communications satellite system if required to meet unique governmental needs or if otherwise required in the national interest.

More significantly, perhaps, are the remarks of Senator Church concerning his successful amendment of section 201(a)(6). As originally introduced this provision allowed government use of another satellite system only if a unique governmental interest so required. Section 102(d) on the other hand stated in addition to this reason, the Congressional intent to allow additional systems if the national interest so required. Senator Church's amendment was clearly intended to make the sections uniform. In explaining the need for his amendment, Senator Church made the following significant statement concerning the purposes and policies of these sections:

> Mr. CHURCH. Mr. President, the purpose of this amendment is to make the operative language of the bill itself conform with one of its most important declared purposes. Under the declaration of policy and purpose of the bill, section 102(d) reads:
>
> > (d) It is not the intent of Congress by this Act to preclude the use of the communications satellite system for domestic communication services where consistent with the provisions of this Act nor to preclude the creation of additional communications satellite systems, if required to meet uniquee governmental needs or if otherwise required in the national interest.

The wisdom of the last clause "or if otherwise required in the national interest" is perfectly apparent. We cannot now foretell howwell the corporate instrumentality established by this act will serve the needs of our people. If it should develop that the rates charged are too high, or the service too limited, so that the system is failing to extend to the American people the maximum benefits of the new technology, or if the Government's use of the system for Voice of America broadcasts to certain other parts of the world proves to be excessively expensive for our taxpayers, then certainly this enabling

> legislation should not preclude the establishment of alternative systems, whether under private or public management. And just as certainly is that gateway meant to be kept open, just in case we should ever have to use it, by the language to be found in the bill's declaration of policy and purpose to which I have referred. 108 Cong. Rec. at 16362 (August 13, 1962)

So far as we have been able to determine there were no dissents to this analysis.

One argument that Comsat may be able to assert in its favor is a section 102(d) implication that only systems which are required to meet "unique governmental needs" or required in the "national interest" can be owned and operated by other organizations. Since we understand from your memorandum that the air traffic control system can be justified factually as in the national interest, this section should not be a bar to the new system in any event.

Even if the new system were not required in the national interest, however, several arguments can be made to the effect that section 102(d) was not intended to be exhaustive but merely illustrative of reasons why a new, non-Comsat system is possible. For example, if the two savings provisions were intended to be exhaustive, Congress would be likely to use the word "solely" to clarify the scope of exceptions. In addition the legislative history which we have already cited, particularly Senator Church's statement, indicates that other independent systems are possible for the broadest of reasons.

A third argument in this regard is a rule of statutory construction holding that statutes be construed as furthering public policy rather than derogating from it. 2 J. Sutherland, Statutes and Statutory Construction § 5901 (1943). In this connection, section 102(c) states that activities of Comsat "shall be consistent with the Federal antitrust laws." 47 U.S.C. § 701(c)(1970). The legislative history also indicates

that antitrust policies were not overridden by this Act. Since the Congress has repeatedly, in this statute and elsewhere, indicated a public policy against monopoly situations, we believe that Comsat has a heavy burden to prove that section 102(d) implies an intent to preclude the establishment of an independent air traffic control system.

II
INTELSAT AGREEMENTS

As we understand it, Comsat has been designated as the United States operating entity for the International Telecommunication Satellite Consortium, INTELSAT. Since 1964, this organization has been governed by the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, 15 U.S.T. 1705, T.I.A.S. No. 5646 (August 20, 1964).

In examining this and subsequent executive agreements, we have not discovered any express provision that would grant Comsat an exclusive monopoly over the proposed air traffic control system. Although we do not have the advantage of the extensive legislative history that was available regarding the 1962 Act, other extrinsic evidence reinforces the conclusion that Comsat was not intended to have a monopoly by the terms of the Interim Agreement.

The Interim Agreement was signed at the initiative of the United States, two years after the 1962 Act. It is clear that INTELSAT is the outgrowth of the Act's directive to the President to "insure that timely arrangements are made under which there can be foreign participation in the establishment and use of a communications satellite system." 47 U.S.C. § 721(a)(5)(1970). The INTELSAT provisions mesh completely with those of the earlier Act. For example, the preamble states the desire to establish "a single global commercial communications satellite system." 15 U.S.T. at 1706. The use of the singular is, significantly, the same as in the 1962 Act.

In such circumstances, a rule of statutory construction requires statutes in pari materia be construed together.2/ This permits the reasonable assumption that the intentions of both the Act and the Agreements are the same. Since we have concluded that the Act does not preclude additional systems, the Agreement should not preclude them either.

Another rule of statutory construction requires that the practical interpretation of persons working pursuant to the terms of a particular provision be given consideration. In this connection it is significant that to date INTELSAT has never provided navigation or public communication services to ships or aircraft.

As noted, the Interim Agreement went into effect in 1964. A permanent agreement to supersede that Agreement was approved by INTELSAT members on May 21, 1971, and has been signed by the United States. It will probably have the requisite number of signatures by early 1972. This permanent agreement, together with statements by the United States interpreting INTELSAT as not encompassing the air traffic control system can serve to indicate the intended construction of the executive agreements.

Article III(a) of the new Agreement states that the prime objective of the organization is in "international public telecommunications services." Other provisions of this Article permit INTELSAT to include domestic-public telecommunications and specialized communications only if they do not impair the ability of INTELSAT to achieve its prime objective. Thus, the Agreement clearly indicates that no monopoly on telecommunications systems was intended, at least in these other areas.

Even if we assume that INTELSAT does have a monopoly for "international public telecommunications services," an assumption not warranted by express provisions of the Agree-

2/ See 2 J. Sutherland, Statutes and Statutory Construction § § 5201-11 (1843).

ment, there arises a factual question of whether the air traffic control system constitutes such a service. Article 1(k) indicates that the proposed system is not such a service:

> "Public telecommunications services" means fixed or mobile telecommunications services which can be provided by satellite and which are available for use by the public, such as telephony, tdegraphy, telex, facsimile, data transmission, transmission of radio and television programs between approved earth stations having access to the INTELSAT space segment for further transmission to the public, and leased circuits for any of these purposes; but excluding those mobile services of a type not provided under the Interim Agreement and the Special Agreement prior to the opening for signature of this Agreement, which are provided through mobile stations operating directly to a satellite which is designed, in whole or in part, to aviation or maritime radio navigation." (Emphasis added).

The clear impact of this provision is two-fold: (1) the New Agreement expressly excludes an air traffic control system and (2) the Interim Agreement, as interpreted in this provision did not cover the proposed system.

In conclusion, our research indicates that substantial arguments can be made for the proposition that neither the 1962 Act nor the INTELSAT Agreements were intended to grant Comsat a completely monopoly over all future telecommunications satellite systems. We would caution that this dispute will likely arise at a later time when the Federal Communications Commission will be required to make a separate legal inquiry in connection with any licensing proceedings for the new system. By that time Comsat and any other interested organization presumably will have developed complete legal arguments in support of a contrary conclusion.

Sincerely,

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

Justice

May 28, 1971

Honorable Robert Mardian
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Mardian:

On April 13, 1971, I requested your views concerning construction and operation of a radio facility by the Government of Algeria within the Embassy of the Republic of Guinea. That request was made pursuant to Executive Order 11556, 35 Fed. Reg. 14193 (1970), which requires me to consult with the Attorney General before authorizing foreign diplomatic radio facilities.

I am aware that in most cases such consultation is made for the purpose of clarifying the internal security considerations involved. In the present instance, however, there is also involved a problem concerning the scope of the authority granted to the President under the above-mentioned statute, and delegated to me--specifically, whether that authority permits approval of a station for a Government which has no diplomatic relations with this country but maintains a diplomatic staff within the embassy of another Government.

My preliminary view is that such authority does not exist. I am uncertain whether your reply to my initial inquiry was intended to speak to this issue as well as to the internal security considerations. I would appreciate your clarifying that point.

Sincerely,

Clay T. Whitehead

SCALIA/ROBINSON/ec
5-28-71
cc: Mr. Whitehead (2)
Scalia Subj File
Scalia Chron File

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN REPLY REFER TO:

6300

MAY 25 1971

Honorable Clay T. Whitehead
Director
Office of Telecommunications Policy
Executive Office of the President
Washington, D. C. 20504

Dear Mr. Whitehead:

This is in response to your request for the Commission's views on the proposal of the Department of State to negotiate an agreement with the Government of Algeria concerning reciprocal rights for embassy radio stations.

The Commission is not in a position to evaluate the factors, as set forth by the Department of State, in your letter of April 13, 1971, in support of the Department's proposal. However, if it is determined by your Office that the proposed agreement would be in the national interest of the United States, the Commission would have no objection to concluding such an agreement.

This letter was adopted by the Commission on May 19, 1971, Commissioners Bartley and Robert E. Lee absent.

BY DIRECTION OF THE COMMISSION

Dean Burch

Dean Burch
Chairman

ASSISTANT ATTORNEY GENERAL
INTERNAL SECURITY DIVISION

Department of Justice
Washington, D.C. 20530

May 14, 1971.

Mr. Clay T. Whitehead
Director
Office of Telecommunications Policy
Executive Office of the President
Washington, D. C. 20504

Dear Mr. Whitehead:

This is in reply to your letter of April 13, 1971 requesting the views of the Department of Justice concerning a request that the Government of Algeria be permitted to install and operate a radio facility at its Embassy in Washington, D. C., pursuant to the authority of Section 305 of the Communications Act of 1934, as amended.

This is to advise you that we would have no objection to the granting of authorization for such a radio station to the Government of Algeria at its Embassy in Washington, D. C. on a reciprocal basis.

Sincerely,

ROBERT C. MARDIAN
Assistant Attorney General

CONFIDENTIAL

GROUP 1
Excluded from automatic
downgrading and
declassification

Department of State TELEGRAM

3 MAY 1971

CONFIDENTIAL 469

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APPROVED BY: AF/N - MR ODELL
OC/P - MR JACARUSO (DRAFT)

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FM SECSTATE WASHDC
TO USINT ALGIERS

C O N F I D E N T I A L STATE 074624

SUBJECT: ALGERIAN RADIO TRANSMITTER

REF: ALGIERS 710

1. PLEASE INFORM FONMINISTRY THAT DEPT IS ACTIVELY PURSUING THIS MATTER WITHIN USG. FYI. OFFICE OF TELECOMMUNICATIONS POLICY (OTP) IN WHITE HOUSE, WHICH MUST APPROVE RECIPROCAL RIGHTS AGREEMENTS, HAS NOT YET DECIDED WHETHER IN ABSENCE FULL DIPLOMATIC RELATIONS SUCH AGREEMENT WITH ALGERIA IS LEGAL. ASSUME YOU HAVE RECEIVED POUCHED COPIES OF (A) DEPT APRIL 5 LETTER TO OTP AND (B) OC/P APRIL 7 MEMO TO AF/N. END FYI.

2. IF OTP ULTIMATELY APPROVES RECIPROCAL RIGHTS AGREEMENT WITH ALGERIA, THERE WILL STILL REMAIN FORMIDABLE TECHNICAL DIFFICULTIES BEFORE ALGERIANS COULD ACTIVATE A STATION IN WASHINGTON. DEPT PROPOSES TO INVITE ALGERIAN INTERESTS SECTION REP IN NEXT FEW DAYS FOR FULL TECHNICAL BRIEFING. IN THIS CONNECTION WE UNDERSTAND THAT ALGERIANS NOW COMMUNICATE THROUGH COMMERCIAL CHANNELS AT FULL RATE FOR EACH WORD. WE BELIEVE WE MAY BE ABLE SUGGEST ALTERNATIVES (TELEX SERVICE) THAT WOULD BE LESS COSTLY. GP-3. IRWIN

CONFIDENTIAL

Department of State

TELEGRAM

4/28/71

LIMITED OFFICIAL USE 710

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TO SECSTATE WASHDC 6003

LIMITED OFFICIAL USE ALGIERS 710

USINT HAS RECEIVED DIPLOMATIC NOTE FROM FONMINISTRY DATED APRIL 14 ASKING US TO UNDERTAKE THE NECESSARY DEMARCHE WITHIN U.S. GOVT IN ORDER TO FACILITATE INSTALLATION OF A RADIO TRANSMITTER AT ALGERIAN INTERESTS SECTION OF EMBASSY OF GUINEA IN WASHINGTON. PLEASE ADVISE RE APPROPRIATE REPLY.
EAGLETON

RECEIVED
APR 28 1971

LIMITED OFFICIAL USE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

Date: April 14, 1971

Subject: Embassy Radio Stations

To: C. T. Whitehead

In connection with your recent letters to FCC and Justice requesting comments on reciprocal arrangements with the Algerian Government, you asked why the letter to Justice should not be addressed to the Attorney General rather than the Assistant Attorney General, Internal Security Division.

This procedure has been followed since 1962 and is based on the coordination channel established at that time at the request of Justice.

If you desire to have Justice letters addressed to the Attorney General in the future, please advise.

W. Dean, Jr.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

Date: April 13, 1971

Subject: Algerian Radio Station in Washington

To: Clay T. Whitehead

Section 5 of E.O. 11556 delegates to you Presidential authority under the Communications Act of 1934 "to authorize a foreign government to construct and operate a radio station at the seat of government." Such authorization "shall be made only upon recommendation of the Secretary of State and after consultation with the Attorney General and the Chairman of the FCC."

State has so recommended in the case of Algeria, and the attached outgoing correspondence is to effect consultation with the Attorney General and the Chairman of the FCC.

This is the first such case since your tenure began. It differs from previous cases in that State was authorized by the DTM in 1965 to grant reciprocal radio rights to Algeria. A government-to-government agreement was concluded in 1966, but diplomatic relations were severed in 1967 before Algeria could install the station.

Because of the severance of relations, and based on a new request from Algeria through the Embassy of Guinea, State is again requesting that authorization be granted for Algeria to install and operate a station in Washington to communicate with Algiers.

Your signature on the letters to Justice and FCC is recommended.

W. Dean, Jr.

Attachments

23 APR 1971

Honorable Dean Burch
Chairman
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Chairman:

The Algerian Government, through the Embassy of the Republic of Guinea, recently requested the Department of State to permit installation of a radio facility to provide service between Algiers and Washington.

Pursuant to the Director of Telecommunications Management's authorization of January 22, 1965, the United States and the Government of Algeria reached an agreement in principle in 1966 for the reciprocal operation of radio facilities. It was stipulated that in implementing this agreement the technical details for the Algerian radio facility must be agreed to prior to commencement of radio operations in Washington. Before any initiative was taken by the Government of Algeria in this regard, diplomatic relations between our respective governments were severed, and, until receipt of the current request, neither government made further effort to resume negotiations.

The Department of State has retained in place a back-up radio facility at its mission in Algiers and continues to have a major interest in establishing an authorization to operate this facility when an emergency need exists and commercial communications means are not available. The Department considers it to be in the continuing national interest to proceed with negotiation of the technical details relating to implementation of the previously concluded agreement in principle.

In light of the foregoing, and pursuant to the provisions of Section 305 of the Communications Act of 1934, as amended, the Department of State has requested that authorization again be granted for the Algerian Government to install and operate a radio transmitter in Washington, subject to negotiation of the necessary arrangements to permit implementation of reciprocal radio operations by the United States in Algiers.

Your views on this proposal are requested.

Sincerely,

Clay T. Whitehead

LGHailey/mef 4/12/71
cc: FM/OTP-3

April 13, 1971

Mr. Robert C. Mardian
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Mardian:

The Algerian Government, through the Embassy of the Republic of Guinea, recently requested the Department of State to permit installation of a radio facility to provide service between Algiers and Washington.

Pursuant to the Director of Telecommunications Management's authorization of January 22, 1965, the United States and the Government of Algeria reached an agreement in principle in 1966 for the reciprocal operation of radio facilities. It was stipulated that in implementing this agreement the technical details for the Algerian radio facility must be agreed to prior to commencement of radio operations in Washington. Before any initiative was taken by the Government of Algeria in this regard, diplomatic relations between our respective governments were severed, and, until receipt of the current request, neither government made further effort to resume negotiations.

The Department of State has retained in place a back-up radio facility at its mission in Algiers and continues to have a major interest in establishing an authorization to operate this facility when an emergency need exists and commercial communications means are not available. The Department considers it to be in the continuing national interest to proceed with negotiation of the technical details relating to implementation of the previously concluded agreement in principle.

In light of the foregoing, and pursuant to the provisions of Section 305 of the Communications Act of 1934, as amended, the Department of State has requested that authorization again be granted for the Algerian Government to install and operate a radio transmitter in Washington, subject to negotiation of the necessary arrangements to permit implementation of reciprocal radio operations by the United States in Algiers.

Your views on this proposal are requested.

Sincerely,

Clay T. Whitehead

LGHalley/mef 4/12/71
cc: Mr. Joseph M. Wyszolmerski
FM/OTP-3

Communications Act of 1934

(d) The provisions of sections 301 and 303 of this Act notwithstanding, the President may, provided he determines it to be consistent with and in the interest of national security, authorize a foreign government, under such terms and conditions as he may prescribe, to construct and operate at the seat of government of the United States a low-power radio station in the fixed service at or near the site of the embassy or legation of such foreign government for transmission of its messages to points outside the United States, but only (1) where he determines that the authorization would be consistent with the national interest of the United States and (2) where such foreign government has provided reciprocal privileges to the United States to construct and operate radio stations within territories subject to its jurisdiction. Foreign government stations authorized pursuant to the provisions of this subsection shall conform to such rules and regulations as the President may prescribe. The authorization of such stations, and the renewal, modification, suspension, revocation, or other termination of such authority shall be in accordance with such procedures as may be established by the President and shall not be subject to the other provisions of this Act or of the Administrative Procedure Act."

E. O. 11556

SEC. 5. *Foreign government radio stations.* The authority to authorize a foreign government to construct and operate a radio station at the seat of government vested in the President by subsection 305(d) of the Communications Act of 1934, as amended (47 U.S.C. 305(d)), is hereby delegated to the Director. Authorization for the construction and operation of a radio station pursuant to this subsection and the assignment of a frequency for its use shall be made only upon recommendation of the Secretary of State and after consultation with the Attorney General and the Chairman of the Federal Communications Commission.

UNDER SECRETARY OF STATE
FOR POLITICAL AFFAIRS
WASHINGTON

April 5, 1971

Dear Dr. Whitehead:

In a diplomatic note of February 3, 1971, the Embassy of the Republic of Guinea, Algerian Interests Section, informed the Department that the Algerian Government requests permission for the installation of a radio facility to provide service between Algiers and Washington.

Pursuant to the Director of Telecommunications Management's authorization of January 22, 1965, the United States and the Government of Algeria reached an agreement in principle on May 3, 1966, for the reciprocal operation of radio facilities. However, it was stipulated that in implementing this agreement the technical details for the Algerian radio facility must be agreed to prior to commencement of radio operations in Washington. Before any initiative was taken by the Government of Algeria concerning the technical details of its proposed radio facility, diplomatic relations between our respective governments were severed on June 6, 1967, and until receipt of the note of February 3, neither government had made any further effort to resume negotiations.

Since the Department has retained in place the back-up radio facility which it had installed at its mission in Algiers prior to the severance of diplomatic relations, it continues to have a major interest in establishing a standing authorization to operate this

Dr. Clay T. Whitehead,
Director of Telecommunications Policy,
Executive Office of the President.

facility when an emergency need exists and commercial communications means are not available. Accordingly, the Department considers it in the continuing national interest of the United States to proceed with the negotiation of the technical details relating to the implementation of the previously concluded agreement in principle.

Although, as noted above, approval was initially given in this case by the Director of Telecommunications Management in 1965, relations between the United States and Algeria have since been altered by the severance of diplomatic relations in 1967. Therefore, pursuant to the provisions of Section 305 of the Communications Act of 1934, as amended, the Department again requests that authorization be granted for the Algerian Government to install and operate a radio transmitter in Washington, subject to the negotiation of necessary arrangements to permit the implementation of reciprocal radio operations by the United States in Algiers.

Sincerely,

U. Alexis Johnson

JUN 5 1972

Justice

MEMORANDUM FOR

Mr. Peter A. Michel

The issue paper which you forwarded concerning the network antitrust suits is accurate. I think, however, that it could be more persuasive and attach a suggested revision to achieve this.

Clay T. Whitehead

Attachment

cc: DO Records
DO Chron
Mr. Whitehead - 2
Eva
GC Subj
GC Chron

AScalia:hmy - 5-30-72

Issue:

Antitrust suits against NBC-TV, ABC-TV and CBS-TV.

Answer:

The Justice Department's civil antitrust cases against the three networks and a former CBS subsidiary are the results of a long standing concern about the monopoly power of the networks over entertainment programming. The suits charge monopolization and restraint of trade in prime time entertainment broadcasting. They contend that it is anticompetitive for the networks to produce or to have any financial interest in the programs which they show, and specifically allege that the networks used their power over programming to compel independent program suppliers to convey financial interests in programs. The complaints cite FCC figures showing substantial increases between 1957 and 1967 in the number of prime time shows which were either produced by the networks or in which the networks held a financial interest.

The object of these suits is to assure viewers a diversity of entertainment programming, from a wide variety of independent program producers. If the suits are successful, the networks would continue to be solely responsible for choosing the programs which they broadcast, but this choice would no longer be artificially limited by their own ownership of rights in certain productions.

Two points about the suits bear emphasis: First, there is no effort to affect television news. The complaints relate solely to network entertainment programs, and expressly exclude "news, public affairs, documentary or sports programs." The Justice Department has specifically stated that no antitrust action relating to television news programs is under consideration nor has any ever been considered; that the current suits are in no way designed to provide any basis for a later attack on network news content; and that the antitrust laws would not permit such action.

Second, the suits are completely unrelated to the ITT hearings. They have been under consideration and preparation for many years, and are intended to correct a problem that has been a substantial concern of the Department for at least the past 15 years.

Opponents' Arguments:

That the suits were filed in an effort to intimidate the news media or to back the Department's claims of vigorous antitrust enforcement in the wake of the ITT hearings.

UNITED STATES et al. v. MIDWEST VIDEO CORP.

United States Supreme Court, June 7, 1972

No. 71-506

[¶10:1, ¶10:2, ¶10:303, ¶307, ¶85:201]
Authority of Commission to require cablecasting.

Commission rule requiring certain CATV systems to originate programming is valid as reasonably ancillary to the performance of its various responsibilities for the regulation of television broadcasting. These responsibilities are considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business. They extend also to requiring CATV affirmatively to further statutory objectives. The Commission has reasonably determined that its origination rule will further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of service. The cablecasting requirement is supported by substantial evidence that it will promote the public interest. United States v. Midwest Video Corp., 24 RR 2d 2072 [US Sup Ct, 1972].

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit [21 RR 2d 2128].

Mr. Justice Brennan announced the judgment of the Court and an opinion in which Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun joined.

Community antenna television (CATV) was developed long after the enactment of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 USC §151, as an auxiliary to broadcasting through the transmission of radio signals by wire to viewers otherwise unable to receive them because of distance or local terrain. 1/ In United States v. Southwestern Cable Co., 392 US 157 [13 RR

1/ "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." United States v. Southwestern Cable Co., 392 US 157, 161 (1968). They "perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." Id., at 163.

2d 2045] (1968), where we sustained the jurisdiction of the Federal Communications Commission to regulate the new industry at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," id., at 178, we observed that the growth of CATV since the establishment of the first commercial system in 1950 has been nothing less than "explosive." Id., at 163. 2/ The potential of the new industry to augment communication services now available is equally phenomenal. 3/ As we said in Southwestern, id., at 164, CATV "[promises] for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country." Moreover, as the Commission has noted, "the expanding multichannel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community," such as facsimile reproduction of documents, electronic mail delivery, and information retrieval. Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417, 419-420 (1968). Perhaps most important, CATV systems can themselves originate programs, or "cablecast" - which means, the Commission has found, that CATV can "[increase] the number of local outlets for community self-expression and [augment] the public's choice of programs and types of services, without use of broadcast spectrum. . . ." Id., at 421.

Recognizing this potential, the Commission, shortly after our decision in Southwestern, initiated a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology. . . ." Id., at 417. In particular, the Commission tentatively concluded, as part of a more expansive program for the regulation of CATV, 4/ "that, for now

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2/ There are now 2,678 CATV systems in operation, 1,916 CATV franchises outstanding for systems not yet in current operation, and 2,804 franchises applications pending. Weekly CATV Activity Addenda, 12 Television Digest, at 9 (Feb. 28, 1972).

3/ For this reason the Commission has recently adopted the term "cable television" in place of CATV. See Report and Order on Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3253 n. 9 [24 RR 2d 1501] (1972) (hereinafter cited as Report and Order on Cable Television Service).

4/ The early regulatory history of CATV, canvassed in Southwestern, need not be repeated here, other than to note that in 1966 the Commission adopted rules, applicable to both microwave and non-microwave CATV systems, to regulate the carriage of local signals, the duplication of local programming, and the importation of distant signals into the 100 largest television markets. See p. 10, infra. The Commission's 1968 notice of proposed rulemaking addressed, in addition to the program origination requirement at issue here, whether advertising should be permitted on cablecasts and whether the broadcast doctrines of "equal

[Footnote continued on following page]

and in general, CATV program origination is in the public interest," id., at 421, and sought comments on a proposal "to condition the carriage of television broadcast signals (local or distant) upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating." Id., at 422. As for its authority to impose such a requirement, the Commission stated that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." Ibid.

On the basis of comments received, the Commission on October 24, 1969, adopted a rule providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent 5/ as a local outlet by cablecasting 6/ and has available facilities for local production and presentation of

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4/ [Footnote continued from preceding page]

time," "fairness," and sponsorship identification should apply to them. Other areas of inquiry included the use of CATV facilities to provide common carrier service; federal licensing and local regulation of CATV; cross-ownership of television stations and CATV systems; reporting and technical standards; and importation of distant signals into major markets. The notice offered concrete proposals in some of these areas, which were acted on in the Commission's First Report and Order, 20 FCC 2d 201 [17 RR 2d 1570] (1969) (hereinafter cited as First Report and Order), and Report and Order on Cable Television Service. See also Memorandum Opinion and Order, 23 FCC 2d 825 [19 RR 2d 1766] (1970) (hereinafter cited as Memorandum Opinion and Order). None of these regulations, aside from the cablecasting requirement, is now before us, see n. 14, infra, and we, of course, intimate no view on their validity.

5/ "By significant extent [the Commission indicated] we mean something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements). Since one of the purposes of the origination requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, 'operation to a significant extent as a local outlet' in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programming (e.g., a camera and a video tape recorder, etc.)." First Report and Order 214.

6/ "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 CFR §74.1101(j). As this definition makes clear, cablecasting may include not only programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programming." First Report and Order 214. See also id., at 203. The definition has been altered to conform

[Footnote continued on following page]

programs other than automated services." 47 CFR §74.1111(a). 7/ In a report accompanying this regulation, the Commission stated that the tentative conclusions of its earlier notice of proposed rulemaking:

> "recognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . . They also reflect our view that a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services, 8/ might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: 'regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient,

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6/ [Footnote continued from preceding page]

to changes in the regulation, see n. 7, infra, and now appears at 47 CFR §76.5(w). See Report and Order on Cable Television Service 3279. Although the definition now refers to programming "subject to the exclusive control of the cable operator," this is apparently not meant to effect a change in substance or to preclude the operator from cablecasting programs produced by others. See id., at 3271.

7/ This requirement, applicable to both microwave and non-microwave CATV systems without any "grandfathering" provision, was originally scheduled to go into effect on January 1, 1971. See First Report and Order 223. On petitions for reconsideration, however, the effective date was delayed until April 1, 1971, see Memorandum Opinion and Order 827, 830, and then, after the Court of Appeals decision below, suspended pending final judgment here. See 36 Fed. Reg. 10876 (1971). Meanwhile, the regulation has been revised and now appears at 47 CFR §76.201(a). The revision has no significance for this case. See Memorandum Opinion and Order 827, 830 (revision effective Aug. 14, 1970); Report and Order on Cable Television Service 3271, 3277, 3287 (revision effective March 31, 1972).

8/ Although the Commission did not impose common carrier obligations on CATV systems in its 1969 report, it did note that "the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels." First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common carrier service. See Report and Order on Cable Television Service 3277.

nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges. . .' (Sec. 1 of the Communications Act). 9/ After full consideration of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest." 10/ First Report and Order, 20 FCC 2d 201, 202 [17 RR 2d 1570] (1969).

The Commission further stated, id., at 208-209:

"The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest' (§303(g)). 11/ The requirement

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9/ Section 1 of the Act, 48 Stat. 1064, as amended, 47 USC §151, states:

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

10/ In so concluding, the Commission rejected the contention that a prohibition on CATV originations was "necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service." First Report and Order 202. "[B]roadcasters and CATV originators. . .," the Commission reasoned, "stand on the same footing in acquiring the program material with which they compete." Id., at 203. Moreover, "a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service," ibid. – an impact that the Commission found had no support in the record and that, in any event, it would undertake to prevent should the need arise. See id., at 203-204. See also Memorandum Opinion and Order 826 n. 3, 828-829.

11/ Section 303(g), 48 Stat. 1082, 47 USC §303(g), states that "[e]xcept as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall" "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest. . . ."

will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities (§307(b)), 12/ in areas where we have been unable to accomplish this through broadcast media." 13/

Upon the challenge of respondent Midwest Video Corporation, an operator of CATV systems subject to the new cablecasting requirement, the United States Court of Appeals for the Eighth Circuit set aside the regulation on the ground that the Commission "is without authority to impose" it. 441 F2d 1322, 1328 [21 RR 2d 2128] (1971). 14/ "The Commission's power [over CATV]. . .,"

12/ Section 307(b), 48 Stat. 1084, as amended, 47 USC §307(b), states:

"In considering applications for licenses [for the transmission of energy, communications, or signals by radio], and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

13/ The Commission added: "[I]n authorizing the receipt, fowarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities." First Report and Order 209 (citing, inter alia, §301 of the Communications Act, 48 Stat. 1081, 47 USC §301 (generally requiring licenses for the use or operation of any apparatus for the interstate or foreign transmission of energy, communications, or signals by radio)). Since, as we hold, infra, the authority of the Commission recognized in Southwestern is sufficient to sustain the cablecasting requirement at issue here, we need not, and do not, pass upon the extent of the Commission's jurisdiction over CATV under §301. See, e.g., FCC v. Pottsville Broadcasting Co., 309 US 134, 138 (1940); General Telephone Co. of Cal. v. FCC, 413 F2d 390, 404-405 [16 RR 2d 2001] (CADC 1969); Philadelphia Television Broadcasting Co. v. FCC, 359 F2d 282, 284 [7 RR 2d 2019] (CADC 1966): "In a statutory scheme in which Congress has given a agency various bases of jurisdiction and various tools with which to project the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."

14/ Although this holding was specifically limited to "existing cable television operators," the court's reasoning extended more broadly to all CATV systems, and, indeed, its judgment set aside the regulation in all its applications. See 441 F2d at 1328.

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the court explained, "must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field," id., at 1326 – a standard that the court thought the Commission's regulation "goes far beyond." Id., at 1327. 15/ The court's opinion may also be understood to hold the regulation invalid as not supported by substantial evidence that it would serve the public interest. "The Commission report itself shows," the court said, "that upon the basis of the record made, it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest." Id., at 1328. "Entering into the program origination field involves very substantial expenditures," id., at 1327, and "[a] high probability exists that cablecasting will not be self-supporting," that there will be a "substantial increase" in CATV subscription fees, and that "in some instances" CATV operators will be driven out of business. Ibid. 16/ We granted certiorari. 404 US 1014 (1972). We reverse.

14/ [Footnote continued from preceding page]

Respondent also challenged other regulations, promulgated in the Commission's First Report and Order and Memorandum Opinion and Order, dealing with advertising, "equal time," "fairness," sponsorship identification, and per-program or per-channel charges on cablecasts. The Court of Appeals, however, did not "[pass] on the power of the FCC . . .to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs," id., at 1326, since respondent acknowledged that it did not want to cablecast and hence lacked standing to attack those rules. See id., at 1328.

15/ The court held, in addition, that the Commission may not require CATV operators "as a condition of [their] right to use . . .captured [broadcast] signals in their existing franchise operation to engage in the entirely new and different business of originating programs." Id., at 1327. This holding presents no separate question from the "reasonably ancillary" issue that need be considered here. See n. 22, infra.

16/ Concurring in the result in a similar vein, Judge Gibson concluded that although "the FCC has authority over CATV systems," "the order under review is confiscatory and hence arbitrary," 441 F2d at 1328, for the regulation "would be extremely burdensome and perhaps remove from the CATV field many entrepreneurs who do not have the resources, talent and ability to enter the broadcasting field." Id., at 1329. If this is to suggest that the regulation is invalid merely because it burdens CATV operators or may even force some of them out of business, the argument is plainly incorrect. See n. 31, infra. The question would still remain whether the Commission reasonably found on substantial evidence that the regulation on balance would promote policy objectives committed to its jurisdiction under the Communications Act, which, for the reasons given infra, we hold that it did.

I

In 1966 the Commission promulgated regulations that, in general, required CATV systems (1) to carry, upon request and in a specified order of priority within the limits of their channel capacity, the signals of broadcast stations into whose service area they brought competing signals; (2) to avoid, upon request, the duplication on the same day of local station programming; and (3) to refrain from bringing new distant signals into the 100 largest television markets except upon a prior showing that that service would be consistent with the public interest. See Second Report and Order, 2 FCC 2d 725 [6 RR 2d 1717] (1966). In assessing the Commission's jurisdiction over CATV against the backdrop of these regulations, 17/ we focused in Southwestern chiefly on §2(a) of the Communications Act, 48 Stat. 1064, as amended, 47 USC §152(a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio. . . , which originates and/or is received within the United States, and to all persons engaged within the United States in such communication. . . ." In view of the Act's definitions of "communication by wire" and "communication by radio," 18/ the interstate character of CATV services, 19/ and the evidence of congressional intent that "[t]he Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,'" 392 US at 167-168 (footnotes omitted), we held that §2(a)

17/ Southwestern reviewed, but did not specifically pass upon the validity of, the regulations. See 392 US at 167. Their validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, e.g., Black Hills Video Corp. v. FCC, 399 F2d 65 [13 RR 2d 2123] (CA8 1968).

18/ Sections 3(a), (b), 48 Stat. 1065, 47 USC §§153(a), (b), define these terms to mean "the transmission" "of writing, signs, signals, pictures, and sounds of all kinds," whether by cable or radio, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

19/ "Nor can we doubt that CATV systems are engaged in interstate communication, even where . . . the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; [CATV operators] thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize [CATV] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.' Federal Radio Comm'n v. Nelson Bros. Co., 289 US 266, 279." 392 US at 168-169.

amply covers CATV systems and operations. We also held that §2(a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply:

> "We cannot [we said] construe the Act so restrictively. Nothing in the language of §[2(a)], in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' FCC v. Pottsville Broadcasting Co., [309 US], at 138, that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' Thus, '[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.' [Ibid.] Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate,' with 'not niggardly but expansive powers.' National Broadcasting Co. v. United States, 319 US 190, 219. We have found no reason to believe that §[2] does not, as its terms suggest, confer regulatory authority over 'all interstate . . .communication by wire or radio.'" Id., at 172-173 (footnotes omitted).

This conclusion, however, did not end the analysis, for §2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised. We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." Id., at 173. In particular, we found that the Commission had reasonably determined that "'the unregulated explosive growth of CATV,'" especially through "its importation of distant signals into the service areas of local stations" and the resulting division of audiences and revenues, threatened to "deprive the public of the various benefits of [the] system of local broadcasting stations" that the Commission was charged with developing and overseeing under §307(b) of the Act. 20/ Id., at 175.

20/ See n. 12, supra. See also §§303(f), (h), 48 Stat. 1082, 47 USC §§303(f), (h) (authorizing the Commission to prevent interference among stations and to establish areas to be served by them respectively). "In particular, the Commission feared that CATV might . . .significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." 302 US, at 175-176.

We therefore concluded, without expressing any view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes," that the Commission does have jurisdiction over CATV "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting . . .[and] may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'" Id., at 178 (quoting §303(r) of the Act, 50 Stat. 191, 47 USC §303(r)).

The parties now before us do not dispute that in light of Southwestern CATV transmissions are subject to the Commission's jurisdiction as "interstate . . .communication by radio or wire" within the meaning of §2(a) even insofar as they are local cablecasts. 21/ The controversy instead centers on

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21/ This, however, is contested by the State of Illinois as amicus curiae. It is, nevertheless, clear that cablecasts constitute communication by wire (or radio if microwave transmission is involved), as well as interstate communication if the transmission itself has moved interstate, as the Commission has authorized and encouraged. See First Report and Order 207-208 (regional and national interconnections) and n. 6, supra. The capacity for interstate nonbroadcast programming may in itself be sufficient to bring cablecasts within the compass of §2(a). In Southwestern we declined to carve CATV broadcast transmissions, for the purpose of determining the extent of the Commission's regulatory authority, into interstate and intrastate components. See n. 19, supra. This result was justified by the extent of interstate broadcast programming, the interdependencies between the two components, and the need to preserve "unified and comprehensive regulatory system for the [broadcasting] industry." 392 US, at 168 (quoting FCC v. Pottsville Broadcasting Co., n. 13, supra, at 137). A similar rationale may apply here, despite the lesser "interstate content" of cablecasts at present.

But we need not now decide that question because, in any event, CATV operators have, by virtue of their carriage of broadcast signals, necessarily subjected themselves to the Commission's comprehensive jurisdiction. As Mr. Chief Justice (then Judge) Burger has stated in a related context:

> "The Petitioners [telephone companies providing CATV channel distribution facilities] have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." General Telephone Co. of Cal. v. FCC, n. 13, supra, at 401.

The devotion of CATV systems to broadcast transmission – together with the interdependencies between that service and cablecasts, and the

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whether the Commission's program origination rule is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." 22/ We hold that it is.

At the outset we must note that the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services. Southwestern refers to the Commission's "various responsibilities for the regulation of television broadcasting." These are considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business. Moreover, we must agree with the Commission that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also

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21/ [Footnote continued from preceding page]

necessity for unified regulation – plainly suffices to bring cablecasts within the Commission's §2(a) jurisdiction. See generally Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame L. 685, 721-723, 726-734 (1972).

22/ Since "[t]he function of CATV systems has little in common with the function of broadcasters." Fortnightly Corp. v. United Artists Television, Inc., 392 US 390, 400 [13 RR 2d 2061] (1968), and since "[t]he fact that . . .property is devoted to a public use on certain terms does not justify . . .the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the [owner] has expressly or implied assumed," Nor. Pac. Ry. v. North Dakota, 236 US 585, 595 (1915), respondent also argues that CATV operators may not be required to cablecast as a condition for their customary service of carrying broadcast signals. This conclusion might follow only if the program origination requirement is not reasonably ancillary to the Commission's jurisdiction over broadcasting. For, as we held in Southwestern, CATV operators are, at least to that extent, engaged in a business subject to the Commission's regulation. Our holding on the "reasonably ancillary" issue is therefore dispositive of respondent's additional claim. See pp. 20-22, infra.

It should be added that Fortnightly Corp. v. United Artists Television, Inc., supra, has no bearing on the "reasonably ancillary" question. That case merely held that CATV operators who retransmit, but do not themselves originate copyrighted works do not "perform" them within the meaning of the Copyright Act, 61 Stat. 652, as amended, 17 USC §1, since "[e]ssentially, [that kind of] a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals. . . ." 390 US, at 399. The analogy thus drawn between CATV operations and broadcast viewing for copyright purposes obviously does not dictate the extent of the Commission's authority to regulate CATV under the Communications Act. Indeed, Southwestern, handed down only a week before Fortnightly, expressly held that CATV systems are not merely receivers, but transmitters of interstate communication subject to the Commission's jurisdiction under that Act. See 392 US, at 168.

to requiring CATV affirmatively to further statutory policies." Pp. 3-4, supra. Since the avoidance of adverse effects is itself the furtherance of statutory policies, no sensible distinction even in theory can be drawn along those lines. More important, CATV systems, no less than broadcast stations, see, e.g., Federal Radio Comm'n v. Nelson Bros. Co., 289 US 266 (1933) (deletion of a station), may enhance as well as impair the appropriate provision of broadcast services. Consequently, to define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artifically constrict the Commission in the achievement of its statutory purposes and be inconsistent with our recognition in Southwestern "that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,'. . .that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.'" Pp. 11-12, supra. 23/

The very regulations that formed the backdrop for our decision in Southwestern demonstrate this point. Those regulations were, of course, avowedly designed to guard broadcast services from being undermined by unregulated CATV growth. At the same time, the Commission recognized that "CATV systems . . .have arisen in response to public need and demand for improved television service and perform valuable public services in this respect." Second Report and Order, 2 FCC 2d 725, 745 [6 RR 2d 1717] (1966). 24/ Accordingly, the Commission's express purpose was not:

23/ See also General Telephone Co. of Cal. v. FCC, n. 13, supra, at 398:

> "Over the years, the Commission has been required to meet new problems concerning CATV and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a continuing process of statutory revision. To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress – one which it sought to escape by delegating administrative functions to the Commission."

24/ The Commission elaborated:

> "CATV. . .has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest 'in the larger and more effective use of radio.' And, even in the major market, where there may be no dearth of service. . ., CATV may. . .increase viewing opportunities, either by bringing in

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"to deprive the public of these important benefits or to restrict the enriched programming selection which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (Secs. 1 and 303(g) of the Act [nn. 9 and 11, supra]), both those who are cable viewers and those dependent on off-the-air service. The new rules . . .are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service." Id., at 745-746. 25/

In implementation of this approach CATV systems were required to carry local broadcast station signals to encourage diversified programming suitable to the community's needs as well as to prevent a diversion of audiences and advertising revenues. 26/ The duplication of local station programming was

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24/ [Footnote continued from preceding page]

programming not otherwise available or, what is more likely, bringing in programming locally available but at times different from those presented by the local stations." Second Report and Order, 2 FCC 2d 725, 781 (1966). See also id., at 745.

25/ This statement, made with reference only to the local carriage and non-duplication requirements, was no less true of the distant importation rule. See id., at 781-782.

26/ The regulation, for example, retained the provision of the Commission's earlier rule governing CATV microwave systems under which a local signal was not required to be carried "if (1) it substantially duplicates the network programming of a signal of a higher grade, and (2) carrying it would – because of limited channel capacity – prevent the system from carrying a nonnetwork signal, which would contribute to the diversity of its service." First Report and Order, 38 FCC 683, 717 [4 RR 2d 1725] (1965). See Second Report and Order, n. 24, supra, at 752-753. Moreover, CATV operators were warned that, in reviewing their discretionary choice of stations to carry among those of equal priority in certain circumstances, the Commission would "give particular consideration to any allegation that the station not carried is one with closer community ties." Second Report and Order, supra, at 755. In addition, operators were required to carry the signals of local satellite stations even if they also carried the signals of the satellites' parents; otherwise, "the satellite [might] lose audience for which it may be originating some local programming and [find] its incentive to originate programs [reduced]." Id., at 755-756. Finally, the Commission indicated that, in considering waivers of the regulation, it would "[accord] substantial weight" to such considerations as whether "the programming of stations located within the State would be of greater interest than those of nearer, but out-of-State stations [otherwise required to be given priority in carriage] – e.g., covering of political elections and other public affairs of statewide concern." Id., at 753.

also forbidden for the latter purpose, but only on the same day as the local broadcast so as "to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day." Id., at 747. Finally, the distant importation rule was adopted to enable the Commission to reach a public interest determination weighing the advantages and disadvantages of the proposed service on the facts of each individual case. See id., at 776, 781-782. In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in Southwestern was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.

In this light the critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . ." p. 2075 supra. We find that it has.

The goals specified are plainly within the Commission's mandate for the regulation of television broadcasting. 27/ In National Broadcasting Co. v. United States, 319 US 190 (1943), for example, we sustained Commission regulations governing relations between broadcast stations and network organizations for the purpose of preserving the station's ability to serve the public interest through their programming. Noting that "[t]he facilities of radio are not large enough to accommodate all who wish to use them," id., at 216, we held that the Communications "Act does not restrict the Commission merely to supervision of [radio] traffic. It puts upon the Commission the burden of determining the composition of that traffic." Id., at 215-216. We then upheld the Commission's judgment that:

> "[w]ith 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 218.

> "A station licensee must retain sufficient freedom of action to supply the program. . .needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest." Id., at 203.

27/ As the Commission stated, "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' Associated Press v. United States, 326 US 1, 20; Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 US 367. . . ." First Report and Order 205.

Equally plainly the broadcasting policies the Commission has specified are served by the program origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming – the same objective underlying regulations sustained in National Broadcasting Co. v. United States, supra, as well as the local carriage rule reviewed in Southwestern and subsequently upheld. See p. 18 and nn. 17 and 26, supra. In essence the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and voice received by the subscriber, while in the other it is with the content of the programming offered. But in both cases the rules serve the polices of §§1 and 303(g) of the Communications Act on which the cablecasting regulation is specifically premised, see p. 5-", supra, 28/ and also, in the Commission's words, "facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities" under §307(b). P. 7, supra. 29/ In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

Respondent, nevertheless, maintains that just as the Commission is powerless to require the provision of television broadcast services where there are no applicants for station licenses no matter how important or desirable those services may be, so, too, it cannot require CATV operators unwillingly to engage in cablecasting. In our view, the analogy respondent thus draws between entry into broadcasting and entry into cablecasting is misconceived. The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting

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28/ Respondent apparently does not dispute this, but contends instead that §§1 and 303(g) merely state objectives without granting power for their implementation. See Brief for Midwest Video Corporation, at 24. The cablecasting requirement, however, is founded on those provisions for the policies they state and not for any regulatory power they might confer. The regulatory power itself may be found, as in Southwestern, see pp. 11, 13, supra, in 47 USC §§152(a), 303(r).

29/ Respondent asserts that "it is difficult to see how a mandatory [origination] requirement . . .can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities." Brief for Midwest Video Corporation, at 24. Respondent ignores that the provision of additional programming outlets by CATV necessarily affects the fairness, efficiency, and equity of the distribution of television services. We have no basis, it may be added, for overturning the Commission's judgment that the effect in this regard will be favorable. See pp. 5-6 and n. 10, supra.

rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

For these reasons we conclude that the program origination rule is within the Commission's authority recognized in Southwestern.

II

The question remains whether the regulation is supported by substantial evidence that it will promote the public interest. We read the opinion of the Court of Appeals as holding that substantial evidence to that effect is lacking because the regulation creates the risk that the added burden of cablecasting will result in increased subscription rates and even the termination of CATV services. That holding is patently incorrect in light of the record.

In first proposing the cablecasting requirement, the Commission noted that "[t]here may. . .be practical limitations [for compliance] stemming from the size of some CATV systems" and accordingly sought comments "as to a reasonable cutoff point [for application of the regulation] in light of the cost of the equipment and personnel minimally necessary for local originations." Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417, 422 (1968). The comments filed in response to this request included detailed data indicating, for example, that a basic monochrome system for cablecasting could be obtained and operated for less than an annual cost of $21,000 and a color system, for less than $56,000. See First Report and Order, 20 FCC 2d 201, 210 [17 RR 2d 1570] (1969). This data, however, provided only a sampling of the experience of the CATV systems already engaged in program origination. Consequently, the Commission:

> "decided not to prescribe a permanent minimum cutoff point for required origination on the basis of the record now before us. The Commission intends to obtain more information from originating systems about their experience, equipment, and the nature of the origination effort. . . . In the meantime, we will prescribe a very liberal standard for required origination, with a view toward lowering this floor in . . . further proceedings, should the data obtained in such proceedings establish the appropriateness and desirability of such action." Id., at 213.

On this basis the Commission chose to apply the regulation to systems with 3,500 or more subscribers, effective January 1, 1971.

> "This standard [the Commission explained] appears more than reasonable in light of the [data filed], our decision to permit advertising at natural breaks. . ., and the 1-year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers. . . . [T]he 3,500 standard will encompass only a very small percentage of existing systems at present subscriber levels, less than 10 percent." Ibid.

On petitions for reconsideration the Commission observed that it had "been given no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability, raising rates or reducing the quality of service." Memorandum Opinion and Order, 23 FCC 2d 825, 826 [19 RR 2d 1766] (1970). The Commission repeated that "[t]he rule adopted is minimal in the light of the potentials of cablecasting," 30/ but, nonetheless, on its own motion postponed the effective date of the regulation to April 1, 1971, "to afford additional preparation time." Id., at 827.

This was still not the Commission's final effort to tailor the regulation to the financial capacity of CATV operators. In denying respondent's motion for a stay of the effective date of the rule, the Commission reiterated that "there has been no showing made to support the view that compliance. . .would be an unsustainable burden." Memorandum Opinion and Order, 27 FCC 2d 778, 779 (1971). On the other hand, the Commission recognized that new information suggested that CATV systems of 10,000 ultimate subscribers would operate at a loss for at least four years if required to cablecast. That data, however, was based on capital expenditure and annual operating cost figures "appreciably higher" than those first projected by the Commission. Ibid. The Commission concluded:

> "While we do not consider that an adequate showing has been made to justify general change, we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request ad hoc waiver of [the regulation], they will not be required to originate pending action on their waiver requests. . . . Systems of more than 10,000 subscribers may also request waivers, but they will not be excused from compliance unless the Commission grants a requested waiver. . . . [The] benefit [of cablecasting] to the public would be delayed if the. . .stay [requested by respondent] is granted, and the stay would, therefore, do injury to the public's interest." Ibid.

This history speaks for itself. The cablecasting requirement thus applied is plainly supported by substantial evidence that it will promote the public interest. 31/ Indeed, respondent does not appear to argue to the contrary.

30/ Commissioner Bartley, however, dissented on the ground that the regulation should apply only to systems with over 7,500 subscribers. Memorandum Opinion and Order 831.

31/ Nor is the regulation infirm for its failure to grant "grandfather" rights, see n. 7, supra, as the Commission warned would be the case in its Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417, 424 (1968). See, e.g., Federal Radio Comm'n v. Nelson Bros. Co., 289 US 266, 282 (1933) ("the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its

[Footnote continued on following page]

See Tr. of Oral Arg., at 43-44. It was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting. As we said in National Broadcasting Co. v. United States, 319 US 190, 224 (1943):

> "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will [in fact] be furthered or retarded by the . . .[regulation]."

See also, e.g., United States v. Storer Broadcasting Co., 351 US 192, 203 [13 RR 2161] (1956); General Telephone Co. of Southwest v. United States, 449 F2d 846, 858-859, 862-863 [22 RR 2d 2171] (CA5 1971).

Reversed.

31/ [Footnote continued from preceding page]

policy"). Judge Tuttle has elaborated, General Telephone Co. of Southwest v. United States, 449 F2d 846, 863-864 [22 RR 2d 2171] (CA5 1971):

> "In a complex and dynamic industry such as the communications field, it cannot be expected that the agency charged with its regulation will have perfect clairvoyance. Indeed as Justice Cardozo once said, 'Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite provision.' Cardozo, The Nature of the Judicial Process 145 (1921). The Commission, thus, must be afforded some leeway in developing policies and rules to fit the exigencies of the burgeoning CATV industry. Where the on-rushing course of events have outpaced the regulatory process, the Commission should be enabled to remedy the [problem]. . .by retroactive adjustments, provided they are reasonable. . . .
>
> "Admittedly the rule here at issue has an effect on activities embarked upon prior to the issuance of the Commission's Final Order and Report. Nonetheless the announcement of a new policy will inevitably have retroactive consequences. . . . The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."

With regard to federal infringement of franchise rights, see generally Barnett, n. 21, supra, at 703-705 and n. 116.

Mr. Chief Justice Burger, concurring in the result.

This case presents questions of extraordinary difficulty and sensitivity in the communications field as the opinions of the divided Court of Appeals and our own divisions reflect. As Mr. Justice Brennan has noted, Congress could not anticipate the advent of CATV when it enacted the regulatory scheme nearly 40 years ago. Yet that statutory scheme plainly anticipated the need for comprehensive regulation as pervasive as the reach of the instrumentalities of broadcasting.

In the four decades spanning the life of the Communications Act, the courts have consistently construed the Act as granting pervasive jurisdiction to the Commission to meet the expansion and development of broadcasting. That approach was broad enough to embrace the advent of CATV, as indicated in the plurality opinion. CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.

Concededly the Communications Act did not explicitly contemplate either CATV or the jurisdiction the Commission has now asserted. However Congress was well aware in the 1930's that broadcasting was a dynamic instrumentality, that its future could not be predicted, that scientific developments would inevitably enlarge the role and scope of broadcasting and that in consequence regulatory schemes must be flexible and virtually open-ended.

Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.

I agree with the plurality's rejection of any meaningful analogy between requiring CATV operators to develop programming and the concept of commandeering someone to engage in broadcasting. Those who exploit the existing broadcast signals for private commercial surface transmission by CATV – to which they make no contribution – are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.

I am not fully persuaded that the Commission has made the correct decision in this case and the thoughtful opinions in the Court of Appeals and the dissenting opinion here reflect some of my reservations. But the scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I a member of the Federal Communications Commission. That I might take a different position as a member of the Commission gives me no license to do so here. Congress has created its instrumentality to regulate broadcasting, has given it pervasive powers, and the Commission has generations of experience and "feel" for the problem. I therefore conclude that until Congress acts, the Commission should be allowed wide latitude and I therefore concur in the result reached by this Court.

Mr. Justice Douglas, with whom Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Rehnquist concur, dissenting.

The policies reflected in the plurality opinion may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by microwave relay transmission or by coaxial cables into communities unable to receive the signals directly. In United States v. Southwestern Cable Co., 392 US 157 [13 RR 2d 2045], we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals." Id., at 163.

CATV evolved after the Communications Act of 1934, 48 Stat. 1064 was passed. But we held that the reach of the Act which extends "to all interstate and foreign communication by wire or radio," 47 USC §152(a), was not limited to the precise methods of communication then known. 392 US, at 173.

Compulsory origination of programs is, however, a far cry from the regulation of communications approved in Southwestern Cable. Origination requires new investment and new different equipment, and an entirely different cast of personnel. 1/ See 20 FCC 2d 201, 210-211 [17 RR 2d 1570]. We marked the difference between communication and origination in Fortnightly Corp. v. United Artists, 392 US 390 [13 RR 2d 2061], and made clear how foreign the origination of programs is to CATV's traditional transmission of signals. In that case, CATV was sought to be held liable for infringement of copyrights of movies licensed to broadcasters and carried by CATV. We held CATV not liable, saying:

> "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but

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1/ In light of the striking difference between origination and communication, the suggestion that "the regulation is no different from Commission rules governing the technical quality of CATV broadcast carriage," ante, at 20, appears misconceived.

the basic function the equipment serves is little different from that by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

"The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." Id., at 399-401.

The Act forbids any person from operating a broadcast station without first obtaining a license from the Commission. 47 USC §301. Only qualified persons may obtain licenses and they must operate in the public interest. 47 USC §§308, 309. But nowhere in the Act is there the slightest suggestion that a person may be compelled to enter the broadcasting or cablecasting field. Rather, the Act extends "to all interstate and foreign communication by wire or radio. . . .which originates and/or is received within the United States." 47 USC §152(a) (emphasis added). When the Commission jurisdiction is so limited, it strains logic to hold that this jurisdiction may be expanded by requiring someone to "originate" or "receive."

The Act, when dealing with broadcasters, speaks of "applicants," "applications for licenses," see 47 USC §§307, 308, and "whether the public interest, convenience and necessity will be served by the granting of such application." 47 USC §309(a). The emphasis on the Committee Reports was on "original applications" and "application for the renewal of a license." H.R. Rep. No. 1918, 73d Cong., 2d Sess., p. 48; S. Rep. No. 781, 73rd Cong., 2d Sess., pp. 7, 9. The idea that a carrier or any other person can be drafted against his will to become a broadcaster is completely foreign to the history of the Act, as I read it.

CATV is simply a carrier having no more control over the message content than does a telephone company. A carrier may of course seek a broadcaster's license; but there is not the slightest suggestion in the Act or in its history that a carrier can be bludgeoned into becoming a broadcaster while all other broadcasters live under more lenient rules. There is not the slightest cue in the Act that CATV carriers can be compulsorily converted into broadcasters.

The plurality opinion performs the legerdemain by saying that the requirement of CATV origination is "reasonably ancillary" to the Commission's power to regulate television broadcasting. 2/ That requires a brand new amendment to the broadcasting provisions of the Act which only the Congress can effect. The Commission is not given carte blanche to initiate broadcasting stations; it cannot force people into the business. It cannot say to one who applies for a broadcast outlet in city A that the need is greater in city B and he will be licensed there. The fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs. The fact that the Act directs the Commission to encourage the larger and more effective use of radio in the public interest, 47 USC §303(g), relates to the objectives of the Act and does not grant power to compel people to become broadcasters any more than it grants the power to compel broadcasters to become CATV operators.

The upshot of today's decision is to make the Commission's authority over activities "ancillary" to its responsibilities greater than its authority over any broadcast licensee. Of course, the Commission can regulate a CATV that transmits broadcast signals. But to entrust the Commission with the power to force some, a few, or all CATV operators into the broadcast business is to give it a forbidding authority. Congress may decide to do so. But the step is a legislative measure so extreme that we should not find it interstitially authorized in the vague language of the Act.

I would affirm the Court of Appeals.

2/ The separate opinion of The Chief Justice reaches the same result by saying "CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act." Ante, at 2090. The difficulty is that this analysis knows no limits short of complete domination of the field of communications by the Commission. This reasoning – divorced as it is from any specific statutory basis – could as well apply to the manufacturers of radio and television broadcasting and receiving equipment.

MARY ELIZABETH MAGUIRE, et al. v. POST NEWSWEEK STATIONS, CAPITAL AREA, INC.

U.S. Court of Appeals, District of Columbia Circuit, June 21, 1972

No. 71-1163

[¶10:301, ¶53:24(R)] Primary jurisdiction of Commission.

Suit seeking injunctive relief against broadcasting the television program "Wild, Wild West," before 9 p.m., on the theory that children have a Fifth Amendment right to be free from the mental harm allegedly caused by excessive exposure to fictionalized violence on television, was properly dismissed by the district court for failure to exhaust available administrative remedies. The Commission has primary jurisdiction over regulation of the communications industry. The mere existence of a putatively valid statutory or constitutional claim does not justify bypassing orderly administrative procedures. Maguire v. Post Newsweek Stations, Capital Area, Inc., 24 RR 2d 2094 [US App DC, 1972].

Appeal from the United States District Court for the District of Columbia.

Before: Mr. Justice Clark, retired, */ and Wright and Robinson, Circuit Judges.

JUDGMENT

Per Curiam. This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this court that the judgment of the District Court appealed from in this cause is hereby affirmed for the reasons set forth in the attached memorandum.

MEMORANDUM

Appellants, parents of children located in the Washington area, brought this action in the United States District Court seeking declaratory and injunctive relief against broadcasting of the television program "Wild, Wild West" before 9:00 p.m. The theory of the suit was that children have a Fifth Amendment right to be free from the mental harm allegedly caused by excessive exposure to fictionalized violence appearing on television. Without reaching

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*/ Sitting by designation pursuant to 28 USC §294(a) (1970).

OCT 11 1972

MEMORANDUM FOR

Mr. Harry Dent
The White House

It is my impression that the Justice Department has no active plans to proceed to break up any particular TV/radio/newspaper combinations in the near future. However, the Department regards its victory against Frontier Broadcasting in Cheyenne, Wyoming, to be the kind of warning to the industry that may be necessary again. The general message that Justice will continue to convey is that, over the long run, companies owning such combinations could prudently avoid the risks of suit by exchanging some of the properties for other properties in different locations.

There may be FCC or Congressional action on cross-ownership, but situations where all the media are dominated by one owner could conceivably be outside the scope of any FCC rules or likely Administration legislative proposals. But even in these cases, there would be substantial long-term risk of action by the Antitrust Division no matter how the general policy matters are resolved. In short, owners in such situations would not seem to be in any immediate danger, but they are in a risky position for the longer run.

If you would like further information on this general situation, I would be pleased to discuss it with you.

Clay T. Whitehead

DO RECORDS
DO CHRON
GC SUBJECT
GC CHRON
WHITEHEAD
EVA
HGoldberg/pab/10-11-72

OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20504

To: Tom Whitehead

From: Henry Goldberg #6

Subject: Bluefield, West Virginia

The following is a description of media ownership in Bluefield:

TV

WHIS-TV, Channel 6, is an NBC affiliate licensed to the Daily Telegraph Printing Company, under co-ownership with WHIS(AM), an NBC radio affiliate, and WHIS-FM. The licensee also publishes the Bluefield Daily Telegraph, a morning daily with a weekday circulation of 25,789 and a Sunday circulation of 35,383. This paper is noted as having a Republican point of view. The same licensee publishes the Sunset News-Observer, a daily, except Sunday, evening paper with a circulation of 3,277. This paper is noted as having a Democratic point of view.

The license appears to be owned and controlled by the Shott family, with at least two-thirds stock interest.

Due to the terrain, it is unlikely that many other off-the-air television signals get into Bluefield, although WSWP-TV, an educational station in Grandview, West Virginia, appears to get a signal into town.

Radio

In addition to WHIS and WHIS-FM, mentioned above, WKOY-AM is licensed to serve Bluefield. This appears to be a low power, daytimer. It is difficult to determine how many other radio signals serve the Bluefield area.

CATV

The Bluefield Cable Corporation operates an old line (i.e. established 1954) 12 channel cable system. The parent company is Continental CATV of Hoboken, New Jersey, and the ultimate owner may be Vikoa. The cable system has between 4,000 and 6,000 subscribers with a potential for 7,100. The system has off-air pickups of five TV stations in West Virginia and Virginia, in addition to the local WHIS-TV. There is also a local origination channel with time and weather and "plans" for one other local, live programming channel. Under the prior FCC distant-signal rules, the cable system has a pending waiver request to bring in three New York City independent stations, plus three others located in the Mid-South. The cable system also offers an FM service of roughly 168 hours per week.

Newspapers

In addition to Bluefield Telegraph and the Sunset News-Observer, mentioned above, the only other publications originating in Bluefield are the Bluefield edition of the American Motorist, a bi-monthly with a circulation of 6,325, and the Bluefieldian, a collegiate quarterly.

TO: Tom

You should read this memo on the CBS v. TPT copyright decision in conjunction with Joel's memo to me on the differences between the McClellan bill + the FCC cable rules.

HENRY GOLDBERG

OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20504

March 21, 1973

To: Brian, Henry

From: Joel

Subject: Recent CBS v. Teleprompter Decision and Affect on Copyright Legislation

As you recall, the premise of the 1968 Supreme Court Fornightly case was that CATV behaves like a passive antenna, and therefore, in retransmitting over-the-air broadcast signals, does not infringe the copyright held by program producers or the exclusive licenses of broadcasters. In this case, the Court of Appeals for the Second Circuit (New York) held that there is such infringement when a cable system imports a copyright distant signal into a community where it would not otherwise be received.

The decision turned on an analysis of whether distant signal importation constitutes a "performance" of the copyrighted work, since it is the exclusive right to "perform" a work which the copyright law grants. Essentially, the Court held that anytime a cable system imports a distant signal, it is "performing" it and therefore subject to copyright liability. As to what constitutes a distant signal, the Court stated that "precise judicial definition . . . is not possible." It went on to state, however, that "when . . . the originating community, and the CATV community are different, and when the signal is initially received by the system at a location in or near the originating community and then transmitted to the CATV community by microwave or cable, a strong presumption arises that it is a distant signal . . . Similarly, when the signal is initially received by the CATV system on an antenna or other receiving device located between originating community and CATV community, the signal should be deemed a distant signal in the absence of a contrary showing by the CATV system.

It is unclear whether the opinion upsets the FCC rules dealing with distant signal importation and the relative bargaining positions of the copyright holders and CATV industry. On its face, the opinion seems to hold that the copyright law prohibits any distant signal importation that is unauthorized, regardless of whether or not permitted by FCC rules (the theory would be that the FCC has no jurisdiction to tamper with federally created private rights). If this is the case, cable will be deprived of a significant source of programming, and its growth inhibited. Because of this, presumably the cable interests will have a greater incentive than at present to seek copyright legislation.

If the above is correct, the interesting result follows that distant signal importation will be up for consideration on McClellan's home ground -- i.e., in his Subcommittee's copyright revision bill, for only in such a bill can the extent of compulsory licensing for distant signals be dealt with. This means, in effect, that McClellan may control not only the copyright fee schedule, but the whole ~~of~~ pattern of cable retransmission of broadcast signals. The differences between the McClellan Bill and the OTP Compromise/FCC on this pattern therefore take on greater importance.

2/12/70 - ltr to Justice Dept. from Sen. Gravel requesting comments from Antitrust Division on a proposed draft amendment to Communications Satellite Act.

5/6/70 - Copy of draft reply putting a hold on the letter -- to be forwarded to DAG's office for review and mailing after Mr. McLaren signs.

5/19/70 - Letter to Director Robert Mayo (BOB) from Richard Kleindienst (Deputy Atty. Gen., Justice) enclosing a copy of a draft reply to Sen. Gravel re his proposed draft amendment to Comsat act of 1962.

6/22/70 - BOB Legislative Referral of draft reply of Justice to the Sen. Gravel letter. (recd. 6/30)

7/7/70 - Wm. Plummer draft reply to referral of 6/22/70 suggesting Mr. Whitehead release it if he agrees.

7/8/70 - At Mr. Whitehead's request, Steve Doyle reviewed. Called Mr. Plummer's office and suggested that DTM response should be that they would defer any comment until the new Director is sworn in (as Mr. Whitehead would be in a position of approving DTM and the White House approval).

7/9/70 - Mr. Plummer memo to Bill Fischer, Asst. Dir. for Legislative Reference in response to the 6/22/70 referral -- suggesting that inasmuch as the Director of Telecommunications Policy has not yet been qualified and commissioned, there is no one in a position to make authoritative comment.

7/15/70 - Bill Fischer called about the draft letter to Sen. Gravel; we suggested he call Don Baker as he and Mr. Whitehead discussed it and Justice is going to rewrite the letter to Sen. Gravel.

(7/18?) 9/18/70 - Note to the file from Plummer advising that he had phoned Mr. Fische to the effect that Mr. Whitehead had told Justice (McLaren) of his difficulty with the Justice letter to Sen. Gravel and that Justice had agreed to rewrite the letter. Fischer said the information was sufficient and he does not need a memo.

11/19/70 - Letter to Mr. Whitehead from Don Baker, Justice, enclosing a redraft of the letter to Sen. Gravel.

12/11/70 - Letter to Don Baker indicating there is no objection from OTP.

1/5/71 - Letter to Sen. Gravel from Richard McLaren, Justice (replying to his letter of 2/12/70 requesting comments on proposed draft amendment to the Communications Satellite Act of 1962).

1/7/71 - Press Release from Sen. Mike Gravel -- stating he is releasing a White House- cleared letter from Asst. U.S. Atty. Gen. Richard McLaren in which the antitrust chief said a good case can be made for eliminating the direct carrier influence over Comsat.

1/7/71 - Press Release from Clay T. Whitehead, Director, BOB, stating "the Justice Dept. letter should not be interpreted as an Administration endorsement of Sen. Gravel's proposal."

1/14/71 - Letter to Mr. Whitehead from Sen. Pastore re an apparent conflict in the exchange of letters between Justice and Sen. Gravel.

1/26/71 - Mr. Whitehead's reply to Sen. Pastore's letter of 1/14/71.

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. Dave			
2.			
3.			
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

The September filing is unavailable. She will send it to you as soon as we get copies.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
Wanda			10/23

4/7/69 Justice

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals.	)	Docket No. 18397

COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE

The Commission's notice of proposed rule making and inquiry, adopted December 12, 1968, invited all interested persons to file written comments on the regulatory problems posed by the rapid growth of community antenna television (CATV) and broad band cable communications systems. 33 Federal Register 19028 (December 20, 1968). The Commission recognized explicitly that competitive considerations are likely to play an important role in the pattern of development of cable communications systems, because of the potential impact of these systems on the structure of the communications industry.

The Commission observed that CATV "is rapidly evolving from its original role as a small . . . reception service bringing television broadcast signals to areas which lack broadcast service or do not receive the full services of the three national networks," to an industry which "is placing increased emphasis on program origination, both of a local public service nature and of the entertainment type, and on the provision of other services to the public." The many potential services available to the public from an expansion of CATV systems to full cable communication service are outlined in some detail. And the rapid expansion of computer-communications technology now underway may result in greatly enhanced possibilities in the future.

The complex regulatory issues created by cable system development necessitates, in the Commission's words, "a far-ranging, overall view if the Commission is to come to grips with this dynamic field and succeed in its efforts to assure the public the most efficient and effective nationwide communications service possible." Accordingly, the Commission instituted this proceeding, "to

obtain informed opinion, technical information and present viewpoints of interested persons, for the inauguration of discussion of new questions as they arise, as a vehicle for rule making action at appropriate stages, and as a basis for the formulation of legislative proposals."

The Commission outlined proposed rules that would require program origination by CATV systems but would limit such origination to a single channel; and requested comments on whether such origination should be financed by advertising or subscriber's fees. The Commission also proposed rules relating to diversification of control of CATV systems and the application of the "equal time" and "fairness" doctrines to CATV-originated programs. Comments on these issues are due April 3, 1969. Comments (due May 2, 1969) were requested on other areas of regulation - including possible common carrier status of CATV systems, and importation of distant signals. All interested persons were invited to submit written comments on the broad issues outlined. In response to that invitation, the Department of Justice respectfully submits these comments.

SUMMARY

The Department of Justice is concerned that common control of competing mass media in a local market will result in elimination of competition, as well as inhibition of technical development in new fields. A CATV system can provide significant competition to existing local mass media, particularly if it is permitted to engage in program origination and accept advertising - two developments we believe would be in the public interest. Therefore, the Department concurs in the Commission proposal to prohibit any local television station from owning a CATV system in the same market; and we recommend that the same principles be applied to newspaper ownership of a CATV system in the same market. Because radio stations have less market power than television stations and newspapers, radio licensees without other media interests need not be included in such a ban, but we suggest that the Commission investigate this area further. The Department would stress that such limitations on ownership are needed to insure that healthy and vigorous competition occurs in markets where entry is

severely limited and the competitive alternatives are necessarily few in number. It must, however, be recognized that such limitations on ownership are unusual restrictions on business activity. They therefore should be applied only to CATV ownership by directly competing media in the same markets. Nothing should prohibit television licensees (except perhaps networks) or newspapers from owning CATV systems in other markets where they have no existing media interests, subject, of course, to such group ownership limitations as the Commission might find to be in the public interest.

I. THE INTEREST OF THE DEPARTMENT OF JUSTICE

The Communications Act of 1934 gives the Commission broad responsibility to regulate communications by wire and radio in the public interest. 47 U.S.C. 151 et seq. The Commission and the courts have always treated the promotion of competitive conditions in the dissemination of news and advertising as an important objective in applying the statutory standard of the "public interest, convenience and necessity" applicable to the issuance, transfer, and renewal of broadcast licenses (47 U.S.C. 304), for "Congress intended to leave competition in the business of broadcasting . . ." Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). Thus, the national policy in favor of competition, illustrated by the antitrust laws, and the public interest standard of the Communications Act are closely related. In some cases, according to the Supreme Court, competitive considerations may entirely control a public interest determination by the Commission:

> Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of a sole newspaper in an area applies for the only radio and television facilities, which if granted, would give him a monopoly of that area's major media of mass communications. United States v. Radio Corporation of America, 358 U. S. 334, 351-2 (1959) 1/

The Department of Justice is charged by Congress with the duty of protecting the public interest in a competitive economy and enforcing the antitrust laws - including Section 2 of the Sherman Act (15 U. S.C. 2) and Section 7 of the Clayton Act (15 U.S.C. 18), which are designed to protect competitive market structures. Transactions involving broadcast facilities, though regulated by the Commission, are not immune from antitrust prosecution, 47 U.S.C. 313; United States v. Radio Corporation of America, supra;

1/ See also Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U. S. 238 (1968), where the Supreme Court very recently re-emphasized the need for a Commission to refer to antitrust standards for guidance on public interest questions; and Northern Natural Gas Co. v. Federal Power Commission, 399 F. 2d 953, 960 (1968) for a similar holding by the Court of Appeals for the District of Columbia.

and antitrust policies are also applicable in the common carrier communications field, Hush-Phone Corporation v. United States, 238 F 2d 266 (D.C. Cir. 1956); In re Carterfone Device, 13 F.C.C. 2d 420 (1968). Accordingly, we believe it appropriate, to respond to the Commission's notice inviting comments by interested parties, by reviewing competitive considerations relevant to the Commission's proposed rules. These considerations seem particularly important here because cable communications services are in a formative stage, and the Commission has a unique opportunity to develop competitive market structures in this field without any substantial disruption of existing arrangements.

We propose to focus primarily on the question of cross ownership of CATV and other local mass media in the same market, while also discussing briefly the related question of program origination by CATV. These questions are of course not wholly separable from the issue of whether common carrier

obligations should be imposed on cable systems, a subject on which comments are due on May 2, 1969. We do not propose to comment on the remaining issues on which comments were invited by April 3, 1969, since they involve policy questions less closely related to competition.

II. THE POTENTIAL ROLE OF CABLE TELEVISION

The basic underlying question before the Commission in this proceeding concerns the extent to which CATV and related broad band cable services are to be permitted to reach their full potential as a communications medium. The Commission notice expressly recognizes this potential. The issues are complicated by the fact that the new medium necessarily challenges existing interests already regulated by the Commission - including broadcasters and communications common carriers. The extent to which it is desirable to take affirmative steps to insure preservation of basic over-the-air television service as an alternative to cable remains a difficult and complex question; but it must be resolved on the basis of the public interest in an efficient over-all communications system, rather than the economic difficulties (actual or imagined) of those with vested interests in established communications technology.

The issue may be complicated by some continuing uncertainty as to the extent of the Commission's authority to regulate CATV, except on the basis of CATV's effect on television broadcasting. While the Supreme Court left the issue open in its recent Southwestern Cable decision, its discussion of the Communications Act suggests that such authority may well exist. 2 /

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2 / U.S. v. Southwestern Cable Co. 392 U. S. 157, 167-173: "Nothing in the language of 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . Congress in 1934 acted in a field that was demonstratably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate,' with 'not niggardly but expansive powers.' National Broadcasting Co. v. United States, 319 U. S. 190, 219. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.'" Ibid at 172-173, footnote ommitted.

To date, Commission regulation of CATV seems to have reflected a concern that CATV constitutes an economic threat to the local television stations, particularly to the marginal UHF stations. This arose in the mid-1960s when CATVs began importing signals in order to offer subscribers a greater choice of programs than was available from local television stations. Accordingly, in 1965 and 1966, the Commission imposed "temporary" restrictions on CATV in order to give the Commission an opportunity to review the situation. Thus, any CATV system in the top 100 markets (which reach some 89 per cent of the nation's television audience) was forbidden, without special Commission approval, to import signals from television stations outside its prime reception area. 3/

We believe that it is important in the long run that the Commission not restrict CATV's ability

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3/ 47 C.F.R. 74.1107

to offer effective competition to television and other local mass media. Therefore, we endorse generally the Commission proposals to relax the "temporary" prohibition on signal importation and to permit "market forces" largely to determine the outcome of the probable competitive struggle between CATV and existing television stations. 4/ We also believe that CATVs should not be prevented from originating program material and accepting advertising. Whether the Commission should go further (as suggested in the notice), and require CATV systems to originate programs on one channel is an issue on which there does not seem sufficient evidence to reach a firm conclusion. Permitting CATV systems to accept

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4/ Whereas the present ban on distant-signal importation was explicitly adopted as an interim measure to give the Commission and Congress time to evaluate the situation and to develop a policy, a more permanent ban would have to rest on the premise of protecting marginal UHF stations until they grow strong enough to be able to withstand CATV competition. Since at any point in time some such television stations will be economically marginal, the Commission would be faced with continued pressure for an indefinite restriction. Of course, the Commission restriction on signal importation is quite a distinct issue from the question of the copyright liability of CATV systems for rebroadcasting imported signals. cf. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390.

advertising is significant because it provides not only a financial means of supporting program origination, but also provides a new advertising outlet for smaller local firms which may not be able to afford the rates of existing TV stations.

Our subsequent comments on cross ownership are closely related to CATV being permitted to become a viable effective force in the broadcasting industry, for if this is not so, the question of control of CATV is of diminished significance. 5/

5/ None of these suggestions is inconsistent with the view that at least some common carrier obligations should be imposed on the CATV operator. A CATV will undoubtedly be a monopoly in its service area. Regardless of who controls the particular system, much of its value to a community will depend on its being available to users on as broad and equal a basis as possible. The Commission should take appropriate steps to require equitable access. See, e.g., Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F. 2d 484, cert den. 344 U.S. 817. For example, it may be appropriate for the Commission to require every CATV system (i) to carry all local television stations on its system; and/or (ii) to reserve a certain number of channels for lease to independent originators of programming. These subjects will be discussed in our comments due on May 2, 1969.

III. CROSS OWNERSHIP OF CATV AND OTHER LOCAL MASS MEDIA

The Commission has requested comments on proposed rules to limit control of CATV systems by other mass media. Commission rules already prohibit common control of two stations in the same service (TV, AM or FM) serving the same market, in order to preserve competition within markets and to foster local ownership of broadcast licensees. 6/

For reasons explained below, we believe that it would be desirable to impose analogous limitations on cross-ownership between a CATV system and other mass media in the same local market. 7/

6/ 47 C.F.R. 73.35, 73.240, 73.636. Last year the Commission requested comments on a proposed amendment to prohibit a broadcast licensee from controlling more than one license in the same market. The Department of Justice supported the proposal and, in addition, suggested that the Commission consider whether it would be desirable and feasible to extend the prohibition to cross-ownership of broadcast media and newspapers in the same market. Comments of the United States Department of Justice, Dkt. 18110, August 1, 1968.

7/ Since systems in different markets are not in direct competition with each other for local advertising or audience attention, multiple ownership of such systems presents a different problem, both in terms of antitrust policy and communications policy. However, as the Commission is aware from its group broadcast ownership proceedings, unrestricted ownership of media in different markets could have deleterious effects

CATV offers the most promising means of achieving greater competition and diversity in local mass media communications. Through local origination, a CATV system will be able to compete directly with newspapers, television and radio for news, entertainment and advertising. Because CATV can provide an abundance of channels at a relatively low cost per channel, 8/ it offers a means of reducing the high entry barriers that presently exist for both broadcast and print media. In particular, CATV will reduce the significance of the existing spectrum limitations on broadcasting and, through its capacity for facsimile reproduction, CATV is likely to reduce the existing barriers to production and distribution of printed media.

7/ footnote continued
on competition for programming and the supply of equipment and on the preservation of local ownership in mass communications media. Since the effects of group ownership of CATV systems in different markets will depend to a large extent on the outcome of other proposed rules relating to program origination, financing of programs and common carrier status, we do not intend to comment on the group ownership problem at this time.

8/ Twenty-channel CATV systems are now available at only slightly greater cost than the traditional twelve-channel systems now generally in service, and even greater channel capacities are technically feasible.

Competition between a local CATV system and each of the other local mass media - television, radio, and newspapers - varies considerably in form and implication. And, therefore, we shall focus separately on the question of cross-ownership as between CATV and each of these other media.

Television

The Department of Justice endorses the Commission's proposal to prohibit common control of a CATV and a television station serving the same community.

The number of television channels now available to most viewers is relatively small. Only about 42 per cent of the country's television audience live in markets served by as many as four television stations, and another 33 per cent are in markets served by three stations. These stations represent for the most part, choices among the three major networks, with relatively little independent programming. As a result, television today remains largely a mass-audience medium with a very limited number of program sources.

CATV has meanwhile developed in many localities because it has been able to offer two services for which people are

willing to pay--a clearer signal and access to additional programs not available over-the-air. However, because it can provide many relatively low cost television channels, CATV is potentially well adapted to selective distribution of television programming to particular specialized audiences, even if they are scattered throughout a city or area. Such programming may be originated by either the CATV operator itself or by independent producers. 9/

A CATV system is thus both an actual and potential competitor to television stations in the same market; and common control of the two would eliminate this direct competition.

Generally, the antitrust laws prohibit horizontal mergers between direct competitors, particularly in industries with high barriers to entry, unless the merging companies have extremely small market shares or one of them is a failing company. See, e.g., United States v. Von's Grocery, 384 U.S. 270 (1966), where the combined market share for

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9/ Of 1440 CATV systems reporting to the FCC in November, 1966, 757 systems were doing some origination, and 232 systems were planning to make such offerings. However, much of this programming was mechanical service such as time and weather reports. Television Factbook, 1967-1968, 54-a

the merging firms was about 8%. It seems altogether probable that any common control of a TV station (particularly a VHF station) and a CATV system in the same market would involve market shares of at least this order in the local market for the dissemination of video programs, regardless of whether that market is measured in terms of advertising dollars or some combination of advertising dollars and subscriber's fees. Antitrust law in this area rests on the basic premise that "competition is likely to be greatest when there are many sellers, none of which has any significant market share." United States v. Philadelphia National Bank, 374 U.S. 321, 363. On the other hand, as the number of competitors becomes fewer, "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." United States v. Aluminum Company of America, 377 U.S. 271, 284.

Common ownership of a CATV system and a television station not only eliminates existing competition, but eliminates the yet unrealized potential for CATV to provide new avenues of competition in the local market for advertising, news, and entertainment. Where the existing television channels are fully allocated, CATV really offers the only way additional competitors can enter this market. In a market with few competitors, potential competition is an important economic consideration. It is for this reason that the Supreme Court has on several occasions declared illegal the merger between a probable potential entrant and an existing competitor in a concentrated market. United States v. El Paso Natural Gas, 376 U.S. 651 (1964); F.T.C. v. Proctor & Gamble Co. 386 U.S. 568 (1967).10/ See also United States v. Penn-Olin Chemical Co. 378 U.S. 158 (1964).

10/ El Paso is probably the closest analogy to this situation since it involved regulated firms where entry was restricted. El Paso, the dominant supplier of natural gas to California, acquired a second company (Northwest) which was seeking to enter the California market by offering gas to existing large purchasers. The Supreme Court held this merger illegal on the grounds that the elimination of Northwest as a potential competitor in California violated the standard of the Clayton Act.

We believe that the economic policies reflected in these antitrust decisions support generally the Commission's proposal to limit cross-ownership of CATV systems and TV stations in the same market. There are necessarily few alternatives for television advertising and programming even in the largest metropolitan areas, and it is undesirable to have this number reduced by common control of two of them. This policy is already reflected in the Commission rule which prohibits common control of two television stations in the same market (47 C.F.R. 73.636(a)(1); and the Commission proposes to extend the policy to common control of a television station and a CATV system in the same markets. We think this would be appropriate and desirable. 11/

11/ Network ownership of CATV systems may create an additional competitive problem even in local markets where a network owns no television stations. The major television networks have an economic interest in the limited number of channels of access to the public which the present television system provides; and this general interest clearly conflicts with the large-scale development of CATV as a means of access to the viewing public. It is possible that this interest might discourage a television network from developing the full competitive potential of a CATV system in communities where the network's programming is available over-the-air from a network-owned station or a network affiliate. Accordingly, we suggest that the Commission consider whether it would be advisable to impose restrictions on network ownership of CATV systems even beyond the service area of their owned and operated stations, particularly in major markets.

The Commission proposes to deal with CATV cross-ownership by a general prohibition rather than by case-by-case analysis of competitive effects in particular situations. This seems appropriate in the light of the Commission's experience. In the past it has adopted general rules "in order to implement the Congressional policy against monopoly and in order to preserve competition."12/ These same considerations seem applicable to the proposed prohibition on common control of television stations and CATV systems in the same markets.

B. Newspapers

A CATV system and a newspaper operating in the same market may well be directly competitive for various types of local news and advertising. In other words, CATV-

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12/ Multiple Ownership, 18 Federal Register 7796. In 1953, the Commission adopted rules limiting broadcasters to ownership of not more than seven licenses of each type (AM, FM and TV). It noted that these multiple ownership rules were designed to "guard against monopolistic tendencies and to preserve competition in the broadcast industry." Multiple Ownership, 18 Federal Register 7796 (December 3, 1953). The Commission specifically concluded that "the problems of multiple ownership of broadcast stations are best resolved by the promulgation of rules of general applicability" and rejected use of special distinctions based on "class and size of stations, geographical locations, populations served and similar factors" as "unsatisfactory or unworkable." Id. at 7797-98. The propriety of the Commission's approach was subsequently upheld by the Supreme Court. United States v. Storer Bcstg. Co., 351 U.S. 192.

originated programming may be for many purposes sufficiently interchangeable to be directly competitive with newspapers as well as television. This interchangeability is clearly established by economic factors of the type customarily considered in both antitrust litigation and administrative proceedings. Thus a relevant market including radio and newspapers was recognized and defined by the Supreme Court in Lorain Journal Co. v. United States, 342 U.S. 143, 147, as "the mass dissemination of news and advertising both of a local and national character," by local mass media in the community of Lorain, Ohio, and environs. Competition for advertising between newspaper and broadcast media has also been recognized in Commission broadcast licensing proceedings. See McClatchy Bdcstg. Co. v. FCC, 239 F. 2d 15, 18 (D.C. Cir. 1956), certiorari denied, 353 U.S. 918; WHDH, Inc., 15 R.R. 2d 411 (1969). These cases reflect the well-recognized economic principle that competition may be significantly lessened and market power may be significantly enhanced by combining under single ownership companies whose products, though not perfectly substitutable, are sufficiently interchangeable to constitute a substantial competitive influence

upon the maximum or minimum price of each other. See United States v. Continental Can Co., 378 U.S. 441, 452, holding that glass bottles and tin cans are an appropriate product market because, for many buyers, they are close substitutes.

Newspapers tend to dominate the market for local advertising; the local newspaper in a one paper city will tend to have over 60% of all local advertising revenues.13/ Even in cities with more than one newspaper, the market share of each paper will generally be substantial and will represent considerable market power in the local advertising market. Hence, common control of a newspaper and CATV in the same community represents substantial foreclosure in the market for local advertising and eliminates development of potential independent alternative advertising media.

In addition, as the Commission has noted, CATV systems have very good potential for facsimile reproduction.14/

13/ See United States v. Citizen Publishing Co., 280 F. Supp. 978 (GX-64) (D.Ariz. 1968) affirmed No. 243, Oct. Term 1968, decided March 10, 1969 and the Department's Memorandum, dated May 8, 1968, p. 14, In the Matter of Application by Beaumont Broadcasting Corp., File No. BTC-5553 showing such market shares in the Tuscon and Beaumont areas.

14/ See statement of Norton Goodwin at the Commission's oral argument on Feb. 4, 1969 in connection with this

This technology has not yet been put to commercial use. Vigorous independent CATV ownership is the most likely method of producing rapid advances in this novel field, which promises to reduce two of the major barriers to newspaper competition (i.e., printing and distribution of copy). It would indeed be unfortunate if existing publishers were to control this source of potential competition and possibly frustrate potential innovations in, or restrict access to, methods of promoting the widest possible dissemination of information.

To summarize, we conclude that common control of newspapers and CATV systems in the same community will tend to restrict actual and potential competition. 15/ Accordingly, we recommend that the Commission prohibit newspaper control of a CATV system in the same market. This would be accomplished by conditioning a CATV system's right to carry broadcast signals on proof that it is not affiliated, directly or indirectly, with a local daily or Sunday newspaper.

14/ [footnote contd] proceeding. See also Paragraph 7 of the Commission's notice in this proceeding.

15/ There are already several examples of such situations. E.g., in Buffalo, New York, the Buffalo Courier-Express owns the CATV system. Television Factbook, 1968-1969, 451-a. In Cleveland, Ohio, the Cleveland Plain Dealer has an interest in an application for a CATV franchise. Ibid., 468-a.

C. Radio Stations

Local radio stations also derive much of their support from local advertising and hence would be direct competitors with CATV systems in this market, if the latter were allowed to accept advertising. On the other hand, there are typically many more radio stations than TV stations in a market and no radio station, standing alone, is apt to be a source of substantial market power in the local market; this is particularly true in the case of an FM station or a daytime-only AM station. Moreover, once newspaper and television stations are excluded from the ownership of CATV, most of the major radio stations in a community are also excluded by virtue of their affiliation with these media interests.16/ It would thus appear that independent radio stations lack substantial market power, and, in addition, such stations--having no investment in existing television technology--will tend to lack the types of incentives, discussed above, to retard innovation in CATV.

16/ See Comments of the United States Department of Justice, Dkt. 18110, Appendix A.

Accordingly, we conclude that radio station ownership of a local CATV system should not unreasonably distort or limit competition vis-a-vis other local media; and, therefore, such common ownership should not be subject to such serious restrictions as cross ownership of a television station or newspaper and a CATV system in the same market. It would appear that the danger that a radio station would be able to obtain unfair and substantial competitive advantages vis-a-vis other radio stations by virtue of its control of a CATV system (e.g., by offering discriminatory joint rates on advertising) might be dealt with by a Commission rule prohibiting joint advertising rates on CATVs and other media.

Consequently, we recommend that the Commission should not at this time limit independent radio station ownership of CATV systems in the same market. However, we suggest that such cross ownership be made the subject of an additional proceeding to determine whether, under certain circumstances, it might be contrary to the public interest.

Relief

The Commission proposes to make its rules prohibiting cross ownership of CATV and other media applicable to all situations. Accordingly, it would require divestiture in existing common ownership situations. This would protect competition and insure that all communities have CATV operators without direct conflicting interests. While we lack any very accurate information as to the extent of existing cross ownership between television stations and newspapers on one hand and CATV systems on the other, it would appear that such situations are not too numerous. Nevertheless, we think it important, as indeed the Commission's Notice suggests, that any scheme of divestiture be carried out gradually over a period of time so as to insure that parties have a reasonable opportunity to recover the value of any properties they are required to divest.

IV. RECOMMENDATIONS

The recommendations made above reflect our basic concern that CATV not be prevented from achieving its full potential as an effective competitor to existing mass media interests. These recommendations include the following:

1. The Commission should not restrict CATV's ability to originate programs, or to accept advertising, and should relax its rules on program importation.

2. The Commission should prohibit common control of a television station and CATV serving the same community.

3. The Commission should prohibit newspaper control of a CATV system in the same market. This would be accomplished by conditioning CATV system's right to carry broadcast signals on proof that it is not affiliated, directly or indirectly, with a local daily or Sunday newspaper.

4. The Commission should not at this time limit independent radio station ownership of CATV systems in the same market, but this should be made

the subject of an additional proceeding.

Respectfully submitted.

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