Catholic University Law Review

Volume 34
Issue 3 *Spring 1985*

Article 5

1985

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Recommended Citation

Michael R. Gardner, *Decemeber 19, 1984 – A Big Day in Telecommunications*, 34 Cath. U. L. Rev. 625 (1985).
Available at: https://scholarship.law.edu/lawreview/vol34/iss3/5

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DECEMBER 19, 1984—A BIG DAY IN TELECOMMUNICATIONS

*Michael R. Gardner**

At an Open Meeting of the Federal Communications Commission (FCC or Commission) held on December 19, 1984, three of potentially the most significant telecommunications regulatory issues to arise in the last few decades were addressed. The three landmark actions taken by the Commission at the meeting include: (1) revision of the "7-7-7 rules," which for over thirty years have restricted ownership of broadcast properties to seven television stations (no more than five of which can be VHF), seven AM, and seven FM stations;[1] (2) adoption of a new cost-based plan for telephone access charges that will establish a monthly residential subscriber line charge of one dollar beginning June 1985, increasing to two dollars in June 1986;[2] and (3) issuance of a Notice of Inquiry and Proposed Rulemaking that may serve as the predicate to authorization of separate satellite systems to compete with the 108 nation INTELSAT global system.[3]

Collectively, the FCC's actions in these three dockets are likely to be viewed in the future as among the most far-reaching and important regulatory changes initiated at any one time during the agency's fifty year history. While the ultimate impact of the Commission's actions will depend on the manner in which industry and government, both in the United States and abroad, implement these regulatory changes, there is every indication that,

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1. *See* Amendment of Section 73.3555 of the Commission's Rules Relating to Mutliple Ownership of AM, FM, and Television Broadcasting Stations, Memorandum Opinion and Order, Gen. Docket No. 83-1009 (1985), 50 Fed. Reg. 4666 (1985) (to be codified at 47 C.F.R. § 73) [hereinafter cited as Revision of Multiple Ownership Rule].

2. MTS and WATS Market Structure, Dedication and Order, CC Docket No. 78-72 (1984), 49 Fed. Reg. 50,413 (1984) (to be codified at 47 C.F.R. § 69).

3. Establishment of Satellite Systems Providing International Communications, Notice of Inquiry and Proposed Rule Making, CC Docket No. 84-1299 (Jan. 4, 1985).

for better or worse, the telecommunications industry will never again be the same.

I. MULTIPLE OWNERSHIP

In the area of broadcasting, the Commission reached a final compromise, at its December 19 meeting, in the highly contentious 7-7-7 rulemaking. Initially, the Commission adopted an Order on July 26, 1984 that would have eliminated all ownership restrictions on broadcast properties by 1990.[4] Under the original Order, until 1990, a single entity would have been permitted to own twelve AMs, twelve FMs, and twelve TVs (with no distinction between UHF and VHF stations). However, in response to congressional pressure and numerous petitions for reconsideration filed by parties concerned about network dominance, the Commission retreated from its complete deregulatory approach. Instead, the Commission adopted a twelve station VHF limit with an additional cap of 25% on the television audience reach of any single broadcast entity.[5]

As a result of the revised multiple ownership rules,[6] radical changes may now occur in the broadcast marketplace if large and small group station owners propel themselves—through mergers, joint ventures, and acquisitions—towards the new twelve station limit for VHF properties. Under the new rules, the networks will be authorized to acquire additional VHF stations. Given their existing holdings, however, they will only be able to acquire one or two major market VHFs, while most other group station owners will be in a position to acquire seven or more of these broadcast industry jewels.[7]

While the new rule is straightforward, the political machinations that led to adoption of this compromise could provide the basis for a best-selling novel. The fight over the 7-7-7 rule began indirectly, more than three years ago, when the then newly appointed FCC Chairman Mark Fowler at-

4. Report and Order, Gen. Docket No. 83-1009, FCC 84-350, 49 Fed. Reg. 31,877 (1984), *appeal docketed sub nom.* Black Citizens for Fair Media v. FCC, No. 84-1503 (D.C. Cir. filed Oct. 9, 1984).

5. *See* Revision of Multiple Ownership Rule, *supra* note 1.

6. The multiple ownership rule devised on reconsideration has no sunset date. Furthermore, in calculating the audience reach any group station owner attains, UHF and minority-controlled stations receive a discount. *Id.*

7. Calling broadcast properties "jewels" is not an overstatement, as is evidenced by recent purchase prices. For example, in 1982, Metromedia paid $220 million for a VHF station in Boston. Two UHF stations in the ninth and tenth largest markets recently captured a collective price of $125 million. Currently, Capital Cities Communications, Inc. plans to sell its Buffalo and New Haven television stations valued at $25 million and $100 million respectively. Wash. Post, Mar. 21, 1985, at B2, col. 4.

tempted to modify a little noted rule called the Prime Time Access Rule (PTAR).[8] That rule requires network-owned or affiliated stations in the fifty largest markets to air one-half hour of nonnetwork produced programming during prime-time (usually between 7:30 and 8:00 p.m.).

In 1981, the deregulation-oriented Chairman Fowler viewed the PTAR as an unnecessary rule that no longer served the public interest. Proponents of the PTAR, however, including the National Association of Television Program Executives (NATPE), Group W, and a diverse coalition of television industry officials, joined together to demonstrate that the PTAR effectively addressed a continuing problem of network dominance. Despite an intensive lobbying effort by network representatives for repeal of the rule, the majority of FCC Commissioners decided informally that retention of the PTAR would serve the public interest by maintaining a modest window of prime time to be filled by programming selected by individual local stations instead of by their networks.

No sooner had the PTAR skirmish concluded than Chairman Fowler initiated a docket to eliminate the PTAR's two sister regulations, the Financial Interest and Syndication rules, commonly known as the "FISR." These rules, promulgated in 1970, were an attempt to check the abusive exercise of network market power over independent programmers by precluding network syndication or any financial ownership interest in independently produced programming.[9] In 1977 and 1980, these rules were further codified by the Department of Justice (DOJ) in Consent Decrees that terminated antitrust litigation between the DOJ and each network.[10]

From early 1982 through 1984, a bitter fight raged between the networks, which supported total repeal of the FISR, and a diverse coalition from the television industry which opposed the abolishment of the FISR. The coalition, known as the Committee for Prudent Deregulation, had among its members major Hollywood studios, the trade guilds (Screen Actors, Directors, Producers and Writers), independent television stations, and television celebrities such as Mary Tyler Moore, Alan Alda, Jean Stapleton, Henry

8. 47 C.F.R. § 73.658(k) (1984).

9. Basically, the Financial Interest Rule, 47 C.F.R. § 73.658(j)(ii) (1984), prohibits the networks from acquiring any financial or other proprietary right or interest in programs produced by entities other than the network itself except the license or other exclusive right to network exhibition within the United States. The Syndication Rule, 47 C.F.R. § 73.658(j)(i) (1984), prohibits networks from selling or syndicating reruns of programs initially aired on a network for later nonnetwork exhibition.

10. United States v. American Broadcasting Companies, 1981-1 Trade Cas. (CCH) ¶ 64,150 (C.D. Cal. 1980); United States v. CBS, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,594 (C.D. Cal. 1980); United States v. National Broadcasting Co., 1978-1 Trade Cas. (CCH) ¶ 61,855 (C.D. Cal. 1977).

Winkler, Charlton Heston, and Norman Lear. The thrust of the coalition's argument was that these rules were needed to help control the continuing problem of network dominance in the broadcasting industry.

The survival of the FISR became a life or death matter for the creative community and television industry that had prospered under its rules. Supporters of the FISR argued that the rules were essential to preserve creative flexibility in the broadcasting industry. Without the FISR, this diverse coalition argued that the networks would be even more reluctant to license once revolutionary programs like "All in the Family," "The Jeffersons" or "Hill Street Blues." But proponents of total repeal claimed there was no legitimate public interest concern involved. Instead, they argued that the issue was one of big dollars, and as long as the FISR remained, the networks would be denied vital revenues to sustain commercial television. In the end, despite tenacious efforts by the networks and the FCC Chairman, bipartisan leadership in Congress finally became involved in the FCC process and forced a moratorium on repeal of the FISR.[11]

It was in this climate that the FCC decided to move forward to modify the 7-7-7 rule with a Notice of Proposed Rulemaking issued on October 20, 1983.[12] Several members of the Commission, particularly Commissioner Mimi Weyforth Dawson, had argued for several years that the 7-7-7 rule should be considered prior to any other sweeping broadcast deregulatory efforts, because regulation of ownership plays a key role in determining the basic competitiveness of the industry.

While the 7-7-7 rule is technically distinct from the FISR and the PTAR, the Commission heard many of the same public interest arguments before modifying the 7-7-7 rule. Primarily, consumers and Congress asked whether the marketplace was sufficiently competitive in 1984 to allow repeal of numerical ownership limits for VHF television properties. Under the 7-7-7 rule, the networks each currently own five major market VHF stations reaching approximately 20% of the national audience. Critics argued that the substitution of a 12-12-12 rule *without* a market reach standard, as ini-

11. On October 19, 1983, the Senate Appropriations Committee, by a 16-13 vote, adopted an amendment to the FY 84 Supplemental Appropations bill precluding the FCC from repealing or modifying the rules through May 31, 1984. By a 57-32 vote, the bill was approved by the full Senate on October 27, 1983. Then, on November 2, 1983, witnesses from the White House, and the Departments of Commerce and Justice testified before the Senate Commerce Committee in support of a two-year moratorium on the rules. In the face of this pressure, on November 16, 1983, Chairman Fowler agreed to delay a decision on the rules until at least May 10, 1984.

12. In the Matter of Amendment of §§ 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, Notice of Proposed Rule Making, Gen. Docket No. 83-1009 (released Oct. 20, 1983).

tially proposed by the FCC's Order, could have permitted each network to reach as many as 35% of the country's television viewers.

As already noted, the issue of network dominance had been addressed throughly in both the FISR and PTAR controversies. Both the Commission and Congress were, therefore, already highly sensitized to arguments that relaxing the 7-7-7 rule could exacerbate network dominance. In this context, it was perhaps predictable that the new 12-12-12 rule advocated by Chairman Fowler instantly was challenged by bipartisan leadership in Congress. After months of formal as well as behind-the-scenes discussions, on December 19, 1984, the Commission modified the 12-12-12 rule. The 7-7-7 rule finally was relaxed by allowing any broadcast group to acquire as many as twelve VHF television properties *as long as* its market penetration does not exceed 25%.[13]

The adoption of the 12-12-12 rule has electrified the broadcast marketplace. Wall Street analysts, passive investors, existing group owners, and previously disinterested corporations are now taking an aggressive interest in the broadcasting industry and the new opportunities for competition created by the Commission's action. Most recently, on March 18, 1985, Capital Cities Communications, Inc. announced that it had agreed to purchase American Broadcasting Companies, Inc. for $3.5 billion.[14] Additionally, Taft Broadcasting, currently the owner of seven stations reaching 6.73% of the national audience (incorporating UHF discounts) plans to acquire Gulf Broadcasting, a group owning five television and several radio stations for the price of $755 million. Together, the twelve television stations will have an audience reach of 11.25%. Rumors abound of mergers and takeovers involving the two remaining networks. Other group owners, such as *The Wall Street Journal* and other media, "tout" the greatly enhanced value of broadcast properties as a result of the FCC's relaxation of the 7-7-7 rule.

In light of this activity, it seems likely that the action taken by the Commission on the 7-7-7 rule will lead to a dramatically restructured broadcast marketplace. Will the networks still dominate? Probably, yes. Nevertheless, the enlightened deregulatory approach represented by the multiple ownership compromise could diminish network dominance as alternative mini-networks grow in size and programming capability. For programmers, distributors, station owners, and especially the American television viewer,

13. Revision of Multiple Ownership Rule, *supra* note 1.

14. Wash. Post, Mar. 19, 1985, at Al, cols. 1-2. Prior to approving the merger, the FCC will require the new company to sell at least one of its 12 television stations. Presently, the combined holdings of ABC and Capital Cities reach approximately 28% of the market. Wash. Post, Mar. 21, 1985, at B1, col. 5. To comply with the new 12-12-12 rule, the audience reach must be reduced to 25%.

the outcome of this deregulatory action portends important and encouraging developments for a society that is fixated on its television tube.

II. Access Charges

The second momentous Commission development on December 19, 1984, is one that has long-term implications for all American consumers. The Commission, with implicit congressional approval (or at least tolerance), implemented a scheme of monthly subscriber line charges for the telephone industry. Although this proceeding was not as colorful as the broadcast proceeding, where leaders of the creative community articulated a public interest standard to federal decisionmakers, the Commission's action in the access docket is just as important. The access decision represents the culmination of an important stage in a six-year effort to shift the telephone industry from a pricing structure that may have been appropriate in the by-gone era of monopoly—but no longer sustainable in an era of competitive alternatives—to a more cost-based structure mandated by current technologies and economic forces.

The essential feature of the December 19 access decision[15] is a change in the manner of recovery of certain fixed costs ("nontraffic sensitive" or "NTS costs") associated with the provision of basic telephone service—essentially those costs incurred in running copper wire pairs between telephone company local switches and every home and office in the country. These NTS costs are incurred by the telephone company in making telephone service *available*, and do not vary according to amount or nature of that use (i.e. local or long distance, intrastate or interstate).

Traditionally, the portion of NTS costs assigned to the FCC's jurisdiction[16] was recovered on a usage sensitive basis in interstate long distance telephone rates. Essentially, the cost of local telephone service was being subsidized by long distance rates. One consequence of this type of recovery was that high volume users of long distance service paid an amount that may have been in excess of their share of the relevant costs. Conversely, low volume toll callers may have contributed much less than the actual cost of

15. Among the other key provisions of the FCC's December 19 recommendations were: (1) a $1 residential and single line business access charge the first year, beginning June 1985, and a $2 second year charge pending FCC review in late 1986; (2) an alternative tariff that can be financed by a surcharge of up to 35 cents on all subscribers in a study area; (3) the establishment of high-cost assistance for small telephone companies; and (4) permitting a waiver of the subscriber line charge if states reduce their local rates by an equivalent amount.

16. Costs are allocated between the state and federal jurisdictions according to a process called jurisdictional separations. Until recently, NTS costs were allocated to the federal jurisdiction according to a formula that resulted in an ever-increasing federal allocation of those costs.

providing service to them. From a public policy standpoint, this pricing system achieved the desired result of making basic telephone service available to everyone at a price below the cost of providing the service.

As long as high volume users had no alternative but to rely on the basic telephone network for service, this type of subsidy scheme was sustainable. However, in an environment where such users have alternatives, whether self-provided or from other carriers, such a subsidy system necessarily will unravel in undesirable ways—chiefly in a spiral of increasing rates for those left on the system (mainly residential users and small businesses), as the large users with alternatives abandon or bypass the system. It was in response to this potential exodus (already underway to a significant extent) documented in the FCC's record that the Commission decided to impose the subscriber line charge.

This landmark Order, which was also extremely contentious in its development, modifies a previous FCC decision that was viewed by highly vocal consumer groups and leaders in Congress as "too much too soon." The original access plan called for an access charge of two dollars per month per residential telephone, increasing to five to six dollars per month in six years.[17] While the industry largely supported the concept of access charges, it became clear that the American public, or at least some of its spokespersons and representatives, would rebel if the FCC's original plan were adopted. As a result, Congress participated actively in the development of a modified access charge plan designed to achieve the Commission's deregulatory goals. At the same time, the modified plan prevents what was viewed, at least by some in Congress, as the potential for drastic financial disruption to the residential and commercial telephone user.

The compromise access decision adopted by the Commission at its December 19, 1984 meeting appears at this time to be acceptable generally to both Congress and the public at large. Statements from Capitol Hill suggest that some concerns remain—principally involving the cost of service for elderly, poor and rural consumers. Both the Commission and a Joint Board of Federal and State Commissioners are continuing to examine these issues in the hope that a further confrontation with Congress can be avoided.

The long-term significance of the access decision is that it moves this country toward a truly cost-based telephone system, as opposed to perpetuating a system where local service is subsidized artificially by long distance rates. As this goal is achieved, together with the evolving implications of the divestiture of AT&T, the entire structure of the basic telephone industry is undergoing a massive transformation.

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17. MTS and WATS Market Structure, *supra* note 2.

III. Separate Satellite Systems

The final major issue addressed by the Commission at its December 19, 1984 Open Meeting involved the authorization of separate satellite systems to compete for the first time with INTELSAT. Based on a November 28, 1984 Presidential Determination concluding that such systems are in the "national interest,"[18] the Commission adopted a Notice of Inquiry and Proposed Rulemaking[19] that may turn out to be the regulatory predicate to the licensing of private satellite systems.

INTELSAT was the outgrowth of a visionary United States initiative to share with the rest of the world its then exclusive satellite technology. Today INTELSAT is a successful non-profit cooperative, comprised of 108 countries, that provides satellite communications to more than 170 countries.

The genesis of INTELSAT can be traced to the adoption of the Communications Satellite Act of 1962.[20] Following enactment of this legislation, the United States set out to advance its political, commercial, and humanitarian goals by convincing its allies to join in an effort to establish a global satellite system that would help both the industrial world as well as the then fast-growing community of developing countries.

Originally, as only a nine nation consortium in 1964,[21] INTELSAT made its services available to the developing world through global average pricing. A mandate, as codified in Articles III and V of the INTELSAT Agreement,[22] essentially guaranteed that regardless of technological developments, changes in traffic patterns, or other factors that might point to deaveraged pricing, INTELSAT's services would be available on a nondiscriminatory equal cost basis to all the nations of the world. Simply stated, this requirement for global average pricing means that a call from New York to London via an INTELSAT satellite costs the same as a call from New York to Nairobi, Kenya. As a nonprofit consortium, INTELSAT is required to use its profits to develop and expand satellite technology. Addi-

18. Letter from President Ronald Reagan to the Secretary of State and the Secretary of Commerce, Nov. 28, 1984 (discussing separate international communications satellite systems).

19. Establishment of Satellite Systems Providing International Communications, *supra* note 3.

20. 47 U.S.C. §§ 701-744 (1982).

21. It is noteworthy that while INTELSAT membership has grown from its original nine members to its current 108 nations, Intersputnik, the Soviet Union's competitive alternative to INTELSAT, has remained stagnant at a thirteen nation membership level. Its membership consists largely of Soviet Bloc countries which themselves frequently use INTELSAT services.

22. INTELSAT Intergovernmental Agreement, Aug. 20, 1971, 23 U.S.T. 3853, TIAS No. 7532.

tionally, the system is required to reduce costs of services to all INTELSAT members, including the United States. Accordingly, in twenty years, INTELSAT has reduced its prices twelve times.

Despite the undisputed success of INTELSAT as an international organization and provider of telecommunications services, the United States government currently is taking a hard look at whether to permit transatlantic and interregional satellite systems to compete directly with INTELSAT. On December 19, 1984, the FCC initiated a comprehensive proceeding that may well result in the licensing of new satellite systems. According to pending license applications, none of the proposed systems contemplates service to remote areas of the world. Instead, the entrepreneurial sponsors of INTELSAT's potential competition propose to serve only those highly trafficked and therefore, highly lucrative routes currently served by INTELSAT. Proponents of these systems, including the Reagan Administration, argue that the licensing of these systems is in the "national interest" since competition will be promoted by the entry of new private satellite systems serving discrete routes. However, with the exception of the United States,[23] INTELSAT and its 108 nation members, argue that the prosperity and political harmony of its global system will be jeopardized if private systems are licensed by the FCC. In accordance with the Notice, it is now up to the FCC to determine what criteria will govern the licensing of the new satellite systems designed to compete with INTELSAT.

In the INTELSAT docket, unlike the two dockets discussed above, the FCC is seeking to determine de novo a public interest standard that cannot be based exclusively on the domestic goal of increased competition in the telecommunications industry. In view of INTELSAT's global composition, the FCC seems to be seeking a balance between the important procompetitive goals and the equally important foreign policy goals that INTELSAT serves.

Since issuing its Notice, the FCC has been contacted by some members of Congress expressing concern that important foreign policy considerations may be pushed aside by a Commission focused solely on procompetitive goals. Others on Capitol Hill have criticized the FCC and the Executive Branch for moving too slowly to license private satellite systems. Given these concerns, Congressional hearings have been scheduled on this issue, once again indicating that Congress may help to shape the ultimate outcome of the FCC's public interest determination.

23. On January 31, 1985, the Assembly of Parties unanimously adopted a resolution supporting the maintenance of a single global system. The resolution urges parties to refrain from entering any arrangements that would lead to the establishment of separate international systems linking the United States and Europe.

IV. CONCLUSION

Regardless of the outcome of the INTELSAT proceeding, the FCC is moving ahead and unquestionably has initiated a proceeding that is both as provocative and important as the FCC's actions in the 7-7-7 rulemaking or the access charge decision. When one examines the three major decisions addressed by the Commission at its open meeting, it becomes apparent that December 19, 1984, was a profound day in the fifty year history of this New Deal era regulatory body. In one sitting, the Commission initiated a major restructuring of the domestic broadcasting industry, revamped the pricing structure for our basic national telephone system, and finally, opened the door for privately-owned satellites as alternatives to the single global satellite system that the United States launched twenty years ago.