

CORPORATE ACQUISITION OF BROADCAST FACILITIES: THE "PUBLIC INTEREST" AND THE ANTITRUST LAWS

I. INTRODUCTION

The Federal Communications Commission, at the time of this writing, is reconsidering applications for the transfer and assignment of seventeen radio and television stations,¹ currently owned and operated by the American Broadcasting Company (ABC), to a new corporation of the same name, which will be a wholly owned subsidiary of International Telephone and Telegraph Corporation (ITT). FCC approval of these applications would clear the way for the completion of the proposed merger of ITT and ABC.

Under Section 310(b) of the Federal Communications Act, the Commission must approve any transfer or assignment of stations before it can legally take place.² In the ITT case, however, the Commission must also assume the task of considering the far more complex and significant problem of the acquisition of the assets of a national broadcast network by a huge, diversified, international corporation. In 1953 the FCC considered similar, though less portentous, applications filed by ABC and United Paramount Theaters, Inc., incident to an acquisition of the network by the theater chain.³ The Commission, in that case, stated that:

In a technical sense, the Commission's function . . . is to approve or disapprove the proposed transfer and assignments by ABC of its AM, FM, and TV licenses . . . to American Broadcasting-Paramount Theaters, Inc. The statutory standard by which the approval or disapproval must be made is whether the transfer and assignments are "in the public interest." By its very breadth, that standard . . . raises fundamental issues far transcending in significance those ordinarily attending a transfer or assignment proceeding involving individual broadcast licenses. The facilities here involved are the core of a far more important segment of the communications industry . . . namely, a national network system of radio and television broadcasting.⁴

¹ On February 1, 1967, the FCC granted the Justice Department's petition for reconsideration of the Commission's order of December 21, 1966, which had approved the transfer and assignment of licenses for stations in Chicago, Detroit, Los Angeles, New York, Pittsburgh, and San Francisco. Just as this comment went to press, the FCC completed its reconsideration and once again approved the proposed merger. *Wall Street Journal*, June 23, 1967, p. 23, col. 1.

² 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

³ *Paramount Television Prods., Inc.*, 17 F.C.C. 264 (1953).

⁴ *Id.* at 315. The Commission also indicated its intended approach to the problem: We must therefore include in our review of the proposed merger the past history and existing structure of the network broadcasting industry, and in doing so, consider: (a) the place of networks in our system of radio and television broadcasting; (b) the emergence of ABC in 1943 as an independent network . . . including the growth and accomplishments of ABC since 1943; (c) the continued dominance of NBC and CBS in network broadcasting and the reasons therefor, including the handicaps under which ABC has operated and its resultant ability to provide the amount of competition which might have been expected from its establishment as an independent network; (d)

Unlike mergers in most other industries, determining the propriety of a merger in the broadcast industry frequently involves conflicts deriving from concurrent consideration of the antitrust issues by the FCC and the Justice Department. This concurrent jurisdiction is a result of the scheme of regulation that Congress established for the broadcast industry. Having recognized the need for regulation in this industry, Congress enacted the Federal Communications Act of 1934, establishing the FCC and thereby subjecting broadcasting to administrative authority.⁵ Since Congress wanted to insure that the field of broadcasting would remain competitive, it did not authorize the Commission to exempt broadcasters from the scope of the antitrust laws.⁶ Furthermore, antitrust cases heard before the Commission are subject to scrutiny and initiation of court injunctive action by the Antitrust Division of the Justice Department. It is the purpose of this comment: (1) to examine the "fundamental issues" raised in terms of FCC policy; and (2) to consider the application of antitrust law to the proposed ITT-ABC merger.

II. FACTUAL BACKGROUND TO THE PROPOSED ITT-ABC MERGER

ITT is a huge, international corporate conglomerate. It has business interests in sixty-six foreign countries, from which it derives sixty per cent of its total revenue.⁷ The balance is chiefly derived from the domestic manufacture and sale of telecommunications and other electronic equipment to the U.S. space and defense industries. Among its many holdings, ITT owns Press Wireless, Inc., which provides complete news-wire service to sixty-five foreign countries. It is currently negotiating to acquire Howard W. Sams & Company, a major publisher and printer of magazines and textbooks. ITT's enormous wealth approximates 2 billion dollars in total assets and 1.75 billion dollars in annual revenue.⁸

In 1943, when the FCC caused the National Broadcasting Company (NBC) to divest itself of one of its two networks,⁹ ABC was formed from the divested facilities. In addition to its five television stations, six standard

whether the merger with UPT will stimulate competition and result in an over-all improvement of network service; and (e) whether the merger will lessen competition or tend to monopoly.

Id. at 315-16. The Commission has essentially covered the same areas with respect to the proposed ITT-ABC merger, with less emphasis, however, on the history of network broadcasting. This comment treats these areas as well as those factors normally considered in regard to transfer and assignment applications.

⁵ 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 151 (1964).

⁶ However, the power to exempt certain industries from the antitrust laws has been conferred on other regulatory agencies, e.g., the Interstate Commerce Commission's power to exempt common carriers under 24 Stat. 380 (1887), as amended, 49 U.S.C. § 5(2) (1964). Such power has also been given to the FCC in its regulation of so-called common-carrier communicators, namely telephone and telegraph companies. 57 Stat. 5 (1943), as amended, 47 U.S.C. § 222 (1964).

⁷ Broadcasting, Sept. 26, 1966, p. 49.

⁸ In the Matter of Applications by American Broadcasting Cos., Docket No. 16828, FCC—Memorandum Opinion and Order, Dec. 21, 1966, at 1 (Johnson, Comm'r, dissenting) [hereinafter cited as *Opinion Approving Transfer*]; Broadcasting, Dec. 26, 1966, p. 21.

⁹ Radio Corp. of America, 10 F.C.C. 212 (1943).

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broadcast (AM) stations, and six frequency modulation (FM) stations, ABC controls a national radio network, a national television network, 400 motion picture theaters, and a major record company. ABC is a powerful organization, but in relation to NBC and Columbia Broadcasting System (CBS), the other two organizations controlling radio and television networks, it is in the weakest competitive position. Its assets and revenue are substantially less than that of either CBS or NBC,¹⁰ and its 137 primary television affiliates reach only 93.4 per cent of American homes, as compared with 99 per cent for NBC's 206 affiliates and 99.2 per cent for CBS's 192 affiliates.¹¹ This latter fact, while not appearing to demonstrate a significantly inferior position, is of great importance to national advertisers (the prime source of network income), who are concerned with reaching the largest possible percentage of the viewing public.

The merger of ITT, now ranked thirtieth in the nation in terms of corporate revenue,¹² with ABC would result in a corporation with assets and annual revenue each approximating 2.3 billion dollars, twentieth in size in the United States.¹³ ITT-ABC's broadcasting activities would account for about thirteen per cent of the corporation's revenue.¹⁴

Early in 1965, ITT, with a view toward increasing its domestic holdings, initiated talks with ABC regarding the feasibility of a merger, and in December 1965 the companies announced that they were considering this matter. The Antitrust Division of the Justice Department then commenced an investigation into the possible anticompetitive consequences. The boards of directors of ABC and ITT approved the merger in February 1966; the required applications for transfer and assignment of ABC's seventeen broadcast-station licenses were filed with the FCC in March 1966; and the Commission then gave the required public notice of this filing.¹⁵ In April 1966, shareholders of both corporations approved the merger.

During the summer and fall of 1966, both the Justice Department and the FCC continued their separate investigations into the legality of the proposed merger. Sharp disagreement among the FCC commissioners as to the procedure to be employed in considering the merger first came to light when two of the commissioners dissented from a majority request made to ITT and ABC for additional information. They dissented on the ground that this information, in combination with that contained in the applications,

10		1965 Assets*	1965 Revenues*
	ABC	263.0	476.0
	CBS	469.0	700.0
	RCA/NBC	1,269.0	2,057.0

* In millions of dollars

These figures are approximate and are drawn from *Broadcasting*, Dec. 26, 1966, p. 21.

¹¹ *Broadcasting*, Sept. 26, 1966, p. 52.

¹² Opinion Approving Transfer, *supra* note 8, at 1 (Johnson, Comm'r, dissenting).

¹³ *Broadcasting*, Dec. 26, 1966, p. 21.

¹⁴ Opinion Approving Transfer, *supra* note 8, at 2 (Bartley, Comm'r, dissenting).

¹⁵ The filing of applications for transfer must be duly publicized. 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 311(a) (1964). Such publication must be broadcast over each station involved and printed in newspapers of general circulation in each city in which one of the stations is located. 47 C.F.R. § 1.580 (1966).

was inadequate to constitute the full record, as the majority of commissioners intended it should. The dissenters felt that the merger was of such "far-reaching political, social and economic consequences for the public interest," that the record upon which this merger was to be considered should be compiled through the medium of an evidentiary hearing.¹⁶ Section 309(e) of the Federal Communications Act and section 1.593 of the FCC regulations require a full evidentiary hearing if the applications or other matters the Commission may have chosen to notice present "a substantial and material question of fact."¹⁷ The majority, however, felt that there were no such questions and that, therefore, a full hearing was not necessary. Their opinion was reinforced by the fact that no interested or adverse parties had come forth to raise any questions or to challenge the proposed merger.¹⁸ In August 1966, the majority of FCC commissioners, in what was ostensibly an attempt, albeit unsuccessful, to appease the dissenters, ordered an oral hearing on the merger before the Commission en banc. The overall purpose of this rather unorthodox procedure was to air the "legal and policy issues of substance and significance" and, additionally, to allow for direct questioning of the applicants.¹⁹ The Commission preserved the right of any interested party to raise questions of fact during the oral hearing.²⁰

At the hearing, conducted on September 19 and 20, no interested or adverse parties appeared. The only testimony came from Messrs. Goldenson and Geneen, presidents of ABC and ITT respectively, and from Mr. John McCone, a director of ITT. The FCC asked for and received from both parties assurances to the effect (1) that ABC was in need of financial assistance, (2) that it was not feasible to obtain such assistance through further debt financing or a new stock issuance, (3) that ITT was committed to support ABC's alleged financial needs, and (4) that ITT's foreign business interests would not adversely influence the "objectivity" of ABC's news and public-affairs programming.²¹ The substance of these assurances created, and remain, "public interest" issues in the present considerations.

In November 1966, the Justice Department requested the Commission to defer judgment on transfer of the licenses until the Department had had more time to complete its study of the antitrust consequences of the merger. On December 20, the Department, believing that a determination by the FCC was imminent, sent a letter to the Commission setting forth the

¹⁶ FCC, Public Notice, Report No. 6084 (July 21, 1966) (dissenting opinion).

¹⁷ 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309(e) (1964). See 47 C.F.R. § 1.593 (1966).

¹⁸ The licensee of radio station KOB at Albuquerque, New Mexico filed an opposition relating to his long-standing application for the frequency occupied by WABC in New York City. The KOB opposition did not, however, raise any broad question or factual issue concerning the merger plan as a whole, but rather an unrelated issue which the Commission believed could be dealt with otherwise. In the Matter of Applications by American Broadcasting Cos., Docket No. 16828, FCC—Order and Notice of Oral Hearing Before the Commission En Banc, Aug. 17, 1966, at 2.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Opinion Approving Transfer, *supra* note 8, at 10-14.

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following preliminary conclusions regarding the antitrust implications of the merger:

(1) There are several anticompetitive consequences that may possibly flow from an ITT-ABC merger, effects of which might conceivably be substantial.

(2) The possibilities of such anticompetitive consequences seem sufficiently speculative that we are not presently contemplating an action under the antitrust laws to enjoin consummation of the merger.

(3) On the other hand, we believe the possibilities of adverse effects are significant enough that we should call them to your attention, and that they deserve full and serious consideration by the Commission in making its determination whether, in light of these and other pertinent factors, the acquisition of ABC by ITT would serve "the public interest, convenience and necessity."²²

The Justice Department also set out six areas which it believed offered the possibility of antitrust violations.

On the following day, December 21, the FCC, by a vote of 4 to 3, approved the transfer of stations, and, in effect, the merger.²³ The FCC majority found that: (1) the merger would eliminate no horizontal competition; (2) the vertical (buyer-seller) relationships between ABC and ITT were so small as to be insubstantial by any legal test; (3) there was no evidence to indicate that the merger would afford either company an opportunity to use the economic power of the other to secure any significant purchases by reciprocity; (4) ITT's larger financial resources would strengthen ABC's capacity to compete effectively; (5) the merger promised meaningful enhancement of ABC's network and station programming services in that ABC would be able to present enlarged news and public-affairs services, speedier conversion to color, and substantial new facilities for program production; and (6) ITT would undertake to promote the advancement of UHF broadcasting.²⁴

Three commissioners dissented, primarily because of the brevity of the FCC's hearing, the Commission's reliance on the representations and assurances of ABC and ITT as the sole factual record upon which approval was granted, and the size of ITT, its foreign holdings, and, as they envisioned it, the adverse influence this would have on ABC's dissemination of news and public-affairs information.²⁵

The Justice Department now maintains that the Commission failed to consider several possible anticompetitive consequences which had been pointed out in the Department's letter of December 20.²⁶ In reply, ABC

²² Letter From Donald F. Turner, Assistant Attorney-General for the Antitrust Division of the Justice Department, to the FCC, Dec. 20, 1966, at 1.

²³ Opinion Approving Transfer, *supra* note 8.

²⁴ *Ibid.*

²⁵ *Id.* (dissenting opinions).

²⁶ In the Matter of Applications by American Broadcasting Cos., Docket No. 16828, FCC—Petition of the Department of Justice for Reconsideration and for Leave to Intervene, Jan. 18, 1967 [hereinafter cited as *Petition for Reconsideration*].

and ITT argue that the FCC had fully considered all issues raised by the Antitrust Division, and had found that the anticompetitive consequences were too speculative to be of concern.²⁷ They further point out that the FCC determined that the merger, rather than lessening competition, would promote competition between the three major networks.

After FCC approval was granted, and two days before the merger was to become effective, the Justice Department filed with the FCC a Petition for Reconsideration and Leave to Intervene. This was followed by a series of replies and counter-replies by ITT, ABC, and the Justice Department.²⁸ At the time of this writing, the FCC has yielded to the Department, has reopened the considerations, and has commenced a hearing, permitting the Department to intervene as an interested party.

III. "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY" UNDER THE FEDERAL COMMUNICATIONS ACT

Consideration of the FCC's proper function in acting on transfer and assignment applications requires a clear understanding of the nature of the standard under which the Commission operates. Congress, in Section 310(b) of the Federal Communications Act stated that:

No . . . station license . . . shall be transferred, assigned, or disposed of in any manner . . . by transfer of control of any corporation holding such . . . license . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.²⁹

In determining what the "public interest" entails and what requirements must be met by an applicant in demonstrating that approval of his application will serve the public interest, section 308(b) of the act provides some initial guidance. This section stipulates that:

All applications . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . and such other information as [the Commission] . . . may require.³⁰

²⁷ *Id.*—Opposition of American Broadcasting Companies, Inc. and International Telephone & Telegraph Corporation to Petition of the Department of Justice for Reconsideration and for Leave to Intervene, Jan. 26, 1967 [hereinafter cited as *Opposition of ABC and ITT to Reconsideration*].

²⁸ *Ibid*; *id.*—Reply of Department of Justice, Jan. 30, 1967 [hereinafter cited as *Reply*]; *id.*—Specification of Issues and Evidentiary Material in Support of Petition for Reconsideration by the Department of Justice, Feb. 15, 1967 [hereinafter cited as *Specification of Issues and Evidentiary Matter*]; *id.*—Statement of American Broadcasting Companies, Inc. and International Telephone and Telegraph Corporation in Response to Specification of Issues and Evidentiary Material in Support of Petition for Reconsideration by the Department of Justice, Feb. 23, 1967 [hereinafter cited as *Response to Specification*]; *id.*—Rebuttal by the Department of Justice, Feb. 28, 1967 [hereinafter cited as *Rebuttal*].

²⁹ 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

³⁰ 47 Stat. 1085 (1934), as amended, 47 U.S.C. § 308(b) (1964).

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The language of section 308(b), read in conjunction with section 310(b), implies that citizenship, character, and financial and technical qualifications must be met before a license can be granted. It does not imply, however, that because an applicant meets these qualifications the grant of a license would necessarily serve the public interest. More is needed, and may be provided for by the language of section 308(b), which also stipulates that all applications shall set forth such facts as the Commission may prescribe as to "other qualifications of the applicant" and, further, "such other information as the Commission may require."³¹ A pertinent FCC regulation, section 1.591(a), states that:

In the case of any application . . . the Commission will make the grant if it finds that the application presents no substantial and material question of fact and meets the following requirements:

- (1) There is not pending a mutually exclusive application . . . ;
- (2) The applicant is legally, technically, financially, and otherwise qualified;
- (3) The applicant is not in violation of provisions of law or this chapter or established policies of the Commission; and
- (4) A grant of the application would otherwise serve the public interest, convenience, and necessity.³²

On the basis of the language of the statute and of the regulation, it can be concluded that the FCC must determine, as a minimum, that the applicant is qualified as to citizenship, character, financial soundness, and technical ability. Thereafter, it becomes necessary for the Commission to decide whether, under the facts and circumstances of the case, the satisfaction of these requirements alone is enough to serve the public interest. If factors beyond the minimum-requirement factors indicate the possibility of adverse effects on the public interest, the Commission must consider these factors.

The public-interest standard, with which an applicant must comply, has been referred to as the "touchstone" of FCC authority,³³ and the Supreme Court has defined it as the "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."³⁴ Since the public-interest criteria vary with the facts of each case, the Commission must employ an *ad hoc* approach to each application.³⁵ But because the standard is so imprecise, it permits the Commission some degree of discretion. A brief analysis of FCC and court holdings will disclose what boundaries have been imposed on the FCC's exercise of discretion.

If a given case should involve a sole applicant for a new broadcasting facility in an area currently not receiving any broadcast signal (a rare case

³¹ *Ibid.*

³² 47 C.F.R. § 1.591(a) (1966).

³³ See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

³⁴ *Ibid.*

³⁵ *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956). Accord, *John Clarence Cook*, 1 F.C.C.2d 1534, 1539 (1965).

today, but frequent early in the FCC's existence), and the applicant has satisfied the minimum requirements, the law would require that the FCC grant the license on that basis alone,³⁶ since almost any broadcast service to such a community is in the public interest. When, however, a community is receiving broadcasting service, an applicant may be required to do more than merely meet the minimum requirements in order to satisfy the public-interest standard. While the FCC and the courts still abide by a 1940 Supreme Court holding that "the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel,"³⁷ the lessening of available broadcast facilities in recent years, and the fact that almost all communities receive broadcast service from several stations, has caused the Commission to be more demanding.

The judiciary now supports the FCC's stricter standards. In 1949 the Court of Appeals for the District of Columbia stated that, "if there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial."³⁸ This decision would seem to lose its validity in view of a 1962 decision by the same court holding that the Commission may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs, and that the Commission is not required to grant a license merely because the sole applicant is legally, financially, and technically qualified.³⁹

When there are two or more applicants for a given facility, the Commission, through a full hearing, makes what is known as a "comparative consideration," and the scope of its discretion is significantly broadened.⁴⁰ The Commission may find that all the applicants meet the minimum requirements, and that all possess other qualities which would prove beneficial to the public. Since approval of any one of the applications would serve the public interest, the Commission must determine which potential licensee

³⁶ See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). Accord, *Easton Publications Co. v. FCC*, 175 F.2d 344, 346 (D.C. Cir. 1949).

³⁷ *FCC v. Sanders Bros. Radio Station*, supra note 36, at 475.

³⁸ *Easton Publications Co. v. FCC*, supra note 36, at 346.

³⁹ *Henry v. FCC*, 302 F.2d 191 (D.C. Cir.), cert. denied, 371 U.S. 821 (1962).

⁴⁰ See 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309(e) (1964); 47 C.F.R. § 1.593 (1966). Also, if the Commission, in the case of a sole applicant, finds a substantial and material question of fact, or should an interested party file a petition protesting the granting of such license under 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309 (d) (1) (1964), in which case a hearing is also required, the scope of the FCC's inquiry is significantly broadened. Neither the FCC's "review" function, nor its licensing function under § 309, is performed merely by determining that the applicant is legally, technically, and financially qualified to receive a grant of a broadcast license. *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 521 (D.C. Cir. 1955). The Commission, on hearing of a protest against the application of a broadcasting company, can consider any issue bearing on the qualifications of the broadcast company or on the public interest, convenience, and necessity. *Philco Corp. v. FCC*, 293 F.2d 864, 868 (D.C. Cir. 1961).

would *best* serve the public interest.⁴¹ This necessitates a comparative consideration of many factors, *e.g.*, awareness of public needs, owner-management relationship, and the range of business or broadcast experience of the applicants involved.⁴² The FCC weighs the positive and negative aspects of each individual application, and then weighs one application against another. Obviously, if none of the applicants would serve the public interest, the Commission has a duty not to approve any of the applications.⁴³

Technically, the transferee/assignee applicant is a "sole applicant" in that section 310(b) of the act stipulates, with respect to such an application, that:

[I]n acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the . . . license to a person other than the proposed transferee or assignee.⁴⁴

The legislative history of this clause states:

In other words, in applying the test of public interest, convenience, and necessity the Commission must do so as though the proposed transferee or assignee were applying for the . . . station license and as though no other person were interested in securing such . . . license.⁴⁵

This statutory clause and its legislative history have caused some to draw the conclusion that the Commission must accept the transferee-applicant if he meets the minimum standards.⁴⁶ While not necessarily illogical, this conclusion is inaccurate. The clause merely prohibits the Commission from considering any hypothetical applicants. The Commission is not limited to a mere determination that the *transferee*, if granted a license, would serve the public interest, but is required to determine whether the *transfer* itself would serve the public interest. This requirement is set out in section 310(b) which states that "no . . . license shall be transferred . . . except upon . . . finding by the Commission that the public interest . . . *will be served thereby*."⁴⁷ (Emphasis added.)

⁴¹ See *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958).

⁴² FCC Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395-96 (1965); *McClatchy Broadcasting Co. v. FCC*, supra note 35, at 19. See generally Hale & Hale, *Competition or Control II: Radio and Television Broadcasting*, 107 U. Pa. L. Rev. 585, 589-90 (1959).

⁴³ *Great Lakes Broadcasting Co. v. FCC*, 289 F.2d 754 (1960).

⁴⁴ 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

⁴⁵ 2 U.S. Code Cong. & Ad. News 2246 (1952).

⁴⁶ Barrow, *Network Broadcasting—The Report of the FCC Network Study Staff*, 22 Law & Contemp. Prob. 611, 620 (1957).

⁴⁷ Section 310(b) provides in full:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the

Although the transferee might be capable of serving the public interest, he might not be as capable as the transferor (present licensee) and, therefore, approval of the transfer could be adverse to the public interest. As a practical matter, consideration of a transfer application should roughly parallel considerations involved in comparative hearings. The Commission must compare the qualities and characteristics of both the transferor and transferee. The background, business expertise, broadcast experience, awareness of public needs, and strengths and weaknesses of both will deserve consideration. The past performance of the present licensee will have to be compared with the prospective performance of the potential licensee. Therefore, though the potential licensee is a sole applicant, the finding required of the Commission literally forces it to make comparative considerations. It would appear, then, that the transfer situation is something of a hybrid, involving elements of both the "sole applicant" and the "comparative" cases.

In a transfer case, it appears that the scope of the Commission's discretion is limited only by the scope and complexity of the transaction involved. When a case involves the transfer of a single station from one individual to another, the Commission's discretion may be rather limited. It must proceed only far enough to find a benefit to the public and to be assured that there are no significant adverse factors. When the transfer involves the acquisition of seventeen radio and television stations and a vast network empire by a powerful, international, corporate conglomerate, the scope of the FCC's discretion should be almost without limit. An accurate finding of where the public interest lies in such a situation cannot be made without extensive consideration.

IV. APPLICATION OF THE PUBLIC-INTEREST STANDARD

A discussion of the public-interest factors involved in consideration of the proposed ITT-ABC merger can be organized around subsections (2), (3), and (4) of section 1.591(a) of the FCC regulations.⁴⁸ Subsection (2) states the basic requirement that an applicant be qualified legally, financially, and technically.⁴⁹ The financial requirement is designed to insure that the applicant is financially sound and has the necessary resources to operate the station or stations applied for. The technical requirement simply demands that the applicant demonstrate his ability to operate and maintain the complex technical equipment associated with broadcasting. Neither should present any significant problems for a major corporate applicant.⁵⁰ ITT is not only financially sound, but is a giant in communications technology—a

proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

48 47 C.F.R. §§ 1.591(a)(2), (3), (4) (1966). This FCC rule derives from §§ 308(b) and 310(b) of the Federal Communications Act of 1934, 48 Stat. 1085, 1086, as amended, 47 U.S.C. §§ 308(b), 310(b) (1964).

49 47 C.F.R. § 1.591(a)(2) (1966).

50 If a major corporate applicant should have a great percentage of its monetary resources tied up in financially unsound enterprises, or if it should have adversely dis-

field closely related to broadcast technology. As will be pointed out later, the combination of ITT's expertise in communications and ABC's expertise in broadcasting could provide a substantial benefit to the public.

The "legal" requirement of regulation section 1.591(a)(2) deserves more thorough consideration, as it can be of great significance to a corporate applicant. In determining that an applicant is "legally" qualified, the FCC considers two basic factors, namely, citizenship and character.⁵¹ The citizenship requirement is stated in Section 310(a) of the Federal Communications Act, in terms of a command that:

The station license required shall not be granted to or held by—

- (1) Any alien or the representative of any alien;
-
- (4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives⁵²

Section 310(a) was drafted and included in the Communications Act of 1934 essentially because of congressional concern with ITT's world-wide businesses and holdings.⁵³ Nevertheless, even though some of its stock is held by aliens, ITT is not in violation of this section and, therefore, qualifies with respect to the citizenship requirement. Possible violation of the spirit of the alien law, however, raises some controversial public-interest considerations which will be discussed later in regard to "licensee responsibility" criteria.

The "character" requirement is rather unclear, and the FCC has not attempted to define it. It is clear, however, that the Commission should consider any facts and circumstances, within its knowledge, which indicate that there may be a question as to the integrity of a person or persons in control of a corporate applicant. The Commission is specifically concerned with pending cases involving felony or other moral turpitude,⁵⁴ membership in the Communist Party or other organizations which advocate the violent overthrow of the Government,⁵⁵ persistent violations of the antitrust laws,⁵⁶ and

proportionate debt obligations, financial requirements take on greater significance. If the corporate applicant is not technically oriented, this problem can be overcome by the fact that the applicant would, most likely, be acquiring the broadcast assets in toto, personnel included, thereby retaining the technical expertise of the present licensee. If for any reason this were not the case, the transferee applicant would have to demonstrate that it had made provisions for securing the necessary operating and management personnel.

⁵¹ Consideration of these factors derives from the language in § 308(b) of the Federal Communications Act stipulating that "applications . . . shall set forth . . . facts . . . as to the citizenship, character, and financial, technical and other qualifications of the applicant." 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 308(b) (1964).

⁵² 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(a) (1964).

⁵³ Opinion Approving Transfer, *supra* note 8, at 9 (Johnson, Comm'r, dissenting).

⁵⁴ See John Clarence Cook, *supra* note 35; Rockland Broadcasting Co., 36 F.C.C. 303, 315 (1964); Aladdin Radio & Television, Inc., 17 F.C.C. 989, 1017 (1953).

⁵⁵ See Pacifica Foundation, 36 F.C.C. 147, 151 (1964).

⁵⁶ See National Broadcasting Co. v. United States, *supra* note 33, at 222-24; Hale & Hale, *supra* note 42, at 590-91.

false statements or misrepresentations in the material submitted by the applicant.⁵⁷ Should any one or more of these factors exist with respect to a given corporate applicant, it is probable that the Commission will disqualify the applicant for reasons of undesirable character. The Commission cannot, however, give weight to the political, social, or economic views of the applicant unless they manifest themselves in activities which would be detrimental to the public interest.⁵⁸ Such manifestations and their significance to public-interest considerations will also be discussed in connection with licensee responsibility. There appears to be no question regarding the integrity of ITT or of those who control it. ITT does not have a history of persistent antitrust violations. For years ITT has been entrusted with national-defense projects of a most sensitive nature, and its leaders are recognized as men of extraordinary competence and integrity.⁵⁹

Section 1.591(a)(4) of the regulations is also important,⁶⁰ since it requires the FCC to carry its considerations beyond the minimum requirements of subsection (2) and, by implication, allows the scope of such considerations to vary depending on the facts and circumstances of each case.⁶¹ In general, the considerations involved can be separated in three ways: (1) diversification of opinion and program sources through the diversification of control of mass-communication media (the noneconomic corollary to the theory of promotion of competition); (2) licensee responsibility; and (3) promotion of competition (to be discussed in detail in a subsequent section of this comment).⁶²

A. *Diversification of Opinion and Program Sources*

Section 303(g) of the Federal Communications Act reflects Congress' belief that the "public interest, convenience, and necessity" require "the larger and more effective use" of broadcasting facilities.⁶³ This, and the

⁵⁷ See *FCC v. WOKO, Inc.*, 329 U.S. 223, 228-29 (1946); *Robinson v. FCC*, 334 F.2d 534, 536 (D.C. Cir. 1964).

⁵⁸ See *National Broadcasting Co. v. United States*, *supra* note 33, at 226.

⁵⁹ ITT developed and installed the President's "hot line." It also played a major role in the establishment of the DEW Line (Distant Early Warning Line), and in the development of allied-forces communications. See *Broadcasting*, Nov. 21, 1966, p. 42.

⁶⁰ Section 1.591(a)(3) of the FCC rules, requiring that the applicant not be in violation of any law or of any policy of the Commission, appears to be merely an extension of the legal requirement of subsection (2).

⁶¹ This subsection requires the Commission to grant a license if it "would otherwise serve the public interest, convenience, and necessity." (Emphasis added.) This essentially allows—in fact directs—the Commission to conduct further inquiry with respect to any and all issues raised by a given application and by other information in its possession, until it is assured that the public interest will be served.

⁶² See *Barrow*, *supra* note 46, at 614.

⁶³ Section 303(g) states:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(g) Study 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

48 Stat. 1082 (1934), 47 U.S.C. § 303(g) (1964).

philosophy behind the fundamental concept of free speech, has resulted in the FCC's establishment of the "diversification of opinion and program sources" as a public-interest criterion. The courts, also, agree that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"⁶⁴ The public is to be protected from dependence upon a monopolistic source, or narrow group of sources, for its day-to-day programming and, especially, for its news and public-affairs programming.⁶⁵ Thus, to increase diversification, the FCC generally permits entry into the broadcast industry by as many licensees as is consistent with technical limitations. This is done through its application of multiple-ownership rules, through its preference for an applicant not in control of other forms of mass-communication media, and through its promotion of the further development and growth of broadcast facilities, such as UHF.

1. *Multiple-Ownership Rules.* "Multiple ownership" refers to ownership of more than one broadcast facility of a given kind, *e.g.*, AM, FM, or television. The FCC has ruled that certain forms of multiple ownership may be contrary to the public interest, and has adopted express regulations limiting such ownership.⁶⁶ No license will be granted for a given type of broadcast station if the applicant owns, operates, or controls another such station which would overlap in coverage. Also, if any stockholder, officer, or director of the applicant is an officer or director of any other such type of broadcast station, and if this circumstance would result in a concentration of control adverse to the public interest, no license will be granted.⁶⁷ In any event, the Commission will always consider it adverse to the public interest for any licensee to have a direct or indirect interest in more than seven broadcast facilities of the same type.⁶⁸

The multiple-ownership rules are directly applicable to the acquisition of broadcast facilities by a corporate applicant. If a corporation, already in control of a station or stations, applies to the FCC to acquire an additional station or stations of the same kind, the Commission will have to determine whether overlap of coverage exists, whether the regulatory allowances will be exceeded, and, even if they will not be exceeded, whether the concentration produced by the inclusion of additional similar stations under the influence of one organization will be adverse to the public interest. The same

⁶⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁶⁵ See *McClatchy Broadcasting Co. v. FCC*, *supra* note 35, at 16 n.2, 17. Accord, *Pacifica Foundation*, *supra* note 55, at 151.

⁶⁶ 47 C.F.R. §§ 73.240, .35, .636 (1966).

⁶⁷ The term "control" is not limited to majority stock ownership, but includes any manner of actual working control. 47 C.F.R. §§ 73.240 n.1, .35 n.1, .636 n.1 (1966). In considering whether control of broadcast facilities is so concentrated as to be detrimental to the public interest, attention will be directed to the facts of each case with particular reference to such factors as the size and location of the areas served, the number of people served, and the extent of other competitive service in the area.

⁶⁸ With respect to television stations, while the maximum number that any one licensee can own is seven, only five of those can be VHF stations. 47 C.F.R. § 73.636 (a)(2) (1966). The multiple-ownership rules regarding FM and television stations are not applicable to noncommercial educational stations. 47 C.F.R. § 73.240(b) (1966) (FM); 47 C.F.R. § 73.636(b) (1966) (television).

principles would apply to a corporation not currently controlling any facilities, but desiring to acquire more than one of a given kind.

Multiple ownership of nonoverlapping stations does have a positive public-interest aspect. Multiple owners generally have greater broadcasting experience and larger financial resources, which will aid in the production of higher quality programming. Because of this, the Commission must frequently weigh the "experience" factor against the "diversification" factor. It is always difficult to establish trends in the FCC's emphasis of various public-interest criteria because of the ad hoc nature of their considerations. Realistically, it is only possible to state that certain factors have become public-interest criteria and have received varied weight depending on the facts and circumstances surrounding the application.⁶⁹ It seems, regarding the "experience" and "diversification" factors, that the need for competent programming, and the high percentage of single-station ownership that existed for many years, caused the FCC to give the "experience" factor equal or greater weight than the "diversification," or concentration-of-control, factor.⁷⁰ In recent years, however, the instances of multiple ownership have increased rapidly,⁷¹ and the quality of programming has generally improved.

It is submitted that the Commission's concern with the present high percentage of commonly owned stations, and with the possible adverse influences on the public interest of such pervasive multiple ownership, is being, and will continue to be, reflected in decisions which allow the "diversification" factor to outweigh the "experience" factor.⁷² Corporations desiring acquisition of more than one facility of a given kind are, therefore, liable to find the Commission's tests more demanding and their approval less frequent. Of course, if a corporate applicant can demonstrate that a transfer and/or assignment will probably result in a substantial increase in experience, or in resources capable of purchasing such experience, this will still count heavily in favor of application approval.

ABC, now owning and operating five VHF television, six AM, and six FM stations, is within the regulatory allowances prescribed by the multiple-ownership rules. ITT, as a corporate entity, neither owns nor controls any commercial broadcast facilities of any kind. An ITT-ABC merger, therefore, would appear not to violate the regulations. In the FCC's majority opinion originally granting approval of this transfer, no mention was made of the applicability of the multiple-ownership rules.⁷³ This is quite probably due to the fact that the FCC found no infringements. It would, of course, have been necessary for the Commission to go beyond a summary consideration of the apparent extent of multiple ownership mentioned above. In order to insure against any possible violation, the Commission would have had to

⁶⁹ See Huntley, *Growing Pains in Broadcast Regulation*, 14 Wash. & Lee L. Rev. 186, 193 (1957).

⁷⁰ Note the differing viewpoints regarding the relationship between the "experience" and "diversification" factors as expressed in the *McClatchy* opinion, *supra* note 35. See also *Tennessee Television, Inc. v. FCC*, 262 F.2d 28 (D.C. Cir. 1958).

⁷¹ See *Channel 2 Corp.*, 2 F.C.C.2d 453 (1966).

⁷² See FCC Policy on Comparative Hearings, *supra* note 42, at 394-95.

⁷³ Opinion Approving Transfer, *supra* note 8.

determine if any officer or director of ITT, or any one of the fifty largest stockholders of ITT "owns, operates, controls, or has any interest in" any broadcast facility not presently controlled by ABC.⁷⁴ Had the Commission found such an interest, and if it was sufficient to result in ITT-ABC having an interest in more stations than the regulations allow, the FCC would necessarily have found such a concentration adverse to the public interest.⁷⁵ Should the Commission have found such an interest which, in combination with the ABC holdings, did not exceed the allowances, it would still have been required to determine the relative size of the interested party's holdings in ITT and the nature and extent of his interests in broadcast facilities.⁷⁶ This would have allowed an assessment of the increase in concentration of control and, in turn, the adversity, if any, to the public interest. It is reasonable to suppose that a person's interests in ITT and in the broadcast facilities would have to have been significant in order to produce disapproval by the Commission.

2. *Preference for an Applicant Not Involved in Other Forms of Mass-Communication Media.* As between two or more applicants for a given license, the FCC tends to prefer the one who does not control other forms of mass-communication media, such as a newspaper business or other types of commercial broadcast facilities.⁷⁷ This is not a matter of express regulation, but rather one of policy designed to provide additional means of insuring that the dissemination of fact and opinion will remain diversified. The "preference" principle is generally employed only in comparative considerations, and is probably outside the allowable scope of FCC inquiry when a sole applicant desires an available broadcast station.⁷⁸ In a transfer situation, and especially one involving the transfer of several facilities, the FCC should be free to use this principle along with other public-interest criteria in order to determine whether to permit the transfer.

The Commission has never denied approval of an application solely because the applicant controlled other forms of mass-communication media. The fact of such ownership is only one consideration the Commission uses to determine who would better serve the public interest.⁷⁹ The FCC has stated that:

Aside from the specific question of common ownership of newspapers and radio stations, the Commission recognizes the serious

⁷⁴ 47 C.F.R. § 73.35(b) & nn.1 & 2 (1966); 47 C.F.R. § 73.240(a)(2) & nn.1 & 2 (1966); 47 C.F.R. § 73.636(a)(2) & nn.1 & 2 (1966).

⁷⁵ *Supra* note 74.

⁷⁶ *Ibid.*

⁷⁷ See, e.g., *McClatchy Broadcasting Co. v. FCC*, *supra* note 35; *Clarksburg Publishing Co. v. FCC*, *supra* note 40, at 517-19. See generally *Hale & Hale*, *supra* note 42, at 598-602.

⁷⁸ In other words, if a sole applicant meets the minimum requirements and would otherwise serve the public interest, the fact that he has substantial holdings in, or control of newspaper businesses or other types of mass-communication media will not be grounds for denial of the license sought. If that same applicant were opposed by an equally qualified applicant without such other communication interests, the fact that the former had such holdings or control would carry significant weight.

⁷⁹ *McClatchy Broadcasting Co. v. FCC*, *supra* note 35, at 18-19.

problems involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communication of fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communication, and to permit them to use all modern inventions and improvements in the art to insure good public service.⁸⁰

Although the courts have never prohibited the FCC from taking note of the fact that an applicant owns some other form of mass-communication media, or from weighing this fact along with others in considering the public interest, the courts did display an early concern with this policy and warned the FCC not to promulgate rules unduly discriminating against such applicants. In *Stahlman v. FCC*, the Court of Appeals for the District of Columbia considered a proposed FCC investigation into the policies the Commission should follow respecting newspaper-owning applicants for broadcast licenses. The court stated that the public-interest standard

should not be extended by implication to embrace a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it.⁸¹

As the number of available broadcast facilities has diminished, and concentration of operating facilities has increased, the courts have given stronger support to this FCC "preference" policy. In upholding the FCC's denial of a license to a major newspaper-owning applicant on the basis of "preference," the Court of Appeals for the District of Columbia, in *McClatchy Broadcasting Co. v. FCC*, held that:

[T]he Commission is entitled to consider diversification of control in connection with all other relevant facts and to attach such significance to it as its judgment dictates.

This does not mean that the owner of a newspaper is disqualified as a licensee. . . . But it does mean that the Commission is free to let diversification of control of communications facilities turn the balance⁸²

A finding by the Commission that the approval of a transfer would result in a concentration of control adverse to the public interest will not necessarily be fatal to the applicant. It will, however, be difficult to overcome, and the applicant will have to demonstrate that substantial public-

⁸⁰ FCC Notice, Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702, 703 (1944).

⁸¹ 126 F.2d 124, 127 (D.C. Cir. 1942).

⁸² 239 F.2d 15, 18 (D.C. Cir. 1956).

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interest benefits will be derived from the transfer in order to cause the balance to weigh favorably.⁸³

As with the multiple-ownership rules, an applicant's ownership of some other media for mass communication frequently means that the applicant is experienced in assessing public needs and in providing for those needs. The FCC will typically compare the experience of the transferor and transferee in this area.

It is difficult to determine whether the transfer of ABC's licenses to ITT would serve the public interest, since there are few specific, well-defined "preference" considerations. ITT is a major communications company, but this is not the same as saying that it is in control of mass-communication media.⁸⁴ There is some question, however, as to whether two of ITT's present interests might endow it with such control. ITT's acquisition of Howard W. Sams & Company, a publisher of magazines, manuals, and textbooks of a technical and professional nature, appears imminent. If this occurs, ITT will have acquired a medium of mass communication, although it is one presently limited in scope. Because of the specialized nature of the materials Sams publishes, contact with the public is not extensive. Moreover, the content of the material is not that with which the principle of diversification is primarily concerned, *i.e.*, news and public affairs. This ITT subsidiary would remain, however, a medium for mass communication, and the nature and extent of its operation would be susceptible to alteration and expansion by ITT.

In addition, there is Press Wireless, Inc., a recent acquisition of ITT. Although it is a telecommunications rather than a broadcast facility, there is the possibility that this operation could readily become the center of widespread news and public-affairs dissemination. This subsidiary currently operates as a news-wire service to sixty-five foreign countries, and has reception facilities in the United States. While ITT employees do not collect or report the news information disseminated via this service, they are responsible for its communication. If ITT acquires the broadcast equipment and expertise

⁸³ If the transferor licensee, himself, owns other mass-communication media, or if his programming is narrowly restricted in content due to other interests or a lack of perception of public needs, the Commission could determine that approval of a transfer to a sophisticated, newspaper-owning, corporate applicant would actually result in a further diversification of fact and opinion sources. As a practical matter, however, such an applicant has a heavy burden which will be directly proportional to the geographical concentration of the applicant's present interests and the facility or facilities it wishes to acquire. The number of newspapers and broadcast stations competing with him is a factor which would carry great weight.

⁸⁴ The difference between being in the communications industry as a "common carrier," as is ITT, and being in the business of mass communication through broadcasting, as is ABC, is illustrated by § 153(h) of the Federal Communications Act, which states that:

"Common carrier" . . . means any person engaged . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not . . . be deemed a common carrier.

48 Stat. 1066 (1934), 47 U.S.C. § 153(h) (1964). Another subsection of the act defines broadcasting as "the dissemination of radio communications *intended to be received by the public* . . ." (Emphasis added.) 48 Stat. 1066 (1934), 47 U.S.C. § 153(o) (1964).

of ABC, the function of Press Wireless could be adapted to serve not only as a means of transmitting news from the foreign correspondent to his newspaper or broadcast newsroom, but also as a center for news programming to be utilized by ABC and other persons or concerns engaged in the business of news dissemination. This possibility and the resultant increase in the concentration of news sources should be considered by the FCC as factors involving the public interest.

Although the common ownership of Howard W. Sams and Press Wireless is not in itself adverse to the public interest, when placed in combination with ABC's broadcast stations, radio and television networks, motion picture theaters, and record company, a potential harm to the public interest may exist. It would seem that even a slight increase, through an ITT-ABC merger, in the number of mass-communication media presently controlled by ABC, would be considered adverse to the public interest.

In applying the preference policy to the proposed ITT-ABC merger, the FCC must be careful not to limit itself to narrowly defined considerations applied in other less significant situations. Most importantly, an analysis of the transfer involved and its effect on the public interest must be conducted in terms of the spirit of the preference policy. The FCC's opinion of December 20, 1966, delivered in its original approval of the transfer applications, stated that:

[I]t does not appear fair or proper to forbid the merger of ABC and ITT because of rather vague fears of potential evils of size. . . . [A]pproval of this merger will not increase the concentration of broadcast holdings in any way. The structure of broadcasting will be the same after this merger as it was before it, except for the additional strength that will accrue to ABC as a network⁸⁵

Based on what has been discussed in this and the multiple-ownership sections, the Commission's conclusion, as far as it goes, is quite probably accurate. The Commission has, however, limited its discussion to the concentration of *broadcast holdings*, and has not spoken in terms of concentration of *mass-communication media* in general. Its statement with respect to broadcast holdings may indicate that the Commission did not make a more comprehensive consideration regarding concentration or, that it did, but found no relevant problems.

The fact that ITT is involved in the telecommunications industry rather than in the broadcast industry should not automatically preclude consideration of the possibility of ITT's telecommunications business being a catalyst for the creation of greater concentration of control of program sources when combined with ABC. The combination of telecommunication assets and expertise with a major broadcast network has potential for providing new means of disseminating fact and opinion not presently available to either ABC or ITT individually. Of course, many of the effects which would result from the combined activities of ITT and ABC are speculative. Others, however, are susceptible of fairly accurate analysis through the exercise of FCC exper-

⁸⁵ Opinion Approving Transfer, *supra* note 8, at 12.

tise. Any findings based on speculation are certainly not entitled to equal weight with more concrete determinations.

On the other hand, one commissioner, dissenting from the FCC's majority opinion of December 20, raised an interesting point which deserves brief discussion. In rejecting the majority's finding that the structure of the broadcast industry would be the same after the transfer, this commissioner stated that:

The structure will be changed substantially because the ABC operations, owned stations, radio network, and television network will be meshed into a corporate conglomerate which changes the diversity of control factor noticeably. Presently there is one TV network owned by a corporate conglomerate. This merger would make two. Bankers think like bankers.

And corporate conglomerates think like corporate conglomerates. One less factor of diversity would result from the merger.⁸⁶

The commissioner appears to be saying that since "conglomerates think like conglomerates," approval of the merger will effectively reduce the number of television networks controlled by differing entities from three to two: CBS will retain its identity, but RCA-NBC and ITT-ABC will think alike, and the result will be the same as if both were controlled by one organization. This is a rather original argument, but one with which it is hard to agree. In practice, there is probably very little difference in the way three powerful, public-conscious, competition-minded television networks "think." ABC thinks like NBC which thinks like CBS.⁸⁷ To include ABC within the ITT conglomerate would not alter this situation in a significant manner and, therefore, would not result in a lessening of diversity of control.

Thus, it is submitted that the FCC has apparently limited the scope of its inquiry regarding concentration of control to that which will result within the ambit of existing broadcast facilities. If the Commission has so limited itself, it has neglected the comprehensive nature of the "preference" principle, a significant guidepost which it established to aid itself in determining the effect of a transfer on the diversification of fact and opinion and, in turn, on the public interest.

3. *Encouragement of Further Development of Broadcasting Techniques.* The diversification policy of the FCC, and the stipulation in the Federal Communications Act that the FCC shall study new uses for broadcasting and provide for experimental uses of frequencies,⁸⁸ have caused the Commission to investigate and encourage technological development in the broadcast industry.⁸⁹ Such development is needed to provide more outlets for the dissemination of fact and opinion. The consequences of the ITT-

⁸⁶ Id. at 11 (Bartley, Comm'r, dissenting).

⁸⁷ ABC, CBS, and RCA-NBC are all concerned with a national market—the same public and the same sponsors—and are likely, therefore, to approach the art of network broadcasting in similar fashion. Sound business policy will not permit radical divergence of thought in this respect.

⁸⁸ 48 Stat. 1082 (1934), 47 U.S.C. § 303(g) (1964).

⁸⁹ See *Connecticut Comm. Against Pay TV v. FCC*, 301 F.2d 835 (D.C. Cir. 1962).

ABC merger on ITT's technological investment in broadcast communications advancement has been a very controversial factor. If any corporate application for transfer and acquisition of broadcast facilities indicated the possibility that approval would have an adverse effect on the expansion of broadcasting facilities, the FCC, acting in the public interest, would be compelled to examine such possibilities thoroughly.

At the present time, the United States has essentially reached the point where major expansion of VHF television broadcast facilities is technically impossible due, primarily, to overlap of signal. However, the development of UHF broadcasting has provided additional outlets, and will promote the diversification of control of broadcasting facilities. Such diversification will not result, however, until UHF becomes better able to compete with VHF. Such competition has proved particularly difficult when the two have been geographically contiguous or, in other words, integrated to serve the same area. The UHF station owners experience economic difficulty which results from the widespread ownership of solely VHF receiving sets and the consequent loss, by UHF to VHF stations, of network affiliation and remunerative commercial contracts. The FCC has attempted to improve the UHF competitive position through experimentation with concepts such as "deintermixture."⁹⁰ This concept calls for the nonintegration of UHF and VHF stations in a given area. Where reasonable, and generally in areas which are not considered major television markets, the FCC will limit television broadcast facilities to either VHF or UHF. The Commission has never been happy with the deintermixture concept, however,⁹¹ and has preferred, with few exceptions,⁹² to rely on the current requirement that all manufacturers of television sets include UHF reception equipment.⁹³ As more and more viewers obtain VHF-UHF receiving sets, the deintermixture concept can be abandoned.

Another means of expanding the number of broadcast facilities, though still in its infancy, is through the community-antenna television system (CATV). This system picks up signals from VHF and UHF transmitters and relays them via cables to home receiving sets. CATV is primarily used to bring metropolitan television to rural areas serviced only by local stations and, more importantly, to remote areas outside the range of any television transmitters. At the present time, the FCC does not consider this system to be competitive with the established television broadcast systems, because CATV operators merely relay regular television signals and do not originate any of their own programming. This system would seem to have the potential,

⁹⁰ See *Greylock Broadcasting Co. v. United States*, 231 F.2d 748 (D.C. Cir. 1956); *Coastal Bend Television Co. v. FCC*, 231 F.2d 498 (D.C. Cir. 1956).

⁹¹ See *Triangle Publications, Inc.*, 37 F.C.C. 307, 320-21 (1964); *Evansville Television, Inc.*, 36 F.C.C. 1387 (1964).

⁹² *Id.* at 1389.

⁹³ 76 Stat. 150 (1962), 47 U.S.C. § 303(s) (1964). The FCC rule adopted in connection with § 303(s) states, in part, that

all television broadcast receivers manufactured after April 30, 1964, and shipped in interstate commerce or imported from any foreign country into the United States, for sale or resale to the public, shall be capable of adequately receiving all channels allocated by the Commission to the television broadcast service.

47 C.F.R. § 15.65(a) (1966).

however, to produce its own programming, and, when it does, it will assume a competitive role.

In addition to UHF and CATV, there is development in the space-age realm of communications, illustrated by the communications satellite. Since this communications field is still in the experimental stages, it is difficult to determine exactly how it will affect the diversification question. It is obvious, however, that further development in UHF, CATV, and satellite communications will be required in order to further the diversification of opinion and program sources.

The Justice Department has cited ITT's great technological expertise and its substantial investment in communications technology as a major factor to be considered by the FCC when acting on the transfer application. The Department contends that merger approval may cause ITT to discontinue much of its investment in UHF and CATV. In support of its contention, the Department first cites the cessation of ITT's experimentation in CATV early in the merger talks with ABC. Second the Department suggests that ITT will not wish to invest further in the development of UHF, as this will increase entry of competitors by making available additional broadcast facilities, thereby harming ABC's competitive position. The Justice Department points out that, in general, ITT's investment in ABC will withdraw funds otherwise destined for technological advances.⁹⁴

ABC and ITT reply that the latter's current lack of interest in the CATV program is totally unrelated to the proposed merger, and even were it not, the inability of CATV to provide original programming should remove CATV as a diversification factor. They point out that one of ABC's major weaknesses, with respect to NBC and CBS, is its numerically inferior affiliation status, and rather than cause ITT to withdraw from UHF development, the merger will prompt ITT to further such development with the hope of acquiring new UHF stations as affiliates. ABC and ITT further contend that any withdrawal by ITT from participation in technological advancement could only be self-defeating, for in a highly competitive world of swift technological change, no one involved in technology can afford not to participate in its advancement.⁹⁵ The majority of FCC commissioners have agreed with these arguments.⁹⁶

Inherent in the realization of further diversification of opinion and program sources is the entry of new broadcasters into the industry.⁹⁷ The ability to enter the broadcast industry and the probability of further entry is effected by many of the previously mentioned factors, such as frequency availability, multiple ownership, and development of new broadcast facilities.

In addition to the problem of entry of individual station broadcasters,

⁹⁴ See Letter from Donald F. Turner, Assistant Attorney-General for the Antitrust Division of the Justice Department, to the FCC, Dec. 20, 1966; Petition for Reconsideration, *supra* note 26; Reply, *supra* note 28; Specification of Issues and Evidentiary Matter, *supra* note 28; Rebuttal, *supra* note 28.

⁹⁵ See Opposition of ABC and ITT to Reconsideration, *supra* note 27; Response to Specification, *supra* note 28.

⁹⁶ Opinion Approving Transfer, *supra* note 8.

⁹⁷ See Barrow, *Network Broadcasting—The Report of the FCC Network Study Staff*, 22 *Law & Contemp. Prob.* 611, 614 (1957).

there is the problem of introducing more network organizations. Because there are only three major television networks and four radio networks, the entry of another fully competitive network, especially a television network, would be very much in the public interest. If a merger, such as that between ITT and ABC, were to lessen the opportunity for such entry, it would clearly be adverse to the public interest, and the FCC would almost certainly be compelled to deny approval of the transfer applications involved. It is submitted, however, that before considering the effect of a merger on creation of another network, the Commission must consider the likelihood that another network would appear. If entry prior to the transfer approval does not appear feasible, can the Commission deny approval of transfer on the ground that it would probably lessen the opportunity for entry? The answer to that question might depend upon anticipated developments which would tend to make entry more feasible at some future time. Again, however, the Commission must base its determination on reasonable probabilities, and cannot deny approval of an application on the basis of speculation alone.

The present structure of the broadcast industry poses severe difficulties for anyone desiring to enter on a network level. The network concept was first put into practice by NBC in 1923, followed by CBS in 1926 and ABC in 1943. In the twenty-four years since ABC entered the industry, there have been no serious, full-scale network operations initiated by other organizations.⁹⁸ Furthermore, the opportunity for network entry is far more grim now than at any time in the past. ABC, CBS, and NBC currently have under affiliation contracts nearly 100 per cent of the television stations in the top 50-100 geographical markets in the country.⁹⁹ Networks rely largely on advertising fees which are received only because the network is able to gain the attention of millions of American viewers.¹⁰⁰ A new network, unable to secure affiliates in the major markets of the country, would find it difficult to remain in operation. If a corporate applicant seeking ownership of several stations could demonstrate the financial and technical ability to use these stations as the nucleus for a new network and, further, could demonstrate a reasonable plan for carrying this out, the acquisition would almost certainly

⁹⁸ Occasionally, other networks are organized, e.g., the Sports Network and the short-lived United Network. Generally they televise a particular type of program by buying local station time on a national level with money received from backers and, hopefully, sponsors. Substantial backing is required, and if the endeavor fails, a second chance is usually not forthcoming. These networks generally neither own nor operate stations of their own. With respect to network operations and the entry problem, see generally Hale & Hale, *Competition or Control II: Radio and Television Broadcasting*, 107 U. Pa. L. Rev. 585, 596-97, 607-12 (1959).

⁹⁹ Although most of the affiliates will not fill all of their broadcast time with programs of the network with which they are affiliated, a fourth network would probably find that prime television time is generally not available since it has been contracted to one of the three established television networks. In addition, the local stations are not too enthusiastic about relinquishing a major portion of their nonprime time, which they have probably reserved for programming of local interest.

¹⁰⁰ In 1965, NBC sold \$542 million of broadcasting time to sponsors. This was an 11% increase over the prior year and meant that for the eighteenth consecutive year NBC had attracted more national advertisers than any other network. RCA Ann. Rep. (1965).

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be approved. However, until greater numbers of comparable broadcasting facilities come into existence, the entry of a fourth television network, capable of competing with ABC, CBS, and NBC, does not appear to be feasible. The contentions of the Justice Department, ABC, and ITT, with respect to the proposed merger's effect on the entry of a fourth television network, will be dealt with in detail in the antitrust section of this comment.

B. *Licensee Responsibility*

Since there are only a limited number of broadcast facilities available for the large number of persons and concerns that wish to obtain a broadcast license, the FCC must employ a selective process in granting such licenses. It follows that the broadcast licensee does not become such as a matter of right, but as a matter of privilege. When the FCC grants a person or a concern the privilege of operating a broadcast station, upon which many will depend for entertainment, news, and public-affairs information, the licensee serves as a trustee for the benefit of the public.¹⁰¹ In requiring the licensee to accept the positive responsibility of serving the community,¹⁰² the FCC takes into consideration the applicant's awareness of community needs, the likelihood that he will serve those needs, and any nonbroadcast activities which influence the "objectivity" of his programming.¹⁰³

To determine the applicant's awareness of community needs, the FCC generally looks to factors such as local residency, civic participation in the community to be served, and any other circumstances or efforts of the applicant which may demonstrate the extent to which he is familiar with the community broadcast needs.¹⁰⁴ With respect to a large, diversified corporate applicant, and especially when that applicant is attempting to obtain licenses for several stations, "residency" and "civic participation" do not apply, and the FCC must rely on other indications of the requisite awareness.

¹⁰¹ *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966). See *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

¹⁰² While the "responsibility" requirement bears some similarity to the "character" requirement found in § 1.591(a)(2) of the FCC rules, it falls more appropriately within § 1.591(a)(4) as a separate and additional consideration to be made once the applicant has satisfied the minimum requirements. This is at least true where the FCC is concerned with a situation similar to that of the proposed ITT-ABC merger. Should the Commission, in a less complex situation, feel constrained to conduct its considerations within the context of the "minimum requirements," it could consider many of the licensee-responsibility factors by bringing them within the "character" requirement of § 1.591(a)(2).

¹⁰³ *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, *supra* note 101, at 500.

¹⁰⁴ It should be pointed out that while there may well be a difference between what the public needs and what the public wants, the FCC generally makes no distinction. There are some who would argue that the FCC should demand that the needs rather than simply the desires of the public be served. Their goal may be a worthy one, but the means would, almost necessarily, violate personal rights. In *Pacifica Foundation*, 36 F.C.C. 147, 149 (1964), the FCC stated that its function was not to pass on the merits of the programming, but, instead, was limited to assaying whether the licensee's programming judgments were reasonably related to the public interest. Of course, the Commission, through its selective processing of potential licensees, can indirectly promote programming better designed to provide for the public needs.

It is reasonable to assume that ABC, NBC, and CBS are too sophisticated, in a business sense, to neglect the task of assessing the public's programming needs or desires in areas where those broadcasters own and operate stations. If nothing else, the exigencies of competition would seem to require this constant awareness. It is possible that ITT's size and varied interests could cause it to neglect the local public service now provided by ABC, but such a possibility seems unlikely.¹⁰⁵ The combination of competition, ABC's continued control over the day-to-day broadcasting operations, ITT's business acumen, and the profit motive would seem to militate against such a result. With regard to network operations, the same principles apply. Because of the need to attract national advertising, the networks make use of, and rely heavily on, the various rating services in order to evaluate their programming in terms of what the public desires. The broadcasting industry is, after all, a commercial industry, and many of its decisions are based on this criterion.

Once the Commission is satisfied that an applicant has an awareness of the public's needs, it generally considers whether the applicant is likely to satisfy those needs. In making such a determination, the FCC has looked to the amount of direct personal participation that the licensee-owner will contribute to managing the operation of his station or stations, his range of business experience, his previous experience in the operation of broadcast facilities, and his proposed programming.¹⁰⁶ These factors will aid the Commission in assessing the probability that the applicant's programming will be in the public interest.

With respect to a transfer, and especially with respect to a multi-station transfer such as that involved in the proposed ITT-ABC merger, the "ownership-management" factor is applicable, though not in the same way as in a single-station licensing request by an individual. In the latter situation, the FCC essentially demands that the applicant demonstrate that he will be the party managing the operation of the station.¹⁰⁷ Such control is obviously not feasible when a large, diversified, corporate applicant acquires a broadcast organization of several stations. In such a case, the FCC, realistically, can do no more than require that the new corporate licensee maintain close supervision over the management and operation of the stations involved. It is not difficult to imagine that a widely diversified corporate licensee could lose touch with its broadcast facilities' daily operations, resulting in an adverse effect on needed local programming. To prevent this, the Commission should examine the proposed management structure of the new combination and the

¹⁰⁵ The 1965 Annual Report of RCA indicates that this huge corporate conglomerate is aware of community needs: the report states that RCA's television-station division has vigorously implemented a policy of community service tailored to locations where NBC owns stations.

¹⁰⁶ *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956); FCC Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395-96 (1965); *Hale & Hale*, *supra* note 98, at 589-90. In *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir. 1948), the court upheld the FCC's determination that the applicant, by indicating his plans to let CBS use as much of his broadcast time as the network pleased, had demonstrated that he was making no effort to service the community's needs.

¹⁰⁷ FCC Policy on Comparative Hearings, *supra* note 106, at 395-96.

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qualifications of those individuals who have been designated to head the broadcast subsidiary or division.

ITT has assured the Commission that ABC will remain substantially autonomous in that the present ABC executives and staff will continue to manage the station and network operations. To insure a close connection between ITT and ABC, there will be an interlocking directorate;¹⁰⁸ ITT management will make ultimate decisions only on overall policy. Thus, the FCC's desire for directness and competence of control should be satisfied.

The FCC considers the applicant's "range of business experience" in order to determine the existence of managerial expertise sufficient to insure efficient and effective operation of a station. This consideration is more significant with respect to a single person or small group of persons applying for a station license than with respect to a major corporate applicant, which would generally be presumed to have such expertise. A poor record of business success, of course, would weigh heavily against the applicant's chances of receiving a license grant. ITT's business success is a matter of common knowledge, and would present no problems in this area.

The Commission also considers the applicant's previous broadcasting experience as a factor in determining whether the public interest will be served. However, it is unlikely that a lack of experience would weigh heavily against the approval of the application. Like ITT, many corporate applicants will have had no broadcasting experience, yet will retain the station and/or network personnel or will demonstrate the intent to replace such personnel with others equally or better qualified. Such a plan of action will, most likely, not effect the public interest in either a positive or negative way.

If all public-interest considerations could be reduced to a common denominator or listed under an ultimate objective, that denominator or objective would almost certainly be "programming." In the long run, the public interest is most concerned with the material and information that is being broadcast. The Federal Communications Act, the FCC's regulations, and that agency's various public-interest criteria all converge on the ultimate goal of providing the public with diverse and competent programming. It is not surprising, then, that the Commission should consider directly the proposed programming of the applicant.¹⁰⁹

In regard to a sole applicant for an available facility, the consideration is generally limited to determining whether the applicant has "an earnest interest" in assessing community needs.¹¹⁰ In regard to an application for license renewal, the Commission has a duty to consider the past performance of an applicant in meeting the community's needs.¹¹¹ Past performance appears to be the best criterion for forecasting the quality of future perfor-

¹⁰⁸ Leonard Goldenson, the President and Chairman of the Board of ABC, will sit on ITT's Board of Directors and will be a member of that Board's Executive Committee. Two other ABC executives will also serve on ITT's Board. Harold Gencen, ITT's President and Chairman of the Board, and two other ITT executives will serve on ABC's Board of Directors. *Broadcasting*, Dec. 26, 1966, p. 21.

¹⁰⁹ FCC Policy on Comparative Hearings, *supra* note 106, at 397-98.

¹¹⁰ *Henry v. FCC*, 302 F.2d 191, 194 (D.C. Cir. 1962).

¹¹¹ *Pacifica Foundation*, *supra* note 104, at 149. See *Robinson v. FCC*, 334 F.2d 534, 536 (D.C. Cir. 1964); FCC Policy on Comparative Hearings, *supra* note 106, at 398.

mance. In regard to a comparative situation in which two or more parties who are presently operating broadcast facilities apply for a broadcast license, past performance would weigh positively or negatively only if it had been *unusually* good or bad.¹¹² As a corollary, the Commission indicates that only if there is a *substantial* and *material* difference between competing proposals for future programming will the Commission count the assessment of planned programming one way or the other.¹¹³ In a comparative consideration involving an applicant who is presently operating other broadcast facilities and a competing applicant who has not in the past operated broadcast facilities, it can be implied that the Commission will consider the latter's proposed programming and the former's past programming as well as any proposals the former may have for improvement. The station-owning applicant would, of course, be presenting his past record and his future capacity for producing good programming in a light most favorable to acceptance of his application.

The transfer situation, such as that involving the proposed ITT-ABC merger, requires special attention because of differences between it and situations allowing comparative consideration. With respect to applications for transfer, at least one party, namely the transferor, will always be presently involved in broadcasting. The station-owning transferor, obviously not competing with the proposed transferee, but, on the contrary, desirous of FCC acceptance of the acquiring corporation, will present its programming and its capacity to continue competent programming in the worst possible light. The transferor wishes to impress upon the Commission its need for the assistance which a merger would provide. In such a case, it appears necessary for the Commission to assess the past programming performance of the station-owning transferor. If there are deficiencies, it should determine the cause of such deficiencies, whether it be lack of sufficient monetary resources and/or poor broadcasting management, and then it should determine whether or not acquisition of such broadcast facilities by the proposed transferee would cure these problems and result in improved programming.¹¹⁴ Should the Commission find that the transferor has a good record, it must still determine whether the acquisition could further improve programming, since it is the transfer which must serve the public interest. However, there is no need for the Commission to require proof of substantial and material improvement. Because of the noncompetitive position of the applicants and the more restricted scope of examination in this "sole applicant" situation, the Commission should be satisfied with finding that the merger would have the *probable* effect of improving programming, thereby serving the public interest, convenience, and necessity.¹¹⁵

If a corporation, by acquiring a broadcast organization, could, through the application of financial resources not presently available to that organization, assist it in improving its programming, there would result a positive benefit to the public. This would especially be true if the broadcast organization was so financially weak that it could offer only programming that was

¹¹² Ibid.

¹¹³ Id. at 397.

¹¹⁴ See Paramount Television Prods, Inc., 17 F.C.C. 264, 315-16 (1953).

¹¹⁵ See Response to Specification, *supra* note 28, at 6.

somewhat inferior to that of competing broadcast companies. The public benefit might be negated or at least lessened, however, should it appear that other sources of financial assistance not involving merger, were available and feasible. The proposed ITT-ABC merger has raised significant questions, and, in turn, has produced heated controversy, with respect to such a consideration.

One of the major reasons propounded by ABC and ITT as to why the transfer of stations, and hence the merger, should be approved relates to ABC's need for new capital, allegedly necessary to enhance its competitive position with respect to NBC and CBS.¹¹⁶ The majority of FCC commissioners were convinced that ABC had proved its need for substantial financial assistance and, being assured by ITT that it had committed itself to a comprehensive expansion program for ABC, felt that the transfer would offer to the public the benefits of improved ABC programming and an improved capacity for competition with NBC and CBS. These benefits were the prime reasons for FCC approval of the merger.¹¹⁷

The Justice Department and the dissenting commissioners, while not doubting the veracity of ABC's financial statements, did not feel that they justified a merger.¹¹⁸ It is quite apparent that ABC is not in grave financial trouble, but rather that it is a profitable company with an excellent growth rate. It is also apparent, however, that NBC and CBS each outstrip ABC in terms of available resources, enabling them to modernize and expand their facilities and programming with less strain on the budget. ABC has been moderately successful in competing with NBC and CBS for ratings, affiliates, and related advertising contracts,¹¹⁹ but there is no doubt that such success has been expensive. These expenses account, to a large extent, for ABC's small share of the industry's net broadcasting profits.

ABC, because of its size and the nature of its business, is subject to great fluctuation in earnings and substantial dips in stock prices, which tend to place "a restraining influence on management's ability to incur important long-term commitments essential to program improvement and [tend] . . . to keep innovation, with its attendant high risks, at lower levels. . . ."¹²⁰ Although a lack of financial depth might certainly tend to keep innovation in programming at a lower level over a long-term period, ABC has been a substantial innovator in recent years.¹²¹ It has been suggested that ABC's weak competitive position has been the motivating force behind such innovation.¹²² This is probably correct, in that in order to attract more advertising, ABC

¹¹⁶ See Letter from Leonard H. Goldenson, President, ABC, to FCC, July 25, 1966. For ABC and ITT's arguments and contentions regarding these needs, see documents filed under FCC Docket No. 16828 referred to in notes 27 and 28 *supra*.

¹¹⁷ Opinion Approving Transfer, *supra* note 8, at 13.

¹¹⁸ See Petition for Reconsideration, *supra* note 26, at 8; Specification of Issues and Evidentiary Matter, *supra* note 28, at 19-23.

¹¹⁹ Letter From Leonard H. Goldenson, *supra* note 116, at 4; Response to Specification, *supra* note 28, at 32-33.

¹²⁰ Opinion Approving Transfer, *supra* note 8, at 40-41 (Johnson, Comm'r, dissenting).

¹²¹ *Id.* at 30-31 (Johnson, Comm'r, dissenting).

¹²² *Id.* at 31 (Johnson, Comm'r, dissenting).

essentially felt it necessary to invest in new and unique programming in an attempt to capture a larger viewing audience. It could be further argued that putting ABC on a financial par with NBC and with CBS will remove the force which is presently motivating ABC to innovate, thereby causing harm to the public interest. This, however, would seem to run contrary to logic and good business sense. Access to a greater amount of capital will not necessarily result in equal acceptance of ABC's programming by the public. In order to attract the advertising ABC needs, it will still have to produce programming which pleases the public. To accomplish this, continued innovation is required. The increased financing would, in fact, allow ABC to take greater risks in programming and to increase the proportion of unique programming. In this way the transfer may serve to put ABC on a competitive par with NBC and CBS, and in the meantime it should produce a benefit to the public in terms of better programming.

The Commission's dissenters also contend that the merger would not increase the number of ABC affiliates, which would be necessary to equalize ABC's competitive position.¹²³ Since a network cannot buy affiliates, the merger would not provide a direct solution to this deficiency. Indirectly, however, through the promotion of better programming, ABC could induce its competitors' affiliates to switch over.

The dissenters are on more solid ground in asking whether the merger is ABC's only solution to its problems.¹²⁴ If ABC could reasonably obtain the needed funds through further debt financing or from a public issuance of stock, and thereby carry out its complete color conversion, construction projects, and programming policies, the merger with ITT, at least in respect to these factors, would not weigh as heavily in the public interest. The FCC has given much consideration to the benefits which merger with ITT would bestow upon ABC in terms of financial assistance,¹²⁵ but it is not apparent that the Commission has given such consideration to the feasibility of ABC's obtaining the needed capital in other ways. Since this question is of such significance to the transfer application, it is imperative that the Commission fully investigate this matter.

C. *The "Adverse Influence" Factor*

One of the most important considerations to be made with respect to the proposed ITT-ABC merger is the effect of ITT's various nonbroadcast interests on ABC's news and public-affairs programming. The phrase "non-broadcast interests" can refer to any activities of an applicant which may effect the objectivity of his programming.¹²⁶ Obviously, no broadcaster is

¹²³ Id. at 32, 39-46 (Johnson, Comm'r, dissenting).

¹²⁴ Id. at 51-55 (Johnson, Comm'r, dissenting).

¹²⁵ Id. at 11.

¹²⁶ In its opinion approving the transfer, the Commission stated that it recognized the importance of preserving the freedom of a broadcast entity to render vital broadcast services undeterred and uninfluenced by private, nonbroadcast interests under common ownership with the broadcast enterprise. Surprisingly, the Commission then made the following statement:

Fully recognizing this as the sine qua non of a reliable and healthy broadcast service, we nevertheless find in our experience with numbers of other licensees

entirely objective, since broadcasting necessarily reflects the subjective attitudes of the various persons who disseminate information. Indeed, a large percentage of broadcasting time is spent editorializing, and it is the presentation of many opinions that makes this medium such a great benefactor of the public. The presence of substantial nonbroadcast interests within the applicant's portfolio of political, social, and economic activities, however, may encourage or coerce the applicant to compromise his programming principles.¹²⁷ The Commission has stated on many occasions that the licensee cannot delegate his responsibility for programming to others,¹²⁸ and it is apparent that the Commission does not want what effectively produces the same result, namely, programming subordinated to, or adversely influenced by, other interests.

This policy is reflected in many ways. For example, the Commission makes an effort to determine the source of funds which will be used to finance station operation. If someone other than the applicant is doing a major portion of the financing, that person will be considered as a principal in interest having a degree of control commensurate with his monetary involvement.¹²⁹ If officers, directors, or major stockholders of a corporate appli-

who encompass, along with broadcast interests, large and diversified non-broadcast activities no indication of abuse of their public trust through the intrusion of their non-broadcast concerns upon the objectivity of their news reporting or commentary and no demonstrated detriment in any other programming sectors.

Opinion Approving Transfer, *supra* note 8, at 14. On the basis of past FCC considerations in varying types of cases, this observation by the majority of commissioners would appear open to question. Assuming the accuracy of the observation, however, it seems that the FCC's policy of making case-by-case considerations would militate against a summary dismissal of such a potentially important issue on the sole basis of past experience. This is especially true in the ITT-ABC case, literally unparalleled by prior FCC cases, where the possibilities of adverse influence are so manifest. As early as 1931, the Radio Commission, predecessor of the FCC, stated that:

When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business

KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931). See Midland Broadcasting Co., 12 F.C.C. 611, 622-25 (1948), for a discussion of how a licensee's close association with a major industrial firm affects the objectivity of the licensee's programming. The FCC has frequently held, with respect to applicants representing religious or socio-politico-economic organizations, that a license can be granted if the Commission is assured that the licensee will give a "fair break" to the views and opinions of others. See, e.g., Noe v. FCC, 260 F.2d 739, 742 (D.C. Cir. 1958); WBNX Broadcasting Co., 12 F.C.C. 837, 841 (1948). For strong arguments on the applicability and seriousness of the possible influence of ITT's nonbroadcast interests on ABC's news and public-affairs programming, see Opinion Approving Transfer, *supra* note 8, at 11 (Bartley, Comm'r, dissenting); *id.* at 8-22 (Johnson, Comm'r, dissenting).

¹²⁷ It must, of course, be remembered that while the Commission may consider the political, social, and economic *activities* of the applicant, it cannot consider the unmanifested political, social, and economic *views* of the applicant. National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1942).

¹²⁸ See, e.g., Massachusetts Universalist Convention v. Hildreth & Rogers Co., *supra* note 101, at 500.

¹²⁹ See WLOX Broadcasting Co. v. FCC, 260 F.2d 712, 716 (1958).

cant are involved in outside interests of a kind that could result in the applicant having an unfair competitive advantage or having his programming influenced to the detriment of the public, the FCC would consider this adverse to the public interest.¹³⁰ In considering an applicant who represents an organization, such as a religious group, the Commission stresses that a prime consideration is whether or not this applicant will give a "fair break" to those who do not share its views.¹³¹

A corporate applicant seeking to acquire broadcast facilities will be subject to the FCC's investigation of its financial structure, its stock distribution, and its business and nonbusiness interests. A financially sound corporation, engaged in the manufacture of foodstuffs, machinery, or automobiles, for instance, would probably not have much difficulty in demonstrating that its prime business interest would not influence its broadcast subsidiary. On the other hand, a corporation depending on defense contracts for its revenue might have greater difficulty convincing the Commission of its "objectivity," since objective programming of news and documentaries regarding the Government's domestic and foreign policy could strain the licensee's relationship with the Government and adversely effect its competition for contracts. In the case of ITT, influential nonbroadcast interests are readily apparent. ITT's widely diversified structure, its major interests in the U.S. space and defense industries, and, most importantly, its reliance on foreign holdings for a majority of its revenue, are factors which could produce pressure on ITT influencing its objectivity. This presents a complex public-interest question for the FCC, and substantial consideration is required.

In the FCC opinion approving the transfer of ABC's stations, the dissenting commissioners pointed out that in many areas of the world, ITT deals directly with the government rather than with private industry.¹³² A situation is hypothesized in which such a government has been overthrown by a military coup: the commissioners then ask what ITT would do if the new government threatened to take control of its assets in that country should ABC broadcast a documentary discrediting the new leaders.¹³³ In reply, ITT has given assurances that it will employ every safeguard to protect the integrity of ABC's news against influence, intended or not, by ITT.¹³⁴ The dissenting commissioners state that they do not doubt the good faith of those top executives who offered the assurances, but argue that, despite good faith, the foreign interests of ITT must, realistically, pose a substantial threat to ABC's programming.¹³⁵ They also argue that, as ITT's present leadership changes, so might the inclination to protect the "objec-

¹³⁰ See *Sunbeam Television Corp. v. FCC*, 243 F.2d 26 (1957).

¹³¹ *Noe v. FCC*, supra note 126; *WBNX Broadcasting Co.*, supra note 126.

¹³² Opinion Approving Transfer, supra note 8, at 10-15 (Johnson, Comm'r, dissenting).

¹³³ *Id.* at 15 (Johnson, Comm'r, dissenting).

¹³⁴ See *Broadcasting*, Sept. 26, 1966, p. 48; Opinion Approving Transfer, supra note 8, at 16; Response to Specification, supra note 28, at 20 n.1.

¹³⁵ Opinion Approving Transfer, supra note 8, at 17 (Johnson, Comm'r, dissenting).

tivity" of the broadcasting segment of the business.¹³⁶ The arguments of these commissioners, which were echoed by the Justice Department on reconsideration of the applications,¹³⁷ must be considered carefully, for the possibility of influence must be admitted.

The majority of the Commission indicated that it felt it could rely on the assurances of ITT; that vague fears of adverse influence did not compel disapproval of the applications; and that the Commission would closely scrutinize the results of the merger in order to detect any undue influence.¹³⁸ The very nature of ITT, its great diversification, may militate against the possibilities feared by the dissenting commissioners and the Justice Department. The broadcast phase of ITT-ABC would be 13 per cent of the whole, leaving 87 per cent of the corporation concerned with nonbroadcast interests.¹³⁹ ITT is not dependent on any one, two, or three of its many activities. Realizing the significance of ABC, which would be one of its largest subsidiaries, ITT would not be likely to jeopardize the interests, or compromise the integrity, of that broadcast network for the sake of some other enterprise. The President and Chairman of the Board of ITT has stated that there is no foreign interest so important as to cause ITT to affect ABC's news. He further commented that ABC could not get away with deliberately slanting the news, since its competitors could easily expose it, thereby destroying ABC's reputation and the network itself.¹⁴⁰ These comments are based on logic and good business sense and go far toward overcoming the fears of adverse influence.

The adverse-influence factor has received much attention from all parties involved in the ITT-ABC merger case, and the Commission's finding that the transfer of stations could not be denied on the basis of vague fears is probably well founded. There is nothing in ITT's past to indicate that it is likely to allow its vast nonbroadcast interests to adversely effect the important role which ABC plays in the broadcast medium. If the Commission were to deny the transfer on the basis of these fears, it would be founding its decision on mere possibilities, long recognized as insufficient grounds for such denial.

V. ANTITRUST ASPECTS OF AN ITT-ABC MERGER

A. *Antitrust and Broadcasting*

There is uncontradicted judicial authority supporting the proposition that the field of broadcasting should be one of "free competition."¹⁴¹ The courts have implied this from the language of the Federal Communications Act of 1934, in which Congress provided the FCC with the power to exempt from the application of the antitrust laws the merger of communications

¹³⁶ Id. at 17-18 (Johnson, Comm'r, dissenting).

¹³⁷ Petition for Reconsideration, supra note 26, at 11.

¹³⁸ Opinion Approving Transfer, supra note 8, at 10.

¹³⁹ Id. at 2 (Bartley, Comm'r, dissenting).

¹⁴⁰ See Broadcasting, Nov. 21, 1966, p. 42. Protecting against unintended influence is more difficult, but can be accomplished through the exercise of reasonable care.

¹⁴¹ United States v. Radio Corp. of America, 358 U.S. 334 (1959).

companies, but not the merger of broadcast companies.¹⁴² However, "free competition," as applied to the broadcast industry, appears to have a special meaning. Insofar as the industry is regulated by the FCC, it is not "freely" competitive. The FCC may restrict entry into the industry by refusing to grant a license¹⁴³ or by regulating the expansion of a licensee through limitation of the area or zone to be served by his station.¹⁴⁴ The FCC may also deny a license on the ground that too much competition might adversely affect the public interest.¹⁴⁵ On the other hand, the industry is freely competitive in the sense that rates and finances are unregulated,¹⁴⁶ and in the sense that it remains subject to the antitrust laws,¹⁴⁷ the purpose of which is to protect competition.¹⁴⁸

Since the broadcast industry has been held subject to the antitrust laws, the FCC may not approve a broadcast-license transfer if it would result in a violation of the Clayton Act. Thus, even if the public benefit from the transfer would outweigh its anticompetitive harm, the FCC must reject the application.¹⁴⁹ However, the FCC's authority to disapprove the transfer of a broadcast license because it may lessen competition does not come directly from the Clayton Act,¹⁵⁰ but rather from its power under the Federal Communications Act to determine whether such a transfer is in the public interest; competition is an element of the FCC's public-interest standard.¹⁵¹

In certain regulated industries, Congress has allowed for the balancing of the positive aspects of a merger against those that are anticompetitive.¹⁵² However, in other regulated industries, including broadcasting, Congress

¹⁴² *Ibid.* See also 48 Stat. 1080, 1086 (1934), as amended, 47 U.S.C. §§ 221(a), 310(b) (1964); 57 Stat. 5 (1943), as amended, 47 U.S.C. § 222 (1964).

¹⁴³ 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307 (1964).

¹⁴⁴ 48 Stat. 1082 (1934), 47 U.S.C. § 303(h) (1964).

¹⁴⁵ To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service.

Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958).

¹⁴⁶ *Celler*, *Antitrust Problems in the Television Broadcasting Industry*, 22 *Law & Contemp. Prob.* 549, 551 (1957).

¹⁴⁷ *United States v. Radio Corp. of America*, *supra* note 141.

¹⁴⁸ See 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

¹⁴⁹ "[T]he Federal Communications Commission . . . is *obligated* to administer its regulatory activities in a manner harmonious with the purpose of [the antitrust] . . . laws." (Emphasis added.) *Celler*, *supra* note 146, at 551.

¹⁵⁰ The authority to enforce the Clayton Act in the broadcast industry is vested in the Federal Trade Commission and the Justice Department, 38 Stat. 734, 736 (1914), as amended, 15 U.S.C. §§ 21(a), 25 (1964).

¹⁵¹ *Celler*, *supra* note 146, at 551.

¹⁵² E.g., *Interstate Commerce Act*, 24 Stat. 380 (1887), as amended, 49 U.S.C. § 5(11) (1964) (railroads and pipe-line carriers):

[A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of anti-trust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the [ICC] . . .

See also *Federal Aviation Act*, 72 Stat. 770 (1958), 49 U.S.C. § 1384 (1964).

has not so provided,¹⁵³ and the courts have accordingly refused to enter the thicket of positive social and economic effects when considering questions of antitrust. This is exemplified by the Supreme Court's statement in *United States v. Philadelphia Nat'l Bank*:

We are clear . . . that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike, fully aware, we must assume, that some price might have to be paid.¹⁵⁴

Thus, the merger of ITT and ABC could be struck down on antitrust grounds alone, despite the fact that the merger may result in extensive public-interest benefits. The Justice Department has alleged that the merger will violate Section 7 of the Clayton Act¹⁵⁵—that the effect of the acquisition of ABC by ITT "may be substantially to lessen competition, or tend to create a monopoly" in the network broadcast industry. Before examining this contention, it is important to establish the line of commerce and the relevant markets in which network organizations are involved. In order to do this, it will first be necessary to describe the nature of the "network."

A broadcast network has been defined as a number of broadcast stations "in different localities, each related by contract with an operating organization, pursuant to the terms of which it undertakes to and does broadcast programs originating from the operating organization."¹⁵⁶ ABC is technically an operating organization, although it is commonly referred to, and will be referred to herein, as a network. The role of a network is to supply local stations with programs. These programs are provided under affiliation agreements between the network and local stations, called affiliates.¹⁵⁷ Besides arrangements with their affiliates, all three television network organizations (ABC, CBS, and NBC) own and operate a number of television and radio stations.¹⁵⁸ A network need not own and operate stations in order for it to serve its affiliates, but network-owned stations have become

¹⁵³ E.g., Bank Merger Act, 64 Stat. 873 (1950), 12 U.S.C. § 1828(c) (1964). See construction of this section in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-55 (1963).

¹⁵⁴ 374 U.S. 321, 371 (1963).

¹⁵⁵ Section 7 states in part:

[N]o corporation engaged in commerce . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

¹⁵⁶ 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

¹⁵⁷ Salant, Fisher, & Brooks, *The Functions and Practices of a Television Network*, 22 *Law & Contemp. Prob.* 584, 585 (1957).

¹⁵⁸ *Id.* at 586.

¹⁵⁹ *Ibid.*

an integral part of the present network organization, and, certainly from the experience of ABC, are financially profitable assets.¹⁵⁹

The customers of a network organization are not, however, local stations, but rather advertisers who buy network time and programs for the purpose of broadcasting commercial messages.¹⁶⁰ The networks, in turn, pay the local stations for time in which to broadcast these messages and programs.¹⁶¹ The networks' line of commerce may therefore be considered as advertising. Although a network has been described as a "national advertising medium,"¹⁶² the markets in which the network organizations compete may range from national to local, depending on the regions in which network customers desire to sell their products. The questions regarding line of commerce and markets have not arisen as issues in the ITT-ABC proceedings before the Commission. However, these issues might arise if the Justice Department should choose to bring an independent court action to enjoin the merger under the Clayton Act.¹⁶³

A further question arises as to the classification of the merger as horizontal, vertical, conglomerate, or product-extension. Turner has defined a horizontal merger as an "acquisition by a producer of the stock or assets of a firm producing an identical product or close substitute and selling it in the same geographical market";¹⁶⁴ a vertical merger as an "acquisition of the stock or assets of a firm that buys the product sold by the acquirer or sells a product bought by the acquirer";¹⁶⁵ and a conglomerate merger as one that is neither horizontal nor vertical.¹⁶⁶ The Supreme Court, however, in *FTC v. Procter & Gamble Co.*,¹⁶⁷ carved out from conglomerate mergers a fourth classification: the product-extension merger. This may be defined as an acquisition of a company whose products are "complementary to those of the acquiring company and may be produced with similar facilities, marketed through the same channels and in the same manner, and advertised by the same media . . ."¹⁶⁸

No acquisition, however, would appear to be purely a horizontal, vertical, conglomerate, or product-extension merger. The ITT-ABC merger provides a good example. Since ITT and ABC are not competitors,¹⁶⁹ their

¹⁵⁹ Profits from the ABC-owned stations were \$16.2 million in 1963, \$21.9 million in 1964, and \$25.5 million in 1965. These profits were used to offset losses in ABC's network operations during these three years. Letter from Leonard H. Goldenson, President, ABC, to FCC, July 25, 1966.

¹⁶⁰ Salant, Fisher & Brooks, *supra* note 156, at 586.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ The courts have historically considered the line of commerce and the markets involved in a merger before determining whether the effect of a merger may be substantially to lessen competition. See, e.g., *United States v. Philadelphia Nat'l Bank*, *supra* note 154; *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁶⁴ Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1315 (1965).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ 87 Sup. Ct. 1224 (1967).

¹⁶⁸ *Id.* at 1230.

¹⁶⁹ *Opinion Approving Transfer*, *supra* note 8, at 9.

merger would not on first impression appear to eliminate any horizontal competition. However, the entry of ITT into the industry may serve to eliminate potential competitors, which may influence actual horizontal competition. Thus, it would have horizontal *effects*. Furthermore, ITT does buy television and radio advertising, as ABC buys products sold by ITT.¹⁷⁰ Although the FCC did not find the ITT-ABC buyer-seller relationship sufficient to classify the merger as vertical,¹⁷¹ the merger will certainly have vertical *effects*. If the horizontal and vertical effects may be anticompetitive, then the merger would violate the Clayton Act, which prohibits mergers, the *effect* of which may be to lessen competition.

The fact that similar technologies are involved in both the communications and broadcast industries suggests a ground for classifying ITT's acquisition of ABC as a product-extension merger. Furthermore, as technologies develop, the communications and broadcast industries may use similar, if not identical, facilities. An example of this is the Telstar satellite system, which is used both for communications and broadcasting purposes.¹⁷² However, ABC's products, network time, and programs are not marketed "through the same channels and in the same manner" as ITT's products. Therefore, in a marketing sense, ITT's acquisition of ABC would not be a product-extension merger. To properly classify the acquisition, one would have to say that it falls between a conglomerate and product-extension merger and will have both horizontal and vertical effects.

The classification of a merger, however, will not affect the standard under which the merger's legality will be tested. In fact, the Supreme Court has held that "all mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."¹⁷³ The standard to which the Court is evidently referring is that of Section 7 of the Clayton Act: whether the effect of such acquisition may substantially lessen competition, or tend to create a monopoly.¹⁷⁴ The classification of a merger does, however, help in describing what the merger's effects on competition may be. It also indicates the problems of proof involved with each merger. These problems increase as mergers move from purely horizontal or vertical to conglomerate or product-extension, since the effects of the latter types of mergers are more difficult to ascertain.¹⁷⁵

B. *Elimination of ITT as a Potential Competitor*

The Justice Department contends that the proposed ITT-ABC merger may injure competition through "the elimination of ITT as a potential competitor in network broadcasting."¹⁷⁶ A potential competitor may be defined as a person or corporation that will probably enter the relevant line

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² See generally Doyle, *Communications Satellites: International Organization for Development and Control*, 55 *Calif. L. Rev.* 431 (1967).

¹⁷³ *FTC v. Procter & Gamble Co.*, *supra* note 167, at 1229-30.

¹⁷⁴ 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

¹⁷⁵ See Turner, *supra* note 164, at 1394.

¹⁷⁶ Petition for Reconsideration, *supra* note 26, at 6.

of commerce independent of a merger, thereby posing a threat of a new competitor. This possibility helps to maintain competition among the active members of the industry. The effect of such a threat has been stated as follows:

[P]otential competition . . . as a substitute for [actual competition] . . . may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. . . . Potential competition, insofar as the threat survives . . . may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets.¹⁷⁷

The apparent basis for this effect on actual competition is a fear that monopoly profits would encourage immediate entry by potential competitors.

In two recent cases, *United States v. El Paso Natural Gas Co.*¹⁷⁸ and *United States v. Penn-Olin Chem. Co.*,¹⁷⁹ the Supreme Court upheld the elimination of a potential competitor as valid grounds on which to establish a violation of Section 7 of the Clayton Act. *El Paso* involved the horizontal merger of two gas line transmission companies, Pacific Northwest and El Paso. Before the merger, both companies had competed for entry into the same market. Pacific Northwest, because of its smaller size, lost the market to El Paso. Since only one transmission company was required to service the market, entry was at least temporarily foreclosed to Pacific Northwest. Nevertheless, the Court held that Pacific Northwest still remained a potential competitor and that its elimination was grounds for finding a violation of section 7.

In *Penn-Olin*, two companies, Pennsalt and Olin-Mathieson, combined in a joint venture for the production of sodium chlorate. The Court found grounds for a possible section 7 violation on a theory that, if the two companies had not combined in a joint venture, one company might have entered the market while the other remained a significant potential competitor. Thus, the joint venture might have eliminated the stimulus that would have been provided by a potential competitor.¹⁸⁰

Several criteria must be considered in determining whether ITT poses a threat as a potential competitor to the network broadcast industry, and whether the effect of its elimination as a potential competitor may be substantially to lessen competition. The following points were suggested by Turner in his article on conglomerate mergers,¹⁸¹ and were among those used by the Court in *El Paso* and *Penn-Olin*.

First, reference is made to the nature of the industry of the acquired

¹⁷⁷ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964), quoting Wilcox, Competition and Monopoly in American Industry 7-8 (TNEC Monograph No. 21, 1940).

¹⁷⁸ 376 U.S. 651 (1964).

¹⁷⁹ 378 U.S. 158 (1964).

¹⁸⁰ Before testing for a § 7 violation in *Penn-Olin*, the Court held that § 7 of the Clayton Act was applicable to joint ventures. *Id.* at 170.

¹⁸¹ Turner, *supra* note 164, at 1362-86.

company.¹⁸² If the industry were an oligopoly, the influence of potential competitors on actual competition would be more significant than if the industry were highly fragmented. In an oligopolistic industry, actual competitors are theoretically more sensitive to the influence of potential competitors, because a new entrant might upset the present favorable industry structure. In a highly fragmented industry, the competitive effect of the many actual competitors on each other would outweigh the influence of potential competitors. There is no doubt that the network broadcast industry is an oligopoly, with only three major television networks (ABC, CBS, and NBC) and four major radio networks (ABC, CBS, NBC, and Mutual) in operation.¹⁸³ Therefore, if ITT is a potential competitor, it theoretically exerts significant influence on competition in the broadcast industry.

A second criterion is the number of potential competitors which pose a threat to the industry of the acquired company.¹⁸⁴ If there were a large number of potential competitors, the loss of only one through a merger might not alone be sufficient to allow a finding that the merger may result in a substantial lessening of competition. However, because of the nature of the broadcast industry—the limited number of transmission frequencies, the resources required to organize a network, the present ownership and affiliations of broadcast stations in major local markets, and the regulated entry into the broadcast industry—the formation of a new competitive network may be highly unlikely if not virtually impossible. The two major problems of a new network would be acquiring television affiliates in major local markets and obtaining the required initial capital. The licenses in most major local markets are now almost exclusively held by ABC, CBS, NBC, or their affiliates.¹⁸⁵ Even with the expansion of available VHF and UHF frequencies, the FCC cannot license many new stations in major markets because of the problem of overlap.¹⁸⁶ As for the required amount of capital, a study for a proposed "public television" network indicated a required capital investment of approximately \$621 million.¹⁸⁷ Thus, the number of potential competitors for the network broadcast industry appears severely limited by the present structure of the industry, present technology, and required capital. There are several major corporations which already own broadcast stations and which could financially qualify as potential competitors.¹⁸⁸ However, the fact that these corporations have not chosen to enter the network broadcast industry over the past several years might indicate a lack of interest, which, as will be seen, would disqualify them as potential competitors. It can be concluded, therefore, that the number of

¹⁸² *Id.* at 1363.

¹⁸³ There are also several smaller "networks" which either operate in localized areas of the country or produce only specialty programs, such as sports broadcasts.

¹⁸⁴ *United States v. Penn-Olin Chem. Co.*, *supra* note 179, at 176-77.

¹⁸⁵ *Celler*, *supra* note 146, at 550. See also Brief for Applicant, p. 54, *American Broadcast Cos.*, No. 16828, FCC, Jan. 26, 1967.

¹⁸⁶ *Ibid.*

¹⁸⁷ Carnegie Commission on Educational Television, *Public Television, A Program for Action 147* (1967).

¹⁸⁸ E.g., *Storer Broadcasting Company*; *Taft Broadcasting Company*; *General Electric Company*; *RKO-General, Inc.*; *Time, Inc.*; *The Hearst Corporation*.

potential competitors posing a threat to actual competition in the industry, if there are any, is small, and that the loss of one of them would significantly lessen any fear that potential competitors will enter the market.

The third criterion for determining whether a corporation poses a threat as a potential competitor is the corporation's resources.¹⁸⁹ A company that does not have sufficient technical, managerial, and financial resources to enter an industry or market and compete effectively upon entry could not realistically influence competition as a potential entrant. There is no question of ITT's capabilities and resources. Since ITT is a manufacturer of communications and broadcasting equipment and the operator of several communications systems, its work is closely related to the technical aspects of network broadcasting. ITT also owns a news-communications system, Press Wireless, Inc., which could act as the nucleus for a news-gathering facility. However, ITT does not appear to have had any experience in the programming field, nor does it have any personnel for gathering and reporting news. Therefore, whether it has the necessary resources to become by itself a viable independent competitor in the network broadcast industry poses a serious factual question.

A fourth criterion is the interest of the potential entrant to move into the industry or market of the acquired firm.¹⁹⁰ Without the requisite interest in entering this market, a potential entrant does not pose a threat to actual competition. However, neither *El Paso* nor *Penn-Olin* set forth the standards by which to measure interest, since in both cases it was evident that the companies involved had strong interests in entering the relevant markets in ways other than through a merger or joint venture. From ITT's interest in acquiring ABC, it could be concluded that ITT has a strong interest in entering the network broadcasting field. However, a distinction should be drawn between entering a market through an acquisition and entering a market as a new, independent competitor. The expense involved in the latter may often exceed the cost of the former. This appears especially true in the network broadcast industry with its limited supply of available broadcast stations and its high initial costs. Furthermore, an acquisition may be accomplished through the exchange of stock, as in the case with ITT-ABC, thus requiring little or no capital outlay on the part of the acquiring company. Therefore, it should not be concluded merely from ITT's interest in acquiring ABC that ITT would be interested in entering the industry as a new, independent competitor.

The potential-competitor theory has been most recently applied in *FTC v. Procter & Gamble Co.*¹⁹¹ In that case, involving Procter's acquisition of Clorox Bleach, the Supreme Court found that "the existence of Procter at the edge of the [bleach] industry exerted considerable influence on the market."¹⁹² ITT's technical and financial resources and its interest in the network broadcast field suggest that ITT may be "at the edge" of ABC's industry. However, as previously suggested, the paramount question is

¹⁸⁹ United States v. El Paso Gas Co., supra note 178, at 660.

¹⁹⁰ Ibid.

¹⁹¹ 87 Sup. Ct. 1224 (1967).

¹⁹² Id. at 1231.

whether the present networks so control major local broadcast stations through network licenses or those of affiliates as to make it impossible for a new, independent competitor to enter.

The present control of the broadcast industry by the major networks might account for the fact that ITT, although "at the edge" of the industry, has not previously entered independently.¹⁹³ This barrier to entry implies that there may be in fact no true "potential competitors" in the network broadcast industry. Furthermore, in order to base a section 7 violation on a potential-competitor theory, it is necessary to show not only that ITT is "at the edge" of the industry, but also that it exerts influence as a potential competitor. Since the effect of this influence is mostly psychological—*fear* of more competition—it is difficult to measure, and the problems of proof under this theory appear to be major. Thus, any antitrust theory based on the elimination of a potential competitor in the ITT-ABC case is open to serious question.

C. Possible Elimination of ITT as an Operator of CATV Systems

The Justice Department has suggested that the ITT-ABC merger may injure competition through "the possible elimination of ITT as an operator of numerous and extensive CATV systems which might eventually be capable of competing with conventional network broadcasting."¹⁹⁴ However, in order to prove an antitrust violation on such grounds, the Justice Department would have to show that it will eventually be possible, given the technology involved in CATV and the restrictive nature of FCC regulations, to develop CATV systems capable of competing with network broadcasting. If this were not possible, there would be no grounds for an action on a theory of the merger's adverse effects on CATV development.¹⁹⁵

The FCC regulations define a CATV system as follows:

The term "community antenna television system" ("CATV system") means any facility which receives and amplifies the signals transmitting programs broadcast by one or more television stations and redistributes such signals by wire or cable to subscribing members of the public, but such terms shall not include (i) any such facility which serves fewer than fifty subscribers, or (ii) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.¹⁹⁶

¹⁹³ FCC regulations restrict to two years the time period through which affiliation agreements may run, 47 C.F.R. § 73.133 (1966). ITT could solicit local stations as their affiliation agreements expire, but an affiliation change appears difficult since it involves technical and programming problems in addition to a change in contracts.

¹⁹⁴ Petition for Reconsideration, *supra* note 26.

¹⁹⁵ It is possible to argue that the merger will also lessen competition in the CATV industry besides the network broadcast industry. This lessening of competition might result from the combined resources of ABC and ITT. Such a lessening of competition, if substantial, would be a violation of the Clayton Act since § 7 refers to "any line of commerce" and not just the line of commerce of the acquired firm.

¹⁹⁶ 47 C.F.R. § 74.1001(e)(1) (1966).

A CATV system usually consists of a receiving antenna, which picks up television signals from distant transmitting antennae, and a microwave facility, which relays these signals through a cable system to local homes (subscribers) in the CATV community.¹⁹⁷ CATV subscribers do not have to install their own antennae, because subscribers' television receivers are directly connected to the cable system.¹⁹⁸ The microwave and cable systems minimize interference, thus improving the quality of the signals received by the CATV subscribers. CATV systems (antenna, microwave, and cable facilities) are owned and operated by persons licensed by the FCC,¹⁹⁹ who receive their income by charging subscribers a fee for the CATV service.

There are two major problems with prophesying that CATV systems might eventually be capable of competing with conventional network broadcasting. First, CATV systems do not presently originate their own programs; they merely transmit signals of other broadcasters. In order to compete with conventional network broadcasting, it would appear that CATV systems would have to begin originating programs and marketing these to advertisers who would otherwise buy from the major networks. Although this development is possible, it would require a major revision in the nature of CATV operations, and is too speculative a basis on which to rest an antitrust action.²⁰⁰

Second, the FCC appears to have relegated CATV operators to a position subordinate to conventional broadcasters. Under present FCC regulations, a CATV operator must, upon request, carry the signals of local-station licensees broadcasting in the area served by the CATV system.²⁰¹ This means that a CATV system must serve local stations, many of which are network affiliates.²⁰² The reason for this is clear. The CATV regulations were promulgated to protect local community broadcasters from excessive competition from distant broadcasters whose signals may be brought to the community via a CATV system. Since a CATV subscriber does not have to erect a rooftop antenna in order to receive signals from the CATV cable, he may be eliminated as a potential local-station viewer. With a reduced potential audience, local stations would be unable to compete for advertisers with stations carried over the CATV system.²⁰³ Thus, the FCC, by requiring CATV systems to carry the signals of local stations, places these stations on a more equal competitive basis with distant broadcasters for attracting audiences and, therefore, advertisers. In effect, then, CATV systems must, by carrying network programs, serve the same network with which the Justice Department suggests CATV systems may possibly compete.

¹⁹⁷ 47 C.F.R. §§ 74.1001, .1083(a) (1966).

¹⁹⁸ See Rules re Microwave-Served CATV, 48 F.C.C. 683, 688 (1965).

¹⁹⁹ See 47 C.F.R. §§ 74.1030, .1031, .1033 (1966).

²⁰⁰ In order to find a violation of § 7 of the Clayton Act, there must be a finding that an acquisition will *probably* substantially lessen competition; a mere *possibility* is not sufficient. Therefore, an antitrust action cannot be based on speculation. See 2 U.S. Code Cong. & Ad. News 4298 (1950).

²⁰¹ 47 C.F.R. § 74.1033(a) (1966).

²⁰² The CATV system, however, need carry local station signals only when it is possible to do this within the limits of the system's channel capacity. See *ibid*.

²⁰³ See Rules re Microwave-Served CATV, *supra* note 198, at 688-93.

The FCC, by requiring that CATV systems carry UHF signals in addition to normal frequency signals,²⁰⁴ has also recognized that the development of UHF broadcasting is more important than the development of CATV systems.²⁰⁵ If CATV systems did not carry UHF signals, there would be a loss of UHF audiences to CATV subscribers, since UHF reception, like other local signals, usually requires an outside antenna. Furthermore, the possible loss and splintering of audiences through CATV operations would discourage market entry of UHF broadcasters. This would certainly be contrary to Congress' intent to expand UHF operations, impliedly expressed in the 1962 amendment to the Federal Communications Act requiring all television receivers shipped in interstate commerce to be capable of receiving UHF signals.²⁰⁶

The FCC's attitude towards CATV is expressed in the FCC's statement that CATV "serves the public interest when it acts as a supplement rather than a substitute for off-the-air television service."²⁰⁷ A substantial change in the function of CATV would be required in order for it to become competitive with network broadcasting. The occurrence of such a change appears to be too speculative a factor on which to theorize that CATV systems could become competitive with network broadcasting.²⁰⁸ Thus, even if ITT were to withdraw from the development of CATV technology, this action should not have any anticompetitive effects within the purview of the Clayton Act.

D. *Adverse Effect of Merger on Technological Development*

The Justice Department has contended that the ITT-ABC merger may injure competition through the "possible elimination of ITT as an independent source of basic technological development which could lead to new systems of communication which might multiply channels of access

²⁰⁴ 47 C.F.R. §§ 74.1033(a)(1)-(3). Note that the regulation refers to "all commercial and non-commercial educational stations." (Emphasis added.) See also Second Report on CATV, 2 F.C.C.2d 725, 756-60 (1966).

²⁰⁵ See Notice of Inquiry and Proposed Rulemaking re All CATV Systems, 1 F.C.C.2d 453, 468-72 (1965).

²⁰⁶ 76 Stat. 150 (1962), 47 U.S.C. § 303(s) (1964).

²⁰⁷ Rules re Microwave-Served CATV, supra note 198, at 701. The FCC's attitude toward CATV is also embodied in its statement that "if there is a significant risk that CATV competition will destroy or seriously degrade the service offered by a television broadcaster, our statutory duties require us to seek means to prevent this result." *Id.* at 700.

²⁰⁸ See text accompanying note 200 supra. A further difficulty which may inhibit competition between CATV systems and conventional network broadcasting is the copyright problem which now faces CATV operators. Recently, a federal district court held that a community antenna TV system's transmission of copyrighted motion pictures, licensed for showing only on specified television stations from which the CATV system picked up signals, constituted infringing performance under § 1 of the Copyright Act. *United Artists Television Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966). This decision may force CATV operators either to discontinue transmitting certain programs or to pay copyright holders for the right to show their programs. Thus, CATV operators would no longer transmit wholly free television material, and it would become financially more difficult for them to compete with conventional network broadcasting.

to the public and provide the basis for new entrants into network broadcasting."²⁰⁹ The Department has also contended that, after acquiring ABC, ITT would have "an interest in retarding the pace of the development and application of technology which would lead to more competition in broadcasting."²¹⁰

It appears that there are two types of technological development in the network broadcasting field: that which contributes to the general improvement of the industry's product and that which makes the industry more accessible to potential competitors.²¹¹ It would be unreasonable to assume that the ITT-ABC merger might retard general technological development. A conglomerate would normally embark on an active research and development program in order to improve the competitive position of the acquired firm in its industry and market. The merger would provide increased resources with which to carry out such a program.²¹² Furthermore, the Sherman Act would provide protection against any attempt by ITT to restrict the licensing of newly developed radio and television apparatus to certain broadcasters through contracts that would result in a restraint of trade.²¹³

However, the Justice Department's major concern seems to be directed at the effect the proposed merger will have on the second type of technological development, that which "could . . . provide the basis for new entrants into network broadcasting."²¹⁴ In claiming that the merger will serve to retard such technological development, the Justice Department is, in effect, asserting the following: A company which is a technological innovator and which acquires a company involved in an area of rapid technological development will probably cease innovations which may assist entry into the industry. Such a conclusion, however, appears contrary to good business sense. If ITT does not develop techniques to increase competition in network broadcasting, one of its manufacturing competitors will. ITT is not the only innovator in the broadcast- and communications-equipment industry, nor does it appear reasonable to conclude that ITT will stand by, because of some notion that it must protect ABC, and watch its (ITT's) competitors profit from new equipment developments. Therefore, there appear no grounds for finding a probable lessening of competition in network broadcasting on a theory that the merger will retard technology. Again, a section 7 violation cannot be founded on mere speculation.²¹⁵

²⁰⁹ Petition for Reconsideration, *supra* note 26.

²¹⁰ Letter from Donald F. Turner, Assistant Attorney-General for the Antitrust Division of the Justice Department, to the FCC, Dec. 20, 1966.

²¹¹ An example of the first type is color television, of the second type CATV.

²¹² This would be especially true in the case of ABC and ITT, since ABC claims that it requires additional resources in order to become more competitive in color television.

²¹³ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1964). See also *United States v. Radio Corp. of America*, 1958 Trade Cas. ¶ 69164 (S.D.N.Y. 1958).

²¹⁴ Petition for Reconsideration, *supra* note 26.

²¹⁵ See note 200 *supra*.

E. Threat of Illegal Reciprocal Dealings

The Justice Department contends that ITT, as a conglomerate giant, could pressure its suppliers of technical equipment, components, and other materials, who are also significant radio and television advertisers, to use the ABC network in return for ITT's business.²¹⁶ This could foreclose a segment of the network advertising market from the reach of ABC's competitors by removing the advertising business of ITT's suppliers and thereby substantially lessening competition in network broadcasting.²¹⁷

"Reciprocity" has been defined as "the practice whereby a company, overtly or tacitly, agrees to conduct one or more aspects of its business so as to confer a benefit on the other party to the agreement; the consideration being the return promise in kind by the other party,"²¹⁸ or, more simply, the elementary business practice, "I will buy from you if you will buy from me."²¹⁹ The danger of a section 7 violation arises when, as the result of an acquisition, reciprocal dealings foreclose a segment of the market from competition.²²⁰ The "evil" in reciprocity is that it

transforms substantial buying power into a weapon for "denying competitors less favorably situated access to the market." It distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit.²²¹

In two recent cases, *United States v. General Dynamics Corp.*²²² and *FTC v. Consolidated Foods Corp.*,²²³ reciprocity was used as the grounds on which to invalidate a merger. The *General Dynamics* case illustrates that for reciprocity to have substantial adverse effects, the conglomerate's purchases from its suppliers must be so substantial that they would be willing to risk losing the business of the conglomerate's competitors by showing undue preference to the conglomerate in reciprocal trading.²²⁴ In their reciprocal purchases from the conglomerate, the suppliers might also be willing to accept noncompetitive price, quality, service, and reliability.²²⁵

Consolidated Foods and *General Dynamics* also illustrate that a minimal amount of probable foreclosure to competition in the market of the acquired firm will be sufficient to establish a merger as violating section 7. The

²¹⁶ Petition for Reconsideration, *supra* note 26, at 10.

²¹⁷ See generally Hausman, Reciprocal Dealing and the Antitrust Laws, 77 Harv. L. Rev. 873 (1964).

²¹⁸ *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 57 (S.D.N.Y. 1966).

²¹⁹ Krash, The Legality of Reciprocity Under Section 7 of the Clayton Act, 9 Antitrust Bull. 93 (1964).

²²⁰ See Hausman, *supra* note 217.

²²¹ *United States v. General Dynamics Corp.*, *supra* note 218, at 59.

²²² 258 F. Supp. 36 (S.D.N.Y. 1966).

²²³ 380 U.S. 592 (1965).

²²⁴ See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313 (1965).

²²⁵ 258 F. Supp. at 59.

Supreme Court in *Consolidated Foods* accepted a showing of a 3 per cent foreclosure²²⁶ and, in *General Dynamics*, the district court accepted 5 per cent,²²⁷ probably because both cases involved oligopolistic industries. In *General Dynamics*, the court expressly adopted the rule set forth in *United States v. Philadelphia Nat'l Bank* that in an already concentrated market, "the importance of preventing even *slight* increases in concentration and so preserving the possibility of eventual deconcentration is . . . great."²²⁸ (Emphasis added.) Since the network broadcast industry is also an oligopoly, it appears that it would only be necessary to find the probability that the ITT-ABC merger would foreclose a minimal amount of the network advertising market in order to find that the merger may substantially lessen competition. *Consolidated Foods* further points out that there need be no definite proof that ITT-ABC will engage in reciprocal dealings; there need only be found the probability that reciprocal buying will occur.²²⁹

Consolidated Foods and *General Dynamics* suggest certain questions that should be asked of the ITT-ABC merger: Does ITT purchase products from companies that are significant radio and television advertisers? Is ITT one of these companies' leading purchasers? Is ITT, therefore, in a position to use leverage to force or "encourage" reciprocal dealing? Is it probable that such reciprocal dealings will foreclose a significant section of the network advertising market, given an oligopoly, leading to a lessening of competition? Whether ITT has the power to influence its suppliers to purchase advertising from ABC, thus foreclosing a segment of the advertising market and lessening competition, will be greatly a function of the size of ITT's purchases from suppliers who are also significant radio and television advertisers. This is a question of fact which remains to be answered.

F. "Deep Pocket" Theory

A fifth antitrust theory is that ITT, as a large company with extensive technical and financial resources, will be able to provide a "deep pocket" from which ABC, a smaller company in an oligopolistic industry, may draw to the detriment of its competition.²³⁰ Although the Justice Department has not yet chosen to use this theory in the case, the ITT-ABC merger presents a fact situation almost identical to three cases in which the Federal Trade Commission found section 7 violations on a "deep pocket" theory.²³¹ These cases involved the acquisition of a company in an oligopolistic industry by a larger company with extensive resources.²³² In each of these cases, the

²²⁶ 380 U.S. at 595.

²²⁷ 258 F. Supp. at 50.

²²⁸ 374 U.S. 321, 365 n.42 (1963).

²²⁹ 380 U.S. at 600.

²³⁰ See generally Note, 7 B.C. Ind. & Com. L. Rev. 392 (1966).

²³¹ *FTC v. Procter & Gamble Co.*, 87 Sup. Ct. 1224 (1967); *Ekco Prods. Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965); *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

²³² Procter acquired Clorox, which alone controlled about 50% of the bleach market and, with five other firms, controlled about 80%. Ekco acquired the McClintock and Blackman companies, which prior to divestiture had controlled approximately 90%

acquired company controlled the most substantial share of the relevant market prior to the merger, so that the "deep pocket" of the acquiring company posed a definite danger of further increasing concentration. No other company in the line of commerce had access to resources similar to those of the acquired company after the merger. However, in the ITT-ABC case, the acquired company, ABC, does not control the most substantial share of the network advertising market, and there is already present in the line of commerce of the acquired company a major corporation (RCA) that provides a "deep pocket" for a competing network (NBC).

Despite these variations, the "deep pocket" theory could still be applied. Although ABC is not the leading competitor in network broadcasting, ITT may still provide ABC with resources sufficient to lead to a substantial lessening of competition in network broadcasting. The competitors who stand to be affected most seriously by the merger are CBS and Mutual, since they do not have a "deep pocket" such as RCA on which to draw. With its financial "deep pocket," ABC would be able to experiment with new programming techniques and could afford to absorb the loss of failures more readily than could CBS or Mutual.

Certainly the development of new programming techniques and broadcasting technology is not anticompetitive in itself, but the issue is whether such development may lead to a substantial lessening of competition in the network broadcast industry.²³³ In *FTC v. Procter & Gamble Co.*, the Supreme Court, in upholding the FTC's application of the "deep pocket" theory, based its decision, at least in part, on the ground that Procter & Gamble's advertising resources would give Clorox, the acquired firm, a considerable advantage over its competitors.²³⁴ The Court did not require any direct proof that Procter & Gamble would use its advertising power to lessen competition in the bleach industry, but appeared to base its decision merely on the grounds that Procter & Gamble had the resources and opportunity to do so.²³⁵ The question under the "deep pocket" theory should, therefore, be whether ITT can provide ABC with the financial and technical resources necessary to give ABC an advantage over its competitors that would substantially lessen competition in the broadcast industry.

The FCC did consider the size and resources of ITT and concluded that the merger would strengthen ABC's competitive effectiveness, but would not enable ABC to dominate the network broadcast industry.²³⁶ The Commission thus used the "deep pocket" theory to draw a conclusion opposite from what would be the usual consequence: ITT, as a large conglomerate, will be able to provide a deep pocket of resources from which ABC may draw to the *enhancement* of competition.²³⁷ The FCC appears to have based

of the market in commercial meat-handling equipment. Reynolds acquired Arrow Brands, Inc., which competed with eight firms in converting aluminum foil for florist wrappings. Arrow controlled approximately 33% of the market.

²³³ This is an instance where public-interest benefits clash with anticompetitive harms.

²³⁴ 87 Sup. Ct. 1224, 1230 (1967).

²³⁵ *Ibid.*

²³⁶ Opinion Approving Transfer, *supra* note 8.

²³⁷ See Note, *supra* note 230, at 395.

this conclusion on the theory that the merger would place ABC in a better position to compete with the larger network broadcasters. The Commission's conclusion that the merger would not enable ABC to dominate the network broadcast industry appears correct, since the RCA-NBC combination will offer considerable competition to its ITT-ABC counterpart.²³⁸ However, the Commission apparently failed to examine the merger's effect on CBS and the Mutual Network, each of whose resources after the merger would be smaller than ABC's.

It also appears that the Commission failed to examine the merger's effect upon potential competitors, for whom the prospect of having to face a giant in the place of ABC might militate against entry. In *Procter & Gamble*, the Supreme Court found that "the substitution of the powerful acquiring firm [Procter] for the smaller . . . firm [Clorox] may substantially reduce the competitive structure of the industry by raising entry barriers"²³⁹ The Court found that Procter could divert a large portion of its advertising budget to meet the short-term threat of a new entrant into the bleach industry, and, "thus, a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox."²⁴⁰ Similarly, ITT could use its resources to meet the threat of a new network entrant and thus frighten off any potential competitors. However, this argument may not be applicable if the network broadcast industry has no actual potential entrants. Furthermore, if the industry does have any potential entrants, they would most likely be of such a size that they would not fear the "giant" ITT. All these considerations, however, raise issues that the FCC apparently failed to examine.

G. Further Antitrust Considerations

The ITT-ABC merger raises at least two more questions with anti-trust implications. First, would the merger allow ITT such a "vast amount of preferential publicity" that it may tend to lessen competition in the electronics and communications industries,²⁴¹ and, second, would an adverse finding in the ITT-ABC case require a divestiture action against RCA and NBC?

The first question involves a reverse "deep pocket" effect, with the acquiring firm gaining not financial resources, but publicity and advertising power from the "deep pocket" of the acquired. The advertising could come in the form of ABC broadcast station announcements reminding the public that it is receiving a service of ITT, in the form of ABC news stories publicizing ITT and its accomplishments, and in the form of inclusion of ITT

²³⁸ However, the ITT-ABC combination will exceed the RCA-NBC combination in both gross sales and assets. In 1965, ITT's gross sales were \$1,783 million and ABC's, \$476 million. RCA's sales (including those of NBC) were \$2,042 million. In 1965, ITT's assets amounted to \$2,022 million, alone exceeding RCA's assets of \$1,269 million. *Fortune*, July 15, 1966, p. 232; *Opinion Approving Transfer*, supra note 8, at 2 (Johnson, Comm'r, dissenting).

²³⁹ 87 Sup. Ct. at 1230.

²⁴⁰ *Ibid.*

²⁴¹ See *Philco Corp. v. FCC*, 293 F.2d 864, 866 (D.C. Cir. 1961).

in the call letters of ABC stations. More directly, ITT could be given preference in sponsoring major ABC network productions. Thus, ITT's competitive position in the electronics and communications markets could be significantly enhanced.²⁴²

In this regard, one complaint has already been made against RCA for its preferential use of NBC's publicity facilities to improve the competitive position of RCA's products.²⁴³ The FCC has the power under the public-interest standard of the Federal Communications Act to refuse to renew a broadcast license if it finds that the applicant has participated in anticompetitive practices.²⁴⁴ When RCA applied for renewal of NBC's Philadelphia television license, the Philco Corporation intervened as an interested party and charged that "NBC affords RCA 'a vast amount of preferential publicity' not available to Philco or other competitors of RCA and so is 'directly instrumental in expanding the adverse effects of RCA's [monopoly] practices.'"²⁴⁵ The FCC, after hearing oral arguments, dismissed Philco's protest and renewed NBC's Philadelphia license without an evidentiary hearing. On appeal, the Court of Appeals for the District of Columbia held that Philco's "protest alleges present misconduct with the particularity the statute requires [for an evidentiary hearing]" and remanded the case to the FCC.²⁴⁶ On remand, RCA was eventually denied renewal of its Philadelphia license on grounds other than preferential publicity.²⁴⁷ Although the FCC failed to make a definitive statement regarding the use of the publicity facilities of a broadcast station by a parent company, the court of appeals' holding implies that preferential-publicity practices which have anticompetitive effects would serve as sufficient grounds to disqualify a license applicant under the FCC's public-interest standard.

ITT will certainly have the same opportunity to use ABC as RCA has to use NBC. Although the RCA case was based on existing evidence of *actual* antitrust practices, the FCC would now have to base a decision to refuse license transfers to ITT on the grounds that ITT would *probably* use the facilities of ABC for monopolistic purposes. However, after the Supreme Court's decision in *Procter & Gamble*, the mere *opportunity* of ITT to use ABC's advertising facilities to gain more control in the market may be sufficient grounds to find a violation of the Clayton Act, if that added control may result in a substantial lessening of competition in the electronics and communications industry.

The second question involves the FCC's belief that to disallow the ABC license transfers would require a divestiture action against RCA and NBC. The FCC has itself stated that it "could not in good conscience for-

²⁴² The Justice Department has also suggested that "the availability of advertising time on its own network to an enterprise like ITT, increasingly involved in consumer goods and services, may give it an advantage over its competitors in those fields by enabling it to take advantage of unsold advertising time." Letter from Donald F. Turner, *supra* note 210.

²⁴³ *Philco Corp. v. FCC*, *supra* note 241, at 866.

²⁴⁴ *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950).

²⁴⁵ *Philco Corp. v. FCC*, *supra* note 241, at 866.

²⁴⁶ *Id.* at 867.

²⁴⁷ *National Broadcasting Co.*, 37 F.C.C. 427 (1964).

bid ABC to merge with ITT without instituting proceedings to separate NBC from RCA, both which are bigger than the respective principals in this case."²⁴⁸ The means by which the FCC would separate NBC from RCA are not clear. One of the simplest ways would be to refuse to renew RCA's licenses as they expire, or to renew them on the condition that RCA divest itself of NBC.²⁴⁹ However, in order to assure that its action benefited the public interest, the FCC would, in effect, have to supervise the establishment of a new company that would provide at least the same level of broadcast service as RCA-NBC now furnishes. It is questionable whether the FCC has the ability to supervise the divestiture and creation of companies of this scale, since it is not usually involved in such cases.²⁵⁰

It may be argued that the public interest would best be served not by ordering RCA to divest itself of NBC, but by maintaining the status quo in the network industry. This would at least sustain the present level of broadcasting. However, if the FCC were to find that the RCA-NBC combination did violate the antitrust laws, it would have to order divestiture even if the result would be a major diminution of service to the public. This is because the antitrust laws take precedence over the other public-interest standards of the FCC.²⁵¹ That an FCC action against RCA-NBC could result in a major diminution of service appears unfortunate and suggests that the Federal Communications Act should be amended to allow the antitrust considerations of station licensing to be balanced against other public-interest considerations.

H. *Antitrust Aspects: Conclusion*

The foregoing has illustrated many grounds upon which the ITT-ABC merger may violate the Clayton Act. Some theories for attack appear more reasonable than others, but all commonly lack a delineated test by which to determine the legality of the conglomerate or product-extension merger. For example, although these theories require a showing of a *probability*, not *possibility*, of a lessening of competition,²⁵² there is no judicial guideline as to when the merger complainant has carried his burden of proof so as to establish the transition from possibility to probability. The fact that the grounds on which to attack a conglomerate merger may at times appear unclear and tenuous may be attributed to the fact that there have been few cases decided by the Supreme Court involving conglomerate, and now product-extension, mergers under section 7.²⁵³ The courts and agencies have had little experience with this type of merger, as opposed to horizontal and

²⁴⁸ Opinion Approving Transfer, *supra* note 8, at 18.

²⁴⁹ The FCC took similar action on a lesser scale when it refused to renew RCA's Philadelphia television license. National Broadcasting Co., *supra* note 247.

²⁵⁰ The supervision of divestiture actions would be more within the expertise of the Federal Trade Commission and the courts. However, the courts have been hesitant to order divestiture when the "cure" appeared worse than the "disease." E.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

²⁵¹ *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

²⁵² See note 200 *supra*.

²⁵³ *Turner*, *supra* note 224, at 1314.

vertical mergers, where the tests of legality appear to have crystallized.²⁵⁴

However, the problem of determining whether a conglomerate or product-extension merger will result in a section 7 violation may also be attributed to the complex theories on which these mergers have been attacked. There are frequently problems of proof involved in each theory.²⁵⁵ How does the complainant actually establish that the acquiring company was a potential competitor? How is the number of other potential competitors determined? What type of technological developments may a merger retard; does a court or an agency have the expertise to answer this question? How does the court measure a potential entrant's "fear" of a "giant"? How deep does a "deep pocket" have to be before there may be a substantial lessening of competition?

The very theories which the Justice Department has proposed for testing the legality of the ITT-ABC merger may in fact be frustrating the enforcement of the Clayton Act. These theories are based on subtle economic arguments, which may not be what Congress intended. As Professor Donovan has pointed out:

The issue under the statute [Clayton Act] is not whether competition in the economic sense may be hurt, but whether *competition in the legislative sense* is likely to be injured. The alarm over economic concentration expressed by the framers of the legislation necessitates drawing the conclusion that Congress considered concentration and oligopoly as the antithesis of competition.²⁵⁶

These remarks by Professor Donovan suggest that the test of the legality of the ITT-ABC merger under the Clayton Act should be simply whether the merger will tend to perpetuate the concentration and present oligopoly of the network broadcast industry. The mere fact that ITT is a giant and that approval of the ITT-ABC merger may clear the way for the acquisition of CBS by another giant should be sufficient to establish this.

In *United States v. Von's Grocery Co.*, the Supreme Court held that the terms of section 7 "look not merely to the actual present effect of a merger but instead to its effect upon future competition."²⁵⁷ With the presence of two giants, and possibly three, in the commercial network broadcast industry, it would be unreasonable to expect that there would be entry of any further competition. An industry structure would result similar to that of the American automobile industry, if there is not already a similarity. Would it be reasonable to expect that someone would enter that industry and attempt to compete with General Motors, Ford, Chrysler, and American Motors?

When the Supreme Court spoke of concentration in the *Von's* case, it stated that, "where concentration is gaining momentum in a market, we

²⁵⁴ Ibid.

²⁵⁵ The problems of proof involved in the theories discussed above should serve as illustrations.

²⁵⁶ Donovan, *The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws—Part II*, 40 So. Cal. L. Rev. 51 (1967).

²⁵⁷ 384 U.S. 270, 277 (1966).

must be alert to carry out Congress' intent to protect competition against the ever-increasing concentration through mergers."²⁵⁸ The ITT-ABC merger may not increase the concentration in the network broadcast industry, although it may shift the market shares among the existing competitors. The merger will, however, tend to perpetuate this concentration. When Congress amended section 7 in 1950, it expressed concern over "the extent to which the American economy has become concentrated and centralized in the hands of a few giant corporations."²⁵⁹ It is therefore doubtful that Congress intended to make a distinction between mergers that increase concentration and those that perpetuate it.

The FCC has itself recognized that the ITT-ABC merger will increase concentration "within the broad framework of the general economy."²⁶⁰ The merger will place ITT within the top twenty industrials in the country in sales. The FCC appears to assume that the fact that other industries will be larger than the new ITT saves the merger from the antitrust laws.²⁶¹ This assumption is clearly wrong. Congress was not only concerned with the relative size of major corporations to each other, but also with their size relative to the general economy. It is very likely that the ITT-ABC merger is exactly the type of increasing bigness that Congress intended to stop under the Clayton Act.

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²⁵⁸ *Ibid.*

²⁵⁹ 2 U.S. Code Cong. & Ad. News 4295 (1950). See also Donovan, *supra* note 256.

²⁶⁰ Opinion Approving Transfer, *supra* note 8, at 12.

²⁶¹ *Ibid.*