DOCUMENT RESUME

ED 132 617 CS 501 560

AUTHOR Avery, Robert K.
TITLE Inequities in Mass Communication Law: The FCC's Application of the Duopoly Rule to Public Broadcasting.
SPONS AGENCY Utah Univ., Salt Lake City.
PUB DATE 76
NOTE 25p.; Paper presented at the Annual Meeting of the Speech Communication Association (21st, Anaheim, California, December 27-30, 1976)

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS Broadcast Television; *Educational Television; *Laws; *Public Television; Standards; *Telecommunication
IDENTIFIERS *Federal Communications Commission; *Ownership

ABSTRACT

A three-part petition was filed in December 1974 with the Federal Communications Commission (FCC) which presented the first serious threat to public broadcasters' exemption from the FCC's multiple-ownership rules. The petition requested a revision of the rules that permit multiple ownership of noncommercial educational stations within a single market and a "freeze" on all applications for reserved educational channels made by government-owned and controlled groups and by religious schools and institutes. This paper traces the evaluation of the FCC's multiple-ownership rules and the issues surrounding the application of these rules to public broadcasting. The paper concludes that, since the FCC decided to allow public broadcasters to continue to receive preferential treatment through the duopoly exemption, and if this exemption is vital to the future development of public telecommunications, it is time to explore the maximum use of existing second channels. (JM)

INEQUITIES IN MASS COMMUNICATION LAW:

THE FCC's APPLICATION OF THE DUOPOLY RULE

TO PUBLIC BROADCASTING

by

Robert K. Avery

Paper Presented at the Annual Convention
of the Speech Communication Association,
San Francisco, December 29, 1976

Department of Communication
University of Utah
Salt Lake City

This Study was Supported by a Grant from the University of Utah Research Fund

Introduction

On December 5, 1974, broadcast access advocates Jeremy Lansman and Lorenzo Milam filed a three-part "Petition for Rulemaking" with the Federal Communications Commission. The petition called for a revision of rules permitting multiple ownership of noncommercial educational stations within a single market; requested a "Freeze" on all applications by government owned and controlled groups for reserved educational channels; and requested a "Freeze" on all applications by religious schools and institutes for reserved educational channels. Although the FCC denied the petition on August 1, 1975, Lansman and Milam succeeded in generating over 700,000 comments to the Commission, the largest number in FCC history. Resulting primarily from the efforts of a number of religious organizations, the majority of letters were premised on the false notion that the petition proposed to ban all religious broadcasting.[1]

While the responses from the public broadcasting ranks were considerably less numerous, the comments were far more carefully prepared. The Lansman-Milam petition posed the first serious threat to public broadcasters' exemption from the FCC's multiple ownership rules, and served as a stimulus to citizens groups who were dissatisfied with local public broadcasting performance. The philosophical distinctions between "commercial" and "noncommercial educational" broadcast services became the basis for legal arguments which had not been articulated with such enthusiasm since the reservation of 242 noncommercial educational television channels in 1952. The simmering duopoly issue (ownership of two stations of the same kind in the same market) was moved onto the front burner, and the fundamental question of regulatory inequities became more than a topic for academic debate. Citizen and minority groups in at least four major cities (San Francisco, St. Louis, Pittsburgh,

Jacksonville) filed petitions against public television licensees, all citing the existing duopoly exemption as a deterrent to program diversification. This paper will trace briefly the evolution of the FCC's multiple ownership rules and the issues surrounding the application of these rules to public broadcasting.

Evolution of Multiple Ownership Rules

Broadcast regulation in the United States has been guided by a mandate to promote competition within a free enterprise system. Section 13 of the Radio Act of 1927 authorized the Federal Radio Commission to refuse a broadcast license to any individual or organization who had been "adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize. . . radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition."[2] When Congress revised this legislation through the Communications Act of 1934, their position on broadcast monopolization was restated. Transferring the powers of the original FRC to the newly created Federal Communications Commission, Congress granted the Commission power to "make special regulations" to assure fair competition. Section 313 of the Communications Act also made all laws concerning monopolies and restraint of trade applicable to the communication industries.[3] Section 314 prohibited common ownership of station facilities and cables, wire telegraph or telephone line systems if the effect of such combinations "may be to substantially lessen competition or to restrain commerce. . . or unlawfully to create monopoly in any line of commerce. . ."[4]

With radio networks exercising an ever-increasing influence over their affiliates, the FCC authorized an investigation into chain broadcasting practices in March of 1938.[5] The question of network ownership of radio stations posed serious concerns that such ownership represented a conflict of interest and might not be in the "public interest, convenience, or necessity." But in the Commission's "Report on Chain Broadcasting" issued in 1941, the FCC declined to deny networks the right to own stations. They did, however, break up NBC's ownership of both the Red and Blue Networks and dual stations in New York, Chicago, San Francisco and Washington. The result was divestiture of the Blue Network and one of the co-located stations in each of the four markets.[6] Although NBC took its case to the Supreme Court, the FCC's power to encourage and promote competition in the broadcast marketplace was upheld.

At the same time the FCC was investigating chain broadcasting practices, the question of multiple ownership by parties other than networks was also considered. Even though the Communications Act contained no specific provision regarding the number of broadcast stations which a single licensee could hold, an informal "duopoly policy" was gradually adopted by the Commission as an important consideration in the granting of licenses.[7] Interpretation of the duopoly rule was not absolute, however, as is evidenced by the FCC's position in the 1938 Genesee Radio Corporation case:

> "It is not in the public interest to grant the facilities for an additional broadcast station to interests already in control of the operation of a station of the same class in the same community, unless there is a compelling showing upon the whole case that public convenience, interest or necessity would be served thereby."[8]

All things being equal, the Commission clearly enunciated its preference for

diversity in station ownership of the same class in the same community, but the FCC did not eliminate the possibility of granting overlapping assignments if such actions could be justified in terms of the public interest.

In 1940, the FCC adopted a formal multiple ownership rule for FM broadcasting stations.[9] The rule contained a local duopoly provision and also placed a limit on the total number of licenses which could be held by a single individual or organization nationwide. No more than six FM licenses were to be commonly held. When television stations were permitted to convert from experimental to commercial operation in April of 1941, a limit of three stations nationwide and one station locally was maintained.[10] In May 1944, just three years later, the FCC responded to a petition from NBC and raised the single party limit to five television licenses.[11] The Commission's first rule limiting multiple ownership of AM stations was finalized in 1943 and included the duopoly rule, but no total limit on the number of licenses held nationally.[12]

Although the FCC had suggested a fairly complex formula for determining new multiple ownership limits set forth in a 1948 proposal, the rulemaking finally adopted in 1953 utilized a simple numerical limit. In short, the revised ruling sustained the five station limit for television, increased the FM limit to seven, and set seven as a limit for AM licenses as well.[13] Parties with broadcast holdings in excess of the new limits were given three years to divest themselves of the stations. At the local level, a single party could hold one AM, one FM and one TV station. Then, in an effort to encourage the development of UHF channels, the FCC revised its television limit the following year to permit a total of seven television stations, with at least two of those being UHF.[14]

While well beyond the scope of this brief review, the evolution of FCC

policy regarding cross media ownership in the same market or region is at least directly related to a discussion of broadcast multiple ownership rules. The Commission's frustrated efforts to consider antitrust problems and media concentrations, especially the infamous WHDH case, had a definite impact on the next duopoly proposal issued in 1968.

Within a month after the FCC abandoned a proposal to limit to three the number of television stations a single party could hold in the top fifty markets, a new proposal to limit multiple broadcast ownership within a single community was released in March of 1968.[15] The Commission explained that its limit on multiple licenses for the same service within a given community had not been as effective in promoting competition and diversity in programming as had been hoped. Hence, the FCC proposed to prevent future concentration by limiting any single individual or corporation to one broadcast license per market. Leaving untouched existing AM-FM-TV combinations, the Commission voted to adopt the new "one-to-a-market" or "one-to-a-customer" rules in March, 1970.[16] Eleven months later, under heavy pressure from radio broadcast interests which claimed economic hardships, the FCC extended its initial exemptions to all AM-FM combinations regardless of market size or class of station.[17] Despite extensive oral argument on the cross-ownership question in 1974 and the adoption of revised multiple ownership rules on January 28, 1975, the duopoly rule and numerical limits remained intact.

Noncommercial Educational Exemptions

The rationale for the FCC's exemption of noncommercial educational (public) stations from the multiple ownership rules has been the subject of heated discussions. In 1975 comments filed before the Commission by National Citizens Committee for Broadcasting, legal counsel argued that the philosophical premise for

granting educational licensees exemption from both the overall numerical limitations and the duopoly rule was "cloaked in mystery." In NCCB's words, "Diligent attempts to uncover its source both in the Commission's records and through questioning of Commission staff have led to nothing but blank walls."[18] Neither the initial 1940 multiple ownership rulemaking for FM stations, nor the later provisions for television (1941) and AM stations (1943) made any distinction between commercial and noncommercial licensees. However, when the Commission adopted a "Report and Order" amending its multiple ownership rules on November 25, 1953, a new subpart (b) of Section 3.636 (now Section 73.636) provided: "Paragraph (a) of this section /referring to duopoly and numerical limits/ is not applicable to noncommercial educational stations."[19]

Although NCCB finds the Commission's decision in this matter to be a mystery, the rationale for the establishment of duopoly standards for commercial stations was clearly enunciated in that same ruling. The fundamental purpose of the multiple ownership rules is to "promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[20] That the FCC choose to exempt noncommercial stations from these rules could lead one to conclude that the Commission was not concerned with the diversification of programming or economic concentration in the educational arena. Yet, when taken in the context of other related rulemakings, the FCC's exemption decision can be seen as being supportive to the creation of a noncommercial service, rather than neglectful of the principles of competition and free enterprise.

It was on April 14, 1952, that the FCC ended the four-year freeze on television allocations by releasing its now famous "Sixth Report and Order."

The 1952 ruling contained a special provision which was the product of the combined efforts of such organizations as the National Association of Educational Broadcasters, the Joint Committee on Educational Television, and the American Council on Education. Over the objections of a strong commercial broadcasting lobby, the Commission reserved 242 television channels for noncommercial educational use. But given educators spotty track record with noncommercial FM, the FCC aroused considerable speculation that the reservations would not be utilized, thus resulting in a waste of valuable spectrum space.

It had taken seventy-six witnesses and thousands of pages of testimony to convince the Commission that the experiment deserved a chance. However, just in case the educators did fail to meet their own expectations, the FCC placed a one year limit on the reservations, after which any educational allocation could be changed to a commercial assignment at the request of a station applicant. One week after release of the "Sixth Report and Order," FCC Chairman Paul A. Walker, speaking to a group of hastily assembled educators for a Television Programs Institute at Penn State, made the following challenge:

> "This is American education's year of decision. What you do this year may determine for a long, long time -- perhaps for generations -- the role of education in television. The time to act is now. Time began to run out the minute this report was issued by the Commission on Monday, April 14, 1952. I fear you will find this year of grace the shortest year of your lives."[21]

That the educators in attendance answered the challenge is well documented, but the early evolution of noncommercial educational television would probably not have been possible without the continued encouragement and support of the FCC. It is within this context that the Commission's 1953 exemption decision takes on new meaning. In 1952 the FCC had established the precedent of encouraging multiple ownership of educational FM stations in an effort to foster

state-wide noncommercial FM networks as an alternative broadcast service.[22] Within a year of the 1953 exemption ruling, the Commission again affirmed its position in Voice of Dixie, Inc.[23] Here, as in the 1957 case of Ponce de Leon Broadcasting, Co., Inc., the FCC ruled that its duopoly rule did not prevent a single licensee from operating two noncommercial educational stations of the same type in the same area.[24] While no specific rationale for these actions is stated, it can be assumed that the Commission's decision to rule in favor of multiple ownership and exemption of the duopoly rule in cases involving noncommercial educational licensees was consistent with the supportive philosophy adopted earlier.

Creation of "Sister" Stations

The first mention of any organization taking advantage of the FCC's exemption to acquire a second noncommercial educational television channel within the same community appears in the June 10, 1957, minutes of Metropolitan Pittsburgh Educational Television's Board of Directors. It was at this meeting that WQED's General Manager, John F. White, reported that an investigation into the feasibility of closed-circuit television for several of the Pittsburgh Area Schools had indicated that costs were well beyond the limited school system budgets. It was clear that the schools would have to rely upon the broadcasting facilities of WQED for any instructional television programs. White proposed that MPET make application for a second or "sister" channel which would be operated as a supplementary programming service to WQED. Justification for this proposal was to be based upon Pittsburgh's in-school programming needs, and the additional utilization of the second channel for specialized programs to business, industry and the medical profession, among others. Although the original application of MPET was cordially received, a complex series of counter proposals for various channel substitutions delayed the acquisition of a second television station for over

a year.[25] Finally, on November 12, 1958, the Commission granted a permit for construction of WQEX, Channel 16, and regular programming commenced on September 14, 1959 (consisting entirely of formal in-school programs).

Two years after MPET had been granted Channel 16 in Pittsburgh, the FCC received its second application for a "sister" station from the Board of Public Instruction of Dade County (Miami, Florida) on December 13, 1960.[26] In their application, the Board explained that a new junior college was pressing for more television time over existing WTHS-TV, Channel 2, thus forcing the Board to reduce the amount of community-oriented programming during afternoon and evening hours. Hence, the primary purpose of the second channel would be to provide "telecourses" for the junior college, with the discussion of public issues incorporated into humanities and history courses where qualified guests and representative students would serve as discussants. The proposed weekly broadcast schedule totaled twenty-five hours (five hours per day Monday through Friday). Eight months after the application was filed, the FCC granted the Board a license to operate WSEC, Channel 17 on September 18, 1961 (the call letters were later changed to WLRN).

The third applicant to request a "sister" television channel was the Milwaukee Board of Vocational and Adult Education, licensee of WMVS-TV, Channel 10. Filing in January of 1962, the Board used language strikingly similar to that of MPET in suggesting that a second channel would be utilized primarily for in-school instruction and providing specialized program services for industry and professional groups in the Milwaukee area. On February 21, 1962, less than one month after the FCC received the application, a license was granted for the construction of WMVT, Channel 36.

WHYY, Inc. a non-profit community corporation in Philadelphia had been operating WHYY-FM (now WUHY-FM) since 1954. The FCC awarded WUHY-TV, Channel 35, Philadelphia, to WHYY, Inc. in 1957. With demonstrated success in other communities, WHYY, Inc. applied for VHF Channel 12 in Wilmington, Delaware. Following an extensive multi-party comparative proceeding which included commercial applicants, the FCC awarded WHYY-TV, Channel 12 to WHYY, Inc. in 1962.

With the precedent firmly established for the acquisition of a second noncommercial educational television channel, additional applications were fast in coming. The Chicago Educational Television Association, licensee of WTTW, Channel 11, acquired WXXW, Channel 20 on September 11, 1963, on the grounds that the second channel would permit more flexible program scheduling in conjunction with school curricula and the creation of new specialized programming for the gifted, deaf and otherwise handicapped children.

Twin City Area Educational Television Corporation (Minneapolis-St. Paul) filed for a second channel within eight months of the granting of WXXW to Chicago. The program service of the proposed station was to be designed principally for reception in the classrooms of the area, with the familiar promise to provide specialized services to the medical profession, business and industry. A permit to construct KTCI-TV, Channel 17, was granted on July 27, 1964. In a similar manner, the Board of Trustees of WGBH-TV, Channel 2, Boston, requested a second channel in February of 1963. However, unlike the more limited program promises for "sister" stations WQEX, WSEC and KTCI, the Board proposed a wide range of program services for their second channel. In addition to the in-school and specialized training programs which had been suggested repeatedly, the Board of Trustees of WGBH-TV promised to create programs which would permit discussion of controversial issues, afford time for ethnic

groups, broaden adult education, provide news coverage and commentary, increase cultural experiences and encourage experimental broadcasts. Obviously, the most extensive list of program services which had been received to date, the FCC awarded WGBX-TV, Channel 44 on October 21, 1964.[27]

Between 1964 and 1971, at least two additional second channels were awarded which required the duopoly exemption. In April of 1966, Central Virginia Educational Television Corporation, licensee of WCVE-TV, Channel 23, Richmond, was granted a construction permit for WCVW-TV, Channel 57. Filing had been made on the rationale that an acute need for a second channel had developed due to the requirements of flexibility in scheduling, more frequent repetition of programs, and a greatly expanded curriculum. As explained by the Corporation, "If we are to continue to schedule cultural and public affairs programs on Channel 23, then a second channel is mandatory for the scheduling of a sufficient number of programs for adult education to take care of community needs."[28] The Commission obviously concurred with this position.

Finally, the Bay Area Educational Television Association (now KQED, Inc.), licensee of KQED, Channel 9, San Francisco, had been awarded a construction permit for Channel 60, on which it planned to provide programming in the area of adult education. However, concurrently with a gift of television facilities to BAETA from commercial Metromedia, Inc., Channel 32 (KNEW-TV) was assigned in September, 1970. BAETA surrendered the license for Channel 60, and began broadcasting operations over renamed KQEC, Channel 32 on June 28, 1971.[29] In addition to adult education programs, the new "sister" station was to be used for "community programming, originated by and directed to the many ethnic minorities in the San Francisco Bay Area."[30]

Promise v. Performance

Keeping with its policy to support the development of noncommercial educational broadcasting, the FCC accepted the rationales of existing licensees and repeatedly employed the duopoly exemption by awarding a second channel. The program performance of the second channels seldom aroused little more than academic curiosity until Albert Kramer and Jerrold Oppenheim called the public's attention to existing program conditions.[31] Under grants from six organizations, Kramer and Oppenheim supervised a study of the role of citizen participation in FCC decision-making. In Chapter Four (Public Television: The Choice Becomes an Echo) of their report, the authors severely criticized public television for not living up to its promise. With specific reference to the granting of second television channels, the authors accused the FCC of unjustified acquiescence and chided the sister stations for their poor record of performance: "St. Paul's Channel 17 took off the entire summer of 1970. Pittsburgh's Channel 16 took a vacation that summer from June 1 to July 20. In 1971, Chicago's Channel 20 operated 33 hours a week and went dark weekends. Indeed, sister Channel 11 showed only three programs on Saturday and did not sign on Sunday until 4:00 P.M."[32]

This marginal performance record was restated in Natan Katzman's study of public television program content in 1974.[33] Treating the data derived from "sister" stations separately, Katzman reported that compared to the sample of primary stations, "the secondary schedules included a higher proportion of ITV material, and a much lower proportion of air time devoted to 'Sesame Street' and 'The Electric Company.' There were higher proportions of News/PA and Information/Skills, and lower proportions of children's general material and cultural material."[34] While on the surface these conclusions appear to support the position that "sister" stations contribute to local program di-

versity and independence, another finding appeared to be of greater importance. Data generated during the survey period clearly illustrated the limited or complete absence of program performance by some stations. Among Katzman's findings were the following: WUHY, Philadelphia and KQEC, San Francisco were not on the air in 1974; WXXW, Chicago, transmitted a school schedule in early 1974, but went off the air after the summer; WQEX, Pittsburgh, transmitted an ITV schedule, but was off the air in the summer and on weekends; and WCVW, Richmond, broadcast an ITV schedule, but was off the air in the summer, weekends and holidays.[35] WMVT, Milwaukee; KTCI, St. Paul; WGBX, Boston; and WLRN, Miami had somewhat more impressive schedules.

Overall, these findings, coupled with an independent review of station files at the FCC, would lead even the most generous observer to conclude that the individual performance of most "sister" stations has fallen short of the promises contained in their original license applications.

Duopoly Exemption Challenged

As noted at the offset of this paper, the first major challenge to the duopoly exemption for public broadcasters was contained within the Lansman and Milam "Petition for Rulemaking" filed in December of 1974. The petitioners requested that the Commission delete paragraphs 73.240 (b) and 73.636 (b) of the Rules and Regulations which permit noncommercial licensees exemption from duopoly regulations. In response to a request for comments on the petition, citizen groups and public broadcasters alike expressed their positions.

Comments in support of the petition came from such groups as the National Citizens Committee for Broadcasting, through its legal counsel Frank W. Lloyd of the Citizens Communications Center. Among the arguments in favor of eliminating the exemption was the belief that the present rule served as an invitation

to existing public licensees to file for a second channel even though the applicant might not have the available resources to provide a viable programming schedule. Rather than provide a second service, a primary motivation was seen as the desire to establish "squatters rights," thereby discouraging other potential applicants. Consistent with the Commission's guiding philosophy in handling commercial licensees, NCCB explained that permitting dual public operations in a single market reduces competitive incentives and the desire to serve diverse interests. Support for this position was provided in the form of previous petitions to deny by ethnic and other minority groups who charged that dual licensees had failed to meet their programming obligations. Data gleaned from the petitions were consistent with the marginal performance record discussed earlier, and offered specific examples of dual licensee negligence. In concluding its arguments, NCCB affirmed, "From all of the above, it is clear that the burden should be on public broadcasters to show why they should continue to be exempt from the Commissions's de-concentration policies."[36]

Responding to the challenge, the National Association of Educational Broadcasters, the Corporation for Public Broadcasting, and the Public Broadcasting Service were among those organizations filing comments in behalf of public broadcasting interests. The NAEB stated that the petitioners' proposals were unrealistic and their acquisitions undocumented. Repeal of the duolopy exemption was seen as threatening "future progress in this steady development of public broadcasting, and pos/ing/ legitimate fears that the benefits gained to date by public broadcasting may be lost. . . "[37] The CPB directed its attention to more pragmatic concerns. For example, it argued that given limited funding, a single licensee could usually do a better job than could two licensees sharing the same resources. Savings in overhead, power, transmission costs and person-

nel could be realized through combined ownership. Thus, with ever-increasing costs, CPB contended that multiple ownership of television stations in a single market can facilitate rather than impede program diversity. Complaints that several existing "sister" stations were currently off-the-air was seen as supporting evidence for the Corporation's position: "When all the efficiencies of multiple ownership fail to provide sufficient financial and other resources for both channels, it is clear that the market is not yet ready to sustain totally separate operations that would probably not complement each other. . ."[38] CPB suggested further that the goal of diversity could best be realized through a modification of the existing programming within any given channel, rather than restructuring services between channels. PBS agreed with the economic arguments advanced by CPB, and went on to explain that many future programming endeavors would be designed for specialized audiences, and their development could be dependent upon the availability of multiple broadcasting outlets licensed to a single party. As explained by PBS, "Many of these programs are not likely to attract large audiences or to generate independent financial support. Their presentation may therefore be dependent on the economies of scale and the broader economic base which multiple broadcasting outlets licensed to a single entity may provide."[39]

When all the comments had been considered, the Lansman-Milam argument that multiple ownership of public broadcasting stations served as an obstruction to program diversity was seen as insufficient grounds for initiating a rulemaking procedure. The Commission did, however, acknowledge that its denial of the petition did not signal an unqualified acceptance of the status quo:

> "On the multiple ownership question. . . we cannot agree that rule making action is now warranted. This should not be taken as indicating that in our view the current ownership pattern represents the ideal or that certain policies underlying the multiple owner-

ship rules may not on occasion need to be applied to the licensing of educational stations."[40]

The FCC also explained that future decisions would continue to be handled on a case-by-case basis, with consideration given to the performance of the stations in question and the quality of competing applications. Stations should not be used to "simply mirror" the programming of another station, even if such programming is being presented at different hours.

From an historical standpoint, it is interesting to note that the Commission suggested "time sharing" as a means of satisfying access concerns at the local level. The time sharing concept had been introduced during hearings prior to the 1952 "Sixth Report and Order" as a possible alternative to the reservation of noncommercial educational channels. In the fall of 1957, Metropolitan Pittsburgh Educational Television rejected a proposal to operate Channel 16 on a time sharing basis with Telecasting Incorporated, licensee of former WENS, Channel 16. Now, nearly twenty-five years after its introduction by commercial interests as a solution to the needs of educational institutions, time sharing has been suggested as a possible avenue for satisfying the concerns of ethnic and other minority groups wishing access to public broadcasting.

Actions by Citizen Groups

On the same day the Lansman-Milam petition was received at the FCC (December 5, 1974), Frank Lloyd, legal counsel for the St. Louis Broadcast Coalition, completed a "Petition to Deny License Application" of the St. Louis Educational Television Commission (ETC). ETC, licensee of KETC-TV, Channel 9, St. Louis, Missouri, had previously applied for an existing noncommercial television allocation, Channel 40. The petition argued that ETC had filed its application in an attempt to block a separate local community group, Double Helix Corporation, from receiving a favorable ruling on its own application for Channel 40.

Central to statements against ETC were concerns that St. Louis might be the next community in line for a public television monopoly.

Hence, independent of the important multiple ownership petition, St. Louis Broadcast Coalition raised many of the issues addressed by Lansman and Milam. Today, more than two years later, the duopoly question is still alive in St. Louis, and Double Helix continues its fight for a noncommercial channel.[41]

In July of 1975, the Pittsburgh chapter of the NAACP filed a petition to deny the license renewal of WQEX, Channel 16. NAACP objected to the limited broadcast schedule which consisted solely of in-school programs (9:00 A.M. to 3:00 P.M., Monday through Friday). Citing many of the problems with duopoly stations discussed earlier, NAACP requested that the Commission affirmatively call for new applicants for the license of WQEX, with preference to be given to minority or other community groups. The FCC denied the petition on April 9, 1976, primarily on the grounds that NAACP completed its filing after the deadline for Pennsylvania stations (July 1, 1975). However, in reviewing the most recent license renewal application for WQEX, one can readily conclude that the NAACP's petition contributed, at least in part, to a greatly expanded broadcast schedule which was initiated in the autumn of 1975.

Within days of the FCC's denial of the NAACP petition, two San Francisco community groups, Community Coalition for Media Change (CCMC) and Optic Nerve, filed separate petitions requesting the FCC to reconsider an earlier decision to allow KQED, Inc. an extension of time in which to reactivate KQEC, Channel 32, which had been off-the-air since September 2, 1972. Both CCMC and Optic Nerve also demanded that the licensee meet an affirmative obligation in making time sharing arrangements with local entities desiring access. The FCC denied the petitions of the two groups on September 8, 1976, and at the time of this

writing, KQED, Inc. was working against a January 2, 1977 deadline to reactivate KQEC.

Perhaps the first major test of the duopoly exemption since the Lansman-Milam petition is under study by FCC staff lawyers. Community-Owned Research and Development, Inc. (CORD), a Black-owned and operated firm in Jacksonville, Florida, has filed comments in response to a petition for proposed rulemaking by Community Television, Inc., licensee of WJCT-TV, Channel 7, Jacksonville. Community Television, Inc. has requested a change in the Table of Assignments which would substitute Channel 30 for presently vacant Channel 59. Assuming that Community Television plans to apply for Channel 30 at a later date, CORD opposes the petition on the grounds that Community Television, as an existing licensee in Jacksonville, should not be considered qualified to apply for a second Jacksonville station, and hence denied the shift in assignments.[42] As stated in reply comments, "CORD believes that the legal and policy arguments advanced herein against the creation of a new public broadcasting duopoly in its community provides good cause for denial of this petition."[43] Should the FCC agree with CORD, it could mark the end of new public broadcasting duopolies.

Conclusions

In spite of the wide range of arguments for and against public broadcasting's exemption from the duopoly rule, both advocates and critics agree on the principle of program diversity and freedom of expression. The conflict arises from differing viewpoints as to how this diversity should be achieved.

Public broadcasters contend that multiple ownership contributes to the economic stability necessary to encourage multiple public television or radio voices within a single community. The realities of competing fund-raising efforts and the savings resulting from shared facilities and personnel are strong

arguments for public stations which face severe financial problems on a day to day basis. NAEB, PBS and CPB have lobbied convincingly that the second public television stations in Pittsburgh, Philadelphia, Boston, Chicago and San Francisco would not have been possible without the successful efforts of their older "sister" stations. Like their critics, public broadcasters are not totally pleased with the performance of most second channels. As explained by Daniel Toohey, "If you asked each of the present dual channel licensees if they were content with their present uses of the second channel, they would undoubtedly say no, but that their planned improvements take time and money. Clearly they may not demand eternal patience of their communities, but there are sound economic reasons for allowing a community to grow into full use of its second ETV channel."[44]

Critics of the duopoly exemption can build a solid case that multiple ownership has not led to diversity of services and increased access in at least several of the communities already cited. They do not suggest that existing public broadcast licensees are consciously working against the principles of diversity by acquiring a second channel in the same community, but that this is the inevitable effect. Using public broadcasters' own economic arguments, citizen groups claim that the very fact that most staffs need to be so strongly committed to keeping their "primary" stations on the air, the "sister" stations fail to receive the creative energies which they deserve. If other sources of funding could be found, local community groups or consortia might be better motivated to give full attention to these second channels. Critics reason that competition should be as healthy an incentive to public broadcasting as it is to the commercial marketplace.

The FCC has decided, at least for the present, that public broadcasters

should continue to receive preferential treatment through the duopoly exemption. But unlike the supportive environment in which the original ruling was made, today's public broadcaster faces a far more critical viewing and listening audience. Citizens who are dissatisfied with a station's programming performance are much better prepared to exercise their rights by taking an active role in the licensing process. Whether the duopoly exemption constitutes an inequity within the Commission's rules and regulations will remain a topic for legal debate. More importantly is the growing awareness that public broadcasters, like their commercial counterparts, should be held accountable for their actions. The FCC has stated that public broadcast duopolies will continue to be handled on an ad-hoc basis, with consideration being given to the performance of the stations involved and the quality of all competing applications. If, as claimed, the duopoly exemption is vital to the future development of public telecommunications, the time for exploring the maximum use of existing second channels is now.

FOOTNOTES

1. "FCC Denies Lansman-Milam Petition on Religious Broadcasting," FCC Report No. 13485, August 1, 1975, p. 1.

2. Public Law 632, 69th Congress, February 23, 1927. Reprinted in Frank J. Kahn (ed.), Documents of American Broadcasting. (New York: Appleton-Century-Crafts, 1972), p. 43.

3. Public Law 416, 73d Congress, June 19, 1934. Reprinted in Kahn, p. 77.

4. Kahn, p. 78.

5. At the time the Commission initiated its investigation, nearly one-half of the commercial broadcasting business in the United States was controlled by the four national networks (CBS, NBC Red and Blue, Mutual). See Kahn, p. 489.

6. National Broadcasting Co., Inc. et al. v. United States et al. 319 U. S. 190, May 10, 1943. Reprinted in Kahn, pp. 486-515.

7. Paul W. Cherington, Leon V. Hirsch, and Robert Brandwein (eds.), Television Station Ownership: A Case Study of Federal Agency Regulation. (New York: Hastings House, 1971), p. 21.

8. Genesee Radio Corporation, Federal Communications Commission Reports, Volume 5 (1938), pp. 186-87. Cited in Robert R. Smith, "Duopoly and ETV," NAEB Journal, Vol. 25, No. 3 (May-June 1966), pp. 41-42.

9. 5 Federal Register 2384, (1940). (FCC Rule 3.228)

10. 6 Federal Register 2284, (1941). (FCC Rule 4.226)

11. 9 Federal Register 5442, (1944).

12. 8 Federal Register 16065, (1943). A detailed discussion of these rules can be found in Herbert H. Howard, "Multiple Broadcast Ownership: Regulatory History," Federal Communications Bar Journal 27 (1974), pp 1-70.

13. "Report and Order," Docket No. 8967, 18 FCC 288 (1953). Cited in Howard, pp. 12-13.

14. "Report and Order," Docket No. 10822, 43 FCC 2797 (1954). Cited in Howard, p. 15.

15. "Notice of Proposed Rulemaking," 33 Federal Register 5315, (1968).

16. "First Report and Order in the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations," Docket No. 18110, 25 March 1970, 22 FCC 2d 306.

17. "Memorandum Opinion and Order," 26 February 1971, 28 FCC 2d 662.

18. "Comments of National Citizens Committee for Broadcasting," RM-2493, 17 March 1975, p. 15.

19. "Report and Order," Docket 8967, 18 FCC 288 (1953) 297.

20. 18 FCC 288.

21. Paul A. Walker, "The Time to Act Is Now," in Carroll v. Newsom (ed.), A Television Policy for Education. (Washington, D.C.: American Council on Education, 1952), p. 31.

22. State of Wisconsin - State Radio Council, 16 FCC 459 (1952).

23. Voice of Dixie, Inc., 11 R. R. 309 (1954).

24. Ponce de Leon Broadcasting, Co., Inc., 15 R. R. 3 (1957).

25. A complete summary of the proceedings which led up to the granting of the first "sister" television station is provided in Robert K. Avery, "A Case Study of the Development of Programming at Educational Television Station WQEX from 1958 to 1966," Unpublished masters thesis, Pennsylvania State University (September 1966).

26. Ibid. p. 134

27. Ibid. p. 145.

28. Comments filed in Exhibit 7, Section IV by Central Virginia Educational Television Corporation, November 18, 1965.

29. Letter from BAETA to Ben F. Waple, Secretary, FCC, August 18, 1972.

30. Ibid.

31. Albert H. Kramer and Jerrold Oppenheim, Policy Without Principle: A Study of the Federal Communications Commission. (Washington, D.C.: Citizens Communications Center, 1973).

32. Ibid. p. 59

33. Natan Katzman, Public Television Program Content: 1974. (Washington, D. C.: Corporation for Public Broadcasting, 1975).

34. Ibid. p. 133.

35. Ibid. p. 131.

36. "Comments of National Citizens Committee for Broadcasting," RM-2493, March 17, 1975, p. 40.

37. "Comments of the National Association of Educational Broadcasters," RM-2493, undated, p. 5.

38. "Comments of the Corporation for Public Broadcasting," RM-2493, March 31, 1975, p. 5.

39. Letter from PBS, prepared by Norman M. Sinel, Esquire, to Vincent J. Mullins, Secretary, FCC, April 15, 1975.

40. "Memorandum Opinion and Order," RM-2493, Re: Multiple Ownership of Noncommercial Educational Radio and Television Stations in the Same Market, FCC 75-946, August 13, 1975, at para. 17.

41. Under consideration at the Commission is a request by Double Helix to assign an additional educational allocation, Channel 46, to the St. Louis market. See "Notice of Proposed Rule Making and Memorandum Opinion and Order." Docket No. 20902, released September 8, 1976.

42. Letter from Frank W. Lloyd, Counsel for CORD, to Vincent Mullins, Secretary, FCC, July 12, 1976. See also Karen S. Frank, "FCC Filing Raises Duopoly Issue Anew," CPB Report, VII:29 (September 13, 1976), p. 2.

43. "Reply Comments of Community-Owned Research and Development, Inc.," Docket No. 20791, RM-2501, July 20, 1976, pp. 1-2.

44. Daniel W. Toohey, "To the Editor: The Lloyd Column," Public Telecommunications Review, Vol. 3, No. 5 (September-October 1975), p. 5.