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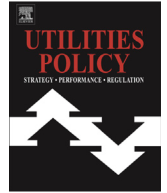

Mergers and acquisitions in radio and television broadcasting: Consistent goals and adaptive regulation

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ABSTRACT

Radio and television broadcasting regulatory policy is fraught with challenges due to rapidly changing technologies and therefore potentially fluid markets. The evolution of regulatory policy in the United States has been relatively adaptable, while policy goals remain constant by comparison. This paper seeks to identify the most important issues regulators face when considering the broadcasting industry generally, and to provide a guide to an adaptive regulatory environment in which mergers and acquisitions in the radio and television industries can exist, based on the U.S. experience.

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1. Introduction: broadcasting in the United States

Economic regulatory policy with respect to radio and television broadcasting as undertaken in the United States by the Federal Communications Commission (FCC) is fraught with challenges due to rapidly changing technologies and therefore potentially fluid markets. The evolution of regulatory policy in the U.S. has been relatively adaptable, while policy goals remain constant by comparison. With technological advances of the Internet and the ability of consumers to access information and entertainment without either radio or television, understanding the environment in which these industries operate is essential to enacting appropriate regulatory policy.

The first challenge government and regulatory authorities face is defining the scope of the market. Such definition is critical to the design and effectiveness of policy, yet complex given the broadcasting industry's brisk changes. With respect to radio and television broadcasting, regulators first must determine the practical substitutability of these media for consumers in order to understand the extent to which any merger activity might affect social welfare. In this paper, studies that provide data on substitutability are reviewed and conclusions are drawn based on the statistics available to date.

With the technological advancement of the Internet and the ability of consumers to access information and entertainment without either radio or television, determining what degree of market power is tolerable within the industries,[1] and what successful competition looks like in such an environment, is the second challenge for regulatory authorities in order to ensure the viability of competition while preventing abuse of market power.[2] This paper uses past and current government policy to illustrate the manner in which the U.S. government and regulatory authorities have instituted and revised legislation in order to accommodate the changing broadcasting market environment.

Finally, regulators are tasked with maintaining the government's stated policy goals of promoting competition, localism, and diversity. In the changing environment, maintaining policy goals requires regulators to review policy frequently, to invite input from analysts and market participants, and to be willing to alter

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[1] Possessing market power that results from superior skill, foresight, or industry, is not illegal (U.S. v. DuPont). A small degree of market power is common and the exercise of such market power by pricing a small degree above marginal cost, for example, is understood not to warrant antitrust intervention. In essence then, acceptable market power is determined by degree, which emphasizes the critical role of oversight agencies.

[2] Generally, a firm is considered to have market power if it has some influence over the market price. Biggar (2011) summarizes the abuse of such market power as "practices by persons possessing market power that are unreasonably discriminatory or tend to unreasonably restrict, impair, or reduce the level of competition, including practices that tie unregulated products or services to regulated products or services or unreasonably discriminate in the provision of regulated services. Market power abuses include predatory pricing, withholding of production, precluding entry, and collusion." (page 37).

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longstanding policy that no longer is needed and may be harmful to social-welfare objectives. This paper highlights the evolution of legislation in the U.S. in an effort to illuminate its connection to market and technological changes.

The purpose of this paper is to offer a study of the radio and television broadcasting industries in the U.S., with the objective of providing a synopsis of regulatory practices with respect to merger and acquisition policy. The paper proceeds as follows. Section 2 provides the history of merger regulation in the U.S. and includes results of research undertaken by academic researchers and the FCC to determine the adequacy of the existing legislation. Section 3 outlines the economic arguments that impact merger activity in the U.S. Section 4 summarizes and provides a discussion of the regulations regarding merger and acquisition activity in the U.S to date, and Section 5 concludes the paper.

2. Merger regulation in the United States

2.1. History of merger regulation

Government regulation of broadcasting transmissions began shortly after the rise of radio broadcasting, and covers the entire history of television broadcasting.[3] At its inception, regulation focused on market-power issues; only later did the public-interest criteria evolve as separate concerns. In 1912, the first U.S. federal law regulating radio was passed, mandating (among other rules) that all radio stations be federally licensed.[4] The U.S Department of Commerce was responsible for radio communications from then until 1927, when the Federal Radio Commission (FRC) was created. In 1934, the FRC was replaced when the Communications Act of 1934 established the FCC, which has remained the regulatory authority for radio and television since.[5]

The FRC first allowed ownership of multiple radio stations within the same market in 1922, allowing entities to own two FM and two AM stations within a market with at least 15 stations, provided the combined audience share of the stations did not exceed 25 percent. For stations in markets with fewer than 15 stations, a single license was permitted for up to three stations, of which no more than two could be AM or FM stations, provided those stations represented less than 50 percent of the total number of radio stations in the market. The FCC's continued use of ownership concentration as a criterion in granting broadcast licenses, using a presumption against ownership by the same entity of two or more radio stations in the same band, reflects the agency-initiated concern for industry competition.

By 1970, the FCC restricted combined ownership of radio and television stations in local markets in order to foster competition and added the public-interest goal of promoting diversification of programming sources and viewpoints.[6] Although the specific regulations have changed over time, the goals of competition and diversification have remained. With respect to promoting competition, the FCC loosened the ownership rules in 1989 and 1992. Congress' enactment of the Telecommunications Act of 1996 was the most recent substantial easing of merger regulations (U.S. Statute 110, 1996). By mandate of the 1996 Act, the FCC lengthened radio license terms from seven to eight years and revised the process for reviewing license renewals. It eliminated national caps on the number of radio stations an entity could own (eliminating previous caps of 20 AM and 20 FM stations), in favor of setting local limits based on the size of the market, raising from four to eight the number of stations an owner could have in the largest markets. For television, The 1996 Act imposed a limit of owning stations that reached no more than 35 percent of the national audience (the prior limit being 25 percent).

The Telecommunications Act of 1996 was the first major rewrite of the 1934 Communications Act. The theme of the 1996 Act was that, to the extent possible, regulation should be replaced by competition. The FCC implemented new regulations while maintaining the 1970 agenda. The new ownership provisions of the 1996 Act had an immediate impact, which was evidenced by extensive merger and acquisition activity. Rapid consolidation resulted in a sharp rise in profits and station valuations as corporations combined facilities and staff in one location. One company, Clear Channel, grew from 196 stations in 1997 to a total of 1183 stations (AM and FM) in 2005. The second largest radio station owner, Cumulus Broadcasting, had 297 stations (FCC Media Ownership Study #5, 2007). Given there were well over 10,000 radio stations in the country, owning roughly 1000 did not amount to significant market power, at least according to the CEO of Clear Channel. Similarly, the CEO of Emmis Communications argued that consolidation was necessary for firms to survive.[7]

In 1999, the FCC again altered its licensing in order to permit broadcasters and the public to benefit from common and cross-ownership of media providers.[8] The Commission said the revised rules reflected the growth in the number and variety of media outlets in local markets, including cable and direct broadcast satellite, and were intended to strengthen the potential of free over-the-air broadcast services to compete.[9] Prior to the revised rules, the Commission had on occasion granted waivers to allow cross-ownership. When the 1999 rules were implemented, the Commission noted that of all the conditional waivers that were granted or on file, a majority involved radio/television combinations that under the revised rules would be permissible. This reflects the Commission's willingness and ability to adapt to industry changes while maintaining fundamental policy goals.

Under Section 202 of the Act, which addresses broadcast ownership, the FCC is required to conduct a quadrennial review of media ownership regulations to determine whether such rules

[3] Wise (2011) page 6.

[4] The Radio Act of 1912, 37 Stat. 302.

[5] The FCC was created by U.S. Congressional statute as an independent agency (see 47 U.S.C. § 151 and 47 U.S.C. § 154). It was created to regulate interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories. The FCC is tasked with roles in monitoring broadband, competition, spectrum, media, public safety, and homeland security.

[6] FCC (2011c).

[7] Spitzer (2010).

[8] With respect to television, new rules permitted common ownership of two television stations if the stations were in separate Nielsen Designated Market Areas (DMAs), and common ownership of two television stations within the same DMA if eight independent television stations would remain post-merger, and one of the stations was not among the top four-ranked stations in the market based on audience share. With respect to radio/television cross-ownership, rules permitted an entity to own a second television station if permitted under the modified TV duopoly rule and any of the following radio station combinations in the same market: up to six radio stations (any combination) in any market where at least 20 independent voices would remain post-merger; or up to four radio stations where at least 10 independent voices would remain post-merger. It defined independent voices as (1) all independently owned, full-power, operational commercial and noncommercial television stations licensed to a community in the DMA in which the TV station in question is located, (2) all independently owned operational commercial and noncommercial radio stations licensed to, or with a reportable share in, the radio metro market where the TV station involved is located; (3) daily newspapers that are published in the DMA with a circulation exceeding five percent in the DMA; and (4) wired cable service (counted as a single voice), provided cable service is generally available in the DMA.

[9] FCC 99-209 News Release, August 5, 1999. Retrieved August 30, 2014 from http://transition.fcc.gov/Bureaus/Mass_Media/News_Releases/1999/nrmm9019.html.

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