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COMPETITION AND REGULATION IN BROADCASTING IN THE LIGHT OF CONVERGENCE

-- United States --

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COMPETITION AND REGULATION IN BROADCASTING IN THE LIGHT OF CONVERGENCE

United States

Agencies Responsible for Regulation of Broadcasting

1. The Federal Communications Commission ("FCC") is an independent United States government agency, directly responsible to Congress. The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 U.S. states, the District of Columbia, and U.S. possessions. The mission of this independent government agency is to encourage competition in all communications markets and to protect the public interest. In response to direction from the Congress, the FCC develops and implements policy concerning interstate and international communications by radio, television, wire, satellite, and cable.

2. The FCC is directed by five Commissioners appointed by the President and confirmed by the Senate for 5-year terms, except when filling an unexpired term. The President designates one of the Commissioners to serve as Chairperson. Only three Commissioners may be members of the same political party. The Commission staff is organized by function. There are six operating Bureaus. The Bureaus are: Mass Media, Cable Services, Common Carrier, Compliance and Information, Wireless Telecommunications, and International. These Bureaus are responsible for developing and implementing regulatory programs, processing applications for licenses or other filings, analyzing complaints, conducting investigations, and taking part in FCC hearings.

3. The Cable Services Bureau was established in 1993 to administer the "Cable Television Consumer Protection and Competition Act of 1992." The Bureau enforces regulations designed to ensure that cable rates are reasonable under the law. It is also responsible for regulations concerning "must carry," retransmission consent, customer services, technical standards, home wiring, consumer electronics, equipment compatibility, indecency, leased access and program access provisions. The Bureau also analyzes trends and developments in the industry to assess the effectiveness of the cable regulations.

4. The Mass Media Bureau regulates AM, FM, television broadcast stations, wireless cable and related facilities. It assigns frequencies and call letters to stations, and designates operating power and sign-on and sign-off times. It also assigns stations in each service within the allocated frequency bands, with specific locations, frequencies, and powers. It regulates existing stations, inspecting to see that stations are operating in accordance with rules and technical provisions of their authorizations. At renewal time, the station's records are reviewed.

5. Broadcast stations are licensed for eight years. Licensees are obligated to comply with statutes, rules and policies relating to program content such as identifying sponsors and broadcasting information only on state-operated lotteries in their own or adjacent states. The Bureau assures that licensees make available equal opportunities for use of broadcast facilities by political candidates or opposing political candidates, station identification, and identification of recorded programs or program segments. Licensees who have violated FCC statutes, rules or policies are subject to sanctions, including loss of license and fines.

6. The National Telecommunications and Information Administration ("NTIA") is an executive branch agency within the Department of Commerce. NTIA and the FCC together determine what parts of the electromagnetic spectrum should be reserved to the federal government, and NTIA manages the spectrum assigned to the government. NTIA also has principal responsibility for determining administration policy on telecommunications issues, and regularly submits comments on FCC rule-making proceedings.

Enforcement of Competition Rules

7. The telecommunications industry affords a good example of how U.S. government agencies can minimize the potential conflicts inherent in overlapping enforcement jurisdiction over competition matters. The FCC has concurrent authority with DOJ to enforce Section 7 of the Clayton Act with respect to telecommunications carriers that it regulates. As a practical matter, the FCC and the antitrust agencies are usually able to avoid inconsistent decisions on telecommunications mergers because the agencies informally share views in advance of a decision by either (though the antitrust agencies are limited in their ability to share confidential information they receive in an investigation). These discussions have been facilitated by special exemptions from FCC rules requiring public disclosure of *ex parte* communications, thus permitting discussions between the FCC and the antitrust agencies on mergers being reviewed by both. The agencies have had such discussions more commonly in recent years, in response to some past instances of inconsistent competition analyses. In addition, the FCC does not need to rely on its concurrent Clayton Act Section 7 jurisdiction to review mergers, but can also rely on its more general "public interest" authority to review transfers of licenses.

Cable Television

8. The FCC and local authorities[1] regulate the cable television industry pursuant to the Cable Communications Act of 1984 ("1984 Act"), the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), as amended and supplemented by provisions of the Telecommunications Act of 1996 ("1996 Act"). The 1984 Act was enacted to establish a national policy concerning cable communications, in lieu of *ad hoc* regulations that inhibited the growth and development of cable, and to promote competition, minimize unnecessary regulation, and allocate regulatory responsibility among federal and local authorities.

9. Finding that the 1984 Act allowed cable operators to increase cable rates substantially, Congress enacted the 1992 Act to curb the market power of cable operators, to protect the economic viability of broadcast television threatened by the growth of cable, and to promote competition to cable television by new technologies for the distribution of video programming. A key element of the 1992 Act was to entitle multichannel video programming distributors to obtain access at reasonable, non-discriminatory rates to programming owned by vertically integrated cable operators. The 1992 Act also prohibited price discrimination in the subscriber rates charged by the many cable operators not subject to "effective competition" in their franchise areas. The relevant federal antitrust law, the Robinson-Patman Act, was determined not to apply to this situation because it applies only to price discrimination in the sale of goods, whereas the delivery of cable programming is a service.

10. The 1996 Act effected a number of changes to the regulatory scheme by eliminating or reducing ownership restrictions and regulations, among other things. These changes were aimed at opening up the opportunity for new programmers and new distributors to get into the business of producing cable television programming and delivering it to consumers. The Act's most important change was to permit

telephone companies to provide services similar to those provided by cable operators, subject to FCC approval. In addition, the Act eliminates as of 1999 rate regulation of programming carried by cable with the exception of broadcast TV programming. Further, the 1996 Act limited the price discrimination provision of the 1992 Act by expanding the parameters of "effective competition" noted above in the 1992 Act.

11. Besides its responsibilities under the three aforementioned statutes, the FCC also has authority to approve or deny transfers of cable television relay service licenses, and thus has indirect power over mergers and acquisitions. Its decision on a proposed transfer is based on a determination of whether it will serve the public interest, convenience and necessity. In making this determination, the FCC must make findings related to the pertinent antitrust policies and weigh them along with other important public interest considerations.[2] An aspect of the interface between the FCC and federal antitrust authorities is illustrated by its decision in *Telecommunications, Inc. & Liberty Media Corp.*[3] There the applicants argued to the FCC that the license transfers should be approved since the DOJ had reviewed the acquisition and approved it subject to certain conditions of a negotiated consent decree. But the FCC decided not to abbreviate its review in deference to the DOJ review on the ground that the FCC must make an independent review that requires consideration of factors other than antitrust in its public interest analysis. To facilitate its review, the FCC subsequently amended its regulations to allow for consultations with FTC and DOJ staff on antitrust policies.

12. The FCC's regulation of the cable industry does not provide immunity from antitrust scrutiny.[4] Participants in the cable industry remain subject generally to federal antitrust laws. The 1992 Cable Act specifically provides that nothing in the statute shall be construed to alter in any manner the applicability of federal or state antitrust laws. (The 1996 Act has a similar provision.) Both the DOJ and the FTC have successfully challenged proposed acquisitions that raised antitrust concerns of increased horizontal concentration or vertical foreclosure. The FTC also entered into consent agreements with cable TV companies settling charges of illegal agreements not to compete and to allocate markets.

Antitrust Agencies and the FCC Generally

13. While the U.S. antitrust agencies generally prefer structural to behavioral remedies in resolving horizontal competitive overlaps, both antitrust agencies and regulators have made use of behavioral restrictions as well, particularly in dealing with competitive problems arising from vertical relationships. Both the DOJ and the FCC largely employed “behavioral” conditions in dealing with joint ventures between foreign dominant telecommunications carriers and U.S. carriers, but based their conditions for approval in some cases on the basis of market-opening reforms ordered by European antitrust and telecommunications authorities. It is not possible to generalize about the breadth of market definitions used by antitrust agencies and regulators, as those decisions are case specific, but in many instances regulatory agencies have tended to adopt market definitions that differ from what a purely antitrust perspective would dictate, but afford greater regulatory convenience for purposes of broad rulemaking. However, the FCC’s market definitions are increasingly reflecting application of antitrust concepts, as in its local competition safeguards decisions.

14. The relationship between the FCC and the antitrust agencies has operated without any formal designation of “lead” agencies or development of common guidelines on competition issues, although the FCC in its decisions often refers to the merger guidelines jointly developed by the DOJ and the FTC for accepted principles on such issues as market definition and measurement of concentration. In addition, an FCC decision on a merger is appealable to the federal courts, and enforcement actions by the antitrust

agencies likewise are reviewable by the federal courts of appeal and ultimately the U.S. Supreme Court, providing a safeguard against development of inconsistent antitrust precedent.

15. In various FCC rulemaking proceedings, DOJ and FTC staff have filed comments advising the agency to adopt antitrust analysis or to rely on antitrust enforcement against monopolization rather than continuing bans or limitations on acquisitions or multiple ownership, particularly in broadcasting. For example, the FTC staff urged case by case analysis of acquisitions of radio stations using antitrust principles rather than a blanket ban of multiple ownership. Both agencies also recommended use of the 1992 merger guidelines principles to FCC decisions on TV station ownership. Yet another example is the FCC's former Financial Interest and Syndication ("Fin-Syn") Rule. FTC staff argued that instances of alleged monopolization could be addressed through conventional application of the antitrust laws rather than the rule's existing prohibitions or limitations on network ownership of syndication rights.

Licensing Issues in Television Broadcasting

16. The "statutory scheme of all broadcast regulation follows the public trustee concept, by which broadcast station owners, as trustees of the public interest, receive limited term licenses in exchange for a promise to serve that interest."[5] Although entertainment programming is generally left to the market, content is important for licensing issues related to non-entertainment programming. An advisory committee established in March 1997 by the White House is expected to issue a report in the near future recommending whether current public interest requirements should be expanded (possibilities would include free air time for political candidates or more public service announcements) in exchange for free spectrum allocated for digital TV.

17. All TV broadcasters must have an FCC license, which specifies the frequency, transmitter location, signal strength, technical standards, and types of service covered. Spectrum allocation is handled by the FCC and NTIA. An April 1997 FCC order temporarily gives existing broadcasters an additional channel for digital TV at no cost, with a requirement to be on the air by a certain date in the larger markets and rules for the eventual return of analog channel licenses to the FCC.

18. Qualification provisions for a broadcast license include rules relating to citizenship and alien ownership, character, financial condition, mutuality of ownership and management, and technical issues (to avoid interference and to maximize operating efficiency). Equal employment opportunity issues are also relevant, and applicants who have previously had a license revoked because of an antitrust violation are ineligible. The standard for granting a license is the public interest. Licenses are for an eight year term, and under the 1996 Act, there is a high level of renewal expectancy. In addition to competition issues, the public interest licensing review considers diversification, including minority ownership, concerns.

19. The 1996 Act altered the broadcast ownership rules, introducing limits based on an aggregated national audience calculation -- a single entity may not hold interests in television stations reaching more than 35 percent of the national audience, although this figure may be exceeded if minorities or small businesses control the additional stations. The 1996 Act also relaxed limits on local ownership of radio stations and repealed all national radio ownership limits. The 1996 Act directs the FCC to reexamine the duopoly rules, which generally prohibit ownership of more than one station in the same market. The 1996 Act also provides for a waiver of the rule against radio-TV combinations in the top fifty markets; the FCC has long favored such waivers where "failed" TV stations have not broadcast for over four months or are bankrupt.

20. The 1996 Act eliminated the statutory prohibition of TV-cable cross-ownership, leaving this area to the FCC's discretion. The Act instructs the FCC to review cross-ownership biannually and eliminate rules which are no longer in the public interest.

21. The FCC regulates broadcasting content in accordance with the Fairness Doctrine, the Personal Attack rule, and political broadcasting rules (equal opportunity for political candidates). The FCC may also impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting, consistent with First Amendment protections for free speech. The 1996 Act mandates that future TV sets have the ability to block certain programs, and authorizes the FCC to establish a rating system if the industry fails to develop one on its own (in March 1998 the FCC announced that it found the industry's video programming rating system acceptable and adopted technical requirements to enable blocking of video programming with the "V-Chip"). Provisions in the 1996 Act relating to indecent and obscene material have been the subject of litigation, and the Supreme Court struck down parts of these provisions on free speech grounds in a decision covering Internet communications. The FCC also enforces the Children's Television Act of 1990, which sets limits on advertizing aimed at children and requires the FCC to consider in licensing decisions whether a broadcaster has served children's educational and informational needs. The FCC has promulgated a number of regulations designed to implement this Act.

22. In the past, the FCC enforced a number of regulations related to the TV networks, mandating access for non-network programming during prime time (Prime Time Access Rule) and limiting domestic syndication of programs or network financial interests in programs not solely produced by the network ("Fin-Syn" rule). These rules were intended to curb network power over independent programmers, but were repealed in the last few years because they unnecessarily limited broadcaster and consumer choices.

23. The 1996 Act, in sec. 335, requires the FCC to promulgate regulations on various service obligations placed on direct broadcast satellite licensees, covering political broadcast rules and educational and informational carriage obligations, at reasonable terms, prices, and conditions.

Enforcement of Competition Law

Federal Trade Commission cases in the cable television sector

24. The Federal Trade Commission has successfully challenged cable television mergers based on concerns of increased horizontal concentration or vertical foreclosure. The agency also has entered into consent agreements with cable television companies settling charges of illegal horizontal agreements not to compete and to allocate markets. The following summarizes a few illustrative cases.

Cablevision Systems Corp, Docket No. C-3804 (1998)

25. Cablevision System Corporation's 1998 acquisition of certain cable operations of Tele-Communications, Inc. ("TCI") raised concerns of substantially reducing competition in two highly-concentrated local markets in New Jersey in which these companies were the only providers of cable television services. The relevant product market in which the Commission analyzed the effects of the acquisition is the distribution of multi-channel video programming by cable television. The Commission so defined the product market after determining that multi-channel video programming by technologies other than cable television (e.g., direct broadcast satellite or multichannel multipoint distribution systems) should not be included. The investigation found that those technologies did not have a significant price-constraining effect on prices charged by cable operators to subscribers. Most cable television subscribers are not likely to switch to another technology in response to a small price increase by cable television

providers. In addition, cable television operator do not typically change their prices in response to prices charged by other providers of multi-channel programming. Based on its analysis of competitive effects, the Commission alleged that the acquisition would substantially reduce competition in two local markets which are highly concentrated and in which only Cablevision and TCI provide cable television services. The complaint alleged that if the acquisition proceeded as proposed, Cablevision would be the sole provider in these markets, thereby significantly increasing the likelihood that the price of cable television services would rise, and/or the quality of service would decline. Entry into the distribution of multi-channel video programming allegedly was unlikely to be timely or effective to prevent anticompetitive effects in the relevant geographic markets.

26. The Commission's concerns were resolved by a consent order by which the parties agreed to divest certain cable operations in the two localities. To ensure that the buyer of TCI's systems in the two localities is able to purchase programming, the order required Cablevision to waive all existing exclusive rights, other than one local all-news network, and not to obtain any new exclusive rights to distribute programming in the two local markets.

Time Warner Inc., Docket No. C-3709 (1997)

27. The acquisition of Turner Broadcasting Systems ("Turner") by Time Warner raised, among other issues, the issue of vertical foreclosure in the relevant markets of cable television programming and cable television distribution.[6] The case involved three media giants: Time Warner, Turner, and Tele-Communications, Inc. (TCI.) Time Warner indirectly owns HBO and Cinemax, two cable networks devoted to premium movies, and also is the second largest cable television distributor in the U.S. Turner is a leading cable programmer and owned several "marquee" cable networks [7]: Cable News Network (CNN), Turner Network Television, and TBS SuperStation. TCI is the nation's largest cable distributor and a leading provider of cable programming.

28. In September 1995, Time Warner and Turner entered into an agreement for Time Warner to acquire the approximately 80% of the outstanding shares in Turner that it did not already own. TCI and its affiliates had an approximately 24% existing interest in Turner. By trading their interest in Turner for an interest in Time Warner, TCI would acquire approximately a 7.5% interest Time Warner, with the potential, under the terms of the agreement, to increase that interest to more than 17%. Also Time Warner entered into two-long term mandatory carriage agreements referred to as programming service agreements (PSAs) that would have required TCI to carry certain Turner networks until 2015, at a price set at the lower of 85% of the industry average price or the lowest price given to any other program distributor.

29. One of the most important aspects of the transaction was the degree to which it increased vertical integration in the cable television market. Prior to the acquisition, Time Warner and TCI, the two largest cable systems in the U.S., had some relatively significant cable programming holdings mentioned above. But this acquisition dramatically increased those holdings, by putting several significant cable networks under Time Warner's control. Thus, the complaint alleged that post-acquisition, Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing cable distribution systems, by denying programming, or providing programming only at discriminatory (i.e., disadvantageous) prices. For example, post-merger Time Warner would have had the incentive and ability to foreclose alternative cable networks from its distribution systems in order to give its own programming a competitive advantage.

30. First, it is important to recognize the degree of vertical integration involved. Post-merger Time Warner alone would control more than 40% of the programming assets. Time Warner and TCI, the nation's two largest cable systems, would control access to about 44% of all cable subscribers. Under U.S.

case law, these levels of concentration can be problematic. Second, there was reason to believe that this acquisition would increase the incentives to engage in this foreclosure without remedial action. For example, the launch of a new channel that could achieve marquee status would be much more difficult without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on cable systems that cover 40-60% of subscribers. Thus, the Commission recognized that one effect of the merger might be to heighten the already formidable entry barriers into programming by further aligning the incentives of both Time Warner and TCI to deprive entrants of sufficient distribution outlets to achieve the necessary economies of scale.

31. The order imposed three provisions to address the impact of the acquisition on entry barriers. First, the order prohibits Time Warner from bundling the most desirable "marquee" channels with less desirable programming to compel local cable systems to accept unwanted channels and further limit available channel capacity to non-Time Warner programmers. Second, the order contains conduct and reporting requirements to provide a mechanism for the Commission to learn of situations where Time Warner might discriminate in handling carriage requests from programming rivals. Finally, the order eliminates the PSAs which would have reduced the ability and incentives of TCI to handle programming from Time Warner's rivals. Eliminating the twenty-year PSAs and restricting the duration of future contracts between TCI and Time Warner restored TCI's opportunities and incentives to evaluate and carry non-Time Warner programming.

Summit Communications Group, Inc., Docket No. C-3630 (1995)

32. In 1995, the Commission settled charges that Summit Communications Group, Inc. and seven Wometco Cable TV companies illegally agreed to allocate between themselves the customers that they would serve in a county in Georgia where their local cable systems overlap. According to the FTC complaint the illegal market allocation began in March 1990 when Summit and Wometco reached an understanding concerning which of the two companies would serve apartment complexes and/or housing complexes in one county in Georgia, where both companies had franchise authority to provide cable television services. The initial agreement was that Wometco would do so and Summit would assign Wometco the contract rights it had with the apartment complex to provide the service. The companies later reached additional agreements on how they would handle future situations where both companies were attempting to serve the same apartment complexes or housing subdivisions.

33. The FTC charged that the agreements between Summit and Wometco not to compete restrained competition for cable television services in the dual franchise area and deprived cable television subscribers there of access to competitively determined prices and quality of cable television services. The consent order prohibits Summit and Wometco from in any way agreeing or attempting to agree to allocate or divide markets, customers, contracts or territories in any of the 14 counties in Georgia where they offer cable service. It also prohibits such agreements to refrain from overbuilding any portion of any cable television system in these counties. The settlement also contains various reporting requirements that would assist the FTC in monitoring compliance with the consent order.

Department of Justice Cases

34. The Department of Justice and the FTC have both been active in competition enforcement in the broadcast media area, though the two agencies have focused on somewhat different categories of cases. For the Department of Justice, two of the most important categories of enforcement related to broadcasting have been review of mergers of radio stations in the wake of the 1996 Telecommunications

Act, and prevention of arrangements that could limit the development of competition between landline cable television systems and alternative delivery systems, particularly Direct Broadcast Satellite.

Radio Mergers

35. In the 1996 Telecommunications Act, Congress required that the Federal Communications Commission's rules be changed to raise significantly the limits on how many radio stations a party could own, operate or control in a market to between 5-8 stations, depending on the number of other stations in the market. These new caps potentially allow one party to control between 20-50% of the stations in a market. However, Congress did not alter the applicability of the antitrust laws to radio station combinations. In practice, this has led to a vast expansion in radio station mergers and also considerable expansion of antitrust enforcement in the area of radio broadcasting, since a number of the mergers that have occurred do not violate the caps but nonetheless pose antitrust concerns. Before the Telecommunications Act was passed, the FCC's stricter regulatory cap of no more than 3-4 stations per market ensured as a practical matter that hardly any radio merger could occur that could give rise to antitrust concerns without also falling afoul of the regulatory prohibition.

36. Congress did not change in the Telecommunications Act the FCC's parallel rule limiting a party to owning, operating or controlling no more than one television station in a single market, although it did allow one party to have any number of TV stations nationwide, up to 35% of audience reach and directed the FCC to review the need for the one-to-a-market rule. Therefore, there has not been an expansion of antitrust enforcement in mergers in TV broadcasting paralleling that with radio stations.

37. Since 1996, there have been over a thousand radio station mergers, of which by early 1997 140 had been large enough to trigger the prefiling requirements of the Hart-Scott-Rodino Act, and 50 were actually investigated. To date, the Antitrust Division of the Justice Department has challenged eight of these radio mergers and obtained agreements from the parties to divest radio stations to prevent unacceptable risks of lessening of competition, while seven other mergers were abandoned when faced with investigation, and four others were voluntarily modified by the parties to fix competitive problems.

38. In these cases the Department of Justice has adopted the same market analysis. The Department of Justice has focused on advertising as the relevant product for radio broadcasting, since listeners receive the service for free although their preferences are naturally important to which stations advertisers choose to use. The Department of Justice regards radio advertising as a distinct market for which other forms of advertising are not sufficient substitutes for identifiable groups of customers. Although some advertisers may have other choices, radio stations individually negotiate prices and can price discriminate against those advertisers who do not have other adequate substitutes. The conclusion that radio advertising is a distinct market, though disputed by some, is based on extensive empirical evidence, including documents of radio station owners themselves. Definition of geographic markets is based on metropolitan areas and has been less controversial; local advertisers typically do not want to incur the expense of advertising on a station with broader regional coverage and do not regard such stations as substitutes. In the radio cases, entry issues have not been a problem, since the number of competitors is inherently constrained by the amount of spectrum allocated by the FCC for radio licenses in any given market.

39. Based on the experience with radio mergers reviewed to date, the Department of Justice has most commonly challenged transactions that would lead to a party controlling more than 35-40% of advertising revenues in a particular market, though it has not adopted a single market share number as a hard-and-fast rule for antitrust enforcement. Combined market shares in the eight mergers challenged include: *American Radio Systems Corp.* (Rochester, N.Y. over 60%; *Jacor Communications Inc.* (Cincinnati, Ohio, over 50%); *Westinghouse/Infinity* (Philadelphia and Boston, over 50%); *American*

Radio Systems Corp. (Sacramento, California 36%, and Charlotte, North Carolina, 55%); *Gulfstar* (northwest Arkansas, 62%); *Chancellor Media* (Long Island, N.Y., over 65%); *Capstar* (various locations in South Carolina, Texas, Pennsylvania, Mississippi and New York ranging from 43% to 74%); and *CBS/American Radio Systems* (Boston, St. Louis and Baltimore, ranging from 46% to 59%). These cases have been based on a unilateral effects analysis, and 35% market share, significantly, has been identified in past Department of Justice policy statements as a threshold at which unilateral effects could occur.

40. The Department of Justice's enforcement actions have not been limited to challenging mergers, but also have dealt in some cases with conduct short of mergers that led to unacceptable restraints on competition between radio stations. Indeed, such restraints were apparently being used by radio station owners in some instances to evade the limitations on mergers. For example, in the *American Radio Systems Corp.* Rochester case, the Department of Justice required that the parties terminate a joint sales agreement, under which one party gave the other control over its advertising sales. This joint sales agreement was considered to be a restraint on trade violating Section 1 of the Sherman Act, limiting price competition without any procompetitive efficiencies. The Department of Justice has also required the termination of local marketing agreements by which one party effectively takes control over another station, even while a proposed merger between the stations is under review, as in *Chancellor Media*, and has blocked radio station swaps in the same market that would have eliminated competition between stations with the same format, in the *American Radio Systems Corp.* Sacramento/Charlotte case. This indicates that not only is radio station advertising a distinct market, but that in some cases these markets can be segmented by listener format differences that give rise to distinct categories of demand on the part of advertisers.

41. To date, competition enforcement in the United States involving radio mergers has not been affected by convergence concerns. To the contrary, the empirical analysis of the Department of Justice has tended to establish the distinctness of local radio advertising markets from other types of advertising for important categories of customers. While programming has not been analyzed as a relevant market in radio station mergers, it is implicit in the conclusion that radio advertising is a distinct market that radio programming enables advertisers to reach distinct listener groups in a more targeted way or less expensively than other media.

Direct Broadcast Satellite - Cable Television Competition

42. Cable television networks ordinarily face no competition in their franchised areas from other landline networks in the United States, as instances of direct overbuilds are still relatively uncommon. The 1996 Telecommunications Act, recognizing the possibility of convergence between landline networks, precludes certain forms of combinations that could eliminate potential competition between them. In particular, it forbids acquisitions of interests of more than 10% in each other by cable television providers and local telephone companies operating in the same area (47 U.S.C. § 572), which could eliminate the potential for the two most ubiquitous networks in a geographic area to be used to serve each other's customers. It also prohibits joint ventures between cable television providers and local telephone companies to provide video programming or telecommunications service in the same geographic market. There are exceptions for small or rural cable systems, and competitive overbuild systems. However, the Act leaves most competitive issues involving cable television and its relationship with potential competitors to general antitrust enforcement.

43. The Department of Justice has regarded multichannel subscription television service as a distinct market for which over-the-air broadcasting is not a fully effective substitute. Cable television is the predominant form of multichannel subscription television service in the United States, passing over 90% of homes and penetrating two-thirds of homes. Of the various potential multichannel competitors for

cable television networks that have been emerging, the most significant has been Direct Broadcast Satellite (DBS). Though DBS still faces some important limitations as a competitor, such as the inability to provide local broadcast channels, and the FTC has concluded that it does not yet have a significant price-constraining effect on cable television, nonetheless cable companies have been concerned about the developing competitive potential of DBS. Some of the Department of Justice's most important enforcement actions in broadcasting have arisen from the efforts of an alliance of cable television networks to control some of the limited number of DBS satellite slots, which would restrict the availability of this scarce resource to competitors.

44. On May 12, 1998, the Department of Justice filed a civil antitrust suit to block Primestar, Inc. -- which is owned by five of the largest cable companies -- from acquiring the DBS assets of The News Corporation Limited and MCI. Primestar, Inc., is the successor to Primestar Partners, L.P., a joint venture formed in 1990 by five of the six largest cable system operators in the nation, Time Warner, Inc., Tele-Communications, Inc., Comcast Corporation, Cox Enterprises, Inc., and US West/MediaOne, and Primestar's satellite provider, GE American Communications, Inc. Primestar's cable owners serve 60% of the nation's cable households. Since 1990, Primestar has offered a medium-power DBS service nationwide, having acquired control over another orbital slot for its K-1 satellite, and the original Primestar agreement contained various provisions restricting access of competitors to the partners' cable programming and facilitating coordinated retaliation against any cable programmer that provided programming to a DBS competitor. The Department of Justice brought suit against Primestar and its owners in 1993, after it was first formed, and secured a consent decree, which protected access to programming controlled by the cable system operators for other potential multichannel television service competitors of the cable systems and precluded the use of Primestar as a retaliatory device against potential competitors to cable television.

45. The Department's second suit against Primestar contended that it would be anticompetitive for Primestar to acquire the MCI/News Corp. DBS assets, which included one of only three orbital slots which can be used for nationwide distribution of video programming in competition with the cable services offered by Primestar's owners. The transaction involved the transfer to Primestar of News Corp./MCI's authorization to operate 28 satellite transponders at the 110 West Longitude orbital slot, along with two high-power DBS satellites currently under construction. MCI acquired the 110 license by bidding $682.5 million in a FCC auction in January 1996. In April 1996, MCI announced the formation of a joint venture with News Corp. (which operates DBS businesses in Europe and Asia) to use the 110 slot to provide DBS service throughout the United States beginning in late 1997. In February 1997, News Corp. announced plans to combine its ASkyB satellite assets and business with Echostar Communication Corporation's existing DBS operations to offer an expanded service to compete aggressively against cable companies. That spring, however, News Corp. and Primestar began discussions which led to the announcement on June 11, 1997, of Primestar's agreement to acquire the DBS assets.

46. The Department contended in the most recent case against Primestar that high-power DBS is the best hope for consumers who seek alternatives to their local cable company and, in the majority of local markets, it is the only significant competition for the cable incumbent. In only five years, high-power DBS firms have garnered 7 million subscriber households nationwide, attracting many of cable's most profitable customers with expanded digital program offerings. High-power DBS competition is constrained, however, by international treaties that limit the number of orbital satellite positions capable of serving the entire continental United States to three locations or "slots." The 110 slot, which has never been used and which Primestar sought to acquire to launch a high-power service, is the last position available for new entry or for expansion by existing, independent DBS firms. The Department alleged that Primestar, Inc. would not use the valuable 110 capacity to compete aggressively against cable companies, because to do so would "cannibalize" its owners' existing cable subscribers. Rather, acquisition of these

assets by Primestar's cable owners forecloses an independent firm from using them to compete directly and vigorously with their cable systems. Thus, the acquisition protects and expands the market power which Primestar's cable owners already enjoy in many local markets. In addition, the complaint asserted that the transaction eliminates the cable companies' most significant potential competitor yet, News Corp.'s ASkyB satellite venture. ASkyB was poised to enter the U.S. DBS business in 1997 and possessed numerous unique advantages, including the authority to program the 110 slot, DBS experience abroad, access to valuable programming, and financial resources which made it a particularly significant potential competitor to cable.

47. Faced with this suit, on October 14, 1998, the parties agreed to terminate the proposed acquisition. This leaves News Corp. and MCI free to make use of these scarce DBS assets in a fully competitive manner, either by initiating their own service or selling the assets to a purchaser not affiliated with the cable companies.

48. The Department's enforcement actions with respect to Primestar, in 1993 and 1998, clearly reflect an assessment of the potential for convergence between cable television systems and DBS as competitive alternatives, and also recognize the potential for dominant cable television operators to exercise market power to exclude competition, either through combined control over programming needed by competitors or preemptive acquisition of scarce resources needed for competitive DBS entry.

NOTES

1 There also is a limited number of express private rights of action to enforce certain provisions of the 1984 and 1992 Acts.

2 47 U.S.C. §§ 308, 310(d) (1994). The FCC also publishes an annual report on the state of competition in the cable industry.

3 9 F.C.C.R. 4783 (1994).

4 Cableamerica v. FTC, 795 F. Supp. 1082 (N.D. Ala. 1992); U.S. v. RCA, 358 U.S. 334, 336 (1959).

5 Communications Law and Practice, 3.01[2]

6 The Commission included direct broadcast satellite in the market but concluded that this emerging technology was not yet likely to prevent competitive harm by putting competitive pressure on both cable distributors and programmers to offer quality programming at reasonable prices.

7 A "marquee" network offers a type of programming that cable companies find essential or nearly essential to convince households to initiate cable service.