

**Statement of Stanley M. Besen<sup>1</sup>**  
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**SUMMARY STATEMENT**

- 1) There have been few attempts to tailor the FCC's *local ownership rules* to the competitive conditions in individual geographic markets. As a result, particular types of combinations are forbidden regardless of the nature and extent of the competitive constraints that would be faced by the "merging" entities.
- 2) An exception is the relatively recent change in the duopoly rules. Where combinations of television stations in the same market were previously not permitted regardless of the extent of competition from other stations, they are now allowed if they do not result in too large an *increase* in concentration – this is accomplished by placing limits on which stations can be combined – and if they do not result in too high a *level* of concentration – this is accomplished by placing a floor to the number of independently-owned stations after the combination.<sup>2</sup>
- 3) Although I do not necessarily subscribe to the particulars of the current rule, the elimination of the blanket prohibition on duopolies is clearly a step in the right direction. Two further steps in that direction would be to apply this more flexible approach to the application of other local ownership rules and to take into account competition from other media in applying the rules. After all, the Commission's *cross ownership* rules are predicated on the belief that there is competition between media, yet the application of the "within media" rules ignores this competition.
- 4) Because the Commission's rules typically ignore local market conditions, they are impervious to changes in those conditions. For example, the duopoly rules remained unchanged for many years despite a very substantial increase in the number of broadcast stations in almost all markets. If the Commission's rules were *self-adjusting*, it would not have to go through a time-consuming and onerous rulemaking process whenever changes in market conditions justify changes in the combinations that are permitted.
- 5) Despite the fact that these rules have existed for decades, the Commission still cannot point to a study, or studies, that justifies the maintenance of many of these rules. Moreover, the studies on which the Commission might rely do not always ask the right questions. For example, they tend to ask *whether*

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<sup>1</sup> The views expressed here are my own.

<sup>2</sup> Another possible instance in which the Commission took market conditions into account was in its decision to require dissolution of existing combinations only in "egregious" cases when it adopted its newspaper-broadcast cross ownership rule. The elimination of the Commission's total ban on common ownership of more than one national broadcast network, the dual network rule, similarly reflects a more nuanced approach to the application of its ownership rules.

particular types of combinations lead to bad outcomes (e.g., higher advertising rates) when what they should be asking is *under what conditions* those combinations lead to bad outcomes. As the Court of Appeals for the D.C. Circuit noted in a somewhat different context (in *Turner II*), there is a gap between “the economic commonplace that, all other things equal, collusion is less likely when there are more firms” and the answer to “the question of what the appropriate horizontal limit is.”

- 6) The Commission probably relies excessively on analysis produced by outside parties or, perhaps more accurately, the Commission does not perform enough of its own analysis to inform its deliberations.<sup>3</sup> This is in contrast to the antitrust agencies, who know that they will have to present, and defend, an affirmative case if they choose to challenge a transaction in the courts.
- 7) A somewhat idealized version of the *process* I would propose for considering revisions of the local ownership rules is the following: First, the Commission would issue a Notice of Proposed Rulemaking which would contain *both* a statement of the rule it proposes to adopt *and* the particular evidence that it believes supports the proposed rule. Next, interested parties would submit comments in which they presented their own analyses, or would criticize the Commission’s analysis, or both. This process would be facilitated if the Commission were to make available to outside parties the data on which its own analysis relied. Finally, the Commission would issue an order in which it responded to the critics – this would be facilitated if the parties provided their data to the Commission – and defended its own analysis.
- 8) This process is not entirely unprecedented, even at the Commission.<sup>4</sup> When I served on the Commission’s Network Inquiry Special Staff in the late 1970’s, we explicitly asked the parties *not* to continue to file comments on the issues we had been tasked to analyze, choosing instead to perform our own analysis which we then released for public comments in the form of preliminary reports. We then responded to the critics and, finally, released our own final report. More recently, the Commission took a similar approach when it performed its own study of the effects of overbuilding on cable television rates in order to determine the rollback in rates it would impose on cable operators. It then put the study out for public comments and, importantly, made the underlying data available to outside parties. Although I disagreed with the substance of the Commission’s analysis, and believed that the Commission did not take the criticisms of its work as seriously as it should have, the approach taken in that case is clearly to be applauded.

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<sup>3</sup> Perhaps the Commission actually performs such analyses, but chooses not to publicize them. If so, it would be salutary for the Commission to make the results of such analysis public so others could comment on it.

<sup>4</sup> My impression is that something like this approach occurs more often, but not always, when the antitrust agencies evaluate a merger.