

# REGULATION OF BROADCASTING

LAW AND POLICY  
TOWARDS  
RADIO, TELEVISION  
AND  
CABLE COMMUNICATIONS

Douglas H. Ginsburg

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*American Casebook Series*



# **REGULATION OF BROADCASTING:**

## **LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS**

By

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**AMERICAN CASEBOOK SERIES**

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To Carl McGowan  
Lawyer, Teacher, Scholar, Judge, Friend

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## PREFACE

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This is a book about the laws governing the electronic mass media—radio, television, and cable—and the policy-making process by which those laws are formed, informed, and administered. It is intended for use in law, public policy, and communications curricula.

There could be no more auspicious moment for the publication of this book and its use in the classroom. The technologies of the electronic mass media are in a state of virtual revolution: cable television is growing apace, bringing satellite-to-cable distribution systems and two-way cable channels in its wake; over-the-air subscription television service is being licensed for the first time in 1978; home videotape recorders are now reaching the mass market; and various other developments, such as fiber optics and a new television tuning device, may soon bring about an unprecedented proliferation of new communications channels. At the same time, there is increasingly wide recognition that the Communications Act of 1934 may not be an adequate regime for the regulation of present technologies and the emergence of new ones. The House Subcommittee on Communications' proposed Communications Act of 1978, H.R. 13015, has assured this issue a prominent place on the agenda of national policy debate for the next several years.

At this moment, too, the Supreme Court has shown an increased willingness to decide issues of communications law; a new majority has emerged at the Federal Communications Commission under the chairmanship of Charles Ferris; and the public interest lawyers concerned with communications issues have achieved a new sophistication in putting matters of public concern before the FCC and the reviewing courts. Not surprisingly, public awareness of and involvement in communications issues is on the ascendant, as reflected in the growing concern with the contents of mass media programs: concern with sex and violence on television, political interference with public affairs programs on public television and radio, the preservation of special formats, such as classical music, on radio, and so on.

These issues will not go away unresolved. And in their resolution there will be great consequences for the public, the affected industries, and the first amendment to the Constitution. It is my hope for this book that, through our students, it will contribute somewhat to the quality of public debate over these matters.

## PREFACE

The materials in this book, and the questions posed, have emerged from three years of teaching the course in Regulation of Broadcasting at the Harvard Law School—to first, second, and third year law students, and to graduate students in the Harvard School of Education and in the Kennedy School of Government. Since I have found that the non-law students have very little difficulty with the legal materials involved, and often add a valuable perspective to the classroom discussion of the issues, particularly those involving content controls and economic regulation, I have no hesitancy in offering the book for use in inter-disciplinary and non-law classes.

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D.H.G.

Cambridge, Mass.  
October, 1978

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# **REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION, AND CABLE COMMUNICATIONS**

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## **PRELUDE: PAYOLA**

In the latter half of the 1950s, quiz shows were among the most popular weekly shows on television. The typical quiz show involved contestants who were asked increasingly difficult questions within their chosen field of knowledge. Elaborate and somewhat theatrical precautions were ostensibly taken to assure that the contestants received no prior hints about what would be asked of them and no help from the studio audience when the questions were put. Contestants who successfully answered the requisite series of questions and outlasted their competitors were awarded prizes of merchandise and cash, in some cases as much as \$200,000. Among the most successful contestants were a child prodigy and a celebrated college professor, and the nation followed their progress from week to week with bated breath; they acquired a personal following of fans and became nationally publicized figures.

In October, 1959 hearings undertaken in Congress to investigate allegations that the quiz shows were rigged "disclosed a complex pattern of calculated deception of the listening and viewing audience. Contests of skill and knowledge whose widespread audience appeal rested on the carefully nurtured illusion that they were honestly conducted were revealed as crass frauds." H.Rep. No. 1800, 86th Cong., 2d Sess. 26 (1960); see Investigation of Television Quiz Shows, Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959).

Toward the end of those hearings, counsel to the investigating committee received a letter from the President of the American Guild of Authors and Composers, making the following allegations:

" \* \* \* The practices of audience deception in broadcasting which has been revealed in the testimony adduced

before your committee, is by no means limited to quiz programs. It has a counterpart in the promotion of music, and in musical products.

“There is no doubt that commercial bribery had become a prime factor in determining what music is played on many broadcast programs and what musical records the public is surreptitiously induced to buy.

“From reports in various publications, it is clear that some of the scandalous facts have come to the attention of both the Federal Trade Commission and the Federal Communications Commission. Yet, neither of these bodies has acted to protect the public or the authors and composers of music.” *Id.*, pt. 2, at 1142.

As a result of this letter, further hearings were convened to look into the practice of “payola,” the payment of consideration to disk jockeys for playing particular records. Hearings Before the Subcomm. on Payola and Other Deceptive Practices in the Broadcasting Field of the House Comm. on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 1 (1960). Among the more sensational revelations was the fact that Dick Clark, who was then the highly successful disk jockey of the television show *American Bandstand*, had in three years amassed over \$400,000 in capital gains on stock in music-related companies. The following excerpt from *Time Magazine* captures the flavor of what the subcommittee heard:

“ \* \* \* As Clark told it, people were always trying to force money on him, and he had a hard time pushing it away.

\* \* \* A freckled, pipe-smoking songwriter named Orville Lunsford told how Clark’s subsidiary firms worked. His record *All American Boy* got a fast ride to the No. 2 position in record sales—but only, he said, after the Mallard Pressing Corp., one of Clark’s interests, got an order to print 50,000 copies. “Almost immediately,” said Lunsford, “I heard my song played every other day on Clark’s show.” *Time*, May 9, 1960, at 68.

As a result of these hearings, Sec. 317 of the Communications Act was amended, and Sections 508 and 509 were added, in 1960.

## H.REP.NO.1800

86th Cong., 2d Sess. (1960).

\* \* \*

Section 317 of the Communications Act of 1934 now reads as follows:

**ANNOUNCEMENT THAT MATTER IS PAID FOR**

**Sec. 317.** All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

**Background**

The amendment to section 317 made by section 7(a) of the committee substitute is a result of a recommendation of the Special Subcommittee on Legislative Oversight. The subcommittee, on page 39 of its interim report issued February 9, 1960, recommended as follows:

Section 317 should be amended to require announcement of payments made not only to licensees but also to any other individuals or companies for advertising "plugs" on behalf of third parties on sponsored programs. Provision should be made to prohibit payment to any person or company or the receipt by any person or company for the purpose of having included in a broadcast program any material, whether vocal or visual, without having announcement made on the program that the showing or hearing of such material has been paid for. Criminal penalties should be imposed upon any person or company who violates this section as amended.

The subcommittee's recommendation was based on evidence presented at its hearings on television quiz show programs and at its public hearings held in February, April, and May, 1960, on "payola" and related improper practices in the broadcast and phonograph record industries.

Testimony before the subcommittee showed that the owner of the Hess Bros. Department Store of Allentown, Pa., paid \$10,000 in cash to get an employee of the store, on the "\$64,000 Question" as a contestant. The purpose of paying the \$10,000 was to obtain publicity for the store.

\* \* \* No public announcement was made by anyone that the employee's appearance on the "\$64,000 Question" was the result of a

payment of money to an employee engaged in the programming of the show.

\* \* \*

Testimony appears to indicate that the selection of much of the music heard on the air may have been influenced by payments of money, gifts, etc., to programming personnel. In some instances, these payments were rationalized as licensing fees and consultation fees.

Another situation explored in some detail by the subcommittee was that of an arrangement between an airline and a television producing company. The airline agreed to pay periodically to a producing company amounts aggregating some \$7,000 over the contract term. In return, the airline was given a credit at the end of the television program to the effect that "travel for the show [was] arranged through the \_\_\_\_\_, Airlines."

The president of the network over whose facilities the program was broadcast testified that the airline contract had the approval of the network.

The foregoing illustrations explain why the committee believes it necessary that section 317 be clarified and expanded. The section as it has existed since the Federal Radio Act appears to go only to payments to licensees as such. The fact that licensees now delegate much of their actual programming responsibilities to others makes it imperative that the coverage of section 317 be extended in some appropriate manner to those in fact responsible for the selection and inclusion of broadcast matter.

As a result of these disclosures the Federal Communications Commission on March 16, 1960, issued a Public Notice entitled "Sponsorship Identification of Broadcast Material."

In this Public Notice the Commission interpreted the provisions of section 317 as requiring an announcement in situations involving gifts to licensees of matter to be exposed in the course of broadcasts by such licensees. Such interpretation of the provisions of section 317 would require, for example, an announcement of the fact that a phonograph record played by a radio station was given to such station by the XYZ company.

The radio and television industry strongly opposed this interpretation of section 317, a provision which, in its original form, had been enacted in 1927 and which up to this point had never been so interpreted by the Commission.

The amendment to section 317 and the accompanying disclosure provisions are aimed at (1) preventing recurrences of the extreme types of "payola" situations uncovered by the Special Subcommittee on Legislative Oversight, and (2) avoiding some of the hardships which have resulted from the Commission's interpretation of the pres-



ent language of section 317 as set forth in the Commission's Public Notice of March 16, 1960.

\* \* \*

**Proposed section 317(a)(1)**

Section 317(a)(1), as it appears in section 7(a) of the committee substitute, is, except for the proviso, substantially identical with section 317 as presently in effect.

The proviso reads as follows:

*Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

In other words, the proviso would establish a general rule that an announcement shall not be required under section 317 with respect to any service or property furnished "without charge or at a nominal charge" to a broadcast licensee for use on or in connection with a broadcast, but this is subject to the exception that an announcement will be required if the service or property is furnished "in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name *beyond an identification which is reasonably related to the use of such service or property on the broadcast*". [Emphasis supplied.]

The effect of the proviso would be to exempt from the announcement requirement some of the situations, involving the furnishing of services or property to licensees without charge or at a nominal charge for use on or in connection with broadcasts, in the case of which the interpretation placed on section 317 of present law by the Commission in its Public Notice of March 16, 1960, would require such an announcement.

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QUESTIONS

1. Precisely why did the Congress consider payola an improper practice? Is there any good reason to prohibit or discourage the practice? After all, who was harmed by it? Does the fact that wrestling is an "exhibition" and not a contest injure the fans who root for their favorite exhibitionist? See generally Sulzer and Johnson, Attitudes toward Deception in Television, 4 J. Broadcasting 97 (1960).

2. Why do you suppose that the president of the American Guild of Authors and Composers (AGAC) brought the existence of payola to the attention of the Congress and desired its prohibition?

In this connection, you should know that the AGAC represented songwriters who contracted with publishers for the publication and licensing of their work; the AGAC standard contract provided that the writer would receive one-half of net revenue received from the licensed users of the material. The publishers would attempt to license a record manufacturer, which would engage a recording artist and release a recording of the copyrighted song. In addition, once a song had been recorded and released, any other record manufacturer could claim a compulsory license under the Copyright Act of 1909, 17 U.S.C.A. § 1(e) (current version at 17 U.S.C.A. § 115 (1976)), to release another recording of the same song so long as it paid the copyright holder (in this case, AGAC) two cents for each record manufactured. During the period leading up to the prohibition of payola, the two-cent statutory fee was in fact more than most record manufacturers were willing to pay for the use of a particular song, with the result that secondary manufacturers more commonly negotiated a somewhat lower fee rather than avail themselves of the compulsory license. See Staff of the House of Comm. on Interstate and Foreign Commerce, 86th Cong., 2d Sess., *Songplugging and the Airwaves: A Functional Outline of the Popular Music Business* 2-3 (Subcomm. Print 1960).

If the record manufacturers engaged in payola in order to promote the records they recorded, why should not the AGAC be delighted, on the theory that anything that sells records is all to the good?

3. Why do you suppose the Congress did not make the payment of payola illegal, but only required its disclosure? In this connection, you should be aware that the FCC has a policy against "overcommercialization," by which it means the sale of an excessive number of minutes per hour for advertising purposes. Would it make sense to apply that policy to a broadcaster that sold all of its time for the playing of records, assuming that the broadcaster complied with the disclosure requirement of § 317 as amended? If the FCC determined that the policy would not apply to this circumstance, do you think many broadcasters would find a ready market for their "three-minute ads?"

4. Did you think that the 1960 amendments and the FCC policy just referred to were sufficient to have terminated the widespread practice of payola? See "Four Record Company Officers Given Prison Terms for Payola," April 13, 1976, *N.Y. Times*, at 58. Do you think they could seriously have been expected to suppress an industry of such magnitude? Cf. Banfield, *Corruption as a Feature of Governmental Organization*, 18 *J. Law & Econ.* 587, 593 (1975).

5. The Commission has now resumed its proceedings in Docket 16648, inquiring into alleged violations of Sections 317 and 508, on the basis of "new information and new complaints from the public." 39 R.R.2d 478 (1976).

6. The Commission received allegations that the program director of a station violated § 508. After conducting its own investigation indicating that violations had occurred, the Commission turned its records over to the Justice Department for possible prosecution, but the U.S. Attorney declined to prosecute due to discrepancies in testimony, lack of corroboration, suspicions about the credibility of witnesses, and alternative plausible explanations for transactions involving the program director.

Would the Commission violate the Due Process Clause of the Fifth Amendment if it denied renewal of the station's license or otherwise sanctioned it in these circumstances? Cf. KMAP, Inc., 40 R.R.2d 47, 61 (1977).

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Part One  
THE SETTING

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Chapter I  
INTRODUCTION

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**BROADCAST SERVICES \***

FCC Information Bulletin (Nov. 1977).

**Evolution of Broadcasting**

One of the most dramatic developments of 20th Century technology has been the use of radio waves—electromagnetic radiations traveling at the speed of light—for communication. Radio communication designed for reception by the general public is known as “broadcasting.” Radio waves of different frequencies (number of cycles per second) can be “tuned.” Hence, signals from many sources can be received on a radio set without interfering with each other.

In everyday language the term “radio” refers to aural (sound) broadcasting, which is received from amplitude-modulated (AM) or frequency-modulated (FM) stations. “Television,” another form of radio, is received from stations making both visual and aural transmissions. AM radio, sometimes called standard broadcasting, was the earliest broadcast service and operates on relatively low “medium” frequencies. FM and TV are newer and occupy considerably higher frequency bands.

Radio communication was born of many minds and developments. In the 1860s, the Scottish physicist, James Clerk Maxwell, predicted the existence of radio waves. Heinrich Rudolf Hertz, the German physicist, later demonstrated that rapid variations of electric current could be projected into space in the form of waves similar to those of light and heat. (His contributions have been honored internationally by the adoption of Hertz as a synonym for cycles per second.) In 1895, the Italian engineer, Guglielmo Marconi, transmitted radio signals for a short distance, and at the turn of the century he conducted successful transatlantic tests.

The first practical application of radio was for ship-to-ship and ship-to-shore telegraphic communication. Marine disasters early

\* Portions of this document have been deleted without indication.

demonstrated the speed and effectiveness of radiotelegraphy for saving life and property at sea.

The new communication medium was known first as "wireless." American use of the term "radio" is traced to about 1912 when the Navy, feeling that "wireless" was too inclusive, adopted the word "radiotelegraph." Use of the word "broadcast" (originally a way to sow seed) stems from early U. S. naval reference to "broadcast" of orders to the fleet. Now it is used to describe radio service to the public.

### **Regulation of Broadcasting**

The Wireless Ship Act of 1910 applied to use of radio by ships, but the Radio Act of 1912 was the first domestic law for general control of radio. It made the Secretary of the Department of Commerce and Labor (then a single Cabinet Department) responsible for licensing radio stations and operators.

Early broadcasting was experimental and therefore noncommercial. In 1919, radio-telephone experiments were operated as "limited commercial stations." In 1922, the wavelength of 360 meters (approximately 830 kilocycles per second) was assigned for the transmission of "important news items, entertainment, lectures, sermons, and similar matter."

Increasing numbers of AM stations caused so much interference that, in 1925, a fourth National Radio Conference asked for a limitation on broadcast time and power. The Secretary of Commerce was unable to deal with the situation because court decisions held that the Radio Act of 1912 did not give him authority. As a result, many broadcasters changed frequencies and increased power and operating time at will, regardless of the effect on other stations, producing bedlam on the air.

In 1926, President Coolidge urged Congress to remedy matters. The result was the Dill-White Radio Act of 1927.

### **Federal Radio Commission**

The Radio Act of 1927 created a five-member Federal Radio Commission to issue station licenses, allocate frequency bands to various services, assign specific frequencies to individual stations, and control station power. The same Act delegated to the Secretary of Commerce authority to inspect radio stations, to examine and license radio operators, and to assign radio call signs.

Much of the early effort of the Federal Radio Commission was required to straighten out the confusion in the broadcast band. It was impossible to accommodate the 732 broadcast stations then operating. New regulations caused about 150 of them to surrender their licenses.

**Communications Act of 1934**

At the request of President Roosevelt, the Secretary of Commerce in 1933 appointed an interdepartmental committee to study electronic communications. The committee recommended that Congress establish a single agency to regulate all interstate and foreign communication by wire and radio, including telegraph, telephone, and broadcast. The Communications Act of 1934 created the Federal Communications Commission for this unified regulation. This is the statute under which the FCC operates and which it enforces; several of its provisions were taken from the earlier Radio Act.

**Federal Communications Commission**

The FCC began operating July 11, 1934, as an independent Federal agency headed by seven Commissioners, appointed by the President with the advice and consent of the Senate.

**FCC Broadcast Regulation**

One of the FCC's major activities is the regulation of broadcasting. It does this in three phases.

1. It allocates space in the radio frequency spectrum to the broadcast services and to many nonbroadcast services that also must be accommodated. The tremendous increase in the use of radio technology in recent decades made the competing demands for frequencies one of the Commission's most pressing problems.

2. It assigns stations in each service within the allocated frequency bands, with specific location, frequency, and power. The chief consideration, though by no means the only one, is to avoid interference with other stations on the same channel (frequency) or channels adjacent in the spectrum. When an application is granted for a new station or for changed facilities the applicant receives a construction permit. Later, when the station is built and it is capable of operating as proposed, a license to operate is issued.

3. It regulates existing stations: inspecting to see that stations are operating in accordance with FCC Rules and technical provisions of their authorizations, modifying authorizations when necessary, assigning station call letters, licensing transmitter operators, processing requests to assign station licenses to other parties or transfer control of the licensee corporation, and processing applications for renewal of licenses. At renewal time, the Commission reviews the station's record to see if it is operating in the public interest.

**THE NATURE OF BROADCASTING IN THE UNITED STATES**

The Communications Act requires applicants to be legally, technically, and financially qualified, and to show that their proposed operation would be in the public interest. They must be citizens of the United States. Corporations with alien officers or directors or

with more than one-fifth of the capital stock controlled by foreign interests may not be licensed.

Penalties for broadcast station violations, depending upon the degree of seriousness, include reprimands, fines up to \$10,000, short-term probationary licenses, denial of license renewal, or license revocation. Cease and desist orders may also be issued.

In 1965, the Commission provided for public inspection of certain records of broadcast stations in the communities they serve. These mainly are duplicates of records in the public files of the Commission in Washington, and include licenses, records of ownership, applications to the FCC and related material, network affiliation contracts, and [equal] employment [opportunity] reports.

The Communications Act requires each broadcast licensee to program in the public interest. The Commission does not prescribe the time to be devoted to news, education, religion, music, public issues, or other subjects. Programing can vary with community needs at the discretion of the station.

Licensees must ascertain and meet the needs of their communities in programing. They must show how community needs and interests have been determined and how they will be met. The Commission periodically reviews station performance, usually in connection with the license renewal, to determine whether the broadcaster has lived up to his obligations and the promise he made in obtaining permission to use the public airwaves.

The Commission is forbidden by law from censoring programs. [Sec. 326]

### **Advertising**

The Commission does not regulate individual commercials. In considering applications for new stations, renewals, and transfers, it does consider whether overcommercialization, contrary to the public interest, may be involved. Radio applicants proposing more than 18 minutes of commercials per hour must justify their policies to the Commission. FCC rules do not contain a commercial quota, but the 18-minute benchmark is part of the National Association of Broadcasters' Radio Code. The NAB Television Code specifies a commercial maximum of 16 minutes per hour.

Stations and producers of advertising are expected to cooperate in controlling the sound volume (loudness) of commercials.

### **Sale of Time and Station Management**

The Communications Act says broadcasting is not a common carrier operation, so, unlike common carriers, broadcasters are not required to sell or give time to all who seek to go on the air, nor are they subject to regulation of rates and business affairs. Because programing is primarily the responsibility of broadcast licensees, the

Commission does not ordinarily monitor individual programs, or require the filing of scripts. However, stations are required to keep logs showing the programs presented and records of requests for political time.

The Commission does not monitor the day-to-day internal management of broadcast stations, or regulate time charges, profits, artists' salaries, or employee relations. It licenses only stations and their transmitter operators, not announcers, disc jockeys, or other personnel except where they are employed as transmitter operators. Stations are required to keep technical and maintenance logs as well as program logs.

### **Call Letters**

International agreement provides for national identification of a radio station by the first letter or first two letters of its assigned call signal, and for this purpose the alphabet is apportioned among nations. Broadcast stations in the United States use call letters beginning with K or W. Generally, those beginning with K are assigned to stations west of the Mississippi River and in territories and possessions, while W is assigned east of the Mississippi.

## **BROADCAST OPERATION**

### **Frequencies and Station Assignments**

Radio frequencies differ in characteristics, and each service is assigned to a frequency band to suit its needs.

The AM aural service, sometimes called standard broadcast, occupies the band from 535 kilocycles per second to 1605 kc/s. Radio waves travel with the same speed as light, and are of different "frequencies" (cycles per second) and "wavelengths" (distance between points in successive cycles). "Frequency" and "wavelength" vary inversely with each other. The latter term was formerly used generally to describe a particular radio wave, and still is in some other countries; but in the United States the use of "frequency" is much more common.

The "medium" frequencies such as the AM band usually are referred to by their number of kilocycles (1,000 cycles) per second, or, for short "kilocycles". The higher frequencies are usually referred to by the number of megacycles (1,000 kilocycles or 1,000,000 cycles) per second, or "megacycles". The term "gigacycle" has come into use in more recent years, meaning 1,000,000,000 cycles per second (1,000 megacycles), to describe the much higher frequencies now being used in many services although not in broadcasting as such.

The term "Hertz" as a synonym for cycle per second has recently been agreed upon internationally and domestically, along with its derivatives "kiloHertz", "megaHertz", etc. The usable frequency spectrum has constantly expanded upward with developing technology,



so that what once were "high" frequencies are now near the low end of the total spectrum used. AM stations are assigned at 10 kc/s intervals beginning at 540 kc/s, providing 107 frequencies.

FM broadcasting occupies the frequencies from 88 to 108 MHz with 100 channels of 200 kHz width each, the lowest 20 of them reserved for educational use. Both the center frequency (e. g., "93.1 MHz"), and the designated channel number from 201 to 300 are used (e. g., "Channel 201" is "81.1 MHz"), although channel numbers are not in popular usage since they are not listed on FM receivers.

In television, where wider channels are required to carry both picture and sound, each channel is 6 MHz wide. The very high frequency (VHF) portion of the television service occupies the frequencies 54 to 72 MHz (Channels 2, 3, and 4), 76 to 88 MHz (Channels 5 and 6) and 174 to 216 MHz (Channels 7 through 13). The ultra high frequency (UHF) portion of the television service occupies the frequencies from 470 to 890 MHz (Channels 14 through 73). Designated channel numbers identify the frequency assignments (e. g., 54-60 MHz is "Channel 2"). There is no "Channel 1" in television.

Although "AM" and "FM" are often used to refer to the standard broadcast and FM broadcast services, these terms more properly apply to methods—"amplitude modulation" and "frequency modulation"—used to impress aural or visual intelligence on the carrier wave. The "AM" principle is used not only in the standard broadcast service but also in the picture portion of television and in the international short-wave service. The "FM" principle is used both in the FM broadcast service and in the sound portion of television.

In all the broadcast services, the same aural or visual channel can be used in different places if the stations are far enough apart not to interfere with one another or with stations on adjacent or technically related channels. A TV station may be required to "offset" 10 kHz above or below its normal carrier frequency. The channel assigned to such a station is then designated "plus" or "minus" as the case may be. This makes more TV assignments possible and reduces the possibility of interference.

### **AM and FM Systems**

Without being too technical, this is how an aural station works:

A person talks into a microphone as if it were a telephone. The voice sets up vibrations of varying intensity and frequency. The lower the pitch the slower the vibration. A cycle, or wavelength, is one complete performance of a vibration.

The microphone converts these vibrations into electrical impulses which are then greatly amplified at the transmitter before being put on the "carrier" wave. The intensity and frequency of the carrier wave are constant. This wave, by itself, does not transmit music or speech, so it is varied to correspond with the fluctuations of the

speech or music received at the microphone. This is called "modulation."

In AM broadcast, the audio waves are impressed on the carrier wave to cause its amplitude (or power) to vary with the audio waves. The frequency of the carrier remains constant. This is known as amplitude modulation. In frequency modulation (FM), the amplitude remains unchanged but the frequency is varied in a manner corresponding to the voice or music to be transmitted.

These modulated waves radiate from the antenna tower at approximately 186,000 miles per second (the speed of light). Some of them follow the contour of the ground and are called "groundwaves." Others dart upward and are called "skywaves." At night, the sky-wave portions of transmissions in the standard broadcast (AM) frequencies are reflected back to earth by electrical particles in the ionosphere portion of the atmosphere. This gives the listener a choice of more distant AM stations at night, but also increases interference. Daytime reception is dependent on groundwaves.

Radio waves may pass through buildings and other objects but are subject to absorption or interference. As in the case of ripples on water, radio vibrations weaken with distance. Seasonal disturbances and sunspot periods can throw them off course and cause "freakish" reception.

AM broadcast stations use medium waves. That is to say, they transmit 540,000 to 1,600,000 waves a second, or 540 to 1,600 kilocycles or kiloHertz. At 540,000 waves a second, the distance between the crests is approximately 1,800 feet.

The so-called shortwave (international long-distance) broadcast stations transmit in the frequency range 6 MHz to 25 MHz (MHz = one million cycles per second). These waves are sent out, one after another, so rapidly that the distance between their crests (wavelength), is only 37 to 150 feet. FM and TV stations, broadcasting in the very high and ultra high frequencies, send out even shorter, or very short, waves. (The word shortwave came into use before there was technology to use these other parts of the spectrum.)

The modulated radio wave from the radio station is picked up by the home receiving antenna. In other words, the wave sets up in the receiving antenna a current having the same frequency characteristics as the one transmitted. In the receiver the audio and carrier waves are separated by a device called a detector or demodulator. The carrier wave, no longer needed, is dissipated while the audio wave is relayed to the loud speaker where it is transformed back into the sound that is heard by the listener.

### **Transmitting Antennas**

In the AM service, antenna height above ground is not usually important. The entire antenna structure acts as the antenna and us-

usually varies in height with the frequency of the transmission. Few AM antennas exceed 1,000 feet and most are less.

By contrast, in FM and TV, where transmission follows "line of sight," service depends on the location of the receiver in relation to the transmitting antenna. Here, antenna height is extremely important. While FM and TV antennas themselves are short, they often are situated atop natural or manmade structures that give greater height, such as tall buildings, mountain tops, or tall antenna towers specifically built for this purpose. TV towers extend as much as 2,000 feet above ground, and higher.

Directional antennas consist of more than one radiating element (the tower in AM), with phasing of the radiation from a series of towers so arranged that radiations cancel each other in some directions and reinforce each other in other directions. Sometimes they are used to increase radiation and service in a particular direction. More commonly the purpose is to restrict radiation in one or more directions, usually to avoid interference to other stations.

As AM stations began to multiply on shared channels, it became necessary to employ directional antennas to prevent interference. Since 1937, directional antennas have helped new stations squeeze into the congested AM broadcast band. Most fulltime (day and night) AM stations operate directionally at night. Directional antenna arrays can produce "figure eight" and more complicated service patterns. A complex array may include 12 towers. Directional antennas also are used in international communication and microwave relay to beam transmissions to particular points. Some FM and TV stations now use directional antennas.

## AM BROADCAST

Amplitude modulation is the oldest system of program transmission. The pioneer AM broadcast service started operation on the low frequencies it still uses now—535 to 1600 kHz.

AM broadcast stations use power of 250 watts to 50 kw (50,000 watts)—the maximum permitted by the Commission.

## Classes of AM Stations

There are four major AM classes:

Class I stations operating on clear channels and usually with 50 kw power (never less than 10kw) serve remote rural areas as well as large centers of population. The U.S. has Class I priority on 45 clear channels. (Other North American countries have their own Class I priorities, some shared by the U.S.) There are only one or two Class I stations on each clear channel.

Clear channels are frequencies set apart by international agreement for use primarily by high-powered stations designed to serve wide areas with groundwave and (at night) skywave service, particu-

larly remote rural areas. Listeners living outside of populous communities depend for nighttime AM service on the skywave signals of distant clear-channel stations. The signals of Class I stations receive a high degree of protection from interference to make this wide service possible.

A Class II station is a secondary station on a clear channel, operating with a power of 250 to 50,000 watts. It serves a population center and an adjacent rural area and is so operated as not to interfere with the extensive services rendered by major clear channel stations (both U. S. and foreign). There are 29 channels on which Class II stations may operate.

A Class III station shares a regional channel with numerous similar stations, using power of 500 to 5,000 watts to serve a center of population and an adjacent rural area. There are 41 regional channels and more than 2,000 Class III stations.

A Class IV station operates on a local channel (shared by many similar stations elsewhere), with a maximum power of 1 kw day and 250 watts night. There are six local channels, each occupied by 150 or more stations.

## FM BROADCAST

Frequency modulation broadcast has several advantages over the older amplitude modulation. FM has higher fidelity and is freer of static, fading, and background overlapping of other stations' programs.

FM's greater tonal range is due primarily to the fact that it uses a wider channel than does AM. Then, too, it occupies a higher portion of the radio spectrum where there is less static and other noise than at lower frequencies. FM receivers have the particular ability to suppress weaker stations and other interference.

Since the FM frequencies do not ordinarily reflect back to earth from ionospheric layers, scattered FM stations can use the same frequency without interference, night or day, unlike AM.

## History

The principle of frequency modulation has long been known, but its advantages for broadcasting were not realized until shortly before World War II. Largely as a result of developmental work by Edwin H. Armstrong in the 1930s, the Commission authorized increased FM experimentation, and in 1940, provided for FM operation to start January 1, 1941.

In 1963 the Commission adopted a table assigning commercial FM channels to states and communities. (This is similar to the TV table of channel assignments.) Nearly 3,000 FM channel assignments were made to nearly 2,000 mainland communities. Assignments in Alaska, Hawaii, Puerto Rico, and the Virgin Islands were added in 1964.

FM stations owned jointly with AM stations in cities of more than 100,000 population may not duplicate AM programming for more than half the FM station's broadcast week.

The Commission has said it believes separate ownership of AM and FM stations is a desirable long-range goal.

### TV BROADCAST

Television broadcasting is synchronous transmission of visual and aural programs. The picture phase is accomplished by sending a rapid succession of electrical impulses which the receiver transforms into scenes and images. Here is a brief explanation of a complex process.

#### **Monochrome**

A special tube in the television camera which has a small "screen" covered with about 367,000 microscopic dots of a special photo sensitive substance is focused on the scene to be televised. This dot array can be likened to a tiny motion picture screen and is called a "mosaic." The varying light from each part of the scene being televised falls upon these dots and gives them an electrical charge, the strength depending upon the amount of light falling on the individual dots. Thus each dot becomes a tiny storage battery and the scene is formed in a pattern of electrical charges on the mosaic.

The mosaic is "scanned" by a tiny beam of electrons, no larger than the head of a pin, moving from left to right and progressing downward (just as the printed page is read by the human eye). This complete process is repeated 60 times per second, and the horizontal lines of alternate scanning are interlaced so that 30 complete pictures or "frames" composed of 525 horizontal lines are produced each second.

As the electron beam strikes each dot on the mosaic, the dot is discharged through the beam and the electrical impulses produced are used to modulate the signals of the TV transmitter. Each time the dots are discharged by the electron beam they are recharged by the light produced by the succeeding scene falling upon them. The succession of individual "still" scenes creates the illusion of motion just as in the case of motion pictures made on film.

The reproduction by the TV receiver of the pictures transmitted is just the reverse of the transmission. The incoming succession of electrical impulses is separated from the "carrier," and after amplification is impressed on the picture tube grid. The picture tube also has an electron "gun" which shoots out a tiny beam of electrons that moves from left to right and progresses downward on the face of the picture tube.

The face of the tube is coated with a material that fluoresces or gives off light at the point where it is struck by the electron beam.

In the absence of a television signal, the whole face of the picture tube is illuminated equally by a series of closely spaced horizontal lines. When a TV signal is placed on the grid of the picture tube, it controls the strength of the electron beam and hence the amount of light on the face of the tube. If the scanning of the electron beam in the picture tube is kept in perfect step with the scanning of the electron beam in the TV camera, the picture tube will reproduce the lights and shadows of the subject scene, and the succession of such scenes produces the illusion of motion.

In brief, the picture seen by the viewer is actually produced by a flickering spot of light moving rapidly across and down the face of the picture tube. The viewer sees the "whole" picture because the screen continues to glow for a tiny fraction of a second after the electron beam has passed. Coupled with the retentive ability of the eye, this creates the illusion that the picture is there all the time. The high rate of repetition of the picture produced by the beam minimizes flicker and lends smoothness to motion.

The TV transmitter is, in effect, two separate units. One sends out the picture and the other the sound. Visual transmission is by amplitude modulation. Sound transmission is by frequency modulation.

### **Color**

In color TV, a brightness component is transmitted in much the same manner as the black-and-white picture signal is sent. In addition, a color component is transmitted at the same time on a subcarrier frequency located between the visual and aural carrier frequencies.

Color standards are based on a simultaneous system of color signals representing red, blue, and green. These are the "primary colors," and when they are combined in various amounts, they produce all the other colors. A magnifying-glass examination of the scene on a receiver will reveal that it is made up only of red, blue, and green dots, no matter what color is being shown. Even scenes not transmitted in color and seen as varying shades of gray to white are made up of red, blue, and green dots.

### **TV History**

Like aural radio, TV was made possible by electronic discoveries in the late 19th and early 20th centuries. In 1884 Paul Nipkow, a German, patented a scanning disc for transmitting pictures by wireless. In this country Charles F. Jenkins began his study of the subject about 1890. The English physicist, E. E. Fournier d'Albe, conducted experiments in the early 1900s. In 1915 Marconi predicted "visible telephone."

In 1923 physicist Vladimir Zworykin, a Russian-born American, applied for a patent on the iconoscope camera tube. In the years fol-

lowing there were experiments by E. F. W. Alexanderson and Philco T. Farnsworth in this country and John L. Baird in England. An experimental TV program, in which Secretary of Commerce Herbert Hoover participated, was sent by wire between New York and Washington by the Bell Telephone Laboratories in 1927.

### **Early Commercial Operation**

The Journal Company of Milwaukee, now licensee of WTMJ-TV, filed the first application to broadcast TV on a commercial basis. At a 1940 hearing the FCC found industry divided on technology and standards, but a committee appointed to develop a policy agreed on the present standards of 525 lines and 30 frames per second, and on April 30, 1941, the Commission authorized commercial TV operations to start the following July 1, on 10 stations that were on the air by May 1942, six continuing during the war.

### **TV Proceedings 1948-1951**

As the Commission had foreseen, it became increasingly evident that the available channels were too few for nationwide service. On September 30, 1948, the Commission stopped granting new TV applications in order to study the situation. This was the so-called TV "freeze" order. On July 11, 1949, comprehensive changes were proposed to improve and extend TV service. These included new engineering standards, opening UHF channels for TV, consideration of color systems, reservation of channels for noncommercial educational use, and a national assignment plan for all channels.

### **Freeze Lifted 1952**

On April 14, 1952, the Commission reopened TV to expansion. It added 70 UHF channels (between 470 and 890 MHz) to the 12 VHF channels (54-216 MHz). It adopted a table making more than 2,000 channel assignments to nearly 1,300 communities. These included 242 assignments for noncommercial educational use.

### **TV Service**

Commercial TV stations are required to broadcast at least 28 hours a week, at least two hours every day, although they are allowed a shorter schedule when they begin operation.

TV service is being expanded to new areas through use of satellite stations—regular stations largely rebroadcasting the programs of parent stations—and translators, lower power automatic installations that pick up and rebroadcast programs of parent stations on a different frequency.

Unlike AM networking over ordinary telephone wires, TV networking requires special relay adjuncts. Network TV was made possible in large measure by the development of coaxial cable and microwave relay facilities.

Programs are carried now mostly by microwave, with cable used for local loops where microwave is not feasible or by satellite. Although there is some private microwave TV relay, most live networking is over the facilities of common carriers. The American Telephone and Telegraph Co., is the dominant carrier nationally.

### **UHF Development**

Economic and technical problems have impeded full utilization of the UHF channels. Because of the large number of VHF-only receivers originally in use, advertisers have preferred VHF stations, limiting UHF revenue.

In 1956 the Commission outlined plans to promote comparable TV facilities as a means of extending service throughout the nation. In the years following, it considered and rejected the idea of moving all or most of TV to the UHF band. It sought the cooperation of industry to find ways to increase the range of UHF stations. It made certain areas all-UHF, and took other steps to put UHF and VHF on a more competitive basis. In 1966 it revised the table of channel assignments to make additional UHF assignments.

At the Commission's request, Congress appropriated money for a test in New York City to determine the ability of UHF to provide service comparable with VHF in a locality of difficult reception because of tall buildings separated by "canyons." As a result of the tests, the Commission concluded that UHF reception, generally, was equal to that of VHF.

Also at FCC request, Congress in 1962 adopted a law permitting the FCC to require that all TV receivers be made to receive UHF as well as VHF channels. Industry had to convert to all-channel production by April 30, 1964. This has given substantial impetus to UHF expansion. A lingering complaint was that VHF tuning dials, which clicked into place, were easier to work than UHF, which worked like aural radio dials. Efforts were launched to make UHF tuning more comparable with the click-action VHF tuning, and rules were adopted in 1970 to require comparability.

### **Cable TV**

Cable TV is not a broadcast service. It augments broadcast service and it is regulated by the FCC, but cable TV systems are not licensed as broadcast stations are.

Cable TV systems pick up the programs of broadcast stations by a central receiving antenna, or by microwave relay. Coaxial cable, which can carry many signals, delivers the programs from the reception point to subscribers' homes.

Cable TV started in 1949-50 as a means of carrying TV service to communities outside the reach of broadcast signals. It spread to communities that had TV service but wanted to receive more stations.



Other markets were found where there already was a choice of signals but where obstacles to over-the-air reception gave cable operators an opportunity to provide a better picture. [Cable TV is considered in Chapter V, *infra*.]

### **Subscription TV**

Subscription television is a special program service for viewers who pay for it. It is transmitted over the air in scrambled signals that are deciphered by devices on subscribers' sets. [Subscription TV is considered in Chapter V, *infra*.]

## **EDUCATIONAL BROADCASTING**

### **FM Educational Stations**

When regular FM broadcasting was authorized in 1941, five channels were authorized for noncommercial educational use as a substitution for AM allocations previously made to education.

In 1945, as part of an extensive revision of frequency allocations, the Commission reserved 20 FM channels between 88 and 92 MHz for noncommercial educational stations. This part of the FM band is contiguous to the commercial portion, and FM receivers can tune both noncommercial and commercial stations. Since then the number of noncommercial educational FM stations has grown slowly but steadily.

Stations in the educational FM service are licensed principally to school systems, colleges, and universities for student-teacher programs as well as for public education and information.

### **TV Educational Stations**

The Commission allocated TV facilities for noncommercial educational use after a lengthy study in the general television proceedings (see Broadcast). It determined that "the need for noncommercial educational stations has been amply demonstrated," that it would take longer for the educational service, to be developed than for the commercial service, and that special channels should be reserved.

Consequently, in 1952, channel assignments were made to 242 communities exclusively for noncommercial educational stations. Forty-six of these were made to primary educational centers. Of the total 242 channels, 80 were VHF and 162 UHF. There have been more assignments since. In 1966 a revised table of channel assignments was adopted for UHF, containing 615 educational TV assignments in the mainland states, more than a third of all channel assignments.

The FCC expects educational TV licensees to make their station facilities available to other local educational institutions, since such assignments are made to serve the educational and cultural needs of

the community. Except in particular cases, educational TV eligibility is not extended to municipal authorities in places where an independent educational authority, such as board of education, is established.

Several colleges, universities, and community groups hold TV authorizations on channels not reserved for education, and they operate either on a profit or nonprofit basis.

## GROWTH OF BROADCAST SERVICE

### I. Television

A. Commercial TV Stations <sup>1</sup>				Industry Finances (\$million) <sup>2</sup>		
YEAR	VHF	UHF	TOTAL	REVENUE	EXPENSES	INCOME <sup>3</sup>
1945	6	—	6			
1950	97	—	97	324 <sup>4</sup>	269	55
1955	294	117	439	745	595	150
1960	441	76	573	1,269	1,025	244
1965	487	99	586	1,965	1,517	448
1970	508	182	690	2,808	2,354	454
1971	511	185	696	2,750	2,361	389
1972	510	189	699	3,179	2,627	552
1973	511	189	700	3,465	2,812	653
1974	513	192	705	3,781	3,043	738
1975	513	198	711	4,094	3,314	780
1976	513	197	710	5,198	3,948	1,250
1977	517	211	728			

Sources: Broadcasting Yearbook 1977; Broadcasting, Aug. 29, 1977.

### B. Non-commercial TV Stations

YEAR	VHF	UHF	TOTAL
1955	—	—	9
1960	—	—	44
1965	54	34	88
1966	61	44	105
1967	67	51	118
1968	71	75	146
1969	76	96	172
1970	77	105	182
1971	85	111	196
1972	89	117	206
1973	91	138	229
1974	91	142	233
1975	95	146	241
1976	97	155	252
1977	101	155	256

Sources: FCC, Broadcast Services; Broadcasting Yearbook 1977.

1. As of January 1 each year.
2. Industry includes networks and stations.
3. Before Federal income tax.
4. 1952.

## II. Radio

A. Commercial Radio Stations <sup>1</sup>				Industry Finances (\$million) <sup>2</sup>		
YEAR	AM	FM	TOTAL	REVENUES	EXPENSES	INCOME <sup>3</sup>
1945	884	46	930			
1950	2,086	733	2,819	468 <sup>4</sup>	407	61
1955	2,669	552	3,221	452	406	46
1960	3,456	678	4,134	592	544	48
1965	4,012	1,270	5,282	777	696	81
1970	4,319	2,184	6,503	1,137	1,044	93
1971	4,323	2,196	6,519	1,258	1,155	103
1972	4,355	2,304	6,659	1,407	1,273	134
1973	4,393	2,482	6,875	1,502	1,392	110
1974	4,422	2,605	7,027	1,603	1,519	84
1975	4,432	2,636	7,068	1,725	1,634	91
1976	4,463	2,767	7,230	2,019	1,841	179
1977	4,497	2,873	7,370			

Sources: 1945-73, FCC, Broadcast Services; 1974-77, Broadcasting Yearbook 1977.

## B. Noncommercial FM Stations

YEAR	NUMBER
1945	—
1950	48
1955	122
1960	162
1965	255
1966	269
1967	299
1968	326
1969	362
1970	396
1971	440
1972	479
1973	625
1974	711
1975	717
1976	804
1977	870

Sources: FCC, Broadcast Services; Broadcasting Yearbook 1977.

1. As of January 1 each year.
2. Industry includes networks and stations.
3. Before Federal income tax.
4. 1952.

## Chapter II

### THE DECISION TO REGULATE

The materials in this chapter raise the most basic questions of radio regulation: why do we have any *public* law in this area? Why the particular regime now embodied in the Federal Communications Act and not some other? What others have been suggested or tried elsewhere? What are the costs of maintaining the present system? \*

The historical background of the present regimes in the United States and Britain is recounted in the materials in Section A. As you read them, note each different plan that was suggested for the early organization and financing of the broadcasting industry in the two countries. Although all of the plans naturally reflect the peculiarities of radio technology, when evaluated against the course of later events they may enable you to formulate some hypotheses about the variety of possible legal responses to the emergence of a new technology generally. These you can usefully test later in this course, e. g. when CATV comes on the scene, as well as elsewhere in the law curriculum where you may encounter the legal problems associated with the advent of construction blasting, electronic funds transfers, deep seabed mining, or microwave telecommunications.

#### A. THE ORIGINS OF THE DECISION

##### 1. IN THE UNITED STATES

Before reading the principal item in this section, you should know something about the formation of the Radio Corporation of America (RCA).

On the day following the United States' declaration of war in April, 1917, President Wilson, by proclamation, nationalized and directed the Navy to seize all radio broadcasting apparatus then in private hands. Under the emergency circumstances, all patents were to be disregarded by government engineers and contractors as they rushed to provide a wireless communication link to allied governments and the army overseas. This was accomplished by year's end, primarily owing to the development of a new transmitter by the General Electric Co.

When the war ended, the Secretary of the Navy unsuccessfully supported legislation to continue the governmental monopoly over radio. He then became concerned over the military implications of General Electric's impending sale of the new transmitting devices to

\* At this point you should read the Communications Act of 1934, *infra* at 663, simply to get an overview of the present regime.

the British Marconi Company, and convinced General Electric to retain the patents and enter the communications field itself. This it did by causing RCA to be incorporated in 1919 and to acquire the American Marconi Company, which held certain other key patents, and owned virtually all the powerful radio stations then extant. RCA then entered into agreements with GE, AT & T, Westinghouse and others under which RCA, in return for stock in itself, acquired patent rights as well as the exclusive right to sell all receiving sets manufactured by Westinghouse and GE. Meanwhile, AT & T would lease or sell the patented transmitters that any would-be broadcasters would require—or so it was thought; and it had reserved to itself the exclusive right to sell advertising time on the air, another right that would prove to be problematic.

### G. ARCHER, HISTORY OF RADIO TO 1926

248–371 passim (1938).

#### *Sec. 136. The Department of Commerce Holds Radio Conference.*

So serious did the problem of rapidly multiplying radio stations become that by mid-winter of 1922 President Warren G. Harding saw fit to instruct Secretary of Commerce Herbert Hoover to call a conference of manufacturers and broadcasters to convene in Washington.

\* \* \*

In opening the Conference Secretary Hoover declared: "We have witnessed in the last four or five months one of the most astounding things that has come under my observation of American life. This Department estimates that today more than 600,000 (one estimate being 1,000,000) persons possess wireless telephone receiving sets, whereas there were less than fifty thousand such sets a year ago. We are indeed today upon the threshold of a new means of widespread communication of intelligence that has the most profound importance from the point of view of public education and public welfare."

There was one point upon which all delegates to the conference were unanimous—that the United States was in need of a definite radio policy. From that point onward, however, they violently disagreed. The commercial broadcasters complained of the irresponsible conduct of the radio amateurs. The amateurs stoutly retorted that the blame rested upon the selfish policies of the commercial broadcasters. Each faction loudly clamored for the regulation of the other, whereupon Secretary Hoover wittily observed that "this is one of the few instances where the country is unanimous in its desire for more regulation."

It was obvious to all that regulation must take the form of allocating channels of communication, or in other words, wave lengths that the various stations should be permitted to use. The laws of 1912 regulating wireless telegraphy were powerless to cope with the situa-

tion or to unsnarl the dreadful tangle which radio broadcasting was rapidly developing. The various governmental agencies now dependent upon radio had vital interest in this matter of regulation.

Colonel Griswold, the official delegate of the American Telephone and Telegraph Company, set forth the views of his company. Radio, he declared, has opened lines of communication between islands and mainland or in remote areas where no other means of rapid communication would be possible. Despite the fact that the Telephone Company was mainly interested in communication by wire the company was sufficiently interested in the possibilities of radio as supplementary to its lines to be contemplating opening an experimental radio station.

The Westinghouse Company, with four stations already in operation, was represented by L. R. Krumm. This gentleman made no secret of the fact that his company was in the broadcasting business to stimulate sales of its various radio appliances. When Secretary Hoover asked him if he did not fear reaching a saturation point in sales, Mr. Krumm replied, "I don't believe it. There is no saturation point on automobiles, for instance. We have found a steady increase in sales and we don't anticipate any drop if the quality of the broadcasting is maintained."

The refreshing frankness of the speaker at length got him into a hornets' nest when he declared that there were already far too many radio stations and expressed an opinion that fifteen stations could cover the nation.

The conference soon developed acrimonious aspects. Police departments were clamoring for special wave lengths for police calls and broadcasts. Newspaper publishers with radio stations had their special problems. The tendency of department stores to advertise over the air was denounced and defended. Manufacturers of radio equipment whose product failed to give adequate range or service were roundly censured. The alleged monopolistic tendencies of some manufacturers of radio equipment were paraded, as might have been expected from the nature of the gathering.

The conference accomplished several important results. \* \* \* Sympathetic co-operation by the government was assured. Best of all, the conference adopted definite recommendations, among which were the following:

*"Resolved*, That the Conference on Radio Telephony recommend that the radio laws be amended so as to give the Secretary of Commerce adequate legal authority for the effective control of—

(1) The establishment of all radio transmitting stations except amateur, experimental and governmental stations.

(2) The operation of non-governmental radio transmitting stations.

*“Resolved,* That it is the sense of the conference that radio communication is a public utility and as such should be regulated and controlled by the Federal Government in the public interest.

*“Resolved,* That the types of radio apparatus most effective in reducing interference should be made freely available to the public without restrictions.”

\* \* \*

*Section 150. Station WEA F Inaugurates Sponsored Programs.*

Now that radio broadcasting had so firmly established itself in American life everyone was happy except the unfortunate broadcaster who may have had no revenue-producing sideline being advertised by his broadcasts. Manufacturers of electrical equipment during the boom days no doubt found a radio station valuable as a spur to business. Department stores such as Bamberger and Wanamaker were likewise reaping financial returns.\* Newspaper-owned stations, however were more or less unsatisfactory from the angle of increased revenue. In fact antagonism was already developing in newspaper circles because of broadcasting of news. Editors in general have always labored under the belief, discounted by many thoughtful observers, that the broadcasting of news discourages the purchase of newspapers.

The summer of 1922 was destined to witness the first typical solutions by the English people on the one hand and the citizens of the United States on the other.

“In Great Britain,” writes the editor of *Radio Broadcast*, “no one is willing to do the broadcasting unless assured of some definite return. Consequently it is not surprising to learn that the British radio organizations which are to do the broadcasting have asked the Postmaster General not to license a receiving set unless made by a member of one of the broadcasting organizations. In this way the profits derived from the sale of radio receiving equipment would go to those who maintain the broadcasting services. Still another plan is to have the Postmaster General exact a modest fee for each receiving license, and then turn over a part of the receipts to the broadcasting organization.” This latter suggestion, as will be seen hereafter, eventually resulted in the government-subsidized British broadcasting system.

Perhaps unknown to the learned editor when he wrote the above article an event had occurred in the City of New York that was to lead the way to a solution of the American problem. \* \* \* The

\* Department stores attracted curious customers by providing space for radio stations' studios.—D.G.

Telephone Company's resolve to operate a toll-broadcasting enterprise was now to produce results.† \* \* \*

*Sec. 152. Strife Between Radio Stations Over Broadcast Hours.*

Radio broadcasting in the autumn of 1922 was in a truly precarious condition. "Every month," writes the editor of *Radio Broadcast*, "sees a remarkable growth in the number of stations licensed for radio broadcasting. This might be taken as a sign of healthy growth of the new art, but a little reflection seems to point to the opposite conclusion. \* \* \* It seems to us that a curb should be put upon the licensing of broadcasting stations or there will soon be country-wide troubles of the kind which recently occurred in New York—conflicts between the various stations for the most desirable hours and the resulting interference of signals between the several stations, which made listening in no pleasure. There are at present nearly 500 licensed broadcasting stations in the United States and this list is being augmented each week; in one week recently there were 26 new licenses issued."

The mischief of the situation as previously indicated was that the art had not progressed to the point where stations could be tuned to different wave lengths and definite frequencies, nor were receiving sets capable of tuning out undesired stations. RCA under the influence of David Sarnoff had by this time definitely decided to enter the field of marketing of radio sets on an extensive scale and was even then setting up a nation-wide organization for distribution of radio sets. \* \* \* Nearly all stations were then on the 360-meter wave length, with the natural result that stations in the same area were driven to agree among themselves—if possible—for a division of broadcasting hours. The national Congress was reluctant to interfere with the situation. \* \* \* Congressman Wallace H. White, Jr., of Maine, however, had filed a radio bill in September, 1922, that embodied the recommendations of the Hoover Conference Committee of the previous winter.

\* \* \*

Secretary Hoover had waited long and patiently for Congress to give him a formal mandate to act. The failure of the White Radio Bill in the \* \* \* Congress and the fact that no more authority could be expected than he already possessed led Secretary Hoover to take the bit in his teeth, so to speak. Nearly every radio executive in the land must have rejoiced when the edict went forth from Washington that a reassignment of wave lengths for broadcasting stations was to be put into effect.

† By using telephone lines, AT&T inter-connected 26 stations by 1924 to create a distribution "network" for its WEAf programming. In 1926 AT&T sold its stock in RCA and left broadcasting entirely by selling WEAf to

the National Broadcasting Co., a subsidiary formed for the occasion by RCA, which already operated a network connected by telegraph lines.—D.G.



\* \* \*

Alas for \* \* \* fond hopes of a complete solution of the radio interference problem! The new system that worked so well for a while had no compelling basis of law. Unscrupulous and selfish individuals, as we shall see, were to undo Secretary Hoover's splendid work in behalf of the radio industry.

\* \* \*

The advertising situation probably came to a crisis during this very summer. The American Tel. & Tel. Company had reserved to itself the right to use its basic patents for toll-broadcasting. So far as RCA, General Electric and the Westinghouse corporations were concerned it might successfully have asserted its rights. But what could the Telephone Company do when all over the nation radio broadcasting stations were ignoring its suggestions that they be licensed by A. T. & T. to broadcast for hire? It was a splendid theory that a fee be exacted from all stations that might desire to broadcast for hire, yet like some other theories it did not work when confronted with the ugly facts of human nature. \* \* \*

In view of the congressional investigation of the alleged monopoly by the Radio Corporation of America then pending, the officials of the Telephone Company doubtless hesitated about appealing to the courts for the enforcement of its supposed rights. Here was prima facie monopoly in a public utility field. A. T. & T. wisely refrained from hostilities.

The attorneys for the Telephone Company were no doubt fully aware that agreements drawn up when radio broadcasting was undreamed of might be fatally defective if tested in the courts. They were constrained to mark time even though squatters had taken possession of their rights. As a face-saving gesture they offered to license toll broadcasting for a small fee. If stations still ignored the invitation, well, that was that! The Telephone Company continued to assert its alleged rights, no doubt hoping by threats to accomplish what it did not dare undertake by wholesale resort to the courts. The company was not without financial rewards from radio broadcasting despite the toll-broadcasting situation. It was also apparent that the growing need of leased wires for chain broadcasting would eventually bring revenue into the Telephone Company treasury. Incidentally Station WEAJ was on the way to financial success.

\* \* \*

*Sec. 169. Federal Trade Commission Reports on the Alleged RCA Monopoly.*

On December 1, 1923, the long-expected report of the Federal Trade Commission was issued—347 pages long. This report contained the results of the investigation made by the Commission in response to a resolution passed by the fourth session of the Sixty-seventh Con-

gress. \* \* \* Not only did it contain a detailed exposition of the historical background of the formation of the Radio Corporation of America ninety-four pages in extent, but in a lengthy appendix it offered documentary evidence of the original agreements and the later cross-licensing agreements between the General Electric Company and the other industrial giants who acted as godfathers for RCA. The whole story was there. No one could deny that the new corporation was in effect a monopoly of the most extreme type, yet in and out of Congress were those who contended that from the nature of things a monopoly was absolutely essential.

The report with admirable impartiality admitted that RCA was the direct result of an appeal to the General Electric Company by representatives of the Navy Department to form an all-American corporation to take over commercial wireless transmission of the nation. All this had occurred, however, during the Wilson Administration. A new party was now in power, a party not ordinarily hostile to big business. The exigencies of politics, with a national election in the offing, rendered the plight of RCA decidedly uncomfortable. Although the Trade Commission report studiously avoided conclusions as to the guilt of the accused, nevertheless the facts themselves were prima facie evidence of guilt. An occasional summing up of the evidence on a particular point was quite devastating, as witness the following excerpts:

“As shown above the Radio Corporation has \* \* \* practically no competition in the radio communication field.”

“There is no question that the pooling of all the patents pertaining to vacuum tubes has resulted in giving the Radio Corporation and its affiliated companies a monopoly in the manufacture, sale, and use thereof. With such a monopoly, the Radio Corporation apparently has the power to stifle competition in the manufacture and sale of receiving sets, and prevent all radio apparatus from being used for commercial radio communication purposes.”

*Section 171. The A. T. & T. Company Wins a Dubious Victory in Court.*

An interesting development of the winter of 1924 was a test case brought by the American Telephone Company against Station WHN of Ridgewood, N. Y., for unlicensed radio broadcasting.

Threat-muttering had ceased to be a virtue when alleged outlaw stations could set up sponsored programs everywhere. The defiance of Station WHN had been particularly exasperating to the guardians of the rights of the stockholders of A. T. & T. They decided to take legal action. This suit was no sooner brought than cries of “monopoly control” began to be heard on all sides. So great became the clamor that Secretary of Commerce Herbert Hoover was at length drawn into

the controversy. In a public expression of his views Mr. Hoover declared:

“I can state emphatically that it would be most unfortunate for the people of this country to whom broadcasting has become an important incident of life if its control should come into the hands of any single corporation, individual or combination. It would be in principle the same as though the entire press of the country were so controlled. The effect would be identical whether this control arose under a patent monopoly or under any form of combination, and from the standpoint of the people’s interest the question of whether or not the broadcasting is for profit is immaterial.”

Thus the A. T. & T. experienced something of the far-flung hostility that had assailed the Radio Corporation of America. Since the suit against WHN was a feeler to test the vexed question of whether the Telephone Company’s patents entitled it to a right to license stations to operate there was cause enough for other stations to join the hue and cry. It mattered not to the public that the American Telephone Company was the legal owner of the patents covering broadcasting station equipment now being used even by the so-called outlaw stations. The fact that the Telephone Company was now granting licenses right and left to stations that applied for the privilege seemed to have no influence with the public mind. Here was an iniquitous trust jumping with hobnailed boots all over the little fellow—hence widespread clamor and ballyhoo.

Having started suit against WHN, however, the lawyers for the Telephone Company, supported by the directors of the company, pressed the case resolutely. They pointed out to the court that a fundamental issue of patent law was involved. Ever since the United States Government had first established the Patent Office it had been the law that the owner of a patent was entitled to legal protection against those who willfully infringe the aforesaid patent rights. Because A. T. & T. stood ready to license WHN on reasonable terms the lawyers contended that the court should order the offending station to comply with the law or cease broadcasting. Before the trial reached the stage where the judges would be called upon to render an official decision the lawyers for Station WHN, realizing no doubt that their case was hopeless despite the nation-wide clamor that they had stirred up, approached the lawyers of A. T. & T. with a suggestion of compromise.

Thus the test case was settled out of court. Protesting bitterly that the license agreement prohibited the licensee from using the station for revenue as WEAJ was doing, Station WHN acknowledged the validity of the Telephone Company patents and signed the usual license agreement.

The directors of A. T. & T. realized, however, that this vindication was no vindication at all so far as the public was concerned. The net result of the effort had been a distinct loss to the company. There could be no more victories of this kind. If a station could not thereafter be persuaded in private it would be unsafe to attempt to persuade it with all the world looking on. This no doubt accounts for the fact that so little was thereafter attempted in the courts against so-called outlaw stations.

Before leaving the topic it is only fair to the American Telephone Company to point out that its business ethics had been of very high order. When the great corporations got together in 1920 and "divided up the world" between them, radio broadcasting was unknown and virtually undreamed of. The A. T. & T. was allotted the field of station transmitting equipment, whereas the others either manufactured or sold (through RCA) radio receiving equipment. As the situation developed RCA, Westinghouse and General Electric were in position to sell all that they could produce. The Telephone Company on the other hand not only had a very limited field in which to work but with a self-restraint unusual among corporations it deliberately refused to sell transmitting equipment where the field was manifestly overcrowded or where the applicant evinced a desire to spread propaganda rather than to serve the public. It is true that this was a form of censorship that might be open to objection, but it nevertheless operated to reduce possible profits of the Telephone Company.

A comment by the editor of *Radio Broadcast* no doubt represented the milder type of journalistic opinion of the day:

"It is probably fortunate for the broadcast listener that this question is at present in the hands of the A. T. & T. Company. This gigantic corporation, with its hundreds of thousands of stockholders, is subject to all kinds of governmental inquiry because of its interstate character. And if there is anything this corporation does not want to start it is a popular demand for government ownership of the American Telephone system. \* \* \* But the fact that WHN, by signing the agreement with the A. T. & T. Company, is not allowed to do any advertising for money, cannot well be classed as an oppressive measure, as the manager of WHN seems to regard it. We think that the interests of the radio public are being conserved when such stations are prohibited from broadcasting for direct monetary profit. Direct advertising by radio is highly questionable even when tried by so excellent a station as WEAf."

Opposition to advertising by radio was still deep-seated, even among those who occupied high positions in the industry. Station WJZ, now owned and operated by the Radio Corporation of America, was WEAf's chief rival for leadership among radio stations. David

Sarnoff, then Vice-President and General Manager of RCA, in an address delivered in Chicago, stated the creed of the owners of WJZ. He believed that the multiplicity of radio stations was an unhealthy condition that would soon cure itself through lack of financial support. Broadcasting in the future, he predicted, would be carried on by a few super-stations supported by the industry itself "from returns on sales of radio apparatus." He then declared: "A fair method of determining the amount to be paid by each member, or portion of the industry, will be worked out and this will be based on a percentage of the sale price of the radio devices."

\* \* \*

*Sec. 179. Third Radio Conference—October, 1924.*

The Third Radio Conference was held in Washington in October, 1924. \* \* \* Secretary Hoover had already experienced opposition to his wave length decree. He realized all too well that if the matter should ever be tested in the courts the decree might be declared invalid. \* \* \*

One of the most significant events in the conference was an address by David Sarnoff, Vice-President and General Manager of the Radio Corporation of America, in which he advocated a chain of super-power radio stations.

\* \* \* Many favored the idea and many opposed it. A compromise was finally arrived at by which the Secretary of Commerce was advised to issue licenses for experimental use of super-power—revocable if it should be found by experience that such stations might interfere with existing service. By super-power was meant 50 k.w. \* \* \*

Hoover had been proceeding upon the democratic theory that all reputable applicants were equal before the law. He had issued licenses accordingly. A feeling was growing up, however, that the granting of licenses should hinge upon the public interest rather than on individual merit of the applicant.

"Many of our correspondents continually point out," wrote the editor of *Radio Broadcast*, "that the question Mr. Hoover has to ask himself is, do the listeners want this proposed station? If they don't want the station then the license should not be granted. We venture to suggest that a new applicant be obliged to accompany his request for a license by a petition signed by at least 100,000 people who live within, say 50 miles of the proposed station." This fantastic suggestion was evidently advanced in good faith. The editor perhaps did not reflect that until a station had demonstrated its qualities people of the locality could not be expected to join in a petition in its behalf. Such a scheme would have cut off the possibility of the licensing of new stations.

\* \* \*

The Fourth Radio Conference in the autumn of 1925 was regarded as especially important to the industry, since Secretary Hoover had virtually been forced to abandon his policy of issuing licenses to all applicants simply because the supply of radio channels had been exhausted. This was a dangerous situation because sooner or later some prospective operator would bring a test case challenging the present set-up of radio oversight.

The Hoover keynote speech at the conference was to the effect that the radio industry had better content itself with no government interference or help. Many people, he declared, were too ready to ask the Government to assume responsibility for problems that should be solved by private initiative.

\* \* \*

\* \* \* To be sure, there was an annual battle in Washington over proposed radio legislation but nothing ever came of it. Congressman White's perennial radio bills had always been rejected. The only genuine law on the subject was the wireless act of 1912—more than thirteen years out of date and having no provisions for the regulation of a great industry that did not arise until ten years after the bill was enacted into law. The distressing truth was that Secretary Hoover's splendid efforts to regulate radio broadcasting had no sound basis in law. He had been obliged to exercise legislative power that the Congress had neglected or refused to exercise or to delegate. Arbitrary action such as proposed by the Fourth Radio Conference, however desirable, could not fail sooner or later to precipitate a radio earthquake of nation-wide dimensions.

Elmer E. Bucher, for many years the Sales Manager of the Radio Corporation of America, has admitted to the author that in those days he was extremely apprehensive of a collapse of the industry. That RCA, General Electric and Westinghouse Companies would be tremendously hard hit if and when the independent operators should suddenly develop a panic of bankruptcy and quit, was his settled conviction. Despite the fact that the great corporations had entertained illusions that they were the pillars of the radio industry Mr. Bucher, in his capacity as sales manager of RCA, realized that the widespread demand for home radio sets had been created not alone by the broadcasting stations maintained by the great electrical manufacturers but also by the multitude of unfortunates who were losing their shirts, so to speak, in operating independent or outlaw stations. They were creating demand for home sets in every hamlet in America. When the craze should pass, as it must soon pass, Mr. Bucher foresaw a collapse of the sales-structure of RCA with staggering losses for an industry geared to manufacture supplies for a market of temporary and artificial character.

\* \* \*

*Sec. 189. Conclusion.*

At the close of the pioneer stage in January, 1926, we find the following unsolved problems: The National Congress had thus far refused to enact any laws for the regulation and control of broadcasting. The Department of Commerce under Secretary Hoover was still struggling to regulate radio broadcasting under the wireless communications law of 1912. Hoover's valiant attempts to follow the advice of the leaders of the industry by promulgating rules and regulations had now reached an impasse. All available broadcast channels had been assigned. Would-be broadcasters were already vainly clamoring for licenses to operate new stations. Ugly threats were already being made of forcing the issue into the courts. The entire radio world foresaw that the courts would be obliged to declare the Hoover rules and regulations invalid in law. In that event chaos in the air would be inevitable. Radio broadcasting was thus in danger of destroying itself by the mad scramble of selfish interests. Already there were instances of rival stations operating on the same frequency—destroying each other's programs in an endurance contest that the Department of Commerce had no power to halt.

The question of who should pay the bills of radio broadcasting was still unsolved so far as it concerned the great corporations having to do with the radio industry. It is true that the American Telephone Company had apparently solved the problem by selling broadcast time to others for advertising purposes. The A. T. & T. Company had already built up a network of stations, yet less than two per cent of the broadcasting stations of the nation were in the Telephone Company control in this manner. Neither the General Electric, Westinghouse nor Radio Corporation had the unchallenged right to sell time on the air. In fact the Telephone Company, under the cross-licensing agreements as well as under patent rights claimant to overlordship of broadcasting for hire, was already at odds with its three former allies. David Sarnoff's advocacy of super-power stations and the actual establishment of some by RCA and the General Electric Company had apparently alarmed the Telephone Company. It resented the presence in the broadcasting field of the great manufacturing corporations. They should be content with their own sphere of activity without invading the telephonic communications field—thus reasoned the powerful A. T. & T.

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#### NOTES AND QUESTIONS

As you know from Chapter I, the situation just described brought forth the Radio Act of 1927, of which the main features that concern us here survive in the Communications Act of 1934. These are the provisions establishing administrative allocation of the spectrum to various uses, and providing for the licensure of would-be broadcast users.

During the administration of the Radio Act, the Federal Radio Commission reduced the number of broadcasters from 732 to 593. The interference problem which underlay the Act was thereby solved, but it was obviously impossible to do so without benefitting some interests and harming others—at the very least those broadcasters who were eliminated from the industry.

1. Should the losers have been compensated for their loss? Precisely how would one value the “property” lost? Cf. §§ 304, 307(d), 309(h) (1).
2. Aside from the pre-1927 broadcasters, some of whom came up winners and some losers under the licensing scheme of the Radio Act, who were the other players in the process leading to the decision to regulate? How does each interest you can identify fare under the outcome?
3. If AT & T had successfully asserted its patents over the equipment needed by broadcasters to transmit their signals, wouldn't that have obviated the need for a governmental licensing scheme (at least for the duration of the patents)?

Recall the “far-flung hostility” AT & T encountered when it sued WHN for unlicensed radio broadcasting, i. e. using AT & T's patents without a license from the company. Who was so hostile and why? How do you suppose the issue was made salient to the public, and by whom?

Wasn't the public fear of monopoly here misplaced inasmuch as every patent by nature and intent bestows a monopoly on its owner? Insofar as free speech values are concerned, would you rather have the government or the telephone company controlling access to the airwaves? Isn't there a middle ground? Who controls the terms of access to the telephonic communication system: the government, the telephone company, or both?

4. Aside from AT & T's own plan for organization of the radio industry as a group of patent licensees, how many other plans were offered? If the expected operation of a particular plan is not altogether clear to you, go back and learn what you can about who supported and who opposed it. You might start with an easy one, such as the RCA plan, advanced by David Sarnoff in 1924. See p. 34, supra. In an earlier statement of the plan, by the way, Sarnoff had also found it “conceivable that plans may be devised whereby it will receive public support. There may even appear on the horizon a public benefactor who will be willing to contribute a large sum in the form of an endowment.” Quoted in White, *The American Radio* 28 (1947).

5. On the early history of broadcasting generally, see E. Barnouw, *A History of Broadcasting in the United States, Vol. I: A Tower in Babel* (1966).



## 2. IN GREAT BRITAIN

R. COASE, BRITISH BROADCASTING:  
A STUDY IN MONOPOLY \*

8-63, passim (1950).

## CHAPTER ONE

## THE ORIGIN OF THE MONOPOLY

## 2. PROPOSALS FOR A BROADCASTING SERVICE

[By March 1922] a number of radio manufacturers had applied to the Post Office for permission to broadcast. The reason for these applications is quite clear. Experience in the United States had shown that there was a large market for receiving sets once a broadcasting service had been provided. Radio manufacturers were therefore anxious that a broadcasting service should be established in order to create a demand for their receiving sets. \* \* \*

\* \* \* The Marconi Company's programme was "to supply instruments to the householder on hire." They planned to set up broadcasting stations in different parts of the country and to transmit on particular wavelengths, "if we get assistance, as I have no doubt we will, from the authorities" so that only those hiring the particular receivers would hear the programmes. \* \* \*

[The Wireless Sub-Committee of the Imperial Communications Committee thereafter recommended that the country be divided into eight areas, each to be served by one or more broadcasting stations at 1.5 kw of power; only bona fide British manufacturers of wireless apparatus should be allowed to broadcast; and those possessing receiving sets should pay an annual licence fee of 10S. ("This is necessary in order to locate apparatus in times of need and so that the user knows the conditions with which to comply." There is no suggestion that the licence fee should be used to pay the costs of the broadcasting service.) No advertising should be allowed, and there would have to be regulations regarding the news that the broadcasting stations would be allowed to transmit.]

Mr. Kellaway [the Postmaster-General reported]: "What I am doing is to ask all those who apply—the various firms who have applied—to come together at the Post Office and co-operate so that an efficient service may be rendered and that there may be no danger of monopoly and that each service may not be interfering with the efficient working of the other." \* \* \*

What is clear is that at this time there was no publicly expressed view that there ought to be a monopoly of transmission in the case

of the British broadcasting service. \* \* \* At the beginning of May, 1922, it appeared, at least to those outside official circles, that the broadcasting stations were to be operated independently by various firms manufacturing radio receiving sets. Sir Henry Norman [Chairman of the Wireless Sub-Committee], who must have been very well informed on Government policy, said of the companies, "Each will announce its own service and there will be a natural rivalry to furnish the most attractive programmes, since hearers may conclude that the firm supplying the best entertainment in the clearest manner is the most likely to make good apparatus."

### 3. THE NEGOTIATIONS

It was not only radio manufacturers who wished to establish broadcasting stations. The *Daily Mail* had proposed (probably early in May, 1922) that a *Daily Mail* Marconi Company broadcasting service should be set up. \* \* \* The applicants for permission to set up broadcasting stations also included some of the large department stores. But the Post Office decided that only bona fide manufacturers of wireless apparatus should be considered. Consequently, only representatives of radio manufacturers appear to have been invited to the meeting which the Postmaster-General had foreshadowed.

\* \* \* The Chairman of the meeting was Sir Evelyn Murray, Secretary of the Post Office. He explained that it would be impossible to grant all the applications which had been made and the firms "were asked to arrive at some co-operative scheme among themselves." Whatever the impression may have been earlier as to how broadcasting was to be organised in Great Britain, it was made clear at this meeting that the Post Office was in favour of a single broadcasting company.

\* \* \*

There is no question that the difficulties in formulating [a plan] must have appeared formidable. But there were other factors at work which helped in bringing about the agreement to form a single broadcasting company. First of all there was the evident desire of the Post Office, a Department with which all firms must have wanted good relations, that there should be a single broadcasting company. Secondly, there is little doubt that the Marconi Company was itself in favour of a single company. And no doubt this made it willing to make concessions on the points which had led to the breakdown of the earlier negotiations. Thirdly, it must not be forgotten that the main interest of the manufacturers was not in broadcasting as such. Their aim was to sell receiving sets and they wanted a broadcasting service to be established in order to be able to do this. Consequently the interest of the groups in preserving their independence in the case of the broadcasting service was not particularly great.

\* \* \*

#### 4. THE BROADCASTING SCHEME OF 1922

The broadcasting scheme was built around the British Broadcasting Company. The capital of this Company was to be subscribed by British radio manufacturers—and they alone could be members. Each member agreed not to sell any apparatus for listening to broadcasts unless the components were British made, and they also agreed to pay the Company, according to a scale laid down in the agreement, a royalty on the sales of all sets and certain of the main components. Any British radio manufacturer could become a member of the Company by subscribing for at least a £1 share and by entering into the Agreement with the Company. The licence which the Post Office issued for receiving sets required the listener to use a set manufactured by a member of the British Broadcasting Company and 50 per cent of the licence fee was paid over to the Company. Thus the funds that the company had at its disposal came from three sources: the subscribed share capital, royalties on sets and components, and 50 per cent. of the licence fee. There is no question that the willingness of the manufacturers to subscribe the capital of the broadcasting company and to pay the royalties was dependent on their expectation of obtaining profits from the sale of receiving sets. \* \* \* All members of the Company agreed to pool (without payment) all patents needed for broadcast transmissions.

\* \* \*

There were in the Licence two important limitations on what the Company might broadcast. The first concerned the transmission of news. It was provided that the Company should not broadcast any news or information in the nature of news "except such as they may obtain from one or more of the following news agencies, viz.: Reuters Ltd., Press Association Ltd., Central News Ltd., Exchange Telegraph Company Ltd., or from any other news agency approved by the Postmaster-General."

The other limitations concerned advertising. The clause in the Licence ran: "The Company shall not without the consent in writing of the Postmaster-General receive money or other valuable consideration from any person in respect of the transmission of messages by means of a licensed apparatus, or send messages or music constituting broadcast matter provided or paid for by any person, other than the Company or person actually sending the message. \* \* \*" The exact legal force of this clause is rather obscure. It is clearly aimed at preventing advertising. But in fact it was not interpreted as prohibiting sponsored programmes; and a programme sponsored by Harrods was broadcast in 1923. \* \* \*

So far nothing has been said about the nature of the legal monopoly granted to the British Broadcasting Company. The reason is a simple one—the Company had no legal monopoly and there was

nothing to prevent the Postmaster-General licensing another broadcasting company. \* \* \* Furthermore, it was doubtful whether any other company could broadcast at all without the use of patents controlled by members of the British Broadcasting Company; and there seems little reason to suppose that they would have been willing to allow a competing broadcasting company to use their patents. So whatever the legal position may have been, it must have appeared when the British Broadcasting Company was formed, that for practical purposes a monopoly had been granted. And so it was to prove.

### 5. POST OFFICE POLICY

It is broadly true to say that the establishment of the broadcasting service in Great Britain as a monopoly was the result of Post Office policy. \* \* \* I shall therefore examine in this section the basis of Post Office policy towards broadcasting and attempt to discover the reasons which led it to favour a monopoly.

\* \* \*

\* \* \* [I]n the spring of 1922 came the applications from the manufacturers. These had been influenced by events in the United States. But so, too, was the Post Office. Mr. F. J. Brown, Assistant Secretary of the Post Office, had spent the winter of 1921-22 in the United States; he had taken a great interest in broadcasting developments, had discussed the subject with many of the leading authorities in the United States and had attended some of the meetings of Mr. Hoover's first Radio Conference. In the United States at that time there was no effective regulation of the number of broadcasting stations. It seems that the only regulation was of the wavelength on which stations could broadcast—and the only wavelength then allowed was, for most stations, 360 metres. The need for some regulation of the number of stations was evident; and Mr. F. J. Brown was impressed by this as well as by the great strides broadcasting was making in the United States.

The way in which this question was treated in Great Britain led some to conclude that a monopoly was needed in order to prevent interference. Consider the following argument taken from a speech in the House of Commons by Mr. Kellaway, the Postmaster-General. “\* \* \* it would be impossible to have a large number of firms broadcasting. It would result in a sort of chaos, only in a much more aggravated form than that which has arisen in the United States of America, and which has compelled the United States, or the Department over which Mr. Hoover presides, and which is responsible for broadcasting, to do what we are now doing at the beginning, that is, proceed to lay down very drastic regulations indeed for the control of wireless broadcasting. \* \* \*”

But we cannot, of course, assume that the Post Office officials shared this view. It was obvious to them that the possibility of in-

terference made necessary not a monopoly but a limitation in the number of broadcasting stations. Why then was it Post Office policy to bring about a monopoly? Mr. E. H. Shaughnessy, who was Engineer in charge of the Wireless Section of the Post Office, was asked, when giving evidence to the Sykes Committee, about the necessity for a monopoly in transmission. He first referred to the problem of the Marconi Company's patents. But he went on to say that "if they were prepared to license people, then you would have a very large number of firms asking for permission probably, and some of them might be sufficiently wealthy to put up decent stations—most of them would not—you would have a very great difficulty in acquiescing, you could not acquiesce in all demands. And then you would have the difficulty of selecting the firms which the Post Office thought were most suitable for the job, and, whatever selection is made by the Post Office, the Post Office would be bound to be accused of favouring certain firms. So that the solution of the problem seemed to be to make all those firms get together to form one Company for the purpose of doing the broadcasting." There can be little doubt that here we have the main reason which led the Post Office to favour a monopoly. One way out of the difficulty would have been for the Post Office itself to undertake the service. But this it was unwilling to do. If there was to be a broadcasting service in Great Britain it would have to be run by private enterprise; and the Post Office could avoid the problem of selection only if a monopolistic organisation was set up. \* \* \*

There can be no question that there was a very real danger of creating monopolistic conditions in other fields if broadcasting licences were granted to particular firms. The nature of this danger was made evident when the Marconi Company, in April, 1922, proposed to set up broadcasting stations.

But it so happens that the [initial] plan for independent operation by \* \* \* two groups which was evolved in the course of the negotiations was one which avoided this particular difficulty. All radio manufacturers would have been free to join one or other of the groups; none could have been penalised by the existence of independent broadcasting companies. Yet the Post Office still preferred that there should be a monopoly. The reason is fairly clear. There would still have remained the problem of the allocation of wavelengths and districts between the two groups. And the Post Office could not have avoided responsibility for the solution of these difficult problems. And there is also reason to suppose that the Post Office considered that it would be more economical to have one company instead of two or more.

\* \* \* But the problem to which a monopoly was seen as a solution by the Post Office was one of Civil Service administration. The view that a monopoly in broadcasting was better for the listener was to come later.

## CHAPTER THREE

## THE FORMATION OF THE CORPORATION

## 2. THE CRAWFORD COMMITTEE

A Committee of Inquiry under the Chairmanship of the Earl of Crawford and Balcarres was appointed in the summer of 1925. Its terms of reference were: "To advise as to the proper scope of the Broadcasting service and as to the management, control and finance thereof after the expiry of the existing licence on December 31st, 1926. The Committee will indicate what changes in the law, if any, are desirable in the interests of the Broadcasting service."

At the start of their investigations the Committee were presented with a memorandum on broadcasting by Sir Evelyn Murray, Secretary of the Post Office. \* \* \*

[S]ix reasons were \* \* \* given for thinking that it was preferable to have a single broadcasting authority. These were:

(1) The locating of broadcasting stations so as "to reach the maximum population (most of whom use crystal sets) with the minimum number of wavelengths \* \* \* can be done most effectively by a single authority." If the policy in the future should be to erect "a few relatively high-powered stations, instead of a multiplication of small stations, a single authority would seem inevitable."

(2) A single broadcasting authority "would consider itself bound to cover the widest possible area; a number of separate authorities would tend to concentrate upon the populous centres, yielding the largest revenue, and none of them would be under an obligation to cater for the less remunerative districts."

(3) "If separate authorities, and in particular municipalities, were licensed, it would be difficult to prevent the establishment of numerous separate stations in adjacent towns with the consequent overlapping of services and risk of interference."

(4) By means of simultaneous broadcasting "the London programme can be distributed over the whole country and London can get the advantage of any item of special interest transmitted from a Provincial station. To carry this out effectively and systematically all stations need to be under a single control."

(5) The division of the licence fee (if this remained the principal source of revenue) would present great difficulties if there were separate broadcasting authorities. It would not be fair to the authority providing the most expensive programme, which would be listened to by those in other regions, if all the licence revenue from those regions went to the local station.

(6) A single broadcasting authority could probably employ a better technical staff and provide better programmes than could separate

authorities spending the same amount of money. "There would be a saving in administrative and overhead charges and the multiplication of fees for news, copyright royalties, etc., would be avoided. The difficulty of providing facilities for several organisations to broadcast important functions, speeches, etc., would not arise."

The memorandum then continued: "If a single authority is decided upon, should the B.B.C. be continued, with or without changes in its constitution?" \* \* \* A broader-based authority would appear desirable. "Moreover, as the sale of apparatus approaches the point of saturation, the interest of manufacturers, as such, in the conduct of the service tends to disappear, and there is reason to think that the manufacturers themselves would not be adverse to the Company being replaced by a new authority."

\* \* \*

The evidence which followed was remarkable for its unanimity.  
\* \* \*

In the circumstances it is not surprising that the Crawford Committee in their report were able to open—and close—their discussion of the question of the monopoly with the following sentence: "It is agreed that the United States system of uncontrolled transmission and reception is unsuited to this country, and that Broadcasting must accordingly remain a monopoly—in other words that the whole organisation must be controlled by a single authority."

The Committee stated they did not recommend a renewal of the licence of the British Broadcasting Company or the setting up of some similar body and the report continued: "We think a public corporation the most appropriate organisation. Such an authority would enjoy a freedom and flexibility which a Minister of State could scarcely exercise in arranging for performers and programmes, and in studying the variable demands of public taste and necessity."  
\* \* \*

### 3. THE BRITISH BROADCASTING CORPORATION

The recommendations of the Crawford Committee that broadcasting should be organised as a monopoly and should be in the hands of a public corporation were accepted by the Government. \* \* \* A public corporation, the British Broadcasting Corporation, was to be set up by means of a Royal Charter \* \* \* The Postmaster-General stated that the reason for using this method rather than incorporation under the Companies Acts or by a special Statute was to emphasise the independence of the new corporation.

By an agreement made between the British Broadcasting Company and the Postmaster-General, the Company agreed to transfer its assets to the new authority in return for repayment at par of the share capital of the Company. \* \* \*

The broadcasting service was to continue to be financed by means of licence fees on receiving sets. \* \* \*

There are two other features of the scheme which are of interest. First of all, the restrictions on the news which could be broadcast were removed. One of the objects of the Corporation as stated in the Royal Charter was: "To collect news of and information relating to current events in any part of the world and in any manner that may be thought fit and to establish and subscribe to news-agencies." Secondly, the ban on advertisements was continued but the use of sponsored programmes was still to be allowed.

But one of the most important features of the scheme is not to be found in either the Charter or the Licence and Agreement. The Corporation was to be a monopoly. \* \* \*

One feature of the scheme was that broadcasting was to be run by a public corporation. To the historian of the public corporation, the fact that this form of organisation was adopted in 1926 in the case of broadcasting is of the greatest importance. For experience of the public corporation in the case of broadcasting was a major factor leading to its general acceptance as the proper method of organising public enterprises. But, as regards broadcasting itself in Great Britain, the replacement of the Company by the Corporation made very little difference. \* \* \*

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### QUESTIONS

1. How did the British Broadcasting Company differ from the original conception of RCA? In its government sponsorship? Composition? Method of financing operations? Monopoly status? Note that each was prohibited from selling advertising time—RCA by the terms of AT&T's patent reservation, and the Company by the terms of its license.

2. Professor Coase finds that "the main reason which led the Post Office to favor a monopoly" was to avoid the problem of selecting licensees and thus be accused of favoring certain firms. P. 42, *supra*.

Are you troubled by Professor Coase's conclusion? The difficulties of choosing a favored firm do not seem to have extended to choosing a favored industry, "bona fide manufacturers of wireless apparatus," and excluding a newspaper and the large department stores from participation in broadcasting. P. 38, *supra*. Why? Is your hypothesis consistent with the 1926 recommendation of the Crawford Committee to continue the monopoly and establish a public corporation? In view of the position apparently taken by the radio manufacturing industry, what other course was open to the Government?

3. Consider whether Professor Coase's conclusion regarding the origins of the BBC monopoly is tenable in light of his later article on the FCC, which follows.



## B. THE POLICY DEBATE

### COASE, THE FEDERAL COMMUNICATIONS COMMISSION

2 J.Law & Econ. 1, 12-40 (1959).\*

#### III. THE RATIONALE OF THE PRESENT SYSTEM

Professor Chafee has pointed out that the newer media of communication have been subjected to a stricter control than the old:

Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.<sup>28</sup>

It is no doubt true that the difference between the position occupied by the press and the broadcasting industry is in part due to the fact that the printing press was invented in the fifteenth and broadcasting in the twentieth century. But this is by no means the whole story. Many of those who have acquiesced in this abridgment of freedom of the press in broadcasting have done so reluctantly, the situation being accepted as a necessary, if unfortunate, consequence of the peculiar technology of the industry.

Mr. Justice Frankfurter, in delivering the opinion of the Supreme Court in one of the leading cases on radio law, gave an account of the rationale of the present system:

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first

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28. Z. Chafee, *Free Speech in the United States* 381 (1942).

comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential. \* \* \* But the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience or necessity."<sup>29</sup>

\* \* \* Justice Frankfurter seems to believe that federal regulation is needed because radio frequencies are limited in number and people want to use more of them than are available. But it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

\* \* \* [T]he real cause of the trouble was that no property rights were created in these scarce frequencies. We know from our ordinary experience that land can be allocated to land users without the need for government regulation by using the price mechanism. But if no property rights were created in land, so that everyone could use a tract of land, it is clear that there would be considerable confusion and that the price mechanism could not work because there would not be any property rights that could be acquired. If one person could use a piece of land for growing a crop, and then another person could come along and build a house on the land used for the crop, and then another could come along, tear down the house, and use the space as a parking lot, it would no doubt be accurate to describe the resulting situation as chaos. But it would be wrong to blame this on private enterprise and the competitive system. A private-enterprise system cannot function properly unless property rights are created in resources, and, when this is done, someone wishing to

29. National Broadcasting Co. v. United States, 319 U.S. 190, 213, 215-17 (1943).

use a resource has to pay the owner to obtain it. Chaos disappears; and so does the government except that a legal system to define property rights and to arbitrate disputes is, of course, necessary. But there is certainly no need for the kind of regulation which we now find in the American radio and television industry.

In 1951, in the course of a comment dealing with the problem of standards in color television, Mr. Leo Herzel proposed that the price mechanism should be used to allocate frequencies. He said:

The most important function of radio regulation is the allocation of a scarce factor of production—frequency channels. The FCC has to determine who will get the limited number of channels available at any one time. This is essentially an economic decision, not a policing decision.

And, later, Mr. Herzel suggested that channels should be leased to the highest bidder.<sup>31</sup> This article brought a reply from Professor Dallas W. Smythe \* \* \* formerly chief economist of the Federal Communications Commission.<sup>32</sup>

First of all, Professor Smythe pointed out that commercial broadcasting was not a "dominant user of spectrum space" but "a minor claimant on it." He explained that "the radio spectrum up to at least 1,000,000 Kc is susceptible of commercial exploitation, technologically. On this basis, the exclusive use of frequencies by broadcasters represents 2.3 per cent of the total and the shared use, 7.2 per cent." \* \* \*

Professor Smythe then went on to explain who it was that used most of the radio spectrum. First, there were the military, the law-enforcement agencies, the fire-fighting agencies, the Weather Bureau, the Forestry Service, and the radio amateurs, "the last of which by definition could hardly be expected to pay for frequency use." (This is, of course, in accordance with the modern view that an amateur is someone who does not pay for the things he uses.) Then there were many commercial users other than broadcasters. There were the common carriers, radiotelegraph and radiotelephone; transportation agencies, vessels on the high seas, railroads, street railways, busses, trucks, harbor craft, and taxis. There were also various specialized users, such as electric power, gas and water concerns, the oil industry (which used radio waves for communication and also for geophysical exploration), the motion-picture industry (for work on location), and so on. Professor Smythe commented:

Surely it is not seriously intended that the non-commercial radio users (such as police), the non-broadcast common car-

31. "Public Interest" and the Market in Color Television Regulation, 18 U. of Chi.L.Rev. 802, 809 (1951).

Rev. 96 (1952), and a Rejoinder by the student author, Mr. Leo Herzel, which appeared in 20 U. of Chi.L.Rev. 106 (1952).

32. Smythe, Facing Facts about the Broadcast Business, 20 U. of Chi.L.

riers (such as radio-telegraph) and the non-broadcast commercial users (such as the oil industry) should compete with dollar bids against the broadcast users for channel allocations.

To this Mr. Herzel replied:

It certainly is seriously suggested. Such users compete for all other kinds of equipment or else they don't get it. I should think the more interesting question is, why is it seriously suggested that they shouldn't compete for radio frequencies?

Certainly, it is not clear why we should have to rely on the Federal Communications Commission rather than the ordinary pricing mechanism to decide whether a particular frequency should be used by the police, or for a radiotelephone, or for a taxi service, or for an oil company for geophysical exploration, or by a motion-picture company to keep in touch with its film stars or for a broadcasting station. Indeed, the multiplicity of these varied uses would suggest that the advantages to be derived from relying on the pricing mechanism would be especially great in this case.

\* \* \*

#### IV. THE PRICING SYSTEM AND THE ALLOCATION OF FREQUENCIES

There can be little doubt that the idea of using private property and the pricing system in the allocation of frequencies is one which is completely unfamiliar to most of those concerned with broadcasting policy. \* \* \*

This "novel theory" (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions. Quite apart from the malallocations which are the result of political pressures, an administrative agency which attempts to perform the function normally carried out by the pricing mechanism operates under two handicaps. First of all, it lacks the precise monetary measure of benefit and cost provided by the market. Second, it cannot, by the nature of things, be in possession of all the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for the various goods and services in the production of which radio frequencies could be used. In fact, lengthy investigations are required to uncover part of this information, and decisions of the Federal Communications Commission emerge only after long delays, often extending to years. To simplify the task, the Federal Communications Commission adopts arbitrary rules. \* \* \*

This discussion should not be taken to imply that an administrative allocation of resources is inevitably worse than an allocation by means of the price mechanism. The operation of a market is not itself costless, and, if the costs of operating the market exceeded the costs of running the agency by a sufficiently large amount, we might be willing to acquiesce in the malallocation of resources resulting from the agency's lack of knowledge, inflexibility, and exposure to political pressure. But in the United States few people think that this would be so in most industries, and there is nothing about the broadcasting industry which would lead us to believe that the allocation of frequencies constitutes an exceptional case.

An example of how the nature of the pricing system is misunderstood in current discussions of broadcasting policy in the United States is furnished by a recent comment which appeared in the trade journal *Broadcasting*:

In the TV field, lip service is given to a proposal that television "franchises" be awarded to the highest bidder among those who may be qualified. This is ridiculous on its face, since it would mean that choice outlets in prime markets would go to those with the most money.<sup>40</sup>

First of all, it must be observed that resources do not go, in the American economic system, to those with the most money but to those who are willing to pay the most for them. The result is that, in the struggle for particular resources, men who earn \$5,000 per annum are every day outbidding those who earn \$50,000 per annum. To be convinced that this is so, we need only imagine a situation occurring in which all those who earned \$50,000 or more per annum arrived at the stores one morning and, at the prices quoted, were able to buy everything in stock, with nothing left over for those with lower incomes. Next day we may be sure that the prices quoted would be higher and that those with higher incomes would be forced to reduce their purchases—a process which would continue as long as those with lower incomes were unable to spend all they wanted. The same system which enables a man with \$1 million to obtain \$1 million's worth of resources enables a man with \$1,000 to obtain a \$1,000's worth of resources. Of course, the existence of a pricing system does not insure that the distribution of money between persons (or families) is satisfactory. But this is not a question we need to consider in dealing with broadcasting policy. Insofar as the ability to pay for frequencies or channels depends on the distribution of funds, it is the distribution not between persons but between firms which is relevant. And here the ethical problem does not arise. All that matters is whether the distribution of funds contributes to efficiency, and there

40. *Broadcasting*, February 24, 1958, p. 200.

is every reason to suppose that, broadly speaking, it does. Those firms which use funds profitably find it easy to get more; those which do not, find it difficult. The capital market does not work perfectly, but the general tendency is clear. In any case, it is doubtful whether the Federal Communications Commission has, in general, awarded frequencies to firms which are in a relatively unfavorable position from the point of view of raising capital. The inquiries which the Commission conducts into the financial qualifications of applicants must, in fact, tend in the opposite direction.

\* \* \*

The Supreme Court appears to have assumed that it was impossible to use the pricing mechanism when dealing with a resource which was in limited supply. This is not true. Despite all the efforts of art dealers, the number of Rembrandts existing at a given time is limited; yet such paintings are commonly disposed of by auction. But the works of dead painters are not unique in being in fixed supply. If we take a broad enough view, the supply of all factors of production is seen to be fixed (the amount of land, the size of the population, etc.). Of course, this is not the way we think of the supply of land or labor. Since we are usually concerned with a particular problem, we think not in terms of the total supply but rather of the supply available for a particular use. Such a procedure is not only practically more useful; it also tells us more about the processes of adjustment at work in the market. Although the quantity of a resource may be limited in total, the quantity that can be made available to a particular use is variable. Producers in a particular industry can obtain more of any resource they require by buying it on the market, although they are unlikely to be able to obtain considerable additional quantities unless they bid up the price, thereby inducing firms in other industries to curtail their use of the resource. This is the mechanism which governs the allocation of factors of production in almost all industries. Notwithstanding the almost unanimous contrary view, there is nothing in the technology of the broadcasting industry which prevents the use of the same mechanism. Indeed, use of the pricing system is made particularly easy by a circumstance to which Professor Smythe draws our special attention, namely, that the broadcasting industry uses but a small proportion of "spectrum space." A broadcasting industry, forced to bid for frequencies, could draw them away from other industries by raising the price it was willing to pay. It is impossible to say whether the result of introducing the pricing system would be that the broadcasting industry would obtain more frequencies than are allocated to it by the Federal Communications Commission. Not having had, in the past, a market for frequencies, we do not know what these various industries would pay for them. Similarly, we do not know for what frequencies the broadcasting industry would be willing to outbid these other industries. All we can say is that the broadcasting industry would be able to obtain all the existing fre-

quencies it now uses (and more) if it were willing to pay a price equal to the contribution which they could make to production elsewhere. This is saying nothing more than that the broadcasting industry would be able to obtain frequencies on the same basis as it now obtains its labor, buildings, land, and equipment.

A thoroughgoing employment of the pricing mechanism for the allocation of radio frequencies would, of course, mean that the various governmental authorities, which are at present such heavy users of these frequencies, would also be required to pay for them. This may appear to be unnecessary, since payment would have to be made to some other government agency appointed to act as custodian of frequencies. What was paid out of one government pocket would simply go into another. It may also seem inappropriate that the allocation of resources for such purposes as national defense or the preservation of human life should be subjected to a monetary test. While it would be entirely possible to exclude from the pricing process all frequencies which government departments consider they need and to confine pricing to frequencies available for the private sector, there would seem to be compelling reasons for not doing so. A government department, in making up its mind whether or not to undertake a particular activity, should weigh against the benefits this would confer, the costs which are also involved: that is, the value of the production elsewhere which would otherwise be enjoyed. In the case of a government activity which is regarded as so essential as to justify any sacrifice, it is still desirable to minimize the cost of any particular project. If the use of a frequency which if used industrially would contribute goods worth \$1 million could be avoided by the construction of a wire system or the purchase of reserve vehicles costing \$100,000, it is better that the frequency should not be used, however essential the project. It is the merit of the pricing system that, in these circumstances, a government department (unless very badly managed) would not use the frequency if made to pay for it. \* \* \*

The desire to preserve government ownership of radio frequencies coupled with an unwillingness to require any payment for the use of these frequencies has had one consequence which has caused some uneasiness. A station operator who is granted a license to use a particular frequency in a particular place may, in fact, be granted a very valuable right, one for which he would be willing to pay a large sum of money and which he would be forced to pay if others could bid for the frequency. This provision of a valuable resource without charge naturally raises the income of station operators above what it would have been in competitive conditions. It would require a very detailed investigation to determine the extent to which private operators of radio and television stations have been enriched as a result of this policy. But part of the extremely high return on the capital invested in certain radio and television stations has undoubtedly been due to this failure to charge for the use of the frequency.

\* \* \*

The extraordinary gain accruing to radio and television station operators as a result of the present system of allocating frequencies becomes apparent when stations are sold. Even before the 1927 Act was passed, it was recognized that stations were transferred from one owner to another at prices which implied that the right to a license was being sold. Occasionally, references to this problem are found in the literature, but the subject has not been discussed extensively. In part, I think this derives from the fact that the only solution to the problem of excessive profits was thought to be rate regulation or profit control. \* \* \* In any case, the determination of the rates to be charged or the level of profits to be allowed would not seem an easy matter. \* \* \* Furthermore, rate or profit regulation with the concomitant need for control of the quality of the programs is hardly an attractive prospect.

#### V. PRIVATE PROPERTY AND THE ALLOCATION OF FREQUENCIES

If the right to use a frequency is to be sold, the nature of that right would have to be precisely defined. A simple answer would be to leave the situation essentially as it is now: the broadcaster would buy the right to use, for a certain period, an assigned frequency to transmit signals at a given power for certain hours from a transmitter located in a particular place. This would simply superimpose a payment on to the present system. It would certainly make it possible for the person or firm who is to use a frequency to be determined in the market. But the enforcement of such detailed regulations for the operation of stations as are now imposed by the Federal Communications Commission would severely limit the extent to which the way the frequency was used could be determined by the forces of the market.

It might be argued that this is by no means an unusual situation, since the rights acquired when one buys, say, a piece of land, are determined not by the forces of supply and demand but by the law of property in land. But this is by no means the whole truth. Whether a newly discovered cave belongs to the man who discovered it, the man on whose land the entrance to the cave is located, or the man who owns the surface under which the cave is situated is no doubt dependent on the law of property. But the law merely determines the person with whom it is necessary to make a contract to obtain the use of the cave. Whether the cave is used for storing bank records, as a natural gas reservoir, or for growing mushrooms depends, not on the law of property, but on whether the bank, the natural gas corporation, or the mushroom concern will pay the most in order to be able to use the cave. One of the purposes of the legal system is to establish that clear delimitation of rights on the basis of which the transfer and recombination of rights can take place through the market. In the case of radio, it should be possible for someone who is granted the use



of a frequency to arrange to share it with someone else, with whatever adjustments to hours of operation, power, location and kind of transmitter, etc., as may be mutually agreed upon; or when the right initially acquired is the shared use of a frequency (and in certain cases the FCC has permitted only shared usage), it should not be made impossible for one user to buy out the rights of the other users so as to obtain an exclusive usage.

The main reason for government regulation of the radio industry was to prevent interference. It is clear that, if signals are transmitted simultaneously on a given frequency by several people, the signals would interfere with each other and would make reception of the messages transmitted by any one person difficult, if not impossible. The use of a piece of land simultaneously for growing wheat and as a parking lot would produce similar results. As we have seen in an earlier section, the way this situation is avoided is to create property rights (rights, that is, to exclusive use) in land. The creation of similar rights in the use of frequencies would enable the problem to be solved in the same way in the radio industry.

\* \* \* It is sometimes implied that the aim of regulation in the radio industry should be to minimize interference. But this would be wrong. The aim should be to maximize output. All property rights interfere with the ability of people to use resources. What has to be insured is that the gain from interference more than offsets the harm it produces. There is no reason to suppose that the optimum situation is one in which there is no interference. In general, as the distance from a radio station increases, it becomes more and more difficult to receive its signals. At some point, people will decide that it is not worthwhile to incur costs involved in receiving the station's signals. A local station operating on the same frequency might be easily received by these same people. But if this station operated simultaneously with the first one, people living in some region intermediate between the stations may be unable to receive signals from either station. These people would be better off if either station stopped operating and there was no interference; but then those living in the neighborhood of one of these other stations would suffer. It is not clear that the solution in which there is no interference is necessarily preferable.

\* \* \* The reduction of interference on adjacent frequencies may require costly improvements in equipment, and operators on one frequency could hardly be expected to incur such costs for the benefit of others if the rights of those operating on adjacent frequencies have not been determined. The institution of private property plus the pricing system would resolve these conflicts. The operator whose signals were interfered with, if he had the right to stop such interference, would be willing to forego this right if he were paid more than the amount by which the value of his service was decreased by this interference or the costs which he would have to incur to offset

it. The other operator would be willing to pay, in order to be allowed to interfere, an amount up to the costs of suppressing the interference or the decrease in the value of the service he could provide if unable to use his transmitter in a way which resulted in interference. Or, alternatively, if this operator had the right to cause interference, he would be willing to desist if he were paid more than the costs of suppressing the interference or the decrease in the value of the service he could provide if interference were barred. And the operator whose signals were interfered with would be willing to pay to stop this interference an amount up to the decrease in the value of his service which it causes or the costs he has to incur to offset the interference. Either way, the result would be the same. \* \* \*

If the problems faced in the broadcasting industry are not out of the ordinary, it may be asked why was not the usual solution (a mixture of transferable rights plus regulation) adopted for this industry? There can be little doubt that, left to themselves, the courts would have solved the problems of the radio industry in much the same way as they had solved similar problems in other industries. In the early discussions of radio law an attempt was made to bring the problems within the main corpus of existing law. The problem of radio interference was examined by analogy with electric-wire interference, water rights, trade marks, noise nuisances, the problem of acquiring title to ice from public ponds, and so on. \* \* \* But this line of development was stopped by the passage of the 1927 Act, which established a complete regulatory system.

\* \* \*

## VI. THE PRESENT POSITION

\* \* \* When Professor Smythe had completed his economic case against using the pricing system (in the article discussed earlier), he introduced an argument of a quite different character. He said that a

second broad postulate which seems to underlie proposals such as that advanced [by Mr. Herzl] is politico-economic in nature: that the public weal will be served if broadcasting, like grocery stores, uses the conventional business organization, subject only to general legal restraints on its profit-seeking activity. This postulate carries with it, usually, the parallel assumption that the educational and cultural responsibilities of broadcast station operators ought to be no more substantial at the most than those of the operators of the newspapers and magazines. \* \* \*

\* \* \* [D]espite the extensive use made of these two assumptions by business organizations for propaganda purposes, there is a powerful tradition in the United States that

the economic, educational and cultural rights and responsibilities of broadcasting are unique.<sup>73</sup>

Professor Smythe's position would seem to be that broadcasting plays (or should play) a more important role, educationally and culturally, than newspapers and magazines (and, I assume he would add, books) and that, therefore, there ought to be stricter governmental regulation of what is broadcast than of what is printed. It is possible to dispute both parts of this argument. But Professor Smythe is right to claim that this view (or something like it) has been long and firmly held by most of those concerned with broadcasting policy in the United States. Thus Mr. Hoover in 1924 said:

Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest in the same extent and upon the basis of the same general principles as our other public utilities.<sup>74</sup>

\* \* \*

If the aim of government regulation of broadcasting is to influence programing, it is irrelevant to discuss whether regulation is necessitated by the technology of the industry. The question does, of course, arise as to whether such regulation is compatible with the doctrine of freedom of speech and of the press. In general, this is not a question which has disturbed those who wished to see the Federal Communications Commission control programing, largely because they thought a clear distinction could be drawn between broadcasting and the publication of newspapers, periodicals, and books (for which few would advocate similar regulation).<sup>75</sup> \* \* \* The Supreme Court made the distinction between broadcasting and the publication of newspapers rest on the fact that a resource used in broadcasting is limited in amount and scarce. But, as we have seen, this argument is invalid.

\* \* \*

73. Smythe, Facing Facts about the Broadcast Business, 20 U. of Chi.L. Rev. 96, 104 (1952). See note 32 supra.

74. Hearings on H.R. 7357, To Regulate Radio Communication, before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. 10 (1924).

76. There have been some who interpret the doctrine of freedom of speech and of the press not as an absolute

prohibition of certain types of government action but as being "permissive and \* \* \* subject (under due process of law) to forfeiture", if it results in "serious damage to some aspect of the public interest". C. Siepmann, Radio, Television, and Society 231 (1950). The establishment of a Federal Press Commission with powers similar to those of the Federal Communications Commission would presumably be compatible with this interpretation of the meaning of freedom of speech and of the press.

Mr. William Howard Taft, who was Chief Justice of the Supreme Court during the critical formative period of the broadcasting industry, is reported to have said: "I have always dodged this radio question. I have refused to grant writs and have told the other justices that I hope to avoid passing on this subject as long as possible." Pressed to explain why, he answered:

\* \* \* interpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural. I want to put it off as long as possible in the hope that it becomes more understandable before the court passes on the questions involved.<sup>81</sup>

It was indeed in the shadows cast by a mysterious technology that our views on broadcasting policy were formed. It has been the burden of this article to show that the problems posed by the broadcasting industry do not call for any fundamental changes in the legal and economic arrangements which serve other industries. But the belief that broadcasting industry is unique and requires regulation of a kind which would be unthinkable in the other media of communication is now so firmly held as perhaps to be beyond the reach of critical examination. The history of regulation in the broadcasting industry demonstrates the crucial importance of events in the early days of a new development in determining long-run governmental policy. It also suggests that lawyers and economists should not be so overwhelmed by the emergence of new technologies as to change the existing legal and economic system without first making quite certain that this is required.

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#### NOTES AND QUESTIONS

1. Be certain that you are not still subject to the "most money" illusion addressed by Professor Coase in the text following his footnote 40. Here is a simple illustration of the point from another, perhaps more familiar perspective.

The A Company sells razor blades. The B Company sells perfume. Each is deciding whether to buy a one-minute commercial spot on Monday Night Football for \$100,000. Which is the more likely to buy this advertising resource, i. e., to be willing to pay more for it? Is that decision in any way related to how much money either firm has?

Suppose that A believes it can sell \$1 million of inexpensive razor blades if it buys the time and runs its ad. Of this amount, \$800,000

<sup>81</sup>. C. C. Dill, *Radio Law* 1-2 (1938). Mr. Taft was Chief Justice of the Supreme Court from 1921 to 1930. So

far as I can discover, the Supreme Court did not consider any radio case while Mr. Taft was Chief Justice.

will cover the cost of producing the blades, and \$100,000 will go to pay for the ad. That leaves A a profit of \$100,000. B, on the other hand, thinks it could sell \$1 million worth of expensive perfume and make, say, \$50,000 in profit after the costs of production and advertising. Clearly, A thinks it can make more money than B if it buys the spot. Indeed, B may think the risk of loss not worth the chance to make a mere \$50,000. But suppose A doesn't have \$100,000 to purchase the time? If you agreed with A's projections of sales and profits, you (or anyone with \$100,000, or 100 people with \$1000 each, and so on) would be willing to finance A's purchase of the time for \$100,000, in return for which you would take, say \$120,000 of the revenues it produces, leaving A with \$80,000 in profits.

In this way, the capital markets would have operated to allocate the spot to the party that can use it most profitably—i. e., is willing to risk that it can do so—and not to the party with the “most money.” Indeed, if the capital markets are open, who can say how much money a firm “has,” or who “has the most money”?

2. Does the government's demand for radio frequencies present a special challenge to the efficiency claimed for the pricing system of allocating resources? Insofar as the government is purchasing spectrum from itself, for example, by a “payment” from the Defense Department to the Treasury for a “purchase” from the FCC, wouldn't it be rather indifferent to price? If you think it might rationally be indifferent to price, ask yourself what it must give up in order to have the frequency, what is its “opportunity cost.” If the government, for whatever reason, is not likely to ask itself that question, and would therefore be inclined to over-consume spectrum space, what institutional arrangement would you suggest to avoid the resulting misallocation? On the present system of intra-governmental allocation of spectrum, see Coase, *The Interdepartment Radio Advisory Committee*, 5 *J.Law & Econ.* 17 (1962); see generally Rosenblum, *Low Visibility Decision-Making By Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 *Ad.L.Rev.* 19 (1965).\*

3. An important question suggested by the thesis of the Coase paper is why the government uses different systems to allocate different resources. For example, the price system is used to auction off rights to timber on government lands, or to leases of offshore oil rights. On the other hand, judicial decisions are provided at almost no charge to litigants, even in commercial cases; but instead of deciding which litigation should be heard first in the “public interest, convenience, and necessity,” most cases are heard in the order in which they were filed. The right to high government office is allocated on a competitive but *non-price* basis known as an electoral plur-

\* Allocation of spectrum within the government is now managed by the National Telecommunications and In-

formation Administration of the Dept. of Commerce. Reorg. Plan No. 1 of 1977, § 3, 3 C.F.R. 197 (1978).

ality. And excuse from military conscription has moved from a price system during the Civil War, through a public-interest model of categorical allocations (by which certain groups of men were excused due to the importance of their work, family obligation, etc.), to a lottery system and, with the abolition of conscription, to a new price system. (In the original price system a conscript had to pay the market rate for a replacement, whereas in the new system the government must pay the market rate for soldiering labor in the first instance.) See generally, Comment, *The Equality of Allocation by Lot*, 12 Harv. C.R.—C.L.L.Rev. 113 (1977).

Each system may be appropriate to its time and the good being allocated, but we may still ask why; what, then, distinguishes radio broadcasting rights from offshore drilling rights? Remember, it is not an answer, but the inability to suggest one, that leads people to “explain” things by reference to “history.” After all, everything is a matter of history; we need testable, potentially refutable hypotheses to follow out, not truisms.

4. Professor Coase observes that the present system of non-price allocation confers extraordinary profit opportunities on the chosen beneficiaries. Since subsequent purchasers presumably must pay the full competitive price to the original licensees, however, the broadcasting industry may by now contain few recipients of any governmental largesse. (These would tend to be concentrated among television licensees where there has been less time elapsed since the original distribution and less turnover among licensees; but insofar as the licensees are corporations, there may have been complete turnover among the shareholder-beneficiaries of the largesse without any change in the identity of the licensee.)

Would it be equitable, therefore, for the government to invoke the rights reserved in §§ 304 and 309(h) of the Communications Act and then to proceed to auction off the right to broadcast? If not, when did it first become inequitable? Compare your present answer with the answer you gave to question (1) at p. 37, *supra*.

5. Professor Coase focuses on the efficiency loss entailed in the administrative allocation of broadcast rights, as well as the revenue loss to the taxpayers when immensely valuable rights are given away free. A related point has been made by Professor Harold Demsetz in the context of natural monopoly utilities, which are typically given an exclusive license and then regulated as to rates, etc. Both the efficiency loss of monopoly pricing and the cost of regulation would be avoided if the license were awarded as a government contract usually is, *viz.* to the lowest-priced competitive bidder for the right to provide the desired good or service. See Demsetz, *Why Regulate Utilities?*, 11 *J.Law & Econ.* 55 (1968); *cf.* Goldberg, *Competitive Bidding and the Production of Precontract Information*, 8 *Bell J.Econ.* 250 (1977).

Demsetz acknowledges the earlier work of the economist Chadwick, *Results of Different Principles of Legislation and Administration in Europe*; of *Competition for the Field*, as compared with *Competition within the Field of Service*, 22 *J. Royal Statistical Soc'y* 381 (1859). For a still earlier, and quite ingenious invocation of the same principle, see Pres. Jackson, *Veto Message (Recharter of the Second Bank of the United States)*, 8 *Cong. Deb. App.* 73, 74 (1832).

6. In Part V of his article, Professor Coase argues that a property rights system would have the advantage of permitting whatever division or recombination of rights proved expedient to those wishing to exploit the broadcast spectrum. He has in mind, I believe, a flexible system analogous to that governing real property, in which various interests short of a fee simple may be allocated separately to their most valuable uses. Thus one "property" might be exploited for its mineral rights, ground rent, and air rights simultaneously by three separate lessee-entrepreneurs, while a fourth might own the fee. As Coase points up, a well-functioning system requires only that the initial package of rights be precisely defined; the imagination of profit-seekers may thereafter be relied upon to divide the contents so as to yield the greatest returns. For concrete proposals for such a system, see DeVany, Eckert, Meyers, O'Hara, & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 *Stan.L.Rev.* 1499 (1969); Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 *J.Law & Econ.* 221 (1975).

The potential loss to society from an overly rigid legal regime for a particular technology is most dramatically illustrated when a new and improved technology is developed, perhaps in another society, but cannot be fitted within the scheme. For example, it is now possible to broadcast a television signal using substantially less spectrum space than the FCC has allocated to each channel. Unless many established interests that relied upon the present allocation system were to be disregarded, however, there does not seem to be any way for the United States to benefit from this. (Receivers with VHF click tuners would have to be replaced. Stations would lose the goodwill invested in promoting their channel number to the public; new transmitting equipment would be required of all stations; etc. One source estimates the public investment in television receivers alone at \$110 billion. U. S. Office of Telecommunication Policy, *The Radio Frequency Spectrum: United States Use and Management D-36* (1975).) The change to a new technology may or may not have been worthwhile, and hence undertaken, in a property rights system of the sort envisioned by Coase; it is impossible to imagine that it could be undertaken in the system that we have, however. Indeed, if our system had been universal, there would have been no incentive to develop a more spectrum-efficient technology anywhere.

Nicholas Johnson, a former FCC Commissioner (1966–73) is sensitive to these costs of our present allocation system. Yet he does not doubt the wisdom of using a *non-price* system of allocation. As you read his article, consider critically the merits both of his arguments against a property rights-market system of allocation and of his recommendations for an improved system of administrative allocation.

### JOHNSON, TOWERS OF BABEL: THE CHAOS IN RADIO SPECTRUM UTILIZATION AND ALLOCATION

34 Law & Contemp.Prob. 505 (1969).\*

The Federal Radio Commission (now the Federal Communications Commission) was created by Congress, in 1927, to impose order upon the chaos of the radio spectrum caused by the electrical interference and the babble of overlapping voices. Forty-three years later, the interference and babble have eased, but the chaos remains.<sup>2</sup>

\* \* \*

## I

### THE CHAOS OF SPECTRUM: THE CRISIS OF SPECTRUM MANAGEMENT

#### A. Scarcity and the Electromagnetic Spectrum

The electromagnetic spectrum is a unique resource. Rights to it are given to users for only a slight user fee. There is little incentive for the private sector to develop methods for more efficient use of the spectrum. The means of allocation of spectrum space is not based upon any rigorous measurement of value to the recipient or value to society. The demand for the spectrum does not determine who receives the right to use it; neither price offered nor need demonstrated is sufficient. Rather, two centralized government bureaus—the FCC and the Office of Telecommunications Management (OTM)—perform the spectrum management task for all of society. These bureaus, founded upon the concept of spectrum scarcity,<sup>6</sup> must allocate this

\* Reprinted with permission from a symposium on communications appearing in *Law and Contemporary Problems* Volume 34, Number 3, Summer, 1969, published by Duke University School of Law, Durham, North Carolina. Copyright 1970 by Duke University.

2. \* \* \* For a history of the legislation and a description of the subsequent regulatory efforts, see Coase, [supra, at 46]; Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government*

and Civilian Use, 4 *Duquesne L.Rev.* 1, 3–47 (1965); Robinson, *Radio Spectrum Regulation: The Administrative Process and Problems of Institutional Reform*, 53 *Minn.L.Rev.* 1179, 1181–98 (1969); Note, *The Crisis in Electromagnetic Frequency Allocation: Abatement Through Market Distribution*, 53 *Iowa L.Rev.* 437, 447–60 (1967). [Footnote relocated.]

6. The problem with scarcity is that users, if not regulated, will not take account of the costs imposed on others in determining the value to them of



scarce resource between competing potential users and uses by the criteria of what meets the "public interest." This task involves a unique blend of engineering, law, and economics, and the existing confusion in spectrum management is in many ways a result of the present incompatibility of these disciplines.

### 1. *Substitutes for Spectrum*

The conceptual basis for the current regulatory system—scarcity of spectrum—obscures the fundamental spectrum management problems. In one sense there are always substitutes for spectrum. For example, transportation is a substitute for spectrum, as are the other factor inputs that radio displaces—labor, storage facilities, vehicles, wire and cable, and so forth. But as radio is often the only practical, and the far most efficient and cheapest, way of performing a task, substitutes are often not available without technological developments. The spectrum is therefore "scarce" only because it is cheaper than substitutes.

Greater and more effective use of the electromagnetic spectrum can be accomplished in two ways. Technical advances allow operation at increasingly higher frequencies. We currently use only a small portion of the potentially available spectrum. \* \* \*

A second manner of spectrum development is to make more effective and efficient use of the currently usable spectrum by transmitting the same volume and quality of information in less frequency space or at a greater rate in the same frequency space. \* \* \*

### 2. *Spectrum Development and Government Regulation*

Technological achievements in recent years have opened up new areas of spectrum. Other advances have produced a more efficient allocation and utilization of the currently used spectrum. And discoveries and developments in microwave technologies, laser beams, solid state electronics, and nonatmospheric transmissions promise to provide practical use of even more of the spectrum. However, \* \* \* these technological developments do not decrease the need for intelligent spectrum management by a central government agency. \* \* \* [I]mproved spectrum management is needed if the advancements are to develop fully. For example, each of these threats to scarcity is also a threat to an economic interest which thrives on that scarcity. The development of these new techniques is retarded by the opposition of economic groups and by outdated regulatory practices that are captives of these entrenched interests.

\* \* \*

the spectrum use. There is a need to choose among several applicants for limited spectrum, because a zero-price is artificially maintained for the scarce resource causing demand to remain above supply. The scarcity ra-

tionale for the existence of a national spectrum manager was seen by Justice Frankfurter in *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

## B. The FCC and Spectrum Management

### 1. *The Present System of Spectrum Management*

Confronted with the demands on the radio spectrum by commercial broadcasting, industrial use, and private use, the FCC, charged by Congress with bringing order out of the spectrum chaos of the 1920s, has failed to develop virtually any consistent, rational policy of spectrum management. The decisions allocating spectrum between competing uses and users are made with little intelligent planning. Each case tends to introduce new criteria of allocation. \* \* \*

(a) *Allocation procedures.* The confusion and chaos of the present spectrum management is quickly seen in the FCC's allocation procedures, where spectrum rights are granted to one use or user to the exclusion of another. The potential user of spectrum must come to the spectrum manager. The manager must choose among the applicants on either a first-come, first-served basis or by finding one of the applicants to possess "superior qualifications of eligibility under the managers' allocational-distributional criteria."<sup>14</sup> Because the FCC has no consistent principles of licensee qualifications, use of the latter test has produced an irrational and chaotic system. What is more, spectrum managers typically seem to use some aberrational combination of the two tests. Both the FCC and the OTM attempt to allocate spectrum on some basis other than first come, first served. However, the incumbent is given an edge over a challenging user, so that first come, first served is the usual result. For example, when spectrum is shared co-equally by two or more radio services, it is shared subject to the condition that new entrants protect from interference all those who are already using the spectrum band. Innovation is thereby stifled, for inefficient uses are not replaced and newly developed techniques are shuttled into the inferior areas of the spectrum.

The philosophy and policy used in allocating frequency space between competing uses is a bit more definite than the assignment of a frequency to competing users who both propose the same use. Blocks of spectrum are set aside for certain uses, and only applicants planning that use are accepted for consideration. The determination of how much spectrum, and which part of the spectrum, should be set aside for each user group is made by balancing two policies: the importance of the use and the technical necessity of spectrum for the function planned. Although this schematic system is followed more often in theory than in execution, it might be helpful to look more closely at it as an example of criteria that can be applied to solve a spectrum management problem.

14. Levin, *The Radio Spectrum Resource*, 11 *J.Law & Econ.* 433, at 467 (1968).

(i) *Importance of the use.* The ranking of user groups has traditionally been determined by the relative public interest and importance of the different uses. On an international as well as national basis, broadcasting and safety services have usually received priority. Industrial services having an element of safety have followed second. Marine, aviation, and police are in the safety services group. Public utilities, such as electric and water companies fall in the second group, since breakdowns of service may affect public health or safety. Industrial concerns whose operations are hazardous are further down the list of priorities. At the bottom of the user group rankings are the small business concerns which rarely have great public safety aspects but whose prompt and efficient services benefit the public.

In allocating blocks of spectrum, the criteria for ranking the importance of specific uses are imprecise. Broadcasters and common carriers are usually favored over mobile radio because more people benefit from them. Nonbroadcast public allocations are usually favored over private allocations because of the importance of public safety. While these rules have some validity, they are too generalized to produce near optimum allocation results. For example, some small private businesses using spectrum for only economic purposes might provide a better or cheaper product with the addition of spectrum. This might be of more value to the public than the addition of more space to broadcasting. The important consideration should not be the relative absolute importance of incompatible uses but rather the comparative value to the public of a marginal unit of spectrum to each use. Only by comparing the value of spectrum for the additional broadcast station with the value of an equivalent amount of spectrum to mobile users, for example, can the true public interest be determined. That broadcasting is more important to the public than land mobile is irrelevant if there is already sufficient spectrum for the desired number of broadcasters but a shortage for land mobile operators. Another problem with the classifications of uses is the imprecision in distinguishing between geographic areas. This leads to the absurd situations where spectrum is reserved for the forest service in New York City or marine services in Nebraska.

(ii) *Necessity of spectrum.* Even though a particular prospective spectrum user might be engaged in activities of great importance to the public interest, it is necessary, in considering frequency allocations, to determine whether, as a technical matter, spectrum is required to perform the function. Police protection, for example, is one of the most important public services in the country. However, it does not follow from this fact alone that the police must be given all the spectrum they want. One must also determine for each individual police function whether spectrum is absolutely vital for the performance of the task. \* \* \*

(b) *Spectrum management decisions.* The FCC's decision in *Lehigh Cooperative Farmers, Inc.*,<sup>16</sup> illustrates the current chaos in spectrum management. In passing on a request for continued use of mobile radio, the Commission relegated the applicant to the more congested Business Radio Service rather than the Special Industrial Radio Service that he had been using. This decision was based upon the solemn finding that the livestock breeding business that he formerly owned was of higher priority than the dairy inspection business in which he was subsequently engaged. For the Commission to allocate valuable spectrum on the basis of which business it feels to be more important, without knowledge of the needs, efficiencies, contributions, and wants of the businesses, makes a mockery of the spectrum management task set forth in the Communications Act.

\* \* \*

## 2. *Inefficiencies from Spectrum Nonmanagement*

The danger and harm resulting from the nonmanagement of the spectrum may not be as obvious as the fact that a rational, systematic management does not exist. It is obvious that the ease with which spectrum users are accommodated in the spectrum affects their capital costs, so that ineffective management of the spectrum raises these costs and produces inefficiencies and distortions in the economic system. But there are other, more subtle inefficiencies introduced by spectrum nonmanagement.

(a) The present spectrum management system has produced the repeated criticism that the FCC has failed to take account of economic considerations in the management of the radio resource. The Commission even today has no economists who are involved in the spectrum management process. \* \* \*

(b) Spectrum users find themselves subject to a number of incentives which work positively against efficient spectrum management, and the Commission has failed to modify that system. Thus, there is no incentive for a present user to economize on spectrum; he gets it free. There is an incentive to stockpile spectrum; it may be difficult to get in the future but costs nothing to stockpile. Acquisition of new spectrum is so uncertain that research and development activities are unnecessarily risky. Although technologically there may be many substitutes for spectrum, without the incentive to economize on its use these will never be developed.

(c) There is no present systematic provision for transferring spectrum from present users who give lower national return to new or alternative users who could provide higher national return. \* \* \*

(d) The Commission processes do not allow even private market efficiency, since the allocation of blocks of spectrum for a specific use

16. 10 F.C.C.2d 315 (1967). \* \* \*

prevents less profitable uses of the spectrum from being exchanged for more profitable ones. \* \* \*

(e) There is no natural incentive for more intensive use of spectrum—through sharing, acceptable levels of interference, or redesign of systems. Again, present users pay nothing for spectrum, and sharing is less satisfactory to them than monopolization.

(f) The Commission does not have the capacity to evaluate adequately the proper mixture of uses of the new spectrum now becoming technically and economically useful at higher and higher frequencies.

(g) There is no comparison of the relative benefits of governmental and nongovernmental uses of the spectrum, a comparison that must be made if judgments about optimum resource allocation are to be made.

\* \* \*

### 3. *Reasons for Spectrum Nonmanagement*

Why has the FCC been unable to respond to the crisis in spectrum management with other than short-sighted, stop-gap measures? There are many reasons, but the major reason is lack of resources—money and competent personnel, primarily. Of course, it is not unusual for a government agency, when faced with a difficult problem, to plead inadequate resources. This plaint is often a way of concealing the fact that the agency lacks the ability ever to deal with the problem. \* \* \*

\* \* \* There are other major causes of the troubles, including possibly the institutional structure of spectrum management. A first problem with the structure is the bifurcated system of regulation, with the FCC having jurisdiction over only the civilian use of the spectrum. There is no decision maker that takes an over-all look at the spectrum. \* \* \*

Another cause of the current crisis in spectrum management is the system of decision making. One aspect of this system is the lack of criteria upon which decisions can be based.<sup>27</sup> The only allocation standards provided by legislation are section 303(g) (“encourage the larger and more effective use of radio in the public interest”), section 307(b) (“provide a fair, efficient, and equitable distribution of radio” to as many communities as possible), and section 309 (“whether the public interest, convenience, and necessity will be served by the granting of” the license). This use of imprecise language, like “public in-

27. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Administrative Standards*, 75 *Harv.L.Rev.* 863, 1055, 1263 (1962); Jaffe, *The Scandal of TV Li-*

*censing*, *Harpers Mag.*, Sept. 1957, at 71; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 *Geo.L.J.* 655 (1959).

terest," to cover up the total lack of criteria has been said to be "somewhere between a charade and criminal fraud." \* \* \*

## II

### ALTERNATIVES TO THE PRESENT SPECTRUM CHAOS

\* \* \*

#### A. Institutional Changes

##### 1. *Market Allocation of Spectrum*

\* \* \* In other parts of the economy, a user gains the right to use a resource such as land, minerals, or water—by paying a price for that privilege. The price he pays is related to the benefit that he (and hopefully therefore society) gets from that use. Alternative users always have the opportunity to bid away those resources by paying a higher price. \* \* \*

(a) *The proposal.* In reaction to the confusion and inefficiencies resulting from the present system of allocation, a group of economists led by Professor Ronald Coase have argued that the radio spectrum should be sold by the government to private users. \* \* \*

(b) *Merits of the market allocation proposal.* \* \* \* He said that the pricing mechanism would bring to spectrum management the same advantages that it confers on other industries. First, the expensive, time-consuming allocation procedure now used would be eliminated. Second, the spectrum would be utilized with greater efficiency. Treatment of spectrum as a free good distorts the resource mix. Capital, labor, and land are used in different proportions to spectrum than they would be if spectrum had a price. No incentive currently exists to economize on spectrum use. If spectrum were costly to use, businesses would not stockpile it against the possibility of future need. And research and development on spectrum conservation would increase as businesses sought to minimize their spectrum costs.

\* \* \*

A third advantage of market allocation of spectrum as seen by Coase would be its avoidance of any threat to freedom of the press inherent in the present allocation procedures for broadcast spectrum. \* \* \* A fourth argument for market allocation is grounded on principles of equity. The sale of spectrum would avoid the arbitrary enrichment of certain users through the free disposition of public largess. This giveaway not only involves the threat of corruption and improper influence on the decision-making process, but also deprives the public of payments by private industry for the use of a national resource.

(c) *Problems with the market allocation proposal.* Despite the simplicity and efficiency claimed by the market allocation advocates, several problems seem to remain.

(i) *Engineering objections.* Precise engineering definitions of spectrum rights would be necessary to the development of a market system in which private ownership and use of spectrum were adequately protected by the law. \* \* \*

(ii) *Economic and policy objections.* Several economic assumptions made by advocates of the market allocation proposal must be examined closely. They assume that businesses will respond to economic incentives in a perfectly rational manner. For example, they envisage consistent profit maximizing decisions by corporate managers. But even with profit maximization as the primary goal of businesses, the market mechanism will not necessarily lead to greater efficiency and equity, for there is no certainty that spectrum use will flow to the best user from an economic and social standpoint. And if recent literature is correct, profit maximization may well not be the primary and/or constant goal of modern American business.<sup>45</sup> The drive to maximize security and produce a safe, constant rate of return may be paramount. If so, the dynamics of the market may operate differently than the market proposal advocates believe.

Similarly, the proponents of the market allocation proposal may also err when they assume that consumers or users of spectrum can obtain the spectrum space they need by expressing their desires with money in the market. In order for consumer desires to be truly reflected in the market, the price system must function perfectly. The markets in America for industrial inputs are not perfect, but rather may inhibit consumer voices. It is probable, for example, that the major business firms, the large users of radio spectrum, manage and create consumer demand more than they respond to it. They may find it necessary to control demand so as to prevent the fluctuations that inhibit effective industrial planning. If larger companies in more concentrated markets are more likely to be able to control the demand for their products than others, the concentration likely to result in the communications industry from the use of the market mechanism would only add to the problem.

The spectrum market would deviate from the theoretical market of the price system advocates in another way. The existence of two different groups of spectrum "users" would inhibit the proper functioning of the dynamic spectrum market. For the market activities to represent consumer desires, all those affected by a spectrum use

45. See, e. g., J. Galbraith, *The New Industrial State* passim (1967); Hetherington, *Fact and Legal Theory: Shareholder, Managers, and Corporate Social Responsibility*, 21 *Stan.L.Rev.*

248, 250, 258, 283 (1969); Robinson, *supra* note 2, at 1251-52. But see Posner, *Natural Monopoly and Its Regulation*, 21 *Stan.L.Rev.* 548, 553-59 (1969).

would have to be able to "bid" in the market. This means that the ultimate consumer of the spectrum service (for example, the television viewer), as well as the initial user (for example, the broadcaster), must be heard. But there are problems with the user-consumer's interest being reflected through the market mechanism. Radio services, for example, may provide social benefits not measured by the willingness or ability of the ultimate consumer to pay—even assuming there was some way he could pay. Television is desired by viewers, but the broadcaster-users of the spectrum would only pay an amount for the spectrum that would maximize advertising revenues. And there is no guarantee that viewer desires for the use of broadcast spectrum would equal the amount that broadcasters would pay to obtain the highest return of advertising revenues.

In certain industries government regulation is substituted for the pricing mechanism due to the high costs involved in the use of a free market. When market transactions involve a large number of people, the negotiation for the transfer of rights becomes too time-consuming and costly to be practical. The existence of two "user" groups for spectrum increases the number of people the market must consider if the market allocation proposal is to succeed. If user-consumers were dissatisfied with present uses of the spectrum, they would have to organize to make the market reflect their preferences for spectrum allocation. But this organizing may involve prohibitive costs—called "transaction costs."<sup>48</sup> These unorganized user-consumers are opposed in the market by existing, well organized spectrum users—often in corporate form<sup>49</sup>—with the wealth, power, and focused attention to secure favorable results. This disparity of power and resources, already apparent in current Commission allocation procedures, would become worse with the market allocation procedure. It would be hypocritical to tell the public that they have equal rights to those of the giant corporate users of spectrum since both can bid for its use.

The conclusion of the market allocation advocates that the pricing mechanism produces the most equitable and efficient allocation of resources is itself a normative, not an empirical, judgment. The government must interfere with the pricing mechanism in situations where the market can no longer be counted on for efficiency or equity, and this may well include the allocation of spectrum. We are seeing increasing challenges in this country to the conclusion that "good" public policy for microeconomic questions is necessarily that which

48. An analysis of transaction costs in another context indicates that these costs increase rapidly with the increase in the number of parties whose actions and desires must be coordinated for a desired arrangement to develop. See Demsetz, *Toward a Theory of Property Rights*, 57 *Am.Econ.Rev. Papers & Proc.* 347 (1967).

49. A corporation is a legal device for bringing together interests with capital and labor and other resources. The transaction costs have been reduced by the emergence of a large and well organized financial community, and are figured into the expected return on the investment.



produces the greatest efficiency. Similarly, the presumption that pure competitive solutions are always "best" is being challenged. Those who urge free market solutions to resource allocation problems have as much responsibility to trace out the effects of their recommendations as do those who propose interference with market processes. To assume that market allocation of a good is the normal situation, to be departed from only in exceptional situations, is to determine an industry's goals and principles by considering only economic factors and ignoring the social impact of the industry.

The market allocation proposal ignores public policy considerations in its failure affirmatively to encourage "good" uses of spectrum. There is reasonable fear that without allocation by a government agency, "wrong" people will use the spectrum at "wrong" rates of use—"wrong" being defined as more than in the economist's sense of "less efficient." Congress, for example, created the FCC to grant broadcast licenses in return for the dedication of some resources to the public interest. And although the Commission cannot, and should not, censor the content of radio and television shows, some review of broadcast programming standards is essential for regulation in the "public interest."<sup>53</sup>

The present structure of spectrum allocation subsidizes certain activities by giving them free spectrum. The argument typically made against this subsidizing is that it is impossible to tell whether the favored activities really deserve this treatment. There is certainly merit in making all subsidized activities visible so that policy objectives can be reviewed. Yet perhaps we can take solace in the fact that this subsidy is no worse than many others. There are many other examples of the pricing system being ignored, purportedly to promote the public interest. Trucking firms, for example, are allowed to use the nation's highways by paying relatively small highway taxes, and airlines are allowed the free use of the airspace in exchange for their service to the public. But without regulation and subsidies, truckers might give less service, and airlines might not supply flights to many communities they are now required to serve. The generally accepted proposition that society benefits by having large trucking operations and air routes to smaller communities might be ignored in a perfectly rational market. I, of course, do not wish to defend subsidies, but I do think it is important to recognize that an installation of the market system for spectrum would have social ramifica-

53. \* \* \* Commissioner Kenneth Cox and I have attempted to develop a quantitative system for judging the performance of broadcast licensees seeking renewal of their licenses. Although our efforts have yet to win Commission majority approval, we

feel that some standards (for example, minimum amounts of news and public affairs programming each day) are necessary for the determination that the licensee is serving the "public interest" through his use of the radio spectrum.

tions. Once this is understood, the decision whether to retain the subsidy can be made on both economic and policy grounds.

\* \* \*

### 2. *Rental Payments for Spectrum Use*

Another proposal for the allocation of the spectrum similar to the market allocation proposal is the use of rental payments. \* \* \*

Professor Harvey Levin has noted that newcomers to the spectrum would rather buy rights to use the spectrum than do without, so long as the payments are less than any spectrum substitute. But without a transfer system there is no way for those with spectrum of little value to them to get it to the newcomer who values it highly. Levin therefore proposes a rental system whereby newcomers would reimburse incumbents for any costs in vacating, sharing, or lending space to accommodate them in the spectrum. If the incumbent prefers not to accommodate the newcomer, he must compensate the newcomer for the costs of exclusion. This system would articulate the opportunity costs involved in spectrum use—for the incumbent, the cost of accommodating versus the payment of rent in the amount of the costs imposed on the rejected newcomer; for the newcomer, the rent in the amount of costs imposed on the incumbent in accommodating versus the cost of utilizing or developing an alternative to spectrum.<sup>56</sup> Although this plan would be difficult to put into practice, the opportunity cost analysis shows the type of thinking that could be done by the spectrum manager. As such, this system of allocation deserves further study.

### 3. *Market Simulation by the Spectrum Manager*

(a) "*Shadow pricing.*" In deciding whether to give spectrum to one user or another, or one use or another, the spectrum manager can simulate the market by attempting to balance the value of the spectrum to one user or use against the value to another. Using value and not ability to pay as the criterion for allocation, the manager can promote efficiencies without the "transaction costs" otherwise incurred by unorganized consumers of spectrum end products.

\* \* \*

Shadow pricing as a market simulation device has advantages over the market allocation proposal, but its execution poses several problems. To determine the actual value of spectrum to a user, one must know the exact price that he would be willing to pay for it. This would be difficult to ascertain in the abstract without the participants actually incurring the costs that they "bid." Until data utilization and economic predictions become more exact, shadow pricing as a system is probably impractical. \* \* \*

56. Levin [New Technology and the Old Regulation in Radio Spectrum Management, 56 Am.Econ.Rev. Papers & Proc. 339, 343-46 (1966)].

(b) *Consumer preference.* \* \* \* According to this plan, the consumer would voice his preference, not by spending money for goods or services, but by casting a ballot for one type of spectrum use or another. Each person could sell his vote, trade it, or combine it with others. In a society with vastly imperfect markets and great discrepancies in the distribution of wealth, this "market" of ballots may be the only equitable market for distribution of the public's radio resource.

\* \* \*

#### B. Changes Within the Present Institutional Structure

##### 1. *Improved FCC Administration and Decision-Making* \* \* \*

##### 2. *Increase User Fees*

The imposition of user taxes or fees can achieve many of the economic efficiencies which would result from the use of the market mechanism in spectrum allocation. If we reject the market approach in favor of a central agency allocating spectrum on a case-by-case basis in order to insure maximum social benefits, it does not follow that the agency need use only abstract priorities to apportion licenses. The FCC now has a schedule of filing fees for licensees; greater economic efficiency might be generated by a better planned system of fees of much larger size. \* \* \*

Higher user fees would promote efficiency in spectrum use by reducing the monopoly rents which produce inequities and resource distortions. With a higher cost for spectrum, users would be forced to consider spectrum substitutes. Spectrum would be transferred from less efficient to more efficient users, and the higher fees would encourage more efficient utilization of spectrum, discourage stockpiling, and increase the research and development on spectrum-conserving techniques. Increased user fees might also eliminate in part the subsidies in the present system—subsidies which enrich only spectrum users and the Washington attorneys who interpret the conflicting and confusing FCC allocation decisions. And most importantly, a significant increase in user fees would give the public some return on its lease of the airwaves.

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#### NOTES AND QUESTIONS

1. Commissioner Johnson holds that government planning of spectrum use is justified (only) so long as spectrum is scarce. Considering his definition of scarcity (p. 62), will the necessity for such planning ever come to an end? On his reasoning, will technological progress make spectrum more or less scarce? Does his reasoning af-

ford a ground on which to recommend the central planning of spectrum use in an otherwise unplanned economy, i. e., to distinguish it from other goods?

2. In allocating portions of the spectrum to particular uses, Johnson says that the important consideration should be "the comparative value to the public of a marginal unit of spectrum to each use." P. 64. What do you take this to mean? To check yourself, re-read his subsequent critique of the FCC's decision in *Lehigh Cooperative Farmers, Inc.*

3. Consider each of the points made under the heading of "Economic and policy objections" (p. 68) to the market allocation proposal. These objections respectively (a) question the realisticness of the market model generally, (b) suggest its inapplicability to the specific cases of radio and television program retailing, and (c) re-cast the policy choice between market and non-market regimes as essentially a normative choice between different policy goals.

Are the objections well-taken? Are they consistent with each other? How do they square with Johnson's earlier objections to the FCC's approach to allocation of the spectrum among different uses? Could both sets of objections be satisfied by erecting a mixed system of market allocation among uses and administrative supervision of particular users, viz. broadcasters? Is that a workable combination of the two approaches?

4. How does one know a "good" from a not-good use of the spectrum? A "wrong" user from a not-wrong user? Does Johnson offer any suggestions? Is there a contradiction inherent in the proposition that "although the Commission cannot, and should not, censor the content of radio and television shows, some review of broadcast programming standards is essential for regulation in the 'public interest?'" Is Johnson's rejection of the market proposal, then, ultimately based upon the view that the state must, and legitimately may, lay claim to regulate what is disseminated through the media of mass communication, or at least the electronic branch of the media? Or does the quoted statement merely distinguish between prior governmental restraint of what can be communicated (censorship) and post hoc ("review") sanctions for speech that is not in the "public interest"? Cf. *New York Times Co. v. United States*, *infra* at 428, ¶ 4.

5. Johnson notes that the proposal advanced by Professor Harvey Levin "would be difficult to put into practice." P. 71. Do you see why? How would *you* limit the number of opportunistic market entrants, i. e., "newcomers" demanding either spectrum or payment?

6. Consider the advantages claimed for increasing the fees paid by spectrum users. Interestingly, Johnson suggests that the size of the fee "could be set by market simulation or by competitive bidding", in either case presumably in order to derive the market-clearing price and an efficient allocation of the resource. Is this consistent

with his prior reasons for rejecting a thorough-going market approach?

7. For a review of the policy debate on spectrum allocation, in addition to the sources cited by Coase and Johnson, see Jones, *Use and Regulation of the Radio Spectrum: Report on a Conference, 1968* Wash.U.L.Q. 71.

8. In addition to increasing user fees, Johnson also makes the predictable proposal that the FCC's resources, i. e., budget for spectrum management, be increased. Whenever a government program is criticized, it is possible to argue that the idea underlying the program was not given a valid test, and therefore ought not yet be found wanting, because the program represented an inadequate commitment either of resources or of authority. The argument will almost inevitably be somewhat plausible because all programs are constrained by a budget and some limits on legal authority.

But it will virtually always be untestable as well. Thus, whether the complaint is that the FCC has no economists on its staff, or that the army is being forced to fight a war with "one hand tied behind its back," in order to explain their respective failures, it is often best to recur to the level of theory and to re-examine whether the idea underlying the program is worthy of further support.

After you have examined the more particularized problems encountered under the broadcast regulatory regime you may wish to retrace your steps through the basic policy dispute over the decision to regulate. Ask yourself then how many of those problems are peculiar to the specific system we happen to have in the Communications Act and how many would arise anyway, to be solved under the relevant law of general application, such as antitrust, fraud, copyright, first amendment, defamation, and nuisance. Would they be resolved in quite the same way by the courts as by the FCC?

It will be time then, too, to rethink the relation between political control of property and political control of speech and to decide for yourself whether to accept or reject the distinction of convenience drawn in the organization of this book between economic and content regulation. Now, on with the task at hand.

Part Two  
INDUSTRIAL ORGANIZATION

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Chapter III  
CONTROL OF ENTRY INTO BROADCASTING

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A. THE FCC LICENSING PROCEDURE

The Communications Act provides that "No person shall use or operate any apparatus for the transmission of \* \* \* signals by radio \* \* \* except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." § 301. Certain narrow categories of persons are prohibited absolutely from receiving a license to broadcast by Sections 310(a) and 313(b). For the most part, however, any United States citizen or corporation is in theory eligible to receive a license to broadcast.

As a technical proposition, it is first necessary to obtain an FCC permit to construct a broadcast station, § 319, which is then to be "covered" by an operating license before broadcasting may lawfully begin; this distinction need not concern us, however.

In very brief summary, an application must conform to the informational requirements promulgated by the FCC under Section 308; see 47 CFR § 21.15; it may then be granted by the Commission if it finds that the "public interest, convenience, and necessity would be served" thereby, § 309(a), but notice must first be given to the public, §§ 309(b), (c), so that "any party in interest" may object by filing a "petition to deny" the application. § 309(d). Such a petition must be acted upon before the Commission can grant or deny the underlying application. Thus, the Commission can deny the petition to deny, giving reasons therefor, or, if the petition to deny raises a "substantial and material question of fact" or otherwise renders it "unable to find that grant of the [challenged] application would be" in the public interest, etc., set the application down for a hearing. *Id.* Of course, if there is no petition to deny filed, the Commission can designate an application for hearing on its own motion in order to resolve the public interest question. § 309(e). In either event, the applicable hearing procedures are set out in Section 311 and the Commission rules thereunder.

Should the Commission determine to approve an application, with or without holding a hearing, the resulting license may not be

for a longer term than three years; it may then be renewed for similar periods. § 307. At renewal time, the entire licensing process is repeated, except that as a practical matter renewal is granted routinely unless (1) there is a serious deficiency in the record that a licensee projects on its renewal application—which asks extensive questions about programming, minority employment, etc.; or (2) the licensee has been the subject of substantial public complaints to the Commission or of administrative censure during the expiring license's term—e. g., for violating the Commission's technical standards, or programming policies; or (3) there is a petition to deny renewal filed, in which case the Commission must, again, either set the renewal application down for hearing or issue a statement of its reasons for denying the petition to deny.

There is one other important exception to all of the foregoing. When an original or renewal application is filed, any other eligible person can file a competing application for the same license, i. e., to operate on the same frequency at the same place, or on any frequency at any place that, for technical reasons of interference, makes the two applications mutually exclusive. In that event a "comparative" hearing must be held and one (or no) application granted and the other(s) denied. Such hearings are the subject of parts B and C of this chapter.

Finally, the denial of any application, or of a petition to deny, is a final order appealable to the United States Court of Appeals for the District of Columbia Circuit, § 402.

At this point, you should read each of the sections of the Act cited in this note, in the order in which they are cited, as well as Sections 304 and 310(b).

## **B. COMPETITION TO ENTER: THE COMPARATIVE HEARING**

Since the decision to allocate broadcasting licenses "in the public interest" is not self-executing, the allocating authority must determine whether a particular applicant for a license will in fact serve the public interest, however it is defined. With licenses priced near zero,\* the FCC often finds itself with multiple applications for the right to serve the public interest in a particular area where not all can be granted. In this happy circumstance, the public might still capture the benefits of competition for the license; although it could not be paid in coin, it could be paid in kind as the would-be entrants compete to promise qualitatively superior service.

In order to capture that benefit for the public, the allocating authority must accomplish two tasks. First, it must develop a pro-

\* The Commission charges each applicant a filing fee and each successful applicant a grant fee (and annual op-

erating fees) as part of the government's policy of charging regulatees for the cost of regulation.

cedure by which to identify the competitor of superior promise, and inform that procedure with substantive criteria relevant to its chosen concept of the public interest. Second, it must devise a means for assuring that the superior promise indeed becomes superior, or at least acceptable, performance. In the remaining portion of this chapter you will have an opportunity to evaluate the FCC's performance in these areas and to develop your own prescriptions for meeting the particular problems encountered by the agency.

**NOTE: ASHBACKER RADIO CORP. v. FCC**

United States Supreme Court, 1945.  
326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108.

In March, 1944 the Fetzer Broadcasting Company filed with the Commission an application for authority to construct a new station at Grand Rapids, Michigan, with an operating frequency of 1230 kc. In May, 1944, before the Fetzer application had been acted upon, Ashbacker Radio Company applied for authority to change the frequency of its station at Muskegon, Michigan to 1230 kc. The Commission viewed the two applications as mutually exclusive since to grant both would produce intolerable interference for each signal. It granted the application of Fetzer, without a hearing, and set Ashbacker's application down for a hearing in which to show that its proposed operation would better serve the public interest.

The Supreme Court held that to grant one of two mutually exclusive applications without a prior comparative hearing on both effectively deprives the losing applicant of its right to a hearing before denial of its application, now found in § 309(e). After noting that no licensee obtains any vested interest in any frequency, the Court said:

By the grant of the Fetzer application, [Ashbacker] has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee. 326 U.S. at 332.

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**QUESTIONS AND PROBLEMS**

1. If the FCC had acted more expeditiously and granted the Fetzer application before Ashbacker had filed but after a reasonable notice period of perhaps 30 days had run, Ashbacker would presumably have been time-barred. But if such notice is always to be made available, then successive chain-reaction filings from contiguous areas might keep the original application open indefinitely and turn every license proceeding into a very broad-ranging inquiry indeed.



The FCC has therefore established a cut-off policy providing that an application will not be consolidated for hearing with previously filed applications unless it is filed before the end of the last-expiring notice period in the chain *and* before any previously filed application in the chain is designated for hearing. 47 CFR § 1.227(b); see *Century Broadcasting Corp. v. FCC*, 310 F.2d 864 (D.C.Cir. 1962) (approving the cut-off rule in a case where 14 conflicting applications from several different communities were consolidated).

Assume that application A is received and notice of its pendency published in the Federal Register on January 10. On February 1, B files a conflicting application for a station to be located in a different town; notice appears on the same day. On February 2 the FCC designates the applications of A and B for hearing, thus barring the application of C for a station in yet another community. Is it in the public interest that the proposal to serve the third town not be considered at all? Might the operation of 47 CFR § 1.227 conflict with the injunction of § 307(b) of the Act?

2. Is there ever a valid policy reason for a licensing agency to dispense with comparative proceedings altogether and grant licenses on a first-in-time basis? Assuming that minimum eligibility criteria must still be met, could such a rule be upheld as reasonably calculated to further a public interest? Consider the reason for establishing western "land rush" claims on this basis, and see *United Cities Gas Co. v. Illinois Commerce Commission*, 48 Ill.2d 36, 268 N.E.2d 32 (1971). Does the FCC have the authority to adopt such a rule? What is its best authority argument? See §§ 1, 303.

3. It is not always obvious, by the way, whether two applications should be deemed "mutually exclusive." Consider:

Station A, the nighttime contour of which covered only 27% of its community of license (Palm Springs, Cal.), applied for a change of frequency and transmitter site to enable it to reach 67% of the community. Meanwhile, Station B (licensed to North Las Vegas, Nev.) sought a facilities change that would require limiting Station A's potential nighttime coverage, if its application were granted, to 41% of its community. Even so, under a Commission policy favoring changes that increase coverage of the community of license, the application of A, as limited, would almost surely be granted.

Under the decision in *Little Dixie Radio, Inc.*, 11 R.R.2d 1083 (1967) an applicant is entitled to comparative consideration per *Ashbacher* where the grant of one application would have a "substantial and material adverse effect upon the other's prospects for success."

How does this standard apply to A's motion to consolidate its application proceeding with B's for comparative treatment? See *KLUC Broadcasting Co.*, 67 FCC 2d 586, 42 R.R.2d 178 (1978).

Would it matter if A alleged that it would withdraw its application if consolidation were denied because the facilities change would

not be cost-justified if it resulted in only 41% coverage? If so, how could the Commission deter opportunistic allegations of this sort?

4. Before going on, you should stop to consider the precise question placed before the FCC by the necessity to choose between two mutually exclusive applications. Formulate that question in a manner general enough to apply to each of the following comparative contexts:

- a. A applies to establish the first radio station in a large suburb of a major city, while B would locate in the rural area beyond, which is presently able to receive the three most powerful city signals even during the day.
- b. A applies for the first license in Town, pop. 5,000; B applies for authority to service City, pop. 20,000, which is 5 miles from Town. Town has no local media, either electronic or print but receives City's radio and television signals (one each) and its daily newspaper. All three of these media outlets are owned by City Corp.
- c. A and B have each applied for the sixty-first license to serve Chicago, Illinois. Each is a U. S. citizen with no prior broadcast experience. Because they had been partners in developing a single application before a falling-out caused them to dissolve their business partnership, they have submitted virtually identical program proposals and financial profiles.

Is there a unique answer, in each of these cases, to the generic question as you have formulated it? If not, specify any further information you would need in order to answer the question in any of the as yet unresolved hypotheticals.

### JOHNSTON BROADCASTING CO. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1949.  
175 F.2d 351.

PRETTYMAN, Circuit Judge.

\* \* \*

Two applications, one for a permit to construct a new radio broadcasting station and the other for changes in the frequency and power of an existing station, were presented to the Commission, one by Johnston Broadcasting Company and the other by Thomas N. Beach. The applications were mutually exclusive, both being for operation on the same frequency. The Commission set them for a comparative hearing.

Johnston moved that the Beach application be rejected, on the ground that it failed to meet the statutory requirements for consideration. That is its first point upon this appeal.

[The court then held that the application of Beach was defective for want of verification.]

This brings us to appellant's second main contention, which is that the Commission acted arbitrarily, capriciously and in violation of due process of law, in that its conclusions were not supported by substantial evidence and one of them constituted a form of censorship forbidden by the statute. Because these phases of the case will be material in further proceedings before the Commission, we will consider them. Moreover, the contention of appellant, in these respects raises basic questions as to findings and conclusions in comparative hearings in which the Commission must choose between mutually exclusive applications. Because these basic questions recur in many cases, we shall consider them somewhat in detail.

A choice between two applicants involves more than the bare qualifications of each applicant. It involves a comparison of characteristics. Both A and B may be qualified, but if a choice must be made, the question is which is the better qualified. Both might be ready, able and willing to serve the public interest. But in choosing between them, the inquiry must reveal which would better serve that interest. So the nature of the material, the findings and the bases for conclusion differ when (1) the inquiry is merely whether an applicant is qualified and (2) when the purpose is to make a proper choice between two qualified applicants. To illustrate, local residence may not be an essential to qualification. But as between two applicants otherwise equally able, local residence might be a decisive factor.

In the present case, the Commission easily found both applicants to be qualified for a permit. The question then was which should receive it. Comparative qualities and not mere positive characteristics must then be considered.

\* \* \* Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant.

\* \* \* The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases. In its judgment upon this evaluation, the Commission has wide discretion. \* \* \*

\* \* \* [T]he required findings need go no further than the evidence and the proposals of the parties. \* \* \* [W]e think that the Commission may rely upon the parties to present whatever factual matter bears upon a choice between them. When the minimum qualifications of both applicants have been established, the public in-

terest will be protected no matter which applicant is chosen. From there on the public interest is served by the selection of the better qualified applicant, and the private interest of each applicant comes into play upon that question. Thus, the comparative hearing is an adversary proceeding. The applicants are hostile, and their respective interests depend not only upon their own virtues but upon the relative shortcomings of their adversaries. We think, therefore, that the Commission is entitled to assume that in such a proceeding the record of the testimony will contain reference to all the facts in respect to which a difference between the parties exists, and that the parties will urge, each in his own behalf, the substantial points of preference. The Commission need not inquire, on its own behalf, into possible differences between the applicants which are not suggested by any party, although in its discretion it may do so.

In sum, we think that there are no established criteria by which a choice between the applicants must be made. In this respect, a comparative determination differs from the determination of each applicant's qualifications for a permit. A choice can properly be made upon those differences advanced by the parties as reasons for the choice. \* \* \*

Our view upon the foregoing matter rests upon the actualities of a truly adversary proceeding, upon the difficulty, if not the impossibility, of defining a list of things in respect to which applicants may differ, and upon the practicalities of the Commission's tasks. It is only common sense to assume that adversaries with substantial interests at stake will overlook no advantage to be found in an opponent's weaknesses. \* \* \* And, lastly, if evidence were required on a list of subjects, immaterial as well as material, to be presented by the Commission staff if not offered by any party, or to be required without exception from the parties, the complexity, length and expense of proceedings would be vastly increased wholly unnecessarily.

In the case at bar, there were five points of difference urged by the contesting applicants as pertinent to a choice between them, (1) residence, (2) broadcasting experience, (3) proposed participation in the operation of the station, (4) program proposals, and (5) quality of staff.

The basis for the conclusion of the Commission is clearly stated. In its Memorandum Opinion and Order, it said succinctly:

"Our opinion to favor the Beach application on its merits over that of the Johnston application was based on our finding that while there were no sharp distinctions between the applicants in terms of residence, broadcasting experience, or proposed participation in the operation of the facilities applied for, there was a sharp distinction in favor of the applicant Beach in matters of program proposals and planned staff operations."

\* \* \*

As to the program proposals, the difference which the Commission found is spelled out in detail in its findings. It found nothing in the record to indicate that Johnston had made or would make an affirmative effort to encourage broadcasts on controversial issues or topics of current interest to the community, such as education, labor, and civic enterprises. On the other hand, it found that Beach has had and proposes to have a program of positive action to encourage such broadcasts, and of complete cooperation with civic interests. The Commission concluded that Beach would provide greater opportunity for local expression than would Johnston. The findings are based upon evidence in the record, and the conclusion seems to us to be within the permissible bounds of the Commission's discretion.

The difference between the staffs of the applicants is succinctly stated. The Commission found, as the evidence indicated, that the proposed positions and duties of the Beach staff promise a much more effective provision for program preparation and presentation than do those of the Johnston staff.

As to appellant's contention that the Commission's consideration of the proposed programs was a form of censorship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute. As we read the Commission's findings, the nature of the views of the applicants was no part of the consideration. The nature of the programs was.

We cannot say that the Commission acted arbitrarily or capriciously in making its conclusive choice between these two applicants.

\* \* \*

Reversed and remanded.

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#### QUESTIONS

1. Does the principle of *Ashbacker* compel the reasoning of *Johnston*?
2. Both Beach and Johnston were already licensees. Beach owned a Birmingham station for which he sought additional operating power, while Johnston operated an AM station at Bessemer (which was 12 miles from Birmingham and, per the FCC, within the metropolitan area), and held a construction permit for an FM station at Birmingham. Johnston would have sold its Bessemer station if its Birmingham license had been granted.

Can the case be said in any way to have turned on the fact that both parties were incumbent broadcasters? Could that have served to distinguish it when the first subsequent case to compare non-broadcasters arose? (You should be aware that the suggested distinction was not drawn in fact; the very abstract tenor of the court's opinion accurately foreshadowed the generality with which it was read and applied.)

3. Among the presumably material facts mentioned in the Commission's opinion were the following:

a. The Beach station had been losing money. Which way does that cut?

b. Birmingham's population was approximately 40% Black. Johnston proposed to devote "considerable time \* \* \* to programs of interest to Negroes," the only one of which specifically described in the record was "one employing Negro talent for entertaining purposes." Beach, on the other hand, was already carrying "not only musical and religious programs for and by Negroes but also a biweekly Negro news program by a Negro," all of which it proposed to continue. A similar disparity existed in the stations' relative attention to labor-management issues, which Johnston did not propose specially to address.

In light of this difference, would you argue that the court was somewhat too clever when it confined the term censorship as used in § 326 of the Act to "the nature of the views of the applicants," as opposed to "[t]he nature of the programs?"

### IRION, FCC CRITERIA FOR EVALUATING COMPETING APPLICANTS \*

43 Minn.L.Rev. 479 (1959).\*\*

\* \* \* When two or more applications seek the same channel or frequency, the Commission is required to afford the applicants a comparative hearing.<sup>3</sup> In such a hearing, the applicants have a large margin of choice as to what evidence to present reflecting favorably upon themselves and the Commission may also rely upon the applicants to detect and prove any adverse factors about an opponent.<sup>4</sup> Thus, in a sense, the parties themselves determine the issues before the Commission. During the years, however, the Commission has

\* [The author, a Hearing Examiner (now called Administrative Law Judge) for the FCC, disclaimed any intention to reflect the views of the Commission in this article.]

3. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

4. *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C.Cir. 1949).

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evolved a number of criteria for making its choice among applicants, and the evidence thus normally relates to these criteria in all cases. It is fundamental, of course, that the ultimate objective is the selection of a licensee who will best serve the public interest. As a consequence, each criterion was originally designed to promote this broad purpose.

\* \* \*

The standard of "public interest" given by Congress is necessarily broad and has never been precisely defined, but it is clear that in every case the Commission and its hearing examiners must act upon some basic concept of what the term means. It is not a monolithic concept, because conditions may vary from area to area or may change with time. For the purpose of this Article I am going to assume that the term involves at least two distinct principles, both of which have been implied by scores of decisions. First, there must be consideration of what the public wants to hear or see. In this sense the public interest actually means majority taste. Satisfaction of that taste by broadcasters is more than a commercially expedient move; it is, with rare exceptions, an effort to satisfy a public need. The second principle, however, is a necessary corollary to the first. When we think of "the public" we necessarily include minorities whose needs, interests and tastes may be both reasonable and laudable. Obviously there is less temptation for the broadcaster to expend time and money on providing programs for minority tastes, but any sound evaluation of the public interest must take them into account. Thus the Commission itself has emphasized the need for a certain amount of free time in order to publicize admittedly worthwhile community organizations and activities.<sup>7</sup> These include well-known nonprofit groups, such as the Red Cross, and also such causes as the promotion of traffic safety, fire prevention, registration for voting, etc. Implicit in all of this is the belief that a broadcaster must not merely cater to existing tastes and interests but must make at least a modest effort toward improving and widening them. Gilbert Seldes, a noted critic of radio and television art forms has urged that the audience must be created; it is not a ready-made component of the population but is rather an incipient body of tastes awaiting to be quickened by the broadcaster's initiative.

Bearing these things in mind we may turn now to the so-called criteria. The ones most often found in decisions are listed as follows:

- Local ownership
- Participation in civic activity
- Integration of ownership and management
- Diversification of background of stockholders
- Broadcast experience

7. \* \* \* Federal Communications Commission, Public Service Responsibility of Broadcast Licenses (1946) (known otherwise as the Blue Book).

Record of past broadcasting performance (including a sense of public service responsibility)

Proposed program policies

Proposed programming (including preparation for operation)

Proposed staff and technical facilities

Diversification of ownership of mass media of communications

\* \* \*

In characterizing these as the "so-called" criteria, I do not intend a slur but suggest rather that "criteria" is the wrong word. Actually they are simply specific areas of comparison, and I think it would be better if we referred to them as such. However, the old name will probably stick, and for convenience I shall continue to use it. The real problem is how to give value to the several items of comparison after preferences in each one have been found. In other words we are faced with the need for higher "criteria" by which a number of distinct preferences can be assessed in relation to one another. In order to make this perfectly clear let us consider a greatly simplified case. Let us say that *A* and *B* go through a comparative hearing on nine areas of comparison. \* \* \* [S]ay that *A* is preferred in five categories, while *B* is preferred in only four. Is the examiner or the Commission simply to add up the number of preferences and give the award to the one with the highest score? This method is so transparently inept that it must be dismissed. Ignoring such un-lawyer-like methods, though, let us consider what alternatives exist. Should there be some one point of comparison which ought to outweigh all others in every case? If so, what should it be? If, on the contrary, there should be a weighing of the criteria in the light of the record in each case, how should this be done?

My first premise, right or wrong, is that there absolutely must be a weighing of the comparative areas in every case. The ensuing remarks will reveal the difficulties which this imposes, but they are designed to show that weighing criteria can be accomplished without being capricious or arbitrary. It may be conceded at the beginning that the rule of *stare decisis* does not apply to administrative cases of the kind we are discussing, but far too often this is taken to excuse a course of action which appears to an ordinary observer as simply quixotic. One case is decided by stressing a certain criterion, and the following week a decision comes down in which the same criterion is passed off lightly. Actually there can be justification for such shifts of emphasis, but unfortunately the reasons are seldom clarified. \* \* \*

One must keep in mind that the ultimate facts in comparative cases relate to the future. The process is therefore quite unlike a suit in tort or contract. The Commission must find which applicant *will* best serve the public interest *in the years to come*. Consequently, there has to be something more than a mere comparison of promises.



Anyone with a little ingenuity can devise programs and formats which positively glow with civic responsibility. But what if his past record shows him to be a person who never keeps his promises? There must be some sort of showing, therefore, of the likelihood of "translating" promises into actual operation. Six of the criteria discussed below are presumed to relate directly to this objective.

### *Local Ownership*

The first of these is local ownership. \* \* \* Stated simply, it is based on the supposition that a broadcast operator who resides in the community where his station is to be located will be more familiar with the needs and interests of the community than someone living elsewhere. \* \* \*

\* \* \* [L]ocal ownership can be used to resist monopoly. People have always feared that broadcasting might fall into the hands of a few powerful interests who could then proceed to throttle expression of opinion. \* \* \* The local man will not necessarily run the best station. Many stations are owned by outsiders but are nevertheless very well operated. The outsider may actually be far more attentive to local needs because he must do a better job to win public approval. \* \* \*

### *Participation in Civic Activities*

\* \* \* [L]ike local ownership, [this] is an area of comparison from which the Commission hopes to derive assurance of continued attention to community needs. \* \* \*

### *Integration of Ownership and Management*

It is implicit in the Communications Act, and in the whole theory of broadcast regulation, that a licensee must be responsible for what his station puts on the air. \* \* \* From this proposition came the criterion of integration between ownership and management. In brief, it means that an applicant whose owners are closely identified with management is to be preferred over one whose owners will delegate authority. This, of course, does not mean that there is any legal requirement for the licensee or any of its stockholders to hold jobs on the station's staff. \* \* \* The Commission has sometimes shown concern where the alleged integration appeared to be "window dressing" carefully designed by skilled legal counsel. It is obvious that merely giving a stockholder some title such as "supervisor of public service" would be meaningless unless he actively participated in public service programming. And this is a matter that is generally gone into very carefully by opposing counsel during a hearing. \* \* \*

### *Diversification of Background*

This criterion \* \* \* has not often been controlling. It seems to rest on the theory that an applicant whose stockholders come from

varied business and professional fields will somehow be more civic minded than one whose stockholders are engaged in only a single business. So far as I am aware there is no empirical data to support this belief and there is very little logic to recommend it. \* \* \*

#### *Broadcast Experience*

\* \* \* The previous experience of principal stockholders in broadcasting is presumed to indicate their capacity for future service. Usually the evidence on this point is brief and consists simply in showing the number of years spent in the broadcasting industry and the types of employment held.

#### *Record of Past Broadcasting Performance*

This criterion differs from broadcast experience in that its purpose is to reflect the nature of the operations which an applicant previously conducted as a licensee. It differs from experience in that the party may not actually have participated in running a station, but since he was a licensee it is expected that the quality of the station's programs will reflect his sense of public service responsibility. Accordingly, it is customary for any applicant which has already owned a station, whether AM or TV, to present evidence regarding its recent operation.

In this area the Commission is mainly concerned with local live programming. It is to the applicant's advantage to show as many high quality shows as possible and also to demonstrate his public service responsibility by showing an appreciable number of announcements on behalf of worthy causes. Naturally his opponents at the hearing will try to uncover a neglect of the public interest through excessive commercialism or some similar sin. The Commission has repeatedly said that it regards evidence of past programming as a more certain reflection of the broadcaster's capability and likelihood to effectuate his promises than such things as local residence or civic activity. \* \* \*

#### *Proposed Program Policies*

If there is one aspect of a comparative case where evidence of a purely subjective and self-serving character is permitted, it is here. In framing a policy statement for future operations the applicant is of course free to make promises of the most idealistic kind. It is noteworthy, however, that a danger exists in making them too extravagant, because they will seem unrealistic and will be likely to suffer when matched against evidence of actual operations.

#### *Proposed Programming*

Evidence of proposed programming has assumed a form which by now is conventional in all hearings. The applicant presents a "typical" program schedule for one week and lists in addition any other occasional and special events he proposes to carry. \* \* \*

### *Operating Plans*

It is elementary that the value of a program consists in something more than a clever title or idea. It requires competent personnel and adequate physical facilities for its production. While these factors have rarely appeared to hold much weight in the Commission's final decisions, they have always been stressed by applicants with highly competent staffs. For example a party with an outstanding program director will always try to show how his skill and experience has been put to use in designing specific shows. An applicant will also endeavor to stress the superior design of its studios and equipment. Admittedly these things have sometimes been carried to excess, as in the case where applicants insisted on being compared with respect to the toilet and parking facilities of the proposed studios. \* \* \*

### *Diversification of Ownership of Mass Media of Communications*

For a good many years the Commission has adhered with a rather high degree of consistency to the doctrine that an application which will tend to spread ownership of media of communication should be preferred over one which will concentrate such ownership. The most striking consequence of this criterion has been to place newspapers in a disadvantageous position against competing applicants, but it also applies to parties with other broadcasting holdings. It is, of course, contrary to the Commission's rules for one person or company to hold interests in two stations of the same category within a single community, although they may simultaneously own an AM, FM or TV station in the same community. The theory behind the diversification-of-ownership doctrine is that it tends to keep the channels of communication open to as large a number of owners as possible and thus prevent restriction of news and information. Whether this is actually accomplished in an age when so much news emanates from network sources is questionable, but, so far as local affairs are concerned (disputes over bond issues, civic problems, etc.), there is genuine ground for concern about allowing all organs of communication to be vested in the same hands.

### *Weighing the Criteria*

\* \* \*

At this point it is fitting to state emphatically that no application of the criteria can ever be successful when it loses sight of the basic philosophy which accounts for their existence. Using the phrase "public service" as an approximate expression of this philosophy, it becomes evident that no one of the criteria should be determinative unless it tends to form a pattern with other evidence concerning an applicant's knowledge of the community, his ability and sincere efforts to perform promises and his general imagination and resourcefulness. The assessment which must thus be made of the areas of comparison is admittedly difficult. It should not be done in any mechanical fash-

ion but requires a most conscientious use of judicial discretion. There can be no question that value judgments are called for. They are sometimes attacked as being "subjective judgments," and this is perhaps true if we regard a judgment that is not made by slide-rule as being subjective. Yet any other type of judgment would be wholly unrealistic.

Possibly the best area of comparison for observing the way in which value or qualitative judgments must be made is in the comparison of programming plans. \* \* \*

Local live programming is obviously more important than network or film presentations. The Commission has stressed that proposals cannot be evaluated purely on the basis of statistical analyses of schedules and that the content and nature of proposed programs must be evaluated.

The word "content" with reference to programs must mean quality, and this appears to be the Commission's view. On one occasion it said: "We note in passing that no preference in any event would be accorded on mere percentage figures, without relation to the content or quality of programs involved."

Notwithstanding these announced principles, the Commission has several times seemed to water down the importance of programs by adopting a negative, rather than positive, view. By this I mean that greater reliance has been placed on the fact that the proposed schedule is "balanced" or merely "adequate" rather than on recognizing a clear superiority in quality which frequently exists. \* \* \*

Let us examine what happened in the Wichita case, Radio Station KFH Co.<sup>29</sup> The Commission first found that the applicants were equal "on the primary preference consideration" of a diversified, well-rounded program service and repeated its principle of not awarding a preference on percentage figures alone. \* \* \*

In that case there were three applicants so that a three-way comparison was necessary. No preference was accorded on religious, news, talks, or sports programs. On the agricultural proposals no difference was found between applicants *A* and *B*, but applicant *B* was given a preference over applicant *C*. The same held true with respect to discussion programs. It appears that the educational category was regarded as particularly significant. Again applicants *A* and *B* were found superior to *C*. *A* proposed three and one-half hours of educational programming a week, whereas *B* proposed seven and one-half hours. After listing the specific programs the Commission said: "In view of this showing, Wichita TV [applicant *B*] was found to be more completely meeting the educational needs of the area." \* \* \*

From all of this it would appear that, although the Commission has renounced the mathematical technique of awarding preference

29. 11 P. & F. Radio Reg. 1 (FCC 1955).

on percentages, it has refused to take the next logical step and weigh the qualitative aspects of the programs themselves. The preference given to *B* on educational programming, was apparently on the basis of a larger number of hours for this category. Yet it is far from clear how *B* is "more completely meeting the educational needs" of the area. \* \* \*

It must be admitted that there is some difficulty in reconciling the decisions on programming. In one instance the Commission looks at "the over-all proposal in terms of its balance." At another time it emphatically stresses the need to examine content. The latter view certainly seems reasonable, because it would be hard to see how mere balance could serve the public if the programs were of a mediocre and pedestrian character.

A long line of cases holds that no preference should be accorded for devoting a greater percentage of time to local live programming. On the other hand an applicant has been preferred for devoting more time to local live programming if the content was also found to be superior.

\* \* \*

The confusion apparently must be explained by the obvious diffidence of the Commission toward an evaluation of quality in programming. There is no doubt that a government agency should not impose its tastes upon broadcasting, but a comparison can be made without being so arbitrary. As a matter of fact the Commission has frequently made value judgments which are subjective and which are not actually supported by any evidence except common sense. For example, the emphasis—which amounts almost to a requirement—on the devotion of at least some time to educational, religious, agricultural and discussion programs is clearly a value judgment. Educational programs are thought to be worthwhile for the public, and broadcasters are therefore expected to present a certain number of them. But it is certainly possible in some instances to demonstrate the superiority of one program over another. A performance by a high school band is technically classified as educational, yet it would be folly to assert that this is on a par with a lecture on history. Similarly, the thoroughness and skill with which a program is prepared or the quality of its production are qualitative elements which can be compared. \* \* \*

The Commission's reluctance to use proposed programming as a primary area of comparison has had one unfortunate result. It has tended to make decisions rest entirely on factors alleged to give assurance of reliability without paying much heed to the *quality* of service to be rendered. In other words, an applicant with a thoroughly unimaginative and mediocre proposal is likely to triumph if he can prevail on the assurance criteria. Just what value there is in having assurance that mediocre promises will be performed is hard

to fathom, but that is, in essence, the result. This points up a problem which has vexed both the Commission and the Bar for many years. It is no secret that many thoughtful observers feel dissatisfaction with the criteria, but so far no one has come up with any that make a genuine improvement. I think the secret to the impasse lies in a general dread of basing the judgment on any area which is not susceptible of mathematical measurement. In other words, one can make some sort of slide rule comparison of civic activity, but any comparison of operational proposals must necessarily be a value judgment. But, while the reason for this fear is easily understandable, it tends to destroy one of the two fundamental elements which ought to support every decision: the element of future service with all that it implies. As things stand, the public interest is being deprived of an adjudication on this very important point.

While speaking of programs, a word should be mentioned about the subject of balance. Balance is a concept which was formed in the days when far fewer stations were on the air than now, and it seeks to promote the laudable purpose of serving a wide variety of tastes and interests. Its purpose, in fact, was to fulfill the second of the two ideals I have already mentioned under public interest, minorities and cultural needs. Conditions change, however, and there has recently been a very marked movement in *aural* broadcasting toward specialized stations. In a community where a number of services exist, it has become popular for one station to program for news and sports, another to cater to ethnic minorities and so forth. In the classic sense of "balance" none of these stations is meeting its obligations but the question is bound to arise whether circumstances do not warrant some exceptions. The "good music" type of station, for example, seems to serve a genuine need in the larger metropolitan areas. \* \* \*

It is elementary that the several areas of comparison were designed with two fundamental objectives: First, to ascertain which applicant proposes the best programs for the public, and, second, how much assurance there is that he will match promise with performance. One without the other would be of dubious value, and their intrinsic relationship should never be forgotten. This is why any attempt to apply the criteria as separate units amounts to an absurdity. A few hypothetical cases will illustrate. Let us suppose that X has run a radio station for ten years and during that time has unfailingly presented a monotonous routine of racing news, commercials and the most deplorable kind of rock-and-roll. Now there may be a defense for X as a licensee, but when he is competing with Y for a new television station his record must be examined closely. If Y is proposing superior programs (both in balance and quality), is there any conceivable reason why the local residence or integration of ownership and management in X's company should be considered? The record of his past operation is enough to damn him. Or we might consider

the opposite case where X has maintained a fine record of past performance. If Y is a newcomer, it is impossible to contrast past records. But does that mean X should get no preference? A very good argument could be made that his record should be the determining factor. Whatever happens, the isolated fact that X or Y have been enthusiastic participants in the Boy Scouts and SPCA should not be put in the scales as something of equal significance.

But a third case will show how civic activity can assume genuine importance. Assume that both X and Y are newcomers to broadcasting. X has lived in the town all his life, but Y has lived there for only a year. In his entire lifetime X was never known to serve on a committee, join a community organization or contribute a nickel to charity. On the other hand Y plunged into the life of the community as soon as he moved there. Can we seriously say that the long local residence of X means anything except, possibly, to show a complete void of civic consciousness?

The key task in any decision would thus seem to be the finding of the comparative area (or areas) which will overshadow all others in revealing the true merits of the applicants. The Commission has come close to naming past performance as this key area, and there would certainly be good reason for doing so. \* \* \*

A difficulty arises, of course, where one competing applicant has operated a broadcast station and his opponent has not. \* \* \* [There] the rule should be that no preference ought to extend to the experienced broadcaster unless his record has been outstanding. It could reasonably be argued also that a newcomer should be favored solely on the proposition of spreading the licenses around as widely as possible. \* \* \*

The most significant thing about [the past performance] criterion is that it requires a qualitative evaluation of programming. It is difficult to see how mere balance could ever be used to demonstrate a superior operation, although significant lack of balance would certainly demonstrate the contrary. What must be taken into account is the quality—or lack of it—in the programs themselves.

\* \* \*

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## QUESTIONS

1. Would it be possible, using the criteria discussed by Irion, for counsel to create an ideal corporate applicant for a license? See Pierson, *The Need for Modification of Section 326*, 18 Fed.Com.B.J. 15, 20 (1963). If so, and the lawyer is doing his or her job, then how can the client lose in a comparative hearing? What form will competition among applicants take?
2. Apart from the incentives implicitly referred to in the prior question, what biases are built into the substantive criteria discussed by

Irion? What behavioral assumptions? Is there any empirical support for these assumptions? Which groups in society are more or less likely to produce broadcast licensees after comparative hearings?

3. What do the criteria, and their multiplicity in the decisional process, suggest about the agency's institutional interest in the licensing process? What are its maximands? If you were making comparative licensing decisions, what goal would you pursue? By use of what criteria and/or what decisional technique? E. g., would you have the staff develop a mathematical scoring system; engage in empirical research into the broadcaster characteristics associated with superior performance; try to "get the feel of" each situation and the applicant appropriate to it; engage in corrupt practices; or eschew corruption but decide that, other things being equal, you might as well help your friends?

4. In thinking about the FCC's purpose in choosing among license applicants, you might be aided by the knowledge that alone among the decisional techniques mentioned in the prior paragraph, the agency has never even been accused of engaging in empirical research. In this, however, it is entirely typical of administrative agencies licensing entry into a regulated industry. See, e. g., *Getman v. NLRB*, 450 F.2d 670 (D.C.Cir. 1971).

5. In the 1950s, some FCC Commissioners were accused of misconduct and one resigned in the ensuing controversy. One study showed that during the Eisenhower Administration there was a nearly perfect correlation between the award or denial of newspapers' applications for television licenses and their editorial support, respectively, of Eisenhower or Stevenson for the presidency. Schwartz, *Comparative Television and the Chancellor's Foot*, 47 *Geo.L.J.* 655 (1959); see Jaffe, *The Scandal in TV Licensing*, *Harper's*, Sept. 1957, pp. 77, 79 (comparative decisions on "spurious criteria, used to justify results otherwise arrived at"); cf. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards (Part II)*, 75 *Harv.L.Rev.* 1055, 1060 (1962): "Most of the so-called criteria are simply a check-list of evidentiary items. \* \* \* Recognition of this at least blunts a few criticisms of the Commission's alleged inconsistency."

6. In the FCC Policy Statement that follows, the Commission refers at the outset to the limited role accorded the doctrine of *stare decisis* in administrative adjudication. See K. Davis, *Admin. Law Text* § 17.07, at 352 (3d ed. 1972). Why do you think the doctrine is less applicable to administrative than to judicial proceedings? As a legislator, what types of decisions would this difference lead you to delegate to an administrative agency as opposed to courts of judges with life tenure? (Does your hypothesis adequately account for the National Labor Relations Board, the members of which decide disputes as their sole function?).



## POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS

Federal Communications Commission, 1965.  
1 FCC 2d 393, 5 R.R.2d 1901.

One of the Commission's primary responsibilities is to choose among qualified new applicants for the same broadcast facilities.<sup>1</sup> This commonly requires extended hearings into a number of areas of comparison. The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.

Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228,<sup>2</sup> and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App.D.C. 236, 230 F.2d 204, cert. den. 350 U.S. 1007.

All this being so, it is nonetheless important to have a high degree of consistency of decision and of clarity in our basic policies. It is also obviously of great importance to prevent undue delay in the disposition of comparative hearing cases. A general review of the criteria governing the disposition of comparative broadcast hearings will, we believe, be useful to parties appearing before the Commission.

\* \* \*

This statement is issued to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest. \* \* \* Our purpose is to promote stability of judgment without foreclosing the right of every applicant to a full hearing.

We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffu-

1. This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.

sions of administrative tribunals", Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 U.S.App.D.C. 383, 385, 174 F.2d 38, 40 (1949).

2. "[T]he doctrine of *stare decisis* is not generally applicable to the deci-

sion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.<sup>4</sup> Equally basic is a broadcast service which meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.

Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated.

1. *Diversification of control of the media of mass communications.*—Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance. \* \* \* The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements which we believe significant. Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant in the degree that they:

(a) are larger, i. e., go towards complete ownership and control;

4. As the Supreme Court has stated, the first amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press v. United States*, 326 U.S. 1, 20. That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a

free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established. *United States v. Storer Broadcasting Co.*, 351 U.S. 192; *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S. App.D.C. 13, 189 F.2d 677, cert. den. 342 U.S. 830.

and to the degree that the existing media:

- (b) are in, or close to, the community being applied for;
- (c) are significant in terms of numbers and size, i. e., the area covered, circulation, size of audience, etc.;
- (d) are significant in terms of regional or national coverage; and
- (e) are significant with respect to other media in their respective localities.

2. *Full-time participation in station operation by owners.*—We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programing designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. \* \* \*

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. [The value of] integration \* \* \* is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs \* \* \* by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs. Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the Community. \* \* \*

3. *Proposed program service.*—\* \* \* The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programing Inquiry," [infra at 174] and need not be repeated here. And the applicant has the responsibility for a reason-

able knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See *Henry v. Federal Communications Commission*, 112 U.S.App.D.C. 257, 302 F.2d 191, *cert. den.* 371 U.S. 821. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.

\* \* \*

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

\* \* \*

4. *Past broadcast record.*—This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance upon the terms set forth below.

A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership per se, and will not give a preference because one applicant has owned stations in the past and another has not.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission (the fact that such representations have been carried out, however, does not lead to an affirmative preference for the applicant, since it is expected, as a matter of course, that a licensee will carry out representations made to the Commission).

\* \* \*

5. *Efficient use of frequency.*—In comparative cases where one of two or more competing applicants proposes an operation which,

for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. \* \* \*

6. *Character.*—The Communications Act makes character a relevant consideration in the issuance of a license. See section 308 (b), 47 U.S.C. 308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate.

\* \* \*

7. *Other factors.*—\* \* \* We will \* \* \* favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced.

We pointed out at the outset that in the normal course there may be changes in the views of individual Commissioners as membership on the Commission changes or as Commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

\* \* \*

#### DISSENTING STATEMENT OF COMMISSIONER HYDE

\* \* \*

One of the expressed objectives of the policy statement is the simplification and the expedition of the Commission's processes with respect to decisions in comparative cases. I agree with the majority that this is a most desirable objective; however the policy statement as now framed will not achieve expedition. Moreover, to the extent that a degree of simplification of our decisional process may result from its adoption, this result, in my opinion, would be at a price which would be prohibitive and perhaps unlawful. It would press applicants into a mold in order to meet the Commission's preconceived standards, thus deterring perhaps better qualified applicants from applying; it would preclude significant consideration of material differences among applicants and result in automatic preference of applicants slavishly conforming to the mold, and eventually force the Commission to decide cases on trivial differences among applicants since basically they would all have come out of the same press. I consider this much too high a price to pay to achieve the majority's objective.

\* \* \*

I presume that one of the reasons for the adoption of the policy statement is to apprise potential applicants of the views of the Commission (and individual Commissioners) as to the manner in which differences among applicants will be treated. Decisions which have been made are available for this purpose. The views of the Commission and of individual Commissioners as to the effect of differences among applicants in comparative cases are set out in decisions which touch on such differences. \* \* \*

I know of no two cases where the underlying facts are identical. I know of no two cases where differences among applicants are identical. Therefore, the significance to be given in each decision to each difference and to each criterion must of necessity vary, and must necessarily be considered in context with the other facts of the individual cases.

If the Commission has been remiss in the past in not spelling out the decisional process in each case as carefully as it should, the obvious remedy is improvement in the preparation of decisions. \* \* \*

\* \* \*

I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. The document says that the policy is to apply to "new" applicants, and that it "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. \* \* \* Since we must assume that the Commission will find it appropriate or necessary to make uniform application of its statement of preferences, it is essential to consider the consequences of such application. The filing of a new application—organized according to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. \* \* \*

I must assume that in the above cases the Commission will not reach its judgments arbitrarily and without giving consideration to all of the significant elements. Upon this assumption, I can foresee the development of case after case where exceptions to the policy will be found to be necessary in order to reach a decision which a majority will consider to be fair and in the public interest. I can foresee a decisional process which eventually will be substantially similar—if not virtually identical—to the one in existence. Under these circumstances, I cannot believe that the public interest will be served, or the processes of the Commission expedited, by the adoption of the proposed policy statement.

\* \* \*

[The dissenting statement of Commissioner Bartley is omitted.]

## CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

\* \* \* I am disappointed that the Commission did not examine alternative methods of "picking a winner" from a group of competing applicants, each of which may be fully qualified but only one of which may be granted. For example, in a recent case involving nine applications where I unqualifiedly concurred with the result arrived at by the majority, I said:

However, I would much prefer such appropriate changes in the Communications Act and in the Commission's practices and policies as would have permitted, in a case such as this, adoption of a procedure which would, on a comparative basis, eliminate from further consideration several of the applications, and which would have permitted us to direct the remaining applicants to endeavor to work out a satisfactory merger arrangement within a stated reasonable period. In the event that such a merger were thereafter presented to the Commission, an award could have been given to the merged entity. Failing such a merger, the Commission would thereupon proceed to select a winner from among the limited eligibles.

\* \* \*

Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a tortuous and expensive hearing where-in each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense—but comes the oral argument and all of the losers concentrate their fire on the "potential" winner and the Commission must thereupon examine the claims and counterclaims, "weigh" the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 percent of the cases.

The real blow, however, comes later when the applicant that emerged as the winner on the basis of our "decisive" criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. \* \* \* †

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† See § 310(d), which was added in 1952 to disapprove a contrary Commission

practice (known as the AVCO rule).—D.G.

## QUESTIONS

1. Is the Policy Statement conducive to “clarity and consistency of decision”? How would you determine whether the comparative licensing process was improved by its issuance? By what criterion does it invite empirical evaluation? Cf. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 *Stan.L.Rev.* 1 (1971) (proposal to award licenses—and renewals—on the basis of a point-scoring system).
2. Is the FCC’s analysis of the integration of ownership and management sensible? If the FCC’s interest in licensee performance in the public interest implies something other than simple licensee profit maximization, should it prefer the integration or separation of ownership and management? See generally A. Berle & G. Means, *The Modern Corporation and Private Property* (1932).
3. Commissioner Hyde’s opinion takes the majority to task for inducing applicants to fit themselves “into a mold in order to meet the Commission’s preconceived standards.” Is this an argument for keeping applicants in the dark about the law to which they will be subject? Or, since he advises them to consult prior FCC opinions for guidance, is it just an argument for letting the outcome of cases depend more upon the skill of counsel in divining what the FCC’s opinions mean? For recognizing the futility of codification and the inevitability of incremental change, in the manner of the common law?
4. Do you favor the merger-arranging approach suggested by Commissioner Lee? Is there a “public interest” reason peculiar to the context of comparative licensing to favor such a mediational rather than adjudicative role for the FCC? See Fuller, *Adjudication and the Rule of Law*, 54 *Proceedings, Am.Soc’y.Int’l Law* 1, 3–5 (1960) (polycentricity); Botein, *Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation*, 6 *Ga.L.Rev.* 743 (1972).

Should it matter to the FCC that some or all of the applicants before it merge themselves into one of their own accord? See 47 CFR § 1.525(a) (Agreements between parties for amendment or dismissal of or failure to prosecute applications.), *infra* at 692. Do the “public interest” considerations vary depending upon whether the accord is reached after the comparative hearing but before the FCC Administrative Law Judge has issued an initial decision (i. e., recommended a “winner”), or after the initial decision has been accepted for review by the Commission?

Assume that the facts in *Ashbacher* recurred today and that rather than undergo an expensive comparative hearing the applicants reached an accord whereby Fetzer withdrew his application in consideration for a 33% ownership interest in and a ten-year employment contract with Ashbacher. Is the FCC powerless to prevent the parties in this way from effectively mooting the § 307(b) issue? See 47 CFR § 1.525(b); cf. § 310(d) of the Act.



5. As you begin the next case, consider the incentives that lay behind the formation of Consolidated Nine, Inc. Was the agreement to form that corporation within the coverage of 47 CFR § 1.525, referred to above?

### TV 9, INC. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1973.  
495 F.2d 929.

Certiorari denied 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

FAHY, Senior Circuit Judge:

\* \* \*

In 1965 we vacated the Commission's award of the Channel to Mid-Florida Television Corporation, and caused the opening of the proceedings to additional applicants. In complying the Commission temporarily authorized Mid-Florida to continue its operation on the Channel, stating that such operation was to be "without prejudice to, and constitutes no preference in, any aspect of any proceeding to be held with respect to channel 9 in Orlando, Fla."

Eight applicants filed for permanent authority. Four of the new applicants (Central Nine Corporation, TV 9, Inc., Florida Heartland Television, Inc., and Comint Corporation) also applied for interim authority, the first three of which subsequently withdrew their request for individual interim authority and formed Consolidated Nine, Inc., to apply for such authority. Consolidated Nine, Inc. "was an open-ended group, with provisions that any applicant for permanent authority could participate with the original incorporators on an equal basis."

On March 29, 1967, the Commission denied the applications of Consolidated Nine and Comint for interim authority. Simultaneously it permitted Mid-Florida to continue interim operation on the Channel pending the award of the construction permit subsequent to the holding of a comparative hearing. On appeal by Comint and Consolidated Nine we vacated the grant of interim authority to Mid-Florida and remanded \* \* \*. On the remand the Commission, on January 9, 1969, granted interim authority to Consolidated Nine.

The controversy then proceeded to a comparative hearing on the applications for the construction permit of TV 9, Inc., Comint Corporation, Central Nine Corporation, Florida Heartland Television, Inc., and Mid-Florida. On January 10, 1972, the Commission granted the application of Mid-Florida \* \* \*.

The principal basis for favoring Mid-Florida was the conclusion that its proposal " \* \* \* offers the best practicable service to the public because of the substantial preference to which it is entitled in the factor of integration of ownership with management," en-

hanced by the local residence of Mr. and Mrs. Brechner, the principal stockholders, their civic participation and radio broadcast experience.

\* \* \*

#### IV

Comint raises a special matter relevant to its application when compared with all others. The principals of Comint include two local Black residents, Paul C. Perkins, who had a 7.17% voting stock interest, and James R. Smith, M.D., with a 7% like interest. Both have lived in the local area, of which about 25% of the population are Black, for more than 20 years, and have not only been active in advancing the interests of the Black members of the community but also have been primarily responsible for significant achievements in bettering conditions for the Black population. Since the highest interest owned by any of Comint's principals was 10% their individual as well as combined ownership is substantial. In addition, Mr. Perkins was to assume the office of Vice President and proposed to devote two days a week to the station. He was also a member of the Board of Directors, and a member of both the Editorial and Community Service Committees. Dr. Smith was a Director of the corporation and was to be on at least one Committee, but he did not propose to devote any specific amount of time to the station.

No merit was accorded to Comint by reason of this Black ownership and participation, although some credit was given under the criterion of ownership participation in management, due to Mr. Perkins' role in that connection. We outline the Commission's position \* \* \* quoting the Examiner in part:

\* \* \* the "Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public in the programming of the station and that factor alone must control the licensing processes, not the race, color or creed of an applicant." \* \* \* Comint has not proved by this standard that its programming directed toward the Negro (and white) audience would be superior to Mid-Florida's (to mention it only of the applicants) because two of its stockholders, Mr. Perkins and Dr. Smith, are Negroes. Unless Comint showed that the participation of Mr. Perkins and Dr. Smith in the operation of the station would use their experience, background, and knowledge of the community in a way likely to result in a superior service it cannot prevail on this point. There is nothing in the degree or type of participation proposed by Mr. Perkins and Dr. Smith which gives assurance that the benefits of their racial background would inure in any material degree to the operation of the station. \* \* \* it cannot be held, under the *Policy Statement*, which demands the practical application of

attributes through station participation, that their part ownership in Comint implies the rendition of a service for a minority group which other applicants could not provide.

\* \* \* Black ownership cannot and should not be an independent comparative factor \* \* \* rather, such ownership must be shown on the record to result in some public interest benefit. \* \* \* In our opinion, Black ownership is more analogous to local ownership than to any other existing comparative factor, and local ownership is no longer recognized by the Commission as an independent factor, but is decisionally significant only when reflected in active participation in station affairs.

\* \* \* The Commission's reliance upon its Policy Statement on Comparative Broadcast Hearings, we think is not accurate. Although, as the Commission states, "The two primary objectives toward which the comparative process is directed are: (1) the best practicable service to the public; and (2) a maximum diffusion of control [of] the media of mass communication," not only are these objectives not exclusive of other considerations but the *Policy Statement* itself disavows an intention "to preclude the full examination of any relevant and substantial factor." This minority stock ownership of an applicant serving the Orlando community is a consideration relevant to a choice among applicants of broader community representation and practicable service to the public. The credit awarded due to Mr. Perkins' participation, as a part owner, in management is not the same as credit based on broader community representation attributed to his and Dr. Smith's stock ownership and participation.

\* \* \*

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship.<sup>28</sup> As we said in *Citizens Communications Center* [infra], "no quota system is being recommended or required." We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public

28. The Examiner found that Blacks did not participate in the ownership or management of any mass communications media in the Orlando area. Also, the United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort*, at 280 (1971)

states that "of the approximate 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities". (Footnote omitted.) This figure may be slightly higher in 1973.

policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.

With due respect, therefore, the court does not accept the Commission's position based either on the *Policy Statement* or lack of advance assurance of superior community service attributable to such Black ownership and participation, an assurance not required, for example, for favorable consideration of local residence, accompanied with participation, on the issue of integration of ownership with management. Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors.

\* \* \*

The grant to Mid-Florida is set aside and the case is remanded to the Commission for further proceedings not inconsistent with this opinion. Notwithstanding the protracted time involved already, and our reluctance to extend it, the court must place above such reluctance the need for an end result which meets its approval when called upon to review the action taken, under the standards applicable to our review authority.

It is so ordered.

### SUPPLEMENTAL OPINION

495 F.2d 941, 1974.

FAHY, Senior Circuit Judge:

The Commission has suggested that the case be reheard en banc.

\* \* \*

### II

The Commission mistakenly refers to the court's holding as directing the Commission to adopt a "new comparative policy of awarding preferences for Black or minority ownership, *per se*." Not only has the court not relied solely upon minority ownership, but our opinion makes no mention of a preference in this matter. In determining which applicant is entitled to a preference under the standard of public interest residing in broader community representation and practicable service to the public by increasing diversity of content, especially of opinion and viewpoint, the court holds only that Comint was entitled to be accorded merit due to the ownership and participation of Dr. Smith and Mr. Perkins. A preference did not necessarily follow since competing applicants were not foreclosed from seeking similar or greater merit.

### III

The position of the Commission is that the comparative standing of an applicant due to personal attributes of an individual stockhold-

er is not enhanced unless the stockholder demonstrates an intent "to devote significant time to station management in a meaningful capacity." While no doubt sound as a general policy statement, this position does not preclude that of the court in this case. The Policy Statement upon which the Commission relies is not an absolute. It expressly allows "the full examination of any relevant and substantial factor," thus recognizing that the Act itself, and not the Policy Statement, is the Commission's basic charter. \* \* \* We do not take issue with the reasonableness of the agency's general approach that station performance will be determined by persons in "managerial" positions. However, in view of the nature of the issues in this case, and the probability that Black persons having substantial identification with minority rights will be able to translate their positions, though not technically "managerial," and their ownership stake, into meaningful effect on this aspect of station programming, we think that such material factors residing in the evidence cannot reasonably be totally and rigidly excluded from favorable consideration. [Petition denied.]

Statement of Circuit Judges MacKINNON, ROBB and TAMM, as to the reasons why they would grant the motion for rehearing *en banc*.

With all respect to the *ends* which the majority has in mind, it is respectfully submitted that the *means* they have adopted are constitutionally suspect. The panel concedes that a "preference" cannot be given because of race and so the opinion permits race to be considered as a "merit" in the FCC's evaluation of license applications. There is no substantial difference between the two statements, both are discriminatory and it is submitted impermissible. We vote for rehearing *en banc*.

Statement of Circuit Judge WILKEY as to the reasons why he would grant the motion for rehearing *en banc*.

\* \* \*

I think this country and its courts long ago reached the conclusion that race could not be a merit or demerit, and that any decision based on race as a factor was constitutionally wrong, morally wrong, and dangerous. There is no way by which a white, yellow, or red man can achieve the same "merit" point awarded the black man here. This is, as I understand the word, discrimination.

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### QUESTIONS

1. Is the court's understanding of the policy favoring "diversification of control" the same as the FCC's? Is it the same as the "maximum diffusion of control?"
2. What is the perceived connection between members of a minority group's ownership of a minority stock interest and the applicant's

likelihood of performance in the public interest? Is this connection likely to be significant in practice? Does the court's theory imply that public ownership would be best of all, even though integration of ownership and management would not then be practical?

3. What is the court's precise holding in *TV 9*? In light of the imprecision inherent in the comparative process, is it of any significance how the reviewing court articulates doctrinal subtleties concerning "merit" short of a preference?

4. The case is noted at 9 Suffolk U.L.Rev. 225 (1974), and 24 Cath. U.L.Rev. 135 (1974).

5. On the constitutional issue raised by *TV 9* see *Regents of the Univ. of Calif. v. Bakke*, — U.S. —, 98 S.Ct. 2733, 57 L.Ed.2d — (1978).

#### NOTE: EXCELSIOR

Having explored the perplexities of the comparative hearing in the context of a license being granted for the first time, you will perhaps be dismayed to learn that there are not many more occasions for this situation to arise since there are very few licenses remaining to be granted. Some of what you have done may yet prove useful, however, as we move on to the comparative question on renewal, that is wherein an incumbent broadcaster applying for renewal of its license is met with a mutually exclusive application, usually for the incumbent's own frequency and locale.

### C. THE COMPARATIVE HEARING ON RENEWAL

#### 1. WHDH: THE ISSUE FRAMED

##### **GREATER BOSTON TELEVISION CORP. v. FCC**

United States Court of Appeals, District of Columbia Circuit, 1970.  
444 F.2d 841.

Certiorari denied 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

[This proceeding began in 1954 when the FCC received four applications to operate on VHF channel 5 in Boston. In 1957 the Commission granted the application of WHDH, Inc., a subsidiary of the Boston Herald-Traveler newspaper, and the station began operating while an appeal was taken. The court of appeals remanded for a supplemental hearing into allegations that Robert Choate, president of WHDH, had initiated improper *ex parte* contacts with the Chairman of the FCC while WHDH's application was pending. After the hearing the Commission concluded that the original grant to WHDH should be set aside since the company's conduct, while not disqualifying, reflected adversely upon it in the comparison of applicants. Accordingly, the FCC revoked WHDH's construction permit, granted it

a special temporary authorization to continue broadcasting, and re-opened the comparative proceeding.

In 1962 the FCC again awarded the construction permit to WHDH, but granted it an operating license of only four months' duration, before renewal of which comparative consideration would again be given to competing applications. On appeal of the short-term renewal the court again remanded, this time for reconsideration in light of Choate's death, to be combined with renewal proceedings, "both to be conducted on a comparative basis."]

LEVENTHAL, Circuit Judge:

*The Current Comparative Proceeding:* The consolidated comparative proceeding authorized by this court began in May, 1964, and there was full presentation by WHDH and the other three applicants.

1. *Hearing Examiner's Decision*

On August 10, 1966, Hearing Examiner Herbert Sharfman issued an exhaustive Initial Decision, in favor of granting the renewal by WHDH. He concluded that the taint of Mr. Choate's activities had passed with his death \* \* \*

In the bulk of his conclusions, related to a comparison of the applicants, the Hearing Examiner took account of the evidence pertaining to the various criteria laid down in the Policy Statement on Comparative Broadcast Hearings (1965):—past performance; diversity of ownership; integration of ownership and management; and program proposals. In determining the weight he felt appropriate under the circumstances of the case, the Examiner placed primary emphasis on the actual operating record of WHDH under the temporary authorizations of the preceding nine years.

The Examiner conceded that the position of WHDH was weak in regard to the integration criterion (participation in station management by owners), and that both BBI and Charles River were proposed by a distinguished and indeed "star-studded" group of civically active residents, offering strong claims on the score of area familiarity. The Examiner acknowledged that both BBI and Charles River proposed a diversity of excellent programs, though he offset this by noting that in the case of program proposals a new applicant enjoys a "literary advantage" over an existing operator. He further noted that the abbreviated nature of the WHDH tenure conferred by the Commission made it clear that WHDH was not entitled to a competitive advantage merely because it is a renewing station. Yet the Examiner concluded that it would be a sterile exercise to decide this case on the basis of the traditional methods of comparison of new applicants. In his view the dominant factor on balance was that the proven past record of good performance is a more reliable index of future operations in the public interest than mere promises of new

applicants, which have no means of validation except as the criteria may be helpful in predicting ability to comply with proposals. The WHDH operating record was considered favorable on the whole, notwithstanding its unwillingness to grasp the nettle of some local problems. As to diversification, the Examiner concluded that while the concentration of ownership of a Boston newspaper and other broadcast facilities would probably have ruled out the WHDH application if this were an all-initial license case, in this case the preference for WHDH on past record was not materially affected.<sup>1</sup> This, the Examiner felt, was in accordance with the Commission's long-standing policy in renewal proceedings, as established in Hearst Radio, Inc. (WBAL), 16 F.C.C. 141 (1951).

## 2. *Commission's Decision*

On January 22, 1969, the Commission reversed the Hearing Examiner's decision, and entered an order denying the application of WHDH and granting that of BBI. 16 F.C.C.2d 1. Its Decision reviewed the comparative merits of the applications.

*Past Performance of WHDH:* The Commission's Decision stated that the principles of the 1965 Policy Statement would be applied to the proceeding. Specifically it invoked the provision of its 1965 Policy Statement that an applicant's past record was to be given an affirmative preference only if it were outside the bounds of average performance. It read the Examiner's findings of fact as showing that the record of WHDH-TV was "favorable" on the whole—except for its failure to editorialize—but concluded that it was only within the bounds of average performance, and "does not demonstrate unusual attention to the public's needs or interests."

*Diversification of Media of Mass Communications:* WHDH's ownership by the Herald-Traveler resulted in an adverse factor on the diversification criterion. The Commission stated that the desirability of maximizing the diffusion of control of the media of mass communications in Boston was highlighted by the incident wherein the Herald-Traveler prematurely published a preliminary draft of the report of the Massachusetts Crime Commission without also simultaneously publicizing the report over the broadcast station. It was brought out at the hearing that such a news broadcast would have impaired the story's "scoop" value for the Herald-Traveler.

The Commission further referred to the contention of WHDH that since it had never editorialized there existed a factor that minimized the charge of concentration of control. The Commission disagreed, stating that licensees have an obligation to devote reasonable broadcast time to controversial programs, and the failure to editori-

1. The fourth applicant, Greater Boston Television Corp. (II), was disqualified for failing to surmount two preliminary (non-comparative) questions:

it had not made an independent evaluation of the community's program needs, nor had it been able to secure its proposed antenna site.



alize, if anything, demonstrated the wisdom of the Commission's policy for diversification of control of media of mass communications. On the factor of diversification, it concluded by awarding a substantial preference to both BBI and Charles River as against WHDH, and giving BBI a slight edge over Charles River (which also operates an FM radio station in Waltham, Massachusetts devoted to serious music).

*Integration of Ownership with Management:* The Commission affirmed the Examiner's conclusion that the applications of both Charles River and BBI reflect an integration—which in FCC parlance means integration of ownership with management—of substantially greater degree than WHDH, whose integration is small. \* \* \*

\* \* \*

*Proposed Program Service:* The Commission agreed that both BBI and Charles River proposed generally well-balanced program schedules, and concluded that neither proposal demonstrated such a substantial difference as to constitute a "superior devotion to public service."

The Commission assigned a slight demerit to BBI because of its insufficiently supported proposal for local live programs, for which it projected an extraordinary percentage of 36.3% of 160.5 hours of weekly programming. It adopted the findings of the Hearing Examiner that this was only a "brave generality" which generated the suspicion that it was flashed for its supposed value in a comparison.

The Commission assessed a slight demerit against Charles River in view of the fact that all its stock is owned by Charles River Civic Foundation, a charitable foundation complying with Section 503(c) (3) of the Internal Revenue Code. "Although Charles River proposes to editorialize, it is manifest that there are limitations on the amount of time that could be devoted to controversial questions which may be legislatively related, and that such limitations are not found in ordinary television station operations."

The slight demerits assessed against BBI and Charles River on proposed program service were deemed to offset each other.

\* \* \*

*The Commission's Vote:* The Commission voted to grant the application of BBI. Its Decision was written by Commissioner Bartley, who was joined by Commissioner Wadsworth. Three commissioners did not participate in the decision (Hyde, Cox and Rex Lee). Commissioner Johnson concurred, with a statement indicating his strong opposition to the application of WHDH, and noting that this was supported not only by diversity of media, but also by the "healthy" result of having at least one network-affiliated VHF television station that is independently and locally owned.

### 3. *The Commission's Action on Reconsideration*

Reaction to the Commission's decision was swift. One distinguished commentator characterized it as a "spasmodic lurch toward 'the left'."<sup>4</sup> The television industry began organizing its forces to seek legislative reversal of what seemed to be a Commission policy, reversing *Hearst*, that placed all license holders on equal footing with new applicants every time their three-year licenses came up for renewal. On May 19, 1969, the Commission adopted a separate Memorandum Opinion and Order on the petitions of all parties for a rehearing. 17 F.C.C.2d 856.

\* \* \*

The Commission added a closing paragraph to clarify that this was not an ordinary renewal case since "unique events and procedures \* \* \* place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." The FCC noted that WHDH's operation, although conducted some 12 years, has been for the most part under temporary authorizations. It did not receive a license to operate a TV station until September 1962, and then for only 4 months, because of the Commission's concern with the "inroads made by WHDH upon the rules governing fair and orderly adjudication." And in the renewal proceeding the FCC expressly ordered that new applications could be filed for a specified 2-month period, which was done and a proceeding held thereon.

### 4. *Subsequent Developments*

While the Commission's decision was on appeal to this court, the legislative pressure continued to build. A bill, introduced by Senator Pastore, Chairman of the Communications Subcommittee of the Senate Commerce Committee, proposed to require a two hearing procedure, wherein the issue of renewal would be determined prior to and to the exclusion of the evaluation of new applications. On January 15, 1970, the Commission issued a new Policy Statement, which, while retaining the single hearing approach, provided that the renewal issue would be determined first, in a proceeding in which new applicants would be able to appear to the extent of calling attention to the license holder's failings. Only upon a refusal to renew would full comparative hearings be held.\*

The Policy Statement set forth that a licensee with a record of "solid, substantial service" to the community, without serious deficiencies, would be entitled to renewal notwithstanding promise of superior performance by a new applicant. This was said to provide predictability and stability of broadcast operations, yet to retain the competitive spur since broadcasters will wish to ensure that their

4. Jaffe, WHDH: The FCC and Broadcasting License Renewals, 82 Harv.L. Rev. 1693, 1700 (1969).

\* Excerpts from the 1970 Policy Statement appear infra, at 117.—D.G.

service is so "substantial" as to avoid the need for comparative proceedings.

The Commission expressly stated that its policy statement "is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." In such case the license holder cannot obviate the comparative analysis called for by the established Policy Statement (1965).

## II. *THE ISSUES ON APPEAL*

\* \* \*

WHDH's central contention rests on its 4-month operating license, duly granted by the Commission in 1962, and the Commission's determination, in the decision before us on this appeal, to adhere to the grant of the original application of WHDH to that extent.

WHDH makes no serious contention that it could protest the grant to intervenor BBI if the Commission proceeded validly in comparing these applications by the criteria used by the Commission for appraisal of new applicants for facilities. On that basis it is undeniable that a strong preference would be available to BBI in view of the "integration" and "diversity" criteria. WHDH objects that such preferences were set forth by the 1965 Policy Statement governing comparative hearings involving new applications for new facilities, and are not properly available in a renewal proceeding. It was by application of the criteria generally used for renewal proceedings that the Examiner entered a decision in favor of WHDH. The failure of the Commission to apply renewal criteria is the core of the WHDH appeal.

The application of the criteria in the 1965 Policy Statement is said to impose an unlawful forfeiture on WHDH amounting to a denial of due process, and to constitute an improper refusal to honor the established policy of promoting broadcast license stability.

There is no doubt that the Commission applied to this proceeding, although it is a renewal proceeding, the same criteria that it normally applies for hearing new applicants for facilities. The effect of that determination was to give WHDH no predicate for renewal on the basis of a sound or "favorable" record in its license operation, and to hold that only an exceptional record would warrant special consideration (since all applicants would be presumed to offer a normal range of operation).

If the case were before us solely on the Decision adopted by the Commission on January 22, 1969—susceptible of the construction that the 1965 Policy Statement was applicable to all renewal proceedings—we would be presented with a different question. While the "forfeiture" terminology invoked by WHDH may be more of a conclusion than a reason, and while this statute does not reflect the same con-

cern for "security of certificate" that appears in other laws, cf. *C. A. B. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 n.6, 324-325, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961), there would be a question whether the Commission had unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act. In addition, a question would arise whether administrative discretion to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards—a contention that may have increased significance if First Amendment problems are presented on renewal application by a newspaper affiliate, including the possibility that TV proceedings may come to involve overview of newspaper operations. Those problems are magnified if a licensee on the one hand may avoid comparison only by maintaining extraordinary performance, and on the other hand court disaster, in the event of comparison, by virtue of the diversity policy, whether expressed in a formal demerit or some inchoate burden.

Fortunately, the present posture of this case permits us to refer to these problems as matters that are not involved in our decision. The Commission's opinion of May 19, 1969, entered on reconsideration, expressly puts this case in a special and unique category because of the past history of WHDH.

\* \* \*

The Commission's 1970 Policy Statement carries a proviso, \* \* \* indicating that it is inapplicable to "those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." In such cases the applicant's record will be examined, but subject to the comparative analysis called for by the 1965 Policy Statement.

We think the distinction drawn by the Commission, in both this case and the 1970 statement, providing for special consideration of certain renewal applicants, as in remand cases, as if they were new applicants, to be reasonable both generally and in its application to the case before us.

\* \* \* The Commission stayed within the range of sound discretion when it adopted, as successive remedial measures, voiding the original grant to WHDH (though not void ab initio); remanding for a comparative reevaluation of the original applicants; confining the grant given to WHDH as the better of the original applicants to a mere 4-month operating license; providing for a reopening period of two months, in order to permit a comparative evaluation with new applicants proposing to serve the public interest.

While the precise nature of the forthcoming comparative evaluation was not spelled out in detail, WHDH certainly has no basis for suggesting it had an assurance of being treated by the same criteria as those generally accorded to renewal applicants.

If anything turned on this we would have to recognize that WHDH was not expressly informed in advance that the comparison between WHDH and its rivals was to be conducted by reference to the criteria normally used for a new application devoid of any elements of renewal. But this did not affect the range of proof which any party might tender or contest. \* \* \*

There being no impediment in the content or shape of the record due to lack of fair notice, certainly we cannot say the Commission was unreasonable when in the last analysis it used the tainted overtures of WHDH as a reason for fresh consideration of all applicants, without any special advantage to WHDH by virtue of its operation under lawful but temporary authority. This is what the law seeks to ensure whenever selection of a contender must be made after a hearing, although one of the applicants has been given temporary authority, either without a hearing at all because of emergency, or after a proceeding subject to a defect. \* \* \*

The complaint of WHDH must be appraised in the light of the courses available to the Commission for coping with the problem presented by the activities of Mr. Choate. At one extreme, the Commission was being asked (by Greater Boston) to take it into account to such extent as would in effect impose an absolute disqualification; this it did not do.

WHDH in effect suggests the other extreme—a brushing aside of the entire matter on the ground that the offending officer is no longer involved, and the corporation has not profited by his delict. The Examiner used this conception on the ground that no reason for deterrence could apply to the unimplicated officers presently managing the station. But the policy of deterrence may have a broader significance. It may take into account that an officer might well be willing to try his hand at an impropriety if all that is involved is a calculated risk as to his own position (which would be enormously enhanced if he is successful), whereas he would possibly be deterred if he realized that his mal-adventure, if discovered, would be costly to the friends and associates who had invested in the enterprise.

In between these extremes are possibilities like a comparative hearing with a demerit assigned to WHDH; that was done by the Commission in its Decision of September 25, 1962, which, however, left the Commission with the conviction that while it would still make a grant to WHDH, a customary 3-year grant was not in the public interest.

The Commission's action in exposing WHDH to another public hearing with new applicants, a hearing scheduled soon after the date of its order, is a disadvantage from the viewpoint of WHDH, but we cannot say it was contrary to the public interest. After this court's remand, to take account of Choate's death, the Commission set a course that retained its order for a hearing with new applicants, but

avoided a specific demerit for WHDH in that comparative consideration. This was preferable to an approach wherein a demerit would be inserted into the comparison with new applicants, preferable both for WHDH and, it would seem, for the public interest.<sup>38</sup> WHDH insists, however, on an approach which would give it all the rights and expectancies of an ordinary renewal applicant. In the ordinary case such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. This position does not fairly characterize the situation of a licensee which, by virtue of its officer's impropriety, has been given only temporary operating authority of one kind or another (including the 4-month license). This was the conclusion of both the Hearing Examiner and the Commission \* \* \* and we think it within the range of reasonable discretion.

The determination that in certain cases a renewal application must be conducted on the basis of a new comparative consideration is not necessarily a "punishment" for wrongdoing. The same result may follow even where the ineptitude and errors of the Commission may be more to blame than the licensee for the state of affairs precipitating that result.<sup>39</sup> The central consideration is that there is a special class of cases where this method of reaching the optimum decision in the public interest may be fairly invoked without undercutting whatever expectancies may attach in general to licensees seeking renewal.

The Commission's action in pitting WHDH against its rivals for fresh comparative consideration is not negated by its \* \* \* 1962 issuance, \* \* \* of a 4-month license rather than some other kind of temporary operating authority \* \* \*. The 4-month license did not operate to make WHDH a conventional applicant for renewal, and that is the core of its position in this court.

The Commission did not try, as WHDH suggests, to erase the operating record and experience of WHDH and its principals. In effect what it did was to hold WHDH to a higher comparative standard than that required of renewal applicants generally in order to be able to invoke a past record as a reason for rejecting the promise of better public service by new applicants. The Hearing Examiner considered that a good record of past performance was a more reliable indicator of public service than glowing promise. The Examiner was

38. When an applicant is required to bear a demerit assigned for non-comparative reasons, the public may wind up being denied the services of a superior broadcaster. Where that demerit is not necessary for deterrent reasons, it would seem counterproductive. As to the final comparative hearing the blend of deterrence and

public interest in selecting the broadcaster was accomplished by requiring WHDH to face a de novo comparative hearing, but without a continuing demerit.

39. Cf. *Office of Communications of United Church of Christ v. F.C.C.*, 138 U.S.App.D.C. 112, 425 F.2d 543 (1969).  
\* \* \*

not as impressed as the Commission by the reliability of criteria as indicators validating the likelihood of performance. Also, he does not seem to have taken into account the problem that his approach provided in effect a "built-in-lead" from actual operation, although he disclaimed any right of WHDH to a privileged position as an applicant for renewal. The Commission, on the other hand, was more concerned with keeping the parties as close as possible to a new application situation, without undue advantage acquired from the physical fact of operation under a temporary authorization.

We think the course adopted by the Commission cannot be considered as arbitrary or unreasonable, or as in violation of legislative mandate. The remedies fashioned through the exercise of its discretion are not without an element of novelty. "In the evolution of the law of remedies some things are bound to happen for the 'first time.'" *International Bhd. of Operative Potters v. N. L. R. B.*, 116 U.S.App. D.C. 35, 39, 320 F.2d 757, 761 (1963). Hand crafted orders and procedures are particularly appropriate for unique fact situations. On the unique facts presented, WHDH was neither a new applicant nor a renewal applicant as those terms are generally construed. Since these orthodox classifications, and the rules generally pertaining to each, were not meaningfully available to the Commission on these facts, that body soundly formulated an intermediate position for the instant case. There was no error.

\* \* \*

Affirmed

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#### QUESTIONS AND EXCURSUS

1. In its decision of January 22, 1969, the FCC put WHDH at a substantial disadvantage on the diversification criterion. Professor Jaffe considered it "one of the ironies of the case that \* \* \* the WHDH license was awarded initially despite the applicants' ownership of the *Herald* at that time." \* Could the FCC have somehow taken this fact into account and thus disregarded the diversification criterion? Could it have done so as to WHDH and yet given a slight preference to BBI over Charles River, which owned an FM station? Could it have done so and yet be consistent with the broader decision to treat WHDH as a new applicant rather than as an incumbent?
2. On what basis did the Commission and the court distinguish WHDH from cases subject to the 1970 Policy Statement? Does the distinction drawn in truth remove from the case the "question whether the Commission had unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act?" (P. 113) An-

\* 82 *Harv.L.Rev.* 1693, 1697. Another irony noted by Professor Jaffe: the *Herald* had been losing money and its

survival without the TV license was questionable. His requiescat was early but not premature.

teriorly, is it clear that such expectancies are implicit in the structure of an Act that is explicitly (e. g., § 309(h)) to the contrary?

3. Are you persuaded that the 1962 grant of a 4-month license was "not necessarily a punishment for wrongdoing" by WHDH? What does the court view it as? Why does it discuss the policy and possibility of deterrence? Cf. B. Cole & M. Oettinger, *Reluctant Regulators* 213 (1978): "Designating a license renewal for hearing is considered by both key [FCC] staff people and most commissioners almost as drastic as taking a license away." Presumably, then, setting a license down for a second *comparative* hearing, which is inherently more expensive and more threatening, is a still more "drastic" measure.

#### Excursus

Innocente brings an action for libel in which his prior reputation is a major determinant of the damage award. Reasonably fearing a nominal award of six cents, he attempts to bribe the judge. After conviction for the attempted subornation, Innocente is sentenced as follows: he is to spend four months on probation, after which there will be a probation revocation proceeding to determine whether he should remain at large or be executed. The issue in that proceeding will be whether "the public interest" is better served by his demise.

Is the analogy to *WHDH* sound? Are the (present) value of one's life, of one's liberty, and of one's property equally a function of the security of tenure one enjoys from the state?

4. There follow some excerpts from the 1970 Policy Statement and Commissioner Johnson's dissent. The Policy Statement does not mention the *WHDH* case by name.

#### POLICY STATEMENT CONCERNING COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS

Federal Communications Commission, 1970.  
22 FCC 2d 424, 18 R.R.2d 1901.

In 1965 the Commission issued a policy statement on comparative broadcast hearings which is applicable to hearings to choose among qualified new applicants for the same broadcast facilities [supra, p. 130]. We believe that we should now issue a similar statement as to the comparative hearing where a new applicant is contesting with a licensee seeking renewal of license. We have, of course, set forth our policies in this respect in several cases, and indeed, have done so in designating issues in some very recent cases. \* \* \* There has, however, been considerable controversy on this issue, as shown



by the hearings on S. 2004 now going forward before the Senate Subcommittee on Communications. Issuance of this statement will therefore contribute to clarity of our policies in this important area.

\* \* \*

The public interest standard \* \* \* with respect to competing challenges to renewal applicants, calls for the balancing of two obvious considerations. The first is that the public receive the benefits of the statutory spur inherent in the fact that there can be a challenge, and indeed, where the public interest so requires, that the new applicant be preferred. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.

The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service. Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. The broadcast field thus must have stability, not only for those who engage in it but, even more important, from the standpoint of service to the public.

We believe that these two considerations call for the following policy—namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area,<sup>1</sup> and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met,

1. We wish to stress that we are not using the term "substantially" in any sense of partial performance in the public interest. On the contrary, as the discussion within makes clear, it is used in the sense of "solid", "strong", etc. performance as contrasted with a service only minimally meeting the needs and interests of the area. In short, we would distinguish

between two types of situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.

\* \* \*

If on the other hand the hearing record shows that the renewal applicant has not substantially met or served the needs and interests of his area, he would obtain no controlling preference. On the contrary, if the competing new applicant establishes that he would substantially serve the public interest, he should clearly be preferred over one who was given the opportunity to do so but chose instead to deliver less than substantial service to the public. In short, the past record of the renewal applicant is still the critical factor, but here it militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest.

\* \* \* The renewal applicant would have a full opportunity to establish that his operation was a "substantial" one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if that is, indeed, the case. The programming performance of the licensee in all programming categories (including the licensee's response to his ascertainment of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether substantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service are also relevant in this critical judgment area. \* \* \*

Two other points deserve stress in this respect. First, unlike the case involving new applicants \* \* \*, a programming record will be considered even though it is not alleged to be either unusually good or bad. Thus, the renewal applicant will not have to demonstrate that his past service has been "exceptionally" or "unusually" worthy. Were that the criterion, only the exceptional or unusual renewal applicant would win a grant of continued authority to operate, and the great majority of the industry would be told that even though they provide strong, solid service of significant value to their communities, their licenses will be subject to termination. As stated at the outset, such a policy would disserve the public interest. And conversely, a new applicant would not have to allege that the existing licensee's operation had been unusually bad.

Second, the renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he

upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon. \* \* \*

\* \* \*

We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. \* \* \* We have stated, however, that as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry. \* \* \* Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media holdings.<sup>4</sup> \* \* \* These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rulemaking proceedings. For example, FCC docket No. 18110 \* \* \*. [See Chapter IV.B, *infra*.]

We believe the issuance of this policy statement will expedite the hearing process in this area. \* \* \* If the examiner, at the conclusion of the initial phase of a hearing dealing with a renewal applicant's past record, has no doubt that the existing licensee's record of service to the public is a substantial one, without serious deficiencies, he should, either on his own motion or that of the renewal applicant, halt the proceeding at this point and issue an initial decision based upon that determination. However, where the matter is in any way close or in doubt, it would be more appropriate to proceed with the hearing, and thus insure that the record is complete when the matter comes before the Commission.

\* \* \*

The policy is thus fair to the broadcaster<sup>6</sup> and to the new contestant, and above all it serves the listening and viewing public. \* \* \* With even-handed administration of the policy, there is unlikely to be any plethora of frivolous challengers, in view of the significant costs involved.<sup>7</sup> And in any event, where frivolous challenges

4. Of course, if such a renewal applicant has not rendered substantial service, he might also face a demerit on the diversification ground. Such an additional demerit might well be academic, since, barring the case where his competitor is also deficient in some important respect, a past record of minimal service to the public is likely to be determinative, in and of itself, against the renewal applicant.

6. It would be expected that appropriate arrangements could and would be

made to purchase facilities owned by the existing station. See, e. g., *In re Application of Biscayne Television Corp.*, 33 F.C.C. 851 (1962). [Footnote relocated.]

7. We wish to stress, with the issuance of this statement, that barring extraordinary circumstances, the challenger to a renewal cannot be reimbursed in any amount for his expenditures in preparing and prosecuting his application, nor will merger agreements be countenanced.

are made, the examiner may in his discretion, and should, take action to avoid a long drawn out hearing. In the final analysis, the broadcaster has, we believe, the answer within his hands—if he really knows and cares about his area and does a good substantial job of serving it, he will discourage challenges to his renewal applications.

We recognized that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But, as stated, there are obvious risks in accepting promises over proven performance at a substantial level, and we see no way, other than the one we have taken, adequately to preserve the stability and predictability which are important aspects of the overall public interest. \* \* \*

\* \* \*

#### DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

\* \* \*

The nature of the American political process is such that any efforts to regulate broadcasting by either Congress or this Commission must constitute a negotiated compromise of sorts. \* \* \*

There is no question but that the American people have been deprived of substantial rights by our action today. There is also no question that the results could be much worse—given the commitment of the broadcasting industry on this issue, and the introduction of legislation (such as S. 2004) by 22 Senators and 118 Representatives.

\* \* \*

There is a germ of legitimate concern in the broadcasters' position. (1) It is inequitable that a broadcaster who has made an exceptional effort to serve the needs of his community, and whose programming is outstanding by any measure, should be subjected to the expense and burden of lengthy hearings merely because some fly-by-night chooses to take a crack at his license. (2) When evaluating a competing application in a renewal case, a record of outstanding performance by the licensee obviously should be given considerable weight. (3) It is far better to provide consistent national standards for station ownership by general rulemaking (with divestiture if necessary) than to involve them on the case-by-case happenstance of which stations' licenses happen to be challenged. (4) There are some public benefits from stability for those broadcasters who take their responsibilities seriously.

What the public loses by this statement can be summarized in the word "competition." The theory of the 1934 Communications Act was that the public would be served by the best licensees available. No licensee would have a right to have his license renewed. Each would be open to the risk that a competing applicant would offer a service preferable in some way, and thereby win the license away.

The FCC was to choose the best from among the applications before it, whether the incumbent's record was mediocre or excellent. This is the principle of the marketplace; the public is assured the best products by opening the market to all sellers, comparing their products, and rewarding the best with the greater sales. The analogy in broadcasting is the competing application. The FCC is the public's proxy. It is we who must make the choice among competitors; it is the public that receives the benefits (or burdens) of our choice.

What we have done in this policy statement is comparable to providing that there could be no new, competing magazines, automobiles or breakfast cereals unless a new entrant could demonstrate that the presently available products are not substantially serving the public interest. The affected industry's arguments on behalf of such a policy would be quite similar to those presented by the broadcasters in this instance. But this country has long believed that the public will be better served over the long run by free and open competition. And after lengthy consideration it is still my belief that, on balance, the principle is equally valid in the broadcasting industry.

\* \* \*

#### QUESTIONS AND A NEWS ARTICLE

1. (a) Would application of the 1965 Policy Statement to comparative hearings on renewal really induce broadcasters to provide the "barest minimum of service" consistent with short run profit maximization? Consider the Commission's footnote 6.

(b) Would application of the diversification policy have the same effect, as claimed? If so, why would the effect be any less because the agency proceeds by rulemaking rather than adjudication?

(c) Is Commissioner Johnson's analogy to the competitive marketplace for magazines, for example, well-taken? Is "free and open competition" an option here? Competition in what marketplace?

2. Is the value of incumbency increased or decreased by the statement in the Commission's footnote 7? What would constitute "extraordinary circumstances" warranting reimbursement or merger of the challenger?

3. Consider the following news report: "WPIX Will Accept Outside Director," N. Y. Times, April 1, 1975,\* at 62:

WPIX, Inc., in an agreement to end a six-year challenge to its license to operate on Channel 11 here, announced yesterday that it would accept a member of its opposition on its board of directors.

\* © 1975 by The New York Times Company. Reprinted by permission.

The agreement, which is subject to approval by the Federal Communications Commission, also provides for WPIX to create a cash fund of \$100,000 in addition to making available its production facilities for special community-interest programming. The community programs would be developed jointly by representatives of WPIX and Forum Communications, Inc., an organization that began its contest for the channel 11 license in 1969.

Further, the agreement calls for the station to reimburse Forum's 24 stockholders for expenses incurred in pursuing the legal challenge for the license up to \$310,995.81.

\* \* \*

For its part, Forum would request dismissal of its application for the station, clearing the way for renewal of the WPIX license. WPIX, a subsidiary of The Daily News, has operated the station since 1948. In that time, it has never elected a member to its board from outside the company.

In its original petition, Forum had accused WPIX of questionable news practices, discrimination toward minorities and generally inferior programming in asking the F.C.C. to deny a renewal of the license.

In its own application for the license, Forum promised to produce a broad range of community-service programming and to offer training in television to members of minority groups.

[After a hearing the Administrative Law Judge had recommended renewal of WPIX's license.]

\* \* \* Lawrence K. Grossman, president of Forum, had vowed to appeal the first decision to the full commission and, if necessary, to pursue the case in the courts.

\* \* \*

---

WPIX estimated its expenses at close to \$1.5 million, apparently exclusive of the settlement. The settlement was rejected by the Commission under the authority of § 311(c) of the Act. WPIX, Inc. 54 FCC 2d 1021, 34 R.R.2d 1073 (1975). The Commission later renewed WPIX's license, by a 4-3 vote. — FCC 2d —, 43 R.R.2d 279. Forum reiterated its intention to appeal. Wall St. Jnl, June 19, 1978, at 13, col. 1.

4. How many levels of broadcaster performance are established in the taxonomy of the 1970 Policy Statement? Do you have any sense of what is meant by "substantial service" or "solidly meeting the needs of [an] area?" Are they the same thing? Can the FCC avoid

the responsibility of defining its terms by delegating the evaluation function to a majority of the "community leaders" who testify? \* We will return to the problem of definition shortly; now to the court of appeals for its reaction to this latest development.

### CITIZENS COMMUNICATIONS CENTER v. FCC

United States Court of Appeals, District of Columbia Circuit, 1971.  
447 F.2d 1201.

J. SKELLY WRIGHT, Circuit Judge:

\* \* \* [P]etitioners in these consolidated cases<sup>2</sup> challenge the legality of the "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants," released by the Federal Communications Commission on January 15, 1970, and by its terms made applicable to pending proceedings. Briefly stated, the disputed Commission policy is that, in a hearing between an incumbent applying for renewal of his radio or television license and a mutually exclusive applicant, the incumbent shall obtain a controlling preference by demonstrating substantial past performance without serious deficiencies. Thus if the incumbent prevails on the threshold issue of the substantiality of his past record, all other applications are to be dismissed without a hearing on their own merits.

Petitioners contend that this policy is unlawful under Section 309 (e) of the Communications Act of 1934 and the doctrine of *Ashbacker Radio Corp. v. FCC*. The 1970 Policy Statement is also attacked by petitioners on grounds that it was adopted in disregard of the Administrative Procedure Act and that it restricts and chills the exercise of rights protected by the First Amendment.

\* \* \* Without reaching petitioners' other grounds for complaint,<sup>5</sup> we hold that the 1970 Policy Statement violates the Federal

\* Who are the leaders of *your* community? Do they watch much television? We will return to them and their role in broadcast regulation under the FCC's rubric of "ascertainment".

2. \* \* \* Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST) [are] two nonprofit organizations organized "for the purposes of improving radio and TV service, of promoting the responsiveness of broadcast media to their local communities, of improving the position of minority groups in media ownership, access and coverage, and of generally presenting a public voice in proceedings before the FCC".  
\* \* \* Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc., [are] ap-

plicants for television channels who have filed in competition with renewal applicants in Norfolk, Virginia and Boston, Massachusetts.

5. Petitioners' complaint charging a violation of the APA is based on the Commission's failure to proceed by rule making rather than by issuing a policy statement. One of the purposes of rule making procedures, of course, is to make an administrative agency more aware of the wishes of the public on whose behalf it must regulate. Although it is not necessary for this court, in disposing of this case, to decide whether the Commission violated the letter of the APA in issuing the 1970 Policy Statement without first holding a public hearing, a serious question does arise as to the propriety of the Commission's action.

Communications Act of 1934, as interpreted by both the Supreme Court and this court.

\* \* \*

### III

Superimposed full length over the preceding historical analysis of the "full hearing" requirement of Section 309(e) of the Communications Act is the towering shadow of *Ashbacker*, supra and its progeny, perhaps the most important series of cases in American administrative law. *Ashbacker* holds that under Section 309(e), where two or more applications for permits or licenses are mutually exclusive, the Commission must conduct one full comparative hearing of the applications. Although *Ashbacker* involved two original applications, no one has seriously suggested that its principle does not apply to renewal proceedings as well. This court's opinions have uniformly so held, as have decisions of the Commission itself.

It is not surprising, therefore, that the Commission's 1970 Policy Statement implicitly accepts *Ashbacker* as applicable to renewal proceedings. To circumvent the *Ashbacker* strictures, however, it adds a twist: the Policy Statement would limit the "comparative" hearing to a single issue—whether the incumbent licensee had rendered "substantial" past performance without serious deficiencies.<sup>32</sup> If the examiner

In order to avoid conflict with *Ashbacker Radio Corp. v. F. C. C.*, the Commission characterizes *Ashbacker* as dealing only with "procedure", and distinguishes the Policy Statement as being in effect substantive. Then caught between Scylla and Charybdis, the Commission turns around and calls the Policy Statement "procedural rather than \* \* \* substantive" in order to avoid conflict with § 4 of the APA. The APA requires the Commission to follow certain procedures (notification, opportunity to file comments, etc.) in all cases of administrative "rule making". Section 2(c) of the APA, 5 U.S.C. § 551(4), defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency". Section 4(a) of the APA, 5 U.S.C. § 553(a)(3)(A), however, exempts from rule making "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice". The Commission argues that the January 15, 1970 Policy Statement is an exempted "general

statement of policy" under § 4(a) and that it did not therefore have to be developed under the procedural safeguards described in § 4. As was said in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416, 62 S. Ct. 1194, 86 L.Ed. 1563 (1942), however, it is not the label placed upon such procedures by the Commission which dictates the procedures to be followed, but rather "the substance of what the Commission has purported to do and has done which is decisive". The issue here turns on whether the January 15, 1970 Policy Statement effected a substantive change in the Commission's comparative renewal standards. \* \* \* In any event, the Commission's suggestion that under the APA it can do without notice and hearing in a policy statement what Congress failed to do when the Pastore bill died in the last Congress is, to say the least, remarkable.

32. "such as rigged quizzes, violations of the Fairness Doctrine, overcommercialization, broadcast of lotteries, violation of racial discrimination rules, or fraudulent practices as to advertising." [Footnote relocated.]



finds that the licensee has rendered such service, the "comparative" hearing is at an end and, barring successful appeal, the renewal application must be granted. Challenging applicants would thus receive no hearing at all on their own applications, contrary to the express provision of Section 309(e) which requires a "full hearing."

\* \* \*

Early after *Ashbacker* this court indicated what a "full hearing" entailed. In *Johnston Broadcasting Co. v. F.C.C.*, we explained that the statutory right to a full hearing included a decision upon all relevant criteria \* \* \*<sup>34</sup>

We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through. Compare *WHDH*, supra. At the same time, superior performance should be a plus of major significance in renewal proceedings.<sup>35</sup> Indeed, as *Ashbacker* recognizes, in a renewal proceeding, a new applicant is under a greater burden to "make the comparative showing necessary to displace an established licensee." 326 U.S. at 332, 66 S.Ct. at 151. But under Section 309(e) he must be given a chance. How can he ever show his application is comparatively better if he does not get a hearing on it? The Commission's 1970 Policy Statement's summary procedure would deny him that hearing.<sup>36</sup>

34. There are several cases cited by respondents to the effect that *no hearing* need be held where an application fails to measure up to the Commission's rules and does not indicate waiver, or where one of several mutually exclusive applicants is basically unqualified. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956) \* \* \*. Contrary to the suggestion of respondents, however, these cases in no way undercut our holding of today. Whatever the power of the Commission to set basic qualifications in the public interest and to deny hearings to *unqualified* applicants, the cases cited above cannot be read as authorizing the Commission to deny *qualified* applicants their statutory right to a *full hearing* on their own merits.

35. The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service. Given the incentive, an incumbent will naturally strive to achieve a level of performance which gives him a clear edge on challengers at renewal time. But if the Commis-

sion fails to articulate the standards by which to judge superior performance, and if it is thus impossible for an incumbent to be reasonably confident of renewal when he renders superior performance, then an incumbent will be under an unfortunate temptation to lapse into mediocrity, to seek the protection of the crowd by eschewing the creative and the venturesome in programming and other forms of public service. The Commission in rule making proceedings should strive to clarify in both quantitative and qualitative terms what constitutes superior service. \* \* \* Along with elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public. We note with approval that such rule making proceedings may soon be under way. *News Notes*, 39 U.S.L. Week 2513 (March 16, 1971).

36. Since one very significant aspect of the "public interest, convenience, and necessity" is the need for diverse and antagonistic sources of information,

The suggestion that the possibility of nonrenewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly. But the Commission, of course, may not penalize exercise of First Amendment rights. And the statute does provide for judicial review. Indeed, the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant.

The Policy Statement purports to strike a balance between the need for "predictability and stability" and the need for a competitive spur. It does so by providing that the qualifications of challengers, no matter how superior they may be, may not be considered unless the incumbent's past performance is found not to have been "substantially attuned" to the needs and interests of the community. Unfortunately, instead of stability the Policy Statement has produced *rigor mortis*. For over a year now, since the Policy Statement substantially limited a challenger's right to a full comparative hearing on the merits of his own application, not a single renewal challenge has been filed.

Petitioners have come to this court to protest a Commission policy which violates the clear intent of the Communications Act that the award of a broadcasting license should be a "public trust." As a unanimous Supreme Court recently put it, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>40</sup> Our decision today restores healthy competition by re-

the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it. *Johnston Broadcasting Co. v. F. C. C.*, 175 F.2d 351 (1949); *McClatchy Broadcasting Co. v. F. C. C.*, 239 F.2d 15 (1956), cert. denied, 353 U.S. 918, 77 S.Ct. 662, 1 L. Ed.2d 665 (1957); *Scripps-Howard Radio v. F. C. C.*, 189 F.2d 677, cert. denied, 342 U.S. 830, 72 S.Ct. 55, 96 L. Ed. 628 (1951). The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. See, e. g., *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Red Lion Broadcasting Co. v. F. C. C.*, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.

Ed.2d 371 (1969). \* \* \* As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation. While no quota system is being recommended or required, and while the fairness doctrine no doubt does serve to guarantee some minimum diversity of views, we simply note our own approval of the Commission's long-standing and firmly held policy in favor of decentralization of media control.

40. *Red Lion Broadcasting Co. v. F. C. C.*, supra Note 36, 395 U.S. at 390, 89 S.Ct. at 1806.

pudiating a Commission policy which is unreasonably weighted in favor of the licensees it is meant to regulate, to the great detriment of the listening and viewing public.

Wherefore it is ORDERED: that the Policy Statement, being contrary to law, shall not be applied by the Commission in any pending or future comparative renewal hearings \* \* \*.

[The concurring opinion of Judge MacKinnon is omitted.]

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#### QUESTIONS AND A NOTE ON LEGISLATION

1. Has the court devised an approach truly consistent with *Ashbacker*? Would it be sensible to do so? See Comment, 71 Colum.L. Rev. 1500, 1510-20 (1971); 46 N.Y.U.L.Rev. 1012 (1971).
2. What must and what can the FCC do in comparative renewal hearings after the *Citizens* case? Must it apply the 1965 Policy Statement? Can even the superior performance of an incumbent be taken account of in the analytic framework of that policy? If so, could the FCC solve its problem by making prior broadcast experience a minimum qualification for applicants? If it cannot do that, can it give it a preference, or even "merit" toward a preference, without betraying *Ashbacker*?
3. The court referred to but did not need to reach the petitioners' first amendment argument(s) against the 1970 Policy Statement. What would the argument(s) be? Whose free speech interests could be invoked: the petitioners'? the incumbent broadcasters'? the public's?

#### Congress: the Other Player

In Part II of its opinion the court recounted the history of the Pastore bill, S. 2004, 91st Cong., 1st Sess. (1969), to which you have seen prior references in *WHDH* and the 1970 Policy Statement itself (first paragraph). The bill was cosponsored by 22 Senators; the House version had 118 sponsors. But, according to the court in *Citizens*:

[T]he bill was bitterly attacked in the Senate hearings by a number of citizens groups testifying, *inter alia*, that the bill was racist, that it would exclude minorities from access to media ownership in most large communities, and that it was inimical to community efforts at improving television programming.

The impact of such citizen opposition measurably slowed the progress of S. 2004. Then, without any formal rule making proceedings, the Commission suddenly issued its own January 15, 1970 Policy Statement and the Senate bill was thereafter deferred in favor of the Commission's 'compromise.'

Indeed, Senator Pastore, then Chairman of the Subcommittee on Communications, in announcing that the subcommittee would take no further action until the Policy Statement had a fair test, said, "It's a step in the right direction. All I ever wanted to do right along was to make sure that a good licensee had a reasonable chance to stay in business, without harassment. The FCC policy \* \* \* will have a salutary effect. It will discourage those engaged in piracy." See E. Krasnow & L. Longley, *The Politics of Broadcast Regulation* 112-24 (1973).

From this sequence of events, isn't it fairly clear that the Congress had acted, without legislating but through an exercise of its oversight power, to approve—indeed to induce—the 1970 Policy Statement? Wasn't the 1970 policy, that is, a congressional policy incorporated informally into the Act and therefore incapable of being set aside by a court on the ground of repugnance to the statute itself? The courts acknowledge the congressional approval implicit in long administrative practice known to but left undisturbed by Congress; even greater weight may be accorded if the statute was amended in other respects but the disputed practice allowed to continue. Why not acknowledge the obvious congressional imprimatur here? Cf. Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 *Va.L.Rev.* 541, 575-76 (1975) (on the relevance of "informal congressional review" in informing the meaning of the statute). Doesn't failure to do so deprive the broadcasting industry of the benefit of its bargain, as described rather explicitly by Commissioner Johnson?\*

Postscript: In the wake of the *Citizens* decision the industry's legislative effort was renewed. By late 1974 both houses of Congress had overwhelmingly passed (379-14; 69-2) versions of a bill (H.R. 12993) that did not become law because no conference committee was appointed before the expiration of the 93d Congress. Substantially the same legislation was re-introduced in the 94th Congress.

### H. R. 669

94th Cong., 1st Sess. (1975).

SEC. 2. (a) Section 309 of such Act is amended by adding at the end thereof the following new subsection:

"(i) The Commission shall by rule establish procedures to be followed by licensees of broadcasting stations to ascertain throughout the terms of their licenses the needs, views, and interests of the residents of their service areas for purposes of their broadcast operations. Such rules may prescribe different procedures for different categories of broadcasting stations."

\* Cf. Landes & Posner, *The Independent Judiciary in an Interest-Group*

*Perspective*, 18 *J.Law & Econ.* 875 (1975).

(b) Section 307(d) of the Communications Act of 1934 is amended to read as follows:

“(d) (1) The term of any license, or the renewal thereof, granted under subsection (a) for operation of a broadcasting station may not exceed four years, and the term of any license, or the renewal thereof, for any other class of station may not exceed five years.

“(2) (A) Any license granted under subsection (a) may upon its expiration be renewed, in accordance with section 309, if the Commission finds that the public interest, convenience, and necessity would be served by the renewal of such license. In determining if the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the Commission shall consider (i) whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under section 309(i) for the ascertainment of the needs, views, and interests of the residents of its service area for purposes of its broadcast operations, and (ii) whether the licensee has engaged in broadcast operations during the term of the license which were substantially responsive to those needs, views, and interests.

“(B) In considering any application for renewal of a broadcast license granted under subsection (a), the Commission shall not consider—

“(i) the ownership interests or official connections of the applicant in other stations or other communications media or other businesses, or

“(ii) the participation of ownership in the management of the station for which such application has been filed,

unless the Commission has adopted rules prohibiting such ownership interests or activities or prescribing management structures, as the case may be, and given the renewal applicant a reasonable opportunity to conform with such rules.

\* \* \*

SEC. 4. Section 309 of such Act is amended by adding after the subsection added by section 2(a) of this Act the following subsection:

“(j) The Commission shall prescribe procedures to encourage licensees of broadcasting stations and persons raising significant issues regarding the operations of such stations to conduct, during the term of the licenses for such stations, good faith negotiations to resolve such issues.”

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#### NOTES AND QUESTIONS

1. Section 5 of the bill provides that judicial review of license decisions be available in the court of appeals for the circuit in which the

station is or would be located. Cf. 47 U.S.C.A. § 402(b) (review in the Court of Appeals for the D.C. Circuit).

2. Is the regime envisioned by the bill preferable to that perceived by the court in the present Act? Would findings favorable to the incumbent under proposed § 307(2)(A)(i) and (ii) lead conclusively or only presumptively to the ultimate public interest finding and thus to renewal?

3. How might the mandate of Section 4 of the bill be implemented? Would the section be a useful addition to the Act apart from the larger revision of which it is a part?

4. Similar bills have been introduced in the 95th Congress. See S. 1108, H.R. 4185. Related legislation is reviewed at 42 Geo.Wash. L.Rev. 67, 73, and 93 (1973).

2. THE SEARCH FOR MANAGEABLE STANDARDS

FIDELITY TELEVISION INC. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1975.  
515 F.2d 684.

DAVIS, Judge:

Nearly ten years ago, intervenor RKO General, Inc. filed an application for a three-year renewal of its license to operate KHJ-TV, Channel 9 in Los Angeles. Thus began a long saga which we may not even end today by affirming the Commission's decision in favor of RKO.

I

RKO, a wholly-owned subsidiary of General Tire and Rubber Company, has operated KHJ since 1951.

\* \* \* [T]his license came up for three-year renewal with those of other California licensees in 1965, and RKO filed an application for renewal on August 31, 1965. Two months later, on October 25, 1965, appellant Fidelity Television, Inc. filed an application for a construction permit to build a station at Norwalk, California, also to operate on Channel 9 and to blanket the same area.<sup>2</sup> As applications for mutually exclusive stations, the requests of RKO and Fidelity were designated for a comparative hearing by the Commission on June 8, 1966. \* \* \* In setting the applications for a comparative hearing, the Commission as was its practice, limited the questions to be considered to the so-called "standard comparative issues," i. e., which of the proposals would better serve the public interest, and which of the appli-

2. \* \* \* Fidelity proposed to construct the station at Norwalk because it wished to orient programming of the channel to the "Southland", an

area described in Fidelity's Petition to Enlarge Issues as the area in Los Angeles County lying to the south and east of the city and Orange County.

cations should be granted. These standard issues did not include programming and certain other factors. Fidelity request[ed] the addition of three issues: which applicant would provide for a more fair, efficient and equitable distribution of television services; the "service philosophy" of each applicant;<sup>4</sup> and the significant differences in programming proposed by each applicant. [This petition was denied.] The comparative hearing on the two proposals, on the standard comparative issue only, opened on February 27, 1967, and the record was closed for the first time on June 15, 1967.

\* \* \*

Concurrently, on March 2, 1967, the Department of Justice filed suit in the United States District Court for the Northern District of Ohio against the General Tire and Rubber Company, Aerojet-General Corporation, A. M. Byers Company, and RKO General, Incorporated (the latter three companies were subsidiaries of General Tire). This action alleged that the four companies had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, in that they had, among other things, engaged "in a combination and conspiracy to utilize reciprocity whereby the purchasing power of all of said defendants is used to coerce and persuade certain actual and potential suppliers of the defendants to purchase tires, wrought iron products, advertising time and other products and services from said defendants, in unreasonable restraint of \* \* \* trade and commerce; \* \* \*"

Responding to this new development, Fidelity filed with the [F.C.C.'s] Review Board, on March 8, 1967, a petition to enlarge the issues to be considered at the comparative hearing to include a determination in light of all the facts and circumstances surrounding the Complaint filed by the United States of America on March 2, 1967, against General Tire and Rubber Company, \* \* \* whether RKO General, Inc., is qualified to be a licensee of the facility for which it is applying herein, or alternatively, whether such matters bear upon the comparative qualifications of RKO General, Inc.; \* \* \* The Board denied the petition on June 20, 1967, saying that Fidelity's allegations of wrongdoing were not specific enough to warrant the addition of a "disqualifying character issue," but that "relevant facts and circumstances forming bases for the civil suit—particularly as they relate to RKO's broadcast practices—can be adduced by Fidelity under the standard comparative issue." The Board also said that any grant to RKO would be conditioned on the Commission's right to reopen the case should the outcome of the antitrust suit be unfavorable to RKO.<sup>7</sup>

4. The "service philosophy" issue deals with an applicant's intention to direct his programming to, or primarily to, only a part of the area to which his signal reaches. \* \* \*

7. The antitrust action was concluded by a consent decree, with judgment

entered on October 21, 1970. The judgment stated that it was entered without "constituting evidence or admission by any party with respect to any issue of fact or law". It did, however, restrain General Tire and its subsidiaries, including RKO, from engaging in the practices of reciprocity charged in the

All requests for additional issues having thus been disposed of, the comparative hearing continued on the standard comparative issue only, with Fidelity providing only a "superficial" inquiry into RKO's trade practices. \* \* \* On February 9, 1968, however, Fidelity petitioned the examiner to reopen the record to receive newly discovered evidence—depositions taken in the Government's antitrust suit. The hearing examiner reopened the record \* \* \* The record was closed for good on August 26, 1968, and the initial decision of the hearing examiner came down on August 13, 1969.

The examiner's decision, without an overabundance of enthusiasm, recommended that RKO's application for renewal be denied and Fidelity be granted a construction permit to build a station to take over Channel 9. He found that General Tire and RKO had substantially contributed to the development of broadcast technology and had the capacity to run a good station. However, he also found that KHJ's past performance in programming and community relations, particularly in the station's concentration on presenting old films and ignoring community criticism of excessive violence in some of the movies, was poor. On the other hand, he gave Fidelity a demerit for an integration-of-ownership-and-management proposal which he felt was created just to win the license and would not be implemented. Fidelity, however, was found superior in local ownership, in community-needs-ascertainment, and in providing for diversification of ownership of the mass media. The examiner berated General Tire's anti-competitive practices, but did not give RKO a special character demerit for them. Finding "neither applicant is any bargain as a broadcast licensee," the examiner chose to give Fidelity a chance to improve on RKO's performance.

Soon after the release of this initial decision, another RKO station, WNAC-TV, Boston, came up for renewal. Upon the filing of two other mutually exclusive applications for construction permits, the Commission, on December 11, 1969, designated the three applications for a comparative hearing. Included in the hearing order was an "anticompetitive" issue much like that added in the current case after the record was closed. On January 8, 1971, the Commission's Broadcast Bureau filed a petition with the Commission asking that the KHJ record be reopened and consolidated with the WNAC record on the anticompetitive issue since the evidence being presented in the latter case was far more complete than that in the present proceeding. Fidelity opposed the move, and the Commission's ultimate resolution of the problem was to go ahead with a conditional decision in this KHJ case and to make Fidelity a party in the WNAC proceeding.

\* \* \* On December 6, 1973 \* \* \* the Commission announced its decision.

complaint. In its decision in this case, and that the Review Board's condition the Commission determined that this had therefore become "a nullity", outcome was not unfavorable to RKO,



By a divided vote, the agency reversed the hearing examiner and granted RKO's renewal application. \* \* \* The opinion found that KHJ had neither engaged in nor benefited from coercive reciprocity, but had engaged only in mutual patronage reciprocity. However, the Commission concluded, partially on the basis of the widespread nature of the practice, that the injunction entered in the Ohio antitrust suit was sufficient to stop the practice and that RKO should not be denied a license for doing something arguably legal when done. The opinion also determined that KHJ's past performance in terms of programming and community relations while not "unusually good" or "superior" was not "insubstantial" or "unusually poor." Furthermore, RKO had promised in its 1962 renewal application no more than it had provided. Therefore, the opinion stated, since the "record must be deemed to be within the bounds of average performance expected of all licensees, [it] warrant[s] neither a preference nor a demerit."

Going on to diversification, the opinion found that while RKO superficially looked poor in this category (in that the company was the licensee of AM and FM stations in Los Angeles as well as stations in other states and was a shareholder in several cable television systems), each station was operated independently and, particularly in the case of KHJ, was one of many media outlets in its market. Finding that the dangers of non-diversification, which it characterized as promotion of "any national or other uniform expression of political economic, or social opinion," did not exist in this case, the opinion concluded that "we are not persuaded that the nature of RKO's interests is such as to have any adverse effect on the flow of information for the audience to be served here." The opinion also found that, since a Fidelity stockholder owned an interest in several suburban Los Angeles newspapers, the challenger was not entirely free of diversification problems. Finally, noting ongoing rule-making proceedings on the application of the diversification criterion to renewal applicants, including a proposed rule requiring divestiture, the opinion concluded that "neither applicant has made a sufficient showing to warrant the award of any preference under the diversification criterion."

On the subject of integration, for which the hearing examiner had given Fidelity a demerit, the opinion found the two applicants equal. It said that Fidelity's conduct as an applicant had indicated that "the record here gives little promise that Fidelity will effectively implement its paper integration promises." On the other hand, RKO was found to have achieved the purposes of integration—local control and accountability—through its policy of station independence, and by requiring active participation in community affairs by station employees.

Finding the two applicants thus equal on the standard comparative factors, the opinion based the ultimate outcome on a policy decision that "credit must be given in a comparative renewal proceeding,

when the applicants are otherwise equal, for the value to the public in the continuation of the existing service." This was found to have tipped the balance in RKO's favor, and the license was therefore renewed—conditional with respect to anticompetitive practices on the final outcome of the WNAC proceeding.

#### IV

We come now to our final task—scrutiny of the F.C.C.'s ultimate decision in the light of the standards for comparative renewal hearings developed by the agency in the past. In reviewing the F.C.C.'s decision, \* \* \* our function is, as has often been repeated, a limited one. It is necessary only that we satisfy ourselves that the agency acted within the bounds of its statutory and constitutional authority, that it has followed its own procedural rules and regulations, that its findings of fact are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions do not deviate greatly from past pronouncements without sufficient explanation, and that in general it has engaged in reasoned decision-making.

The two basic features of the present system as the Commission has developed it are that a renewal applicant will be judged on his past record, and that the so-called traditional comparative factors are largely predictors of the kind of service a new applicant would offer and not requirements for being a good licensee. It is not our function to approve or disapprove this framework if it falls, as it does, within the agency's authority. As we have said before, and as the F.C.C.'s oversight committees in Congress have recently reiterated,<sup>35</sup> the comparative hearing process might well come much closer to producing licensees who act in the public interest if standards of "substantial service" in programming and other areas were developed either by the FCC directly or through stricter rules for ascertainment of community needs, and if licensees were required to follow them or run the risk of non-renewal. But we reiterate that it is not our judicial job to direct the Commission on how to run the comparative hearing process, beyond assuring that the administrative process respects the rights of the public and of competitors assured under the Communications Act and the *Ashbacker* doctrine, and that it produces rational decisions based on factors generally known in advance.

We consider first the Commission's finding that RKO's performance was "average" and not "poor" as the hearing examiner had found. If the performance was poor, then by the Commission's own standards, RKO would have been almost out of the running. While the examiner's decision is an important part of the record before this

35. Broadcast License Renewal Act, H. Rep.No.93-961, 93d Cong., 2d Sess. 16-17 (1974); Broadcast License Re-

newal Act, S.Rep.No.93-1190, 93d Cong., 2d Sess. 10 (1974).

court, particularly where he is overturned on an inference from facts accepted by the Commission, "it is the agency's function, not the Examiner's, to make \* \* \* the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." *Greater Boston Television Corp. v. F.C.C.* [supra.] The record shows that KHJ's programming during the license period was largely oriented to the showing of feature films, usually interrupted by a substantial number of commercials. On the other hand, the record also shows that RKO was the first licensee in the country to obtain a substantial film library and to make these movies available to the television audience. While some films engendered substantial criticism for excessive violence, many of the movies "claim excellence" and the large bulk were inoffensive. In addition, RKO did present, at a substantial expenditure of money, some other entertainment programs which enriched the Los Angeles television scene. In the non-entertainment category where RKO had not promised much, the showing was similarly mixed. News coverage, for example, even for the 1962-65 era of 15-minute national news, was not overabundant, but on the other hand the station did present a certain amount of coverage of Los Angeles City Council hearings. On an absolute basis, it might be difficult for all of us, if we were regulators, to characterize KHJ's past performance as "superior," entitling it to "a plus of major significance,"<sup>40</sup> but as judges we are agreed that we cannot, on the record as a whole, say that the Commission's decision that programming performance was "average" is bereft of the support of substantial evidence.

Having decided that RKO's programming performance was only "average," the Commission had to go on to the other traditional criteria, comparing Fidelity's predicted success in achieving the goals of integration, local ownership, and diversification with RKO's actual performance in those areas.

As we noted above, the examiner, but not the Commission, gave Fidelity a demerit for its integration proposal. The agency's reversal of the hearing examiner on this point was more apparent than real, since both felt that the proposal, while on paper all that the Commission could have wanted, had extremely little chance of being implemented. \* \* \*

On RKO's behalf, the Commission found that, through the company's policy which "requires the management of its stations to involve themselves in a wide range of community and civic organizations and to use the information gained from such contacts to help determine the direction and programming of the station," RKO's management had acquired the kind of interest in local affairs which

40. *Citizens Communications Center v. F. C. C.*, 145 U.S.App.D.C. 32, 447 F.2d 1201, 1213 (1971).

made the station responsive to the community—the ultimate goal of the integration and local ownership criteria. The examiner's decision shows that KHJ's supervising personnel were long-time residents, including natives, of the Los Angeles area, and were active in a wide variety of civic associations both locally and nationally. The record also shows more formal efforts to ascertain community needs, as well as the results of these efforts in KHJ's programming. While we cannot say that RKO's local interest performance was any better than Fidelity's could be predicted to be on the basis of the challenger's integration proposal, we also cannot properly overrule the Commission's finding that it was no worse.

With respect to diversification, it was apparent on this record that Fidelity had far fewer media interests than did RKO<sup>42</sup> and that if diversification in its quantitative form were the basis of comparison, Fidelity should have been preferred on this point. However, in a renewal hearing, or in a standard comparative hearing where one applicant is the licensee of other stations, the Commission has on occasion considered whether the licensee has in the past met the goals of diversification by operating his stations autonomously and independently. See *McClatchy Broadcasting Co.*, 19 F.C.C. 343, 380–81 (1954). But cf. *Chronicle Broadcasting Co.*, 18 F.C.C.2d 120, 123 n. 9 (1969). In addition, the number of other outlets for diverse views in the market is an important consideration in weighing the need for a new organization to receive the license. \* \* \* Here, both the Commission and the examiner found that KHJ was operated independently of control from the national office of RKO or General Tire, except in broad policy areas. \* \* \* There is also substantial evidence to support the Commission's findings that there is sufficient opportunity to present diverse views through the area's 126 radio stations, 12 commercial television stations and 350 newspapers, including two general circulation dailies. Though the Commission has vacillated over the years in its general approach to diversification, its determination in this case was not in direct conflict with any rule or any policy as enunciated in prior decisions, and we cannot say that the approach here was an unreasonable or unlawful application of the existing diversification principles to this renewal case.

On the whole it is fair to say that the Commission found that the ultimate effect of its analysis of the record was that Fidelity and RKO were essentially equally poor contenders—or, at the best, both were minimally acceptable applicants. While the agency was under

42. The agency's opinion used the ownership by one of Fidelity's minor stockholders of a substantial interest in suburban Los Angeles newspapers to diminish Fidelity's rating on diversification. Fidelity contends, however, that the newspapers were mere advertising throwaways which cannot

be considered media interests. This is one of the charges on which no hearing was held; it should not have been used at all by the Commission. The error, however, was minor and, in our view, did not control or significantly affect the outcome.

no obligation to give the license to either competitor, we cannot say that it committed legal error when, in its attitude as of the times pertinent in this case, it took the view that "minimal service is to be preferred to no service at all." Compare Broadcast License Renewal Act, H.Rep.No.93-961, 93d Cong., 2d Sess. 17 (1974). There is no need here to expand on "renewal expectancies." We are not faced with a situation where a superior applicant is denied a license because to give it to him would work a "forfeiture" of his opponent's investment. We merely confirm what we intimated in the *Greater Boston Television Corporation* case—that, when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license.

It is worth emphasizing the special posture of this particular case. It is based on a record built under standards which have since been upgraded or modified or reconsidered by the Commission. New community ascertainment criteria have been issued and there is now a requirement for something of a continuing dialog between a station and its audience. The agency has also undertaken its rule-making process on cross-ownership. The development, through rule-making, of standards of "substantial performance" also seems imminent and should prove helpful. We hold here only that under the former criteria the Commission, when faced with a poor challenger who offers little more and is likely in fact to provide somewhat less than the incumbent, did not commit reversible error by awarding the license to the incumbent.<sup>44</sup>

Affirmed.<sup>45</sup>

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44. Judges Leventhal and Davis join in the court's affirmance of the Commission for the reasons given, but wish to note, speaking for themselves, that the Commission could have considered the alternatives of granting RKO a short or conditional license rather than limiting itself to a choice of non-renewal or a full three-year license. The FCC's authority to grant short licenses was made explicit by the 1960 Communications Act Amendments, now codified at 47 U.S.C. § 307(d) (1970), and the agency has in fact granted short licenses particularly where ex parte communications or other conduct have raised questions about a potential licensee's character or where the successful licensee has succeeded only by default. See *Greater Boston Television Corp. v. F. C. C.* The Commission also has the authori-

ty to grant conditional licenses, 47 U.S.C. § 303(r) (1970) \* \* \*.

Particularly where a qualified competitor brings a licensee's weaknesses to the FCC's attention, the public interest might be better served by the Commission's considering whether a short or conditional license would induce the licensee to correct the weaknesses—here going both to programming and to character. In addition, such a license could serve, if needed, as a basis for treating the licensee as a new applicant when the license comes up for renewal. See *Greater Boston Television Corp. v. F. C. C.* \* \* \*

45. Our affirmance, \* \* \* is conditional (as was the Commission's decision) on the ultimate outcome of the WNAC proceedings.

## APPENDIX

The following are excerpts from the Hearing Examiner's findings regarding KHJ-TV's programming. His Initial Decision is reported at 44 FCC2d 149; the Commission decision rejecting his conclusions of law is reported id., at 123.

SOME NOT SO FAVORABLE ASPECTS OF  
KHJ-TV'S PROGRAMMING*Commercialization*

91. Much of KHJ-TV's air time is devoted to the presentation of advertising. The station has no policy limiting the amount of advertising it will present. It does limit to 25% the amount of time it will carry commercial announcements during a half-hour period but permits the 25% to be averaged over a two-hour period. \* \* \* During the 1965 composite week KHJ-TV reported presentation of 1132 commercial spot announcements. Its application for renewal estimates that its next renewal application would show 1430 such announcements.

*Movies and Other Programming*

93. The time between commercial announcements at KHJ-TV is, by and large, occupied by movies. Many of these are old, many are repeated and many feature crime.

95. [KHJ-TV's total broadcast time during the 1965 composite week was 133 hours, 40 minutes, of which 113 hours, 41 minutes were devoted to syndicated or feature film presentations.]

*Crime and Violence*

98. The one feature of KHJ-TV's programming that is not adequately covered thus far is the station's practice of presenting movies featuring crime and violence. As one for findings, the subject is not without difficulty. Besides ever recurrent First Amendment problems attendant upon examination of the substantive content of any radio or television programming, there are two schools of thought on the social desirability of television shows featuring crime and violence. One of these schools claims that a diet of such vicarious experiences is just what we all need, for it purges us of our innate criminal propensities. The other school simply views such programming as a college for criminal knowledge. Be that as it may, the record shows that KHJ-TV did show a lot of movies featuring crime and violence, and that an appreciable body of opinion out of the station's audience strongly protested this practice. \* \* \*

## QUESTIONS

1. What, if anything, does *Fidelity* leave of the integration and diversification criteria? See *Cowles Florida Broadcasting, Inc.*, 39 R.R.

2d 541, 546 (1977) (on reconsideration). Should the proposed autonomy of each commonly owned station be relevant in the initial licensing context as well as at renewal, i. e., where an incumbent broadcaster or newspaper owner seeks a new license?

2. What is the relevance of a licensee's trade practices, such as reciprocal dealing, to its broadcast performance? Is this entirely a matter of "character," or is there possibly an anticompetitive impact on a market with which the FCC is appropriately concerned? Cf. *National Broadcasting Co. v. United States*, *infra*, 247.

3. (a) Is *Fidelity* the death-knell for any serious comparison of an incumbent to a challenger on renewal? Can it be distinguished on the ground that it would have been inequitable to deny a license based upon 1962-65 performance, which predated the *WHDH* decision and related developments? Consider the following assessment by former Commissioner Robinson in his dissent to yet another comparative renewal decision, *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372, 37 R.R.2d 1487, 1555-56 (1976) (appeal pending, D.C.Cir.):\*

All in all, *Fidelity* was a tour de force, accomplishing even more than the Commission has purported to accomplish with its ill-fated 1970 Policy Statement. In 1970, the Commission merely purported to guarantee renewal to an incumbent which demonstrated 'substantial' service. In *Fidelity*, it managed to grant renewal to an incumbent who demonstrated 'average service,' who was actually the weaker candidate on one major comparative criterion [diversification], and not materially better on the others (integration and local ownership).

(b) Is the court's final paragraph any assurance of the continued vitality of the comparative hearing on renewal? How promising are the implications of footnote 44 concerning short or conditional renewals?

4. Consider the related legislative proposal made in Comment, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U.Chi.L.Rev. 854, 876 (1969): Initial licenses would be issued for six years but after three years the FCC would hold a hearing to evaluate the licensee's record and the proposals of those who plan to compete for the license at the end of its term. The Commission could extend the license by three years giving the incumbent a new six-year tenure, or if it preferred one of the proposals, refuse to extend the license, in which case the licensee would have three years to improve its performance before undergoing a second comparative hearing. During that period the licensee could not transfer the license (i. e., sell the station) to anyone other than the challenger who had appeared at the hearing with the proposal preferred by the Commission.

"The [proposed] amendments attempt to provide sufficient incentives for an applicant to challenge \* \* \* while reducing the

\* Reversal on appeal. See Appendix B, p. 721 *infra*, for the opinion of the court, which should be read at this point.

'ambush' effect of such challenges on present broadcasters." Do they succeed? At what cost? Do you prefer this approach or that of H.R. 699 in attempting to assure broadcaster responsiveness to community needs?

5. (a) The WNAC-TV comparative renewal proceeding in which the antitrust issues are before the FCC is still pending. An additional issue was proposed by one of two challengers, Community Broadcasting of Boston, Inc. when it charged that General Tire and Rubber Company had bribed government officials in Chile, Morocco, and Rumania. Is this a character issue alone? What do you think of the challenger's argument that "[t]he public's right to accurate, full and complete disclosure of wrongdoing is impaired when the wrongdoers themselves control broadcast facilities?" (N.Y. Times, Dec. 11, 1975.) Should broadcast ownership be isolated from all other interests by disqualifying conglomerate applicants?

(b) General Tire and Rubber Co. has sought Commission consent to transfer de jure control of RKO General, which holds seventeen radio and television licenses, to the parent firm's 51,000 shareholders—to "spin off" the subsidiary, in the jargon of corporate reorganizations. According to General Tire, this would merely formalize RKO's de facto independence of the parent, while freeing the subsidiary of recurring legal problems, particularly before the Commission, owing to the relationship. The FCC has deferred acting on this application for pro forma transfer of control pending decision in the WNAC case, on the ground that the continued interest of General Tire is essential to a full "adversarial development of the facts sought to be explored by the added issues." 40 R.R.2d 1059 (1977).

(c) More recently RKO General agreed to sell WNAC-TV to New England Television Corp., a new company formed by the two petitioners to deny. New England, which will have about 15-20% black ownership, is to pay \$54 million—a figure considered very low by some media brokers. The transaction is conditioned on the FCC's renewing RKO's license and determining "that in all other respects RKO possesses the requisite qualifications to be a broadcast licensee," thereby providing the successful outcome in the WNAC proceeding on which the renewal license for KHJ-TV (and WOR-TV, New York) depends. Broadcasting Magazine, Apr. 24, 1978, at 29. If the sale is approved, General Tire will presumably then be allowed to complete its spin-off of RKO General.

Should the FCC approve the proposed transfer to New England on RKO's terms? Is the consideration that led it initially to block the spin-off an equally weighty objection to the new proposal?

6. Yet another approach to assuring and assessing broadcaster performance would be for the Commission to establish quantitative program and advertising standards. One proponent of this approach (who thought the FCC should have denied both applications in *Fidel-*



ity and invited new applicants to enter) also notes that such standards could "eventually be used in all licensing proceedings, original and renewal, contested and uncontested." Goldin, Spare the Golden Goose—The Aftermath of WHDH in FCC License Renewal Policy, 83 Harv.L.Rev. 1014, 1028 (1970).

As the following Report and Order shows, the Commission has now rejected a quantitative approach to measuring "substantial" past performance for comparative renewal purposes. It did so in the proceeding hopefully referred to in footnote 35 of the court's opinion in *Citizens Communications Center*.

### FORMULATION OF POLICIES RELATING TO THE BROADCAST RENEWAL APPLICANT, STEMMING FROM THE COMPARATIVE HEARING PROCESS

Federal Communications Commission, 1977.  
40 R.R.2d 763 (Docket No. 19154) (appeal pending, D.C.Cir.).

#### REPORT AND ORDER

1. The Commission has before it for consideration \* \* \* the criteria to be used during a comparative proceeding in which a renewal applicant is challenged by one or more new applicants for the same facility.

5. The Commission was aware that the policy and standards which it had adopted lacked mathematical precision and that the elements which would constitute substantial service would have to be developed in terms of the particular factual circumstances of hearing cases. On February 23, 1971, however, the Commission instituted the present inquiry in an effort to explore the feasibility and appropriateness of quantifying a concept of substantial service by which the past performance of a licensee could be properly evaluated in the context of a comparative hearing. Notice of Inquiry, 27 FCC 2d 580. As a beginning point, the inquiry concerned television broadcasting only and focused on two important areas, local programming and programming designed to contribute to an informed electorate, specifically news and public affairs programming. The following figures were proffered as representative of a substantial service:

"(i) With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15% in the prime time period, 6-11 p. m., when the largest audience is available to watch).

"(ii) The proposed figure for news is 8-10% for the network affiliate, 5% for the independent VHF Station (including a figure of 8-10% and 5%, respectively, in the prime time period).

“(iii) In the public affairs area, the tentative figure is 3-5% with, as stated, a 3% figure for the 6-11 p. m. time period.”

Where a percentage range was proposed, it was stated that the applicable percentage would depend on the station's revenues and market size. As a general matter, it was also suggested that unprofitable stations be exempted from these tentative guidelines and so, independent UHF Stations were excluded until such time as they became profitable. The high end of the range in each category was to apply to renewal applicants in the top 50 television markets with annual revenues over \$5 million, whereas the low end would apply to stations which were located outside those markets and which had annual revenues totalling less than \$1 million. An appropriate graduation within the suggested ranges was left to be established for intermediately situated stations.

6. The Notice of Inquiry further pointed out that the proposed program guidelines were only prima facie indicators of substantial service. They were not conceived to be automatically definitive, either for or against the renewal applicant. If the renewal applicant did not meet these program guidelines, it could still be argued in the comparative hearing that the overall service rendered was substantial notwithstanding the substandard quantitative performance in the local and informed electorate program areas. In the same vein, the satisfaction of these guidelines would not preclude an evidentiary showing that the station's past performance was not, in fact, substantial—that the station had not dealt with the issues of truly great public concern or had failed to serve equitably and in good faith the needs of significant groups within its service area. Finally, it was noted that the program guidelines, if adopted, would not be fixed or immutable. They would have to be revisited at appropriate intervals to determine, in light of experience and changing conditions, whether the selected figures should be revised, upwards or downwards.

7. On June 11, 1971, the United States Court of Appeals for the District of Columbia Circuit invalidated the Commission's 1970 Policy Statement, holding that the bifurcated hearing procedure adopted by the Commission contravened Section 309 of the Communications Act, as interpreted in *Ashbacker Radio Corp. v. FCC*, 326 US 327 (1945), by depriving the qualified new applicant of its right to a full hearing on the merits of its application. *Citizens Communications Center v. FCC*.

8. In a Further Notice of Inquiry adopted on August 4, 1971, the Commission weighed the impact the Citizens case had upon the instant proceeding and concluded that the court's decision reinforced, rather than obviated, the need to seek out and quantify, at least in part, a past performance entitling the renewal applicant to a “plus of major significance” in a comparative renewal situation. See 31 FCC

2d 443. While expressing some confusion as to the meaning ascribed by the court to the term "superior," the Commission found that further attempts to redefine the differing characterizations applied to the renewal applicant's past performance were not necessary. "What rather counts," stated the Commission, "are the guidelines actually adopted to indicate the 'plus of major significance'—the type of service which, if achieved, is of such nature that one can ' \* \* \* reasonably expect renewal' \* \* \* " 31 FCC 2d at 444. Thus, the Commission invited interested parties to address themselves to the appropriateness in this respect of the percentage figures, set forth in the prior Notice, \* \* \* [At the same time] the Commission expressed its disbelief that a general standard could be formulated with respect to the diversification of control of the media of mass communications. That important factor, reasoned the Commission, "is one which must be evaluated on the facts of each case." 31 FCC 2d at 445.

9. \* \* \* In the Second Further Notice [43 FCC 2d 367 (1973)], the Commission requested interested parties to comment on the pragmatic problems arising from the implementation of definitive guidelines in this area. Some problems specifically noted by the Commission were the categories of programming selected, the precise definitions of those categories, the relative merit of exact percentages or percentage ranges to reflect substantial service, and the applicability of the suggested standards to various groups of stations. In conjunction with this Notice, a special questionnaire was issued to all commercial television licensees in order to elicit current data on the program categories selected for the proposed percentage guidelines. The tabulations, based on these questionnaires, were set forth in the Third Further Notice [43 FCC 2d 822 (1973)].

15. Our attention was originally focused on the effects of quantitative standards on comparative renewal hearings. However, many of the comments filed discuss the anticipated effects of such standards outside the hearing process. It has become entirely clear that, whatever use standards would have in hearings, they would also have a substantial effect generally. In fact, we believe that almost all licensees would adopt our standards of substantial performance as their own minimum standards. This would result in increased levels of local, news, and public affairs programming, since many stations now broadcast lesser amounts of these program types.

16. Some commenters, \* \* \* applaud the expected increases in these "favored" program categories as an improvement in broadcasters' public service. However, many others maintain that mere quantitative increases are an illusory gain, and that the intrusion on licensee discretion inherent in the scheme argues against it. There is some merit in each view. It is apparent that the value of a program to the viewing public is dependent on many variables, including the resources committed to its production and its relation to audience

needs and interests. Those stations that increased their support for local and informational programming might well upgrade their service. However, others—through choice or necessity—might only spread their resources thinner, and reduce the quality and value of such programming. In short, increasing the amount of this programming would not necessarily improve the service a station provides its audience. In any event, we have no illusions that quantitative standards would be other than an encroachment on the broad discretion licensees now have to broadcast the programs they believe best serve their audiences. We do not believe such a result is justified unless there are clear and substantial benefits accompanying it. We therefore turn to consideration of the likely effects of quantitative standards on the comparative hearing process.

18. Unfortunately, the very flexibility required for meaningful quantitative standards reintroduces much of the uncertainty we sought to avoid in the first place. Were they in effect, selecting the precise standards from the specified ranges would itself be a point of contention between competing applicants. Further, even once it were determined that a station's performance fell above or below the appropriate standards, the parties would indubitably dispute whether other factors overcame the *prima facie* showing of substantial or insubstantial service. Thus, quantitative standards do not appear to us to offer licensees, competing applicants, or the public any significantly greater certainty as to what level of performance would constitute substantial service. In addition of course, even a clear history of substantial service would not guarantee renewal, since any preference awarded for it cannot terminate the hearing in favor of the incumbent licensee.

19. Quantitative standards also suffer a defect suggested earlier, when we pointed out that meeting them established only a *prima facie* case of substantial service. We rely chiefly on program percentages and avoid judging program quality *per se*, but there are certain qualitative aspects we must consider. This was illustrated in an example we gave in the Notice of Inquiry: "An applicant could devote a most substantial percentage of his time to public affairs, \* \* \* but with coverage solely of issues like canoe safety, rather than the issues that are truly of 'great public concern' in the area." We therefore look to the adequacy of an applicant's ascertainment of community problems, needs, and interests, and to his programming in response to them. While we afford a licensee great discretion in selecting his responsive programming, the adequacy of the programming effort is obviously the sum of both the amount and the nature of it. Since quantitative standards cannot take such important factors into account they are inherently deficient.

### Conclusions

20. To summarize, we believe that the quantitative program standards under consideration here would have effects in two areas. First, they would artificially increase the time most television stations devote to local, news, and public affairs programming. Such general increases were not our purpose in this proceeding and would represent a restriction on licensees' program discretion, a result we would eschew in the absence of clear and substantial public interest benefits. Licensees must present a reasonable amount of local and informational programming to justify renewal, but we are not convinced that the government should impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served. Second, they would not produce any significant improvement in the quality or efficiency of our comparative renewal hearing process. On the contrary, they might well complicate the process further.

21. We set out to establish benchmarks of substantial program service which would warrant preferring an incumbent licensee to a challenger, thereby affording licensees a degree of certainty as to programming performance they would have to achieve to protect themselves against competing applicants. \* \* \* [W]e conclude that quantitative standards would not do what we had hoped. They would not simplify the hearing process, and they could not offer a licensee any real assurance of renewal. They are a simplistic, superficial approach to a complex problem, and we will not adopt them.

22. While we have decided that quantitative program standards should not be adopted and that this protracted inquiry should be terminated, our efforts and the endeavors of those who participated herein have not been for naught. The evaluation of the commentary developed in this proceeding and the experience acquired since 1971 in considering individual comparative renewal cases and in reviewing the legislative proposals advanced in Congress have led this Commission to conclude that inadequacies of the mechanism for comparing the incumbent licensee and the new applicant are symptomatic of the defects inherent in the comparative renewal process itself. In November 1976 we therefore recommended to Congress the elimination of comparative renewal hearings \* \* \*.

23. Until such time as the Congress acts in this area, the Commission will continue to resolve these renewal proceedings in a manner consistent with the policies and practices set forth in prior comparative renewal cases. \* \* \*

24. \* \* \* [T]he renewal applicant must therefore continue to run on its record, and we believe that that record should be measured by the degree to which the licensee's program performance was sound, favorable, and substantially above a level of mediocre service

which might just minimally warrant renewal. Where the renewal applicant has served the public interest in such a substantial fashion, it will be entitled to the "legitimate renewal expectancy" clearly "implicit in the structure of the [Communications] Act." *Greater Boston Television Corporation v. FCC*, supra. Thereafter, we will direct our attention to the comparative factors set forth in the 1965 Policy Statement, supra. While that policy statement will otherwise govern the introduction of evidence in the comparative renewal proceeding, the weight to be accorded the legitimate renewal expectancy of the incumbent licensee and the significance of other comparative considerations will depend on the facts of the particular case.

25. This approach leaves it to the hearing process to determine—on a case-by-case basis—which applicant would best serve the public interest. Given the comparative nature of the process, we question whether any other result is possible, since each case must be decided on the record. That is, because each applicant is entitled to a full and complete comparative hearing, the outcome of the hearing must depend on the evidence adduced, not on some absolute standard set by the Commission.

26. Accordingly, it is ordered, that this proceeding is terminated. [The separate concurring statements of Commissioners Hooks and Fogarty, and of Commissioner Quello, are omitted.]

An appeal of this rulemaking decision has been filed with the D.C. Circuit Court of Appeals by the National Black Media Coalition and the San Jose chapter of the Committee for Open Media. *Broadcasting*, June 13, 1977, at 46.

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#### NOTES AND QUESTIONS

1. What were the various reasons that the FCC gave for abandoning the proposal that it develop quantitative standards for evaluating a licensee's past performance? Were the shortcomings perceived in such an approach more or less grave than those inherent in the present approach to comparative license renewal questions? For a vigorous defense of the rejected quantitative approach, and some refinements in its formulation, see Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 Va.L.Rev. 471, 503-14 (1975).

2. Notice that the proposal considered in Docket 19154 would have applied quantitative analysis to broadcasting *outputs* only. An alternative that dealt with broadcasting *inputs* was suggested in the *Citizens Communication Center* case (at n. 35): "\* \* \* one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public." Would this approach have overcome the objections raised in the foregoing Report and Order?

Would it have other drawbacks? What are they, and what regulatory response would they engender?

3. *Merit goods and tax policy.* You may find it useful to conceive of the FCC's efforts to encourage a particular type of programming as essentially equivalent to the imposition of a tax upon broadcasters—something like a franchise tax. It should be obvious that if the provision of an officially favored type of program ("merit" programs) were consistent with broadcaster profit maximization, there would be no need for regulatory intervention in order to encourage such programming. If the favored programs are not forthcoming to the degree desired, providing them in greater quantity *probably* entails submaximization of broadcaster profits, and the use of government to require them in greater quantity is like imposing a tax payable in kind rather than in money. See Posner, *Taxation by Regulation*, 2 Bell J.Econ. 22 (1971).

There are certain questions that you should always ask in analyzing such a regulatory intervention, just as you would if it were couched in the form of an explicit tax.

a. *Incidence.* What is the incidence of the burden and the benefit of the tax requirement? That is, who is helped and who is hurt by it? Because viewers and broadcasters do not explicitly transact, this question is particularly difficult in the context of merit broadcast programming. Consider the relative positions of broadcasters, advertisers, consumers of advertised products, and various sub-groups of the potential and actual audiences.\* In doing so you may find it helpful first to ask what the outcome would be in the following, rather extreme cases: (i) The three stations in a television market are required to carry only merit programs in prime time; or in a particular hour thereof. (ii) In each of the three hours between 8:00 and 11:00 p. m. a different station is required to carry merit programming.

b. *Tax planning.* What steps will be taken in order to minimize the impact of the tax? For example, in a market with two or more television stations, where would you, as program director for one of them, schedule your merit programs: opposite your competition's merit programs? Or opposite their entertainment programs, and if so, how would you choose a time?

c. *Enforceability.* It was said of the Romans that they would make a desert and call it peace. Tacitus, *Agricola* § 30. May it not also be said of some broadcasters that they

\* Don't forget to ask who benefits from there being an "informed electorate", i. e., an electorate informed by televi-

sion news and public affairs programs?

traffic in "happy talk" and call it news? How much of the contemporary "news" program is related to the policy of having an "informed electorate"?

The FCC anticipated the possible need to distinguish between public affairs programs concerning issues of great and of little public concern, such as canoe safety. ¶ 19, *supra*. Would it also be necessary, under either an input or an output quantitative approach, to distinguish between bona fide news and other chatter on a "news" program?

4. Are the problems associated with quantitative requirements overcome if the quotas are expressed not in terms of the air time devoted to a particular merit category but rather in terms of the "viewer hours" a broadcaster must achieve? For an imaginative proposal along this line, see Schiro, *Diversity in Television's Speech: Balancing Programs in the Eyes of the Viewer*, 27 *Case W. Res.L.Rev.* 336, 353 (1976).

5. In a separate opinion in Docket 19154, Commissioners Hooks and Fogarty proposed as an alternative to quantitative guidelines a "Comprehensive Overview" Approach, to be implemented as follows:

\* \* \* [T]here should be articulated an outline of those positive activities engaged in by licensees which could evidence a strong commitment to the public interest responsibilities that accompany the broadcasting privilege. Such a conceptual list should include not only those codified duties that form the threshold [of] any bare acceptability test, but those that go appreciably beyond our minimum requirements. Moreover, for purposes of taking cognizance of conduct that is in the truest sense "superior," the list should fully include those activities that demonstrate an awareness of and sensitivity to community problems, needs, tastes, and interests above and beyond those strictly amenable to regulatory supervision. By these, we mean those activities which evince a full integration into the affairs of the community and the licensee's attempts through its licensed medium to call attention to problems, to suggest answers, to educate the electorate, to serve minority groups, to recognize and respond to the needs of the large children's audience—in short—to illuminate, to entertain, to enlighten, to uplift.

Is this a promising approach to the goals initially proposed to be reached by means of quantitative standards?

#### D. THE ASSUMPTION OF TECHNOLOGICAL SCARCITY RELAXED

The comparative hearing with which this chapter has been concerned thus far is of course premised upon the technological im-



possibility of accommodating all would-be broadcasters. Entry into the industry may, however, encounter non-technological barriers as well. There is the obvious economic barrier, enhanced by the financial qualifications required by the FCC, but that is not a difficult one to overcome if large profits can be expected. Less obvious, and less explicable, are the litigative barriers created by liberal standing rules under which "any party in interest" may petition the FCC to deny any application. Communications Act, § 309(d)(1). This language has been interpreted to enable anyone in economic harm's way, normally a competitor, to contest an application before the FCC and, of course, to appeal its grant to the courts.

The economic consequences of this rule, may be measured in the out-of-pocket litigating cost to the applicant—who is receiving no broadcast revenue during this prolongation of the entry process—and the profit lost during the delay. Since the intervening incumbent incurs only the litigating expense and realizes an immediate return thereon—in the form of continued profits at their higher level prior to new entry—it will often have an incentive to invoke its standing, even if its case is not a strong one on the merits.

In the following cases, however, the ground for standing and the case on the merits are very closely related under the banner of the public interest. The asserted interest is an elusive one, however, and you would do well to examine it very critically before accepting or rejecting the assertion.

### CARROLL BROADCASTING CO. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1958.  
258 F.2d 440.

PRETTYMAN, Circuit Judge.

This is an appeal from the Federal Communications Commission and concerns a license for a standard broadcasting station. Carroll, our appellant, is an existing licensee. It unsuccessfully protested the grant of a license to West Georgia, our intervenor.

Carrollton and Bremen are towns in Georgia, twelve miles apart, with populations, respectively, of 8,600 and 2,300. Carroll's main studios are in Carrollton. West Georgia would broadcast from Bremen.

Three issues were prescribed by the Commission for the hearing upon the protest. One of these was upon the request of Carroll and was:

"To determine whether a grant of the application would result in such an economic injury to the protestant as would impair the protestant's ability to continued [*sic*] serving the public, and if so, the nature and extent thereof, the areas and

populations affected thereby, and the availability of other broadcast service to such areas and populations.”

\* \* \*

On this issue the Commission held that “Congress had determined that free competition shall prevail in the broadcast industry” and that “The Communications Act does not confer upon the Commission the power to consider the effect of legal competition except perhaps” in Section 307(b) cases. Hence, said the Commission, “it is unnecessary for us to make findings or reach conclusions on this issue.” Moreover, the Commission said, pursuant to other decisions by it, as a matter of policy “the possible effects of competition will be disregarded in passing upon applications for new broadcast stations”.

It was settled by the Sanders Brothers case<sup>1</sup> that economic injury to an existing station is not a ground for denying a new application. But the Court, it seems to us, made clear the point that economic injury to a licensee and the public interest may be different matters. The Court said, for example:

“*First.* We hold that resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.”

And the Court said:

“This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission’s practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter.”

Thus, it seems to us, the question whether a station makes \$5,000, or \$10,000, or \$50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be

1. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940).

improved by competition. But, if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.

\* \* \*

So in the present case the Commission had the power to determine whether the economic effect of a second license in this area would be to damage or destroy service to an extent inconsistent with the public interest. Whether the problem actually exists depends upon the facts, and we have no findings upon the point.

This opinion is not to be construed or applied as a mandate to the Commission to hear and decide the economic effects of every new license grant. It has no such meaning. We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial (i. e., if the protestant does not fail entirely to meet his burden), should make a finding or findings.

The Commission says that, if it has authority to consider economic injury as a factor in the public interest, the whole basic concept of a competitive broadcast industry disappears. We think it does not. Certainly the Supreme Court did not think so in the *Sanders Brothers* case, *supra*. Private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public. The broadcast industry is a competitive one, but competitive effects may under some sets of circumstances produce detriment to the public interest. When that happens the public interest controls.

\* \* \*

Remanded for further findings.

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## QUESTIONS

1. Was the Supreme Court's concern in *Sanders* that "both stations—the existing and the proposed—will go under" a reasonable one? Is that more or less likely to occur in broadcasting than in other industries, such as retailing? Should entry into that field be similarly restricted, then? See 2 A. Kahn, *The Economics of Regulation* 173 ff. (1971). Compare Meeks, *Economic Entry Controls in FCC Licensing: The Carroll Case Reappraised*, 52 *Iowa L.Rev.* 236 (1966)

with Note, Economic Injury in FCC Licensing: The Public Interest Ignored, 67 Yale L.J. 135, 141-45 (1957).

2. Why would either of the stations, let alone both, be "compelled to render inadequate service?" The theory of competition points in just the opposite direction, and it is monopolies that are usually thought to abuse consumers. Are broadcasters just perverse in this respect? Consider what the Court might have meant by "inadequate service," and this comment from Comanor and Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J. Law & Econ. 177, 178-79 (1972) (emphasis in original):

A dominant feature of *planning by regulation* is that the regulatory authorities have only limited power for their task. While they can require that certain actions be taken, they generally have no funds at their command to subsidize or pay for desired results. What they can do is to protect the monopoly position of the firm in certain markets, precisely so that these funds can be used to subsidize projects—desired by the regulators—which are not self-sustaining. What they can provide is the protection required for internal subsidization.

3. *Carroll* is applied not only to the question of whether to grant a new initial license; indeed, the next case involves a transmitter relocation that would have introduced the applicant's signal into some areas served by the protestant. Should it also apply to other steps that can have serious economic consequences to competitors, such as a transfer of ownership to a more aggressive or talented licensee, or a change in format, e. g., to become the second all-news radio station in a market? \* Geographical market protection, without product market protection, seems rather incomplete, but consider whether there would be special problems in these suggested extensions of the protection.

#### WLVA, INC. (WLVA-TV), LYNCHBURG, VA., v. FCC

United States Court of Appeals, District of Columbia Circuit, 1972.  
459 F.2d 1286.

J. SKELLY WRIGHT, Circuit Judge:

\* \* \* WLVA, Incorporated (WLVA-TV), our appellant, challenges a September 9, 1970 memorandum opinion and order of the Federal Communications Commission granting without a hearing the application of intervenor Roanoke Telecasting Corporation (WRFT-TV) for a construction permit to make major modifications of its UHF television facilities in Roanoke, Virginia. Specifically, WLVA-TV

\* The latter change, however, does not require FCC approval, so under present law there is no proceeding in which to protest; that could be

changed, of course. Cf. *Citizens Comm. to Save WEFM v. F. C. C.* infra at 294.

contends that the Commission abused its discretion in denying its requests for (1) a *Carroll* hearing on WRFT-TV's application, and (2) an *Ashbacher* consolidated comparative hearing on both WLVA-TV's and WRFT-TV's allegedly mutually exclusive applications. We conclude that appellant's claims for these hearings were properly denied, and therefore affirm the Commission's order.

## I

Under the Commission's table of television allocations, 47 C.F.R. § 73.606 (1971), Stations WDBJ-TV, WSLS-TV and WRFT-TV (UHF) operate on Channels 7, 10, and 27 respectively in Roanoke, Virginia, a city of approximately 100,000 nestled in the mountainous terrain of western Virginia. WDBJ-TV is an affiliate of the Columbia Broadcasting System and WSLS-TV is affiliated with the National Broadcasting Company. Intervenor WRFT-TV, a considerably smaller operation, began broadcasting over Channel 27 in March 1966 as a primary affiliate of the American Broadcasting Company in Roanoke. Because of the limited scope of WRFT-TV's technical facilities, however, the station has encountered continuous and substantial financial difficulties ever since its inception. As a result, its impact on the existing competitive structure of the local broadcast market has been minimal.

Approximately 45 miles east of Roanoke is Lynchburg, Virginia, a community of approximately 55,000 people, where appellant WLVA-TV, serving as Lynchburg's only operating television station, broadcast on VHF Channel 13 as an affiliate of the American Broadcasting Company. Although the Commission's table of allocations treats Roanoke and Lynchburg as separate communities, the spacing is such that WSLS-TV and WDBJ-TV in Roanoke and WLVA-TV in Lynchburg can provide technically acceptable service to both communities.<sup>8</sup> Roanoke and Lynchburg are therefore considered a single television market (the 67th largest in the nation) by the major audience measurement firms (American Research Bureau and A. C. Nielson Company), the national television networks, national television advertisers, and the Research and Education Division of the Commission's Broadcast Bureau.

As a result, WLVA-TV competes for national and regional advertising with Roanoke television stations WDBJ-TV and WSLS-TV. The technical facilities of WSLS-TV and WDBJ-TV, however, are superior to those currently employed by WLVA-TV. The two Ro-

8. Roanoke is within the predicted city grade coverage contour of WLVA-TV and Lynchburg is within the predicted city grade contour of both WSLS-TV and WDBJ-TV. \* \* \* The reception of WLVA-TV in most of Roanoke, however, is generally of

weaker Grade A or Grade B strength. Thus while NBC and CBS each has one affiliate to cover both Roanoke and Lynchburg, ABC has 2 affiliates in the area—appellant WLVA-TV in Lynchburg and intervenor WRFT-TV in Roanoke.

anoke VHF stations transmit from antennas located on Poor Mountain, situated 13 miles southwest of Roanoke, with an effective radiated power of 316 kw and an antenna height of 2,000 feet. WLVA-TV's antenna is located on Johnson Mountain, approximately 17.5 miles southwest of Lynchburg, and operates with an effective radiated power of 316 kw and an antenna height of only 1,095 feet. Thus while WDBJ-TV and WSLC-TV are able to reach 543,000 and 581,000 television homes respectively, WLVA-TV's overall coverage is 326,000, or approximately 60 per cent of that attained by the two major Roanoke stations.

Despite this situation, however, WLVA-TV managed to garner a modest yet consistent profit until 1966. In that year the Evening Star Broadcasting Company, which had purchased the station in 1965 and transferred it to a wholly-owned subsidiary in 1966, made two decisions intended to improve WLVA-TV's competitive position *vis-a-vis* its Roanoke competitors. First, the Evening Star made sizable capital outlays and incurred sharply increased operating costs in an effort to upgrade the station's physical plant and technical equipment and to improve its public service programming. \* \* \* [Second,] WLVA-TV applied to the Commission for authority to move its facilities 17.5 miles to the northwest, to raise its antenna 1,250 feet, and for waiver of the Commission's spacing requirements. \* \* \* If granted, this modification would enable WLVA-TV to improve its existing signal over the areas it presently serves as well as to extend its Grade B coverage to reach a sizable audience west of Roanoke not presently served by the Lynchburg station.

WLVA-TV's application was opposed by WRFT-TV in Roanoke, by permittees of two Charlottesville UHF stations, and by the Association of Maximum Service Telecasters, Inc. The matter was designated for hearing on nine issues, including "whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service." WLVA, Inc., 15 F.C.C.2d 757, 764 (1968). On November 24, 1969, the hearing examiner issued his initial decision in which he recommended denial of WLVA-TV's application. The examiner concluded that a grant would have an adverse impact on WRFT-TV and that such impact would be detrimental to the public interest. Exceptions were filed and the matter is presently pending before the Commission's Review Board.

Meanwhile, on June 10, 1969, intervenor WRFT-TV applied to the Commission for modification of its own facilities. \* \* \* WRFT-TV commenced operations in March 1966 and was granted an hourly network rate of \$75 based on predicted ultimate delivery of 10,000 to 18,000 prime time homes. Because of the modest nature of WRFT-TV's technical facilities, however, the station failed even to approach its projected coverage and the hourly network compensa-

tion was therefore discontinued in November 1967 when WRFT-TV was delivering only 1,000 prime time homes. The station's financial picture is dismal. WRFT-TV suffered a net cash loss of \$41,397 during the first year of operation, \$46,729 in 1967, and \$52,740 for the first eight months of 1968. By June 1969 the station had lost over \$200,000 and the indebtedness has since swelled to over \$450,000 and is increasing at the rate of \$10,000 per month.

In an effort to rectify this situation, WRFT-TV filed its application with the Commission to expand its technical facilities and to move its transmitter to Poor Mountain, the location of WDBJ-TV and WSLC-TV. \* \* \* The new facilities would enable WRFT-TV to cover 46 per cent of the homes able to receive UHF service in the Roanoke-Lynchburg market, with the result that WRFT-TV would duplicate WLVA-TV's ABC network programming in approximately an additional 25 per cent of WLVA-TV's present coverage area.

On July 16, 1969, WLVA-TV filed a petition in support of WRFT-TV's application or in the alternative a petition to deny, arguing that "the public interest compels the grant of both its application and the application of WRFT-TV." Because of the detrimental competitive impact a grant of only WRFT-TV's application allegedly would have on WLVA-TV, however, WLVA-TV urged that "should the Commission deny its application, the application of WRFT-TV must also be denied." \* \* \*

After issuance of the hearing examiner's initial decision on WLVA-TV's own application, appellant filed another petition with the Commission requesting consolidation of consideration of WRFT-TV's application with its own on the ground of alleged economic mutual exclusivity of the two applications. WLVA-TV contended that it would be denied its *Ashbacher* rights unless this petition was granted.

The Commission [on] September 9, 1970, found that WLVA-TV had not pleaded sufficient factual data to raise a *Carroll* issue and that a consolidated comparative hearing was not required. Accordingly, the Commission, without hearing, granted WRFT-TV's application and denied WLVA-TV's petition to deny and petition for consolidation. This appeal ensued.

## II

Appellant WLVA-TV contends first on this appeal that the Commission erred in denying its request for a *Carroll* hearing to determine whether the economics of the situation would be so affected by a grant of WRFT-TV's application as to lead to an overall degradation of service to the public. \* \* \*

\* \* \* [A] petitioner seeking a hearing on the *Carroll* issue must plead specific factual data sufficient to make out a *prima facie* case that the economic consequences of a grant of the challenged ap-

plication will lead to an overall derogation of service to the public. Specifically, the petitioner must raise substantial and material questions of fact as to whether: (1) the revenue potential of the market is such that a grant will cause the petitioner to suffer a significant loss of income; (2) the effect of this loss will be to compel the petitioner to eliminate some or all of its public service programming; and (3) this loss of programming will not be offset by the increased non-network programming proposed to be offered by the applicant. Since these three aspects of the *Carroll* issue are essentially interdependent, a failure to satisfy any one of the three is likely to be dispositive of the petitioner's claim to a hearing.

In an effort to meet these requirements, WLVA-TV's pleadings incorporated by reference relevant portions of the evidentiary record compiled in the hearing on its own application for modification, but did not adduce any additional evidence directed specifically to the issue at hand. For reasons given below, we conclude that appellant failed to plead sufficient factual data to entitle it to a *Carroll* hearing.

We begin, then, with an analysis of the first aspect of the *Carroll* issue—whether a grant of WRFT-TV's application is likely adversely to affect WLVA-TV's long-run financial prospects. In the typical *Carroll* situation—where the applicant and the petitioner are in direct competition for revenues—an improvement of the applicant's facilities will almost invariably lead to a shift in advertising income away from the petitioner and to the applicant. This is, of course, a natural consequence of the law of competition. The instant case, however, is somewhat atypical, for WRFT-TV and WLVA-TV apparently do not compete for local sources of advertising. WRFT-TV has limited its efforts in this regard to the Roanoke market, while WLVA-TV concentrates solely on Lynchburg advertisers.

WLVA-TV contends, however, that although its local revenue sources may remain substantially unaffected by a grant of WRFT-TV's application, its competitive standing in the national and regional advertising markets may be seriously jeopardized. In essence, appellant argues that since WRFT-TV's proposed improvements will place duplicate network programming into approximately an additional 25 per cent of WLVA-TV's current Grade B coverage area, WLVA-TV will suffer a significant loss of audience which, in turn, will cause a freezing of WLVA-TV's network compensation and a reduction of national and regional advertising revenues.

Even if valid, however, such an argument is not, in and of itself, conclusive of the question of adverse economic impact. For even in the typical *Carroll* situation, the Commission must consider not only existing, but also future, competitive conditions. What may appear in the short run to be a substantial financial loss may often pale to insignificance when the overall revenue potential of the market is taken



into account. Indeed, "under the impetus of competition, existing operations often increase their revenue." *Tri-County Broadcasting Corp.*, 18 F.C.C.2d 751, 752 n. 1 (1969). It cannot simply be assumed that the market's capacity to generate income is essentially static and that any increased competition must inevitably result in a long-range reduction in income. Thus a mere showing of loss of *existing* sources of advertising does not, without more, raise a substantial and material question of fact as to adverse economic impact.

This does not mean, of course, that the Commission may limit *Carroll* hearings to only those cases in which "pre-knowledge of the exact economics of the situation is necessarily available." Such a restriction was explicitly rejected by this court in [*Folkways Broadcasting Co. v. F. C. C.*, 375 F.2d 299 (1967).] Rather, the petitioner must plead sufficient statistical data to enable the Commission to make an informed judgment as to the overall market revenue potential. Typically, such data includes information concerning the number of businesses in the area, total volume of retail sales, other advertising media, and other data related to the economics of broadcasting. [Citations omitted.] Moreover, since WLVA-TV's claims here hinge primarily on national and regional advertising considerations, detailed factual data relating to these sources of revenue would be particularly relevant in the present context.

Appellant, however, has failed almost entirely to provide meaningful statistical information concerning the revenue potential of the Roanoke-Lynchburg market. Instead, \* \* \* appellant apparently contends that because of certain unique features of this controversy it need not fulfill the Commission's pleading requirements in order to make out a *prima facie* case on this aspect of the *Carroll* issue. Specifically, WLVA-TV asserts that a grant of WRFT-TV's application is likely to cause a perforation of the Roanoke-Lynchburg television market. That is, Roanoke and Lynchburg would for the first time be considered as separate markets by national and regional advertisers. Under such circumstances, Lynchburg would no longer constitute part of the nation's 67th largest market and would fall to the level of 122nd in market size. Were this to occur, WLVA-TV would allegedly lose much of its national and regional advertising revenue and would therefore suffer extraordinary and irrevocable financial hardship.

\* \* \* WLVA-TV simply *assumes* that a grant of WRFT-TV's application will cause it to suffer a major loss of audience. This assumption is crucial to appellant's perforation argument, yet no evidence was presented to demonstrate that WRFT-TV's UHF signal would be technically equal or superior to appellant's own VHF signal in the area of overlap. In the absence of such evidence, WLVA-TV can hardly be said to have made out a *prima facie* case of perforation.

Even if we were to accept as valid appellant's claim that a grant would lead to a reduction in its viewing audience, the question re-

mains whether national and regional advertisers would be likely to desert WLVA-TV in favor of an expanded, yet still less powerful, WRFT-TV. \* \* \* Appellant, however, simply assumes that a loss of audience will inevitably cause its national and regional advertisers to switch to WRFT-TV; it offers no corroborating evidence whatever. We therefore conclude, as did the Commission, that appellant has failed to plead specific factual data sufficient to raise a substantial and material question as to the likelihood that a grant of WRFT-TV's application will cause WLVA-TV to suffer a significant loss of income.

Moreover, even if appellant had satisfied this requirement it still would not be entitled to a hearing, for it failed also to establish a *prima facie* case as to the second aspect of the *Carroll* issue—that the adverse economic impact of a grant is likely to compel WLVA-TV to eliminate some or all of its public service programming. The inquiry here shifts from the general market structure to the particular nature of appellant's own operation. Two considerations are paramount in this regard—the projected financial status of appellant if the application is granted, and the nature and cost of appellant's present and proposed non-network programming.

In the instant case WLVA-TV has presented no evidence concerning the cost of its public service programming. In the absence of such data, it is virtually impossible for either this court or the Commission to determine with any reasonable degree of certitude whether the alleged adverse economic effects of a grant of WRFT-TV's application are likely to cause a deterioration in the quality of appellant's service to the public. As a result, a failure to plead such information will in most cases justify denial of a hearing on the *Carroll* issue.

\* \* \* [H]owever, WLVA-TV contends that because of its "marginal" financial position any loss of revenue caused by a grant will necessarily require it to cut back on its public service programming. Data relating to the cost of such programming, appellant asserts, is therefore immaterial. Although we agree in principle with this argument, an analysis of WLVA-TV's financial picture reveals that the instant case simply does not fall within the principle espoused.

Prior to its acquisition by the Evening Star Broadcasting Company in 1965, appellant operated at a slight yet respectable profit. In 1966, however, the Evening Star commenced an intensive drive to upgrade the station's facilities and to improve its programming. Since that time, some \$400,000 has been devoted to these purposes and operating costs between 1966 and 1967 were increased by \$350,000 per year. Consequently WLVA-TV in 1966 suffered a net operating loss of \$148,408, with a cash flow loss of \$16,274; the corresponding losses for 1967 were \$164,323 and \$19,228. Throughout this period, however, WLVA-TV's gross earnings continued to climb, and appel-

lant's cash flow has gradually increased from a negative \$19,228 in 1967 to a positive \$48,677 in 1968 and 9.1 per cent of revenues in 1969.

On the basis of these statistics, the Commission rejected appellant's plea of poverty<sup>52</sup> and found, to the contrary, that the station was "financially sound." In view of this finding, which clearly was reasonable under the circumstances, we conclude that appellant's pleadings were insufficient to raise a substantial and material question of fact as to whether a grant of WRFT-TV's application is likely to cause a deterioration of WLVA-TV's public service programming.

Finally, since appellant has failed to satisfy both the first and second aspects of *Carroll*, either of which failure is sufficient to dispose of its petition, we need not consider WLVA-TV's showing under the third component—that the petitioner's loss of public service programming will not be offset by the increased programming proposed to be offered by the applicant. We therefore affirm the Commission's denial of appellant's request for a hearing on the *Carroll* issue.

#### QUESTIONS

1. What was the theory underlying WLVA's petition of July 16, 1969? Did WLVA take logically inconsistent positions at different times? What was its litigation strategy?
2. Was WLVA remiss in "simply assum[ing] that a loss of audience will inevitably cause its national and regional advertisers to switch to WRFT-TV?" Is the "assumption" unreasonable? How could WLVA have offered "corroborating evidence" for it? What sort of information would constitute "specific factual data sufficient to raise a substantial and material question" about the likely impact that WRFT's upgrading would have on WLVA? Are affidavits from present advertisers necessary? Sufficient?

The FCC in fact requires, among many other data, "the number of businesses in the area which do not now advertise on radio." *Magic Box Media, Inc.*, 40 R.R.2d 1518, 1521 (1977). Is that useful information?

3. Do you agree that WLVA was "financially sound?" Was it earning a profit for its owner?
4. One commentator has suggested that the *Carroll* doctrine is unconstitutional, arguing that "rejection of a qualified applicant where

52. To support its pleas of poverty and its claim that any loss of income will result in elimination of at least some public service programming, appellant alleged that even under existing competitive conditions it became necessary to curtail segments of the ex-

panded programming service initiated by the Evening Star in 1965. However, \* \* \* it is not clear whether these changes were made for economic reasons or merely "due to lack of audience acceptance".

\* \* \*

available frequencies exist \* \* \* would appear to be itself an abridgement of freedom of the press' guaranteed by the first amendment. *Givens, Refusal of Radio and Television Licenses on Economic Grounds*, 46 Va.L.Rev. 1391, 1403 (1960). Do you agree? As to both initial entry into broadcasting, as in *Carroll*, and a facilities change such as the one at issue in *WLVA*? If so, how would you state the requirements of the first amendment in this area?

5. Would the *Carroll* doctrine be unnecessary, on its own premises, if the FCC had adopted program percentage requirements of the sort considered in Docket No. 19154, *supra*? Or would such requirements just exacerbate the problem at which the *Carroll* doctrine is directed?

## Chapter IV

### FCC OBJECTIVES AND POLICIES IN BROADCASTING

In their study of television regulation, Roger G. Noll, Merton J. Peck, and John J. McGowan identified four general objectives underlying the FCC's most important economic decisions:

- (1) "what has come to be known as the FCC's 'local service' objective—the establishment of stations in as many localities as possible;"
- (2) "achievement of an acceptable level of diversity in program content;"
- (3) "fulfillment of broadcasting's role as public servant;"  
and
- (4) "the maintenance of an acceptable level of competition."

Economic Aspects of Television Regulation 99 (1973). At the less general level at which more particularized corollary policies must be articulated and implemented, these objectives often conflict. In *Carroll Broadcasting*, for example, there was a potential conflict perceived between the maintenance of any competition and fulfillment of a public service role for broadcasting; in the comparative licensing criteria, where all four of the objectives are arguably represented, the conflict arises at the operational level of choosing between different applicants that are thought to represent different contributions to localism (local ownership and locally originated problems), diversity in programming, public service (past broadcasting record), and competition (diversification of ownership).

This chapter examines certain major FCC policies that implicate various combinations and conflicts among these four objectives: broadcaster ascertainment of and programming for local needs; restrictions on multiple ownership within a market; licensee independence of network control; and limiting network dominance of the program supply industry. As you consider each policy, try to clarify its relationship to each of the four objectives. Which are being sacrificed and which emphasized, and for what purpose? With what likelihood of success?

Bear in mind, too, that the policies examined here are by no means exhaustive of those that the FCC justifies by reference to some combination of the general objectives. Perhaps most prominent among those not separately considered here is the policy of promoting and protecting the development of UHF broadcasting and UHF broadcasters, which relates to at least three of the four general objectives. (Do you see how?)

Finally, when these various subjects have been surveyed, it will be time to re-examine the meaning of "diversity," to ask whether

“diversity of program content” is an attainable objective in any event, and—if it is—to question what the price of its achievement is likely to be. For now, of course, feel free to proceed using “diversity” in its ordinary sense, and gaining experience with which to address these questions later.

### A. THE LOCAL SERVICE OBJECTIVE

#### NOTE, THE LOCAL SERVICE OBJECTIVE AND FCC BROADCAST ALLOCATIONS \*

With the passage of the Radio Act of 1927, Congress charged the Federal Radio Commission (FRC) with the complex task of eliminating the chaotic interference then endemic on the (AM) broadcast band. To minimize interference between broadcast stations, two stations may not be assigned to the same frequency (or channel) in the same area; indeed the ability of one signal to interfere with another on the same channel extends to an area well beyond the range in which its own signal could reliably be received even if there were no other stations on that channel. To complicate matters further, a station broadcasting at a given frequency will cause interference on adjacent, and often even separated frequencies.

Initially therefore, the FRC believed that it would have to eliminate at least 400 of the 732 stations then on the air, and reassign the frequencies of the remaining stations in accordance with a comprehensive plan in order to reduce radio interference to tolerable levels. The number of stations that could be licensed would, as a technical matter depend upon three variables: (1) transmitter power; (2) station location, including the propagation characteristics of the surrounding geography; and (3) time of operation.

#### **Local Service is Born: Radio**

Congress, however, interjected yet another constraint—the Davis Amendment. Concerned about the paucity of stations in the South and West, and fearing that the spectrum would become monopolized by stations located in the major cities, where broadcasting was most profitable, Congress in 1928 amended the Radio Act to require the FRC to equalize, as nearly as possible, the number of stations, their power, and time of operation among five zones into which it divided the country. Further, the stations allocated to each zone were to be distributed evenly among the states in that zone.

Finally, the FRC had to deal with two other conflicting goals of the Congress. One was to provide a local station for every community in the nation that could support one economically, the other to serve rural portions of the nation as well. To provide local commun-

\* This note was written by Nell K. Alexander, Jr., Class of 1978, Harvard Law School.

ity service would require many, low-power stations. These, however, could not hope to reach the rural hinterlands with their signals. To serve the rural areas would require a spectrum allocated among a much smaller number of high-powered stations.

### **The Clear Channel Debate**

The FRC consulted a group of engineers on the formulation of an allocation plan in light of the above constraints and goals. The engineers proposed creating fifty "clear channel" frequencies, each of which would be assigned to only one station at night. (AM broadcast stations have a larger broadcast area after sunset by virtue of the "skywave" phenomenon.) These stations would guarantee nighttime service to much of the rural portion of the nation, which at that time was largely unserved. These same fifty stations would be the dominant stations during the day, but other stations would be licensed for daytime operation on the same frequencies. Other frequencies, the engineers proposed, could then be licensed at lower power to serve small communities. This scheme would still have required the FRC to eliminate many of the stations operating in 1928, or at least to force them to share the broadcast day on the same frequency.

The FRC adopted a compromise position between the engineers' proposal and the existing broadcasters' opposition to any reallocation. It created forty clear channels, eight for each zone, although this geographical distribution was very inefficient insofar as maximizing the number of signals received by listeners was concerned. The Commission also designated 34 "regional" channels to accommodate 125 full-time stations, and left space for an additional 150 full-time "local" stations.

The clear channel stations were licensed up to 25 kilowatts, with experimental authorization up to 50 kilowatts, an aspect of the plan opposed by the Chairman of the FRC and by Congressman Davis, author of the 1928 amendment. Their feeling was that the clear channel stations would be too powerful, both politically and economically, and would be monopolized by chain broadcasters (networks). For these reasons, they sought to impose a 10 kilowatt limitation on power, which would have eliminated much of the rural service planned by the FRC. They were unsuccessful, however, and as predicted, the networks did come to dominate the clear channel stations, some of which they owned, and virtually all of which had affiliation agreements.

Some members of the industry further encouraged the FRC, and later the FCC, to license "superpower" stations that could serve vast areas of the country on a clear channel. Foremost among them was Powel Crosley, Jr., the owner of station WLW in Cincinnati; and in 1934, the FRC licensed WLW experimentally at 500 kilowatts.

For Crosley, the experiment may have been too successful. The station became immensely profitable from the sale of advertising, and

Crosley also used WLW to market inexpensive radios; although the purchasers might have difficulty receiving other stations, they could count on a strong signal from "superpower" WLW. In 1936, an FCC survey revealed that WLW was the first choice of listeners in 13 states, and the second choice in another 6 states. Inevitably, other clear channel stations clamored for authorization to go "superpower" too.

Crosley's success, and his anti-labor editorial policies, eventually raised opposition in Washington. Senator Burton Wheeler of Montana, who saw "superpower" as the advent of a new monopoly (and for the same reason opposed multiple ownership, networks, and even "clear channels") sponsored a Senate resolution, passed in 1938, against the licensure of any station for more than 50 kilowatts. In 1939, the FCC terminated the WLW experiment, reduced the station's authorization to 50 kilowatts, and denied all pending applications for higher power operation.

Meanwhile, in 1936, Congress had relieved the FCC of the Davis Amendment, which proved to be hopelessly inconsistent with engineering principles for efficient use of the spectrum. In its place Congress enacted Section 307(b) of the Communications Act, calling upon the Commission simply to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

#### **Local Service Reborn: Television**

In the late 1940s and early 1950s, the FCC again had to face the policy choice between local service and national coverage, this time in the context of the new television medium. The number of television stations that could be licensed on a fixed broadcast band was dependent upon the same three technical variables as applied to radio and a fourth, viz., the height of the antenna. Television (and FM) signals cannot be received beyond the horizon of the antenna, the line of sight.

The Commission opted again for a locally-oriented approach, which it believed was required by Sections 1 and 307(b) of the Act, and which surely appealed to its radio-bred image of broadcasting as a community-oriented service much like a local newspaper. Again it rejected the alternative of powerful regional stations, which could have provided as many as six VHF channels for most of the country, in favor of a scheme of lower-power local stations, permitting more towns to have their own station, but reducing the number of channels the average viewer could receive. The Commission created a Table of Assignments, allocating at least one channel to 1,274 different communities in a manner designed to avoid interference among the sta-



tions using the same channels in different towns. The Table was drawn according to the following priorities:

- (1) to provide at least one television service to all parts of the United States;
- (2) to provide each community with at least one television broadcast station;
- (3) to provide a choice of at least two television services to all parts of the United States;
- (4) to provide each community with at least two television broadcast stations; and
- (5) to assign any channels remaining under the foregoing priorities to the various communities depending upon their size, geographical location, and the number of television services available to such community from television stations located in other communities.

Sixth Report and Order, Television Allocations, 41 FCC 167, 1 R.R. Cur. Svce, ¶ 91:620 (1952).

The Commission rejected the proposal to reserve some of the higher UHF frequencies for "stratovision", a method of telecasting from an air-borne transmitter, which could "supply about 81 percent of the area of the United States with one signal," 41 FCC, at 216, bringing substantial additional service to rural areas at the cost of local ground-based stations. Once again, some concern was expressed by both the Senate Interstate Commerce Committee and the Commission as to the possibly "monopolistic" effects of stratovision.

The DuMont Television Network opposed the Commission's heavy emphasis on providing local service in constructing its Table of Allocations. DuMont had suggested that the FCC assign four VHF stations to as many major markets as possible, at the sacrifice of some local stations in smaller communities, which would still be able to receive service through these more powerful metropolitan stations; this pattern would have made a fourth national network feasible, thereby fostering greater competition. The Commission, however, was "of the view that healthy economic competition" would exist under its Table of Allocations, which allowed for three stations in a large number of markets. 41 FCC, at 171-72.

### **The Clear Channel Debate Renewed**

Meanwhile, the issue of "superpower" and unduplicated clear channels in the AM service remained unsettled. The FCC returned to them in 1946, but no conclusion was reached for fifteen years. Technical advances had greatly increased the number of AM stations on the air, but as of 1958, 20 million Americans were still without primary nighttime service. Meanwhile, network dominance of radio had

all but disappeared with the advent of television. In 1961, the Commission assigned one additional station on 13 of the 25 clear channels still unduplicated, with directional antennas, in hopes of reducing the nation's nighttime "white areas"—those without primary AM service. The FCC deferred a decision on authorizing "superpower" on the unduplicated channels, at least in part because of the 1938 Wheeler Resolution and the opposition of most of the radio industry.

The House of Representatives responded with a resolution calling for the retention of all 25 clear channels unduplicated, and stating the sense of the House that the Commission could disregard the Wheeler Resolution of the Senate in authorizing power above 50 kilowatts. H.Res. 714, 87th Cong., 2d Sess. (1962). The FCC did not change its position on superpower, however, and the issue lay dormant until 1975.

At that time the Commission reopened the matter. It conceded that the 1961 changes had brought primary nighttime service to only 300,000 additional persons and that it simply did not know how many were newly served by FM. Thus, the issues respecting superpower remained much the same as they had been in the 1930's:

Crucial to the final settlement of the clear channel problem is an unequivocal decision by the Commission as to whether Class I-A stations are to be authorized, at least in particular instances, to operate with power in excess of 50 kilowatts. It has long since been recognized that if the quality of secondary service is to be enhanced to the degree that it becomes an adequate substitute for primary service, station power must be increased very substantially—in the order of ten to fifteen times. However, the implementation of such power increases inevitably will have adverse effects on the structure and balance of the existing broadcast service, effects which reasonably may be foreseen, but whose magnitude are difficult to assess with any degree of precision. The opponents of clear channel power increases, which include virtually all segments of the broadcasting industry, with the exception of the licenses of those few stations which might be eligible for such increase, have cited the destructive competition which they believe such powerful operations could create, with the draining of advertising revenue from many smaller stations, and a lessening of their ability to operate in the public interest. Further, these parties have alleged, higher power operation would lead to the socially undesirable result of the placing in the hands of a very small number of persons, instruments by which they influence the thinking and conduct of vast segments of the population. General considerations such as these, in the past, have presented major obstacles to any

action by the Commission which would raise the I-A power ceiling.

In re Clear Channel Broadcasting in the Standard Broadcast Band (Docket No. 20642), 40 Fed.Reg. 58,467 (1975). The time for filing reply comments in this matter ran out, after several extensions, on June 27, 1977; no further action has been taken yet.

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#### NOTES AND QUESTIONS

1. The Commission has calculated that if twelve unduplicated clear channel stations were authorized to operate at 750 kilowatts, they would provide a minimum of four skywave (night) services to virtually the entire nation, eliminating most white areas, and extend daytime primary service into areas lacking it. Clear Channel Broadcasting, 24 FCC 303, 315 (1958). For the purpose of the present Clear Channel proceeding, how would you argue that the FCC has the authority, and perhaps even the obligation, to authorize some stations to increase their operating power substantially?
2. On what criterion or criteria should competing applicants for superpower authority be chosen? Should broadcasters whose nighttime service would have to compete with the newly strengthened signals be heard to object? Cf. *Carroll Broadcasting v. FCC*, supra at 204. If such authority is granted to broadcasters on channels from which other broadcasters must be cleared, could a system for the voluntary (paid) exchange of present broadcasting "rights" or authorizations be devised? See Note, *Power to Some People: The FCC's Clear Channel Allocation Policy*, 44 *So.Cal.L.Rev.* 811, 844-46 (1971).
3. Did the FCC, in rejecting the regionally oriented proposal of DuMont, with its potential to support four television networks, and in favoring local service instead, reasonably balance the conflicts among its various objectives? Return to this question after completing your study of this chapter.
4. As a technical matter, national television policy could have been to have six or seven national channels. Each could originate programming from a different part of the country, if that was desired, for distribution—by cable, microwave, or now by satellite—to local or regional transmitters that would broadcast the signal to receivers just as they do at present. See Noll, Peck & McGowan, supra, at 116. Indeed, it may have been possible to combine a nationwide six-channel system with a local or regional origination capacity to be used, during certain designated hours, to bring the benefits of localism to at least a substantial part of the population.

The BBC, for example, operates a two-channel national network, along with local production centers that not only feed the network

but also provide specialized programming to such diverse regions of the United Kingdom as Northern Ireland, Wales, and Scotland. In addition, the eight regional stations within England produce daily news and weekly regional affairs and sports programs. BBC Handbook 198, 205 (1977).

5. Local Service in Comparative Hearings. The section 307(b) issue has not been confined to the problem of clear channels and the television (and FM) Tables of Assignment; it appears also in the context of comparative hearings for new station licenses. In *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955), the Commission had granted a construction permit for an AM station in Easton, Pa., to Easton Publishing Co. and denied the mutually exclusive application of Allentown Broadcasting Co., which proposed to operate in Allentown, Pa.; neither of the proposed stations would be able to serve the other community. "Allentown had three local stations; Easton only one. The Commission recognized that Allentown was a city almost triple the size of Easton and growing at a greater pace, but held that Easton's need for a choice between locally originated programs was decisive." 349 U.S., at 360. The Court ruled that the FCC, in awarding AM licenses between mutually exclusive applicants for different communities, could select one community over another on the basis of the former's need under Section 307(b), without first determining the relative ability of each applicant to serve its own community.

Under the authority established in the *Allentown* case, the Commission has now adopted a policy for determining when a comparative applicant for an AM license in a suburb of a larger community could obtain a preference on the ground that it would provide the first local service to the suburb. Policy Statement on Section 307(b) Considerations for Standard Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 R.R.2d 1901 (1965). The Commission emphasized its policy of preferring first local service—i. e. the first station actually located in and licensed to a given community regardless of the number of other signals received in the community—over multiple local service to any other community. All too frequently, in its view, suburban stations that place a strong signal over the metropolitan area "tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities." This defeats the local service objective that dictated placing stations in the suburbs to serve peculiarly local needs. To resolve the dilemma, the FCC has erected a rebuttable presumption that a suburban applicant in a metropolitan area with multiple local service intending to place a strong signal over the larger community should be treated as an applicant for the larger community for Section 307(b) purposes. Therefore, it would not be entitled to a preference for providing "first local service." It follows from this policy that, in a comparative hear-

ing between applicants from the same or multiple suburban communities lacking a first local service, one proposing to transmit a weak signal that would not encompass the larger community would be preferred on the Section 307(b) ground to others proposing a strong signal.

Such a case arose in *Pasadena Broadcasting v. FCC*, 555 F.2d 1046 (D.C.Cir. 1977). Eight applicants, all from suburban communities around Los Angeles, were vying for the license of a station that had been denied renewal. In the interim, the frequency was being used by a licensee with temporary authorization at 50 kilowatts during the day and 10 kilowatts at night. Seven of the applicants proposed to continue service at these power levels, reaching five million people in the metropolitan area. An applicant from Newport, 20 miles from Los Angeles, proposed daytime-only service at 1 kilowatt, serving 3 million people. Newport, like several of the competing applicants' towns, lacked a first local service.

The Commission disqualified the Newport applicant, however, on the ground that its application posed an inefficient use of the frequency, since it would serve far fewer people. It deemed the Suburban Community Policy Statement inapplicable, for although the proceeding was for the grant of an initial license, the frequency had been operating for some time at a power high enough to serve much of the metropolitan area. Finally, the Commission found that "it would be wholly unrealistic to conclude \* \* \* that any one of the operations here proposed would not seek similar identification [with the entire metropolitan area], including the \* \* \* Newport \* \* \* applicant." 45 FCC 2d 578 (1973).

The court reversed. Evidently disregarding the quoted statement, the court held that the Commission erred in not considering Newport's need for its first local service compared to "Los Angeles's" need for additional service.

(a) What strategic considerations does the Commission's suburban policy inject into the comparative hearing process?

(b) Is that policy inherently inconsistent with the "efficiency" criterion of Section 307(b)? Does it address a situation in which equity and efficiency are in conflict? If so, are there other, less costly approaches it might have taken toward localizing the orientation of a suburban station that reaches the larger metropolitan area?

6. Is the FCC's preference for a highly localized broadcasting system mandated by the Communications Act? What is the argument that it is?

Vincent Mosco, in *The Regulation of Broadcasting in the United States: A Comparative Analysis* 31-32 (1975), has collected the

following observations by commentators who see more at work here than mere agency fidelity to a statutory direction:

“Noll, Peck, and McGowan contend that it stems from the Commission’s peculiar vision of the station owner as a kind of latter-day Mark Twain who understands the needs and concerns of his community in an imaginative and sensitive way. Given this conception, the ownership of the local station is crucial. [Hyman] Goldin, on the other hand, argues [in an interview with the author] that it is important to distinguish between localism as an *entrepreneurial* and as a *service* policy. According to him, the Commission has administered localism as the former—a means of getting more people into the broadcasting business. \* \* \* Goldin does not believe that the Commission has really considered a local *service* policy to be a serious goal. Finally, there are those like [Bernard] Schwartz, who consider localism, even as understood in its entrepreneurial sense, to be of little more than ideological significance to the Commission.” \*

Notice that none of these statements offers a hypothesis to explain the FCC’s behavior—either in pursuing localism or merely purporting to do so. Indeed, they raise more questions than they answer. *Why* does the FCC maintain the unrealistic image of the local broadcaster that Noll, et al. ascribe to it? *Why* has it adopted a policy of “getting more people into the broadcasting business”? And if it has, why has it purported to follow a local *service* policy as well?

Keep these questions in mind as you read the following official statement of the local service policy and as you shape your own hypotheses about the origin of localism as an FCC policy. Regarding the 1946 statement, bear in mind that radio then occupied the position later taken over by television as the primary electronic medium, and attracted much greater resources in money and listener time than it does today.

## PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES [BLUE BOOK]

Federal Communications Commission (1946).

### PART III. SOME ASPECTS OF “PUBLIC INTEREST” IN PROGRAM SERVICE

\* \* \* [T]he Commission must determine, with respect to each application granted or denied or renewed, whether or not the

\* Mosco here quotes from Schwartz, *The Professor and the Commissions*, 102 (1959) to the effect that FCC com-

parative licensing decisions often preferred outside over local applicants.

program service proposed is "in the public interest, convenience, and necessity."

The Federal Radio Commission was faced with this problem from the very beginning, and in 1928 it laid down a broad definition which may still be cited in part:

"Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interest of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. \* \* \* The emphasis should be on the *receiving* of service and the standard of public interest, convenience, or necessity should be construed accordingly. \* \* \* The *entire* listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. \* \* \* In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of its public issues may be broadcast. *If \* \* \* the station performs its duty in furnishing a well rounded program, the rights of the community have been achieved.*" (In re Great Lakes Broadcasting Co., F.R.C. Docket No. 4900; cf. 3rd Annual Report of the F.R.C., pp. 32-36.) (Emphasis supplied)

In granting and renewing licenses, the Commission has given repeated and explicit recognition to the need for adequate reflection in programs of local interests, activities and talent. Assurances by the applicant that "local talent will be available"; that there will be "a reasonable portion of time for programs which include religious, educational, and civic matters"; that "time will be devoted to local news at frequent intervals, to market reports, agricultural topics and to various civic and political activities that occur in the city" have contributed to favorable decision on many applications. As the Commission noted in its *Supplemental Report on Chain Broadcasting (1941)*:

"It has been the consistent intention of the Commission to assure that an adequate amount of time *during the good listening hours* shall be made available to meet the needs of the community in terms of public expression and of local interest. \* \* \*"

#### **Extent of Local Live Program Service**

No reliable statistics are currently available concerning the time devoted to local live programs, partly because there has heretofore

been no accepted definition of "local live" \* \* \*. [Based upon January, 1945 reports by 703 stations, however, it appears that non-network, non-transcribed programs were broadcast, on average, 3.09 hours per day (12.7% of time on air); 1.07 of these hours (7% of time on air) were on a sustaining basis and the rest had commercial sponsorship.]

From 6 to 11 p. m., moreover, non-network, non-transcribed programs are considerably rarer, amounting on the average to only 42 minutes in five hours for all stations. *Sustaining* programs of this type average only 13 minutes in five hours.

\* \* \*

The most immediately profitable way to run a station, may be to procure a network affiliation, plug into the network line in the morning, and broadcast network programs throughout the day—interrupting the network output only to insert commercial spot announcements, and to substitute spot announcements and phonograph records for outstanding network sustaining programs. The record on renewal since April, 1945, of standard broadcast stations shows that some stations are approaching perilously close to this extreme. Indeed, it is difficult to see how some stations can do otherwise with the minimal staffs currently employed in programming.

\* \* \*

The average local station employed less than  $\frac{1}{3}$  of a full time musician and less than  $\frac{1}{6}$  of a full time actor.

Such figures suggest, particularly at the local station level, that few stations are staffed adequately to meet their responsibilities in serving the community. A positive responsibility rests upon local stations to make articulate the voice of the community. Unless time is earmarked for such a purpose, unless talent is positively sought and given at least some degree of expert assistance, radio stations have abdicated their local responsibilities and have become mere common carriers of program material piped in from outside the community.

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## TWO QUESTIONS

Precisely why is local (non-informational) programming arguably preferable to non-local programming, in the Commission's view? In your view?

Precisely why is live (non-informational) local programming arguable preferable to recorded local programming, in the Commission's view? In your view?



### PROGRAM POLICY STATEMENT (NETWORK PROGRAMMING INQUIRY)

Federal Communications Commission, 1960.  
25 Fed.Reg. 7291, 20 R.R. 1901.

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. \* \* \*

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.

Although the individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities, the structure of broadcasting, as developed in practical operation, is such—especially in television—that, in reality, the station licensee has little part in the creation, production, selection and control of network program offerings. Licensees place "practical reliance" on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country.

In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such

needs and interests on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests.

The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming.

\* \* \*

To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise \* \* \* our application forms to require a statement by the applicant, whether for new facilities, renewal or modification, as to: (1) the measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires.

Thus we do not intend to guide the licensee along the path of programming; on the contrary the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community.

\* \* \*

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#### QUESTIONS

1. As counsel to a broadcaster, how would you advise your client to conform its conduct to the Program Policy Statement?

2. As a broadcaster, what would you do upon receipt of the Program Policy Statement and your counsel's advice letter?
3. The Program Policy Statement notes that most television licensees rely particularly heavily upon network-provided programs. As we shall see, television program production is much more expensive than radio programming, creating a greater incentive to produce for the larger audiences obtainable by networking. Does this suggest that the Commission should distinguish between radio and television licensees in setting its requirements for local service by broadcasters? Economics aside, is either medium better suited to locally-oriented types of programming? (You may wish to distinguish between informational and entertainment programming here.)

### ASCERTAINMENT OF COMMUNITY PROBLEMS BY BROADCAST APPLICANTS

Federal Communications Commission, 1975.  
53 FCC 2d 3, 40 Fed.Reg. 22091, R.R. 53:367 (Dkt. No. 19715).

### FURTHER NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING

3. Following several years of confusion as to the ascertainment requirements—particularly as to the purpose of the consultations—set forth in the 1960 Programming Policy Statement, supra, the Commission, on February 23, 1973, issued a Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 36 F.R. 4092 [21 R.R.2d 1507] (hereinafter Primer), in an effort to clarify the broadcast applicant's obligation in this area.

4. To begin, under the guidelines set forth in the Primer, applicants must determine the demographics and composition of the city of license, indicating its economic, social, racial, ethnic and other significant characteristics. Thereafter, and within the six month period prior to filing a broadcast application, the applicant must conduct two surveys—one of community leaders and the other of members of the general public. These surveys must be conducted to ascertain community "problems, needs and interests" as distinguished from program preferences.

5. As indicated, to ascertain the community's problems, needs and interests, the applicant's principals or management level employees must interview community leaders representing a cross-section of the community as revealed in the compositional study. While an applicant is expected to make reasonable and good faith efforts to interview leaders in each significant community element (e. g., labor, religious, etc.), interviews with leaders of all groups within each significant element are not required. \* \* \*

6. With respect to the general public survey, applicants must make efforts to consult with a random sample thereof. \* \* \*

7. Having completed its community leader and general public surveys, the Primer requires the applicant to list all problems (excluding the frivolous) ascertained. Based on its evaluation of these problems, the applicant must determine which problems merit treatment on its facilities. The applicant in this regard, is not expected to treat all ascertained problems. With respect to those problems it proposes to treat, however, the applicant must propose what programs it will broadcast to deal with those problems, giving a description of the program or program series, its anticipated time segment, duration and frequency of broadcast.

## NOTICE OF INQUIRY

### Part I—The Roles of Radio and Television

8. In the instant Notice of Inquiry we set out to explore, first, whether there is a difference between the respective roles of radio and television in discharging their statutory responsibility to serve the “public interest, convenience and necessity”; and, second, whether the ascertainment guidelines set forth in the Primer, *supra*, should be modified, particularly with respect to applicants seeking renewal of their broadcast licenses.

10. In the 1930s and 1940s, radio was the sole electronic communications medium for bringing to the general public a “rapid and efficient” nationwide broadcast service (47 U.S.C. § 151). Since the 1950s, however, we have witnessed the spectacular growth of television—a broadcast medium which now reaches over 96 per cent of the nation’s homes. The phenomenal growth of television has had a dramatic effect on radio in terms of station operation and programming technique. With the rapid development of television and the divergence of national advertising revenues to this new medium, radio broadcasters were forced to cut operating costs—operating staffs were cut to a minimum by using combination positions where possible, by having the program log kept by the announcer, news-person, or disc jockey (by the person on duty). Joint studio-transmitter operations, remote control, automation, and other operating techniques became the rule rather than the exception during the 1950s, and have remained so today. Radio programming was revamped for casual listening. Background music, news and other bits of information interspersed by the disc jockey between records became, and have remained, the staple of radio programming.

11. The nature, scope and reasons for these changes in radio cannot go unrecognized if we are to develop ascertainment guidelines that are workable and useful. A station with few employees, for instance, cannot be expected to conduct a community survey as

extensive as its larger television counterpart.<sup>2</sup> Similarly, how a licensee of a radio station decides to respond to the many conflicting and competing problems and needs of the public within its service area may differ substantially from the manner in which its television counterpart serves the public.

12. Some broadcasters contend that radio, by comparison with television, operates with a handicap not often recognized. They claim that any pronounced amount of talk on radio has a tendency to cause listeners to tune to another station, usually in search of music. The aural and visual techniques of television, it is asserted, make talk on this medium more attractive than it seems to be on radio. In providing listeners with their favorite music, news capsules and other tidbits of information without requiring extended concentration, radio may have no peer. This does not mean, however, that radio stations are under no obligation to provide programming related to community problems, needs and interests. Of course, any notion that a program is not a program unless at least 15 or 30 minutes in length fails to comprehend radio broadcasting as it currently exists. Given today's medium, we think it important to reiterate our opinion that an effective public service job can be done on radio programs of a shorter duration—vignettes, they might be called. [Citations.]

In sum, the types of appropriate service may differ from community to community, from service to service, from station to station, and from time to time. The licensee's prudent judgment on how to best serve its community will therefore be accorded great weight by the Commission. In the final analysis, however, we must concur with the comments of BEST and others filing similar comments that the differences between radio and television do not provide a reasonable basis for developing different ascertainment standards for AM and FM on the one hand and TV on the other. While each service performs a somewhat different role in serving the public, all broadcast licensees have the same basic obligation to discover and fulfill the problems, needs and interests of the public within their service areas, for broadcast service.<sup>3</sup>

14. As noted above, under existing requirements new applicants are required to conduct a compositional study of the city of license to become familiar with its population characteristics and community institutions and elements. While a renewal applicant, under the procedures suggested herein, will be required to have on

2. In 1973, television stations averaged about 59 full-time and 6 part-time employees, whereas radio stations averaged about 11 full-time and 4 part-time employees.

3. \* \* \* [W]e are proposing an exemption from most of the revised documentation and filing proposals

herein for stations licensed to smaller communities. \* \* \* [S]ome 1,900 radio stations and 14 television stations are currently licensed to communities whose populations are less than 10,000, and which lie outside all Standard Metropolitan Statistical Areas (SMSAs).

file certain population data, a detailed compositional study will no longer be required. In lieu thereof, we have identified 19 typical institutions and elements normally present in a community (Appendix C), and we expect the licensee to utilize this listing in conducting its community leader survey. Absent a compelling showing to the contrary, interviews with leaders in each of the enumerated categories on an annual basis will establish a prima facie case of compliance with the Commission's ascertainment guidelines. So far as the general public survey is concerned, under the procedures recommended herein a licensee must make a reasonable and good faith effort to consult with a generally random sample at a period of his choosing during the license term. \* \* \* A licensee may, of course, continue to use a professional research firm to conduct its general public survey.

17. \* \* \* [E]very licensee would be required to place in the station's public inspection file yearly, on the anniversary date upon which the station's renewal application normally would be filed, an annual listing of what the licensee believes to have been the most significant problems and needs (up to 10) discovered during the preceding 12 months, together with typical and illustrative programs or program series—excluding ordinary news inserts—broadcast to help meet those problems and needs. At renewal time, these annual problem-program lists would be filed as exhibits with the renewal application itself.

#### Part II—Ascertainment Guidelines For Renewal Applicants

31. \* \* \* Number of Leaders. \* \* \* Action for a Better Community submitted a formula which, while designed for the general public survey, could be extended by analogy to community leader consultations. It viewed the number of interviews as a direct function of population of the licensee's service area and an inverse function of the number of other stations serving that area. \* \* \*

32. Like BEST, "we are wary of fixed formulas for determining the number of spokesmen to be consulted." \* \* \*

We believe that one or more community leaders in each of the listed categories present in the service area should be contacted annually rather than triennially. \* \* \* This does not mean, necessarily, that three consultations with one or more leaders in a given category (i. e., one consultation per year) would suffice to withstand any inquiry or challenge. The test remains representativeness of the community sought to be ascertained. While quantitative factors such as population, and qualitative considerations such as the "importance" or "influence" of an element or its leaders, all are germane to the idea of representativeness, we refuse to infringe upon either the discretion of the licensee or the freedom of the licensee's critics by establishing acceptable minimum numbers of community leader consultations.

34. [Level of Consultation.] [T]he 1960 Programming Policy Statement views ascertainment as the "principal ingredient" in the execution of the licensee's obligation to serve the public interest. Under such a view, which we here reaffirm, it is difficult to imagine the licensee's principals and/or managers being permitted to take anything less than a substantial interest in the ascertainment process. We think it justifiable that where these individuals are in some sense new to a community—as in the case of applicants for a prospective facility, or assignees of an existing facility—their interest ought to be accounted for by direct participation in surveying leaders of the community in question. \* \* \*

35. We are inclined to agree \* \* \* that even in a renewal ascertainment "licensee owners and managers should be required to do at least some of the interviewing." \* \* \* In fact, where interviewers other than principals or management-level employees are involved in interviewing—an involvement which we here permit—we expect that their activity will not only be reported to, but be carried on, under the supervision of, a principal or manager of the licensee. \* \* \*

36. \* \* \* We, therefore, are proposing that at least 50% of the leader interviews during the license term be done by principals and management-level employees, with the balance permitted to non-managerial employees if the station so chooses. \* \* \*

38. [Format of Leader Consultations. T]he Inquiry asks whether community leader consultations ought to be allowed to take place in "group," on-the-air ("broadcast programming") and "Town Hall" settings. The comments received suggest that first, and more fundamentally, we must address ourselves to the degree to which leader interviews should be formally pre-arranged and conducted with full awareness of all parties that an ascertainment, per se, is taking place. On this record, a substantial number of comments call for some reduction in what the writers perceive as an undue formality in the present requirements. These respondents wish to make use of—and would like to receive credit for—the myriad of less formal contacts and encounters daily between licensee's representatives and community leaders. \* \* \*

\* \* \* [T]he record in this proceeding is rife with comments—particularly from communities with multiple broadcast services—that community leaders are growing weary of near-simultaneous requests for individual appointments by large numbers of licensees. In fact, the group interview to be discussed below arose as one means of dealing with such frustrations. \* \* \*

41. \* \* \* [W]e continue to believe that the joint consultation must allow what amounts to a multiplicity of one-on-one dia-

logues. As we said in a footnote to this question in the Inquiry  
\* \* \*:

“Each individual community leader must be given an opportunity to freely present his opinion of community problems; each broadcaster present must have an opportunity to question each leader; and the joint meetings should include community leaders who are [on] the same or equal plane of interest and responsibility.”

76. \* \* \* [C]omments are invited upon the matter discussed in this Further Notice. \* \* \*

[The concurring statement of Commissioner Hooks is omitted.]

### APPENDIX C

#### SAMPLE—COMMUNITY LEADER ANNUAL CHECKLIST

Institution/Element	Num- ber	Not Applicable (Explain briefly)
1. Government (local, county, state & federal)		
2. Business		
3. Labor		
4. Agriculture		
5. Education		
6. Professions		
7. Charities		
8. Civic, Neighborhood and Fraternal Organizations		
9. Public Safety, Health and Welfare		
10. Recreation		
11. Environment		
12. Organizations of and for Youth and Students		
13. Organizations of and for the Elderly		
14. Religion		
15. Minority and Ethnic Groups		
16. Organizations of and for Women		
17. Military		
18. Culture		
19. Consumer Services		

While the following are not regarded as separate community elements for purposes of this survey, indicate the number of leaders interviewed in all elements above who are:

- (a) Blacks
- (b) Spanish-surnamed Americans
- (c) American Indians
- (d) Orientals
- (e) Women



## NOTES AND QUESTIONS

1. After the receipt of further comments, the Commission adopted separate ascertainment guidelines for renewal applicants. It deleted the requirement that each renewal applicant compile a compositional survey (§ 4, *supra*), substituting therefor a demographic profile of the community to be kept in the station's public file. It also dropped the suggestion of one consultation per year/per category (§ 32, *supra*) and substituted a numerical test geared to the population of the broadcaster's city of license. (E. g., population 25,000–50,000, 100 consultations.) A broadcaster that conducts the requisite number of interviews is open to challenge only as to "whether representativeness has been achieved." The Commission also exempted all stations in communities of fewer than 10,000 and not within an SMSA from all inquiry into the manner in which they become aware of community problems and needs. Approximately 1900 small market radio stations and 14 commercial television stations are thus exempted from the reporting, but not the substantive, obligations of ascertainment. 35 R.R.2d 1555, 41 Fed.Reg. 1371 (1975) (First Report and Order, Dkt. 19715, and Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants).

2. Licensees in cities of 500,000 or more will have to conduct 220 leader interviews over the three-year term of their license to assure against a challenge to the quantitative adequacy of their efforts. The eight commercial television and 27 commercial radio stations licensed to Chicago, therefore, will want to hold a total of 8,400 interviews, an average of 2,800 per year. In addition, to minimize the risk of a challenge for non-representativeness, they will each want to include at least one leader from each of the nineteen categories listed in the Commission's Community Leader Annual Checklist (Appendix C, *supra*). This will undoubtedly entail some leaders' being surveyed by multiple licensees; even in a city the size of Chicago, how many different "military" or women's organization leaders can there be?

Does it make sense to require each broadcaster to contact at least one leader from each Institution/Element, if there is one, rather than encouraging broadcasters to specialize by concentrating their ascertainment efforts?

Licensees are assured of a broad discretion to choose the ascertained problems they will actually address. On what criteria are they to choose, however? Will competitive or other incentives encourage them all to apply the same criteria and to choose the same issues, so that certain issues are everywhere, and others nowhere, addressed by them? See Canby, *Programming in Response to the Community*, 55 *Tex.L.Rev.* 67, 81 (1976). If this process does result in homogeneous offerings, can anything constitutionally and practically be done to remedy it?

3. Commissioner Robinson dissented from the issuance of any renewal applicant guidelines, noting a lack of "reliable evidence that the ascertainment process does what it is supposed to do." 35 R.R.2d, at 1578. His own study of local and non-entertainment programming on 50 network-affiliated television stations before and after the 1971 adoption of the Primer on Ascertainment of Community Problems by Broadcast Applicants showed no increase (and a probable decrease) in these categories. Concerning the possibility of a qualitative improvement owing to the ascertainment requirements, Robinson noted the difficulty of making such an inquiry "without becoming involved in subjective program judgments which it is the point of our ascertainment process to avoid." *Id.*, at 1582 n. 9. Thus he saw the Commission, "[h]aving assumed away the important question of the efficacy of the process, \* \* \* quite naturally become preoccupied with rather trivial matters, such as: what percent of interviews should be conducted by management, [etc.]."

4. The FCC's attention to detail in setting "ascertainment" requirements should not surprise you any more than Commissioner Robinson. First, in defining the local service policy as attention to community "problems, needs, and interests," rather than attention to its program preferences, the Commission is trying to make broadcasters act against their economic self-interest. This type of behavior is not readily forthcoming from businessmen.

At a more elevated level of discourse, it should also be noted that the agency's preoccupation with specifying input procedures consists well with, if it is not exactly required by, the free speech ideology that discourages governmental attention to outputs—which in this case would be the programs broadcast in alleged responsiveness to ascertained needs.

Since the result is regulation by indirection, however, it is necessarily going to be less precise in producing desired outputs than would the alternative system of directly evaluating the output. Greater precision in producing desired outputs necessarily comes at the cost of more detailed input specifications, and less flexibility to meet variegated circumstances. Indeed, you know that the preceding Notice proposes a relaxation of the previous level of detail and rigidity of application presented by the Primer on Ascertainment, 27 FCC 2d 650, 21 R.R.2d 1507 (1971), which did not differentiate renewal from new license applicants. That document is a monument to the imagination of lesser governmental servants, few of whom have ever been given so free a hand to issue guidelines for a hapless sector of the economy. Of a confection so rich a mere taste will be quite enough for the palate of ordinary sensibility:

"18. Question: In consulting with community leaders to ascertain community problems, should an applicant also elicit their opinion on what programs the applicant should broadcast?"

Answer: It is not the purpose of the consultations to elicit program suggestions. Rather, it is to ascertain what the person consulted believes to be the problems of the community from the standpoint of a leader of the particular group or organization. Thus, a leader in the educational field would be a useful source of information on educational matters; a labor leader, on labor matters; and a business leader on business matters. However, it is also recognized that individual leaders may have significant comments outside their respective fields, and the applicant should consider their comments with respect to all community problems. The applicant has the responsibility for determining what broadcast matter should be presented to meet the ascertained community problems as he has evaluated them.

Comment: Our encouragement of (program suggestions) may tend to make consultations primarily a discussion of programming and programming preferences, rather than a discussion to ascertain community problems. Obviously, we do not expect an applicant to ignore comments from the general public or community leaders as to the kinds of programming that they believe should be presented. We expect, however, that the applicant will guide the consultations so as to elicit community problems. In this regard, if a person offers program suggestions, further questioning by the applicant may elicit a more detailed picture of community problems. Suppose, for example, a community leader states, "We need more programs dealing with the activities of city government." Further questioning might reveal such problems as poor community-police relations, under-utilization of certain welfare agencies while other similar agencies were overcrowded, or low utilization of a city adult vocational training program despite a high unemployment rate and a need for the skills offered by the training program.

Other parties suggest that community leaders should be consulted as to the kinds of programs best suited to meeting community problems. Since an applicant will have a broader overview of community problems due to the ascertainment process, is more aware of the kinds of broadcast matter available from others, is more aware of his own resources for producing programs and announcements, we see little need to consult community leaders as to the kinds of broadcast matter presented to meet community problems."

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The reader with unusual tastes will perhaps wish to consult Southern California Broadcasters Ass'n, 47 FCC 2d 519, 29 R.R.2d 1739 (1974), in order to learn the answer to the question whether "in view of the current energy crisis, the Primer permits telephone interviews with community leaders outside the city of license and, if so, what percentage of those interviews may be conducted by telephone."

5. With these observations in the background the following questions may command more respectful attention:

(a) Is there an output-based alternative means of getting what the FCC wants from a local service policy without risking governmental involvement in content evaluation?

(b) If there is not, is the input-based system worth retaining?

The latter question would seem to require an evaluation of the resulting output, loss of which may be the cost of abandoning the local service policy. Does that mean that the FCC cannot abandon ascertainment because to do so would require it to pronounce the problem-directed programs to be of little value? See Prime Time Access Report, *infra* at 281, (Robinson, Comm'n'r, dissenting, pt. III).

6. Recurring to the question of why the FCC adopted the local service objective at all, consider the following hypothesis in light of the content that the agency has given to the local service obligation of the broadcaster: The local service objective was designed to maximize good will in the Congress, by assuring to every member, no matter how rural his or her district, a broadcast outlet over which to reach constituents. The local service obligation of the broadcaster, as implemented preliminarily through the ascertainment process, is in turn the continuing policy that assures this access to the congressmen, among others. Note also that the others tend very largely to be politicians, too; many of the Institution/Element categories of Appendix C involve leaders who are often, or always, incumbent officeholders at some level of government.

A major drawback of this hypothesis is that it does not seem to be readily testable; how would one refute it? On the other hand, perhaps one may demand less by way of rigorous demonstration insofar as it is but an application of a more general set of accepted theorems making up a body of theory about human and political behavior. At the very least, however, the hypothesis must be held up to scrutiny for consistency with its policy environment. Consider the hypothesis in light of the remaining materials in this section of the chapter.

**NOTE, GENERAL ELECTRIC BROADCASTING CO.  
OF COLORADO, INC.**

40 R.R.2d 13 (1977).

GEBCO applied for renewal of its license for Station KOA, Denver, Colorado, which operates fulltime on a clear channel at 50 kw with a non-directional antenna. The station's daytime signal encompasses most of Colorado and parts of Wyoming, Nebraska, and Kansas; its nighttime reach is further still into the named states.

A coalition of organizations and individuals petitioned to deny the license, arguing that KOA, because it occupied a scarce resource, was obligated to provide program service to the populations within its entire predicted daytime service contours, and not just to the area of its city of license. The petitioners to deny also complained of KOA's ascertainment efforts, in that "only ten agriculturalists were contacted (4 percent), only one was a farmer, and three of the ten had Denver addresses." The licensee responded that only 2.5% of Colorado population is engaged in agricultural pursuits.

The Commission denied the petition to deny, stating:

\* \* \* [T]he Clear Channel Rule Making [Dkt. No. 6741] imposes no special obligation on KOA to provide programming designed to meet the specific needs of outlying areas. Similarly the major thrust of ascertainment is the community of license, and no contacts are required in communities more than 75 miles from the station. Moreover, the Commission has consistently held that it will not play a numbers game regarding the survey requirements. It is therefore not necessary to interview community leaders in statistical parity with the presence of their group in the area. It is our belief that the test of a licensee's ascertainment efforts is representativeness, not numbers. \* \* \* More specifically, we find that the applicant has contacted agricultural leaders in sufficient numbers to represent that portion of the population within its primary service area, and to satisfy its self-imposed obligation to serve rural areas. [Citations omitted.]

1. Cf. Citizens Committee to Save WEFM v. FCC, pt. II.B.1 (The relevant service area), *infra* at 302. The *Stone* case referred to therein arose from Washington, D.C. The petitioners to deny were city residents who maintained that WMAL-TV had oriented itself *primarily* to the concerns of the area's suburban Maryland and Virginia populations. The court found it unnecessary to decide whether a licensee has a primary obligation to serve its city of license, as opposed to the full service area it reaches. In *WEFM*, however, the court held "that the public interest implicated in a format change is the interest of the public in the service area, not just the city of license." Is the *GEBCO* case consistent with *WEFM*?
2. Is the *GEBCO* decision consistent with the FCC's articulated policy toward localism, as expressed in the 1946 Blue Book and the 1960 Program Policy Statement? With § 307(b) of the Act? With the hypothesis advanced in the note that precedes it? With the decision that follows?

## ADEQUATE TELEVISION SERVICE FOR THE STATE OF NEW JERSEY

Federal Communications Commission, 1976.  
62 FCC 2d 604, 39 R.R.2d 137 (Dkt. No. 20350).  
Affirmed 574 F.2d 1119 (3d Cir. 1978).<sup>4</sup>

1. By this Third Report and Order the Commission concludes the final phase of its inquiry concerning New Jersey's television service. Here we address the sole remaining issue: the need vel non for the establishment of New Jersey production studios by certain "out-of-state" television licensees. \* \* \* [W]e have determined that the Commission-mandated construction and maintenance of New Jersey production studios by out-of-state television licensees not only is unnecessary and generally inefficient, but that it would likely constitute an unwarranted intrusion into the business and journalistic discretion of these broadcast licensees.

2. \* \* \* In the First Report and Order and Further Notice of Proposed Rule Making, 58 FCC 2d 790 [36 R.R.2d 1105] (1976), the Commission found a need for augmented locally-oriented television broadcast service for the citizens of New Jersey. While the Commission's First Report rejected (1) the concept of a New Jersey VHF "drop-in" and (2) the [New Jersey Coalition for Fair Broadcasting's] proposal to reallocate VHF Channel 7 from New York City to central New Jersey, it did seek further comment on a number of other proposals for enhancing New Jersey's television service. Although the Commission stated its belief that the existing allocations structure need not be modified to provide adequate New Jersey service, we indicated that we would further examine the "dual-licensing" proposal raised by the Coalition and would accept further comments concerning station reallocation not involving transmitter site movement. However, the focal point of the Further Notice was the possible establishment of a New Jersey "physical presence" by some or all of the television broadcast stations licensed to New York City or Philadelphia. \* \* \*

3. \* \* \* [I]n the Second Report and Order [59 FCC 2d 1386, 37 R.R.2d 1275 (1976)] the Commission rejected, inter alia, the reallocation and dual-licensing proposals \* \* \*. We indicated that all area television licensees, in addressing a special New Jersey service obligation, should maximize, within practical and flexible limits, their service to the New Jersey portions of their coverage areas. Additionally, the Commission (1) stated that these licensees should make positive physical commitments to the establishment of a New Jersey "presence" and (2) set up guidelines to express the Commission's judgment as to what a reasonable commitment would be.<sup>3</sup>

3. \* \* \* We suggested, inter alia, the use of New Jersey-dedicated

ENG or film crews, New Jersey correspondents, local news offices, toll-free

We recognized that licensees must have the flexibility to assign both resources and personnel and produce programming in a manner consistent with their business and journalistic discretion. For this reason, we did not, at that time, establish fixed requirements for particular classes of stations. However, the Commission stated it had not ruled out the possibility of requiring certain "out-of-state" television stations to maintain production studios in New Jersey.

4. \* \* \* We also reaffirmed our observation that New Jersey's own UHF and educational stations, including those operated by the New Jersey Public Broadcasting Authority, have significant and specific New Jersey service responsibilities which are in no way lessened by our decisions in the instant proceeding.

#### Commitment Statements Received

5. The New Jersey service commitment statements requested by our Second Report and Order were timely filed by the New York City and Philadelphia licensees referenced therein and include the [commitments set out in the following table:]

	NETWORK STATIONS					
	(Commitments Made In Pleadings)					
	WCBS-TV	WNBC-TV	WABC-TV	WCAU-TV	KYW-TV	WPVI-TV
News Crew	Full time	Full time	Full time	Full time	Full time	Full time
Additional crew as needed	Yes	Yes	Yes	Yes	Yes	Yes
Correspondent	Yes	Yes	Yes	Yes	Yes	Yes
Local Telephone	Yes	Yes	Yes	Yes	Yes	Yes
Office	No	No	Yes	Yes	Yes	No
Microwave relay or other system to expand station news coverage capabilities	Live transmission from N.J. <sup>1</sup>	Live transmission from N.J. <sup>1</sup>	Live transmission from N.J. <sup>1</sup>	Live transmission from N.J. <sup>1</sup>	Microwave from two locations <sup>2</sup>	Microwave from two locations <sup>2</sup>
Special ID or N.J. service announcements	Yes	Yes	No	Yes	Yes	Yes

1. Station has capacity to originate live broadcast programming from some areas of New Jersey through ENG equipment in microwave contact with main studio.
2. Station is committed to establish or maintain a microwave link from Trenton to main studio and an additional link from a location in southern New Jersey to main studio.

9. The Commission \* \* \* has concluded that the various undertakings of the licensees, taken as a whole, constitute the demonstration of a service commitment that will significantly enhance New Jersey's locally-oriented television service and help achieve the New Jersey service goals we have established in this proceeding. We ac-

New Jersey telephone lines, and non-official promotional ID's highlighting

out-of-state stations' New Jersey service obligations and activities.

cept these licensees' commitments at this time and will expect the licensees to carry out the New Jersey service activities and undertakings they have described. \* \* \* [A]ll area licensees, including those New Jersey, Pennsylvania, Delaware, and New York licensees that were not required to supplement current renewal applications, will be expected to supplement future renewal applications with statements concerning their own New Jersey service commitments. We are confident that these licensees too will indicate an awareness of their New Jersey service responsibilities and will take all reasonable efforts to make an appropriate and effective contribution to the state's overall television service. The Commission will carefully review each of these future renewal applications and will give special attention to the New Jersey service commitments and service obligations of New Jersey as well as non-New Jersey licensees.

10. It is our determination, following an analysis of the comments, the commitment statements, and the entire record, that the provision of adequate service to New Jersey does not require the construction of separate or shared New Jersey auxiliary studios by out-of-state licensees. We find that such a studio requirement would be inefficient, is unnecessary to the realization of our New Jersey service goals, and might constitute an unwarranted intrusion into licensee business operation. Furthermore, no party has presented a reasoned showing of where such proposed studios actually should be located in the state. As far as news coverage is concerned, the construction of studios would produce facilities least useful. Rarely do news stories develop within the confines of a studio. It is our view that mobility and flexibility are the keynotes to coverage of such a densely populated and diverse area such as New Jersey. We believe that more responsive and efficient New Jersey coverage can be achieved in this fashion than by the creation of static studio facilities in the state. In this connection we note, from the body of information developed in this proceeding, that all network-affiliated stations in New York City and Philadelphia will have the capacity to originate live programming from New Jersey sites within their respective service areas. It may be that certain of the subject out-of-state licensees could financially afford to establish and maintain New Jersey studios. However, licensee requirements that are unnecessary and inefficient for attaining adequate New Jersey service are made no less so merely because of a particular station's "ability to pay." The Commission is confident that the physical presence guidelines and the special New Jersey service obligations we have developed in this proceeding will serve to assure the adequacy of New Jersey's television service. We intend to closely examine, in the renewal process, the implementation of these New Jersey service commitments. We shall not hesitate to take appropriate and remedial action when and if such a course appears necessary.



11. In conclusion, we wish to express our hope that the citizens of New Jersey will be able to create, expand, and maintain firm lines of responsive communication with not only the stations licensed to bordering cities but with the many television outlets licensed to cities within the state. A myriad of stations, in-state and out-of-state, provide a signal to New Jersey and are required to serve the needs and interests of its residents. There is no doubt that the effective and efficient use of this multitude of voices can satisfy our New Jersey service goals. We believe that the Commission has adopted a course of action which will reach this end.

12. Accordingly, it is ordered, that this proceeding is terminated.

[The concurring statement of Commissioner Fogarty is omitted.]

DISSENTING STATEMENT OF COMMISSIONER  
BENJAMIN L. HOOKS

\* \* \*

In previous stages of this Docket proceeding, I have enunciated my concerns and made a number of suggestions as to how we could begin to ameliorate an unjustifiable historical accident, wholly of our own making, and bring our policies into some approximation of conformance with the unambiguous interdictions of the Communications Act, particularly Sections 151 and 307(b). Those suggestions have been rejected.<sup>3</sup>

I intended to use this portion of my dissent to fully expound on some of the pernicious consequences of the absence of strong, dedicated television facilities throughout an entire state. But I am personally spared that depressing recitation by virtue of an excellent article on the subject by the distinguished journalist, Frank Mankiewicz, entitled "The Political Costs of a TV Wasteland" (Washington Post, January 2, 1976) \* \* \* [which] constitutes Appendix A hereto.

\* \* \*

3. I suggested the following (not necessarily mutually-exclusive) alternatives.
1. Network affiliation for appropriate New Jersey UHF stations (with attendant station relocations if or as warranted).
  2. Re-establishment of "city-of-license" obligations for the two strong stations (Ch. 13, Newark and Ch. 48 Burlington) already allocated to New Jersey.
  3. Reallocation of VHF frequency or frequencies [Footnote omitted].
  4. Rotation of hyphenated status and "primary responsibility" obligations for

New Jersey on New York and Philadelphia stations (e. g., 2 to 3 per license term) initially chosen at random.

5. Permit the New York and/or Philadelphia stations (or the networks themselves)—irrespective of duopoly rules—to own and operate UHF facilities in the central New Jersey area (with attendant rule waivers and revisions as necessary).

Nowhere in the Commission's disposition are there persuasive reasons given as to why these proposals are unacceptable to the agency.

## APPENDIX A

## THE POLITICAL COSTS OF A TV WASTELAND

By Frank Mankiewicz

\* \* \* New Jersey is not some rural backwater. It is the eighth most populous state in the union, the most densely populated, the most industrialized and the third highest in per capita income. In addition, it also ranks high in average level of education.

Given all these facts, the level of political awareness is astonishingly low. Now political awareness, to begin with, is almost always a function both of education and of income. \* \* \*

But New Jersey citizens—despite their education and their affluence—rank very low—indeed last—in these political awareness tests. In a Harris poll in 1973, 59 per cent of all Americans could name one U.S. senator from their state, and 30 per cent could name both. But in the Garden State, even though both senators have considerable seniority, only 32 per cent could name either one, and only 25 per cent could name both.

Even worse were the results of a 1972 sampling by the New Jersey Poll. In that year—an election year—only 19 per cent could identify Clifford Case as a candidate for the Senate, even though he was then seeking (successfully, as it turned out) his fourth six-year term. Only 5 per cent could identify his Democratic opponent. In northern New Jersey, more people know about Mayor Abe Beame of New York than about Mayor Kenneth Gibson of Newark, and in the south, the major political figures are Frank Rizzo and Hugh Scott, both Pennsylvanians. \* \* \*

The answer, of course, is that there is something in the air. And what is in the air over New Jersey consists of signals from seven New York television stations and four from Philadelphia—and none from New Jersey. None, count 'em, none. New Jersey is one of only two states without a television channel in the VHF (2 to 13) band, the only one which really counts so far. Delaware is the other, although the Philadelphia educational channel is actually located in Wilmington.

And since television is not—at the bottom line—a public trust by which news and entertainment is given to the public, and certainly not a great educational machine mirroring our society and increasing our understanding of it, but only the cheapest device yet discovered by which large audiences can be delivered to advertisers who will pay substantial sums for the delivery. New Jerseyans are simply part of two of those audiences—in this case the New York and Philadelphia “media markets.”

As such, the fact that they are in another state is ignored, along with the imperatives that fact is thought—outside of television—to include. If the governor of New Jersey has a message for his fellow citizens, for example, he must leave the state in order to deliver it through the medium most of them use for news. Like Americans elsewhere, 70 per cent of the people in New Jersey rely on television for most of their news; 50 per cent say they get *all* their news from the tube.

The audience for New York and Philadelphia television stations includes, in each case, somewhere between 25 and 30 per cent New Jersey viewers. No station maintains studio facilities in New Jersey, and reporting is sporadic. For a New York station, getting news from New Jersey requires sending a crew: a correspondent, an electrician, a sound man, a cameraman and at least one producer/director type. It requires them to shoot their story, get back to New York (probably fighting the traffic), edit and develop the film, and get it on the air by 5 or 6 p. m.

\* \* \*

In addition, advertisers are affected by the relatively low share of the audience to be found in New Jersey. Many New Jersey advertisers—including, most of all, political candidates—simply cannot afford to pay for an audience three-fourths of whose members are geographically unable to buy the product. Thus, the New Jersey voter makes up his mind on local and state-wide elections and issues with little or no assistance from television—either from the news or from commercials.

Some results are clear, others subject to some informed speculation. The nature of television news is that the exciting and the controversial, the “visual” and, above all, the quick will survive the editorial process; the complex, difficult and abstract will wind up on the cutting room floor. It is this Gresham’s Law of television news that will put a night-time fire in your living room any evening that film of one is available, that will (and did) show you a presidential candidate every evening carrying his garment bag off an airplane but rarely if ever tell you what he believes, and that denies Americans any cognizance through their most-used news medium of the tough economic issues which increasingly dominate our lives.

And it is that Law—In a Medium in Which a News Piece Takes a Minute and an “In-Depth” Piece Takes Two Minutes, the Simple Will Drive Out the Complex—which gives the people of New Jersey a picture of their state as one in which there is a lot of violent crime and frequent natural disasters, and damn little else.

The director of the New Jersey Poll, Stephen Salmore, has been quoted as suggesting that major New Jersey economic problems continue to fester as a direct result of the absence of television, and he makes a persuasive case. According to Salmore, as well as most

serious analysts of New Jersey's economy, much of the state's problem is due to the fact that it is the only industrial state without a real income tax, and property taxes are at their realistic limits. (A recent compromise regressive income tax is regarded as a start, but a weak one.)

Both Republican and Democratic governors tried for years to get an income tax, says Salmore, but failed even though a steady majority of the voters favored it in the form it was offered. The explanation, he says, is that television provides the indispensable link between politicians and the public, and in New Jersey this link is missing. The result is that special interests can apply pressure on individual legislators without having to worry about countervailing public pressures. A governor can't "go over the heads" of the legislators or the lobbyists; there's nowhere overhead to go—at least not in New Jersey.

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#### NOTES AND QUESTIONS

1. The following item concerns a hearing before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce; it is from Broadcasting 28 (May 30, 1977):

Andrew Maguire (D-N.J.), a member of the parent Commerce Committee but not the subcommittee, prevailed on Representative Lionel Van Deerlin (D-Calif.), chairman of the subcommittee, for some time to present 'a parochial view'—New Jersey's case for additional television service.

\* \* \*

Chairman Wiley recalled that the commission concluded re-allocation was "not viable" and felt that a studio would not "get the job done. \* \* \* If they're not living up to their [New Jersey service] commitments, we'll look into it. The commission is serious about this."

Commissioner James Quello tried to defend the commission's position with an appeal to the congressman's sense of political realism. But the effort backfired. "If the commission moved ABC [ch. 7] out of New York to New Jersey," he said, "we'd hear from the senators and congressmen from New York."

"That's a shocking statement," Representative Maguire thundered. It's the kind of thinking, he said, that prevents the commission from acting. He expressed the view that the New York congressmen would be interested in a fair distribution of television facilities.

2. Were you as shocked as Congressman Maguire? Does the New Jersey television decision cast doubt on our working hypothesis concerning the local service objective? Does it suggest that the hypothesis should be limited to radio service, where it originated? Both the economics of television and the smaller number of stations practically available under any allocation scheme make that limitation understandable.

3. You might wonder how New Jersey's barren condition was ever allowed to develop in the first instance. The license of WNET-TV (Ch. 13) was originally assigned to a licensee in Newark, N. J., WNTA. In 1961, the license was transferred to non-commercial Educational Television for the Metropolitan Area, Inc. (ETMA), and the studio moved to New York (over the petition of "the Governor and other New Jersey officials") on the ground that ETMA would make the vast educational and cultural resources of the New York metropolitan area available to a service area of 15 million population on VHF and to the entire nation through its affiliation with the National Educational Television and Radio Center. This fact was held to outweigh the loss of what was then New Jersey's only television service; UHF's allocated to New Jersey were then dormant.

WNET's city of license remains Newark, but that is a mere formality. More substantively, upon approving the license assignment and studio transfer, the Commission pointed out that the "stations in New York, Pennsylvania or Delaware whose service areas include New Jersey communities \* \* \* have a duty to serve, to some extent, the local needs of their New Jersey viewing audience," and announced its "intention to inquire, at time of renewal, whether and how these responsibilities have been met." NTA Television Broadcasting Corp., 44 FCC 2563, 2577, 22 R.R. 273, 295 (1961).\*

4. In future license renewal proceedings, how should the Commission determine whether "implementation of these New Jersey service commitments" has been adequate, or even helpful, in accomplishing its purpose—the provision of "adequate television service" for the State? How might Commissioner Hooks and Mr. Mankiewicz?

5. Should the Commission require that each New York and Philadelphia television station direct its local news and public affairs programming to New Jersey subjects in proportion to Jerseyites' representation in the area served by the station? Would this proposal unfairly deprive New Yorkers and Philadelphians of locally-oriented programming?

6. Assuming that no VHF stations are to be relocated to New Jersey what, if anything, should be done about the fact, as stated by Mankiewicz, that New Jersey political candidates cannot afford to pur-

\* The Commission has recently heard argument on whether to designate WNET's renewal application for a hearing on the issue of its service to New Jersey.

chase advertising on VHF television stations since the high rates reflect an audience most of which they do not want to reach?

## **B. COMPETITION IN THE LOCAL MARKET: THE MULTIPLE OWNERSHIP PROCEEDING**

### **MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS**

Federal Communications Commission, 1970.

22 FCC 2d 306, 18 R.R.2d 1735 (Dkt. No. 18110, First Report and Order).

#### **THE COMMISSION'S PROPOSAL**

2. In this proceeding, the Commission proposed to amend the present multiple-ownership rules so as to prohibit the granting of any application for a broadcast license if after the grant the licensee would own, operate, or control two or more full-time broadcast stations within the market. The proposed amended rules would apply to all applications for new stations and for assignment of license or transfer of control except assignment and transfer applications filed pursuant to the provisions of section 1.540(b) or 1.541(b) of the rules (i. e., pro forma or involuntary assignments and transfers) and applications for assignment or transfer to heirs or legatees by will or intestacy. Divestiture, by any licensee, of existing facilities would not be required. The remainder of this section sets the proposal in perspective.

3. The multiple-ownership rules of the Commission have a twofold objective: (1) Fostering maximum competition in broadcasting, and (2) promoting diversification of programming sources and viewpoints. The rules are essentially the same for the standard, FM, and television broadcast services and, respectively appear in 47 CFR §§ 73.35, 73.240, and 73.636 (1969). Each of these sections is divided into two parts, the first of which is known as the duopoly rule, and the second of which is often called the concentration of control rule.

4. The concentration of control rules aim at achieving the aforementioned twofold objective nationally and regionally by providing that a license for a broadcast station will not be granted to a party if the grant would result in that party's owning, operating, or controlling more than a specified number of stations in the same broadcast service. For AM the number is 7, for FM it is 7, and for TV it is 7, with no more than 5 being VHF. The rules also provide that a grant will not be made, even though it would not result in exceeding these specified maximums, if it would result in undue concentration of control contrary to the public interest (some of the criteria for making such a determination are contained in the rules).

5. While the concentration of control rules aim at attaining the two-fold objective nationally and regionally, the duopoly rules are designated to attain it locally and regionally by providing that a

license for a broadcast station will not be granted to a party that owns, operates, or controls a station in the same broadcast service a specified contour of which would overlap the same contour of the station proposed to be licensed. (For AM stations the predicted or measured 1-mv./m. groundwave contours must not overlap; for FM, the predicted 1-mv./m. contours; for TV, the predicted grade B contours.) In broader language, the duopoly rules prohibit a party from owning, operating, or controlling more than one station in the same broadcast service in the same area. However, they do not prevent a single party from owning, operating, or controlling more than one station in the same area if each station is in a different service. Hence, a single licensee often has a standard, an FM, and a television broadcast station in one community.

6. The proposal in this proceeding is in essence an extension of the present duopoly rules, since it would proscribe common ownership, operation, or control of more than one unlimited-time [commercial] broadcast station in the same area, regardless of the type of broadcast service involved.

#### THE RULES ADOPTED HEREIN

13. A party having no broadcast stations in a community may obtain a license for only one station there—TV, AM (daytime only or full time), or FM. However, such a party may obtain licenses for an existing AM-FM combination in the same market by way of assignment or transfer if a proper showing is made by the seller that for economic or technical reasons the stations cannot be sold and operated separately.

14. No divestiture, by any licensee, of existing facilities will be required at this time. \* \* \*

#### THE BASIS AND PURPOSE OF THE RULES

16. Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (*Associated Press v. United States*, 326 U.S. 1, 20 (1945).) Thus, our Constitution rests upon the ground that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

17. These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with a concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting. For, centralization of control over the media of mass communications is, like monopolization of economic power, per se

undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

18. It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few hands, the control of this powerful medium of public communication. This basic principle, enforceable in ad hoc proceedings or through rule-making, applies to the judgment of whether an individual application should be granted as well as to the comparison of competing applicants.

19. It is true that section 315 of the Communications Act, the Commission's Fairness Doctrine, and the Commission's rules relating to personal attacks and station editorials on candidates for public office all contribute substantially toward insuring that, whatever a station's ownership, and the views of the licensee, each station will present conflicting viewpoints on controversial issues. However, this is not enough. For, as was stated in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S.App.D.C. 13, 19, 189 F.2d 677, 683 (1951), cert. den. 342 U.S. 830, the key to the question is the public interest in acquiring information from diverse and antagonistic sources, and news communicated to the public is subject to selection and, through selection, to editing, and \* \* \* in addition there may be diversity in methods, manner and emphasis of presentation. This is true not only with respect to news programs, but also the entire range of a station's treatment of programs dealing with public affairs.

20. As pointed out above, the governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition. The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and that remedial action need not await the feared result.

21. Application of the principles set forth above dictates that one person should not be licensed to operate more than one broadcast station in the same place, and serving substantially the same public, unless some other relevant public interest consideration is found to outweigh the importance of diversifying control. It is elementary that the number of frequencies available for licensing is limited. In any particular area there may be many voices that would like to be heard, but not all can be licensed. A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than



50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated. We see no existing public interest reason for being wedded to our present policy that permits a licensee to acquire more than one station in the same area.<sup>7</sup>

22. It is true that many communities have multiple broadcast and other communications media. But it is also true that the number of daily newspapers has been decreasing, a fact which increases the significance of the broadcast medium. \* \* \* [T]he number of cities with commercially competing local dailies [was] 45 in 1968. In 1962 the figure was 61. In our view, as we have made clear above, there is no optimum degree of diversification, and we do not feel competent to say or hold that any particular number of outlets of expression is enough. We believe that the increased amount of broadcast service now available also forms the basis for the conclusion that, with the exceptions mentioned later herein, it is no longer necessary to permit the licensing of combined operations in the same market, as was the case in the early days of broadcasting, in order to bring service to the public. \* \* \*

23. It is said that the good profit position of a multiple owner in the same market results in more in-depth informational programs being broadcast and, thus, in more meaningful diversity. We do not doubt that some multiple owners may have a greater capacity to so program, but the record does not demonstrate that they generally do so. The citations and honors for exceptional programming appear to be continually awarded to a very few licensees—perhaps a dozen or so

7. MBS states its conviction that it can only become stable and viable as a network by having AM, FM, and perhaps TV, stations in major markets. It avers that it presently owns no broadcast stations, that it has publicly announced its intention to acquire AM, FM, and TV stations, and that the rule would prevent it from having more than one station in a market. At the same time, the networks with which it competes would not be divested, so that MBS could not achieve parity with them. \* \* \* It is not clear that MBS could not achieve a competitive posture through the ownership of the permissible number of AM, FM, and TV stations in separate markets. However, MBS would

be entitled to a full hearing if it filed applications with requests for waiver of the new rules setting out adequate reasons why it should be permitted to obtain more than one station in an area.

A full hearing could similarly be obtained by ABC, which argues that its competitive position could be improved by merging with a larger company, but that the advantages of merger would be nullified by the new rules which would require it to divest of all but one of its owned and operated stations in each market it is licensed to serve in order to obtain approval of the merger request.

multiple owners out of a total of hundreds of such owners. Although multiple owners may have more funds for experimental programming and innovation, there has been no showing that the funds are spent for these purposes. However, accepting *arguendo* that some multiple licensees do a better programming job in this respect than do single station licensees, we are not reducing the holdings of multiple licensees. Moreover, the further notice being issued today, which would require divestiture over a period of time, would not reduce the financial strength of multiple owners that presumably leads to an ability to engage in such programming. Rather, it would maximize the number of different licensees in each market but would permit the purchase by divested licensees of a similar number of stations in other markets.

24. Finally, the argument is made that rules prohibiting a present owner of a single full-time station in a community from obtaining additional stations there would be illegally discriminatory because they would prevent him from competing effectively with combination owners in the area and would make a privileged class out of combination owners. Therefore, it is argued, if the rules are adopted, divestiture should be required. The decision to refuse to permit additional local concentration in the future does not necessarily require that existing situations all be uprooted. On an overall basis, there has been no showing that single stations cannot compete effectively with combination owners. We are herewith instituting new rule-making to consider the need for divestiture and will there consider the arguments in its favor. Individual cases can of course always be dealt with where necessary to preserve adequate competition. But a line must be drawn somewhere, and the application of new policy to new applications is a clearly reasonable approach.

25. Although the principal purpose of the proposed rules is to promote diversity of viewpoints in the same area, and it is on this ground that our above discussion is primarily based, we think it clear that promoting diversity of ownership also promotes competition. A number of comments were made with respect to the competitive advantage that licensees of co-owned stations have over the single station licensee in the same area. Thus, the Department of Justice points out that AM, FM, and TV are for many purposes sufficiently interchangeable to be directly competitive, and that competitive considerations support adoption of the rules. It mentions that one effect of combined ownership of broadcast media in the same market is to lessen the degree of competition for advertising among the alternative media. Another, it is averred, is that a combined owner may use practices which exploit his advantage over the single station owner. These practices may include special discounts for advertisers using more than one medium, or cumulative volume discounts covering advertising placed on more than one medium. \* \* \*

26. Opponents of the proposed rules state that there is no hard evidence that multiple licensees generally engage in practices of this kind. CBS says that the argument about such practices provides no justification for the rules for the Commission long ago addressed itself to the matter (Combination Advertising Rates, 24 Pike & Fischer, R.R. 930 (1963)), and there is no significant problem in this area. A study commissioned by WGN and others purports to find no statistical evidence that revenue yields for multiple owners are significantly different from yields of single-station owners (using revenue per thousand audience as an indication of superiority). \* \* \*

27. NBC, in its reply comments (directed against the Justice comments), argues that the market shares of the largest owners in the larger markets are well below the points which are generally considered danger points by antitrust standards. The basic data on market shares which it presents, in spite of the conclusion of NBC, do show high concentration in some markets. For example, in Washington, D.C., if the market is considered to be only the broadcast media, the top three owners have a 64-percent market share; if the market is considered to be broadcast and newspaper media, the top two owners have a 68-percent share. In any event, we find that distributing ownership more broadly will strengthen competition by removing the potential of competitive advantage over single station owners. There is no need to find specific abuses in order to provide a healthier competitive environment of benefit to smaller licensees.

## DISCUSSION OF THE RULES

### *Characteristics of different "markets"*

35. A widely held view of opponents is that the proposed rules are too sweeping and not tailored to the specific requirements of particular situations. It is said that all markets are not alike and that the rules should treat different markets differently. Some urge that large markets should be exempted because of the great number of independently owned mass media serving them. Others urge exemption for small markets because viability there often depends on having combined operations, and point to the fact that the Commission recognized financial difficulties in smaller markets when it exempted them from the AM-FM duplication rules. Still others proposed that if a market has a specified number of "voices," it be exempted on the ground that it presumptively has an adequate amount of diversity so that the rules are not needed. And some suggest that weights or points be given for various types of media and that a single owner be permitted to have only a specified number of points in a market.<sup>13</sup>

13. Air Trails suggests an incentive plan that might encourage owners to break up local combinations by permitting them to own a greater number of stations nationally than is per-

mitted under present rules. This would increase diversity locally at the expense of increasing concentration of control nationally. We think it more in the public interest to adopt rules

*Comparability of A.M., F.M., and TV*

42. Opponents of the proposal aver that the three services are not comparable and therefore that the rules are inapt since the different services have different audiences in kind and size and eliminating common ownership in the same market does not mean that individual members of the public will receive more voices.

44. The rules are designed to prevent any possible undue influence on local public opinion by relatively few persons or groups. They can do this by either bringing more voices to the same audience, or by assuring that no one person or entity transmits its single voice to each of three audiences. Assuming separate audiences for each of the three services, a commonly owned AM-FM-TV combination sends a single voice to the sum of all three audiences which might well constitute most of the community. With three separate owners, no one person or entity could so reach the entire community. Each would reach a part of it, and this would act to reduce possible undue influence. Insofar as there is overlap of audiences of the three services, separate ownership, of course, would bring more voices to the overlapping audiences. Such overlap may be substantial.

*FM and UHF development*

45. Some parties urge that the rules would be contrary to the policy of fostering UHF development, since often the local AM licensee might be the only one willing to undertake to build a UHF station, so that may be the only way that UHF may develop in many communities. Moreover, in many communities, we are told, independent FM operation is not viable. If this is the case, it is argued, it is difficult to see how the rules would achieve diversity. Channels would lie fallow that otherwise might have been used by licensees of other local stations. Moreover, when AM-FM combinations are sold, there may often be no buyer for the FM station, with the result that it would go off the air. This, opponents contend, would be unfair to AM licensees who went into FM operations in the same community as the result of Commission encouragement since it would deny them the fruits of their risk taking by depressing property values at the time of sale. Consequently, it is argued, many might be disinclined to enter into new areas of communications in the future, thereby slowing development in new areas, and this would be contrary to the public interest. It is also pointed out that the AM-FM nonduplication rule recognized that AM-FM combinations in small markets are not in a position to program even 50 percent separately, yet the rules proposed herein would not only require 100-percent separate programming, but separate ownership as well.

46. As opposed to the foregoing, supporters of the proposal hold that the clear effect of combined ownership of stations in the same

that would increase local diversity  
while at the same time not increasing

national concentration to the degree  
suggested.

market is to reduce diversity of news and information sources available and to lessen the degree of competition for advertising; that separate ownership of AM and FM stations would require completely separate programming instead of the amount presently permitted under the nonduplication rules and that this would give the public a greater choice of programming; that it is difficult to imagine that a dual owner would carry conservative editorials on its AM station and liberal editorials on its FM station—separate owners give more views; and that common ownership of AM and FM stations restricts FM development.

47. We find the arguments of opponents persuasive. Surely independent UHF stations still need all the support they can receive. Although AM stations have shown little inclination in the past to build or acquire such UHF stations, combinations of UHF with AM stations, or, should the occasion arise, with FM stations or with AM-FM combinations, will be dealt with on an ad hoc basis. \* \* \*

48. With respect to existing AM-FM combinations in the same area, we recognize that in most cases the operations may be economically and/or technically interdependent. Financial data reported by FM stations indicate that they are generally losing money. We are, therefore, in the rules adopted today, permitting assignments or transfers of combined AM-FM stations to a single party where a showing is made that establishes the interdependence of the stations and the impracticability of selling and operating them as separate stations. Although this will not foster our objective of increasing diversity, it will preclude the possible demise of many FM stations, which could only decrease diversity.

49. However, although we take the aforementioned step as to existing AM-FM combinations, licensees of FM stations or of full-time AM stations (with the exception of certain class IV's) will not be permitted to obtain a second aural authorization in the same market. We believe that there is no general shortage of aural service, and have decided to prevent any further concentration of ownership of such stations. The excepted class IV stations are those in markets with a shortage of local aural service \* \* \*. [Also] daytime-only AM stations will be permitted to obtain FM licenses.

57. It cannot be denied that past encouragement has been given to AM licensees to engage in joint AM-FM operations. However, as stated elsewhere (par. 22, supra), changing conditions require a re-evaluation of objectives, which may result in rule changes. For example, for a long time 100 percent duplication of AM-FM programming was permitted. However, that was changed by the adoption of the AM-FM nonduplication rules. \* \* \*

#### *The nondivestiture provision*

68. When the notice was issued we believed that it was in the public interest to "grandfather" existing licensees (partly because of

the disruptive effect of divestiture), although requiring them to break up combinations when selling their stations. Consideration of the record, however, has given us pause. \* \* \* Accordingly, we are today issuing a further notice of proposed rulemaking looking toward divestiture in order to develop more information on the subject and to give interested parties an opportunity to comment on the matter. For similar reasons, the matter of newspaper ownership, mentioned by various parties, is also dealt with in the further notice.

CONCURRING AND DISSENTING STATEMENT OF CHAIRMAN  
DEAN BURCH

\* \* \*

The Commission has been considering solely the question of future acquisitions, by new application or purchase, of TV-AM-FM combinations in the same market. Where there are only a few aural services, this may be a significant issue (although often in areas of sparse population, only the multiple owner will come forward to provide UHF or FM service). But in the great majority of cases, it is not a pressing issue. The reason is obvious: In the Washington metropolitan area there are 37 aural services; in New York, 59; in Chicago, 61, and so on. There is a plethora of aural services in all significant markets. Thus, while separating TV from AM or FM might make a contribution in a few cases, it is clearly far from the heart of the problem. The plain fact is that the Commission has labored for over 2 years, received reams of comments, heard extensive argument, only to bring forth a rule which applies to areas of ownership least needing attention, if at all.

Clearly, the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily newspaper. There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter. As far as I am concerned, if there is any threat of undue concentration, and I have of course reached no final conclusion on this score, it does not lie in cross ownership of AM-FM-TV.

\* \* \*

DISSENTING STATEMENT OF COMMISSIONER ROBERT WELLS

The Commission has today taken drastic action and has proposed more. It has done so with little justification, and with insufficient investigation and understanding of the consequences of its action. Some of the consequences are speculative, others will depend upon the flexibility of the Commission in granting waivers where necessary; however, I have no doubt but that the rule adopted today and the one proposed will disserve the public interest.

\* \* \* The broadcasters predicted, with apparent justification, that the quality of news and public affairs programming would suffer if the facilities were separately owned. The Commission responds that present multiple owners would have stations in other markets which would permit the same financial strength and, therefore, the same quality programming. This is unresponsive. It is the fact that each facility benefits from the larger news and public affairs staff that permits superior quality. A 30-man news staff in a Chicago television station would contribute little to a commonly owned FM station in Portland.

The majority states that there is no evidence that multiple owners provide better service than single outlets. The question of whether present service would deteriorate if the facilities were operated separately, particularly if one or more should be a marginal operation, is ignored. \* \* \*

\* \* \* The economic impact of the rules and the proposed rules is difficult to assess, I do not know what will result. Clearly the majority does not. Surely upgrading of facilities that may have to be sold will cease. The psychological impact on the industry will doubtless be substantial because these far-reaching rules have been adopted and proposed with little apparent justification, and because of the dramatic reversal of policy after years of encouragement to expand into new services. Broadcasters may be understandably chary of the Commission's encouragement to enter UHF knowing that their ownership may be secure only until they are successful. \* \* \*

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### QUESTIONS

1. The passage quoted from Justice Holmes' dissent in *Abrams* (§ 16) has achieved very broad currency; the metaphor of a competitive "marketplace of ideas" is fully enshrined in our understanding of the first amendment to the Constitution. One must be wary of the epigrammatist, however, for the power of an epigram to get itself accepted in the competition of the market may have more to do with packaging than with its analytic rigor. The persistence of Justice Holmes' irrelevancy about "falsely shouting fire in a theatre" is a particularly appropriate illustration. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Does the FCC thus err insofar as it equates the maximum possible diversity of ownership with the optimal level of diversity? See § 21. Optimal for what, you might well ask. What is the Commission's answer?

Similarly, is the two or three firm concentration ratio (§ 27) a useful concept as applied to audience shares rather than advertising sales?

2. In justification of its new multiple ownership rules, the FCC relies in part upon the value of economic competition among broadcasters, i. e., for advertising sales. Yet it did not allege that local advertising markets were either being subjected to specific anti-competitive practices or, except in the one market instanced, were highly concentrated. Is the argument a makeweight?
3. According to Chairman Burch, concurring and dissenting, the Commission's "action is a prime example of bureaucratic tinkering to no effect." Yet Commissioner Wells calls it "drastic action" the ramifications of which are uncertain but sure to be substantial. Can either view be supported a priori? Cf. ¶ 48. The FCC does not, by the way, prescribe the accounting methods to be used by licensees. Will this be an obstacle to administration of its waiver policy?
4. Regulations that "grandfather" non-conforming parties, as opposed to properties, often create a situation in which property has a different value in different hands. A familiar example is rent control with a "vacancy decontrol" provision. What incentives are created by the similar rule allowing the continuation, but not the joint transfer, of AM-FM combinations?

#### NOTE ON FURTHER DEVELOPMENTS

1. On reconsideration the Commission deleted the rules (a) barring formation of new AM-FM combinations and (b) requiring a special showing to justify the joint sale of such combinations. The one-to-a-market rules were continued for VHF-aural combinations, however. 28 FCC 2d 662, 21 R.R.2d 1551 (1971). Is this distinction between new AM-FM and new VHF-aural combinations a logical one? How does it consist with the Commission's simultaneous announcement, *id.* at ¶ 37, that it would soon institute a rulemaking proceeding to determine "whether and to what extent [AM-FM program] non-duplication rules can serve as an effective alternative to diversification of ownership?"
2. Commissioner Johnson dissented. He would have continued to require the separate sale of AM and FM stations unless it could be shown that "the prices offered for the stations separately were significantly lower than a fair price for the stations in combination." Is this a workable suggestion? Is it responsive to the problems, referred to above, that arise when property has different legal content in different hands?
3. Johnson also made the following observation:

"In large markets, so the argument goes, there is so much competition that there should be no concern over AM-FM combinations, and they should be permitted in all circumstances. \* \* \*

"While it is true that there is more competition in larger radio markets, it is also the case that available channels in



these markets are generally exhausted. There are numerous groups in our society, particularly minority groups, that feel themselves cut off from ownership of broadcast properties, and are interested in getting into media ownership and operation. For example, roughly  $\frac{1}{10}$  of 1% of the nation's 7500 radio and television stations are owned by blacks. The concentration of black population is in the very cities where the Commission is going to continue joint ownership and where all available construction permits for new stations are exhausted. So long as those circumstances continue to exist, it is hard to justify continued AM-FM combinations in the largest markets—where additional potential owners are pounding on the door. The situation would be better if those groups that want to enter broadcasting could do so.”

Assuming the reasonably effective operation of Johnson's proposed price inquiry scheme, would the minorities desiring to enter broadcasting be any better off with than without the rule against joint sale of AM-FM combinations?

4. In its Second Report and Order, which follows, the FCC addresses the subject of newspaper and broadcast station common ownership in a manner that invites antitrust analysis. See *infra* ¶¶ 10–11, 33; cf. ¶ 110. Therefore, as you read both the Report and Commissioner Robinson's separate opinion you should question whether newspapers and broadcasting constitute a single product market, or whether the relevant product market is either narrower or broader. This will in turn require that you have a grasp of whether at any given point the FCC is, or should be, discussing the market for advertising time and space or the “market” for consumer attention to ideas and journalistic content. See, e. g., ¶ 39, *infra*. The distinction is elusive but important to clear analysis; its centrality, as well as its peculiarity, are captured in the saying—significantly, perhaps, not a newspaper-industry saying—that broadcasters are in the business of selling audiences to advertisers.\*

#### MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS

Federal Communications Commission, 1975.

50 FCC 2d 1046, 32 R.R.2d 954 (Dkt. No. 18110, Second Report and Order).

4. On the same date that the First Report and Order was adopted, the Commission also adopted a Further Notice of Proposed Rule

\* Before reading the Report, you may wish to consider preliminarily the facts concerning media concentration in Erewhon, set out at page 233 *infra*. Do you think it likely that Erewhoners receive the benefits of vigorous

competition to sell advertising time/space to local businesses, and/or of media controversy concerning public affairs? (We shall return to Erewhon in due course.)

Making which contained a proposal as to common ownership of broadcast stations and of daily newspapers and broadcast stations in the same market. The proposal would require divestiture, within five years, to reduce one party's holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM-FM combination. Under the proposal, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market. Comments were also invited on whether divestiture should be required with regard to AM-FM combinations so that no party could own such a combination unless he had made a showing that the two stations were for economic or technical reasons so interdependent that one could not be sold without the other.

10. Our diversification policy is derived from both First Amendment and antitrust policy sources. See, e. g., *Associated Press v. United States*, 326 U.S. 1 (1945). \* \* \* The federal courts have consistently upheld our use of these grounds in efforts to promote diversity of control over the electronic media of mass communications. In its earliest opinions construing the Communications Act, the Supreme Court recognized that regulation of broadcasting was designed to preserve competition and prevent monopoly. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-76 [9 R.R.2d 2008] (1940). The Supreme Court said in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 [16 R.R.2d 2029]: "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee". The court then concluded: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at p. 390. In *Mt. Mansfield TV Inc. v. FCC*, 442 F.2d 470 [21 R.R.2d 2087] (2nd Cir. 1971) the court upheld our prime time access rule as being consistent with our obligations under the First Amendment to promote diversity of program sources.

11. Although the Commission is not empowered to enforce the antitrust laws, it may properly take cognizance of antitrust violations and antitrust policy in performing its public interest licensing function. *United States v. RCA*, 358 U.S. 334 [18 R.R. 2051] (1954). In expanding on this point in *RCA*, the Supreme Court said in dicta:

"Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory stan-

dard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. [Citations]"

Antitrust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices. However, these two sources of our diversification policy are not always present to the same extent nor do they apply with equal force in every case. Our prospectively-applicable rule with respect to future newspaper-broadcast combinations in the same city draws its support principally from our First Amendment concern. Our divestiture order applied to "egregious" cases in which the only newspaper and the only broadcast station in a city are co-owned is founded upon both concerns. While we have proceeded by a different course than one based strictly on a market analysis, the fact is we have in effect used a geographic market in writing our new rules and have considered daily newspapers and stations as part of the same product market.

#### NEWSPAPER OWNERSHIP—ECONOMIC CONSEQUENCES

33. Much of the discussion relating to daily newspaper-television station common ownership in the pleadings was approached from the point of view of antitrust considerations. To aid in understanding the nature of the questions thus presented the succeeding paragraphs in part follow an antitrust oriented arrangement. In addition, a number of pleadings were directed to the question of diversity of viewpoints as it related to newspaper-broadcasting common ownership. These arguments will be discussed separately.

35. [Relevant Product Market.] The dispute here centers on whether newspapers and television stations are part of the same product market, or in other words are competitors.<sup>11</sup> In antitrust terms this is a basic question, for if they are not, then the cross ownership which exists does not suggest that owning both would lead to owning a larger share of the same market. According to the Department of Justice, newspapers and television stations are in many ways engaged in the same business, namely attracting audiences and selling them to advertisers. While it does acknowledge that the two are not interchangeable for all advertisers, it asserts that the two are far more alike than they are different. It also contends that there is a public interest in preserving competition between products which are physically distinct but are commercially substitutable for certain classes of customers. Since Justice sees newspaper and television

11. A similar comparison is made between newspapers and radio stations.

advertising as interchangeable, it would define the product market so as to include newspapers and television stations.

37. **Relevant Geographic Market.** To evaluate the economic implications of the situation requires knowledge not only of the product line but of the geographic confines involved as well. Depending on where the geographical line is drawn, the situation could be much altered. Generally speaking, as the area enlarges, the part of the market belonging to the company in question drops as other economic entities are included in the market share calculations. The subject is not the simple one it may seem, as there are a number of ways to go about the determination. \* \* \*

38. As might be expected, the parties favoring divestiture urge a narrower geographic confine for use in a Commission determination, and those opposing divestiture urge a broader one employing Grade B coverage or ADI [Area of dominant influence] for the television station and for newspapers the similarly extensive primary market area or the city and retail trade zone. In the Department of Justice filings against the renewal applications for several stations, the thrust of its pleading here has been followed, with use of a market in no case larger than the equivalent of a city and its suburbs. Conversely, the opposing parties urge the Commission to apply its own standards and to reject as artificially contrived the market concepts of the Department of Justice.

39. **Market Share of Newspaper—Television Station Combinations.** Certain facts mentioned by the parties are not in dispute. Daily newspapers tend to be much larger enterprises than television stations. Radio stations are significantly smaller than either. Moreover, few cities have competing daily newspapers, so that from the point of view of advertising revenues, a daily newspaper-television station combination would inevitably garner a sizeable portion of the total local advertising revenues. The dispute, then, centers on the importance of these economic facts in terms of Commission policy goals. Also, to what extent should the Commission take into account the multiplicity of media exposures from magazines and other sources, in determining the degree of concentration? The Department of Justice points to a Roper study that indicated that the public principally relied on newspapers and television stations for their news. On this basis they would give little weight to other media sources. Justice then goes on to compare the local market shares of the newspaper and television station combinations with Clayton Act Section 7 merger guidelines. Simply put, in an oligopolistic situation the acquisition of even small shares of the market can conflict with these guidelines. However, as a number of parties point out, the prohibition in Section 7 applies to acquisitions, not to internal growth, as was the case with the creation of most newspaper-television combinations. Instead, these parties point out that the Sherman Act prohibitions on monopolization apply. In such instances, Section 2 of the Act

requires a showing of action of the entity in question to set prices or otherwise restrict competition. They contend that no showing has been made that establishes anything resembling such economic power.

\* \* \*

40. It is clear that by any standard, market differences do exist, and that the extent of economic power, whether exercised or not, varies. When this proceeding began, there were 19 instances (now fewer) in which the owner of the only local daily newspaper also was connected to the only television station licensed to the community. From a concentration point of view, these would seem to present the most severe cases, but even in these instances, the industry did not agree that action by this agency was appropriate. They say also that from a diversity point of view even in these communities there is a plethora of media voices originating in or entering the market. \* \*

#### NEWSPAPER OWNERSHIP—DIVERSITY OF PROGRAM AND SERVICE VIEWPOINTS

43. The preceding discussion has focused on the economic significance of combinations. The other side is the impact on the dissemination of ideas in a democratic society if there is a combination of media holdings held by a single entity. At what point, if any, is there a lack of diversity of viewpoints and programming or if such diversity at some level exists does that end the need to consider the size or market share of the entity in question? These are the kinds of questions to consider.

44. Opponents of the proposal have argued that the proposal rests on the false premises that current diversity is inadequate and that 51 voices are necessarily better than 50. However, they assert, if the forced transfer of a station to the 51st voice results in the station's news operation's being reduced to "rip and read", the addition of the 51st voice would not have been beneficial.

45. Do They Speak With One Voice. Opponents contend that cross ownership of newspapers and broadcast stations does not mean that both entities speak with the same voice. Most of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff, including news and advertising staffs (which compete with each other for advertising), and do not have joint advertising rates. Some even claim that because they have separate editorial boards they present editorials in one outlet which are opposed in the other. We are told that there are other built-in protections against commonly owned newspapers and station's offering the same viewpoint and information. These parties point to the professionalism in journalism and the development of industry practices and codes of ethics which transcends employee-employer loyalties and result in highly independent staffs operating even common owned media. Also, the technology which requires specialized and separate management teams for various media holdings is said to limit the influence of the

common owner. Finally, we are assured, there is protection because of existing diversity, so that in major markets it would not be possible to control the informational output of the communications media or to prevent a significant point of view from reaching the public. These parties assert that if abuses of this nature were occurring, there would be outcries from the public and other local competitive media. They believe that the absence of such complaints is the most telling argument against the need for the proposed rules and that in smaller markets economic considerations may inhibit the financial separation of different media.

48. More specifically, many parties referred to the Seiden study submitted by NAB to show that there is ample diversity in their own markets. The Seiden study listed all media available in each market in various categories, including those originating within and outside the market. Unlike the premises under which this study was done, the Justice Department would only include local television and newspapers in evaluating diversity since in its view these are the only effective competitors for local advertising. Weekly newspapers and other periodicals as well as broadcast signals originating outside the market on this basis should therefore not be counted. Opponents of the proposed rule and of the Justice viewpoint recommend that national media be considered in addition to local media because they reach substantial numbers of people to provide diverse information sources. Further, they urge that the fact that the public favored one medium or one newspaper or broadcast outlet rather than another should not be taken as indicating a lessening of the diversity of available media. They thought it should be irrelevant for the purpose of the Commission's proposal that the circulation bases differed so markedly.

49. At the time the proceeding began there were ninety-four (94) TV stations which were affiliated with local newspapers. The Seiden study purported to show that there is abundant diversity in these communities as well as elsewhere—that there is abundant diversity in every TV market. In New York City, we were told, there were 610 media with 434 owners. Even in Zanesville, Ohio, the then most concentrated market, there were 49 media with 39 owners. Of these, four media were considered local, and were held by two owners. In Glendive, Montana, the smallest market, there were 36 media with 30 owners. Of these, five media with four owners were local. The average for the top 50 markets was 317 media, owned by 170 different groups. Of these, 139 originated in the market and were held by 111 different owners.

50. The American Newspaper Publishers Association ("ANPA") says that the number of newspaper-owned TV stations has decreased since 1948, when 48% were owned by newspapers, to 14% in 1969, and there has been an absolute as well as proportional decrease in

newspaper-owned stations since 1955. The NAB says that newspaper ownership of all broadcast outlets is less than 7%. \* \* \*

51. Opponents assure us that the Fairness Doctrine, Section 315 of the Communications Act, and the developing body of law falling under the category of "access to media" ensure that stations will not present only one viewpoint. \* \* \*

#### NEWSPAPER OWNERSHIP—SPECIFIC ARGUMENTS

62. Jointly Owned Broadcast Stations and Newspapers in the Same Market Can Give Better Service. \* \* \* According to the exponents of this view the public would lose more than it would gain if those of the journalistic tradition are excluded from broadcasting. They argue that newspaper owners, coming from a tradition of journalism rather than entertainment, have set high standards of emphasis upon informative broadcasting with extensive news staffs and upon dedication to meeting community needs and advancing community projects. In fact, former Chairman Newton N. Minow has suggested that the public interest might better be served if, contrary to the thrust of our proposal, more newspapers were given the opportunity to operate TV outlets in their communities. He also suggested that the tradition of professional journalism offered by the newspapers greatly enhanced their ability to offer programs in the public interest.

64. The argument has been made that integrating broadcast and newspaper operations enables the licensee to provide service in the public interest which could not be provided if the operations were conducted independently and under separate ownership. Combined ownership is said to permit experimentation, innovation, minority programming, more effective dissemination of news and public information, independence from advertisers, lower advertising costs, financial stability, and otherwise contributes to diversity. They argue that because of the combination, many efficiencies and economies of operation can be effectuated, such as economies in buying and maintaining equipment, the joint use of buildings and office space, the common staff of program, technical and administrative personnel, etc.

68. Broadcast Media and Newspapers Are Not Comparable. Although opponents of the current proposal acknowledge that newspapers and TV are the public's primary source of news, they contend that there is a radical difference between them, both in method and scope. They are seen as complementary, not competing, sources of news. In their view the Commission's statement that newspaper ownership of a co-located TV station directly parallels joint ownership of two TV stations in the same community, ignores many salient differences. For example: (a) the broadcast media bring the public only the headlines whereas newspapers provide the details and background; (b) the broadcast media devote no more than 10% to 12% of their time to news whereas newspapers devote 100% of their non-advertising

space of journalistic function; (c) broadcasting is basically an entertainment medium whereas a newspaper is primarily a news medium; (d) a newspaper is a recorder of events whereas the broadcast media are not; (e) newspapers provide a permanent record for future reference whereas the broadcast media do not; (f) the types of advertising and the products advertised through the two media differ; (g) the two media do not necessarily encompass the same market; (h) the persons who use TV as their primary source of communication do not necessarily subscribe to newspapers; and (i) the broadcast media are inherently incapable of providing on a day-to-day basis in-depth local reporting whereas a newspaper has such capability. Pointing to the Commission's Further Notice in this proceeding where it was indicated that studies showed that persons relying most heavily upon newspapers as a source of information are those identified as leaders or opinion molders, the opponents state that the joint ownership of a newspaper or TV station is likely to make no difference to these people since the nature of the newspaper analysis of a news event varies so greatly from the most abbreviated form of news which appears on TV. Further, we are assured, these persons are unlikely to rely on a single source of information for their news.

#### The Proposed Rule Amounts to the Virtual Abandonment of the Commission's Policy Favoring Local Ownership

78. Opponents charge that the divestiture provision of the rule would frustrate the Commission's policy favoring local ownership which has long been considered conducive to programming responsive to local needs and interests. This they say can be seen in the Commission prediction that many licensees will simply trade stations with other licensees, thereby achieving divestiture without significant upheaval in the identity of the media ownership. They argue that this trading of broadcast properties would result in absentee ownership. However they do not think such ownership is desirable, particularly where a broadcast station is traded away from a newspaper with local ownership and strong community ties. Rather, they believe that the strong affiliation between a newspaper and its community often results in programming on a commonly owned television station which is particularly responsive to the needs and interests of the community. They think an absentee owner, with less contact with the community might be less concerned with the public interest and more concerned with the balance sheet, and the divestiture may result in the fragmentation of professional staffs which have been built up over the years to provide the best possible service to the public. This leads them to conclude that the absentee ownership resulting from divestiture would therefore result in a loss of service of the public.

79. Opponents have rejected suggestions that the first opportunity to purchase a station be given to local group or that more



than one potential purchaser be submitted to the Commission as unworkable and contrary to Section 310(b) of the Communications Act.

\* \* \*

#### Divestiture Would Have a "Chilling" Effect and Inhibit Free Speech and Press

88. The charge is made by the NAB that already extensive regulation exists and unwarranted extension of such regulation could only have harmful results. Inevitably, they feel, a fear would be created that governmental action could be invoked as a means of expressing displeasure at a course of conduct, not because it is unlawful but because it is contrary to governmental preference. Even if the current proposal in itself did not bring the weight of government to bear in such a manner, they believe that the fear would be created that it could happen in the future. The net effect they foresee would be a restriction on free speech, a curtailment of creative journalism, affecting newspapers as well as stations. Thus, the NAB states, in a democracy, it is the power of the government, not that of the press that is to be feared. Especially in the current political climate, the action here proposed is bound to be interpreted as a governmental assault on the free press, it is argued.

89. The lesson of history in this regard is said to be clear: there is no such thing as compulsory freedom. Just so, there can be no compulsory diversity. The greatness of this country's press, print and broadcast, we are told is the product of the lack of governmental intrusion. It is its freedom of operation that has and will continue to offer a continuation of the situation in which American diversity exceeds that of any country. \* \* \*

#### The Commission Should Adopt Specific Rules to Deal With Potential Abuses

92. Several parties suggest that if the Commission can identify evils which could occur in cross-ownership situations, such as preferential advertising rates for purchase of both newspaper space and broadcast commercial time, it should regulate such practices by specific rules. The Commission's response to the payola scandals—sponsorship identification requirements of §§ 73, 119 and 73.654—is said to be a good example of selective rule making.

#### CONCLUSIONS

101. Prospective Rules. \* \* \* It appears that the licensing of a newspaper applicant for a new station in the same city as that in which the paper is published is not going to add to already existing choices, is not going to enhance diversity. In fact, since the number of channels open for filing has vastly diminished, the channel in question may be the last or one of the last available for the community.

All this leads us to conclude that steps need to be taken in this regard. We think that any new licensing should be expected to add to local diversity. Accordingly, the rules will bar combinations that would not do so. Not all print media are equal or are generally circulated. Thus, we do not believe that weekly newspapers or specialized publications (including foreign language dailies) need to be included in the prohibitions we are adopting. Their situation would be different, for much of the audience of a station owned by such an entity would receive that entity's views for the first time. Each such publication is a relatively unimportant fraction of the media mix in a particular area. For this reason and because of the sheer size of daily newspapers, we shall limit the rule to daily newspapers of general circulation. For the purpose of this rule, collegiate papers, even if dailies, are not considered to be circulated generally.

102. Since there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership, some limit needs to be placed on the geographic effect of the rule. We have decided to follow the parallel of the multiple ownership rule already adopted in this proceeding which bars new TV-radio combinations within certain specified contours, namely Grade A for television, 2 mV/m for AM and 1 mV/m for FM. The rule would bar newspaper ownership if the predicted contours encompassed the city in which the daily newspaper is published.

103. The rule will apply to new ownership patterns however created, whether by initial application and construction or by acquisition. In fact, the latter category is perhaps an even greater cause for concern since there would be a loss of an already existing separate voice if a separately owned station were acquired by a paper. In addition, once a sale is to take place the rule would require a split in an existing combination. No divestiture would be effected nor hardship created since this is a voluntary action by the seller. Thus the rule will apply to all applications for assignment or transfer other than those to heirs or legatees or those for pro-forma changes in ownership.<sup>24</sup> In addition to barring daily newspapers from acquiring a station if any of the above-mentioned contours encompass the newspaper community, we shall prohibit grant of a renewal to any station which acquires such a newspaper.

104. The new rule will apply to radio, as well as television applications. While on the one hand it could be argued that the larger number of radio facilities means there already is more diversity than in television, the fact is that we wish to encourage still greater diversity. \* \* \*

105. The portion of the multiple ownership rules being amended today has come to be known as the "duopoly" portion of those rules

24. Parties believing that survival of both entities depends on their joint sale may make such an argument in seeking waiver of this requirement.

(as contrasted with the seven-station portion). Originally, the duopoly rules proscribed common ownership, operation, or control of two broadcast stations in the same broadcast service serving substantially the same area. \* \* \* [A]t an earlier stage of this proceeding, the duopoly rules were amended to cut across broadcast service lines, namely, VHF television and radio. Today they are further amended to include daily newspapers.

107. The Commission's present rules proscribing acquisition of common ownership of stations in different services in the same market [do not apply to UHF stations.] \* \* \* Instead, a case-by-case approach is followed. After careful consideration we have decided not to follow this distinction in connection with newspaper-television common ownership. \* \* \*

108. Divestiture. \* \* \* We remain no less convinced than before of the importance of diversity, but this is not the only point to consider. Our examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone. There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be [to] outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding.

109. In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules, divestiture introduces the possibility of disruption for the industry and hardship for individual owners.

110. \* \* \* [W]e have analyzed the basic media ownership questions in terms of this agency's primary concern—diversity in ownership as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly antitrust approach. Indeed, we have taken into consideration such matters such as potential disruption of the broadcast industry which may not have been

relevant from an antitrust analysis, but are intimately involved with important public interest considerations which this agency cannot ignore.

111. The distinction between our approach and the Justice Department's is best put this way. Justice and others applying traditional antitrust criteria are primarily interested in preserving competition in advertising. They place a greater emphasis on public policies underlying the need to preserve competition than on diversity aspects and for their arguments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area. The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. \* \* \*

112. Having said that our primary concern is diversity in programming service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. This does not mean that the Justice Department's concern for economic competition is irrelevant; only that it is of secondary concern under the Commission's regulatory responsibilities. After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases. We have examined instances where there is co-located common ownership of a daily newspaper and a television and/or radio station to see which situations, if any, required action. In doing so we had to select some standards.

\* \* \* We were greatly concerned about a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically. This did not mean, for example, that no magazines or other periodicals entered the market, or that no other radio or television station could be received there. Aside from the fact that such media outlets often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues. If they did deal with locally oriented issues, it was their own locality that was the focus. Such a situation does not bespeak a real diversity on vital issues of local concern. In fact, it is local issues on which so much decision-making by the electorate is required, and on which the level of diversity provided by incoming media is lowest. Accordingly, we made an effort to determine whether diversity, real community-wide diversity, was present on such topics of

local concern. As to prospective interests, we concluded that we were free to act to foster diversity without being concerned about negative impact from our action. As to interests already in existence, however, we concluded that a recognition needed to be given to such concerns and we used as a guideline whether a single full-fledged choice was available. We thought it would suffice, provided it was one which could be expected to deal with matters of local concern. In such cases there would not be such an unacceptable level of undue concentration. We looked then to incoming signals as a basis for exemption from divestiture.

114. Ascertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not. We did not believe that determining that a signal (regardless of whether it was city-grade, Grade A or Grade B) could be received, would suffice. We drew the line so as to require encompassment of the newspaper locality by the city-grade signal of another commercial television (or radio) station. There are two reasons for selecting this standard. First of all, dependable coverage of the community in question would be provided, but even more importantly, because of the proximity of the station to the city in question, such stations could be expected to serve the needs of the newspaper locality as well as their own.<sup>36</sup> \* \*

115. Up to this point we have not attempted to distinguish radio stations from television stations in terms of the need for divestiture or to indicate the reasoning underlying our views on each. As will be clear from the discussion which follows, we are applying the same standards to a radio monopoly co-owned with a monopoly newspaper as we have to a television monopoly with a newspaper connection. Radio and television are given parallel treatment, based on encompassment by a city-grade signal. We are not unaware of the fact that in the cases where the television station and newspaper are the only ones of each in the locality, a city-grade radio signal may very well encompass the city. This fact, in our view, is not sufficient to change matters. Realistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern. When the weight of a daily newspaper and the commonly owned television station (perhaps with a radio station or even an AM-FM combination under common control) are combined, the radio station standing by itself cannot be considered as providing significant diversity or as constituting a meaningful competitor at all. Accordingly, the rule shall not provide an exemp-

36. Stations have a secondary obligation to provide service to areas outside their city of license. In a number of instances stations which place city-grade signals over monopoly communities are addressing themselves to

the problems, needs and interests of those communities. Stations in a similar posture should recognize and undertake to serve, on a secondary basis, these monopoly communities. [Footnote relocated]

tion based on encompassment of the monopoly television-newspaper community by a radio station as would be the case for encompassment by a television station. Weekly newspapers, likewise, have too small an impact in comparison to the daily newspaper-television station combination to provide a basis for an exception.

116. As to the situations where there is no local TV station and the only radio stations are owned in common with the only daily newspaper, we are of the view that the combined importance of the daily newspaper and the radio station(s) is akin to that of a television-newspaper combination in the television cities. It must be remembered in this connection that there is no local television station to which the local residents can turn and in most cases no incoming city-grade television signal from another community. \* \* \*

117. The rules we have fashioned will prohibit the monopoly situations described above and will require divestiture no later than January 1, 1980. In the case of newspaper-television station monopolies either property could be sold. In the case of radio-newspaper monopolies either the newspaper or a radio station would have to be sold, so if there were an AM-FM combination involved, the affected party need only dispose of one of the stations. Since AM-FM combinations are not precluded by the rules, the AM-FM combination could be sold together. Our goal, the creation of a competing source of news and public affairs programming attentive to the needs of the locality, could be thwarted if appropriate protections were not included to insure compliance with the requirements of the new rules. Thus, for example, there is a need to protect against a station's being offered for sale at a price out of keeping with its true value so that the owners could seek waiver on the basis of the inability to dispose of the station. We expect the parties involved to proceed in good faith. In connection with any attempt to show the inability to dispose of an interest to conform to the rules, we shall not give any weight to a showing that does not include a full description of the effort made to sell that interest, the price at which it was listed and a certification of a station (or if it applies, newspaper) broker that in his view this price is consistent with the fair market value of the station (or newspaper) in question.

118. We anticipate a number of waiver requests. The following discussion sets forth some of the circumstances in which waivers, either permanent or temporary, might be granted.

119. It is not our intention that the rules should work a forfeiture. The rules are not in the least premised on the existence of improprieties in the operation of the media holdings. Thus, only a sale, not a loss is contemplated. For this reason, inability to sell the station would be a basis for waiver. Otherwise a refusal to grant a further renewal of license to the present licensee would work a forfeiture, a result contrary to our intent. We would take a similar view if the

only sale possible would have to be at an artificially depressed price. Likewise, if it could be shown that separate ownership and operation of the newspaper and station cannot be supported in the locality, waiver might well be appropriate. In any of these instances we contemplate waivers of reasonable duration, so that we shall not always be bound by a result based on outdated information. Finally, if it could be shown for whatever reason that the purposes of the rule would be dis-served by divestiture, if the rule, in other words, would be better served by continuation of the current ownership pattern, then waiver would be warranted. \* \* \*

124. The suggestion has been made that we should act to help insure that ownership of any divested station should pass to minority group ownership. Secondly we were urged to act similarly to encourage assignment to local (preferably minority) owners. The trouble with this request is that it appears to run afoul of Section 310(b) of the Communications Act of 1934, as amended. That provision specifically bars the Commission from considering whether the public interest would be served by transferring ownership to a party other than the one proposed in the application filed with the Commission. \* \* \*

129. Impact on comparative hearings involving regular renewal applicants. \* \* \* In the light of Citizens Communications Center, whatever policy is developed will take into account diversification as a factor that must be considered in a comparative renewal hearing. Also in the light of that case, the weighing of factors lies within the substantive discretion of the Commission, and the weight to be given the factor of diversity in comparative renewal hearings remains to be determined. \* \* \* [W]e do not believe the court in Citizens Communications Center is seeking to have the ownership patterns of the broadcast industry restructured through the renewal process; \* \* \* rather, any *overall* restructuring should be done in a rule making proceeding. And what we consider to be the necessary *overall* restructuring has been done today.

131. Policy Regarding Non-Divestiture Combinations. \* \* \* If the power of the print-broadcast combination were exercised monolithically or if the print and media outlets were mirror images of one another, speaking with once voice, we would have to be concerned. In the divestiture cases, we held that even in the absence of specific abuses, the need to provide at least minimal diversity required action. As to the remaining instances of combination ownership, we believe some clarification in our expectations is required.

132. Many of the parties owning newspapers and broadcast stations in the same locality described how the two entities—print and broadcast—were separately operated. We were told that separate editorial and reportorial staffs were utilized. Many pointed to a separation in sales staff and an emphasis on competition between

media. We endorse such efforts to insure a maximum of diversity and competition possible under the circumstances of common ownership and we commend those conscientious owners for their efforts.

\* \* \*

[Proceeding terminated.]

STATEMENT OF COMMISSIONER GLEN O. ROBINSON  
CONCURRING IN PART AND DISSENTING IN PART \*

The FCC does have a responsibility to promote diversification of ownership and competition among communications media, as the Commission recognizes by today's Report and Order. My colleagues and I part company not over whether that responsibility exists, but over its scope and its implementation. As a matter of practical effect the Commission's decision is essentially limited to a few cases of literal monopoly, inasmuch as those are the only cases in which it is willing to require divestiture. Although future cross ownerships are banned in all markets, I believe a prospective ban is of little significance.

My version of what best serves the public interest would forbid, and require the divestiture of, commonly owned media (either newspaper or station could, of course, be divested) in all heavily concentrated markets, which are not confined to those in which the co-owned media constitute a literal monopoly. I would apply the same standard of undue concentration for divestiture as for a ban. For both I would apply essentially the standards developed in antitrust law—which, *conservatively interpreted*, would require divestiture in cases where the station and newspaper together controlled at least 30 percent of their respective markets. I would acknowledge the possibility of waivers in extraordinary cases, but I would emphasize that such waivers would be granted only on a most compelling showing of special considerations. With respect to radio-newspaper ownerships, I am less concerned about the dangers of concentration, but I would adopt the same standard of concentration as in the case of television-newspaper cross ownerships. I would deal in the same way with aural-television station combinations, which are at least still nominally before us in this proceeding. Because my pre-eminent concern is with the newspaper-television cross ownerships and because the same basic policy considerations are, I believe, generally applicable to the other combinations, I shall focus principally on the newspaper-television combinations.

I. Competition as a Communications Policy

\* \* \*

\* Footnotes have been omitted without indication. The separate statements of Commissioners Lee, Reid, Wash-

burn, and Quello, concurring, and Hooks, concurring and dissenting are omitted.—D.G.



## A. The "No Competition for Competition's Sake" Argument

\* \* \*

I acknowledge that if our deconcentration policy were premised solely on promoting competition in commercial advertising in local markets, we would have to give more studied thought to the argument raised by the NAB and ANPA. While I recognize that competition in advertising markets is an entirely proper aim of public policy, I also acknowledge that in radio and television advertising markets, competition is not an unalloyed benefit. A short digression into the economic effects of concentration (or, conversely, competition) will illustrate the nature of the problem.

The standard economic rationale for market deconcentration derives from the hypothesis that concentrated markets provide the opportunity for sellers to restrict output and to raise the price of their goods or services. As a result, resources migrate from these markets to other markets in which they contribute less to the common good. In short, concentration distorts efficient resource allocation. See, generally, F. Scherer, *Industrial Market Structure and Economic Performance*, ch. 17 (1970). Application of this theory to television advertising would lead one to expect a similar effect on local-market concentration upon advertising rates, and correspondingly on "proper" resource allocation. Though no conclusive result emerges from the comments filed in this proceeding, we can assume for the sake of argument that there is a direct relationship between concentration, appropriately defined, and advertising rates.

The standard economic argument that attempts to connect competition and economic welfare through the price mechanism may not be sufficient to allow us to make policy judgments concerning television advertising. If concentration in local advertising markets conveys monopoly power, this power would be reflected in the broadcaster's ability to restrict viewer hours of advertising messages in order to raise the price per viewer exposure. This effect could be accomplished either through a decision to offer fewer commercial interruptions in entertainment programming or to air programs with less mass appeal. The former reduction we might applaud. The latter we might deplore—unless it reflected the substitution of "public service" programming for more-popular syndicated or network fare. The broadcaster with monopoly power is surely freer—and might well be more inclined—to preempt a network motion picture in order to offer a detailed investigation of a local sewer scandal. Thus, market power may be consistent with our desire to stimulate the public-service responsibility of broadcasters.\* Indeed, if there were not *some* barriers to competition in local markets, I suppose we could not expect licensees to offer the nonremunerative programs which are part of their public service responsibility. See Carroll Broadcasting Co.

\* See Comanor & Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 *J.Law & Econ.* 177, 178-79 (1972).—D.G.

v. FCC, 258 F.2d 440 (D.C.Cir. 1958); cf., Levin, Federal Control of Entry in the Broadcasting Industry, 5 J.Law & Econ. 49, 61 (1962). These benefits from the exercise of market power in broadcasting must be candidly acknowledged as possible partial offsets against the potentially greater economic efficiency in the allocation of resources which increased competition can be expected to stimulate.

If the desirability of competition here turned simply on assigning values to the foregoing economic considerations and weighing the resulting numbers against one another, I might be hesitant to say that the public interest demanded stricter control of concentration. However, an additional consideration must be placed in the scales: competition is a means of enhancing the potential for diversity of news and opinions available to viewers, readers or listeners. The weight of this consideration seems to me decisive on whether increased competition in the advertising market is worthwhile. The dangers which concentrations pose to diversity of opinion seem to me sufficiently real to require the conclusion that a reduction in cross ownership in concentrated local markets serves the public interest whatever conclusions are reached concerning the effect of concentration on advertising rates or whatever judgment is reached about the economic effects of competition generally.

\* \* \*

### III. Measuring Concentration

#### A. Market Definition: Product Market

There is no exact science to the definition of line of commerce, or product market, as the Merger Guidelines of the Department of Justice (see 1 CCH Trade Rep. para. 4430) make very clear:

“The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality and use from the standpoint of that group of purchasers for whom the two products are equally interchangeable.”

While a variety of subjective judgments are often required in determining whether products are substitutes and in drawing market

boundaries, these judgments can be supplemented in most cases with empirical evidence. Do the prices of the goods appear to move together? Does an increase in the relative price of one good influence the demand for the others? Are the goods in fact interchangeable in terms of production or in consumers' consumption bundles? Unfortunately, this type of empirical evidence has not been assembled and analyzed in this proceeding.

In any event, it is important to distinguish between the two sets of "products" we consider here: (1) advertising and (2) the dissemination of news and opinions.

(1) The delineation of a product market for advertising is deceptively difficult. I believe that one must accept the notion that newspaper and television advertising are competitive services to some extent, but I must acknowledge the possibility that the cross elasticity of demand may not be large. For some products, they are obviously not good promotional substitutes while for others print may serve just as well as broadcast messages. I also concede that insofar as other forms of advertising are substitutes for print or broadcast messages, the advertising market includes other media which presumably offer some competition to newspapers and television stations. Having issued this caveat, however, I still stand by the conclusion that newspaper and broadcast advertising are sufficiently close substitutes to justify our regarding them, for purposes here, as the same "line of commerce."

(2) Delimiting the market for dissemination of news and opinion is equally problematical, but in this instance there are few empirical data to guide us. It is virtually impossible to determine the relative importance of various media upon local citizens' knowledge of contemporary affairs. While it may be that especially well informed citizens draw their information from a wide variety of sources—daily newspapers, magazines, weekly newspapers, television, radio, and various professional newsletters—as a practical matter, it seems to me unlikely that most citizens avail themselves of the full variety of sources available. Such evidence as we have corroborates the intuition that television, newspaper and radio are the dominant sources of information.\* On this conclusion I believe we are amply justified in striving for diversification of control of these media within the same geographic market.

#### B. Geographic Market

The above considerations argue for quite different approaches to the demarcation of geographical boundaries in defining the relevant market. For advertising, the important question is whether a given medium competes for exposure to audience (readers, viewers,

\* H. Litwin & W. Wroth, *The Effects of Common Ownership on Media Content and Influence* (1969).

or listeners) for promoting a particular group of products or services. The media in effective competition with one another in this respect may not be alternatives for disseminating news and opinions concerning local or regional matters. For both product markets, a number of alternatives are before us. One, argued by the NAB and endorsed by most of the media interests, is the so-called Area of Dominant Influence (ADI), employed by advertisers to define markets for purposes of advertising sales. A second, suggested by the Justice Department and others, is the Standard Metropolitan Statistical Area (for markets outside officially designated SMSA's, presumably something like Urbanized Area could be used). A third, which is suggested by some of our own prior precedents, is the service contour of the co-owned station (Grade B, Grade A, or City Grade, or their radio counterparts, could be used—with widely divergent results). Each of these different approaches to market definition does have something to be said for and against it. But for present purposes the market area in which we are interested is not the area served by one or the other of the co-owned firms, but that area in which their service overlaps.

For purposes of its prospective ban on newspaper-television cross-ownerships, the Commission implicitly \* regards the Grade A service area of the co-owned television station as the relevant geographic market for purposes of banning newspaper-television (comparable service areas are drawn for radio-newspaper) ownerships.\*\* Following the majority's approach of banning all (future) common ownerships within the Grade A contour of the station, the use of a Grade A contour standard actually imposes a stricter standard—for purposes of a prospective ban—than would be suitable under an approach which uses the market concept as a framework for measuring concentration. The majority, in other words, uses the television/radio contours as the criterion for deciding in what area co-ownership ought to be banned. My view is that, since concentration of control is the evil to be eliminated, engineering contours without more will not necessarily yield the information we presumably want, and ought not be depended upon to do so. It might be acceptable to use the Grade A television service contour (or its aural equivalent) to describe a geographic area in which concentration would be measured; but this approach, in my view, would artificially dilute the concen-

\* The point is somewhat obscured in the majority opinion. The Grade A contour is used to define "co-owned" rather than to measure concentration. Under my approach the "market" is defined for purposes of measuring the degree of concentration.

Incidentally, it should be noted that, while only television-newspaper markets are dealt with here, I am concerned with basic concepts and the

same concepts are applicable, mutatis mutandis, to aural-newspaper ownerships, and also television-aural combinations.

\*\* For purpose of divestiture the majority adopts a much different approach, one which is not based on any concept of market definition but simply on a restrictive view of what constitutes impermissible concentration.

tration figures. I believe it much more realistic to measure concentration with reference to the city or urban area (or perhaps in larger cities, the SMSA) in which the co-owned facilities exist. However, I would then ban *existing* as well as future ownerships in such of those markets in which there was an "undue concentration" according to criteria described below.

### C. Competitive Foreclosure: Determining the Threshold

My greatest difficulty with the majority is not with its approach to market definitions, but with its determination of the tolerable level of concentration for existing combinations. The majority's acceptance of a high level of concentration for existing stations is particularly disturbing given the rather remote possibilities for new entry into television broadcasting.

The Justice Department urges upon us the adoption of the Clayton Act Section 7 standard of illegality which is based upon numerical market shares and the trend in concentration. The high-water mark in Section 7 litigation was reached in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), where the Court found a violation in a merger of two grocery chains which, between them, embraced but 7.5 percent of the relevant market. The Court's standard depends not only on the alarm with which it views trends towards increasing concentration in an industry; it is also conditioned on the possibility that new entrants can invade a market which has become noncompetitive. In local television and newspaper markets, concentration is not likely to decline much further, but new entry is equally unlikely. New television stations are obviously not likely to spring up in concentrated markets unless the Commission changes its allocations plan. Entry by new central-city newspapers is even more unlikely. Thus, we are dealing in an area in which concentration cannot be reduced by market forces unless it occurs through new entry in weekly newspapers, magazines, advertising/news circulars, or other less important advertising-information media.

Given the relative immutability of media concentration, the prudent approach is to adopt a rather strong standard for cross-ownership. I do not believe that we should imitate the antitrust case law by distinguishing between new combinations and older agglomerations of market power because we cannot presume that market forces will eventually lead to increased competition through new entry. Whether this standard should be based upon concentration ratios—computed on the basis of audience or advertising shares—or less precise data, the standard should be the same for divestiture and new cross-ownership and it should be sufficiently stringent to be at least consistent with earlier Commission decisions dealing with media concentration.

An examination of immediately relevant precedents in this area indicates that the Commission's administrative standards for judging

competition or concentration have, at least until now, been more rigorous than the judicial standards noted above. In its earlier action in this docket the Commission prohibited common ownership of VHF television and aural stations regardless of the number of television or aural station competitors in the market. So also in its duopoly rules the Commission prohibited common ownership of television stations with overlapping Grade B contours—again irrespective of the number of competing stations in the market area. In both these situations it is easy to imagine individual ownerships within the ban of the rule that would not meet, for example, the 30 percent foreclosure test in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

Obviously, application of these precedents here yields different results depending on the precedent chosen, the particular mode of measurement and so on. For example, if the Philadelphia Bank standard of 30 percent foreclosure of the market is translated into station-audience/newspaper-circulation shares for the co-owned facilities within the “home city” (urban area in which both facilities are located), divestiture would be required in some 67 combination ownerships.\* A Von’s Grocery standard would require divestiture of all combinations. Reliance on our own past precedent in this area would suggest we ignore data on concentration ratios, whether measured by audience shares or other indicia of market strength, and simply ban all common ownership regardless of market shares. The majority has here adopted this latter standard—for future combinations only.

I could accept either the 30 percent concentration standard of Philadelphia Bank or a stricter, flat proscription of combinations in all markets, regardless of degree of concentration; the latter has the very substantial advantage of administrative convenience. What I cannot accept is the standard adopted by the majority for purposes of divestiture—that is, taking the worst cases of market concentration and distilling therefrom only those markets where the newspaper-owned station provides the only City-Grade television service.

\* \* \*

The inadequacy of the Commission’s approach to divestiture is underscored by the fact that, in confining divestiture to a handful of small, monopoly situations, it is confining effective relief to markets where competition may prove, ultimately, to be unfeasible. Stations (or newspapers) in these small markets may be marginal operations with the least potential for sale at a reasonable price. Small market owners could well be the most attractive candidates for waivers in order to avoid, for example, undue financial hardship.

\* \* \*

\* This is based on prime time audience shares for the television station and daily circulation shares for the newspaper. See Baer, Geller and Grund-

fest, *Newspaper-Television Cross Ownership: Options for Federal Action* 14 (RAND 1974). \* \* \*

## IV. The Case for Divestiture

\* \* \* In broad terms, we have three issues before us which we must carefully consider: (1) the need for divestiture, (2) the effect of divestiture (herein the question of "equity"), and (3) the legal authority of the Commission to order it.

## A. Need for Divestiture

The desirability of divestiture is made out simply by observing that, in the absence of divestiture, a rule banning cross-ownership of newspaper-television stations will mean very little. \* \* \*

## B. Effects of Divestiture

The majority rejects the remedy of divestiture for newspaper-television station combinations in all but a very few cases of pure local monopoly. The reason they give for treading so lightly on existing combinations while enacting strict standards for prospective combinations is a professed fear of disrupting the "stability and continuity" of the local broadcasting service. This justification seems to me a makeweight; if it were not, I doubt whether the Commission would routinely approve the numerous transfers of broadcast licenses it passes on each year. If transfer of ownership is disruptive, per se, it should be no more disruptive when ordered by the Commission than when undertaken voluntarily by the licensee.

It is argued by opponents that a divestiture policy might actually undermine diversity because without the advantages of joint ownership, some stations, or some newspapers, might be forced into bankruptcy. Although the argument is sometimes expressed in terms of newspapers subsidizing marginal stations, the reality generally seems to be the other way—that newspapers are being subsidized by stations. Such was reportedly the case with Channel 5 in Boston, and such is allegedly the case in other markets as well. To the extent that this is the problem, I think the Commission ought to give slight weight to it, as a general matter, for several reasons.

First, we do not have any reliable information on the degree of cross subsidization and what would happen to current newspapers after divestiture. The fact is, however, that if the stations were sold at a reasonable profit, the profit could be re-invested in another enterprise which could support the paper as well as a broadcast station could. Why should cross subsidy—assuming it is a good thing (a temporary assumption to be examined momentarily)—only be achieved by operating a television station? If an owner wishes, for whatever motive, to subsidize an unprofitable newspaper, I see no reason why he could not do so just as well by taking the proceeds from the sale of the station, investing in some other lucrative enterprise, and using the resulting income to support the newspaper.\*

\*The counter to this may be that no other such lucrative enterprise offers

the same possibility for cross subsidization. There are two possible an-

Second, whatever the general public interest merits of subsidization of newspapers I do not think that this is, in itself, a proper concern of the FCC. That does not mean that we could not accept, as a reason for not requiring divestiture, a showing that the newspaper would fail were divestiture required. This "failing company" defense has been recognized in antitrust law since *International Shoe Co. v. FTC*, 280 U.S. 291, 302-303 (1930), and I am prepared to entertain it in an appropriate case. As a general proposition, however, I doubt that I would accept the failing company argument as an automatic and absolute defense in the case of broadcasting; I question the wisdom of encouraging the use of broadcast profits to support other, failing business, even newspapers.\* \* \* \*

### C. Legal Authority for Divestiture

\* \* \* By way of conclusion, one general observation: it is very important that it be recognized that this proceeding, and the concerns underlying it, results in significant part from our own previous decisions in allocating the broadcast spectrum. The Commission's objective of stimulating localism required that television frequencies be dispersed as they are—and the result has been that most television markets are highly concentrated. In a very real sense, the fact that Cleveland has only three VHF stations makes similar concentration in Kansas City inevitable. The only way additional television stations could possibly get enough advertising revenues to survive would be for new networks to form, a development which is made impossible by the absence of a fourth or fifth equivalent frequency assignment in most markets. Thus, Commission policies themselves must bear a large portion of the blame for local market media concentration. I do not say that important benefits do not result from this policy of localism. But there are certainly substantial costs in terms of foregone potential for greater diversity. The fact that we adhere to a local allocations policy does not undercut the case for competition and

chors to this speculation. One is that no other investment is quite so profitable as a television station, the other is that economies of scale permit special saving. If the first statement is true, however, it is irrelevant because the supra-normal profitability of the station would be capitalized in the sale price leaving the former owner with the same present-value of capital as before. The second statement would appear to be at odds with the owners' argument that stations and newspapers are separately managed and are, as news gathering and entertainment vehicles, genuinely unrelated.

\* Even assuming that it is appropriate public policy to subsidize newspapers, it is not at all clear that broadcast profits are better put to this purpose than to enriching the program offerings of the broadcast stations. \* \* \* As to the supposed benefit of supporting competition for the co-owned broadcast station, the question that needs to be asked is whether under these circumstances of co-ownership there is adequate competition. It is not a full answer to this question to say that this competition is better than none since subsidization of a failing newspaper may serve to retard new competitive entry—in some form—that may take the place of the old service.



diversity; it rather underscores the high importance of adopting all feasible measures to offset the limitations which a localism policy imposes on competition and diversity. The present proceeding seeks to do this in a modest way. I regret that the Commission has not gone further, by requiring general divestiture.

## APPENDIX D

## TV STATION MONOPOLIES—DIVESTITURE REQUIRED

State	City
Alabama	Anniston
Georgia	Albany
Iowa	Mason City
Mississippi	Meridian
New York	Watertown
Texas	Texarkana
West Virginia	Bluefield

## APPENDIX E

## AM AND FM STATION MONOPOLIES—DIVESTITURE REQUIRED

State	City
Arkansas	Hope
Illinois	Effingham; Macomb
Kansas	Arkansas City
Michigan	Owosso
Nebraska	Norfolk
Ohio	Findlay; Wooster
Pennsylvania	DuBois
Wisconsin	Janesville

## APPENDIX G

## Summary of Actions Taken

**I. Previous Rules Continued in Effect**

(a) *TV-radio combinations.* No divestiture of existing combinations is required. The present rules governing such combinations

which were adopted in an earlier phase of this proceeding remain in effect. This means that a licensee of a VHF television station may not build or acquire a radio station(s) (AM, FM, or AM-FM) in the same market; and that the licensee of an AM station, an FM station, or an AM-FM combination may not build or acquire a VHF station in the same market. Although existing combinations are not required to divest, if the owner of a VHF-radio combination sells, he must sell the TV and the radio station(s) to different parties. Applications involving UHF TV stations and radio stations are handled on a case-by-case basis. VHF television stations and AM stations are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community of license of the AM station, or if the 2 mV/m contour of the AM station completely encompasses the community of license of the TV station. A similar market concept holds for FM stations and TV stations except that the critical contour for the FM station is 1 mV/m.

(b) *AM-FM combinations.* Existing rules governing such combinations continue in effect. No divestiture is required. This means that the licensee of an AM station may build or acquire an FM station in the same market and vice versa. Moreover, such a combination may be sold to a single party. The matter of whether the present rules governing duplication of programming by AM-FM combinations should be amended will be pursued in pending Docket No. 20016 (39 Fed.Reg. 14228 (1974)).

## II. New Rules Adopted

(a) *Radio-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only radio station(s) placing a city-grade signal over the entire community in daytime hours are under common ownership. The owner of such a newspaper-AM-FM combination may satisfy the divestiture requirement by selling the newspaper, the AM-FM, the AM, or the FM. Waivers will be granted on a proper showing. The formation of new radio-newspaper combinations in the same market is barred. They are considered to be in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station completely encompasses the community in which the newspaper is published. If an existing radio station licensee acquires a daily newspaper in the same market, he is given until the date of expiration of license of the radio station, or one year, whichever is longer, in which to divest of one of the two properties. Newspaper-radio combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the radio station(s) must be sold to different parties.

(b) *TV-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only TV station placing a city-grade signal over the entire community are under common ownership. The divestiture requirement may be satisfied by selling either the newspaper or the TV station. The divestiture requirement applies whether the TV station is UHF or VHF. Waivers will be granted on a proper showing. The formation of new TV-newspaper combinations in the same market is barred. (The proscription against formation of new TV-newspaper combinations applies whether the TV station is UHF or VHF.) They are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community in which the newspaper is published. If an existing TV licensee acquires a daily newspaper in the same market, he is given until the date of expiration of the TV license, or one year, whichever is longer, in which to divest. Newspaper-TV combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the TV station must be sold to different parties.

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#### TEXTUAL QUESTION

Continuing with the problem of market definition, compare paragraphs 39 and 43:

- a. What is the intended relevance of the Roper study (¶ 39) indicating that newspapers and television are the public's primary sources of news? \*
- b. Can you assign a sensible meaning to the penultimate sentence of paragraph 43? Is the reference to "market share" intended to mean:
  - i. audience share, as in broadcast ratings or percentage of newsstand sales;
  - or
  - ii. advertising revenue as a percentage of industry revenue?

\* Many of the studies submitted to the FCC are reviewed in Comment, Media Cross-Ownership—The FCC's Inade-

quate Response, 54 *Tex.L.Rev.* 336, 352-64 (1976).

### PROBLEM: CONCENTRATION IN EREWHON

Consider the degree of media concentration in Erewhon, which has three AM and two television stations, as well as a daily newspaper. The usual national magazines are available. The population is 100,000.

	Radio (Format)	Television (Primary Affiliation)	Newspaper
1. Erewhon Publ. Co.	AM(MOR)	VHF(ABC)	Daily
2. Erewhon Communications Co.	AM(R&R)	UHF(CBS)	
3. Erewhon Radio, Inc.	AM(C&W)		

The newspaper sells 20,000 copies daily, reaching an estimated 30,000 persons.

During drive time, the three AM stations have listening audiences, respectively, of 20,000, 15,000 and 10,000. During prime time, the ABC television network affiliate has an average viewing audience of 30,000; the CBS affiliate averages 20,000 viewers. The area reached by the latter's signal contains only 75% of the population.

Total advertising revenues in the local Erewhon newspaper-broadcasting industry are divided as follows (in percentages):

	Radio	Television	Newspaper	T
1. Erewhon Publ. Co.	10	30	15	(55)
2. Erewhon Communications Co.	15	15		(30)
3. Erewhon Radio, Inc.	15			(15)
T	(40)	(45)	(15)	

Is ownership of the media in Erewhon more concentrated than sound public policy would dictate?

- (A) Is the availability of national dailies (Wall Street Journal, Christian Science Monitor) or periodicals in Erewhon relevant to analysis of media concentration? (§§ 48-49, 112)\* Would the publication of regional or metropolitan editions (for advertising pages only) of national magazines affect your analysis?
- (B) Assuming that you are initially concerned about the dominant position of Erewhon Publishing Co., is there any state of facts about the operations of the company that would allay your concern? (§§ 45, 62, 64)
- (C) What change, if any, should the FCC (or Department of Justice) seek in the Erewhon media?

\* References to the Second Report and Order are neither exhaustive nor necessarily approbatory.—D.G.

- (D) Consider the proposal that concentration of control of the media be measured (for the purposes of evaluating a proposed license transfer, i. e. merger) solely with reference to the market share of advertising revenues going to each owner. Thus, Professor Bennett argues that “[c]oncentration of control \* \* \* is not control of a large number of media but rather control of a large part of the total capacity of the media to be effective.” He argues that advertising revenue is the best practical measure of the capacity of the media to be effective:

“Advertisers are also concerned about the relative effectiveness of the media. Their expenditure of dollars in various media are directly related to their calculations of this effectiveness. Insofar as the advertisers are making their calculations correctly, the effectiveness of the media should be proportionate to their total advertising revenues. Advertising revenues of a given medium as a percentage of the total revenues in the market thus provide the desired measure of effectiveness and hence of concentration of control.”

Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 *Nw.L.Rev.* 159, 194 (1971).

Is this approach to analyzing mergers, which the author admits is “greatly oversimplified,” useful in determining whether *divestiture* should be required in markets that are highly concentrated when measured by advertising market shares? What problems would it present? For a related proposal to require divestiture based on “circulation and market shares,” see Comment, *Concentration of Ownership of the Media of Mass Communication*, 24 *Emory L.J.* 1121, 1161 (1975) (proposal of National Citizens Comm. for Broadcasting before the FCC in Dkt. No. 18110).

#### NOTES AND QUESTIONS

1. Even if one assumes that a lesser degree of concentration would exist in an ideal world than does in Erewhon, it does not follow apodictically that any move toward the ideal would be an improvement in the real world. What are the costs associated with FCC intervention
  - (i) requiring widespread divestiture? See, e. g., ¶¶ 78, 88–89, 108–109; Robinson opinion, § IV. B.
  - (ii) as actually undertaken? See, e. g., ¶¶ 108–109, 112.
  - (iii) in a “behavioral,” rather than a “structural,” mode, i. e., directed against the particular abuses that may result from concentration of the market, rather than at deconcentrating it? See, e. g., ¶ 92.

2. Stations WSTC(AM) and WYRS(FM), the only radio stations licensed to Stamford, Conn., are owned in common with the only local daily newspaper. The only other city-grade signals to encompass Stamford are two clear channel AM stations in New York City. Radio Stamford, Inc., an applicant for the Stamford licenses in a comparative hearing on renewal, petitions the FCC to reconsider its Second Report and Order in order to change the rule so as to disregard, in defining monopoly communities for divestiture, an in-coming signal that originates in a separate SMSA.

What result? 53 FCC 2d 589, 591, 33 R.R.2d 1603, 1609-10 (1975).

3. The Brockway Company publishes the only daily newspaper at Watertown, N. Y. and is licensee of WWNY-TV, the only American commercial television station placing a city-grade signal over Watertown. Watertown also receives, however: (1) the city-grade signal of an educational station; (2) a city-grade signal originating immediately across the Canadian border; (3) a city-grade signal originating elsewhere and relayed to Watertown by means of a translator, i. e., a low power station that extends the range of a distant station; (4) two Grade B signals from Syracuse stations; (5) and cable service that includes, in addition to a full range of imported signals, some locally originated programming with an emphasis (specified by certain performance standards in its local franchise) on public affairs (e. g., required coverage of city council meetings).

None of these services could be counted under the Second Report and Order in determining whether Brockway had a monopoly on local television as well as the only daily newspaper. On Brockway's petition for waiver of the divestiture requirement, what result? See 53 FCC 2d, at 596-98, 33 R.R.2d, at 1610-13; see also Buck, Watertown, N. Y.: Suitable Grounds for Divorce? More 14 (Oct. 1977).

4. Media Publishing Co. publishes a daily newspaper in Media, Pa. It is also the licensee of the VHF television station licensed to Media, which is a gold mine. Media Communications Co. owns the only AM, FM, and UHF broadcast stations in town. The UHF station has had modest but persistent losses for several years.

Assume that it would be very difficult to demonstrate the financial dependence of the newspaper upon the VHF station, indeed that the situation is not at all clear due to the presence of unallocated joint costs (e. g. space in an owned building) and pooled accounting.

If the UHF station ceases operation, would the Publishing Company be subject to the divestiture requirement of the FCC regulations? If so, what counsel can you offer the Company? Have the new regulations given the Media Communications Co. a leverage it can act upon, and, if so, how and how much is it worth?

5. Concern with the viability of independent UHF and FM stations has been a theme running throughout the multiple ownership pro-

ceeding, and indeed ostensibly throughout the Commission's policy structure for two decades. See V. Mosco, *The Regulation of Broadcasting in the United States: A Comparative Analysis* (1975). Thus, in an effort to aid, or at least not fatally to burden, these services applications involving the creation or joint transfer of radio-UHF combinations are to be given ad hoc consideration, see e. g. *American Public Life Broadcasting Co.*, 36 R.R.2d 1181 (1976) (combination approved); and AM-FM combinations, after a close call with disestablishmentarianism in the First Report and Order, are not particularly to be discouraged.

With the Second Report and Order, the FCC has added newspapers to its list of endangered species deserving its official solicitude, over Commissioner Robinson's critique (§ IV. B). His arguments should be evaluated not only in their own, economic terms but also in relation to congressional policy as expressed in the *Newspaper Preservation Act of 1970*, 15 U.S.C.A. § 1801 et seq., *infra* at 684.

(a) The scale economies to be had from a joint newspaper operating arrangement, especially as between a morning and an afternoon newspaper, are more obviously substantial than are those available from newspaper-broadcast station common ownership. But the latter may not be insignificant, and unbound by facts or a record, one may speculate about circumstances in which they are important. But cf. H. Levin, *Broadcast Regulation and Joint Ownership of Media* 91-100 (1960) (1940-52 data show economies not significant).

Further, in markets where a newspaper's entry into broadcasting would not create a monopoly of the local advertising media, and therefore no monopoly profit potential, there would seem to be no incentive other than the expectation of scale economies for a newspaper to enter into this field as opposed to any other. See Caldwell, *Principles Governing the Licensing of Broadcasting Stations*, 79 U. Pa.L.Rev. 113, 153 (1930) (similarities, scale economies); compare Lago, *The Price Effects of Joint Mass Communication Media Ownership*, 16 *Antitrust Bull.* 789 (1971) (joint media ownership without effect on prices for national advertising in either newspapers or television) with Owen, *Newspaper and Television Station Joint Ownership*, 18 *Antitrust Bull.* 787 (1973) (newspaper-owned TV stations charge 15% more than otherwise for national advertising). On the other hand, newspapers (like networks) with experience in radio broadcasting may have perceived a special opportunity to realize the rents accruing from experience by entering the television field, as well as the scale economies of joint radio-television operations. See generally Sterling, *Newspaper Ownership of Broadcast Stations, 1920-68*, 46 *Journalism Q.* 227 (1969). In any event, the newspaper companies and radio stations were strongly motivated to enter television. Newspapers obtained 50 of the first 142 television station construction permits issued through 1952, and radio stations got many of the

rest; interestingly, only eight went to licensees with no other communications interests (including motion pictures, networks, and national magazines). Moreover, these early licenses tended to be for the largest markets, where there were multiple stations and the least reason to expect that an advertising monopoly could be established.

(b) Note that the Newspaper Preservation Act contemplates the elimination of competition in the advertising market, where the realization of scale economies (from joint solicitation, for example) is not likely to be significant. Can this tolerance of non-competitive pricing be adequately explained by observing that, were all but one of the contracting newspapers to fail, see § 4(b), pricing would not be competitive anyway?

(c) Assume that in the Media, Pa. situation described earlier, it is the Publishing Company's newspaper rather than the Media Communications Company's UHF station that is failing. If the newspaper's VHF affiliate were able to enter into an agreement with the competing UHF station, in the words of § 3(2), "pursuant to which \* \* \* joint or unified action is taken \* \* \* with respect to \* \* \* establishment of advertising rates," the continued operation of the newspaper would be assured. (Publishing Co. is willing to sustain these losses for non-economic reasons of the owners.)

(i) Accordingly, Media Communications proposes to transfer its UHF television license to Media Publishing in return for stock; Media Publishing will divest itself of the UHF station should it either sell or cease to publish the newspaper.

(ii) Alternatively, Publishing and Communications seek approval of an agreement whereby advertising rates for their two television stations will be set by agreement between them, revenues to be divided per an agreed formula, but all other operations managed separately.

Should either proposal be approved? Advise the FCC.

6. The relationship between the antitrust laws and the FCC regulatory policy is somewhat more complex than the preceding Report might suggest. (See, e. g., ¶ 11.) For although the Commission may incorporate antitrust considerations into its articulation of the "public interest," it does not have exclusive or primary jurisdiction of antitrust issues involving broadcasters; the government or a private plaintiff may bring suit under the antitrust laws without, or indeed in spite of, any prior resort to the FCC. See *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

(a) The Department of Justice (DoJ) has, moreover, made a practice in recent years of appearing before the agency, perhaps because it perceives the courts as somewhat deferential to the FCC's public interest determination notwithstanding the agency's lack of authority to preclude the antitrust issue. Alternatively, the administrative for-



um can be more convenient, with its more informal evidentiary rulings, and especially its ability to address issues categorically in rulemaking, obviating the need both for multiple adjudications and for proof of specific violations of the law. See Lee, *The FCC and Regulatory Duplication: A Case of Overkill?*, 51 *Notre Dame Law*. 235, 245 (1975) (DoJ not an appropriate party in adjudications); cf. Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 *Duke L.J.* 282 (proposal to obligate DoJ to intervene before FCC, estoppel of separate antitrust action); compare *McClatchy Newspapers, Inc.*, 61 *FCC 2d* 279, 38 *R.R.2d* 980 (1976) (DoJ petition to deny, on grounds of monopolization, denied), with *Westinghouse Broadcasting Co.*, *Petition for Rulemaking* (DoJ memorandum in support of a broad inquiry into network program origination practices, filed Nov. 23, 1976).

(b) These considerations may seem less weighty, however, in light of the FCC's general lack of sympathy with positions taken before it by the Justice Department. Indeed, limited divestiture was ordered in the Multiple Ownership proceeding only after, and only to the extent that, Justice made it clear that it would seek antitrust relief in court if divestitures were not forthcoming from the FCC.

(c) The government or private party opposed to a broadcast station's acquisition, i. e., assignment of its license, on the ground of undue concentration may either seek a preliminary injunction based on the antitrust laws, or file a petition to deny as provided in § 309(d) of the Communications Act. In the latter event, the FCC is required to set the application down for hearing if and only if the petition raises a "substantial and material question of fact on the resolution of which the Commission's public interest determination depends;" otherwise it may deny the petition to deny, for which action it must issue "a concise statement of the reasons." Denial of such a petition to deny is a final order appealable to the United States Court of Appeals in Washington, D. C.

That court has given a rather liberal construction to the concept of a substantial and material question of fact. See *Citizens Committee to Save WEFM, Inc., v. FCC*, 506 *F.2d* 246, 261, 266 (1974), and sources there cited. As a result, a hearing before the FCC may be made available in cases that would not warrant a district court in issuing a preliminary injunction, although either step might cause a proposed transferee to withdraw from the acquisition, an option frequently negotiated by assignees, rather than assume the costs associated with the delay and uncertainty inherent in protracted litigation.\* The Department can presumably be relied upon not to exploit the difference between the standards applicable to antitrust preliminary injunctive relief on the one hand and a hearing on petition to deny,

\* E. g., ITT cancelled its proposed acquisition of ABC's 17 owned and operated broadcast stations when the De-

partment of Justice took an appeal from the FCC's approval of the license transfers.

on the other, in order to defeat an acquisition by delay alone. Query, however, whether the same can be said of a competitor, who would have standing in either forum, or of "any party in interest" with standing to petition for denial?\*\*\* Cf. Note, Washington Star Communications, Inc., *infra*.

#### NOTES AND QUESTIONS ON SUBSEQUENT DEVELOPMENTS

1. National Citizens Committee for Broadcasting. On review of the Second Report and Order, the court of appeals upheld the Commission's authority by rulemaking to prevent the formation or joint transfer of commonly located newspaper-broadcast combinations, and to order divestitures by existing combination owners. The court reversed, however, insofar as the FCC had limited the divestiture requirement to those markets in which there is effectively a monopoly in local media ownership. Citing the Commission's "long-standing policy" favoring diversification of media sources, the final clause of § 303(g), and the "policies of the First Amendment," the court held that the Commission must presumptively order divestiture, i. e., "except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C.Cir.1977).

The Supreme Court reversed insofar as the court of appeals had read the Communications Act (and the APA) to require more divestitures than the FCC had ordered; the Commission's order was thus upheld in all respects as rational, within the agency's rule-making authority, and constitutional. The first amendment, said the Court, does not give newspaper owners an unbridgeable right to be broadcasters, and the cross-ownership regulations do not "unconstitutionally condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper" in the same locale because they "are not content-related; moreover, their purpose and effect is to promote free speech, not to restrict it." At the same time, the Commission could rationally decide to "grandfather" most existing co-located combinations in the interests of stability and continuity of service to the public, fairness to newspaper owners who had provided meritorious broadcast service, and local ownership of broadcast stations. FCC v. National Citizens Comm. for Broadcasting, — U.S. —, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978).

\*\* In *Office of Communication of United Church of Christ v. F. C. C.*, 359 F.2d 994, 1005 (D.C.Cir. 1966), the court held that "responsible spokesmen for representative groups having significant roots in the listening community", pursuing broad public interests and not their own narrow pur-

poses, have standing as petitioners to deny. The FCC, apparently rather than apply this standard, has determined that a single individual within a station's service area has standing to file a petition to deny. See *Harrea Broadcasters, Inc.*, 52 FCC 2d 998, 33 R.R.2d 1075 (1975).

For a different analysis of the Commission's decision, see Mills et al., *The Constitutional Considerations of Multiple Media Ownership Regulation by the FCC*, 24 Am.U.L.Rev. 1217 (1975).

2. Washington Star Communications, Inc. (WSCI). Through its subsidiaries WSCI owned The Washington Star-News, the capitol's only afternoon newspaper, and its only daily newspaper other than The Washington Post; the WMAL AM-FM-TV combination in Washington, D. C.; the WLVA AM-TV combination in Lynchburg, Va.; and a television station in Charleston, S. C.

Perpetual Corporation (Joe L. Allbritton) acquired working control of the financially precarious Star-News under an agreement that contemplated acquisition of WSCI subject to FCC approval, for about \$28 million. Applications for transfer of control of the broadcast licenses were filed in November, 1974, and petitions to deny various of the applications were filed by Washington-area citizens' organizations. In July, 1975, after issuance of the Second Report and Order in Docket 18110, the FCC determined not to waive its cross-ownership rules without a hearing. It set the applications down for an expedited hearing on (1) WSCI's efforts to sell the Star-News separately, and the adequacy thereof; (2) whether to waive the multiple ownership rules and if so, whether for a limited time and/or conditional upon later divestiture(s); and (3) the proposed transferee's financial qualifications. Proposed ascertainment and character issues against the transferee were rejected.

The Commission made the following observations regarding the utility of a hearing on the designated issues:

\* \* \* In considering requests for waiver of the multiple ownership rules, it is the Commission's policy to fashion any waiver to the exigencies of the situation before it, to accommodate the private interests of the parties and the public's interest in greater diversity of program and service viewpoints which underlie these rules. Here, we are urged by WSCI to approve the waiver in its requested form lest Allbritton decide not to consummate the transaction. We cannot, however, disregard the fact that the transferee has not explicitly committed itself by its agreement with WSCI or otherwise to the continued publication of the Star-News following approval of the requested waiver. Neither has Perpetual articulated the basis for its optimism that the situation at the Star-News can be "turned-around"; nor has it projected the period of time necessary to implement its unspecified plan of action and to effectuate this financial transformation. More importantly, we cannot overlook the lack of full and complete information with respect to the financial posture of the Star-News, including the extent to which each of the Washington, Lynchburg and Charleston stations have

supported the operations of the newspaper. The necessity for the continued monetary support of the Star-News by each of the WMAL and WLVA stations has not been demonstrated. Instead, WSCI posits that these stations represent an important consideration in securing Perpetual's investment and that Allbritton may choose not to consummate the transaction without WSCI's continued ownership or these broadcast properties. The transferee's concern in fully securing its investment, however, does not relieve the Commission of its responsibility of ascertaining whether the public interest would, under the circumstances present herein, be better served by the required divestiture of one or more of WSCI's Washington and Lynchburg stations. Our unqualified approval of the requested waiver may be warranted; however, we cannot reach that conclusion without first exploring and resolving in the crucible of an evidentiary hearing the concerns outlined above. 34 R.R.2d 913, 922-23. [Footnote omitted.]

Commissioner Robert E. Lee dissented, observing that he could not recall in 22 years a single "expedited" hearing completed within a year; he predicted that, given the Star's precarious condition, the "hearing will never be concluded. It may never begin."

In December, 1975, the FCC deleted the hearing orders, waived its multiple ownership rules, and approved the applications as amended. These provided that within three years Perpetual would, (a) dispose of one broadcast property in Lynchburg; and (b) either dispose of

(i) all broadcast properties in Washington,

or

(ii) both Washington radio stations and the newspaper,

or

(iii) the Washington TV station and the newspaper,

at its election. Perpetual expressed its intention, but undertook no specific obligation, to try to save the newspaper, which it claimed was then losing more than \$1 million per month. Perpetual had entered into an agreement with a coalition of the petitioners to deny under which they withdrew their petitions; Mr. Allbritton would use his best efforts to locate financing for minority purchasers of the Washington properties; and WMAL-TV would implement an affirmative action plan, broadcast "access free speech messages," and carry annually six prime time "special public affairs programs of community interest." 36 R.R.2d 129, 140.

WSCI thereafter sold the WMAL-AM-FM combination (to ABC for \$16 million) and had reached agreement on the sale of WLVA

(\$660,000) when it announced the proposed sale of WMAL-TV (re-named WJLA-TV) to Combined Communications Corp. (CCC) for \$55 million in CCC's preferred stock and KOCO-TV, Oklahoma City. The total sale value was estimated to be \$100 million. Broadcasting 28 (April 4, 1977).

The local citizens groups again petitioned to deny, this time on the ground of Allbritton's alleged failure to adhere to the agreement to seek out minority purchasers and of "bad faith bargaining" in dealing with one group of Blacks interested in purchasing the station. Specifically, petitioners to deny alleged that Allbritton told the potential buyers that he was not in serious negotiations with anyone else only nine days before announcing the proposed transfer to CCC. The petition also sought to raise a trafficking issue. Broadcasting 22 (Aug. 29, 1977).

The WSCI response defended its course of dealing and the felt necessity to accept CCC's offer as soon as it was made lest it be withdrawn. The offer was said to be uniquely attractive because it was structured to minimize WSCI's tax burden while maximizing the long term flow of revenue to the Star, which was still said to be losing money. Apparently, WSCI did not ask the Black group whether they would match the CCC offer.

(a) Assuming that the petitioners to deny raised a substantial question of fact concerning the course of events leading up to the negotiation of the proposed transfer, should the Commission designate the application for hearing? See § 309(d). Put otherwise, would such questions be "material" to its processes, either on misrepresentation, or character, or other grounds?

(b) Can the Commission review WSCI's good or bad faith in negotiating with minority businessmen without running afoul of § 310(b)?

(c) The Commission approved the transfer of WJLA-TV on Jan. 12, 1978. The majority emphasized the need to assure the survival of the Star. Commissioner Brown dissented on the ground that Allbritton's preferred stock in CCC required that ownership of CCC's seven television stations be imputed to him which, when added to his interests in three others, put him in violation of the seven-station maximum. Commissioner Fogarty questioned whether Allbritton had kept his promise of good faith efforts to minority group purchasers. 42 R.R.2d 117 (1978). The citizens groups appealed to the court of appeals.

On Feb. 3, 1978 Allbritton announced his sale of the Star to Time, Inc. in an agreement under which he would serve as the paper's publisher and chief executive officer for at least five years. On March 24 he withdrew from the agreement to sell WJLA to CCC due to the delay caused by the pending appeal; according to CCC's president,

that company "couldn't close with the appeal pending." Broadcasting, March 27, 1978, at 27.

Since the Commission has said that the cross-ownership rules refer to joint control rather than joint ownership, Allbritton's move from owner-publisher to publisher of the Star is without significance; he must either give up his position on the paper or sell the television station by January, 1979 (unless extended).

Should the Commission hold that Allbritton lacks "control" of the Star if Time, Inc. asserts editorial direction through the paper's board of directors? What factual showing would be adequate to support such a holding?

(d) In *United States v. Philadelphia National Bank*, 374 U.S. 321, 372 n. 46 (1963), the Court raised the possibility, obiter, that "the so-called failing company defense \* \* \* might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures." Is this substantive suggestion applicable to the field of broadcasting? Newspapers? What would its procedural corollaries, if any, be? Is § 309(f) of any practical assistance here? See also Freedman, *Summary Action by Administrative Agencies*, 40 U.Chi.L.Rev. 1, 14-16 (1972).

## C. CONTROLLING NETWORK PRACTICES

### 1. NETWORK-AFFILIATE RELATIONS

Networking in a rudimentary form involving as few as two stations was the subject of experimentation as early as 1923. By 1927, the year of the original Radio Act, the National Broadcasting Co. (NBC) had been formed as a subsidiary of RCA and was operating two network systems (the "Red" and "Blue" networks), and the Columbia Broadcasting System (CBS) was operating a third. The Mutual Broadcasting System was formed in 1934 as a cooperative venture among its affiliates.

In the years before television, radio networks offered a full schedule of programs to their affiliates. As television developed after World War II, however, advertising revenues, and hence programing resources, were drawn away from radio and into the new medium. As a result, radio broadcasting now depends upon inexpensive recorded music and live talk formats, with networking limited primarily to news and feature services, and regional or national sports distribution.

In contrast, television stations affiliated with one of the national networks take a very substantial portion of their programing from the network, and network affiliation is the largest single determinant of a station's financial well-being; the so-called "independent" or un-

affiliated stations as a group have been financially precarious and, outside of the few largest markets, remain so. (Many independent stations labor under the additional obstacles of being on the UHF band.)

The economic role of networking was analytically the same in radio as it is now in television. Accordingly, although the following note was written as part of a study of television, and the latter, descriptive part of it is specific to television, the analysis is of general application to broadcasting.

**NOTE, THE ECONOMICS OF NETWORKING,  
IN NOLL, PECK & MCGOWAN, ECONOMIC ASPECTS  
OF TELEVISION REGULATION**

58-63 (1973).\*

In its most rudimentary form a broadcast network is merely a group of interconnected stations. Interconnection provides a means of distributing programs from a central source, either for simultaneous broadcast in several communities or for recording, storage, and re-broadcast at the discretion of the local station.

Program distribution, however, is a minor activity of the networks. Indeed, the technical facilities for achieving interconnection are provided by the American Telephone and Telegraph Company (AT&T) and other communications common carriers, not by the networks themselves. Networks occupy the dominant position in American broadcasting by supplying an audience for national advertisers and by originating much of the programming broadcast by local television stations.

The economic origin of this position is the ability of networks to reduce the costs of broadcasters, advertisers, and program suppliers. First, the networks serve to economize on the costs of arranging for nationwide advertising by employing a single agent to deal with national advertisers and granting him exclusive rights to the sale of prespecified blocks of time. Similarly, by supplying programs that are broadcast nationwide, the network simplifies the guesses advertisers must make about audience sizes.

Second, further economies can be achieved through centralized program procurement. Without it, the program owner would be required to negotiate with every station separately in order to maximize his return, thus raising transaction costs for both program owners and broadcasters. In addition, concentrating program procurement in three networks unbalances market power, converting a competitive situation into an oligopolistic one favoring broadcasters. By passing some of the gains from market power on to stations, networks

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provide broadcasters with an incentive not to deal directly with program producers.

Both the economics of supplying national advertising time and the economics of program procurement thus provide advantages to centralized decision making in commercial television broadcasting. Because of regulatory restrictions on multiple ownership, centralization must be achieved, for the most part, through contractual agreements between the networks and their local affiliates. The terms of these agreements are important factors in the economics of commercial broadcasting because they serve as one determinant of the distribution of revenues among networks, affiliates, and program suppliers.

The agreements, in turn, reflect two elements: (1) the costs of labor and capital in the broadcasting industry, and (2) rents—the portion of payments reflecting the scarcity value of talent, broadcasting licenses, and so forth. Rents can also be viewed as payments to induce owners of unreproducible resources to take one action rather than another. Thus fees are paid to local stations for carrying network rather than nonnetwork programs, or to program owners for selling their programs to networks rather than directly to stations. These payments have no necessary relation to social costs—that is, the resources used—in the various alternatives.

An economic analysis of broadcasting requires estimates of the size of rents in the industry. Changes in policy will alter the strategic positions and scarcity values of unique resources, thereby affecting rents, but since these payments for market positions exceed the amount necessary to draw a resource into the television business, such shifts will not change the actual resources available to it. The next sections focus on the size and distribution of rents in the broadcasting industry.

### *Network-Affiliate Relations*

The essence of the network-affiliate relationship can be captured in a somewhat abstract statement of the economic interest of each party. An affiliate will carry a network program if its share in the total advertising revenue generated by the program is greater than the profit from broadcasting a nonnetwork program. Since the total advertising revenue of a program is directly proportional to the size of its audience, the relative attractiveness of a network vis-à-vis a nonnetwork program depends on (1) the size of the audiences of the two programs, and (2) the terms on which the station shares in the advertising revenues of each. These factors interact; the greater the popularity of network programs the smaller the share of revenue required to make them more profitable to a station.<sup>3</sup>

3. Minimization of the share of revenue given up to affiliates would require a different sharing proportion for each program, with the share de-



The basis of network control over the share of revenues affiliates take is the superior audience appeal of its programming. Using its economic advantage, a network can offer a program owner more favorable terms than, acting independently, he could obtain from stations. Networks thus acquire, and offer to affiliates, programming more appealing than that available from nonnetwork sources and do so at prices that afford them a profit representing the value of the scale economies and of their market power. But a potential for profits beyond this amount exists and its magnitude can be influenced by the terms on which networks compensate affiliates for clearing network programs.

During most regularly scheduled network entertainment programs, three minutes per half hour are set aside for network commercial messages; movies have four network commercial minutes per half hour. Network program schedules also allow for varying amounts of additional time at the hour and at the half hour during which local stations identify themselves and broadcast commercials for local, regional, and national advertisers. In the 1968-69 season the net result of these practices was an average of 3.8 minutes of commercials for each half-hour segment of prime-time network television, 83.7 percent of which was allotted to the networks and the balance to affiliates. Thus, one way in which a network compensates its affiliates is by allowing them to share in potential advertising revenue through the commercial time it makes available to them within and adjacent to its programs. Assuming affiliates sell all of the time made available and that they receive the same aggregate revenue per viewer per commercial minute as the network, the value of the commercial time to them is equal to 16.3 percent of the total revenue from a network broadcast.

Affiliates also receive compensation directly from the networks. The terms vary somewhat among the networks and among the affiliates but the basic agreement contains two provisions. First, no compensation is paid on the first 21 to 24 hours of prime-time programs carried each month. Second, for each network commercial minute carried beyond the minimum number of program hours, the network agrees to pay each station approximately 30 percent of its so-called station rate. Station rates were formerly used as the basis for computing charges for network time to national advertisers for the programs they sponsored. However, with the shift from sponsorship of whole programs to purchase of commercial minutes within programs

clining as the popularity of the program increases. Such a structure would be costly to implement since the shares would have to be renegotiated with each affiliate every year as programs and their audiences changed. In addition, the full exercise of network monopoly power im-

plied by such behavior would be likely to incur regulatory wrath. These considerations suggest the prudence of a simpler, though perhaps less efficient, structure of sharing ratios that, for many programs, will make the actual ratio exceed the minimum required.

supplied by the networks, the station rates have come to be used almost exclusively as a basis for determining network compensation to affiliates. The station rates are negotiated between each affiliate and its network, and a network's charge to a national advertiser for a commercial minute differs substantially from the sum of the station rates of the affiliates over which the commercial message is broadcast.

In practice network compensation in the years 1965 through 1969 averaged 20.3 percent of total network revenue. \* \* \*

### NATIONAL BROADCASTING CO. v. UNITED STATES: PREFACE

FCC concern with the consequences of the economic relationship between network and affiliate first surfaced in 1938, when the Commission authorized an investigation to determine whether special regulations applicable to radio stations engaged in "chain broadcasting" were advisable.\* As a result of that inquiry, it issued the Report on Chain Broadcasting (1941) and the regulations described in the following case. The current regulations governing affiliation appear at 47 CFR §§ 73.131 et seq. (AM); 73.231 et seq. (FM); and 73.658 (a)-(i) (TV). The television regulations are reproduced in *infra* at 695.

As you read the opinion, consider the relationship between the various regulations and the general objectives set forth at the beginning of this chapter: which goals are being pursued, which sacrificed?

### NATIONAL BROADCASTING CO. v. UNITED STATES

United States Supreme Court, 1943.  
319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

\* \* \*

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission. \* \* \*

\* \* \* The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power," are addressed in terms to station licensees, and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest," and we shall consider them *seriatim*. \* \* \*

\* The Mutual Broadcasting System had requested the investigation, complaining that it had had difficulty in obtaining affiliates for its planned national network due to NBC and CBS

dominance of local stations. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 Fed.Comm.B.J. 1, 5 (1974).

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue." NBC was also the licensee of 10 stations. \* \* \* 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations. \* \* \* 74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting," it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. \* \* \* But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated."

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

*Exclusive affiliation of station.* The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the station from broadcasting the programs of any other network. The effect of this provision was to

hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939 Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, and as a result thousands of persons in many sections of the country were unable to hear the broadcasts of the games.

[The Commission adopted the regulation now found at 47 C.F.R. § 73.658(a) *infra* at 700.]

*Territorial exclusivity.* The Commission found another type of "exclusivity" provision in network affiliation agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the "territorial exclusivity" clause of its affiliation agreement prevented the network from offering the program to other stations in the area. \* \* \* [See *id.*, § 73.658(b).]

*Term of affiliation.* The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: "Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract." The Commission concluded that under contracts binding the affiliates for five years "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its free-

dom of action." Accordingly, the Commission adopted [47 C.F.R. § 73.658(c)].

*Option time.* The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as "network optional time". For CBS affiliates "network optional time" meant the entire broadcast day. \* \* \*

In the Commission's judgment these optional time provisions in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. \* \* \*

The Commission undertook to preserve the advantages of option time, as a device for "stabilizing" the industry, without unduly impairing the ability of local stations to develop local program service. [It] called for the modification of the option-time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. \* \* \* [Cf. 47 C.F.R. § 73.658(d).]

*Right to reject programs.* The Commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." NBC required a licensee who rejected a program to "be able to support his contention that what he has done has been more in the public interest than had he carried on the network program." \* \* \*

While seeming in the abstract to be fair, these provisions, according to the Commission's finding, did not sufficiently protect the "public interest." As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. "It is obvious that from such skeletal information [as the networks submitted to the stations prior to the broadcasts] the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agen-

cies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. \* \* \*

“It is the station, not the network, which is licensed to serve the public interest \* \* \*.”

The Commission undertook in [47 C.F.R. § 73.658(e)] to formulate the obligations of licensees with respect to supervision over programs \* \* \*.

*Network ownership of stations.* The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. “Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This ‘bottling-up’ of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates.”

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission’s continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that “the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest,” and that it was also against the “public interest” for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage

that competition would thereby be substantially restricted. [See 47 C.F.R. § 73.658(f).]

*Dual network operation.* \* \* \* In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of [it] since there is no immediate threat of its enforcement by the Commission. [See 47 CFR § 73.658(g).]

*Control by networks of station rates.* The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. In the words of NBC's vice-president, "This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves."

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers." [See 47 CFR § 73.658(h).]

The appellants attack the validity of these Regulations along many fronts. \* \* \* We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

\* \* \* The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. \* \* \*

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough,

the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303(g) (i).

\* \* \* [I]t is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the anti-trust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. \* \* \* While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. \* \* \* We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest."

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

[The Court here rejected the contentions that the regulations were "arbitrary and capricious" and that the "public interest" stand-



ard of the Act works an unconstitutionally vague and indefinite delegation of legislative authority.]

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Affirmed.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

[The dissent of Mr. Justice Murphy, with which Mr. Justice Roberts noted his agreement, is omitted.]

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#### NOTES AND QUESTIONS

1. In AM and FM Service, the rules relating to dual networking, exclusive network affiliation, term of affiliation, time optioning, stations' right to reject programs, and network control over station rates have been repealed and replaced by a more general Statement of Policy on Network Radio. This action was taken in recognition of the increase in aural broadcast stations (from well under 1,000 AMs and 25 FMs in 1941 to more than 8,000); the diminished economic importance of networks in radio; and the change in the nature of the

network service, from one of half-hour or longer entertainment programs to one of short periodic segments (e. g. hourly) of news and information. Network Broadcasting by Standard (AM) and FM Broadcast Stations, 40 R.R.2d 80 (1977).

2. The prohibition on network ownership of multiple stations in the same service and market has been supplemented by the more general prohibition of duopoly ownership by any licensee.

The dual radio network operations of NBC, by the way, were severed in 1943, in response to the FCC's threat of action, thus causing the FCC to suspend the prohibition on dual radio network operations. The Blue Network was spun off and, in 1945, became the ABC radio network. ABC now operates 3 AM and one FM networks. As reflected in 47 CFR 73.958(g), the prohibition of dual network operation does apply to television.

3. How significant an impact were the Chain Broadcasting Regulations likely to have on the continuing network-affiliate relationship? Wouldn't the likely answer be a function of the particular licensee's market characteristics—particularly the number of local stations and thus potential affiliates? (According to the brief of the Mutual Broadcasting System, which supported the regulations, only twenty-one cities were fully served by four or more commercial stations—i. e., fully encompassed by the signals of four such stations with unrestricted hours of operation.) What is their likely significance, then, as adapted for television? See B. Owen, J. Beebe, and W. Manning, Jr., *Television Economics* 97–98 (1974).

4. Even if the impact of these particular regulations was slight, NBC and CBS might still have had reason to pursue this litigation, of course, in order to defeat the FCC's assertion of jurisdiction over the network affiliation contract through its power to license individual stations. As we shall see, the Commission has since asserted near plenary authority over the television networks in this manner, without benefit of additional legislation. (The Commission unsuccessfully sought legislation explicitly granting it jurisdiction over networks, as recommended in the 1960 Network Programming Inquiry.)

5. The Chain Broadcasting Regulations were initially applied to television in their original form devised for radio. As a result of the Commission's Report on Network Broadcasting (1957) (Barrow Report), however, the FCC completely banned option time in television and prohibited television networks from representing their affiliates for the sale of non-network time, i. e., spot advertising sales. See 47 CFR §§ 73.658(d) and (i).

(a) What was the economic function of option time? The significance of its prohibition? See Besen & Soligo, *The Economics of the Network-Affiliate Relationship in the Television Broadcasting Industry*, 63 *Am.Econ.Rev.* 259 (1973); cf. Salant, Fisher, and

Brooks, *The Functions and Practices of a Television Network*, 22 *Law & Contemp.Probs.* 584, 603 (1957).

(b) Why do you suppose the Commission prevents television networks from representing their non-owned affiliates in the national spot market? What are the advantages and disadvantages of such representation?

6. In 1962 the Commission reviewed the CBS television Incentive Compensation Plan for conformity with its rules. Prior to CBS's institution of the Plan, the standard network compensation scheme provided that the network would not compensate the affiliate for the first five hours of network programming carried each week, and would thereafter compensate at 30% of the station rate. Under the CBS Plan the affiliate was to be compensated at 10% of its station rate for a number of hours equal to 60% of the number offered by the network, and at 60% of its station rate for hours cleared in excess of that number.

The Commission determined that the Incentive Compensation Plan violated 47 CFR §§ 73.658(d) and (e), but not (a). CBS Network Compensation Plan, 24 R.R. 520a (1963). The Commission stated:

Variations in degree might, or might not mean the difference between legality and illegality. However, any plan that provides for payment wherein the average hourly rate of compensation varies greatly or is heavily influenced by the number of hours taken, has a coercive effect and tends toward full-line forcing. *Id.*, at 515.

The current contract between NBC and its affiliates provides that the network will not compensate the affiliate for the first 24 hours of prime time programming carried each month as "a means of sharing the overhead cost to NBC of providing network service." The CBS and ABC affiliation agreements provide for the deduction of a specified sum from the compensation otherwise payable, which has the same effect as would a provision that compensation not be paid for the first 20 (or so) hours.

In its Petition for Inquiry, Rule Making and Immediate Temporary Relief, *In Re Television Network Practices and Their Effect on the Ability of Station Licensees to Operate in the Public Interest*, RM-2749, the Westinghouse Broadcasting Company suggests (at 43) the existence of a substantial question "as to whether the current practice is consistent with the Commission's rules," as interpreted in *CBS*, *supra*.

How should the Commission resolve this question?

7. Westinghouse also complained that affiliates have no effective role in the content or clearance of network programming, empha-

sizing that they are not consulted as to program concepts or schedules, and are not able to preview individual episodes of network programs to determine their acceptability under local program standards, particularly with respect to adult material and violence. Films are more often previewed, but no more than a few days in advance of air time, at which time substitutions cannot be promoted or included in TV Guide and newspaper schedules. This, according to the petition "makes it virtually impossible for the affiliate to carry out Commission-imposed responsibilities for program selection," vitiates the intended effect of 47 CFR § 73.658(e), and impairs affiliates' contracted rights to reject network programs.

The networks, in response, pointed out that programs made for television (as opposed to films produced for theatre exhibition) are rarely completed long before broadcast, but must be scheduled for TV Guide and for advance promotion purposes some three weeks to a month before air time; that affiliates can reasonably rely on network standards for program acceptability; and that it would be undesirable for the creative community to be "maneuvered into a Government-directed time table based on TV Guide's deadline," a timetable that would presumably force the networks to have programs available for affiliate previewing (and clearance or rejection) substantially before air time.

(a) Should the FCC intervene on this score? Can it accommodate the interest asserted in § 73.658(e) without jeopardizing the public's access to programs of a highly topical nature? How?

(b) Who will gain and who will lose, by the way, if nonclearance of network programs becomes a more realistic option for network affiliates? Consider the Note on The Economics of Networking, *supra* at 244; § 73.658(b) of the FCC regulations; the Prime Time Access Rule, *infra* at 266; and the following Report and Order.

8. In response to the above-cited petition by Westinghouse, the Commission has announced a broad-ranging inquiry into network-affiliate relations. Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest, 42 Fed.Reg. 4,991, R.R. ¶ 53:571 (Notice of Inquiry, Dkt. No. 21049, 1977).

## 2. NETWORK SUPPLY

### a. SYNDICATION AND FINANCIAL PARTICIPATION

#### COMPETITION AND RESPONSIBILITY IN NETWORK TELEVISION BROADCASTING

Federal Communications Commission, 1970.  
23 FCC 2d 382, 18 R.R.2d 1825 (Dkt. No. 12782, Report and Order).

1. On March 22, 1965, the Commission issued a Notice of Proposed Rule Making flowing largely from an earlier Program Inquiry in which we proposed rules intended to multiply competitive sources of television programming by (1) eliminating networks from domestic syndication and from the foreign syndication of independently (non-network) produced programs; (2) prohibiting networks from acquiring additional rights in programs independently produced and licensed for network showing; and (3) limiting to approximately 50% (with certain programs exempted) the amount of network prime time programming in which networks could have interests beyond the right to network exhibitions. \* \* \*

11. \* \* \* [T]he three national television networks for all practical purposes control the entire network television program production process from idea through exhibition. Because "off network" [i. e., previously shown on a network] programs constitute a principal staple of the non-network program market, networks also control the production and hence, the form and content, of a large share of the syndicated programs exhibited by television stations. The networks have gradually—since about 1957—increased their economic and creative control of the entire television program process. Between 1957 and 1968 the share of all network evening program hours (entertainment and other) either produced or directly controlled by networks rose from 67.2% to 96.7%. If entertainment programs alone are considered, network produced or controlled evening hours rose from 64.4% in 1957 to 96.2% in 1968.

12. Data supplied by the networks show a big increase in network-controlled "independently" produced programs—the so-called joint-venture programs with respect to which networks almost invariably acquire the first-run right in addition to some rights to share in the profits from the domestic syndication and overseas sales and other valuable subsidiary rights. This type of arrangement facilitates network control of the form, content, and creative aspects of the show even though actual filming is done by a nominally independent producer. During the same period there has been a sharp decline (from roughly one-third to less than 4%) on all three networks in the number of programs independently produced and licensed to advertisers. The following table summarizes the sources of all evening (6:00–11:00 p. m.) programs carried on each of the three net-

works during representative weeks in 1957 and 1968. The figures are shown as percentages of total network evening program hours (A) [and] for entertainment programs only (B):

	(A) 3 Networks combined		(B) 3 Networks combined	
	1957	1968	1957	1968
(1) Network produced	28.7%	16.3%	21.2%	4.1%
(2) Network participation (produced by others and licensed to network corporations)	38.5%	80.4%	43.2%	92.1%
(1) and (2) combined	67.2%	96.7%	64.4%	96.2%
(3) Independently provided	32.8%	3.3%	35.6%	3.8%

13. The above data demonstrate that whereas in 1957 independents provided approximately one-third of the evening network schedules, their share in 1968 had declined to below 4 percent. Conversely, programs produced by or in conjunction with networks now occupy about 96% of the weekly evening hours on the three networks combined. The ratios of network-controlled program fare as among the individual networks range from about 95% on NBC to just 98% on ABC for entertainment and other programming, and 93.9% on NBC to 98% on ABC for entertainment programming. The figures show a steady increase in such control of evening programming since 1957. Indeed, there has been a substantial increase in such control during the pendency of this proceeding—in hours of overall programs from 93.1% in 1964 to 96.7% in 1968; in entertainment programs from 92.0% to 96.2%.

14. Coincident with the increase of network control of the program process, there has been a progressive change both in the techniques of television advertising and length and format of television programs. Presently 90% or more of network evening advertising is sold in the form of "spots" (formerly largely minutes but more recently consisting of increased numbers of 30-second spots).<sup>18</sup> There has been a coincident decrease in individual and dual sponsorship and a large increase in multiple or minute sponsorship. Formerly, most programming was individually or dually sponsored. Individual and dual (or alternate) sponsors frequently procured their own programs and placed them in time arranged for on the network through their advertising agencies. Occasionally an advertiser would indicate his wish to acquire an individual half hour program and suggest to the network that it buy the program and obtain an alternate sponsor. Typical situations involved programs put on by sellers of multiple brands such as Proctor & Gamble, General Foods and Lever Brothers. In such cases, the sponsor procured the program directly from an in-

<sup>18</sup>. The total number of different network commercials in 1964 was 1,990.

In 1968 it had increased to 3,022. (The New York Times, Jan. 4, 1970.)

dependent producer and used it to advertise his various products. Ultimately, this kind of sponsorship was supplemented by minute participations in network-controlled shows, and more recently by thirty-second participations. Under this method of selling advertising, the network procures a filmed program, often of an hour or 90 minutes in length, slots it into its evening schedule and then sells advertising spots to a variety of sponsors.<sup>21</sup> At present about 90% of evening network time is sold in this fashion.

15. Indeed, Counsel for CBS conceded in his argument before us that networks by and large control the creative process in order to attract large circulation of advertisers. The objective is to deliver homes to advertisers at a cost of "something like one cent per home." He said:

"I readily concede that creativity does not flow as freely and openly as it does in the theater, in books or in motion pictures, each of which can support itself economically on a much smaller audience."

16. Such control stems from the necessities of commercial advertising. A half-hour prime time "costs the advertiser approximately \$40,000 per commercial minute" and he will pay about \$3.50 per thousand homes, which at \$40,000 per minute would require an audience of 11 million homes or, even at the low estimate of two people per home, something in the neighborhood of 22 million people. Counsel agree that there are advertisers who say they are willing to pay a much higher cost per thousand to reach an audience with something that matters to them or to reach a particular segment of the audience. The basic question in his view was: "how do you program in a system supported by advertisers, financed by advertisers, at a cost of one to two cents per home?" \* \* \* There was also extensive testimony in the Commission's Program Inquiry that there is network control in the creative process in television entertainment programming in the interest of advertising circulation. Also the statement before the Commission in July 1969 by Richard M. Powell, speaking for the Writers Guild of America, indicates that such is still the case. He said:

"\* \* \* the power to determine form and content rests only in the three networks and is exercised extensively and exclusively by them, hourly and daily. They read and pass on premises for stories; they read and pass on finished scripts and they sit in judgment on completed telefilm."

17. We also note that networks have increasingly engaged in the subsequent syndication of packager-licensed network programs

21. There are usually six minutes of commercial network spots per hour in addition to local spots at station

breaks. Spot purchasers may, and frequently do, differ from week to week in the same series. \* \* \*

[i. e., programs produced by others and licensed for first-run to the network] Hours of packager-licensed entertainment programs in network schedules more than doubled between 1957 and 1967 (281¼ hours to 631½ hours). The percentage of such hours in which networks acquired domestic distribution rights increased from 15.9% to 23.8%, and foreign distribution increased from 23% to 24.4%. Total hours of packager-licensed programs in which networks obtained domestic syndication distribution rights more than trebled (from 4½ hours in 1957 to 15 hours in 1967), and foreign distribution more than doubled (from 6½ hours in 1957 to 15½ hours in 1967). \* \* \*

When profit shares are considered the results are even more indicative of the networks' acquisition of an increasingly strong position in syndication. \* \* \*

18. While they do not constitute a principal part of overall revenues, revenues accruing to networks from syndication activities are substantial and are increasing. \* \* \*

19. A direct relationship appears to exist between new programs chosen for network schedules and network acquisition of subsidiary rights and interests. As these and other data referred to earlier indicate, very few programs are produced for network exhibition where the network does not get some share in their subsequent earning power through syndication and other rights. The overall result is that, save for about six or seven percent of their schedules which were the result of direct dealing between independent producers and sponsors, networks accepted virtually no entertainment program for network exhibition in a five-year period in which they did not have financial interests in syndication and other subsequent use; in addition, they had similar interests in a large part of the surplus product available.

20. The networks between 1957 and 1967 have expanded their activities and interests in the sale of television programs in domestic syndication and foreign markets. Network commercial interests in domestic distribution and foreign sale took two forms: (1) actual distribution of programs through their syndicated program divisions, and (2) profit sharing rights in domestic and foreign distribution carried on by others. Between 1957 and 1967 network sales of off network television series in domestic and foreign syndication steadily increased from \$5.4 million to \$26.1 million—at the same time industry sales of off network series increased from \$13 million to \$100 million. The three networks, with 23.6% of overall series sales (\$124 million in 1967), were among the leaders in sales in the industry. Profit sharing accounted for a much larger return to networks than did fees from domestic syndication distribution. \* \* \*

21. \* \* \* It appears to be, based on the testimony and especially the statistical evidence, that network judgment in choosing new programs is substantially influenced by their acquisition of subsidiary interests in the programs chosen. But in any event, even were we



not to reach that conclusion, it is clear that the existence of subsidiary interests does pose a significant conflict of interest in the selection of programming by the networks, and that as a prophylactic measure, the public interest would be served by the elimination of this conflict. Certainly there is a close correlation between programs taken and subsidiary rights held. We see no necessity to preserve such a conflict of interest situation. Finally, the presence of the networks as domestic syndicators is inherently undesirable. They are in the position of selling programs to independent stations in competition with their own network programs on affiliated stations, and they compete against independent syndicators in the affiliated-station market where they have an advantage due to their permanent relationship with the stations.

27. We have \* \* \* decided to adopt that part of our original proposal designed to eliminate the networks from distribution and profit sharing in domestic syndication and to restrict their activities in foreign markets to distribution of programs of which they are the sole producers.

28. Under present conditions independent producers who desire to exhibit their product first on a network and then offer it in domestic syndication and foreign markets must first bargain with the networks who are their principal competitors in syndication and foreign sales for the network exposure necessary to establish the subsequent value of their programs as valuable commercial assets in domestic syndication and foreign sales, and are usually required to grant to the networks either the distribution rights or large shares in the profits from domestic syndication and foreign distribution, or both, for the program. Similarly, a producer who seeks to distribute his programs in foreign countries must compete with networks who through the bargaining with the same and other independent producers control the source of supply of the programs which constitute the staples of this market and/or they share in the profits from such distribution by others. The record has convinced us that networks have a clear conflict of interest in choosing programs for their schedules. Indeed, as stated, we believe on the basis of the record before us that networks do not normally accept new, untried packager-licensed programs for network exhibition unless the producer/packager is willing to cede a large part of the valuable rights and interests in subsidiary rights to the program to the network.

29. If networks are prevented from operating as syndicators or from sharing in the profits from distribution by others in the domestic syndication market, there will no longer be any inducement to choose for network exhibition only those packager-licensed programs in which they have acquired other rights. Furthermore, producers and packagers will be enabled to fully benefit from their own initiative and presumably become more competitive and independent sources of programming since in many instances a packager cannot recoup his out-

lay from the first network run of a series or program and must look to the commercial uses of the program subsequent to the network run for commercial success. Relieved of the need to grant a network a large portion of his potential profit the producer's ability profitably to operate in network television will be greatly enhanced. With the expanded syndication market as a feasible alternate to network exhibition his bargaining position will be improved and he can be expected to develop into a stable and continuing alternate source of programs and ultimately to compete for network time.

30. We prohibit networks from acquiring subsidiary program rights and profit shares, as little would be accomplished in expanding competitive opportunity in television program production if we were to exclude networks from active participation in the syndication market and then permit them to act as brokers in acquiring syndication rights and interests and reselling them to those actively engaged in syndication. We also believe that the prohibition of network domestic syndication of their own programs will serve a salutary purpose in making for fairer competition. As pointed out above, the network has an advantage as a competitor in the syndication market because of its existing relations with affiliates. In addition, the prohibition will permit the networks to lend all their efforts to the sale of network programs. We find that the rule will eliminate a potential for competitive restraint in these respects. \* \* \*

31. Foreign distribution rights are an important part of the valuable assets which currently are on the bargaining table when the choice of a packager-licensed program or series is being determined. \* \* \* Were we to permit networks to continue to bargain for foreign distribution rights and profit shares, such rights would continue to be important elements in the decisional process. Their concession to networks might well be a factor in program acceptance. Also an important source of revenue to enable independent programs to develop would be diminished. On the other hand we see no reason to exclude networks from entering into arrangements with broadcasters in foreign countries for the sale or exchange of programs wholly produced by the networks. \* \* \*

32. Finally, we do not believe that a network which has acquired the first run network exhibition right or license to a program or series of which it is not the sole producer should be permitted to hold such right indefinitely against the wish of the producer. Thus, we have provided that if the network does not make timely use of the program the producer or other person from whom the right or license was acquired may reacquire it on his timely offer reasonably to compensate the network. In this way networks cannot keep a program in reserve for an unreasonably long time when, perhaps, such program or series might have a ready market as a non-network offering or an offering to another network.

36. While we have not moved to limit network economic and creative control of the programs in their schedules, we are convinced that American commerce and industry will support greater diversity of programs and program sources than presently are represented in network schedules. \* \* \*

[The dissenting statement of Chairman Burch, joined by Commissioner Wells, is omitted; the concurring statements of Commissioners Cox and H. Rex Lee are omitted.]

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#### NOTES AND QUESTIONS

1. The regulation promulgated with the preceding Report to govern network ownership and syndication of television programs appears at 47 CFR § 73.658(j), page 702. Be certain that you understand its operation.

2. As the Commission recounts, see ¶ 14, the method by which television advertising revenues are raised has undergone a significant transformation since the 1950's. In the earlier period, one or two advertisers would "sponsor" a particular program, which generally meant that they, through their advertising agency, would actually produce the shows for delivery to the network and airing at an agreed time. Their advertisements were more or less a part of the show, incorporating product names into the shows' titles (e. g., the Texaco Star Theater) or even displaying product logograms during the entertainment. The "sponsor" thus controlled program content in every sense from the decision to broadcast one program rather than another to the final production of each show.

In contrast, advertisers now typically take no direct role in determining program content at all; they are offered "spots" of 30 or 60 seconds in which to insert their commercials, and their collective demand for spots during or adjacent to a particular program determines whether the network retains or discontinues the show. (There are exceptions to the foregoing statement, in that an advertiser may require as a condition of its purchase of substantial time that certain content guidelines be observed, e. g., in order to avoid association of its product with violence or the use of vulgarisms.) See generally E. Barnouw, *The Sponsor* (1978) (emphasizes continuing influence of sponsors on content).

As the numerous advertisers withdrew from a direct role in program production, the programing function came to be concentrated increasingly in the hands of the three networks, either through their own production activities or their purchasing decisions in dealing with independent producers.

(a) In its efforts to deconcentrate control over programing decisions, did the FCC in the preceding Report anticipate that adver-

tisers would directly re-enter the production field to a significant degree? Why had they receded from program production to spot buying? Is there any reason to think that the network could produce a schedule with more advertiser appeal than the advertisers themselves could do? See Comment, *The Wasteland Revisited: A Modest Attack Upon the FCC's Category System*, 17 U.C.L.A.L.Rev. 868, 869-78 (1970).

(b) Would it have greater viewer appeal as well? Among the views submitted to the FCC on the general proposal to limit the amount of prime time programming in which networks could have interests beyond the right to network distribution, opponents of the idea suggested that it would place program control in the hands of "circulation oriented advertisers to the detriment of broadcast service." The Screen Actors Guild, on the other hand, expressed the opinion (substantially joined by the Writers Guild of America) that increased network control of programming had "been accompanied by a consistent decline in the quality and variety of television programs and an increase in unimaginative stereotype programs which are little more than 'attention holders' for commercial advertising."

Consider the hypothesis of Bryant, *Historical and Social Aspects of Concentration of Program Control in Television*, 34 *Law & Contemp. Probs.* 610, 621 (1969): "the average network program which is planned, produced, and slotted into prime time before it is sold must necessarily take account of the views of the most conservative advertisers as to subject matter." Do you agree?

3. The Commission suggests, but refrains from actually finding, a "direct relationship" between network acquisition of subsidiary rights and interests in some programs and selection of such programs for initial network exhibition. See ¶¶ 19, 21. How could such a relationship be established? Cf. Crandall, *The Economic Effect of Television-Network Program "Ownership"*, 14 *J.Law & Econ.* 385, 400 (1971) (network decision to renew a program for an additional season not related to ownership of distribution rights or network's percentage of syndication profits). Would the existence of such a relationship be either surprising or suggestive of any impropriety? Why?

4. Why is it "inherently undesirable," ¶ 21, that the networks, having acquired syndication rights, then market them to independent stations "in competition with their own network programs on affiliated stations?" That they compete against independent syndicators in selling to affiliated stations? If there is a problem here, would it be solved if the networks were simply barred from making syndication sales to their own affiliates?

5. The Commission rests its case ultimately upon the potential for a conflict of interest that it perceives in the network's dual roles as program backer and program selector. ¶ 28. Precisely how does it operate? Does it exist to the same, a lesser, or a greater degree if

the network, instead of acquiring after-rights in an independently produced program, produces the program itself and then disposes of the syndication rights to a specialist in that activity? Or perhaps markets the foreign syndication rights itself?

6. The Commission projected that “[r]elieved of the need to grant a network a large portion of his potential profit the producer’s ability profitably to operate in network television will be greatly enhanced.”

¶ 29. Does this statement make sense? What would you have projected? Commissioner Robinson, in an omitted portion of his dissent to the Prime Time Access Rule Second Report and Order, *infra*, states his belief that the “ultimate practical effect of [the syndication and financial interest rules] has been \* \* \* simply to increase the dominant position of the major Hollywood film producers \* \* \*.”

7. Would a network violate § 73.658(j) by contracting for exclusivity against network stripping—i. e., daily airing over another network—or against syndication of, old episodes of a series during the run of the contract?

#### b. COMPETITION IN PROGRAM PRODUCTION

##### PRIME TIME ACCESS RULE

Federal Communications Commission, 1975.

50 FCC 2d 829, 32 R.R.2d 697 (Dkt. No. 19622, Second Report and Order).

##### Introduction

1. In this Second Report and Order, the Commission decides the form of the “prime time access rule” (§ 73.658(k) of the Commission’s Rules). \* \* \*

2. In substance, the provisions of the new rule, effective September 8, 1975, are as follows

(a) Network-owned or affiliated stations in the 50 largest markets (in terms of prime time audience for all stations in the market) may present no more than three hours of network or off-network programs (including movies previously shown on a network) during the hours of prime time 7:00–11:00 p. m. E. T. and P. T., 6:00–10:00 p. m. C. T. and M. T.

(b) Certain categories of network and off-network programming are not to be counted toward the three-hour limitation; these are generally:

—Network or off-network programs designed for children, public affairs programs or documentary programs.

—Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material

related to this coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

—Regular half-hour network news programs when immediately adjacent to a full hour of locally produced news or public affairs programming.

—Runovers of live network coverage of sports events, where the event has been reasonably scheduled to conclude before prime time.

—For stations in the Mountain and Pacific time zones, when network prime time programming consists of a sports or other live program broadcast simultaneously throughout the United States, these stations may schedule programming as though the live network broadcast occupies no more of their prime time than that of stations in the other time zones.

—Broadcasts of international sports events (such as the Olympics), New Year's Day college football games, or other network programming of a special nature (except other sports or motion pictures) when the network devotes all of its evening programming time, except for brief "fill" material, to the same programming.

(c) Another provision includes definitions of the terms "programs designed for children" and "documentary programs".

### I. Background and Description of Comments

3. The prime time access rule, § 73.658(k) of the Commission's Rules, was originally adopted in May 1970, and, with some modifications adopted later that year, went into effect October 1, 1971, as far as the basic restriction on prime time network programming was concerned. The restriction on use of off-network and feature film material during the time cleared of network programs went into effect October 1, 1972. This rule, "PTAR I", provides that stations (network-owned or network-affiliated) in the 50 largest U. S. television markets may not carry more than three hours of network programs each evening during the four prime time hours (7:00–11:00 p. m. E.T. and P.T. 6:00–10:00 p. m. C.T. and M.T.); and that the one hour thus cleared of network programs may not be filled with off-network material or feature films shown by a station in the market within the previous two years. The rule contains an exemption for network programs which are "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office." The May 1970 decision also contemplated waivers of the rule generally in two other types of situations, which have been granted since: (1) where stations carry a full hour of local news or local public affairs material immediately before prime time, and wish to carry a half-

hour of network news at the beginning of prime time without its counting toward the permissible three hours; and (2) sports runovers, where a network telecast of a sports event normally would conclude within the allotted time but possibly may not. This matter arises chiefly with late-afternoon sports events scheduled to last until 7:00 p. m. E.T., but also sometimes occurs with respect to evening sports events. While not specifically mentioned in the decision adopting the rule, there has also been in effect since 1971 a waiver for one-time network news and public affairs programs, those not part of a regular series. Waivers have been granted since early 1972 for particular off-network programs (Wild Kingdom, National Geographic, etc.). There have also been waivers to take into account time zone differences. In a few cases, where requested by individual stations, waivers, have been granted to permit use of 3½ hours of network or off-network material in one evening if accompanied by a reduction in such material on a later night soon after.

4. While not required by the terms of the rule, two other developments have occurred. First, as far as network origination of programs is concerned, the time cleared of network programs has been the first hour of prime time, or 7:00–8:00 p. m. E.T., Monday through Saturday. On Sunday, CBS and NBC have run from 7:30 to 10:30, leaving 7:00–7:30 and 10:30–11:00 as cleared time; ABC has alternated between that schedule and 8:00–11:00 p. m. Second, while the rule applies only to the top 50 markets, as a matter of business judgment, the networks decided not to present more prime time programming on affiliated stations below the top 50 markets. Therefore, the rule has led to an across-the-board reduction in network schedules, from 3½ hours on weekdays and 4 hours on Sundays before the rule (25 hours total) to 3 hours a night (21 hours total).

5. Because of complaints about the rule's effects and the filing of three petitions seeking its repeal, the Commission instituted the present inquiry and rule-making proceeding, Docket 19622, on October 26, 1972. This was designed to explore the rule's operation and consider changes in, or repeal of, the rule. \* \* \*

6. On January 23, 1974, a Report and Order was issued, making certain changes in the rule to be effective in September 1974. All restrictions were removed from Sundays and from the first half-hour of prime time (7:00–7:30 E.T., etc.). One of the remaining six 7:30–8:00 p. m. half-hours could be used for network or off-network material of certain types—children's specials, public affairs or documentary programming ("documentary" was defined to include programs which are educational and informational and non-fictional, but not where the information is part of a contest among participants). Finally, feature films were barred entirely from access time periods. Following this decision, the networks made plans to use the additional time made available to them. \* \* \* [U]nder these plans, all of

Sunday prime time would be occupied by network programs, and, on an annual basis, about half of the Saturday hour previously cleared.

7. The National Association of Independent Television Producers and Distributors (NAITPD), one of the most vigorous proponents of the original rule, sought judicial review of this decision, appealing to the U. S. Court of Appeals for the Second Circuit which had affirmed the original rule in May 1971. \* \* \* The decision (NAITPD v. FCC, 502 F.2d 249) did not rule on the merits of our January changes or the contentions of the appellants on both sides (NAITPD et al. urging a return to the original rule, some major film producers and independent producers urging repeal). Rather, it held that the Commission had acted too precipitously in making the changes effective this fall, particularly since, when the original rule was adopted in May 1970, the networks were given some 16 months grace before the effective date in the fall of 1971. The Court enjoined us from putting the changes into effect before September 1975, and remanded the matter to us to determine what the effective date should be.

8. While the Court did not rule on the substance of the changes, it did indicate some areas where it believed further Commission inquiry would be appropriate. \* \* \* [T]he Court also expressed the desire for more definite statements concerning three matters: the argument that the rule works to increase, rather than diminish, network dominance; the effect of the rule on competition, as to which we were urged to get the views of the Justice Department; and the question of economic impact on Hollywood, the argument being that the rule, by reducing the amount of prime time available for network programs, has a serious impact on the U. S. program production industry and employment in it.

9. In light of these Court observations, we issued on July 9, 1974, a Further Notice Inviting Comments in this proceeding \* \* \*.

10. [Comments were filed by 17 "public groups," all but one of which supported the original rule and opposed the PTAR II modifications. The Department of Justice, NAITPD, ABC ("although not viewing the PTAR II compromise as unsatisfactory") Westinghouse, some program suppliers and others also urged return to the original rule. The White House Office of Telecommunications Policy, six major film companies ("the majors"), CBS, the Screen Actors Guild and others urged repeal of the rule entirely. NBC supported the PTAR II compromise.]

## II. Discussion and Conclusions

13. \* \* \* [T]he Commission has decided to return to PTAR I, the original rule adopted in 1970, except for the codification of certain waiver practices which have grown up under it (sports runovers, network news following an hour of local news, time-zone differences,



etc.), and except for network or off-network programming which is designed for children, public affairs or documentary programs, and different provisions as to feature films.

*A. Arguments of Opponents of the Rule*

14. In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material. These are still valid objectives. It was also noted that this increased supply would be a concomitant benefit to independent stations; and "it may also be hoped that diversity of program ideas may be encouraged by removing the network funnel for this half-hour \* \* \*". Thus, diversity of programming was a hope, rather than one of the primary objectives. It was emphasized that the Commission's intention is not to smooth the path for existing syndicators or encourage the production of any particular type of program; the "types and cost levels of programs which will develop must be the result of competition which will develop."

15. As to the matter of network dominance, it is readily apparent that, as far as network control over station time is concerned, it is reduced by the requirement of cleared or access time, and that certain public advantages have resulted. These include the local programming activities which have been stimulated. \* \* \* It may be that these programs in some cases would have been presented anyhow, and possibly at a reasonably desirable hour in prime or fringe time; but their presentation in high-audience hours is certainly facilitated by the rule \* \* \* These showings afford tangible evidence of the benefits flowing from the rule. The same applies to the presentation of syndicated programs which, in the licensees' judgment, have particular appeal to their stations' audiences, such as Lawrence Welk and Hee Haw after their cancellation on the networks. In sum, the rule in this respect has provided a significant public benefit, in freeing licensees to exercise their own programming judgments. Also of significance in this connection is the fact that affiliated stations are able to retain all of the revenues from access program time (less the amount they spend for programming, typically no more than 33% according to earlier material herein) compared to about 30% which they typically get from the networks for network time. Thus, they have more money from which to support local programming efforts. We find it an important and valid consideration.

16. Also of considerable importance is the encouragement of a body of new syndicated programming, which independent stations may use as well as affiliated stations, by making prime time available for its presentation. Such a body of programming has developed.

While the majors et al. urge that this is not of significance (being game shows, foreign imports or other network "retreads"), it is premature to make any final judgment at this time as to the character of this programming (assuming that such a judgment is ever appropriate). There has, of course, been a reduction in network programs, and thus no doubt in programs which could become off-network material; however, the latter is rather speculative as to quantity \* \*. In any event, we conclude that it is definitely in the public interest to encourage the development of a body of new (not repeat) programs outside of the network process, and thus provide opportunity for the development of new program approaches and ideas.

17. On balance, we conclude that the rule also has other benefits. These include the increased opportunity for non-national advertisers as well as an optional outlet for national advertisers who may choose to use spot rather than network messages. There is increased programming of a public service character presented by ABC as a result of its greater profitability under the rule. Finally, there is the emergence of successful distributors who are able to finance their own and others' production of network and non-network programs, e. g., Worldvision and Viacom. As a result there is now an increased number of producers active in prime time. In light of the different views as to the present effect on independent stations, we do not attach significance at this time to the benefit to independent stations formerly claimed and still asserted by some parties.

18. Diversity and other programming considerations. \* \* \* We reject the argument concerning lack of diversity and quality, as a basis for action at this time beyond that taken herein, for a combination of reasons. First, we are persuaded that the rule has not yet been fully tested. An evaluation of its long-term potential cannot be made at this point, with respect to the kind of programming which is likely to develop with time and a more favorable climate. The uncertainties [surrounding the rule's future] have undoubtedly had a discouraging effect on investment in the development of programs other than those most easily produced and readily saleable. \* \* \* Finally, we believe that the case for economic factors being an iron-clad, immutable obstacle to more elaborate programming efforts has not been made. \* \* \*

19. It is also to be noted that there is by no means a total lack of diversity, even though the emphasis is on game shows. There are a number of programs of other types, including animal shows and musical variety shows. \* \* \*

20. Perhaps more fundamental is the question of to what extent repeal or really substantial abridgement of the rule would be justified on the basis of a Commission evaluation of such matters. Action on a basis like this has the danger of reflecting the Commission's personal predilections and prejudices. A related question is, assuming such an inquiry is appropriate, what standards should be used \* \* \*. For example, assuming that 65.6% of access entertainment time devoted to game shows is undesirable, what about 41.2% of network prime time devoted to crime-drama shows of various types? If we look at the concentration of game shows in certain markets such as Cincinnati or Albany, must we not look also at three network crime-drama shows opposite each other on Wednesdays at 10:00 p. m.?

21. We do regard it as important to provide greater opportunity for the presentation in access time of certain kinds of material which are to some extent inhibited by the rule. One of our objectives in so doing is to promote an increase in the range of fare available to the public at these times. Should the time come to review the rule again, it may well be that a continuing lack of diversity will be grounds for change; but we do not find it so now except as provided herein.

22. \* \* \* Warner claims that the rule discriminates against American producers and favors foreign producers. \* \* \* In light of the reduced role which foreign product plays in access programming this year as compared to earlier years under the rule, action to repeal or substantially abridge the rule on this basis is not warranted.<sup>21</sup> While it is regrettable that American producers face off-foreign-network competition, which comes in with a cost advantage, this is a situation which obtains elsewhere in our economy. As to [Warner's] other point—alleged irrelevance of access-period programs from the standpoint of minority groups and women, and American social problems generally—this is much too speculative a matter to afford basis for action at this time, particularly in view of the impetus to local programming.

23. Other arguments \* \* \* Network dominance is obviously reduced by the reduction in network prime time programming; and this reduction is only slightly lessened by the somewhat greater carriage of network programs during network prime time through decline in station preemptions and nonclearances. \* \* \*

24. With respect to the impact on employment in the program production industry, \* \* \* we find nothing presented to us which could be considered relevant to our decision. What is claimed to be involved are some 3,570 fulltime jobs, with at least some of this loss attributed to the rule made up by increased station employment (up more than 1,000 at top-50-market affiliated stations from 1971 to

21. According to the majors' joint appendix, off-foreign network programming (the only foreign-produced material which probably should be consid-

ered in this connection) occupied 7.2% of access entertainment time in 1974-75, compared to 14.3% last year and 17.6% in 1972-73.

1973 according to ABC, and some of this is attributable to the rule). Additionally, there are gains in production of non-network programs as well as sales and similar activity. \* \* \*

25. As to the more general subject of the well-being of Hollywood entities such as the major film companies and film producers we do not find in these arguments reason to repeal or substantially abridge the rule. As has been pointed out many times, the problems of Hollywood are of long standing, having many causes, and it is unclear as to the extent the problems are attributable to the rule, or how much help repeal of the rule would afford. We agree with the proponents of the rule that it is not the responsibility of the Commission to return Hollywood companies to their buoyant health of pre-1948 days; and, as ABC points out, most of the majors are doing rather well and they always have the choice of producing for access time. \* \* \*

26. The last argument in this area is the effect on creative persons—actors and playwrights referred to by the Court, and others such as producers, musicians, etc. In this connection, there is an impact on the creative opportunities for some persons as the rule has operated so far, since there is less network programming of a dramatic or comedy nature which uses them, and very little from U.S. sources of the same type for access-period use. But in this respect, it is simply too early to evaluate the rule's long-term effect. Other categories of persons, such as musicians, may well have gained by virtue of the musical variety shows which occupy a certain amount of access time but which are almost totally absent from current network prime time. \* \* \* We do not find reason here to repeal the rule.

*B. The Exemption for Children's, Public Affairs and Documentary Programs; Arguments of Rule Proponents*

28. As mentioned above, we have decided to permit an exemption for "programs designed for children" and "public affairs programs or documentaries." [These terms are defined at 47 CFR § 73.658(k) (Note 2) *infra* at 703.]

29. We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time. We believe that the importance of these kinds of programming outweighs any concern as to its source, whether locally produced, first-run syndicated, network or off-network. \* \* \* The viewing public has a right to these types of programming, and the prime time access rule, by its operation, has had the effect of limiting this right.

30. With respect to children's programs, it appears that a very small amount of such material is locally produced and carried in access time. \* \* \* However, our concern here is with the numerous

children's special programs presented by the networks, generally starting at 8:00 p.m. E.T. or later under the network schedules which have resulted from the rule, as well as with the potential for regular programming significant in this area. \* \* \*

The Commission has received numerous complaints from parents, educators and others interested in children's matters, and sometimes from the children themselves, to the effect that this starting time is simply too late in relation to children's bedtime (except, perhaps, on Saturday). As emphasized in the recent policy statement concerning children's television [infra at 615], paragraphs 26-27, the Commission wishes to encourage licensees to meet the needs of children with a variety of programming, especially at a time other than Saturday or Sunday morning. In order to foster such material, and avoid the problem mentioned with network broadcasts, we conclude that an exemption to permit access-period presentation of such material (in addition to the usual three hours of network material) should be granted, with respect to both network and off-network programs. \* \* \* [W]e are extending this to regular as well as special programs, since they may be equally beneficial to the public. \* \* \*

32. With respect to public affairs programming, this is not available in significant amount in new syndicated material, although of course there is a substantial amount of such programming produced locally and presented in access time, one of the important benefits of the rule as already mentioned. As to the networks, there is a substantial amount of public affairs programming (and similar news documentary material) in prime time on all three networks, but no regularly scheduled material, whereas before the rule both CBS and NBC had regular prime-time programs of this nature, and it is also noted that some such network programming occurs outside of prime time. We conclude, therefore, that the rule constitutes an inhibition on the networks' exercise of this highly important part of their activities, fulfillment of part of their journalistic function to advise and inform the public concerning matters of public importance, and that this added benefit outweighs the impingement on access time. This exemption is a codification and extension of the existing waiver for one-time network news and public affairs programs which has been in effect throughout the rule's history. That exemption has not been used to an inordinate extent by the networks. \* \* \*

33. Documentaries as defined herein also, of course, include other programs, such as National Geographic and Jacques Cousteau specials and the America series, both network and off-network programs. \* \* \*

It is also recognized that, particularly as to use of off-network material, the exemption includes half-hour animal series, such as Wild Kingdom and Animal World. \* \* \* We conclude that the exemption should be broad enough to include such material. When

it comes to the off-network restriction, this is not related to network dominance directly, but is simply a restraint on licensee freedom of choice, designed to preserve the potential of cleared time availability for new non-network material. We conclude that preservation of this restraint is not warranted, when it comes to barring a station from using programs such as Wild Kingdom or Animal World (which were independently produced) in cleared time, instead of another program of the same or different type. In sum, in view of the obvious informational value of documentary programs, the benefit to the public from facilitating the presentation thereof outweighs in importance what might be termed an increase in network dominance (to the extent these are network programs) and an incursion into the full availability of 3 hours a night of cleared time for other new material.

\* \* \*

34. We expect the networks, and licensees in their acceptance of network programs and use of off-network material, to keep such programming to the minimum consistent with their programming judgments as to what will best serve the interests of the public generally.<sup>29</sup> \* \* \* We attach particular importance to the programming opportunities available on Saturday in the access time period. We do so because of the significance of existing local programming efforts in this time period, and the fact that this time offers the most significant opportunity for hour-long access programs [since there is no network news broadcast at 7:00 E.T.]. We caution networks to avoid any incursion into this period unless there are compelling public interest reasons for so doing. If there are extensive deviations from these precepts, the exemption may have to be revisited.

35. In acting herein to permit an increase of network programming of certain types, we are only opening up an option for licensees to use such additional network material if, in light of their programming judgments as licensee-trustees meeting the needs, tastes, interests and problems of their coverage areas, they deem it appropriate to do so. Our purpose is to make available to licensees programming which, to some extent, was removed from prime time or caused to be run at a much later hour. There is intended no requirement, or even a suggestion, that such additional network programming should be carried in order for a licensee to carry out properly his programming obligations.

36. Arguments of proponents of the rule. In light of the foregoing, we turn to the arguments advanced by the proponents of PTAR I \* \* \*.

40. We have considered the argument that we should take other approaches to meet what we consider the shortcomings of broadcast-

29. Thus, the stripping of off-network material on the theory that it is a program designed for children or a

documentary program, would not be regarded as consistent with the spirit or objectives of the rule.

ing under the rule—require the networks to run children's programs earlier (giving up the 10:30 time slot instead of 7:30), requiring them to run a certain amount of public affairs in their own time, questioning stations about over-use of game shows or stripping, etc., rather than by relaxing the rule and nullifying its benefits. \* \* \* We do not agree. We believe that these alternatives would involve the Commission too deeply in day-to-day programming and scheduling decisions.

42. Warner Brothers and other opponents of the rule renew herein their arguments that the rule violates the First Amendment in a number of respects [including the contention] that it is illegal because the Commission is getting into the business of determining programming by setting up categories of preferred programs, as well as by earlier waiver policy. \* \* \*

45. We point out that the Commission does not violate the First Amendment in interesting itself in the general program formats and the kinds of programs broadcast by licensees (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 [16 R.R.2d 2029] (1969)). It is also well recognized, of course, that the inherent limitations in broadcast spectrum space make necessary restraints—restricting the speech of some so that others may speak—not elsewhere appropriate \* \* \*.

46. As we see it, our adoption of the prime time access rule, and its modification herein, may be roughly described from a First Amendment standpoint as follows: the rule was designed to lessen the tendency of licensees which led them to carry network or off-network programming, in order that the voices of other persons might be heard. The rule was a restraint on licensees designed to reduce the impact of another restraint, that of the networks, by preventing licensees from choosing present or former network programs so that new program sources might arise and be heard by the public. Such new persons or sources have come forward, but by and large, as far as syndicated programming is concerned, they present mostly game shows. At the same time, other sorts of programming important to the public—those included in the exemptions herein—have been somewhat reduced in amount, or, in the case of children's programming, have not been available at the most appropriate time. Therefore, since it was the Commission's rule which has had this effect, we have an affirmative duty to relax our restraint to permit such programming to be made more readily available. We point out that the kinds of programs involved here are to a large extent those whose importance has been recognized in the Communications Act (§ 315) or by us recently in the children's programming proceeding.

48. We do not believe that permitting the carriage of programs in the categories exempted raises any questions of a Constitutional nature. \* \* \*

*D. Off-network and Feature Film Restrictions*

49. As to the off-network restriction, we find that repeal or relaxation is not warranted, except to the limited extent adopted herein and discussed above. It is readily apparent that elimination of this restriction would lead to a large-scale incursion into cleared time by use of off-network material, sharply reducing the availability of time to sources of new non-network material. While the off-network aspects of the rule do constitute a restraint which is not directly related to present network dominance, the drastic impact on our objective of encouraging the development of new material would obviously be completely disserved.

50. We have decided to modify prior provisions regarding the use of feature films in access time. Under the changes made here, we eliminate the restriction on movies which have been shown by a station in the same market within a two-year period. At the same time, however, the new rule bars any feature film which has ever appeared on a network from the access period. If a movie has never appeared on a network, it may now be presented during the access hour, regardless of when or whether it has ever appeared on a station in the same market. If it appeared on a network—whether or not made for television—it is barred. We believe that this will ease the administration of this portion of the rule for licensees, motion picture distributors, and the Commission. \* \* \*

53. Network news following a full hour of local news. The new rule (§ 73.658(k)(3)) codifies the existing waiver for a half-hour of regular network news if it is preceded by a full hour of local news or local public affairs programming. \* \* \*

[Discussion of the exemptions for sports runovers, special network programming, and special network news coverage, and of time zone problems with live coverage of special events, is omitted. These regulations appear at 47 CFR § 73.658(k)(2)–(6).]

*G. Other Matters: the Licensee's Duty with respect  
to Locally Significant Material; the Future  
of the Rule; Effective Date*

60. As mentioned above, one of the really significant benefits from the rule is its impetus to the development of local programming efforts, and this is one of the principal reasons for retaining it in a form close to PTAR I. We expect that stations subject to the rule will devote an appropriate portion of "cleared time," or at least of total prime time to material particularly directed to the needs or problems of the station's community and area as disclosed in its regular efforts to ascertain community needs, including programming addressed to the special needs of minority groups. Such programming efforts are necessary if the benefit of the rule in stimulating locally



meaningful programming is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however, that programming of the significant character mentioned need not necessarily be all locally produced. Syndicated or network programming, where it deals with needs or problems common in substantial degree to many communities, may also make an important contribution.

64. \* \* \* We believe that the public interest dictates that the new modifications become effective at an early date because we feel that the rule as amended in this Report and Order will best serve the public interest. Finally, parties to this proceeding have been on notice as to the specific changes adopted in the rule since November 15, 1974, the date of our Public Notice concerning staff instructions in this matter. Therefore, we conclude that these changes can go into effect in September, 1975.

[The concurring statements of Chairman Wiley and Commissioners Reid and Robert E. Lee are omitted.]

## DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

### I. Introduction

\* \* \*

The revised rule plainly reflected the Commission's ambivalence between curbing network dominance over programming on the one hand and retaining network programs (the kind for which waivers had been granted) on the other. \* \* \* There appears to be no recognition that each part of the modified rule undercuts the other. Access is good, but it does not produce the kind of programming which we like so we have to provide the opportunity for such programming; we like such programming but if we see too much of it we see it as evidence of "network dominance" since it can only be supplied by network brokers.

\* \* \*

The prime time access rule, as originally promulgated, was intended to serve several, interrelated objectives that can, I think, be fairly summarized as follows: (1) to reduce network "dominance" over programming decisions, (2) to provide market opportunities to new creative talent which were presumed to be foreclosed by the network triopoly, (3) to re-establish local control of programming decisions which were presumed to have been increasingly appropriated by the networks (an increase in local programming was mentioned only incidentally as a benefit in the original order; however, it has since become an important rationale of the rule), and (4) to increase the supply of first-run syndicated programming. The objectives stated in the Commission's present decision are essentially the same \* \* \*.

## II. The Concept of Network Dominance

\* \* \*

Presumably, network dominance refers to the power which three national brokers of local station time and national programming have in selecting the nation's television program menu. In general, program suppliers must deal with one of these three network companies or forego national distribution of their product. This limited number of potential buyers, it is asserted, presents the real threat of arbitrariness in program selection and the denial of access to program suppliers with new ideas. A second form of "network dominance" which emerges in the discussion of the rule is the ability of networks to persuade local affiliates to clear time for network programming. As networks expand their activities to new day parts, they progressively preempt the local station's ability to make its own program choices. The rule would return this choice to the stations, if for only one hour per day.

Unfortunately, there appears to be only a limited understanding that the chief cause of "network dominance," making inevitable some form of network power, derives from the Commission's own television frequency allocations. There are but three national networks for one important reason—our allocations policy has dispersed VHF station allocations so as to allow most households to receive no more than three. With only three competitive stations in markets comprising two-thirds of the nation's television households, there can be no more than three brokers for any given hour of national broadcasting. It is a basic economic fact that, with a few exceptions, programs receiving less than national exposure cannot hope to compete for audiences with those achieving network distribution. If network distribution were not national, program budgets would have to be much lower per dollar of advertising generated. Network distribution allows the most efficient use of television advertising revenues in the stimulation of program production.

A network is more than a mere broker of station time. It is also an investor in programming. By agreeing in advance to commit its local affiliates to a given program series, and by guaranteeing program suppliers a sum certain (in the form of a license fee) for a number of programs well in advance of exhibition, the network makes possible the investment of \$250,000 or more per hour of entertainment fare. Without this "preselling," producers would not commit themselves to such program budgets.

To the extent that the Commission laments the decline in station program selection and the growth of "network dominance" in this process, it laments the development of efficient program brokerage. In this sense, what has been obtained from the prime time access rule is just what should have been expected: a fragmented array of low-cost, low-quality programs offered to local stations directly by

producers without the intervention of a broker. Enormous energies and expenses are required in this distribution process—expenses which are diverted directly from program budgets.

As time passes, it may be possible for program brokers to develop for just the access period. If this were to happen, however, we would be no closer to the goals which the majority hopes to attain than we were with PTAR I or II. Since market forces would distill no more than three such brokers from the set of current program distributors, the *best* that can be realistically hoped for is the development of a new triopoly, which would “dominate” the access period. Unfortunately, this optimum is likely to be difficult to accomplish if there are any scale economies in performing network brokerage. A mere seven hours per week may not be sufficient to make efficient use of the personnel required to establish and enforce affiliate contracts, negotiate for program rights, select and schedule new program series and perform various research functions. The result may well be that a much greater share of the revenues for this period will be diverted to these brokerage functions than is true for the three existing networks.

At some point it is necessary to submit to the limitations of the real world. Although we would have it otherwise, the fact that there are only three station outlets limits us to three brokers of television programs at any given hour. As a result, program decisions will be virtually the same as those currently made by the three national network firms, reflecting the tastes of the mass audience. We can change the identity of the program suppliers, we can limit the time periods in which they are permitted to sell their wares, but the economic incentives will remain unchanged: the profit maximizing firm will tend to program to maximize audience shares in light of the number of viewing options. So long as the number of viewing options remains the same, the strategy of commercial programming will remain the same for any networking agency. \* \* \* All one can confidentially expect of programming brokered by the “mini-network” is a decline in the quality of programming due to the inefficiencies of small-scale network activity.

It could be argued that increasing the number of brokers of programs for prime time from three to six, by limiting the existing three to no more than three hours, is a major improvement, because then program suppliers can turn to six rather than three potential buyers. I do not think that this state of affairs would constitute any significant improvement. The same economic forces apply to each set of three brokers to fill a given period with programming opposite only two rivals. I assume that these economic forces would be the dominant influence in how program decisions are made. Furthermore, since the efficiency of brokering only one hour per day (particularly if that hour is early prime time, when both audience and revenue are

lower than the average of all prime time hours) is almost certainly much less than those typical of the three existing networks—it is clear to me that in order to get three extra, identically motivated program buyers, we must require the public to forego the sort of programming they consistently prefer when given a choice in the matter—high-quality, high-budget fare like that the present networks offer in prime time. To me, this trade-off is unacceptable.

### III. Program Access, Quality, and Diversity

Searching through the current access period programming in pursuit of the gems which the three networks are supposed, in their capriciousness, to avoid, is a frustrating business. No definition of program quality seems to me congruent with the current run of access programs, an opinion which appears to be widely shared—by Commissioners, television critics and quite a few viewers. Of course measures of quality are elusive at best, and one's interpretation of the prudence of continuing the rule cannot depend solely upon comparisons between network and access programs. In particular I am mindful of the First Amendment restrictions that preclude us from judging the merits of the access rule by engaging in critical review of, say, "Bowling for Dollars" or "Let's Make a Deal." \* However, a major premise of the rule was, and is, that it would promote diversity—by promoting new sources of programming, reflecting different ideas and creative energies. I assume we can, without affronting the First Amendment, ask whether this goal has been or can be achieved under the rule.

The first three years under the rule proceeded as one would expect. With no one assured that the rule would continue for an extended period, program suppliers were unwilling to commit resources to expensive series formats. Unable to line up stations in advance for a distant period, during which the rule might no longer exist, these suppliers instead focused upon series which could be produced cheaply and quickly. As a result, the access period has been dominated by (1) game shows which can be mounted and filmed in a very short period of time (most of these are revivals of old network shows or "new" episodes of daytime game shows); (2) recently discontinued network series whose development costs and lead times were equal to zero (e. g., "Hee Haw" and "Lawrence Welk"); and (3) various "nature/wildlife" features which could be drawn in large part from existing footage (e. g., "Wildlife Kingdom," and "Wild Wild World of Animals").† \* \* \*

\* Though we may, I take it, consider the response of critics and of the public at least in characterizing and classifying the programming. See *NBC v. FCC*, 516 F.2d 1101, (D.C.Cir. 1974), vacated, Dec. 13, 1974 (en banc), *infra* Ch. VII, § B.

† \* \* \* In 1974-75 over 65 per cent of the programs in the access period were game shows—a five-fold increase over the last pre-PTAR period, 1970-71, when the figure was 11 per cent. In the 1974-75 season, 17 of the top 22 access shows (accounting for 87

The market for access programs has already begun to distinguish the programs with audience appeal from those with little value to viewers. A few series \* \* \* dominate the access market while myriad other programming ventures realize very limited sales and are dropped by syndicators. This trend will continue \* \* \*. Only those programs achieving full national distribution, obtaining clearance in a large proportion of markets, will be able to cover the costs of production, which syndicators will soon find beginning to escalate. Thus, one of the purported benefits of the rule—the large number of programs available for the period (in contrast to the twenty-one hours available from networks if they programmed the full access period) will soon evaporate as the rule assumes a more permanent appearance.

The Commission should not lament this decline in the number of access programs as it develops. It is only through the process of funneling the total national advertising revenues available for the period into program budgets of a smaller set of programs exhibited in every market that suppliers of access programs will be able to compete for resources with those supplying network fare and to offer quality programs. In short, quantity and quality are inversely related in this market through their interaction in the program budgets of suppliers. \* \* \*

That the current access programs are not only cheaper but less lovely in the eyes of their beholders is clear. The average audience of independents in four-or-more station markets has increased markedly during the access period since their competitors, the affiliates, have been forced to forego network brokered series. The independents, who continue to exhibit old feature films and old network series during the period, have been the beneficiaries of a considerable bonanza during the period in which they enjoyed larger advertising revenues with unchanged program costs. As syndicators of feature films and off-network series have begun to respond to this phenomenon by increasing their program prices, the independent stations' attachment to the rule has weakened somewhat. Nevertheless, the fact that these independents continue to enjoy larger audiences than they did when they were faced with network competition is ample testimony to the inferiority of access shows in comparison to network series.

\* \* \*

#### IV. Local Station Programming Responsibility

\* \* \*

For entertainment programming, and for most high quality programming other than local news, the goal of local station responsibil-

per cent of all *syndicated* access programming) had been broadcast before the access rule, 16 had been broadcast (as network programs) before the ac-

cess rule. Many of these shows, in fact, continue to be produced with network facilities (and some are still broadcast as network shows).

ity for programming in typical prime time hours is as a practical matter difficult to achieve. Such programs are not produced for a local, but rather for a national market. The economics of the medium require station managers in each market to exhibit principally those programs which have national acceptance. \* \* \*

The Commission seems virtually to admit as much in creating a broad exemption from the access rule for "special" network programs—most notably children's programs, documentaries and public affairs programs. Thus, on the one hand the Commission applauds the freedom given local stations by the access period, but on the other hand it acknowledges that this compulsory freedom has killed (or, without repeated waivers, would have killed) high quality programming. So the Commission engineers a number of permanent exceptions to the rule so that we can continue to enjoy high quality programming—of the kind which we like. \* \* \* †

\* \* \*

The Commission opines that with their increased profits and new "freedom" from network "control," local stations will produce more local programming—particularly of the kind which *we* favor (children's programming, public affairs and the like).

The amount of such local programming that has so far filled the access period is something less than overwhelming. However, taking the most favorable view of what has occurred and what might be expected to occur, I am still not persuaded that the gain exceeds the loss. If the rule has increased the incentive for additional local programming, it has done so largely by degrading the competition. The access rule has lowered program quality so much that individual station managers have been less reluctant to offer local programs opposite the access shows than they would be to pre-empt a network show opposite two other network programs. The audience loss is simply smaller for these examples of public-service broadcasting than it would be in the absence of the rule. \* \* \* Continuing to guarantee local station licensees low-quality competition on rival stations in order to induce them to fulfill their responsibility to broadcast in the public interest is an unacceptable strategy. The Commission ought to be able to design a better method of enforcing licensees' obligations to the public.

† I note the seeming contradiction between the Commission's statement, on the one hand, that it is unable to make a judgment on the quality of game shows and other access programs, and on the other hand its creation of an exemption for "public affairs," "documentaries" and "children's programs." This paradox simply mirrors and carries forward a

larger paradox: the tension between the Commission's expressed concern that we not allow our own programming preferences to dictate the nature of the rule, as contrasted with the obvious fact that having the rule in the first place substitutes our choice for public choice in television programming.

### V. Economic Viability of Access Programming

\* \* \*

An important side effect of the rule has been the sharp increase in total advertising messages in the access period as many stations have introduced five commercial minutes of advertising plus station breaks into their access programs. Indeed, most access series are produced with more commercial interruption time than network series. Thus, the access programs are not only of lower quality but interrupted more with commercial messages.\* In light of this it is not surprising that the NAITPD can demonstrate that the access period can generate sufficient revenues to support programming. With more-numerous commercial minutes during access time, it is even possible that revenues from this period will be even greater than those which would be forthcoming if the networks programmed this period. It is unfortunate that so much of these revenues may continue to be wasted on transaction costs between stations and program suppliers.

### VI. The Choices Faced by the Commission

\* \* \*

If we wish to commit ourselves seriously to reducing "network dominance," I believe we have to focus our attention on the basic source of the problem: the limited number of economically competitive television stations in each market. What is wanted is a means to increase the number of stations. One step in this direction—a limited one—might be VHF drop-ins. Alternatively (or additionally), some form of deintermixture—by community or region—might be undertaken in order to strengthen UHF and thereby to permit an increase in station outlets. I am well aware that both drop-ins and deintermixture are not simple, easy solutions. Both have drawbacks and limitations.\* Perhaps the most important liability is political;

\* Considering the quality of the access programs some critics might look on increased commercial interruption as benign relief. That is not quite the way the Commission rationalizes it. It contends that the increased advertising is offset by the increased opportunity for local advertisers. That assertion seems to me rather disingenuous and in startling contrast to the past occasions in which we have expressed concern about overcommercialization—without noting that it was balanced by the increased opportunity given to advertisers.

\* Drop-ins would provide an incomplete solution since the number of drop-ins that has so far been considered as

technically feasible would fall short of the number necessary to support a fourth network. In the case of deintermixture the chief drawback is the relative inferiority of UHF—essentially a function of two things: the added cost of providing service coverage commensurate to VHF, and the inadequate technical capability of present receivers. However, the first problem would be minimized if competition with VHF were eliminated in particular markets, and the second problem would probably disappear if a substantial number of UHF-only markets were created, creating a substantial economic incentive for set manufacturers to correct the problem.

in fact memory of the warfare that these measures produced in the late 1950s and early 1960s makes me hesitate even to suggest them. However, I see no other less controversial solutions. Cable could offer a competitive solution. But, of course, the growth and development of cable is currently as controversial as drop-ins or deintermixture, and the Commission's refusal to permit freer development of cable, and particularly its refusal to liberate pay cable from what I think are unwarranted fetters, has for now virtually foreclosed this competitive option in the same way that its allocations decisions have limited intra-broadcast competition.

Unless the Commission confronts the issue of network *economic power* head-on, it will simply sit as a constant arbitrator among groups competing for the scarcity rents which it has created by its allocations plan and the current access rule. The Commission should not be forced to determine how these rents should be divided between large Hollywood motion picture companies and smaller purveyors of game shows. Rather, it should carry out its authority to increase competitive outlets in a manner which prevents the development of monopoly power. If it is unwilling to do this, it should simply return to the status quo ante, allowing the three national network companies to program as much or as little of the prime time period as they wish. This last is obviously the most realistic option at this point; and in light of the past few years' experience, together with what I believe are the demonstrable facts of economic life, I think the Commission should embrace it.

#### APPENDIX D

##### General Picture of "Access Period" Programming in 48 of Top 50 Markets, Week Beginning September 21, 1974

##### Access Period Half-Hours Devoted to Various Categories of Programs

	<b>Total for Week</b>	
	No. of ½ hrs.	% of Total
Network News	135	6.6
Local News	397	19.5
Local Movies	50	2.5
Other Local	143	7.0
Game Shows	844	41.6
Animal	142	7.0
Variety	155	7.6
Other	<u>165</u>	<u>8.1</u>
Total	2,031	99.9



## NOTES AND QUESTIONS

1. Notice that the three television networks, whose market dominance is the primary target of PTAR, took widely disparate positions in the PTAR II proceeding: CBS sought repeal of the rule, NBC "supported the PTAR II compromise," and ABC was a "strong supporter" of the original (PTAR I) rule. See ¶ 10. What might explain this array of views?
2. (a) Among the benefits claimed for PTAR, the FCC found that affiliated stations fared better financially, thus giving them "more money from which to support local programming efforts." ¶ 15. Is the FCC's premise plausible? Assuming it is, does the Commission's conclusion follow?

(b) The Commission also found that "network dominance" was reduced under PTAR, for the reasons given in ¶ 23. Yet the Commission had before it a staff report stating:

Overall network power has been strengthened, not weakened, by the [PTAR]. Network originated programming has become scarce, resulting in greater advertiser demand for commercial minutes within prime-time programming. It has, in addition, strengthened the networks' bargaining position with program producers, who are now required to compete for fewer prime-time network hours.

A. Pearce, *The Economic Consequences of the FCC's Prime-Time Access Rule on the Broadcasting and Program Production Industries 1* (1973). Are the two statements reconcilable? How? Which employs the more useful criterion of "network dominance" for the purpose of evaluating the PTAR?

3. PTAR II was reviewed in *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). First the court (1) upheld the basic PTAR concept against the argument that it had failed to achieve its purposes; (2) rejected the first amendment attack on PTAR II's scheme of exceptions based on program type; but (3) directed the agency (a) to formulate a broad definition of "public affairs programs," and (b) not to entertain waiver or other petitions requesting it to determine whether particular programs fall within the exempted categories.

The court also (4) held that "so long as the FCC permits movies never seen on a television network to be played in cleared access time, it must also permit movies which have been shown on network to be played in that time," *id.* at 543; and (5) read paragraph 34 as an unlawful delegation to licensees of the Commission's "policing duty" under the public interest standard of § 307(d), and required that the Commission "either withdraw its admonition concerning Saturday programs or make the exempted categories wholly unavail-

able to licensees in access time on Saturdays.” Finally, the court (6) directed the FCC to consider in conjunction with the effective date for PTAR II, “a ceiling on total hours allowed for the exempted network programs in the light of the number of independent programs for first-run syndication then available for early production.” *Id.* at 544.

On remand the Commission declined to impose an overall ceiling on the use of network or off-network material qualifying for exemption as children’s, documentary, or public affairs programming, and responded to the court’s mandate concerning the Saturday access hour, the use of feature films, and the definition of “public affairs programs.” As thus amended, the PTAR rules appear at 47 CFR § 73.658(k), page 703, *infra*.

4. The court of appeals, in upholding the constitutionality of the exemption of certain favored categories of programming from the operation of the PTAR, reasoned that the “public interest” standard of the Communications Act requires that broadcasters provide programs to somebody’s specification of the “public interest;” that the broadcaster could not itself make this determination “for he is in an obvious conflict of interest;” that “[s]ince the public cannot through a million stifled yawns convey that their television fare, as a whole, is not in their interest, the Congress has made the FCC the guardian of that public interest;” and that the “Commission surely cannot do its job without interesting itself in general program format and the kinds of programs broadcast by licensees.” 516 F.2d at 536.

The court deemed it significant that in PTAR II the Commission “is not ordering any program or even any type of program to be broadcast in access time. It has simply lifted a restriction on network programs if the licensee chooses to avail himself of such network programs in specified categories of programming.” *Id.* at 537. In contrast, the court stated that “it may be that *mandatory* programming by the Commission even in categories would raise serious First Amendment questions.” *Id.* at 536 (emphasis in original).

Is this distinction well-taken? If so, could the FCC prohibit the carriage, at any time, of network programming other than that which it has exempted? If not, then how does one determine the number of hours to which the PTAR could constitutionally be extended?

5. While the court required the FCC on remand to define “public affairs programs,” it specifically approved the Commission’s definitions of “children’s programs” and “documentary programs,” see 47 CFR § 73.658(k) (Note 2), *infra* at 703, and rejected first amendment vagueness arguments that the classifications “place the licensee at his peril to interpret them.” With respect to the former category, the court stated:

The exemption for network children’s programs does not, by its terms, exclude fiction or drama, fairy tales or poetry,

nor does it prescribe what is educational or informational. It does not provide that if the rest of the family happens to be entertained as well, the program is no longer 'primarily designed for children.' Of course, other factors, such as a preponderance of shaving cream advertisements, might raise some doubt on that score. 516 F.2d at 539-40.

(a) Is the question whether a program was "primarily designed for children" one of the designer's intent? The broadcaster's intent in scheduling the program in access time? For example, "Leave it to Beaver" and "The Brady Bunch," both now popular in the after-school time slots watched by many children, were originally run in prime time. Could newly produced episodes run in access time?

(b) Does the reference to "shaving cream advertisements" suggest that the question is to be answered on the basis of the audience composition in fact, rather than anyone's "designs"? But that can only be determined *post hoc*. Is it the reasonably foreseeable audience composition that matters? Cf. W. Melody, *Children's Television* 79-80 (1973): "The idea is developing that children may be the best targets of advertising for adult products. [According to M. Heltzer and C. Heyer, *The Youth Market* (1970)] 'manufacturers of such products as food, drug, and toiletry items and clothing can advertise and sell as effectively to these youngsters as can the makers of candy, gum, toys and games.'" Is there a better indication than the nature of the accompanying advertising that a particular program was "primarily designed for children?" Would it withstand the first amendment vagueness condemnation, *viz.* "that men of common intelligence must necessarily guess at its meaning and differ as to its application?"

(c) On Sunday, October 23, 1977 ABC programed four prime time hours, claiming that *The Donny and Marie Birthday Special*, aired between 7 and 8 p.m., was presented under the exemption for children's programs. In a letter complaint to the Commission, NAITPD said that "the show's adult variety format," and its sponsorship by Chevrolet, Fiat, and Toyota among others, established that it was not a children's program. *Broadcasting*, Nov. 14, 1977, at 50.

Have the ABC affiliates that showed this program violated the PTAR? What additional facts, if any, would you want to know in order to decide?

(d) Is a dramatic recreation of an historical event a "documentary program" within the definition in Note 2 of the PTAR? Does an "educational or informational" program necessarily lack at least one element of drama? Which one(s)?

(e) Consider the definition of "public affairs programs" as formulated by the FCC on remand and contained in Note 2 of the PTAR. Is a speaker whose "commentary" on public affairs takes

the form of political satire barred from network presentation in access time? What if the speaker is merely, but chronically, sarcastic? If a program "primarily designed for children" may properly entertain "the rest of the family," does it follow that a "public affairs program" may also entertain? Would you argue that an impressionist who mimics and parodies the President—"I am not a crook"—could permissibly star in a network program in access time? Would you so advise a network producer?

(f) The Commission received a letter requesting either (i) a waiver of the off-network prohibition or (ii) a ruling that "new" rather than off-network material would be involved in the production of a new series of half-hour programs out of comedy material from kinescopes of "Your Show of Shows," a popular network variety show of the 1950s, starring Sid Caesar.

According to the letter request, Mr. Caesar and other producers of the new series will have to make new judgments as to selection of the material and pacing of it. Editing, of course, will be involved, and since the original material was live, the editing will include tightening up the material. It is intended to have Mr. Caesar introduce the material, probably with other members of the original company to the extent they are available. It is also stated that, since the material is old and of varying quality, the process of transfer to videotape will make it necessary 'to perform significant technical adjustments to balance lighting, sound and picture quality.'

The Commission denied the waiver, pursuant to the court's direction, *supra* ¶ 3(3) (b), and denied the requested ruling that "new" material would be involved, citing the PTAR's "objective to make prime time available for sources of truly new non-network material." 58 FCC2d 431 (1976). Does the quoted statement comport with your understanding of the rule's objective? Does the result?

(g) The court of appeals, in resolving its doubts about the vagueness of the Commission's program categories, stated: "We must weigh the relative vagueness of the standard against the practical sanctions for good faith error." That formulation has an appealing and practical ring to it. But what is the "sanction" for good faith error in this instance? And is it a reliable measure of the degree to which unobjectionable, indeed constitutionally protected and politically important speech will be "chilled," i. e., deterred?

6. Recall that the Commission, in rejecting arguments for repeal of the PTAR, was of the view that "the rule has not yet been fully tested." ¶ 18. Similarly, the court of appeals noted the effect of uncertainty about the duration of the rule as a barrier to firm conclusions about its potential efficacy. The court, however, went on to say that

“[f]ailure to adopt a fixed term, a policy choice with which we will not now interfere, cannot be used indefinitely as an excuse for lack of diversity of program and source.” Cf. 33 R.R.2d 1089, 1090 (PTAR II on remand):

With respect to \* \* \* three matters—absence of a ceiling [on the use of exempt programs], rules concerning Saturday night, and feature film—the rules adopted herein do not specify any time limit on the duration of the pertinent provisions. However, it should be understood that these are being adopted as appropriate for the first year, 1976–77. The operation of the rule as modified will be closely observed during the year, and if it appears that the public interest would be served thereby, changes will be proposed for the future.

(a) Does the potential for near-term change in the particular regulations identified as provisional by the FCC adversely affect the validity of the PTAR “experiment”?

(b) Assume that all uncertainty about the future of the PTAR for the next five or ten years is dispelled: by what standard(s) would you urge the FCC, or the court of appeals, to evaluate the success or failure of the PTAR at the expiration of that period?

#### NOTE, PENDING ANTITRUST CASES

In 1972 the United States filed antitrust actions against each of the three networks. The complaints, which were dismissed without prejudice, and then refiled in 1974, allege that the networks have violated Section 1 (contracts in unreasonable restraint or trade) and Section 2 (monopolization, or attempt to monopolize) of the Sherman Act. The relevant market is apparently alleged to be that for “television entertainment programs exhibited on [each respective network] during prime evening hours.” The litigation is noted at 27 *Hast.L.J.* 1207 (1976).

The specification in *United States v. CBS, Inc.*, Civ. Action No. 74-3599 (C.D.Calif.), is found in the following paragraphs:

18. Pursuant to said offenses, defendant CBS:

(a) has used its control over access to the broadcasting time of the CBS Television Network during prime evening hours:

(i) To exclude television entertainment programs in which CBS had no ownership interest from broadcast on the CBS Television Network during prime evening time;

(ii) To compel outside program suppliers to grant to it financial interests in television entertainment programs produced by them;

- (iii) To refuse to offer program time alone to advertisers and other outside program suppliers;
  - (iv) To control the prices paid by CBS for television exhibition rights to motion picture feature films distributed by non-network motion picture distributors;
  - (v) To obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films; and
- (b) has entered into a contract with National General, then owner and operator of the second largest chain of theaters in the United States, for exclusive distribution in the United States of all theatrical motion picture films produced by CBS.
19. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.
20. The effects of the aforesaid offenses, among others, have been and are as follows:
- (a) Ownership and control of television entertainment programs broadcast during prime evening hours on the CBS Television Network has been concentrated in defendant CBS;
  - (b) Competition in the production, distribution and sale of television entertainment programs, including feature films, has been unreasonably restrained;
  - (c) Competition in the sale of television entertainment programs to the CBS Television Network by outside program suppliers of said programs has been unreasonably restrained;
  - (d) The viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

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The government initially sought an order prohibiting each network from (1) obtaining any interest (other than for the first-run right of exhibition) in any television entertainment programs, including feature films, produced by others; (2) engaging in syndication of any such programs; (3) offering over the network any such programs produced by the network itself or any other commercial television network; and (4) offering any other commercial network programs produced by it.

The government then, however, entered into a somewhat more modest proposed consent decree with NBC (1) embodying the FCC's financial interest and syndication rules; (2) limiting certain terms that may be bargained for in purchasing programs from independent producers, e. g., terms requiring the use of NBC's production facilities; (3) prohibiting reciprocal dealings in the purchase and sale of programs from or to other networks; (4) limiting the option rights and exclusive exhibition rights NBC can negotiate with independent producers; and (5) limiting, for 10 years, the amount of NBC-produced programming that NBC may exhibit in the various dayparts, as follows:

Max. hours/week	Daypart
2½	Prime time (6-11 p. m.)
8	Day time (9 a. m.-6 p. m.)
11	Fringe Time (11 p. m.-6 a. m.)

The last provision, like certain others, is effective only if ABC and CBS are subjected to the same terms, either by consent or after litigation.

CBS and ABC filed comments objecting to the proposed consent decree. 42 Fed.Reg. 25267 (1977). ABC argued that the FCC was the appropriate forum for regulation of network program practices in the broad public interest, referring specifically to the Network Practices Inquiry begun in January, 1977. Regarding particular provisions of the proposed decree, ABC objected to the limitation to be imposed upon NBC's self-production of entertainment programming, *inter alia*, on the ground that it would curtail the network's "flexibility to create new and innovative programs and to schedule network produced programs during periods of short supply," which was said to be a problem of increasing potential significance in light of some ad hoc networks' successes with single programs (e. g. "Testimony of Two Men") and plans for the establishment of additional, limited-time networks by various advertising agencies and program suppliers.\*

CBS added arguments that the decree would be anticompetitive and an unconstitutional prior restraint of speech insofar as it limits the networks' ability to produce programs. The first point is based largely on the conditional nature or "most favored nation" aspect of the proposal decree, and the observation that "if NBC were to agree with ABC and CBS to a limitation on either its program production or the program rights it would seek to require from its suppliers, the agreement would without question constitute a *per se* violation of the

\* MCA-TV's Operation Prime Time, a program-financing consortium of stations and producer of the show instanced above, has announced plans for three programs in 1978; as of October 1977 it reported clearance on 41 network affiliates and 24 indepen-

dents, reaching 70% of the national market. Broadcasting 53 (Oct. 3, 1977). See Brown, *Syndication Cuts Into Major TV Networks' Prime-Time Program*, N. Y. Times, Mar. 14, 1978, at 70, col. 3.

Sherman Act. No further analysis would be needed or indeed permitted." The constitutional point, inevitably, draws heavily upon analogies to the print media. For example, *Miami Herald Publ. Co. v. Tornillo*, *infra* at 492, is cited for the proposition that a newspaper cannot be required to carry a letters-to-the-editor column. "*A fortiori*, a newspaper could not be prohibited from carrying more than two columns a day of articles by its own reporters, even though it was left free to fill the balance of each issue with material from syndicated columnists and wire services. Yet that is in substance precisely what \* \* \* the proposed decree does."

Despite these objections, the consent decree was approved. 449 F.Supp. 1127, 3 Med.L.Rptr. 1753 (1978).

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### QUESTIONS

1. As counsel to the Government how would you have responded to the networks' various arguments against the consent decree? What position should the FCC have taken on the proposed decree, assuming that it was to be consistent with its own prior decisions?
2. What continuing significance would the PTAR have if, after further bargaining, the decree were entered by consent against all three networks in a form similar to the present proposal? What changes in the PTAR, if any, would you then recommend to the FCC?
3. Notice that the proposed agreement separately limits the amount of daytime, prime time, and nighttime (11:00 p. m.–9:00 a. m.) network-produced programming per week. Does this make any sense when one considers that entertainment programs can be distributed over the network at any time for delayed broadcast by the affiliates? How would you amend the decree to respond to the practice implicitly suggested in the prior question?
4. Should the government seek to prohibit a network-owned and operated station (O&O) from producing programs that it then sells to other affiliates or one of the other networks? A group of O&Os producing a program for sale to the network? Would such a provision give non-network groups, such as the Westinghouse stations, an unfair advantage?
5. Is the concept of "entertainment programming" so vague that the antitrust court could not constitutionally hold a network in contempt for violating the decree? Cf. Rule 65(d), Fed.R.Civ.Proc. Is "60 Minutes," which is produced by CBS News, "entertainment programming?" Was "Who's Who?" Could the court constitutionally entertain requests for clarification with respect to the permissibility of particular shows under the terms of the decree. Cf. *NAITPD v. FCC*, *supra*.
6. Is entertainment programming entitled to less protection under the first amendment than informational programming? Than "com-



mercial speech," such as advertising? See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (state may not prohibit advertising of prescription drug prices). This question is surely implicated in the next case, which deals with radio formats.

#### D. DIVERSITY IN PROGRAM CONTENT

An argument against the desirability of "diversity" in broadcast programming is difficult to imagine.\* That would seem to be an argument against variety and choice in a heterogeneous society distrustful of centralized decision making in matters of taste including, at least traditionally, public affairs. Cf. Director, The Parity of the Economic Marketplace, 7 J.Law & Econ. 1 (1964). Clearly, the argument, if there is to be one, must be over whether any, or particular, regulatory steps should be taken in order to increase the degree of diversity in programming.

That was an issue in the Prime Time Access Rule proceeding: would the rule's benefits in diversity exceed its costs in consumer satisfaction derived from network programs? There was also, however, a logically anterior issue: what additional diversity was to be expected from adoption of the Rule? Still prior to that issue lurked the matter to which we now turn: what is diversity and how is it to be measured? Without answers to these latter questions, it is fond to speculate over the utility, measured in diversity benefits in excess of other losses, associated with or to be expected from any regulatory intervention. Who, after all, can say whether widgets are a bargain at \$1.69/cwt?

As you read the next case, isolate the court's understanding of the concept of "diversity" and how to measure it; consider how the same term would be applied in the context of television programming.

#### 1. RADIO FORMATS

##### CITIZENS COMMITTEE TO SAVE WEFM v. FCC

United States Court of Appeals, District of Columbia Circuit, 1974.  
506 F.2d 246 (reh. en banc).

McGOWAN, Circuit Judge:

This is a statutory review proceeding involving the Federal Communications Commission. It has been thought appropriate for *en banc* consideration because it presents important questions with re-

\* Diversity in programs does not necessarily imply any particular degree of specialization among stations. One can imagine two equally diversified arrays of programming with each sta-

tion broadcasting some of each type, as in television (e. g., comedy, adventure, melodrama), or with each station broadcasting only one or two types, as in radio (e. g., rock, MOR, classical).

spect to the utilization of the publicly-owned airwaves in such manner as to serve the divergent interests and tastes of the largest possible number of their owners. A Citizens Committee was organized to contest the assignment of the license of radio station WEFM (FM), Chicago, Illinois, by Zenith Radio Corporation to GCC Communications of Chicago, Inc. The FCC denied the Committee's petition to deny the application to transfer the license or, alternatively, to conduct a hearing on certain questions. 38 FCC 2d 838; 40 FCC 2d 233 (on reconsideration).

\* \* \*

We find that the Committee has raised substantial and material questions necessitating a hearing before final disposition of the transfer application, and that the present record is inadequate to support the Commission's purported public interest finding. \* \* \*

## I

Since it was first licensed to Zenith in 1940, WEFM's format has always been one of classical music. For twenty-five years Zenith operated the station on an entirely non-commercial basis, at the same time using the station as a developmental adjunct to, and laboratory for, its FM receiver manufacturing business. As such, WEFM has had a distinguished history, being the first Chicago station to broadcast in high-fidelity (1953), the pioneer in stereophonic broadcasting (1959), the source of experiments leading to the FCC's national standards for multiplex (stereo) operations (1961), and the first station in its area to introduce the dual polarization antenna, which radiates both horizontal and vertical signals (1966).

The increased costs that Zenith incurred with its 1966 expansion of WEFM's studio and technical facilities caused the company for the first time "to seek advertising support" for its operations. Both the degree of Zenith's commitment to commercial operation, and the relevance of commercial benefits realized by it over and above the advertising revenues received, remain the subject of dispute, but, according to the Commission, statements filed with it show that advertising income failed to cover costs in each succeeding year.

In March, 1972, Zenith contracted to sell WEFM to GCC, a corporation organized for the purpose of the purchase, for \$1,000,000.<sup>3</sup> Thereafter Zenith and GCC applied to the FCC for assignment of the license of WEFM to GCC. In the application GCC proposed to "present a format of contemporary music approximately 70% of the time," twenty-four hours a day. In this manner, it was said, "[t]he

3. GCC is a subsidiary of General Cinema Corporation, which controls several stations in other cities.

applicant will contribute to the overall diversity of program services in the Chicago area.”<sup>4</sup>

Notice of the proposed assignment was broadcast over WEFM once daily for four consecutive days and published four times in one of Chicago's four daily newspapers. \* \* \* No mention of the proposed format change was required, and none was made.

In its petition filed with the FCC, the Committee related that the 7.5 million residents of the metropolitan area served by WEFM received classical music from no AM stations and, in the greater part of the service area, from only one other FM station, WFMT-FM.<sup>5</sup> It alleged that the program formats of these stations varied somewhat, but did not claim that any part of the service area would be left entirely without a classical music station. The Committee asserted that it had received hundreds of letters in opposition to the sale, and that the FCC had received over 1,000 such letters. It [suggested that Zenith had taken no steps] indicating that its claimed losses, which were also doubted by the Committee, occurred despite efforts to operate WEFM on a truly commercial basis. The Committee also pointed out that in its 1970 license renewal application, approved by the FCC in 1971 to run through 1973, Zenith had represented that continuation of WEFM's classical music format was in the public interest and that it would be continued.

On the basis of these and other allegations of fact, the Committee asserted that it had made out a case to deny the proposed assignment of WEFM's license on public interest grounds, or at least raised “substantial and material question[s] of fact,” necessitating a hearing, 47 U.S.C. § 309(d), about the public interest in the proposed format change, Zenith's claimed losses, and GCC's qualifications as a licensee. It also challenged the constitutional adequacy of the public notice that the assignment was pending, and that a format change was contemplated.

Zenith and GCC filed oppositions to the Committee's petition. For its part, Zenith asserted facts intended to show the bona fides of its attempt to operate WEFM on a commercial basis and the amount of its losses, said to be almost \$2 million over six years. GCC controverted the Committee's assertion that it had already decided to abandon WEFM's classical music format when it agreed to purchase the station, stating that “[i]t was only after the study of [community]

4. As explained in GCC's later opposition to the petition to deny, “contemporary” music is rock music. According to GCC's own account, however, five of the sixty-one stations serving the Chicago area play rock, progressive rock, or jazz rock music, while another eight concentrate on “pop,” or “pop contemporary” music. Ascertainment of Community Interests, Needs and Problems 70-73.

5. Part of the area is also served by WNIB. WNIB would then, so it is classical music library acquired from WEFM, along with technical assistance and that station's call letters, to WNIB. GCC has proposed to give the said, be able to reach a larger portion of WEFM's service area with classical music.

needs [which the FCC requires of each license applicant] was completed and it was determined that the station would program for the young adults of the Chicago area that it was determined that a classical music format would not be consistent with programming directed to this age group." It also asserted that Chicago-area classical music broadcasting would be of overall higher quality when only WFMT and a strengthened WNIB shared that market than it could be with three stations competing for the classical music audience, but no facts were alleged to buttress either the premise that present service is poor or the likelihood that it would be improved by WEFM's format change.

The Committee's reply alleged that WNIB reached at most 15% of the area served by WEFM, further questioned Zenith's claimed losses, although it alleged no specific facts to the contrary, and by a later amendment, challenged the validity of GCC's community leaders survey. \* \* \*

On December 21, 1972 the FCC issued a Memorandum Opinion denying the Committee all relief and granting the assignment application without a hearing. \* \* \* It stated \* \* \* that "[t]he Chicago metropolitan area is served by two additional classical music stations," WEMT and WNIB, and that "[t]he issue here simply put is whether the assignee without a hearing can change the musical format of WEFM from classical music to a 'contemporary music' format where there are two other classical music stations serving Chicago and the station has been suffering continuous operating losses."

The Commission's resolution of this issue, however, depended not on the claimed losses, but rather on its view of its own role in cases where the format to be abandoned is not unique. In these circumstances, the FCC opined, competition among broadcasters will produce the optimal distribution of formats. *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM) v. FCC*, 141 U.S.App.D.C. 109, 436 F.2d 263 (1970) (hereinafter *Citizens Committee of Atlanta*), where this court had held that abandonment of a unique format was "material" in gauging the public interest and that "substantial" factual questions therefore had to be resolved in a public hearing before the assignment application could be approved as being in the public interest, was thus distinguished. In the FCC's view, abandonment of a non-unique format is not a matter affected with the public interest but a business judgment within the licensee's discretion.

To hamper the licensee's discretion in this area with the ominous threat of a hearing in a case like this would only serve to discourage licensees from choosing or experimenting with a format \* \* \*. Accordingly, we find no basis to question the applicants [sic] discretion in the choice of format \* \* \*. 38 FCC 2d at 846.

Finding the Committee's factual allegations concerning the assignee's financial structure and its parent's losses, and community leader opposition to a format change, to have been met adequately by the applicant's responses, the FCC held that there were presented no material and substantial questions of fact on which to require a hearing. [Commissioner Johnson dissented.]

Appended to the Commission's opinion on reconsideration was an opinion entitled "Additional Views of Chairman Burch In Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley, and Hook Join." 40 FCC 2d at 230. Since Commissioners Reid and Wiley did not join in the opinion on reconsideration but only concurred in the result, these "Additional Views," to which six of the seven FCC Commissioners adhere, take on peculiar significance. \* \* \* Indeed, they were offered because the Commissioners believed "that an explanation of the many policy considerations underlying our decision here is both appropriate and necessary." According to the six Commissioners, the starting point for discerning the appropriate FCC policy on format choice is in striking the "balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in the Communications Act, on the other," quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474, 60 S.Ct. 693, 84 L.Ed. 869 (1940). Thus:

The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of nonentertainment programming, while allowing licensees wide discretion in the area of entertainment programming. Thus with respect to the provision of news, public affairs, and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop programming responsive to those identified needs. *In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces.* As the Commission stated in its Programming Policy Statement, 25 Fed. Reg. 7293 (1960), "[o]ur view has been that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations." (Emphasis added.)

In further support of this policy, the Commissioners expressed their view of the unwisdom of "locking" a broadcaster in to a particular format, lest it have "the effect of lessening the likelihood that [pro-

gram formats appealing to minority tastes'] will be attempted in the first place."

## II

The Committee presses several grounds for reversal of the FCC in this court. Its principal arguments are that (1) the FCC failed to, and could not on this record, determine whether the assignment and format change would be in the public interest; (2) substantial and material questions of fact necessitate a hearing; and (3) the public notice of the impending assignment required by the FCC is insufficient on due process criteria. \* \* \*

### A. *Analytic Framework.*

\* \* \* It is common ground among all hands, as it was between the majority and dissenting positions on the FCC, that the need for a hearing in this case turns largely on the reach of our decision in *Citizens Committee of Atlanta, supra*, which is factually like the instant case to a startling degree.

The Atlanta case also involved a proposed sale and abandonment of a classical music format. Public notice of the application produced an outcry against the format change, the FCC received a large number of protestant letters, and a citizens committee arose to intervene before the FCC in opposition. The FCC approved the application without a hearing. It relied upon the applicant's community leader survey to demonstrate informed support for the proposed change in format, determined from the applicant's surveys that the proposed programming would be in the public interest, and "recited as a fact" that the transfer in ownership was a financial necessity. 436 F.2d at 266.

\* \* \*

This court reversed the FCC. We held that a format change involving abandonment of a unique format, protested by a significant sector of the community, is a matter material to the public interest and thus one on which a hearing must be held if there are substantial questions of fact. Accordingly, we remanded for a hearing to determine (1) the true financial situation of the assignor, (2) the actual views of the community leaders interviewed by the assignee, and (3) the degree to which the Decatur station provided Atlantans with classical music during the daytime.

The theory underlying the court's decision in *Citizens Committee of Atlanta* is that the FCC does have *some* responsibility, under its public interest mandate, for programming content. The Commission had forsworn any such role on the theory that, because it is not authorized to be a "national arbiter of taste," it must rely entirely on the licensee's discretion in matters of entertainment format. As we pointed out, however, the alternatives are not so stark. "The Commission is not dictating tastes when it seeks to discover what they

presently are, and to consider what assignment of channels is feasible and fair in terms of their gratification." 436 F.2d at 272 n. 7. In discharging its public interest obligation, the court thought it to be within the Congressional contemplation that the FCC would seek to assure that, within technical and economic constraints, as many as possible of the various formats preferred by segments of the public would be provided.

Thus, if 16% of the populace wanted access to classical music on radio, the public interest would, *pro tanto*, be served by its continued availability *provided* that the format is not economically unviable in the particular market. If a proposed format change would introduce a new format for a larger segment of the public that is not presently being served, it could not be denied by giving disproportionate weight to the preference of the audience for classical music, but that was not the situation in Atlanta. We repeat what we said in 1970 (436 F.2d at 269):

The Commission's point of departure seems to be that, if the programming contemplated by intervenor is shown to be favored by a significant number of the residents of Atlanta, then a determination to use that format is a judgment for the broadcaster to make, and not the Commission. Thus, so the argument proceeds, since only some 16% of the residents of Atlanta appear to prefer classical music, there can be no question that the public interest is served if the much larger number remaining are given what they say they like best.

In a democracy like ours this might, of course, make perfect sense if there were only one radio channel available to Atlanta. Its rationality becomes less plain when it is remembered that there are some 20 such channels, all owned by the people as a whole, classics lovers and rock enthusiasts alike. The "public interest, convenience, and necessity" can be served in the one case in a way that it cannot be in the other, since it is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible.

\* \* \* We clarified the "financial viability" constraint on the doctrine of the Atlanta case as follows [in *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (1973)]:

The question is not whether the licensee is in such dire financial straits that an assignment should be granted, but whether the *format* is so economically unfeasible that an assignment encompassing a *format change* should be granted. (Emphases in original.)

Once a proposed format change engenders "public grumbling [of] significant proportions," the causal relationship between format and finance must be established, and if that requires the resolution of substantial factual questions, as it did in that case, then a hearing must be held.

The result was different in *Lakewood Broadcasting Service, Inc. v. FCC*, 156 U.S.App.D.C. 9, 478 F.2d 919 (1973), decided the same day, because the FCC had properly found, in a "painstakingly thorough decision," that no substantial factual questions existed. The assignor's financial losses due to the all-news format were undisputed, as was the availability of a substantial amount of news programming on other area stations. \* \* \* Nothing in *Citizens Committee of Atlanta* was to be understood to impose upon the Commission a hearing requirement where there are no substantial questions material to the public interest determination.

The teaching of these decisions may be briefly summarized. There is a public interest in a diversity of broadcast entertainment formats. The disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first-preference level. When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

B. *The public interest issues.*

\* \* \*

In its original decision, the FCC stated flatly that, unlike the situation in Atlanta, "there are two other classical music stations in Chicago." 38 FCC 2d at 845. On reconsideration the FCC responded to the Committee's contention that WNIB's limited service area made it an inadequate substitute for WEFM. On the basis of an attached contour map showing the service areas of all three stations, it found that WNIB, while it does not reach anything like as great an area as WEFM, does reach "all of the city of Chicago, its city of license." In addition, WFMT was shown to reach all of WEFM's service area, so that the withdrawal of WEFM from service to the classical music



audience would not leave that segment of the public without access to classical music. Accordingly, the FCC concluded that "this is not a 'format' change case where there is no appropriate substitute for the service being lost." 40 FCC 2d at 226.

The FCC's assertion that abandonment of WEFM's classical music format will not leave its service area bereft of similar programming cannot be sustained on the record before us.

1. *The relevant service area.*

\* \* \*

Insofar as WNIB fails to reach the area served by WEFM, we think it is, *pro tanto*, not an available substitute for WEFM. The FCC's reliance on WNIB as a substitute clearly reflected its view that the public interest in format change cases is defined by the metes and bounds of the city of license. In *Stone v. FCC*, *supra*, we found it unnecessary to decide finally whether a licensee "has a *primary* obligation to serve the needs and interests of its city of license," 466 F.2d at 327 (emphasis added), as opposed to the full service area it reaches, because the FCC had properly determined that the television licensee in that renewal case had adequately served its city of license. But we did think it "clear that a broadcast licensee has an obligation to meet the needs and interests of its entire area of service." \* \* \* Suburban and other outlying areas are not cities of license, although their needs and interests must be met by television stations licensed to central cities."

We now hold that the public interest implicated in a format change is the interest of the public in the service area, not just the city of license. No other view consists with our explication, here and in *Citizens Committee of Atlanta*, of the requirements of "the public interest, as that was conceived of by a Congress representative of all the people." *Id.* 436 F.2d at 269.<sup>24</sup> In considering the availability *vel non* of an alternative source for a particular format, reliance on an alternative that reaches less than a substantial portion of the area served by the station to be assigned gives disproportionate weight to the interests of one portion of the public, and none at all to those of another. Unless the Commission has considered this effect, and reasonably determined that the overall public interest is, on balance, better served by this arrangement, we cannot say that it has discharged its obligation to assess and act in the public interest.<sup>25</sup>

24. We note that GCC's Ascertainment of Community Interests, Needs and Problems, which the FCC accepted as adequate, takes as the relevant "community" an area said to be coextensive with "the essential broadcast coverage area of WEFM and, hence, it is the area which WEFM serves."

25. GCC's own preference survey of the "kind of music respondents like

to hear" reveals that 18% preferred "rock and roll" and 18% preferred "serious music (classical)." If WEFM's format is unique, therefore, its abandonment in favor of rock music would not bring service to a larger segment of the public and would leave that part of the classical music audience beyond the reach of WNIB without any service, except as WFMT may be found to fill the void.

## 2. *WFMT as an alternative source of classical music.*

Insofar as WNIB is not an available alternative to listeners presently served by WEFM, WFMT is the only remaining station on which the FCC could rely in support of its thesis that WEFM's abandonment of classical music does not come within the unique format doctrine of *Citizens Committee of Atlanta*. There is, however, a problem with the FCC's bald characterization of WFMT as a classical music station in this proceeding.

A challenge to a proposed assignment of the license of WFMT came before this court in 1968. *Joseph v. FCC*, 131 U.S.App.D.C. 207, 404 F.2d 207. \* \* \*

\* \* \* WFMT represented itself to be, and the court referred to it as, "an award-winning fine arts station," *id.* at 208, and not as a classical music station. After the hearing on remand, the \* \* \* FCC approved the application as amended. In the course of doing so, it recited that "[the assignee] has given assurances that it intends to cause WFMT to maintain the *unique fine arts programming* of the station for the benefit of the people of Chicago." 21 FCC 2d 401, 403 (1970). Nowhere in the FCC's opinion was WFMT described as a classical music station, and it was three times described in other terms.

Against this background<sup>28</sup> we think the Commission has an affirmative obligation to establish that WFMT is in fact a reasonable substitute for the service previously offered by WEFM before relying on the affirmative of that proposition to avoid the necessity of weighing the public interest in a change of WEFM's format. \* \* \*

The substitutability of WFMT's "fine arts" programming for WEFM's classical music format may perhaps be capable of demonstration without the benefit of a hearing. The FCC retains a discre-

28. In addition, we refer to Zenith's 1970 application for renewal of its current license for WEFM. Question 8 of the application asks "how and to what extent (if any) applicant's station contributed during the past license period to the over-all diversity of program services available in the area or communities served." Zenith responded as follows:

There are upwards of 25 commercial FM stations in the Chicago area. Only one major station other than WEFM offers classical music to the extent that we do. Adherence to our classical music format provides a choice for lovers of fine music. Changing our basic programming would inevitably lessen the over-all diversity of program services available in this area.

From the WNIB program guide, made a part of the record in this case, Zen-

ith's reference would appear to be to that station, thus indicating that Zenith itself did not consider WFMT a "classical music" station. In any event, WEFM's representation to the FCC that its present format enhances diversity requires explanation if abandonment of that format is predicated upon the notion that diversity will not be lessened. The explanation may well lie in the breadth of the term "classical music," if that rubric is used so broadly as to cover formats that do not substantially overlap. One station might not, for example, play music composed in this century, while another might concentrate on twentieth century works. In popular parlance both would be termed "classical music" stations, yet the loss of either would unquestionably lessen diversity in the area.

tion commensurate with its expertise to make reasonable categorical determinations. \* \* \*

C. *Questions of fact requiring a hearing.*

The FCC also held that the non-format questions raised by the Committee were not material and substantial, and thus that no hearing was required to resolve them. \* \* \* [W]e cannot agree.

*Zenith's alleged losses.*

Zenith claims to have incurred an operating loss of almost \$2 million in the six years during which WEFM sold advertising time, and to have suffered a net after tax loss of approximately \$1 million. The Committee disputed this claim by alleging that Zenith continued to advertise its own products on WEFM, and did not really attempt to sell enough other advertising to make WEFM self-supporting. Neither the FCC nor Zenith referred to any evidence, nor does the record reveal any, either controverting the Committee's allegations or demonstrating that losses resulted despite the use of an accounting method that would give proper recognition to the institutional advertising and other promotional or developmental values derived by Zenith from WEFM.

\* \* \*

The FCC should have used its authority under Section 309(e) to set the matters down for hearing and to assign the burden of proof respecting such losses and Zenith's claimed efforts to make WEFM self-sustaining after twenty-five years on non-commercial operation to the party with access to the relevant information, viz., Zenith. Until these questions are resolved, there is simply no basis from which the FCC can infer that WEFM's classical music format is financially nonviable. See *Progressive Rock*, supra.

\* \* \*

### III

This court's role as the sole forum for appeals from FCC licensing decisions impels us to add a further comment on the Commission's approach to the public interest in matters of format, and what it termed the "ominous threat of a hearing." As stated in Section I, supra, the six Commissioners who voted to deny reconsideration in this case spoke directly, through Chairman Burch, to the "policy considerations underlying [their] decision." Their analysis contains an apparent error, and failure to identify it will only result in a continuation of this series of similar cases that began with *Citizens Committee of Atlanta* four years ago.

The crux of the Commissioners' reason for believing that entertainment "program format is a matter best left to the discretion of the licensee or applicant" is that "as a matter of public acceptance

and economic necessity he will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations." But this analysis is not applied uniformly by the FCC, which distinguishes entertainment fare from other services, such as news and public affairs coverage, as to which the FCC "require[s] that broadcasters conduct through surveys designed to assure familiarity with community problems and then develop programming responsive to those needs." In this way, the FCC has attempted to strike a balance between free competition in broadcasting "and the reasonable restriction of that freedom inherent in the public interest standard." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474, 60 S.Ct. 693, 84 L.Ed. 869 (1940).

Precisely why the balance should be struck with entertainment programming in one pan and everything else in the other is not clear. The Policy Programming Statement pays a great deal of attention to First Amendment considerations in justifying the FCC's non-interference in entertainment matters, but familiar First Amendment concepts would, if anything, indicate a lesser—not a greater—governmental role in matters affecting news, public affairs, and religious programming. We need not today, however, wade into such deep waters.

The Supreme Court has, more recently than *Sanders*, made it clear that "[t]he 'public interest' to be served under the Communications Act is \* \* \* the interest of the listening public in 'the larger and more effective use of radio.' § 303(g)."

\* \* \*

*The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.*

*National Broadcasting Co. v. United States*, 319 U.S. 190, 216–217, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) (emphasis added). Moreover, there is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition.

The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications.

*FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93, 73 S.Ct. 998, 97 L.Ed. 1470 (1953).

This court does not sit to make radio policy, but to protect Congress's "avowed aim" of "secur[ing] the maximum benefits of radio to all the people of the United States." What is a benefit, and of what magnitude, is a question ordinarily best left to the agency charged

with regulating the industry in the public interest. But whether the diverse interests of all the people of the United States are being served by radio to the maximum extent possible is a question we cannot ignore in the context of a controversy like the one before us.

There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger *or* a demographically more desirable audience for advertisers. Broadcasters therefore find it to their interest to appeal, through their entertainment format, to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type, e. g., young adults with their larger discretionary incomes, then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public.

This is inherently inconsistent with "secur[ing] the maximum benefits of radio to all the people of the United States," and not a situation that we can square with the statute as construed by the Supreme Court. We think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest.<sup>34</sup> There may well be situations in which that is not the case for reasons within the discretion of the FCC to consider, but a policy of mechanistic deference to "competition" in entertainment program format will not focus the FCC's attention on the necessity to discern such reasons before allowing diversity, serving the public interest because it serves more of the public, to disappear from the airwaves.

The orders under review are set aside, and the matter is remanded for further proceedings consistent herewith.

It is so ordered.

[The opinions of Bazelon, C. J., concurring in the result, and of Robb and MacKinnon, JJ., dissenting, are omitted.]

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#### NOTES AND QUESTIONS

1. The court of appeals remanded for a hearing on several questions—the adequacy of WFMT as a "substitute" for WEFM; the validity

34. It cannot be otherwise when it is remembered that the radio channels are priceless properties in limited supply, owned by all of the people but for the use of which the licensees pay nothing. If the marketplace alone is to determine programming format, then different tastes among the totality of the owners may go ungratified.

Congress, having made the essential decision to license at no charge for private operation as distinct from putting the channels up for bids, can hardly be thought to have had so limited a concept of the aims of regulation. In any event, the language of the Act, by its terms and as read by the Supreme Court, is to the contrary.

of Zenith's claim to have lost money operating WEFM; the causal relation between such loss and WEFM's classical music format; and in an omitted section of the opinion, whether GCC misrepresented its format plans in interviewing community leaders; apparently it regarded each of these as a "substantial and material question of fact." Yet the FCC had declined to hold a hearing on any of these questions.

In this context, of course, the question whether a factual issue is "substantial" is equivalent to the question whether a hearing should be held to resolve it. Stated in the latter form, it is more obvious that the answer should and will turn upon the decision-maker's view of the costs and benefits of a hearing under the circumstances. The court clearly had a high estimate of the utility of a hearing for the discovery of "truth." Equally clear, the FCC regarded the prospect of a hearing as an "ominous threat" to a broadcaster.

The two views are not logically inconsistent; yet they led to different outcomes with respect to the Citizens Committee's request for a hearing. What underlying difference in views could account for the difference in the two decision-makers dispositions?

2. (a) What is the court's conception of "diversity" in the preceding case? How would one measure a change in diversity—an increase or a decrease—in order to make the public interest determination called for by the court in "unique format cases?" Did the agency have a different conception of "diversity?"

(b) The Commission recently declined to convene a rule making proceeding to consider a proposed modification in the Prime Time Access Rule to prohibit the use of more than one episode per week of any program during access time. Currently some programs are "stripped"—shown daily—in some markets at access time, and some are shown twice weekly. The petitioner, a producer of game shows shown one episode per week, argued that multiple exposures in prime time, *pro tanto*, frustrated the pro-diversity policy underlying the PTAR, but the Commission considered the potential gain in diversity as "only speculative." "The distinction which such a rule would draw might well prove to be arbitrary and capricious [for] who is to say that Name that Tune is more 'different' from Treasure Hunt than are two successive episodes of Dinah or [Mike] Douglas or [Merv] Griffin, with widely differing guests." 38 R.R.2d 71, 74 (1976). Is the Commission's denial of relief in the PTAR context consistent with the court's approach in *WEFM*?

3. In Part III of its opinion, the court reasons that the process by which advertising forces determine programming is "inherently inconsistent" with the Communications Act's purpose "to secure the maximum benefits of radio to all the people." Accord, Barrow, *The Attainment of Balanced Program Service in Television*, 52 Va.L.Rev. 633 (1966). Consider the following news article, which suggests that, if radio operates in the manner of television, the court's understand-

ing of the relation between advertising, programming, and audience size may have been quite accurate.

### SAME FLAVOR TO NEW PRIME-TIME SHOWS

New York Times, Jan. 1, 1976.\*

By Les Brown.

Although the networks are making substantial midseason changes in their programming, the flavor of prime time will not be altered by the effort. The incoming programs are similar in type to those discarded. Of the canceled shows, seven were action-adventure series and five were situation comedies. Among the replacements, six are adventure dramas, and six are situation comedies. Moreover, like the departed shows, the new comedies are in the bold tradition established by "All in the Family," and the dramatic shows are largely concerned with police work.

\* \* \* [W]hile business is booming, the weekly prime-time series have become constricted to two major types—half-hour story comedies and one-hour action shows—and two others that are declining in popularity: movies and variety shows.

Prime-time television has always been the almost-exclusive province of light entertainment, but the fare has been much more varied than today: Westerns, slapstick comedies, countrified comedies, science-fiction shows, quiz shows, circus shows, satires, serials, talk shows, panel shows, vaudeville shows and drama anthologies.

Most programmers attribute the narrowing scope of network programming to the fact that increasingly the shows are being designed for a certain target audience, the group advertisers are most eager to reach—reasonably affluent urban adults 18 to 49, who presumably are raising families.

Rating studies have found that the two groups of normally heavy viewers—children under 12 and adults over 50—are so dedicated to watching television that they can be drawn to the set by almost any kind of programming. On the other hand, young adults have to be won over by programs that are to their taste, and those apparently have proved to be frank-spoken comedies and action melodramas with overt or threatened violence.

Westerns, musical revues such as "The Lawrence Welk Show" and rusticated comedies like "Green Acres" and "The Beverly Hillbillies" are not deemed suitable for network television today because they tend to appeal to viewers who are too old, too young or residing in rural communities—in short, outside the target group.

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Those programs, along with "The Red Skelton Show," "The Jackie Gleason Show," "Mayberry R.F.D." and "Hee Haw" were canceled in 1970 while they were still mass hits, because in the main they were drawing what network sales departments considered to be the wrong audience.

Advertising rates for television spots are based on the cost of reaching 1,000 people. But advertising agencies are willing to pay \$12 to \$14 a thousand for viewers in the desirable age range and only \$2.50 to \$5 a thousand for the younger and older viewers.

Clearly, the network able to attract the largest number of young adult viewers will make the greatest profits, and that is why new police shows are brought in to replace other police shows that have failed.

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4. Continuing with the court's analysis in Part III of *WEFM*, and assuming that radio advertising rates are a highly variable function of audience demographics, does the court's conclusion (see ¶ 3, *supra*) follow? Is there any warrant, in the statute or the Constitution, for incorporating by implication a "one person/one vote" model of political economy into the Communications Act?

5. In light of *WEFM*'s implications beyond the particular case remanded, the Commission opened Docket No. 20682, Development of Policy re: Changes in Entertainment Formats of Broadcast Stations, *infra*. In the Notice of Inquiry, 57 FCC 2d 580, 41 Fed.Reg. 2859 (1976) "[t]he Commission acknowledge[d] the force of the Court's point, that it would be factually erroneous to assert that the market forces which operate on radio stations are identical with the forces which produce the preference hierarchies of the members of the community of license. But implicit in that observation is the notion that the Commission, if it tries hard enough, can come up with a meter of collective welfare which is superior to the advertisers' marketplace. There are excellent reasons for supposing, however, that the search for the public interest in entertainment formats may be a difficult and ultimately futile exercise. See, generally, K. Arrow "Social Choice and Individual Values" (1951)."

The Commission then asked parties "who favor some degree of government involvement" to address the questions set out below. Regardless of your view on the general question of government involvement in format matters, you should address these questions in order to determine what a system responsive to the court's views would entail: (a) at a minimum, and (b) if undertaken with some zeal for the task.

"(a) When should the Commission become involved in format changes—i. e., in all cases or only those where there is a significant



public outcry? See Citizens Committee to Keep Progressive Rock, supra, at 934. Also, how do you determine significant public outcry?

(b) Should the Commission attempt to categorize entertainment formats and, if so, on what basis?

(c) Other than a general objection to a proposed change in entertainment format, what burdens should be placed on members of the public to demonstrate that a unique format is being abandoned?

(d) If an applicant proposes to change from an alleged unique format, what showing is necessary to justify the proposed change? Also, if financial hardship is alleged, what showing should be submitted by an applicant justifying the losses?

(e) In cases of an alleged unique format, what consideration should be given to factors such as: (i) the similarity of other formats in the market; (ii) the population and areas served by broadcast facilities; (iii) the audience of the respective stations; (iv) the hours of operation, type of service (e. g., AM, FM, educational), and the like? Further, in hearing cases involving alleged unique formats, what should be the burdens of the respective parties?

(f) If an applicant proposes to change from one unique format to another, should a hearing be held to determine which will better serve the public interest?

(g) Should the Commission consider a change from an alleged unique format only when the station is being sold, at license renewal time, or at other times?

(h) Is the maximization of program diversity necessarily in the public interest? That is, does the maximization of entertainment formats necessarily result in the maximization of consumer satisfaction?

Additionally, we invite interested parties to address the First Amendment ramifications of the policy suggested by the Court of Appeals. \* \* \*

## CHANGES IN THE ENTERTAINMENT FORMATS OF BROADCAST STATIONS

Federal Communications Commission, 1976.  
41 Fed.Reg. 32950, 37 R.R.2d 1679 (Docket No. 20682,  
Memorandum Opinion and Order).

10. The WEFM decision has far-reaching ramifications for our entire scheme of radio broadcast licensing. Although this case, like the other entertainment format cases which the Court of Appeals has seen, arose in the context of an application for assignment, Section 309 deals not merely with transfers but, more broadly, with all written applications which it is the Commission's duty to grant or deny under Title III of the Act. The public interest finding that the Com-

mission is required to make before granting an assignment application is in no respect different from the public interest finding that must be made before a renewal application may be granted; accordingly, nothing which the Commission is obliged to do in order to find that the public interest would be served by the grant of an assignment may properly be omitted in the much more common situation of an application for renewal.

11. The Commission's long and continuing reluctance to define and enforce the "public interest" in entertainment format preservation is based both on practical considerations and on our understanding of the structure and meaning of the Communications Act. The practical problems are simple to comprehend. To determine, in the context of a prospective format change, whether the public interest would be served by allowing it, we must ascertain: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail. Moreover, where a prospective purchaser alleged that its proposed new format would add as much program diversity to the communities in its service area as the abandonment of the old format would subtract, evidence would have to be heard on this issue as well.

12. In the renewal context, the Commission anticipates that the usual format abandonment protest would concern a *fait accompli*, i. e., would involve a complaint that a licensee, with an obligation to operate his station in the public interest, had deprived its service areas of a unique format during the previous license term, for which, accordingly, a sanction would in principle lie. The Commission could then well be obliged to designate a hearing on the renewal, similar to that described in paragraph 11, *supra*, but more complex also, because it might include the question whether a format change had in fact actually occurred.

13. This last question presents an acute practical problem \* \*. How is the Commission to define what constitutes a particular entertainment format, and what demarks it from neighboring formats? The Court of Appeals has made it clear that it, for one, will not be satisfied by any Commission attempt to define formats broadly. Hence, "popular music" is not a sufficiently diacritical category to meet the Court of Appeals' conception of our public interest mandate; nor even, we infer, would be "rock music" or "classical music." Instead, the Commission is required to distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock v. FCC*; likewise, as the Court of Appeals suggests in the *WEFM* opinion, we may be obliged to distinguish between 19th Century and 20th Century classical music, and to make, in the context of an application for renewal, very real consequences turn on such distinctions.

14. In practical terms, "format" means program material. As Commissioner Robinson has put it: "What makes one format unique makes all formats unique. \* \* \* Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another), all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and, alas, appellate judges) call format." 57 FCC 2d 580, 594, 595 (1976) (concurring statement).

15. The elusiveness of a format's definition has a practical consequence in addition to a vagueness that makes it impossible for a broadcaster to know prospectively what sort of entertainment programming the public interest standard requires it to present. The same uncertainty that plagues the licensee's decision making in the first instance will plague our review of the licensee's discretion. The Commission does not know, as a matter of indwelling administrative expertise, whether a particular format is "unique" or, indeed, assuming that it is, whether it has been deviated from by a licensee. Furthermore, we have not been afforded any degree of latitude in summarily deciding whether the station's finances are probative of an untenable format, even assuming it to be unique. Accordingly, the Commission would be obliged in the typical case to hold a hearing on renewal.

16. The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (i. e., promoting the greatest diversity of listening choices for the public) or in economic terms (i. e., maximizing the welfare of consumers of radio programs). The market allocation method is not, however, perfect. \* \* \* We recognize that the market for radio advertisers is not a completely faithful mirror of the listening preferences of the public at large. But we are not required to measure any system of allocation against the standard of perfection; we find on the basis of the record before us that it is the best available means of producing the diversity to which the public is entitled. \* \* \*

17. Format allocation by market forces rather than by fiat has another advantage as well. It enables consumers to give a rough expression of whether their preference for diversity *within* a given format outweighs the desire for diversity *among different* formats. As Commissioner Robinson has observed, "with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of \* \* \* formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would." 57 FCC 2d 580, 594–595 (1976).

18. A recent staff study of audience ratings for major market radio stations lends further credence to this observation. The results of that investigation indicate that audience ratings for major market radio stations tend to differ nearly as much for stations programming similar types of music (e. g., middle of the road) as they do for stations programming markedly different types (e. g., progressive rock as opposed to classical). This finding strongly indicates that audiences carefully discriminate in selecting stations. \* \* \* [E]fforts to maximize format diversity through regulatory fiat could very well result in a *diminution* of consumer welfare: a format protected under the WEFM rationale may be of lesser value than the format which the broadcaster proposes to substitute. There is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format. It is impossible to determine whether consumers would be better off with an entirely new format without reference to the actual preferences of real people. In these circumstances, there is no reason to believe that government mandated restrictions on format changes would promote the welfare of the listening public. Indeed, in view of the administrative costs involved in such a program of regulation, and in view of the chilling effect such regulations would doubtlessly have on program innovation, there is every reason to believe that government supervision of formats would be injurious to the public interest. \* \* \*

19. Finally, allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate. In our society, public tastes are subject to rapid change. The people are entitled to expect that the broadcast industry will respond to these changing tastes—and the changing needs and aspirations which they mirror—without having to endure the delay and inconvenience that would be inevitable if permission to change had to be sought from a government agency, particularly after a full-scale evidentiary hearing. In this respect, it may not be widely appreciated what, precisely, is entailed in a hearing of the sort contemplated by Section 309 of our statute. It is not a brief or summary affair, but large-scale litigation which imposes enormous costs on the participants and the Commission alike. We do not know with any certainty the magnitude of the burdens imposed on broadcast licensees by hearing procedures of the sort contemplated by the Court of Appeals in WEFM, but it may be instructive to consider the costs to the Commission of the WEFM case, hearings on which have been proceeding pursuant to the court's mandate on remand. The WEFM hearings may be considered fairly typical of format abandonment hearings; the administrative law judge is required to consider, basically, the issues mentioned in paragraph 11, *supra*, as well as a financial issue and a misrepresentation issue. The ordinary case would generally be similar in complexity. And in this case, an administrative law

judge held two pre-hearing conferences in Washington, D. C.; his preparation time was an additional eight hours. In addition, the Broadcast Bureau trial staff spent above two hundred man-hours of preparation time. Subsequently, hearings were held on nine separate dates in Washington, D. C., and on nine different dates in Chicago, from which a transcript of 3120 pages was compiled. Following the hearings, the Broadcast Bureau spent two hundred and forty hours preparing proposed findings of fact and the administrative law judge will have spent approximately two hundred and eighty hours preparing his initial decision.

20. These costs, and the uncertainties that impose them, have a constitutional dimension as well. Under the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable. \* \* \*

21. The administrative process "combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are collaborative instrumentalities of justice." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). When such "partners" come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive. \* \* \* Our reflection \* \* \* has fortified our conviction that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion. \* \* \* 8

#### DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

\* \* \*

I do dissent because, without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. \* \* \*

[Commissioner Hooks would have adhered to the "extra hard look" formulation disapproved in the Commission's note 8, supra.]

8. The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 FCC 2d at 231. Having given

the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. \* \* \* [Footnote relocated.]

SEPARATE STATEMENT OF COMMISSIONER  
GLEN O. ROBINSON

I addressed [the problem of uneven distribution of burdens arising from the WEFM mandate] in my earlier separate statement, 57 FCC 2d at 598-99 \* \* \* :

“[If] our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, \* \* \* then it seems to me unthinkable that we should allow the consequences \* \* \* to fall asymmetrically on licensees who are seeking assignment authorization. Indeed, elementary considerations of fair play as well as constitutional principles of equal protection would seem to forbid the Commission from placing on any one licensee the full weight of the obligation to promote diversity without imposing an equivalent burden of obligation to the public interest in diversity on its competitors \* \* \* [If] the FCC’s responsibilities to the public interest include the obligation to implement what the Court of Appeals has described as the ‘undoubted intention’ of Congress that all major cultural groups be represented to the extent possible, I can see no escape from market by market allocation proceedings which would determine what array of formats a particular community required, together with which station would be allowed to use which format. With all its evils, this system clearly would be fairer than the one we have now (under the Voice of Arts-Progressive Rock—WEFM mandate) which, like Browning’s Caliban on Setebos, lets ‘twenty pass and stone[s] the twenty-first/Loving not, hating not, just choosing so’.”

This consideration, of course, meshes with those that the Commission addresses and fortifies our conclusion that the regulation of formats is a business from which we should altogether abstain.

\* \* \*

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NOTES AND QUESTIONS

1. The Commission denied reconsideration of the foregoing Order terminating Docket No. 20682, 41 R.R.2d 543 (1977); an appeal is pending before the United States Court of Appeals for the District of Columbia Circuit.
2. Does the Commission Opinion fairly portray the minimum regulatory intervention called for by *WEFM*? How would you argue that much less was at stake? E. g., is it reasonable to expect that the *WEFM* hearings would be “fairly typical of format abandonment

hearings?" (§ 19) Could the FCC have pursued a light-handed supervisory role over format changes (as it does over compliance with the Fairness Doctrine obligation to give reasonably balanced coverage to all sides of a controversial issue) that leaves to broadcasters very broad discretion to choose how they will serve the public interest in a diversity of programming? In other words, is it reasonable to expect that broadcaster difficulty in knowing what format the public interest requires will necessarily "plague the licensee's decision making in the first instance [and FCC] review of the licensee's discretion?" (§ 15)

3. Would a format change review system that delegated broad discretion to licensees and placed a commensurately high burden on renewal challengers respond to Commissioner Robinson's concerns? Is that the system that Commissioner Hooks had in mind?

4. In Appendix B to the foregoing opinion, the FCC evaluated various economic arguments for and against format supervision. After reiterating the observations made in § 18 of the opinion—that as between seemingly duplicative and unique formats, preference should in theory be given to the format of greater value to consumers, and that such information is not available in practice—the Commission stated:

Nor does a willingness by a group of listeners to contest a format change by litigation adequately express a cognizable intensity of preference for the format that they desire to have retained (or recovered). In every case, an intensity value could be assigned only after obtaining some information about the economic resources of the protestants and the opportunity costs associated with their protest. Given the legal complexities and expenses that characterize format change litigation, one would expect that a willingness to go forward with such cases would be especially typical of persons of higher educational attainment and socio-economic status. If this assumption is so, then it follows that rewarding the format preference of protestants would by definition discriminate against the effect on less well-off listeners who might be the beneficiaries of a licensee's proposed new programming plans.

Is the Commission correct in this analysis? Is it the same analysis as underlay the *WEFM* court's requirement that the protest of a format change must be made by a "significant sector of the community" before the FCC must take notice of a public interest in the change?

5. Footnote to history. The hearings ordered by the court in *WEFM* went forward, as recounted in the opinion in Dkt. No. 20682, § 18; during the pendency of the case, *WEFM* continued its classical music format. The Initial Decision of the Administrative Law Judge recommended approval of the proposed assignment to GCC, and the consequent format change. While the Citizens Committee considered an

appeal to the Commission (and perhaps then to the court of appeals), it reached a settlement under which GCC would give WEFM's classical record library to WNIB-FM, donate equipment to non-commercial WBEZ-FM and underwrite a classical music show on that station, as well as pay the Citizens Committee \$60,000 to cover legal expenses. Variety, "Rocky" Road to Conversion of WEFM, Nov. 9, 1977, at 35. The Commission approved the agreement, six years after the original application of assignment had been filed. Zenith Radio Corp., 42 R.R.2d 468 (1978).

## 2. TELEVISION PROGRAMS

### OWEN, DIVERSITY AND TELEVISION

Office of Telecommunications Policy.  
Staff Research Paper OTP-SP-8 (1972).

Diversity is one of the most common policy goals of communications regulation. \* \* \* But here, we will be concerned with the context of mass media, and especially, television programming. Diversity is an important policy goal in this area as well. The initial award of broadcast licenses, and their renewal, is predicated (at least in theory) on the promises in applications of significant diversity in programming. The search for a diversity of viewpoints is one of the purposes of the Fairness Doctrine. The creation of the Corporation for Public Broadcasting was a manifestation, on the national level, of this same goal. The so-called prime time access rule is another example of attempts to ensure, if not diversity of programming, at least diversity in sources of programming for television.

What is diversity and why should it be an important goal of communications policy? We will come to definitions and measures of diversity later; for the moment, let us consider three alternative (but not mutually exclusive) hypotheses concerning diversity policy. The first hypothesis is that policies favoring diversity are really designed to carry out the mandate of the first amendment to the Constitution, guaranteeing freedom of expression. The second hypothesis is that diversity policy is designed to remedy certain structural deficiencies in the media, which lead to the production of an inefficient mix of programming. The third hypothesis is that, by encouraging diversity, the Government seeks to encourage production of programming which is good for people, whether they like it or not.

#### *Diversity as a Political Goal*

The first possibility is that in seeking diversity, the Government really seeks that state which would obtain in the event that there were free and open access to the media. If there were an abundance of channels of (electronic) communication, and if the cost of access were very low, and if access were not regulated by any concentrated



(private or Government) source of power, then presumably we would have a "free and open" marketplace of ideas, in which diversity would be a normal state. The electronic media, at least, are not characterized by the absence of concentration of control of access, and diversity is, perhaps, not their normal state. It might be argued, then, that diversity should be assured by Government policy. To this, it must be replied that diversity is in no sense a political or constitutional goal in itself. The real goal seems to be freedom of expression, or of access to the channels of communication.

There are two aspects of the first amendment issue involved here. The first is freedom of speech, and of press. This implies at least the absence of Government-imposed restrictions on access to audiences. It *may* also imply a positive responsibility on the part of Government to insure that access is not restricted by concentrations of economic power. The second aspect is the rather novel "Right to Hear" which the Court promulgated in the *Red Lion* case. This apparently implies a Government obligation to provide, through its instrumentalities (broadcast licensees) a certain menu of programming, in order that the public "be informed," as opposed to being able to "inform itself."

\* \* \* But in neither case is diversity *per se* the policy goal; the goal is either access by the public to the media, or an "informed public." Diversity is clearly a most fallible test of the degree of freedom of access, since much diversity might exist without any freedom of access, and practically complete freedom of access could conceivably result in little diversity. Similarly, there is no necessary relationship between program diversity and an "informed" public, at least in the sense (explored below) in which diversity is usually defined. The conclusion is that we must reject the political rationale for a prodiversity policy, and turn our attention to the other two hypotheses. In fact, most of the effect of the diversity goal is concentrated in the area of entertainment programming, in which the political question is of little import. The remainder of this discussion will be concerned with diversity of entertainment programming.

#### *Diversity to Remedy Structural Deficiencies and Provide "Merit Goods"*

The argument favoring policies to expand the diversity of entertainment programming rests on several aspects of the structure of the broadcast media. They are, for instance, licensed by the Government, trustees of a scarce public resource, the spectrum, and therefore required to serve the public. The public is presumably diverse in its tastes, and licensees might therefore be required to serve all elements of the public taste. Moreover, assuming licenses to be instrumentalities of the Government, they may have an obligation to provide diversity in the form of programming for which there is little or no public demand, on the grounds that such programming may be good

for the public, because it is uplifting or educational. This view is akin to that which holds that a democracy may require certain behavior of its citizens, such as compulsory school attendance, for the greater public good. Finally, recognizing the peculiar economic structure of the broadcast media, in which advertisers rather than consumers support the cost of programming, it is possible that the normal mechanism of consumer sovereignty in the marketplace is frustrated by the inability of consumers to pay directly for programs which they value. \* \* \* Then, it can be argued a policy favoring diversity may result in a mix of programming which more nearly approximates the conditions which would obtain in a free market than would the advertising mechanism, operating without constraint.\*

No doubt all of these considerations play a part in supporting the policy objective in question. But, in fact, most of the effect of the diversity goal is expended in assuring the existence of programming for which there is little consumer demand, at least as evidenced by the small audiences which it obtains. Of course, the fact that audiences are small does not necessarily mean that the programming is not worth producing; after all, a few viewers may value certain programming more highly, in aggregate, than the many viewers of a more popular program.

It is possible that the diversity policy is designed to correct a condition in which some kinds of programs (those with only a few potential viewers, each of whom values the programming very highly) are underproduced, while other kinds of programming (that which is watched by a lot of people, none of whom values it very highly) is overproduced; this constitutes the "structural deficiency" hypothesis. The third hypothesis is that a prodiversity policy is in existence because small-audience programming is a "merit good," which is required by the Government because it is thought to be good for people, or because the people who value it highly ought to be served by television.

In any event, the result, for broadcast stations, is that some portion of the scarcity rent which results from the fewness of licenses is drawn off into the production of unprofitable programming of a "public service" nature. The result for the Government is the necessity to preserve those excess profits (profits in excess of those required to obtain a "normal" return on investment) against competitive or technological threats; hence, the Carroll Doctrine. This can lead to serious dilemmas. The growth of cable television, for instance, promises to expand the number of channels of communication, and to lessen their cost; and hence, presumably to increase the opportunity for diversity, but only at the apparent expense of broadcast station profitability. This creates a serious policy problem.

\* That is, people could be made better off at the same cost with different

programs, or as well off at less cost.  
\* \* \*

*The Meaning of Diversity*

How does one define and measure diversity? In the context of the policy discussions, diversity is generally taken to mean the number of programs of different "kinds." This requires the construction of a taxonomy of program types, which generally follow industry categories: drama, situation comedy, quiz shows, etc. It is immediately apparent that the diversity which obtains in any given situation is critically dependent on the number of categories which are identified. What is not apparent is the meaning of these categories in terms of consumer tastes. Implicit in such a definition is the assumption that all programs of a given type are reasonably perfect substitutes, either for viewers or for public officials concerned with viewer welfare.

A measure of diversity which uses this sort of taxonomy standard is likely to understate considerably the degree of diversity because it neglects differences among programs within categories. On the other hand, if the taxonomy neglects those *possible* categories into which no observed programs fall, it may overstate the degree of diversity. Absolute diversity must be defined with respect to the whole spectrum of possible programs or categories, and not just those which are actually present. But since the number of possibilities is indefinitely large, we are never likely to have an operational measure of diversity in these terms. If we can measure psychologically perceptible differentials in an objective way, then we can perhaps say whether one state is relatively more or less diverse than another, remembering that more diversity is not necessarily *preferable* unless all of the alternatives actually available in the less diverse state are still present in the more diverse state. Even then, one must know whether the increase in diversity is worth its resource cost.

Going beyond the problem of definition, why should it be assumed that one state, in which a given number of programs can be fit into the procrustean bed of six program types, is "better than" a state in which the same number of programs can only be fit into five categories similarly defined? If I have a choice between one meal, consisting of two servings of steak, and another, consisting of one serving each of steak and eggplant, I may prefer the first, even though it is "less diverse." To strain the paradigm, public imposition of the more diverse state is tantamount to giving my no doubt well-meaning dietician the powers of a dictator. This may be a problem, even if the dietician is elected. In the context of the paradigm, this course can be defended as being "good for me." But if the goal is, instead, to better satisfy my preferences, then I ought to be allowed to choose what I like. On the other hand, if the meal is sponsored by advertisers, I may get a menu which has only steak on it, even though I would be willing to pay something in excess of cost for eggplant. I do get a free meal, but I would be willing to pay for a different meal.

It is sometimes said that a more diverse state is not objectionable because it contains the old alternatives. But this is not true.

In a television industry characterized by scarcity of channels, one more "uplifting" program means one less entertaining program, and as has already been pointed out, not all entertaining programs are reasonably perfect substitutes. The cost of Government-imposed diversity is thus not only on the pocketbook of the broadcaster, but on the range of *relevant* alternatives available to viewers. If the Government requires programming for which there is little demand, then some consumers have been deprived of alternatives which they do in fact value at least enough to watch them, so long as channel capacity is limited.

Is it possible to go back and redefine diversity in a more meaningful way? It seems apparent that any meaningful definition must take into account consumer behavior and tastes. One possibility is to go directly to the utility or demand functions of individuals. \* \* \* The result is that a policy favoring more diversity than is present in a competitive equilibrium must necessarily reduce consumer welfare as perceived by consumers.

It can be argued that the advertiser-supported broadcast structure does not approximate that menu of programs which would be produced in competitive equilibrium, and that therefore the imposition of the diversity standard may make people better off in a second best sense, by moving the menu closer to what it would be if there were an operable market in programs bought by consumers. This argument could rely on the public good nature of programming and its transmission, as well as on the Steiner hypothesis. But such an argument would require considerable empirical support; certainly there is no theoretical reason to suppose that it is so. Such empirical evidence as exists suggests that the present diversity policy produces some programs with very small audiences; but we don't know how much value is placed on either type of programming by either audience. This does not dispose of the merit or "it's good for them" argument. That argument can be discussed only in terms which are almost entirely noneconomic.

In any event, it seems clear that, at least in economic terms, it is not diversity *per se* which is at issue, but consumer welfare. If consumer welfare is to be measured in accord with an elitist social welfare function, then diversity may be important, but one might just as well go to the heart of the matter and designate certain programs or types as "merit goods."

### *Conclusion*

Diversity policy can operate in a number of ways: it can result in pressures for structural change, in order that the industry itself better satisfies consumer welfare: or it can impose programming obligations on broadcast licensees within the existing structure, or it can change the methods of control in such a way as to increase access within the existing structure. Each policy has distinct implications,

and in choosing among them, one must know which goal one is seeking to achieve.

In order to know whether the prodiversity policy increases or decreases consumer welfare, one must know how much value people place on different kinds of programming. Empirical evidence on this point is scarce, but not nonexistent. Some inferences might be made from the observed demand for such commodities as books, magazines, movies, and newspapers. But a policy *designed* to increase consumer welfare (as opposed to the psychic income of elitists) must proceed from some premises concerning these values. It cannot rationally proceed from the premise that more diversity, measured in the traditional way, is necessarily better.

We initially identified three hypotheses which might justify a policy favoring diversity in the mass media, with diversity having its traditional meaning and measurement. Diversity was seen to be largely irrelevant to the existence of freedom of expression. It is also seen to be apparently irrelevant to the question of improving the performance of the media in satisfying consumer tastes, although more evidence on this point might be very useful. The sole remaining justification is the merit good argument. If indeed this conclusion is correct, then we ought probably to have a much broader consensus on the question of which programs the public "ought" to see.

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#### QUESTIONS

1. Which of the three hypotheses discussed by Owen best explains the concept of "diversity" as it is pursued by the court in *WEFM*?
2. Owen suggests that if the government's sole justification for encouraging program diversity is "to encourage production of programming which is good for people, whether they like it or not," "then we ought probably to have a much broader consensus on the question of which programs the public 'ought' to see."

Is this observation applicable to the context of unique radio formats? Are unique formats, demanded by a small segment of the public, through the instruments of government, "merit goods" as Owen uses that term?

3. In concluding, Owen observes that a policy of encouraging diversity in programing—once that concept is given content—can proceed in a variety of ways: structural change that conduces to diverse outputs; programing obligations mandating such diversity; or "change [in] the methods of control in such a way as to increase access within the existing structure." Within this trichotomy, where is the doctrine of *WEFM* best described?
4. The following paper deals with a clearly structural approach to encouraging diversity, viz., intertemporal monopoly.

## BEEBE AND OWEN, ALTERNATIVE STRUCTURES FOR TELEVISION

Office of Telecommunications Policy.  
Staff Research Paper OTP-SP-10 (1972).

There has been a long and heated debate concerning the quality of commercial television and whether it can be improved by altering the structure of the industry. Some of this debate has centered on the motivation of the executives of stations and networks, and proceeds on the premise that television would be "better" if only the media owners would make it better. Implicit in these criticisms is the idea that there is a subterranean conspiracy to deprive the public of high quality television either because of laziness or because of greed on the part of the media owners.

The other side of the debate has been more academic, and takes the economic motivation of media owners as given, if not proper. This approach does not attempt to rationalize firm behavior on philosophical or sociological grounds. Nor does it reflect traditional methods of regulation, which for the most part attempt to regulate firm behavior directly. Instead, it is directed at developing positive policies for regulation through altering market structures. The problem is to propose alternative industry structures in which the natural economic incentives of media owners work to the greater satisfaction of consumers, by "the invisible hand."

Public policy has over the years undertaken a number of changes in the structure of television in order to improve it. Examples include the multiple ownership and chain broadcasting rules, the All-Channel Television Receiver Act, the Prime-Time Access Rule, and the creation of the Corporation for Public Broadcasting. With the growth of cable television, we perhaps are on the verge of another major structural change, possibly the most significant since the advent of over-the-air television. \* \* \*

This paper examines in some detail the idea of monopoly control of a few channels as a structural alternative to the present system—competition (or at least rivalry) among a few channels, principally the three national networks. We shall not consider here the possibility of many channels (cable) and of pay-television. The question is whether the current system of broadcasting can be changed structurally, preserving the existing stations and networks, and not increasing the number of channels available, so as to "improve" broadcast programming.

An immediate difficulty lies in the problem of defining "better" programming. To the economist, the "best" allocation of resources among programs is that which consumers would be willing to pay the most for, net of production costs. But we have no information

on this point, and are unlikely to get any in the absence of pay-TV. An alternative welfare criterion is to count noses on a one-man, one-vote basis. That is, we can posit alternative states of the world for viewers, and derive implied results in terms of what viewers would vote for if they had the choice. This turns out to be a reasonably practical welfare criterion, and it is the one we use for the election of public officials. But note that it is not the decision rule which an economist would prefer for the allocation of resources. It is used here with that caveat.

Suppose there are three viewers and two programs. Two of the viewers prefer Program A to B, while the third prefers Program B to A. We propose to these viewers two alternative states: (1) in which Program A is aired, (2) in which Program B is aired. By vote, state (1) wins, 2 to 1. We shall then say that state (1) is "better than" state (2), keeping in mind that the out-voted viewer, if he had been able to vote with dollars, might have been able to win. The phrase "better than" in this context has a highly populist connotation.

The academic literature on television makes a distinction between "diversity" and "duplication." First, one conceives of a certain taxonomy of programs—"types"—defined in terms of consumer preferences. All programs of a given type are perfect substitutes for viewers. If there are two programs, A and B, and if there are two stations, then the production of both A and B is a state "more diverse" than the production of two programs of Type A. The latter is said to constitute "duplication" and is wasteful of resources employed in program production.

We wish first to compare the behavior of a few competitors with that of a monopolist in the context of an advertiser-supported television system of limited channel capacity. Later we will compare the behavior over time of a monopolist, a few competitors, and a few temporal monopolists.

The problem is basically one of depicting competition within product space. Models of program patterns in broadcast markets date back to Steiner's seminal article.† \* \* \*

Steiner concluded that a monopolist would avoid program duplication and under constrained channel capacity would produce a more diverse program mix than would competitors. The monopolist, therefore, would provide greater viewer satisfaction and "would produce a socially more beneficial program pattern." Although Steiner is correct in concluding that the monopolist will avoid program duplication, work reported elsewhere shows that his conclusions regarding program diversity and viewer satisfaction are the direct consequence of restrictive assumptions. Sufficient conditions for such a result as Steiner's to obtain are: the distribution of viewer preferences is rather

† Peter O. Steiner, "Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting", 66 Q.J.Econ. (1952).

highly skewed; viewers will watch only their "first choice" programs; only a few channels are available; the system is advertiser supported; and all viewers are of equal value to advertisers. Perhaps the most unreasonable assumption is that viewers decline to view if they are not offered the program of their preferred choice. (At least, this is unreasonable if the taxonomy of program types is very detailed.) Extensive viewing of television in the United States suggests that this is not the case.

Consider the following example. There are three groups of consumers, each internally homogeneous.

Group	1	2	3
Size of Group	60	25	15
Preferred Program	A	B	C

Any program of type A is assumed to be a perfect substitute for any other program of that type. Presented with two programs of the same type, viewers distribute themselves equally between the two programs. If stations seek to maximize audience size, in order to sell advertising, then the following result holds: \*

Number of Channels	Programs Produced Under:	
	Monopoly	Competition
1	A	A
2	AB	AA
3	ABC	AAB

If the number of channels equals two or three, and if people are allowed to vote, they will choose monopoly. In fact, for the sufficient conditions above, monopoly always satisfies at least as many viewers as does competition, and in most cases, satisfies more viewers (Steiner's conclusion).

But we can show Steiner's conclusion to be false if we relax any one of the assumptions. \* \* \*

Two important aspects of profit maximizing product variation stand out for their impacts upon program patterns and viewer satisfaction: competitors' efforts toward program (product) duplication and imitation, and the monopolist's search for audience maximizing "lowest common denominators." Competitive producers seek to maxi-

\* The profitability of a program is treated as the difference between break-even audience and total audience attained. The model ignores production costs for the sake of exposition, thereby assuming in effect that break-even audience size is constant across program types. It is the opportunity cost of foregone alternative programs, therefore, which is the rele-

vant cost of introducing a particular program. This opportunity cost is altered in the model by changing the skewness of consumer preferences. The assumption of a constant break-even point across program types is not restrictive so long as one considers a system of only a few channels, and allows alteration in the structure of viewer preferences.



mize profits of their own channels. But the monopolist seeks to maximize the joint profits of the system. The former behavior results in intensive product competition \* \* \* Not only does duplication result in a waste of resources, but under constrained channel capacity may cause displacement of alternative programming. The monopolist's behavior is the result of producer protection from product competition and exemplifies traditional monopoly theories extended to product quality. The monopolist never engages in duplication and under advertiser-supported TV avoids producing close substitutes.

\* \* \*

If channel capacity is binding, then the possibility of program duplication under competition poses a serious threat to the production of program types desired by smaller audiences, even though these programs are profitable under unconstrained capacity. But on the other hand if viewers accept choices other than first, the fact that the monopolist can capture these viewers without catering to higher ranked choices may have a greater impact in lessening program offerings and viewer satisfaction than does the impact of duplication under competition. Steiner's model reveals lost viewer welfare due to competitive duplication only, whereas in fact it is not possible to state which is the superior structure without knowing the structure of viewer preferences.

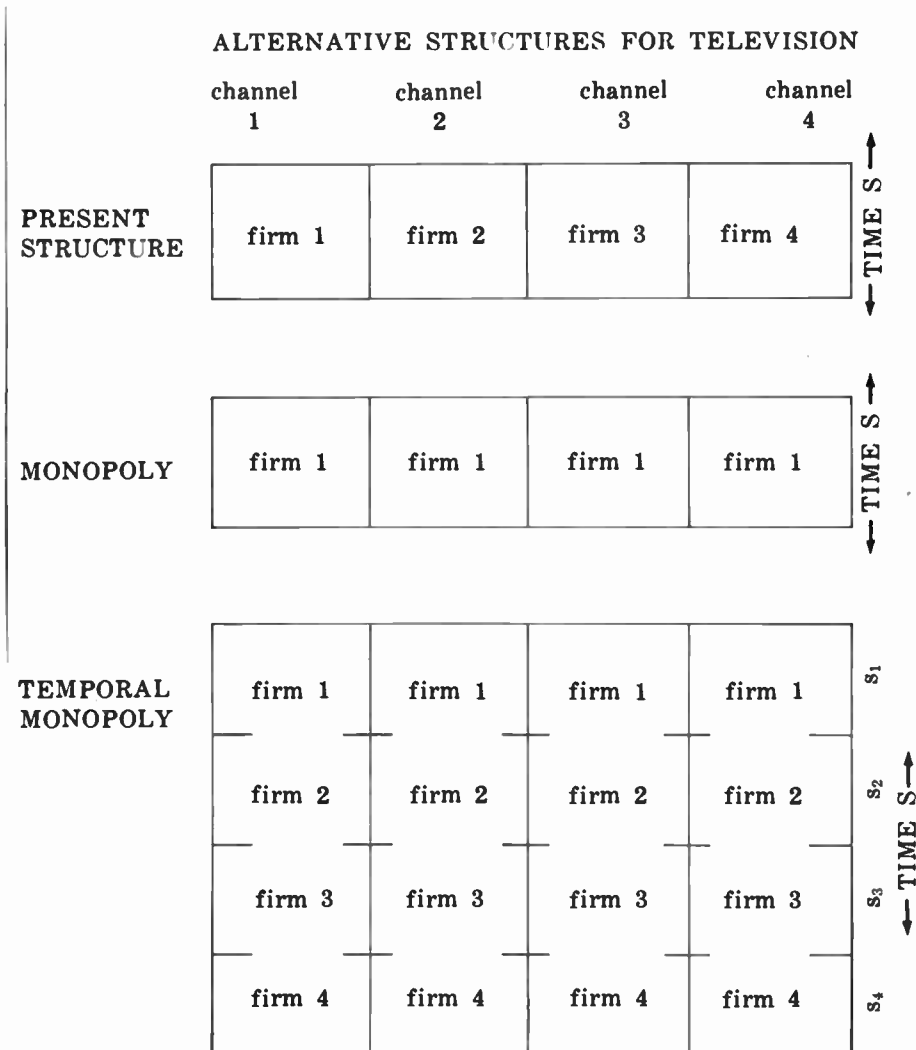
Up to this point, we have shown that under limited channel capacity, one cannot say for certain whether monopoly or competition is likely to yield higher viewer satisfaction. Duplication under competition displaces potential "minority" programming; the monopolist's search for "lowest common denominator" programming does not ensure the production of preferred programming. In the context of a pre-cable world with limited channels, can we conceive of a structure under which profit maximizing producers might avoid both of these tendencies—one in which producers avoid duplication at any point of time *and* produce preferred programs even though viewers will watch lesser choices?

Consider now the possibility of intertemporal competition. In order to explore this possibility, we will add a new assumption: Each viewer is assumed to have a finite upper limit on the time he will spend watching television. \* \* \* We make two further assumptions, which are sufficient for our result, but perhaps not necessary: [the amount of time that each viewer group will view is independent of the actual programs offered, and viewers are indifferent as to the periods in which they allocate their viewing time within  $S$ , the span of time considered, e. g., an evening.]

Each viewer in group  $g$  looks at the total program offerings in  $S$ , chooses that program in each period ( $s_i$ ) which he prefers, and then chooses those periods in  $S$  for viewing which provide choices preferred to those offered in other periods such that his total time

allocation is no greater than  $T_g$ . He is expected to view with equal probability any options which offer equal satisfaction. If he finds no option which he prefers to nonviewing, then he turns the set off.

We shall examine the program patterns offered viewers under three alternative institutional structures. The first is that of a single monopolist who controls programming on all channels for the entire time span  $S$ . The second is a competitive structure similar to that which we have today. Each competitor controls a single channel over the entire span  $S$ . The third is an interesting alternative to the previous two. We allow each "competitor" a monopoly of all channels at any single period  $s_i$ , but then turn control of *all* channels over to another "competitor" in the next period  $s_i$  (this next "competitor" again becomes a temporal monopolist). We allow as many "competitors" as there are time periods  $s_i$  in  $S$ .



The following example will illustrate the proposition that "competitive temporal monopolists" *may* produce over the time span  $S$  both a diverse program mix (which competitors won't do) and preferred choices (which a monopolist won't do).

Consider the following preferences \* \* \*:

Group, $g$	1	2	3
Size	60	25	15
Maximum Viewing, $T_g$	3	2	1
1st Choice Program	A	B	C
2nd " "	E	F	none
3rd " "	D	D	none

Take the monopoly case first. The joint profit maximum is described by the following table for three time periods and three channels:

Period	Channel 1	Channel 2	Channel 3
1	D	C	dark
2	D	C (or dark)	dark
3	D	C (or dark)	dark

Program patterns of the monopolist clearly do not result in a high level of viewer satisfaction. Only group 3 receives its preferred choice, the reason being simply that it refuses to watch anything else. (This is the typical result under monopoly.)

Compare the above result with that which obtains when stations compete in parallel through time, as they do at present:

Period	2 stations 3-hour day	2 stations 4-hour day	3 stations 3-hour day	3 stations 4-hour day
1	AA	AA	AAB	AAB
2	AA	AA	AAB	AAB
3	AA	AA	AAA	AAA
4	—	AB	—	AAA

Groups 1 and 2 both prefer this structure to monopoly, but group 3 is now clearly worse off. The "minority" program never appears. (This is the typical result of competitive duplication under constrained channel capacity.)

Now consider program patterns offered viewers under the structure of "competitive temporal monopolists":

Period	Channel 1	Channel 2	Channel 3
1	A	B	C
2	A	B	C
3	A	B	C
4	A	B	C

Without resorting to interpersonal comparisons, we can rank temporal monopoly as preferable to monopoly since a vote between the

two would favor temporal monopoly. Similarly, we can rank it preferable to competition for the same reason. Everyone is at least as well off with temporal monopoly as with any other structure. \* \* \* So long as considerable duplication occurs under competition (due to the skewed distribution of viewer preferences), the vote will come out in favor of "competitive temporal monopoly" [over] competition. The reasons are twofold: (1) the temporal monopolist will always avoid duplication within his own time period  $s_i$ ; (2) at the same time, if viewers are restrictive as to their total viewing, the temporal monopolists must compete for viewers (across time periods) by offering preferred choices.

Under the conditions of the model, the institutional structure of "competitive temporal monopolists" provides an economic incentive to producers through "the invisible hand" so as to ameliorate both competitive duplication and monopolistic production of "lowest common denominator" programming. In lieu of increasing channel capacity through the introduction of cable television, such a structure is not farfetched. One might give the networks each successive one-hour blocks throughout the day, allowing each network in turn to program all three channels. Or one might allow each network one evening, rotating networks in succession.

Note that the success of any such proposal depends critically upon the nature of viewer preferences. If viewers will always watch the full time span,  $S$ , of programming, then the institution of successive monopolists will produce programming no "better" than that of monopoly.

We have not shown that temporal monopoly will satisfy all viewers to a greater extent than will either competition or monopoly. But we have shown that it is at least not unreasonable that such a result might obtain. We have shown the following: Steiner's result that under constrained channel capacity, monopoly will yield a higher level of viewer satisfaction than will competition is sensitive to his restrictive preference assumptions. If preference assumptions are relaxed, it is generally not true. In fact, under a wide range of preference assumptions, the result that one structure yields a higher level of viewer satisfaction than another under constrained channel capacity is found to be sensitive to the exact nature of preferences. We have shown also that where channel capacity is limited, it is possible that "competitive temporal monopoly" produces satisfaction superior to *both* monopoly and competition.

There are almost no data as to the nature of viewer preferences. We cannot tell, therefore, what structure would be "best." \* \* \* At the same time, we have shown that there may exist a structure—temporal monopoly—which is preferable to both monopoly and competition when there are only a few channels. In view of the imminence of cable television with its many channels, it may not be worthwhile

experimenting with different structures for present-day television especially in view of the practical difficulties such an experiment would entail.

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### NOTES AND QUESTIONS

1. With the foregoing analysis of intertemporal monopoly as an industry structure for encouraging diversity, compare the conclusion drawn in McGowan, *Competition, Regulation, and Performance in Television Broadcasting*, 1967 Wash.U.L.Q. 499, 511-12. Professor McGowan begins by assuming that broadcasters, such as the present network triopoly, do not collude to determine their programming policies or schedules nor do they make side payments to each other; thus, each competes to maximize its own profits rather than industry profits.

Our question then becomes, will program diversity be the same as it would under the assumption that the broadcasters behaved to maximize industry profits [i. e., as a monopolist would]? The answer is "yes", provided: (1) that \* \* \* broadcasters find it profitable to broadcast for the whole programming period [as they do], and (2) each broadcaster makes his program decisions in full knowledge of the other's decisions. \* \* \* If the second condition is not satisfied, then industry program policy will only eventually correspond to the joint maximum policy as the broadcasters revise their program policies from period to period. Since this second condition will in general not be satisfied when there is no collusion, whether tacit or explicit, between broadcasters, industry performance under competition may at times be characterized by less diversity than would occur under conditions where all broadcasters were under unified management. However, so long as broadcaster markets are highly oligopolistic, some degree of cooperative behavior among broadcasters is likely to arise.

The foregoing considerations lead us to conclude that, on the average, competition among broadcasters is an efficient means of promoting diversity in programming. By this we mean that industry performance given the number of broadcast stations will, on the average, be the same when the several broadcast facilities are independently operated as it would be if they were operated under unified management.

(a) In what way(s) does (do) McGowan's analysis differ from that of Beebe and Owen?

(b) Does the industry practice of 'counter-programming' tend to confirm or to refute the relevance of McGowan's analysis to the real world?

(c) Notice that both the Beebe and Owen and the McGowan analyses, being structural, focus on the *process* by which programing decisions are made under different industry configurations, monopoly and competition respectively. As they illustrate, structural analyses do not have to address the question of whether a resulting *output*—an array of programs offered at any given hour—is in fact more “diverse” than would be some other mixture. They do not need to resolve, that is, the programing-categorizing questions posed by the FCC in the rule-making inquiry following *WEFM*, because they predict analytically rather than empirically that the most diverse array of programs possible will result.

2. Another proposal for re-structuring the television industry is made in Crandall, *The Economic Case for a Fourth Commercial Television Network*, 22 Pub. Pol’y 513, 532–34 (1974). The author calculates that a viable fourth network reaching almost 60 million homes (44 million of them on VHF) could be created by transferring to UHF all VHF educational stations in markets with fewer than four commercial VHF’s; “dropping in” additional VHF’s where feasible under the present allocation scheme; interconnecting these two groups of stations with existing independents and enabling the resulting network also to build UHF’s in markets with fewer than four commercial stations. He estimates that “[t]he shifting of noncommercial stations to the UHF band might reduce their audiences by as much as 25 to 30 percent, or less than 100,000 viewers [in prime time]. But a fourth network would be worth nearly \$1 billion to viewers,” a gain which he estimates to be substantially more than the value of the loss imposed upon the audience for noncommercial television.

Crandall predicts that under his proposal, the three existing networks’ audiences would erode and the rents earned by performers would decline as a result; affiliation payments to stations would decline only somewhat, while total industry network advertising revenues would be “very nearly the same as for a three-network market.”

Assuming the accuracy of these projections, what are the implications of Crandall’s proposal for the four general objectives of the FCC, as identified by Noll, Peck, & McGowan, *supra* at 162? Putting aside those present objectives, how do you evaluate the proposal? Is Crandall’s single welfare criterion—value to viewers as measured by their willingness to pay—the only one you would use? Return to this question after you have studied the noncommercial sector of television in Chapter IX.

#### NOTE, ELECTRONIC VIDEO RECORDERS

1. Electronic video records (EVRs), such as the Sony Betamax pictured on the next page, are available now for less than \$1,000. As scale economies of production are realized and competition from new

SONY BETAMAX [ADVERTISEMENT]

...caught in a pocket  
 ...in an attempt  
 ...award-winning performances by John  
 ...Cagliano and Mike Mangano.  
 9:30 **MOVIE—Science Fiction**  
 "It Came from Beneath the Rock."  
 (1963) A worm, after growing to enor-  
 mous proportions, attempts to devour  
 Burbank, California. Mike Lawlor,  
 Sachi Tasaka.  
**JOE LADY AMATEUR HOUR—**  
**Variety**  
 Joe's guests tonight include comed-  
 ians Coghlan and Gallagher, songstress  
 Sue Hershey, tap dancer Leslie Citron  
 and a host of other unknowns.  
**ESPORTS**  
 Ping-Pong finals live via satellite from  
 Peking.  
**ROMEO IN JOLIET**  
 This week, Tony Romeo's refusal to  
 do a fox trot during a prison dance  
 leads to an enormous jail break and  
 the warden's cancelling of dances for  
 two months. Tony: Jim Scalfone.  
**MOVIE—Mystery**  
 "The List of Harriet Messenger."  
 (1971) A shopping list provides several  
 clues in the mysterious disappearance  
 of a bottle of rare wine from a cheese  
 tycoon's home. Cameo appearances  
 by thirty-nine top stars.

**THANKS TO SONY'S BETAMAX,  
 NOW YOU CAN CIRCLE TWO.**

How many times have you wanted to watch two shows that are on at the same time?

Well, now you can.

Because Sony's remarkable Betamax—available in console (shown) or deck which hooks up to any TV set—can actually videotape something off one channel while you're watching another channel. Then, when you're finished watching one show, all you do is push some buttons and you see a tape of the show you would have missed.

Another question: How many times have you had to go somewhere, or do something, at a time when there

was something on TV you wanted to see?

Well, Sony's Betamax handles that one also. By setting an automatic timer, you can actually videotape something while you're not there. Then, when you are there, once again you can play back a tape of the show you would have missed.

Our one-hour tapes are reusable—just record over them, and use them over and over again.

Sony's Betamax. Who said you couldn't have it both ways?

**BETAMAX™  
 "IT'S A SONY!"**



Model LV 1001 Videotape Recorder/Player

\* © 1976 Sony Corporation of America  
 BCTM and Betamax are trademarks of Sony Corporation.

[89488]

\* Reprinted by permission of Sony Corporation of America.

manufacturers of EVRs and from video disk systems—which use disks that resemble 12" records and a laser beam in the role of a needle—increases, further price reductions are likely; this has been the consistent experience with home electronics since the introduction of television.

2. A number of companies are planning to market recorded video cassettes for use on EVRs. One company, for example, has obtained the right to market cassettes of 100 20th Century-Fox feature films; they are being offered at \$50 each. *Broadcasting*, Oct. 24, 1977, at 34. Sony and presumably other EVR manufacturers are interested in encouraging the availability of such "software" in order to make their machines more attractive to consumers, who are otherwise limited to the recording and replay of over-the-air broadcasts, with the advantages stressed in the Betamax advertisement. See *Broadcasting*, Feb. 27, 1978, at 82 ("Magnavox Software").\*

3. Drawing on the experience of the early years of radio, and then of television, what other developments might one expect as manufacturers seek to market EVRs? Will EVR manufacturing be integrated with program supply, as radio and television receiver manufacturing were? In this connection, it may be noteworthy that RCA Corp., parent corporation of NBC, has signed a license agreement under which it will market the Matsushita (Panasonic) "VHS" home videotape recorder in the United States. Magnavox has a similar license. *Wall Street Journal*, Aug. 24, 1977, at p. 6, col. 3; May 24, 1977, at p. 33, col. 3.

Consider the speculation of Hugh M. Beville, Jr., executive director of the Broadcasting Rating Council, who projected 10 million EVRs in use by 1985 (14% of current TV homes) and ultimately 50-60% market penetration:

Once broadcasters recognize the new opportunities which the home recorder provides we will see even a greater programming variety. The generally unprogrammed period from 1 a. m. to 6 a. m. represents a potential for the presentation of many specialized features, which can be taped for later playback—golf and tennis lessons, home health and aid, educational series, X-rated movies—anything of a specialized nature which is promised by pay cable or video disks.

\* \* \*

I believe that over the next decade, by unhinging the program from the time period, the home [video tape recorder] (VTR) will out pace the growth of both cable and pay TV. In fact,

\* These advantages are in some doubt, however. See *Universal City Studios, Inc. v. Sony Corporation of America*, 429 F.Supp. 407 (1977) (allegation that "Betamax is designed and distributed for the sole purpose of inducing pur-

chaser \* \* \* to record television shows, in derogation of their copyrights," and as a form of unfair competition; preliminary injunction against marketing denied).



it may well impact negatively on both of these. And if broadcasters awake to the potentialities of this device, it can both increase TV viewing and slow the emergence of competitive services. Broadcasting, "Rating expert sees VTR reshaping U.S. television," Nov. 14, 1977, at 22.

4. What are the implications of relatively widespread home EVR capacity for each of the four FCC mega-policies examined in this chapter? For each of the particular policies, such as the PTAR, and network financial interest regulation? In this evaluation, assume first that programs are provided principally over the air, as at present, and then that they are sold on tapes or discs, just as aural recordings are now sold.
5. What regulatory response to inexpensive EVR would you expect? Does the FCC have jurisdiction to assert any regulatory authority over EVR machines directly? Cf. *United States v. Southwestern Cable Co.*, *infra*.

## Chapter V

### CABLE TELEVISION AND BROADCAST POLICY

Cable communications involves the transmission by wire of broadcast services now competing for scarce spectrum "space." Because of a cable's ability to carry large numbers of channels, interest in its exploitation, and in some quarters fear of its implications, has been intense.

The materials in this chapter give a necessarily selective exposure to the issues raised by the advent of cable television (CATV)—the primary service offered by cable communications systems. They address the jurisdiction of the FCC; Commission regulation of signal carriage on the cable; the appropriate relation of federal to state or local regulation; and, tangentially, the role of copyright. They do not address such issues as FCC regulation of technical standards; anti-trust and industrial organization—such as cross-ownership with local broadcast and print media, or the related utility "pole attachment" issue.

As you read and think about the cable, and its impact on the regulatory and industry structure in broadcasting, bear in mind that universal access to the cable cannot be assumed or deemed a realistic possibility (a) in the near future; or (b) perhaps ever, absent a regulatory requirement thereof; sparsely populated areas, and some urban areas with a large number of signals available over the air and high construction costs might never be wired for cable if the decision is left to market forces. Any prescriptions that you encounter, or formulate, should be probed, therefore, for any assumption about universal penetration, and scrutinized for their applicability to a world of partial penetration.

Finally, do not confuse CATV with what may generically be called "pay-TV." That refers to the sale of a special service, either on a program-by-program basis or by the provision of a special channel. Such service, which is just getting underway, may be provided over the cable as a supplemental service to those who take the basic cable service (where it is called "pay cable,") or over the air (called "subscription television," or STV) by transmission of an encoded signal and lease of a decoder to the subscribers. These services and their relationship are considered in Part C of this chapter.

## A. INTRODUCTION TO CABLE

## U. S. v. SOUTHWESTERN CABLE CO.

Supreme Court of the United States, 1968.  
392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001.

Mr. Justice HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after requests by Midwest Television for relief under §§ 74.1107<sup>2</sup> and 74.1109 of the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station.<sup>4</sup> Midwest sought an appropriate order limiting the carriage of such signals by respondents' systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints. 4 F.C.C.2d 612. On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934 to issue such an order. 378 F.2d 118. We reverse.

## I.

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. CATV systems characteristically do not produce their own programming, and do not recompense producers or broadcasters for use of the programming which they receive and redistribute. Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.

The CATV industry has grown rapidly since the establishment of the first commercial system in 1950. \* \* \* By late 1965, it was

2. 47 CFR § 74.1107(a) provides that "[n]o CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area.

\* \* \* San Diego is the Nation's 54th largest television market.

4. Midwest asserted that respondents' importation of Los Angeles signals had fragmented the San Diego audience, that this would reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided in the San Diego area by local broadcasting stations.  
\* \* \*

reported that there were 1,847 operating CATV systems, that 758 others were franchised but not yet in operation, and that there were 938 applications for additional franchises.<sup>15</sup> \* \* \*

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals.<sup>16</sup> \* \* \* CATV systems, formerly no more than local auxiliaries to broadcasting, promise for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country.

\* \* \* [T]he Commission has, since 1960, gradually asserted jurisdiction over CATV. \* \* \* The Commission found [in 1962] that "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed." It reasoned that the importation of distant signals into the service areas of local stations necessarily creates "substantial competition" for local broadcasting. The Commission acknowledged that it could not "measure precisely the degree of \* \* \* impact," but found that "CATV competition can have a substantial negative effect upon station audience and revenues \* \* \*."

The Commission attempted to "accommodat[e]" the interests of CATV and of local broadcasting by the imposition of two rules. First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals. Second, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. These carriage and nonduplication rules were expected to "insur[e] many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs \* \* \*."

\* \* \* Further, the Commission [in 1965] forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously found that it "would be

15. Second Report and Order, 2 FCC 2d 725, 738. The franchises are granted by state or local regulatory agencies. \* \* \*

16. The term "distant signal" has been given a specialized definition by the Commission, as a signal "which is ex-

tended or received beyond the Grade B contour of that station". 47 CFR § 74.1101(i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See 47 CFR § 73.683(a).

consistent with the public interest," "particularly the establishment and healthy maintenance of television broadcast service in the area," 47 CFR § 74.1107(c). \* \* \*

## II.

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio \* \* \*." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available \* \* \* to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service \* \* \*." 47 U.S.C. § 151. \* \* \*

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of \* \* \* signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(a),(b). These very general terms amply suffice to reach respondents' activities.

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 279.

Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems.

First, they emphasize that the Commission in 1959 and again in 1966 sought legislation that would have explicitly authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. \* \* \* Second, respondents urge that § 152 (a) does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Title II of the Act, or that they are broadcasters, and thus within Title III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio \* \* \*." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication \* \* \*." S.Rep.No.781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that \* \* \* Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *F. C. C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 84 L.Ed. 656.

Moreover, the Commission has reasonably concluded that regulatory authority over CTAV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U.S.C. § 307(b). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station as an outlet for local self-expression."<sup>39</sup> In turn, the

39. H.R.Rep.No.1559, 87th Cong., 2d Sess., 3; Sixth Report and Order, 17 Fed.Reg. 3905. And see Staff of the Senate Comm. on Interstate and For-

eign Commerce, 85th Cong., 2d Sess., *The Television Inquiry: The Problem of Television Service for Smaller Communities* 3-4 (Comm. Print 1959).

Commission has held that an appropriate system of local broadcasting may be created only if two subsidiary goals are realized. First, significantly wider use must be made of the available ultra-high-frequency channels. Second, communities must be encouraged "to launch sound and adequate programs to utilize the television channels now reserved for educational purposes." These subsidiary goals have received the endorsement of Congress.

The Commission has reasonably found that the achievement of each of these purposes is "placed in jeopardy by the unregulated explosive growth of CATV."<sup>43</sup> \* \* \* In particular, the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters. \* \* \* We are aware that these consequences have been variously estimated, but must conclude that there is substantial evidence that the Commission cannot "discharge its overall responsibilities without authority over this important aspect of television service." Staff of Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., *The Television Inquiry: The Problem of Television Service for Smaller Communities* 19 (Comm. Print 1959).

\* \* \*

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." 47 U.S.C. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

The Senate Committee has elsewhere stated that "[t]here should be no weakening of the Commission's announced goal of local service." S. Rep.No.923, *supra* at 7.

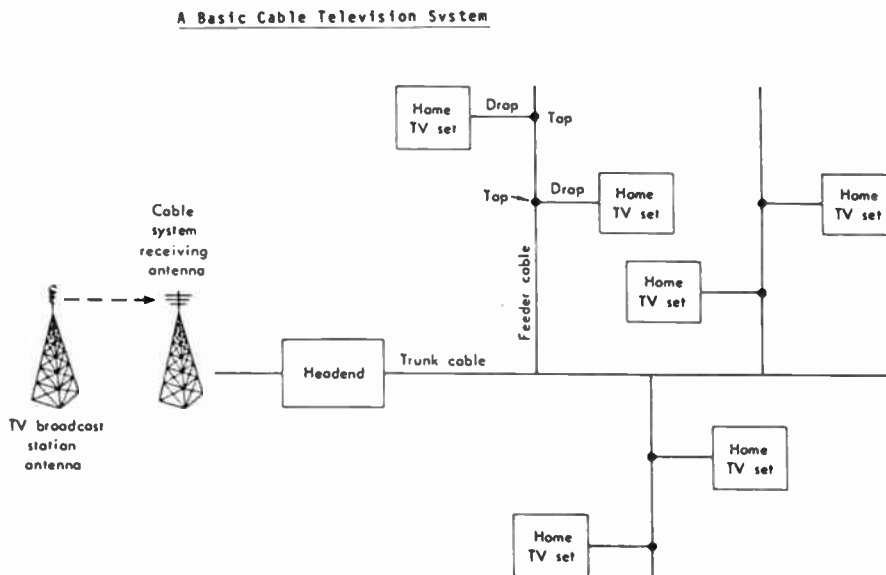
43. \* \* \* It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting, and that, in turn, this would have four undesirable consequences: (1) the local community "would be left without the local service which is necessary if the public is to receive the maximum benefits from the television medium"; (2) the "suburban and rural areas surrounding the central com-

munity may be deprived not only of local service but of any service at all"; (3) even "the resident of the central community may be deprived of all service if he cannot afford the connection charge and monthly service fees of the CATV system"; (4) "[u]nrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service—or being left, at best, with nothing more than a highly limited satellite service". S.Rep.No.923, *supra*, at 7-8. The Committee concluded that CATV competition "does have an effect on the orderly development of television." *Id.*, at 8. [Footnote relocated.]

[The Court went on to uphold the particular FCC order under review.]

### NOTES ON CABLE, THE COMMISSION, AND COPYRIGHT

1. The following diagram of the units in a cable television system is taken from Staff of the Subcomm. on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Cable Television: Promise Versus Regulatory Performance* 10 (Subcomm. Print 1976). In a system importing "distant signals," microwave transmission stations (provided by AT&T and others) would relay the signal of a distant broadcast station to the cable system receiving antenna.



Source: Carl Pilnick and Walter S. Baer, *Cable Television: A Guide to the Technology*, The Rand Corporation, R-1141-NSF, June 1973, p. 4.

[B9469]

2. A cable system with the capacity to originate its own programming, called "cablecasting," would have as an additional unit a television studio, programming from which would be transmitted from the headend on some otherwise unoccupied channel. In 1969, the FCC adopted a rule providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." First Report and Order, Dkt. No. 18397, 20 FCC 2d 201, 24 R.R.2d 1501 (1969).



In justification, the Commission invoked the mandate of § 303(g); noted that the origination requirement would facilitate the geographical distribution policy expressed in § 307(b); and stated its view that "a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services, might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created," here citing the first purpose stated in Section 1 of the Act.

This regulation was opposed both by CATV systems that anticipated insufficient advertiser support for cablecasting to justify the requisite investment, and by broadcast interests that sought to prohibit cablecasting in order to avoid "fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue. \* \* \* " *Id.*, at 202.

Is the cablecasting requirement "reasonably ancillary" to broadcasting? In *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972) (*Midwest Video I*), the Court upheld the FCC's action but could not articulate a majority position. The plurality opinion for four Justices found in the *Southwestern Cable* standard "authority to regulate CATV with a view not merely to protect but to promote the objective for which the Commission had been assigned jurisdiction over broadcasting." *Id.*, at 667. The Chief Justice, concurring in the result, referred to CATV as being "dependent totally on broadcast signals," "to which they make no contribution," adding that "when they interrupt the signal and put it to use for their own profit, they take on burdens, one of which is regulation by the Commission." Nonetheless, he was of the view that "the Commission's position strains the outer limits" of its jurisdiction. Justice Douglas, in a dissent for four members of the Court, would have distinguished compulsory origination from regulation of such programming as a cable operator chose to originate; if the FCC can "compel people to become broadcasters," he reasoned, then it has "authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee." *Id.* at 681.\* Cf. *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C.Cir., 1976) (FCC lacks jurisdiction over use of CATV system leased access channels for two-way point-to-point non-video communications); noted, 89 *Harv.L.Rev.* 1257 (1976).

3. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) the Court held that a CATV system does not "perform," and therefore does not infringe the copyright on, programs that it retransmits; they were "released to the public" when

\*The Commission has since deleted the mandatory origination requirement, although it still requires that systems with more than 3,500 subscribers maintain some equipment for local

production use by others; further, local authorities may re-impose an origination requirement. *Cablecasting Rules*, Dkt. No. 19988, 32 R.R.2d 123 (1974).

they were broadcast. See also *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974) (accord, where CATV imports a "distant" signal into a new market).

When the Court decided *Fortnightly*, the House had passed and the Senate was considering a revision of the Copyright Act of 1909. 392 U.S., at 396 n. 17. Accordingly, the Court declined to render what it called a "compromise decision" urged by the United States, *amicus*, to "accommodate various competing considerations of copyright, communications, and antitrust policy. \* \* \* That job is for Congress." *Id.*, at 401. By the time of the *Teleprompter* decision, however, still no legislation had passed, "apparently because of the diversity and delicacy of the interests affected by the CATV problem." 415 U.S., at 414 n. 16.

Copyright legislation governing CATV has now been enacted. P.L. 94-553, 94th Cong., 2d Sess. (1976); see 386 *infra*. In 1972, however, when the FCC issued its Cable Television Report, *infra*, the Supreme Court had not yet decided *Teleprompter* and the Congress had not yet enacted the new copyright law. The copyright liability of CATVs importing distant signals was thus unresolved when the FCC acted.

On August 5, 1971 the Commission sent a "letter of intent" to the relevant congressional committees outlining the CATV regulatory regime it was intending to propose for rulemaking. (This letter, referred to in the following Report as Appendix C, has been deleted here; it appears at 22 R.R.2d 1755.) Thereafter, Chairman Burch met with members of the affected industries and reached a "consensus agreement," and the FCC instead adopted its terms. This background is discussed more fully in the separate opinions that follow the Report, and you may wish to read them before reading the Report itself.

## B. THE REGULATED EMERGENCE OF CABLE

### CABLE TELEVISION REPORT AND ORDER

Federal Communications Commission, 1972.  
36 FCC 2d 143, 24 R.R.2d 1501 (Dkt. 18397).

#### I. Introduction

1. In our Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397, we launched an inquiry into the long-range development of cable television. Our purpose was to explore:

\* \* \* [H]ow best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology and potential services. \* \* \*

\* \* \* [O]ur Notice recognized the variety of possible services that cable systems could offer. We did not attempt an all-inclusive listing of cable's potential uses, but took note of many.<sup>10</sup>

4. The First Report and Order in Docket 18397<sup>11</sup> was the first significant action in the proceeding and established the ground rules for cable origination. \* \* \*

5. In June, 1970 we issued further proposals on television broadcast signal carriage,<sup>13</sup> cross-ownership of cable systems and radio stations and cable and newspapers, multiple ownership,<sup>14</sup> technical performance standards, minimum channel capacity, two-way transmission capability, local origination centers, and the division of jurisdiction between the federal and state-local levels of government. These were followed later by proposals concerning the logging of cablecast programming, equal opportunities in employment practices, and the use of call letters in connection with nonbroadcast channels.

9. \* \* \* Following the public proceedings, the Commission formulated a cable program designed to allow for fulfillment of the technological promise of cable and, at the same time, to maintain the existing structure of broadcast television. The framework of the new program was described to the Congress in testimony before the Senate Communications Subcommittee on June 15, 1971 and before the House Communications and Power Subcommittee on July 22, 1971. In order to permit the Committees and the Congress ample opportunity to consider its proposals prior to final adoption, the Commission on

10. "[F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e. g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State and municipal level; e. g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs; e. g., job and literacy training, pre-school programs in the

nature of 'Project Headstart', and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e. g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community." 15 FCC 2d 417, 420.

11. 20 FCC 2d 201 [17 R.R.2d 1570] (1969), stay denied 20 FCC 2d 899 (1969), recon. denied 23 FCC 2d 825 [19 R.R.2d 1766] (1970).

13. Second Further Notice of Proposed Rule Making in Docket 18397-A, [24 FCC 2d 580, 35 Fed.Reg. 11045 (1970)].

14. Notice of Proposed Rule Making in Docket 18891, 23 FCC 2d 833 (1971).

August 5, 1971 adopted a "Letter of Intent"<sup>20</sup> in which it described in detail the course it planned to adopt.

10. \* \* \* We have also witnessed over the last several years repeated attempts by the affected industries to resolve their differences. Following release of our Letter of Intent further negotiations were undertaken, and agreement was reached on a proposal that was supported by the National Cable Television Association, the National Association of Broadcasters, the Association of Maximum Service Telecasters, and a major group of program suppliers. This consensus agreement is fully discussed later in this Report and it, too, has had significant impact on the direction of our settlement of the complex questions having to do with distant signals/copyright.

11. As indicated, the rules we are adopting are the result of a number of interwoven proceedings. The program is designed as a single package because each part has impact on all the others. Our concerns may generally be divided into four main areas:

- television broadcast signal carriage;
- access to, and use of nonbroadcast cable channels, including minimum channel capacity;
- technical standards; \*
- the appropriate division of regulatory jurisdiction between the federal and state-local levels of government.\*\*

Each of these will be considered in order. Questions concerning patterns of ownership, including cross-ownership and multiple ownership, are under consideration in another proceeding and will be taken up separately.

## II. Television Broadcast Signal Carriage

### *Proposals and Alternatives*

12. Within the frame described above, we turn to a consideration of the various proposals that have been advanced for settling the question of cable carriage of television broadcast signals.

#### 1966 Rules

13. Under the rules adopted in March, 1966, local broadcasters and the Commission had to be notified before any cable system could undertake to carry a television broadcast signal (§ 74.1105). A distant signal (that is, a signal carried beyond its Grade B contour) could not be carried into one of the 100 largest television markets without prior Commission authorization after evidentiary hearing (§ 74.1107). \* \* \* The 100 largest television markets were singled

20. Cable Television Proposals, 31 FCC 2d 115 [22 R.R.2d 1755] (1971) \* \* \*.

\* Omitted.—D.G.

\*\* *Infra*, at p. 409.

out for special attention because it was felt that the potential for independent television station growth, particularly for UHF stations, was most favorable in those areas. Additionally, all local stations on request had to be carried by cable systems within the stations' Grade B service areas and, again on request, systems generally were not to duplicate the programming of a higher priority station by carrying the same programming from a lower priority station during the same 24-hour period (§ 74.1103). The priority of a station for purposes of obtaining program exclusivity was based on the strength of its signal in the area, with stations of higher signal strength having higher priority (§ 74.1103(a)).

#### 1968 Commission Proposal

15. The 1968 rules, proposed to replace the evidentiary hearing requirement, contained the following basic provisions:

Retransmission Consent	(1) All restrictions would be eliminated on the carriage of distant signal programming for which cable systems had obtained "retransmission consent" on a program-by-program basis from the originating station.
Top 100 Markets	(2) Cable systems * * * in the 100 largest television markets could carry no distant signal programming in the absence of retransmission consent.
Smaller Markets	(3) Cable systems * * * not in the top 100 markets could carry, without obtaining retransmission consent, * * * the signals of stations affiliated with each of the three national television networks and the signal of one commercial independent station.
Beyond All Markets	(4) Cable systems [not in] any commercial television station community could carry distant signals without restriction as to number.
Noncommercial Educational Stations	(6) No restrictions were placed on the carriage of noncommercial educational station signals. * * *
Leapfrogging	(7) In the absence of waiver for good cause, each distant signal carried had to be obtained from the closest station of the type sought or from the closest in-state station of that type.
Carriage and Program Exclusivity	(9) Existing rules concerning program exclusivity and mandatory carriage would remain essentially unchanged * * *.

These rules were designed to achieve certain basic purposes: to insure at least a minimum of service in underserved areas, set limits to the impact of cable distant signal carriage on over-the-air broadcasting, and eliminate certain elements of competitive unfairness resulting from the fact that cable systems are not required under existing copyright laws to pay for the television broadcast programming they pick up and distribute. Carriage of the closest stations of particular types was required because they were more likely to be attuned to the needs and interests of the cable community.

#### 1970 Commission Proposal

17. In June, 1970, another alternative to govern the carriage of television broadcast signals was proposed and released for comment. Under this proposal, cable systems \* \* \* in the 100 largest televi-

sion markets would be permitted to carry four channels of distant non-network television programming. Systems would be required to delete the advertising from these distant signals and insert advertising supplied by certain of the local stations. Preference in inserting commercials was to be based on a priority system, with those stations most threatened by cable competition receiving first priority. It was thought that by means of this proposal cable might be used affirmatively to promote the development of UHF stations.

18. Because of the commercial substitutions that would have been required in the distant signals carried, it was felt that the adoption of the proposal would have to dovetail with copyright legislation. While acknowledging that copyright was for Congress to resolve, a method of calculating the amount of compensation to which distant signal program owners would be entitled was included to show that the proposal could be designed to compensate program owners fully. As a further condition to carrying distant signals in this fashion, and affirmatively to support noncommercial broadcasting, cable systems would have been required to contribute five percent of their gross subscription revenues to public broadcasting.

[Broadcast interests generally supported, and cable interests uniformly opposed, the retransmission consent proposal. The latter argued that program-by-program consents were impractical. "Many of the cable parties felt that the Commission was usurping the power of the Congress in the copyright area, because the consent requirement would have operated as though a change had been made in the copyright laws." ¶ 24. The proposal to require substitution of local for distant commercials was opposed by all broadcast and copyright interests, and by many cable parties. ¶ 27.]

34. \* \* \* Cable parties generally questioned whether the Commission had the authority to enact regulations that would require cable systems to support public broadcasting. They pointed out that it was not the Commission's duty to provide financing for the public broadcasting system, that there were other methods of providing for financing, and that the requirement was discriminatory. Broadcasters generally were in agreement with the cable operators that the requirement would be beyond the jurisdiction of the Commission and should not be undertaken without legislation.

36. The comments on [leapfrogging] were generally divided between broadcast and cable interests, with the former strongly supporting the rule and the latter either opposing it or supporting it with qualifications. Those in favor of a strict anti-leapfrogging rule stressed that such a rule would support our allocations policy, avoid undue concentrations of control in major market independent VHF stations, lead to carriage of stations more attuned to the needs and interests of the cable community, and result in the carriage of stations with less audience appeal, giving them the benefits of extra circulation

and resulting in less audience diversion in the markets into which they were carried. Those opposing adoption of such a requirement felt that cable subscribers should be entitled to the best stations available without regard to place of origin, that concern over concentration of control could be discounted in light of the control of the existing networks from New York and Los Angeles, that community of interest considerations might dictate carriage of more distant stations, and that frequently the choice is not between closer and more distant stations but between no additional stations and those available over existing microwave facilities.

#### Additional Alternatives Proposed

45. Direct Compensation for Audience Diversion. Dr. Leland Johnson, in a report entitled "Cable Television and the Question of Protecting Local Broadcasting" \* \* \* raised the possibility that UHF stations suffering audience diversion from cable should receive direct compensation from the cable systems in question. \* \* \* Payments could be made to all stations in the market, to those below a stated level of profitability, or to all stations on a sliding scale related to station profitability.

46. John J. McGowan, Roger G. Noll, and Merton J. Peck, \* \* \* also suggested the adoption of a form of direct compensation. They suggested that all cable systems be required to make payments into a UHF development fund. \* \* \* This fund would be distributed according to the following rules: (i) Only unprofitable stations would be eligible and only to the extent of their deficit. (ii) Payments would be related to the number of hours of programming devoted to first-run syndications or local live programs in order to encourage the development of new programming. \* \* \*

53. Justice Department Proposal. The United States Department of Justice was critical of our cable regulations and proposals as being unnecessarily protective of the broadcast industry. It recommended that the Commission attempt to assure only a minimum of continued over-the-air service "consisting of one, two or perhaps even three stations." Beyond that minimum, there should be no restrictions on distant signal carriage, and copyright questions should be left entirely for Congressional resolution. Cable systems, it was asserted, should be left to compete with broadcasters in the marketplace, and the marketplace should decide how many and what kind of facilities survive. \* \* \*

#### *Resolution of Issues Concerning Television Broadcast Signal Carriage*

57. The carriage of distant television broadcast signals by cable television systems has been center stage in the continuing controversy before the Commission, the Congress, and the courts. The industries involved have variously argued—the cable industry, that cable

technology will bring extra programming and other services to the public, both on distant signals and on locally originated channels; the broadcast industry, that distant signal importation will lead to smaller audiences and reduced revenues and thus threaten the existence of some broadcast stations or inhibit their ability to produce local public service programs; the television programming industry, that suppliers of programming should receive compensation for the use of their product by cable systems and that the exclusive sales of such programs in particular markets should be honored.

58. In resolving these issues, our basic objective is to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television. We also desire to put to rest the problem of exclusivity protection for programs imported from distant cities by cable television systems and to open the way for resolution of the long-standing dispute over copyright payments. \* \* \*

59. We are also rejecting the retransmission consent proposal of Docket 18397. Experience has indicated that it simply will not achieve our basic objectives. Nor does the commercial substitution proposal of Docket 18397-A provide the answer. \* \* \* [T]he prospect is not promising because of the necessity for close cooperation of all the parties—and such cooperation, as the comments indicate, is highly unlikely. \* \* \*

60. The approach we are adopting is to extend existing exclusivity rules so that they cover non-network as well as network programming, and to restrict the number of distant signals that a system may carry based on the size of the market in which it is located and the estimated ability of that market to absorb additional competition. In so regulating distant signal carriage, we hope to give cable impetus to develop in the larger markets without creating an unacceptable risk of adverse impact on local television broadcast service. At the same time, these limits should serve to create an incentive for the development of those nonbroadcast services that represent the long term promise of cable television and are critical to the public interest judgment we have made.

#### The Consensus Agreement

61. In the course of developing a regulatory program, and because of Congressional concern over these important matters, the Commission in its Letter of August 5, 1971 outlined to Congress the rules on which there was Commission agreement. We noted there the recent efforts of the principal industries to reach agreement on the major issues at controversy and expressed the hope that these efforts would be successful. Following the Letter's release, intensive efforts were made to achieve a consensus, and agreement has now been reached. Because this consensus agreement is of particular signifi-



cance to our deliberations, it is set out in full in Appendix D.\* The Office of Telecommunications Policy provided valuable assistance in the negotiations that led to this agreement.

62. The agreement does not alter in any respect the access, technical standards, or federal-state/local aspects of the August 5 Letter. It deals solely with Part I of the Letter—television broadcast signal carriage. It proposes three modifications, as follows:

(i) **Exclusivity.** For syndicated programming, the agreement provides for extensive exclusivity in the top 50 markets, and more limited exclusivity in markets 51–100. For network programming, it substitutes simultaneous for same-day protection.

(ii) **Local signals.** The agreement changes the significant viewing standard applied to out-of-market independent stations in overlapping market situations from a one percent share of viewing hours to a two percent share; it does not alter the standard applied to network affiliates.

(iii) **Leapfrogging.** The agreement retains a UHF priority where a third distant signal is carried but changes the requirements for the first two signals. There is no restriction on these signals as to point of origin, except that if either is taken from any of the top 25 markets it must be from one of the two closest such markets. \* \* \*

63. The principal addition the agreement would make to the program we outlined in August is the provision of exclusivity for syndicated programming. \* \* \* Now a consensus has been hammered out by the principal industries themselves and they have agreed to support legislation that resolves the remaining aspect of the copyright issue, that of copyright payments.

64. \* \* \* Adoption of the agreement does not mean that we would, absent agreement, have opted in its precise terms for the changes it contemplates. But their incorporation into our new rules for cable does not disturb the basic structure of our August 5 plan. And if, as we judge, the terms are within reasonable limits and the agreement is of public benefit, then it should be implemented in its entirety.

65. We believe that adoption of the consensus agreement will markedly serve the public interest:

(i) First, the agreement will facilitate the passage of cable copyright legislation. It is essential that cable be brought within the television programming distribution market. There have been several attempts to do so, but all have foundered on the opposition of one or more of the three industries involved. \* \* \*

\* Omitted.

(ii) Passage of copyright legislation will in turn erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth. \* \* \*

(iii) Finally, the enactment of cable copyright legislation by Congress—with the Commission's program before it—would in effect reaffirm the Commission's jurisdiction to carry out that program, including such important features as access to television facilities.

It is important to emphasize that for full effectiveness the consensus agreement requires Congressional approval, not just that of the Commission. The rules will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program. \* \* \*

66. \* \* \* The legislation that we believe must follow will limit the number of distant signals to which compulsory copyright licenses apply to those specified in §§ 76.59, 76.61, and 76.63 of the Rules. In all other respects—for example, the details of network and syndicated programming exclusivity protection, leapfrogging, the significant viewing standard, the definition of signals that must be carried—the Commission retains full freedom and, indeed, the responsibility to act as future developments warrant. We reiterate that we are affording cable the minimum number of distant signals necessary to promote its entry into some of the major television markets but that, ultimately, its success will depend on the provision of innovative nonbroadcast services. \* \* \*

#### Impact Considerations

68. Before proceeding to the specific provisions of the rules, some discussion would be useful on the judgments we have made as to: (a) the amount of distant signal competition that can be introduced into particular types of markets without having adverse impact on local television service, and (b) the effect of distant signal carriage on the supply of television programming. \* \* \*

71. \* \* \* [I]t is our judgment that it would be wholly wrong to halt cable development on the basis of conjecture, for example, as to its impact on UHF stations. We believe the improvements that cable will make in clearer UHF pictures and wider UHF coverage will offset the inroads on UHF audiences made by the limited number of distant signals that our rules would permit. \* \* \* [T]here may well be exceptional cases—as to a particular market or, more likely, a particular station in that market. In such an event, we would be prepared to take appropriate action under the special relief provisions of the rules.

73. The additional program exclusivity rules are designed both to protect local broadcasters and to insure the continued supply of

television programming. The latter, of course, is fundamental to the continued functioning of broadcast and cable television alike. As with the basic signal carriage rules, the types of exclusivity incorporated into the rules vary according to market size: the most extensive protection is in the top 50 markets from which the bulk of program supplier revenue is derived and where these restrictions are consequently most needed to insure the continued health of the television programming industry.<sup>36</sup> This protection will also assist independent stations (including many UHF's) that are very largely concentrated in these markets. In markets 51-100 the rules afford additional, although limited, protection to local broadcasters. It has been necessary to find a middle ground: the stations are very largely network affiliated, and generally only two distant signals will be permitted; but these markets are mostly underserved, lacking independent stations, and thus there is a particular need for cable. No syndicated programming exclusivity is added in markets below 100 because the number of distant signals is very strictly limited under the rules. That limitation along with network programming protection is, we believe, adequate to preserve local service, and no additional impediment should be placed on cable operations in these underserved markets.

### *Signal Carriage Rules*

74. The chart [below] will give an overview of signals that will be permitted.

<p><u>Priorities</u></p>	<p><u>General Outline of the Rules Pertaining to Broadcast Signal Carriage</u></p> <p>The television signal carriage rules divide all signals into three classifications:</p> <p>First, signals that a cable system, upon request of the appropriate station, must carry.</p> <p>Second, signals that, taking television market size into account, a cable system may carry.</p> <p>Third, signals that some systems may carry in addition to those required or permitted in the two above categories.</p> <p>These three classifications of signals are used in various market situations as outlined below:</p>
<p><u>First</u></p>	<p><u>Cable Systems Located Outside All Television Markets</u></p> <p>The following signals are required, upon request, to be carried:</p> <ol style="list-style-type: none"> <li>(1) All Grade B signals</li> <li>(2) All translator stations in the cable community with 100 watts or higher power</li> <li>(3) All educational television stations within 35 miles</li> <li>(4) Television stations significantly viewed in the cable community</li> </ol>
<p><u>Second</u></p>	<p>The cable television system may carry any other additional signals.</p>

36. Our concern here with the continued supply of television programming

has a counterpart in the prime time network access rules.



### Signals Required to be Carried

78. Our objective in approaching the signal carriage issue has been generally twofold: (1) to assure that "local" stations are carried on cable television systems and are not denied access to the audience they are licensed to serve; and (2) to gauge and, where appropriate, to ameliorate the competitive impact of "distant" signal carriage. Because market patterns vary and there is only gradual deterioration in a station's receivability as the distance from its transmitter increases, there is no necessarily clear dividing line between "distant" and "local" signals. Nevertheless, a line must be drawn somewhere.

81. We have now decided that the following classes of signals should be treated as local: signals of stations within 35 miles of the cable system, signals meeting a significant viewing test, market signals in hyphenated markets, and in some cases Grade B signals.

82. 35 Mile and Grade B Signals. All cable systems must carry, on request, the signals of all stations licensed to communities within 35 miles of the cable system's community. This requirement, based on policy considerations similar to those underlying existing carriage rules, is intended to aid stations—generally UHF—whose Grade B contours are limited. In this manner less powerful stations will be able to compete with more powerful stations in the same market more effectively. \* \* \* With respect to cable systems located wholly outside the specified zones of all stations, all Grade B signals must be carried. This \* \* \* assures that all stations whose Grade B contours extend beyond 35 mile zones will be carried by systems located outside such zones.

83. Overlapping Market Signals. \* \* \* Audience measurements frequently show that stations from one market coming into another market do not receive audience shares of significant size in the latter even though they are of predicted Grade B strength. Such stations with no significant audience in a market may logically be treated as distant signals. The problem then is to draw a line between those stations that have sufficient audience to be considered local and those that do not. Cable development is not likely to be advanced if television choices on the cable are more limited than choices over the air, nor is it reasonable that signals significantly viewed over the air be excluded from carriage on cable systems. Thus, our rule permits and, on appropriate request, requires carriage of a signal from one major market into another if that signal—without regard to distance or contour—has a significant over-the-air audience in the cable system's community. \* \* \*

84. A significant viewing standard can reasonably be drawn at several points. We have concluded that an out-of-market network affiliate should be considered to be significantly viewed if it obtains at least a three percent share of the viewing hours in television homes

in the community and has a net weekly circulation of at least 25 percent.<sup>43</sup> For independent stations, the test is a share of at least two percent viewing hours and a net weekly circulation of at least five percent. The two criteria reflect distinct concepts. Net weekly circulation reflects the extent to which signals are of any interest to television viewers but tends largely to reflect the availability or viewability of a signal as a technical matter. Audience share indicates the intensity of viewer interest. The combination of these two criteria provides greater assurance that the signal meeting the test is in fact significantly viewed. The lower figures for independent stations are intended to reflect the smaller audiences that these stations generally attract even in their home markets.

#### Additional Service

88. \* \* \* Clearly, cable service can provide greater diversity—can, if permitted, provide the full television complement of a New York or a Los Angeles to all areas of the country. Although that would be a desirable achievement, it would pose a threat to broadcast television's ability to perform the obligations required in our system of television service. We believe, however, that those who are not accommodated as are New York or Los Angeles viewers should be entitled to the degree of choice that will afford them a substantial amount of diversity and the public services rendered by local stations.

89. Cable television can and should help in achieving the diversification sought by our allocations policies. It would, of course, be desirable to adopt one nationwide standard. However, because we seek to minimize possible impact on local broadcasting, we have decided to establish standards of television service that vary with market size. (Noncommercial educational and non-English language stations are not included in these standards and are discussed separately below). It is our determination that the public interest will be served by allowing cable systems to make available the following complement of signals:

- (1) In television markets 1–50:
  - three full network stations
  - three independent stations
- (2) In television markets 51–100:
  - three full network stations
  - two independent stations

43. As used here the term net weekly circulation is a measure of the number of households that viewed a station for five minutes or more during

an entire week, expressed as a percentage of the total television households in the community. \* \* \*

(3) In smaller television markets (below 100):

—three full network stations

—one independent station

If after carriage of stations within 35 miles, those from the same market, and those meeting the viewing test, the service authorized above is not available, distance signals are permitted to be carried to make up the defined level of service.

90. Cable systems in major markets are in any case permitted to carry two signals beyond those whose carriage is required under the mandatory carriage rules. If the service standards set out in the preceding paragraph are met by the carriage of all stations required to be carried, two additional independent stations will be authorized. However, if the system adds distant signals—either network affiliates or independent stations—to meet the service standards, these will be counted against the two additional signals. \* \* \* The rationale for permitting at least two additional signals in all major markets is simply this: it appears that two signals not available in the community is the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems and to open the way for the full development of cable's potential. We will, therefore, permit this complement of signals in the larger markets because it is necessary in terms of cable's requirements and because it is acceptable in terms of impact on broadcasting.

91. Cable systems in communities entirely outside the zone of any commercial television station may carry television signals without restriction as to number and must carry all Grade B signals, all educational television stations within 35 miles, and all 100 watts or higher power translator stations licensed to the cable community. We have, however, given particular attention to the arguments of small market broadcasters that continuing cable penetration will adversely affect their ability to serve the public interest. Because these smaller stations serve sparsely populated areas, we agree that some relief is warranted. Accordingly, we are going beyond our August Letter by requiring that these smaller market signals, where significantly viewed, must be carried on all new cable systems and on all existing systems with sufficient channel capacity—even if the cable community is beyond Grade B contours—and, as to new systems, must be afforded simultaneous non-duplication protection (§§ 76.57 (a) (4) and 76.91 (c)). \* \* \*

#### Leapfrogging

92. In establishing policy in this area we have had a number of conflicting considerations to reconcile. On the one hand, it is arguably desirable to allow cable systems the greatest possible choice, on the assumption that they will select those signals that will most

appeal to their subscribers and are available at the least expense. But in that event there is a risk that most cable systems would select stations from either Los Angeles, Chicago, New York, or one of the other larger markets. There would then be no general participation by broadcast television stations in the benefits of cable carriage. There is the additional consideration that carriage of closer stations, because they are usually in the same region and often in the same state, supplies some programming that is more likely to be of interest in the cable community. We believe we have struck an appropriate balance.

93. The leapfrogging rules are applicable to cable systems in all television markets. With respect to network affiliates, a cable system must afford priority of carriage to the closest such station or, at the option of the cable system, to the closest such station within the same state. In selecting independent stations, cable systems have a choice as to the first two such stations carried, except that if stations from among those in the top 25 designated markets are selected, they must be taken from one or both of the two closest such markets. Systems permitted to carry a third independent station are required to select a UHF station from within 200 miles. In the absence of any UHF station in this area, a VHF independent from within the area may be carried or, at the option of the cable system, any UHF independent. During those periods when programming on a regularly carried independent station must be deleted by virtue of the program exclusivity rules, the system is free to insert unprotected programming from any other stations (including network affiliates) without regard to point of origin. Such substitute programming may be continued to its conclusion. The cable system may also substitute other programming when the material on the regularly carried independent is a program primarily of local interest to the distant community (e. g., local news or public affairs).

#### Educational Stations

94. The principal concern of noncommercial educational broadcasters with signal importation is not reduction in audience size but possible erosion of local support among cable television subscribers. The rule we are adopting will permit carriage of distant educational stations in the absence of objection from local educational stations or educational television authorities.

95. \* \* \* The rules require cable systems to carry, on request, all educational stations within 35 miles and those placing a Grade B contour over the cable community. \* \* \*

#### Foreign Language Stations

96. Except in a very few markets, all U. S. stations broadcast in the English language. Although there are areas of the country,



especially along the Canadian and Mexican borders, with significant populations whose first or only language is French or Spanish, the economics of television broadcasting generally precludes providing these areas with other than English language programming. Cable systems, however, have the capability of overcoming this problem, and we believe this capability should be encouraged. We will, accordingly, permit cable systems to carry non-English language programming without limitation \* \* \* unless the local station demonstrates that such importation will adversely affect its ability to serve the public. In order to encourage this carriage, distant foreign language stations will not be counted as part of the additional signal quota discussed above and we will not impose any restriction as to which stations, either foreign or domestic, may be carried. \* \* \*

*Program Exclusivity*

97. Our solution to the problem of distant signal carriage involves an extension of our existing program exclusivity rules to provide more effective protection to syndicated programming. Additionally, we believe a change is appropriate in the same-day exclusivity rule that applied as a practical matter only to network programming.

98. The previous exclusivity rule (§ 74.1103) was based on a system of priorities that generally protected a station of higher priority against having its programming duplicated on the same day by cable carriage of a lower priority station. From highest to lowest, the signal strength priorities are Principal Community, Grade A, and Grade B. With respect to network television programming, we are retaining this system of priorities but will only require cable systems, on request of a higher priority station, to refrain from simultaneous duplication of the higher priority station's network programming.  
\* \* \*

100. Syndicated programming will now be effectively protected in the major markets. In markets 1-50—cable systems, on receipt of appropriate notification, will be required to refrain from carrying syndicated programming on a distant signal as follows: (1) during a pre-clearance period of one year, syndicated programs sold for the first time anywhere in the United States for television broadcast exhibition; (2) during the run of the contract, programs under exclusive contract to a station licensed to a designated community in the market. In markets 51-100—cable systems, on receipt of appropriate notification, will be required to refrain from distant signal carriage of syndicated programs under exclusive contract to a station licensed to a designated community in the market, except [as provided at 47 C.F.R. § 76.151(b)].

101. \* \* \* [C]ontracts must specifically provide for broadcast exclusivity (both over the air and by cable) before a program can be protected under the rules. At a minimum a television licensee seeking

exclusivity protection must obtain (a) exclusivity against other television stations licensed to its designated community in the market and (b) exclusivity against cable dissemination of the program within the 35 mile zone via a distant signal. We think that this is a reasonable requirement. A broadcast station may now purchase the exclusive right to broadcast a television program in its market. Cable represents another way to distribute the program. The station may bargain for the exclusive right as to any cable television presentation (e. g., cable origination, pay-cable, or other leased channel presentation). But what it must obtain, in order to be entitled to protection, is the exclusive right with respect to broadcast exhibition—whether the broadcast exhibition stems from another station in the market or from a cable system in the market that is bringing in distant broadcast signals. This is reasonable market exclusivity which the broadcaster is entitled to seek and which he must obtain to claim exclusivity rights under Section 76.151.

102. Because this is a complex subject, it may be helpful to give examples, using the Baltimore-Washington situation. A Washington station, even if significantly viewed in Baltimore, would have no right to preclude carriage of its syndicated programs on a distant signal (e. g., from Philadelphia) carried on a Baltimore cable system, because Baltimore is a designated major market community that does not fall wholly within 35 miles of Washington. A Washington station could preclude carriage of a protected program on a distant signal being carried on a Washington cable system and on other cable systems located within 35 miles of Washington (except on a cable system in Baltimore). In Laurel, Maryland, which lies between Washington and Baltimore, a cable system could carry both Washington and Baltimore signals, would protect the programming of neither against the other, and would protect the programming of both Baltimore and Washington signals against distant signals. Assuming that a smaller television market community were located wholly or partially within the 35 mile zone of Washington, a Washington station would be entitled to top 50 market exclusivity protection in that community. If a community fell wholly or partially within 35 miles of both a top 50 station and a second 50 station, the one year pre-clearance period would be applicable, and the cable system could be called on to protect the programming of stations from both markets in accordance with the requirements respectively applicable to those markets.

103. In markets 1-50, pre-clearance protection is complementary to the way in which syndicated programs are sold—i. e., they are sold in the largest markets first and, without a pre-clearance period, cable carriage of signals from these larger markets into other markets in the first 50 could dilute exclusivity and the value of the product. \* \*

106. The rules governing program protection specify that appropriate notification be given to cable systems when exclusivity rights

are asserted. The pre-clearance rule for the first 50 markets is designed principally for the benefit of copyright holders. The burden is therefore placed on copyright holders or their designated agents to notify cable systems in these markets when a sale has been made and that the pre-clearance period is running. With respect to other requests for exclusivity, the burden is also placed on the party seeking protection, in these cases the broadcaster. \* \* \*

### *Grandfathering*

107. In light of the difficulty of withdrawing signals to which the public has become accustomed and in deference to the equities of existing system operators, we are not applying the new carriage rules to any signals that a cable system was authorized by the Commission to carry or was lawfully carrying prior to March 31, 1972. \* \* \*

## III. Access to and Use of Nonbroadcast Channels

### *Channel Capacity*

120. We envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals. We note 40, 50, and 60 channel systems are currently being installed in some communities. The cost difference between building a 12 channel system and a 20 channel system would not appear to be substantial. We urge cable operators and franchising authorities to consider that future demand may significantly exceed current projections, and we put them on notice that it is our intention to insist on the expansion of cable systems to accommodate all reasonable demands. \* \* \* [In the top 100 markets] we believe that 20 channel capacity (actual or potential) is the minimum consistent with the public interest. We also require that for each broadcast signal carried, cable systems in these markets provide an additional channel 6 MHz in width suitable for transmission of Class II or Class III signals.† \* \* \*

### *Designated Channels*

121. Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable—the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments. Accordingly, cable television systems will have to provide one dedicated, noncommercial

† Class II channels are those used to deliver cablecast programming. Class III channels are for uses other than television picture transmission, e. g.,

encoded television (perhaps for pay cable, FM, AM, facsimile and printed message material.—D.G.

public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis and, without charge during a developmental period, one channel for educational use and another channel for local government use. We have already imposed an obligation on systems with 3,500 or more subscribers to originate programming and are now requiring that the origination channels be specifically designated.

122. Public Access Channel. It has long been a Commission objective to foster local service in broadcasting. \* \* \*

We believe there is increasing need for channels for community expression, and the steps we are taking are designed to serve that need. The public access channel will offer a practical opportunity to participate in community dialogue through a mass medium.  
\* \* \*

123. Educational Access Channel. It is our intention that local educational authorities have access to one designated channel for instructional programming and other educational purposes. \* \* \*  
An important benefit promises to be greater community involvement in school affairs. It is apparent, for instance, that combined with two-way capability, the quality of instructional programming can be greatly enhanced. \* \* \*

124. Government Access Channel. The government access channel is designed to give maximum latitude for use by local governments. \* \* \*

#### *Leased Access Channels*

125. In addition to the designated channels and broadcast channels, cable systems shall make available for leased use the remainder of the required bandwidth and any other available bandwidth (e. g., if a channel carrying broadcast programming is required to be blacked out because of our exclusivity rules or is otherwise not in use, that channel also may be used for leased access purposes). \* \* \*

#### *Expansion of Capacity*

126. Our basic goal is to encourage cable television use that will lead to constantly expanding channel capacity. Cable systems are therefore required to make additional bandwidth available as the demand arises. There are a number of ways to meet this general objective. Initially, we intend to use the following formula to determine when a new channel must be made operational: whenever all operational channels are in use during 80 percent of the weekdays (Monday-Friday), for 80 percent of the time during any consecutive three-hour period for six weeks running, the system will then have six months in which to make a new channel available. This requirement should encourage use of the system with the knowledge that channel space will always be available, and also encourage the cable operator continually to expand and update his system. \* \* \*

*Two-Way Capacity*

128. [W]e have decided to require that there be built into cable systems the capacity for return communication on at least a non-voice basis. Such construction is now demonstrably feasible. Two-way communication, even rudimentary in nature, can be useful in a number of ways—for surveys, marketing services, burglar alarm devices, educational feed-back, to name a few.

*Regulations Applicable to Channels Presenting Nonbroadcast Programming*

130. We now turn to the question of the regulation of access channels presenting nonbroadcast programming. \* \* \*

135. With respect to the public access channel, the rules to be promulgated by the system must specify nondiscriminatory access without charge on a first-come, first-served basis. These rules shall also proscribe for all designated access channels (except the government access channel when it is being used for its designation purpose) the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information and obscene or indecent matter \* \* \*. The cable operator must not in any other way censor or exercise program content control of any kind over the material presented on the public access channel.

136. We recognize that open access carries with it certain risks. But some amount of risk is inherent in a democracy committed to fostering “uninhibited, robust, and wide-open” debate on public issues. (New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). \* \* \*

138. The cable operator similarly must not censor or exercise program content control of any kind over the material presented on the leased access channels. Specifically, his rules shall provide for non-discriminatory access on a first-come, first-served basis with the appropriate rate schedule specified. \* \* \*

*Production Facilities*

142. It is apparent that our goal of creating a low-cost, non-discriminatory means of access cannot be attained unless members of the public have reasonable production facilities available to them. We expect that many cable systems will have facilities with which to originate programming that will also be available to produce program material for public access. In any event, we are requiring that the cable operator maintain within the franchise area production facilities for use on the public access channel.

*Applicability*

147. These access rules will be applicable to all new systems that become operational after March 31, 1972 in the top 100 television markets. Currently operating systems in those markets will have five years to comply fully with this section. We focus here on the top 100 markets because we have selected these markets as the recipients of certain benefits in order to stimulate cable growth. But, correspondingly, that growth should be accompanied by access obligations if the public is to receive the full benefits of this program. Further, cities in the top 100 markets have, as a general rule, more diverse minority groups (ethnic, racial, economic, or age) who are most greatly in need of both an opportunity to express their views and a more efficient method by which they can be apprised of governmental actions and educational opportunities. \* \* \*

148. \* \* \* While we encourage systems in markets below the top 100 to provide access channels, we are not at this time requiring them to do so. We will permit local franchising authorities in such areas to require systems to provide access service, but to no greater extent than we have specified for systems in the top markets. In that event, our access rules would be applicable.

[Part IV, Technical Standards is omitted. Part V, Federal-State/Local Relationships appears infra. The separate opinions of the Commissioners have been re-ordered; those of Commissioners Bartley and Reid, concurring, have been omitted, as has the supplementary opinion of Commissioner Johnson.]

OPINION OF COMMISSIONER NICHOLAS JOHNSON,  
CONCURRING IN PART AND DISSENTING IN PART

Introduction

In future years, when students of law or government wish to study the decision making process at its worst, when they look for examples of industry domination of government, when they look for Presidential interference in the operation of an agency responsible to Congress, they will look to the FCC handling of the never-ending saga of cable television as a classic case study. \* \* \*

I. Cable Development: A Model

Unencumbered by political and vested economic pressures, cable television would develop like any new technology—in the market place. Systems would be built in markets in which consumer demand made building profitable. These systems would import distant signals to the extent of market demand. \* \* \* And, I would guess, that level would be somewhere between eight to fifteen signals, depending upon the region of the country involved.

I would impose limited regulations on this basic marketplace system. I would require all systems in the larger cities to have a minimum capacity of 40 channels, half of which would be dedicated to other than over-the-air broadcast services. Of the one half of the channels reserved for purposes other than over-the-air broadcast signals, at least one would be dedicated to state and local government use, one would be dedicated to educational use, one would be dedicated to the public use (all on a first come-first serve basis, free of charge), and the others would be leased to all comers at fixed rates. Systems would be required to expand channel capacity in accordance with demand, in the manner set out in the August 5 letter and these rules.

\* \* \*

The over-the-air broadcast system as we know it is an important element of our society and is entitled to some protection. No one wants massive numbers of over-the-air stations suddenly to go bankrupt and leave the air because of cable. Cable is currently almost wholly dependent upon over-the-air stations for its programming; there are many homeowners who can't or won't have cable; and the continued competition and choice for the viewer between cable and over-the-air signals is his only ultimate protection against cable abuses. The question is only *how much* protectionism is warranted and necessary at a time when *no* station has yet gone off the air because of cable. I would provide, for starters, only that no cable system could simultaneously duplicate a local station's program with that of an imported station. Then, if a local station could demonstrate that (1) it is deteriorating substantially (i. e., a steady decline of gross revenue), and (2) that such deterioration is a result of the existence of cable television in its market, special relief could then be made available. If the problem became widespread, new general protection could be fashioned at that time.

\* \* \*

As a matter of principle, I believe copyright holders should be compensated for the use of their products by cable systems. But regulations implementing that right need not take the form of exclusivity (prohibiting a cable system from carrying the program at all), as they do in these rules. Regulations could simply require the automatic payment of fees to the copyright holders, through a mechanism similar to that used by ASCAP for song writers. However, I am not convinced that the FCC is the appropriate forum in which such decisions should be made \* \* \*.

Finally, I would support regulations limiting subscriber charges, lease prices for leased channels, and rates charged by utilities for the use of their poles.

The model I have outlined ought to have the support of most people of independent mind—"free entrepreneurs" and "regulators"

alike. It serves the "public interest" and is wholly consistent with the profit motive. The problem, of course, is that it does not have the support of the most powerful broadcasters—a group whose political influence is unrivaled in our time.

The rules we adopt today vary from this model; in some cases they are quite similar, while in others they are based on a wholly different philosophical premise. But a persistent current, running throughout the rules, is an absence of adequate rationale, satisfactory justifications for departures from this model.

## II. August 5, 1971 and Its Aftermath

On August 5, 1971, the Commission, in a 6 to 1 decision, transmitted to Congress a "letter of intent," outlining its proposed rules for cable television. These rules were the result of exhaustive public hearings at which all positions were aired. The result reached was a far cry from the free enterprise model described above; it was itself a compromise, intended to adjust and protect various economic interests, and to accommodate "political realities." But it was a compromise we agreed was feasible, and one under which cable could at least get started.

Subsequent to our adoption of the August 5 letter, apparently not satisfied with the concessions made to each of them, broadcasters and copyright owners, with the support and encouragement of the White House and Chairman Burch (and the participation of cable interests), carved up the cable pie in a manner more to their liking. In its rules the Commission puts its stamp of approval on the results of these closed door sessions by implementing the precise terms of the industry's agreement.

\* \* \*

## III. Policy and Protectionism

The compromise and the rules promulgated by the Commission are a far cry from the free enterprise model of cable television. They are a patchwork of protectionism, designed to foster the interests of vested economic institutions at the expense of the public. Admittedly, under these rules cable will be able to make a very modest start in some of the smallest markets. It will not, however, grow with the speed and the impact it would have under less restrictive rules. The major failings of the compromise and the rules, as I see them, involve the exclusivity protection, the viewing standard, and leapfrogging.

Exclusivity protection. The rules provide for "run of the contract exclusivity" to stations in the top 50 markets, and two year exclusivity to stations in markets 51-100. That is, a program supplier can sell, and a station can buy, an "exclusive" right to a given program, and gain thereby the legally enforceable right to keep any



other station in the market from showing it. Now, says the FCC, the station can use that "exclusivity" to keep a cable system from importing that program from an out-of-market station as well. In other words, if a station in one of these markets has a contractual right to show David Frost or The Pawnbroker, no cable system in that market can import it from another city. Thus, although top 100 market systems are "permitted" to import distant signals, these signals will have to be blacked out whenever they carry programs covered under exclusive contracts. One of the principal services offered by cable—not just different programming, but alternative schedules for the same programming—is hereby simply wiped out. Further, programs or films subject to local "exclusivity" may not be imported by cable even though the local station may not show them for years.

Translated into concrete examples, based on current programming and currently existing contractual arrangements, a cable system in Charlotte, North Carolina, the forty-second market, would have to black out over 16 hours a day of programming from WTCG-TV, Atlanta, Georgia, if it chose to import that station. A system in Fort Wayne, Indiana, the eighty-second ranking market, would have to black out WGN-TV, Chicago, should it choose to import it, for over eight hours daily. Obviously, we can expect to find a rush to exclusive contracts in the future to permit local stations to take advantage of this FCC-sanctioned anti-competitive device.

Viewing standard. Television signals can often be picked up off the air from 60 to 100 miles distance in proper terrain with a good antenna. The advantage of cable is that it can bring subscribers *more* signals than they can get off the air. That's because the cable system has a taller, more powerful receiving antenna than most homeowners, and because it can relay signals by microwave over long distances (the same way the networks relay their signals from New York around the country to affiliates). Even with a little "rabbit ears" antenna, however, I can, for example, pick up Baltimore signals on my home receiver in Washington. One would assume, therefore, that cable systems would be permitted by the FCC to provide their subscribers *at least* what the subscribers can already pick up off the air. Right? Wrong. The rules contain a unique concept known as the "viewing standard." Cable systems in all cities with television stations are required to carry all stations licensed to cities within a 35 mile circle around them. That's no problem; most cable systems would want to do that anyway. The problem comes in defining what additional signals the cable may carry as, in effect, "local signals"—that is, signals that will not count as "distant" imported signals. I would define that as "viewable" signals whether technically defined as "predicted Grade B," actual Grade B, or most pragmatically, what the cable operator can, in fact, pick up with his an-

tenna. In my case, for example, those Baltimore signals would be considered "viewable," even though, in fact, one would generally watch the Washington signals whenever the same network program is being shown by both. (By contrast, the same network's news may be shown at different times in Washington and Baltimore, and being able to watch both cities' signals thereby increases the number of networks' news shows that may be watched.) This is decidedly not the FCC/industry "viewing standard." Its standard is not whether the station can be watched, but whether it is, in fact, watched. Such an inquiry is, of course, directed solely at protection of the local station's market revenues, not to the technological capabilities of cable. The details of "share" and "net weekly circulation" are spelled out in the majority's documents and are not necessary to our discussion. It's sufficient to note that the August 5 policy was that any station actually viewed by 1% of the local homes could be carried and that the "compromise" raises that to 2%—and thereby cuts in about half the number of stations that may be carried. (For example, none of those Baltimore signals I can now watch could be carried by a Washington cable system.)

**Leapfrogging.** The rules provide for the importation of a limited number of distant signals. However, although technologically capable of bringing in distant signals from anywhere in the country, if a cable system wants to bring in a signal from a city in one of the top 25 markets—obviously, the most desirable stations—it must reach out only to the *closest* two top 25 cities. Only when forced to black out one or both of those signals can a system go nationwide for programming. That is, it may not "leapfrog" closer stations in order to reach out for more distant (and desirable) stations.

The net result of this compromise—exclusivity, viewing standard, and leapfrogging—is to reverse the priorities we established in August. The exclusivity provisions in the top 50 markets were designed to protect the copyright holders, who derive over 80% of their profits from sales to stations in the top 50 markets. Under these provisions, virtually all attractive programming will be unavailable to cable systems during terms of contracts that theoretically can exist forever. \* \* \* This resulting lack of available programming will doom cable in the top 50 markets. It will literally have nothing to sell.

The exclusivity provisions in markets 51 to 100 are designed to protect broadcasters. The copyright holders don't really care about these markets, as they earn less than 20% of their revenues there. The broadcasters, vicariously protected in the top 50 markets by the interests of the copyright holders, managed to negotiate two year exclusivity in the remaining markets. \* \* \*

There is no exclusivity in the small markets and nonmarket areas. These were the cities "given" to the cable industry by broadcasters and copyright holders.

The compromise agreement not only makes little sense from a sound regulatory point of view, it's not even very sensible selfish protectionism. While, on the one hand, our August 5 plan expressly provided benefits to the big city systems by permitting them to import some signals, the compromise burdens these systems by imposing prohibitive exclusivity, viewing standard, and leapfrogging requirements.

There may be some truth to the argument that television stations in small markets can be injured economically through audience fragmentation when even one additional competitive station comes to town via cable. But it should be clear that stations in the major markets, already competing with large numbers of other television stations and other entertainment and news outlets, are less likely to be injured by an additional station or two. Yet it is in these major markets where the regulations inhibit cable, and the smaller ones where cable is free to develop. This result can only be explained in terms of the sheer political power that the history of the compromise represents.

#### IV. History and Failings of the "Consensus Agreement"

It is impossible to have a full understanding of the significance of the Commission's adoption of the consensus without first fully exploring the background of both the consensus and the rules.

In 1968 we imposed what amounted to a freeze on cable television development in the major cities—even though never denominated as such. We adopted procedures that we said would enhance the growth of cable, and which I believed would actually work. Under these procedures, no cable system in a top 100 market would be permitted to import distant signals unless it received retransmission consent from that station. This never worked.

The battle lines reformed around the issue of distant signals. *Fortnightly Corporation v. United Artists*, 392 U.S. 390 (1968) \* \* \* was read narrowly by the FCC and limited to its facts: that is, no copyright fee would be required for the showing on cable systems of local stations, but the question of distant signals remained unsettled.

The parties refused to budge. Broadcasters and copyright holders threatened to block any cable rules that permitted the importation of distant signals until copyright legislation was adopted—by exerting their impressive political influence in Congress, forcing Congressional hearings. Cable owners refused to support copyright legislation until the cable rules were adopted. The Senate Copyright Subcommittee refused to pass a copyright revision until the question

of cable was settled, and it refused to enact a separate copyright law for cable. The process ground to a halt.

Finally, the Commission, after months of thorough study, acting precisely as one would hope a quasi-legislative body should act, promulgated its August 5 letter. \* \* \*

Unfortunately, our historic example was not to be. Three months later, the industries had used their White House leverage to fashion their own cable policy, and the consensus agreement was born.

\* \* \*

The value we have trampled on comes to us from at least three different sources: the Administrative Procedure Act (APA), the philosophical concept of independent Congressional agencies, and the due process clause of the fifth amendment. The APA was designed to establish an orderly procedure by which administrative agencies can collect information necessary for them to make intelligent decisions. It provides an opportunity for all interested parties to comment on a proposal (in this case, cable television regulation), reply comments from those who wish to dispute what others have said, and public hearings in the event the agency feels they are desirable. After this process, the agency is free to consult or use any source it wishes. Thus, although adoption of the consensus agreement may not be prohibited by the APA, such an action is clearly inconsistent with the spirit of an Act which attempts to set out an orderly public procedure by which decisions of this nature are made. The FCC often issues proposed rule makings which are little more than superficial rewrites of the requests of one special interest or another. That is not the point. In this instance we went out of our way to canvass the full range of public and industry opinion *before* issuing our August 5 policy. For Chairman Burch *subsequently* to go into secret sessions with industry spokesmen, and accept their rewrite of the rules, and then force the industry version down the throats of his fellow Commissioners, Congress and public alike make an unnecessary cruel hoax of what started out as a fairly commendable undertaking.

Perhaps more serious is the fact that one major party to the compromise (described by some as the "glue" that holds the compromise together) was the Director of the President's Office of Telecommunications Policy. His participation, indeed the very existence of his Office, looms large as a threat to the independence of the FCC as an agency responsible only to Congress. This alternative voice tends to turn the Commission into a partisan body, by causing it to react on political rather than sound policy grounds; further, it tends to increase the rivalry between the President and Congress, a rivalry which is healthy only when it results in constructive dialogue as opposed to destructive bickering. And, no less serious, it legitimizes the Administration's carrot/stick approach to broadcasters, serving

as it does as an ambiguous, fear-inducing institutional outlet for the President's attacks and rewards to the media.

\* \* \*

The very existence of this compromise, and the fact that as a practical matter the Commission was obliged to either accept it in its entirety or not at all (with the necessary result of eliminating the prospects of *any* cable for months or years), made the act of putting out the rules based on this compromise as a Further Notice of Proposed Rule Making for public comment an exercise in futility. I tried to offer modest revisions of some of the compromise provisions to make them a wee bit more palatable; Chairman Burch would not budge. It was fait accompli or nothing. It would have been hypocrisy in the extreme to solicit comments suggesting changes we were not free to make. The only question that we, as Commissioners, had to decide, was whether we were willing to sacrifice a fundamental value of a democratic society—the independence of government officials from the influence of big business—in exchange for some cable television. The majority concluded that it was in the public interest to do so. I could not. \* \* \*

#### V. Conclusion: The Politics of Cable

\* \* \* The majority is saying, in effect, that a regulatory commission must consider not just the legitimate interests of all parties but also their political power. Its responsibility, says the FCC, goes beyond simply finding and promulgating the policy most "in the public interest." It must also consider the power of any of the powers before it to use political influence with the White House or Congress to render its policy ineffective.

The contrary position, of course is that a regulatory commission should simply declare the policy as it sees it and let the chips fall where they may in terms of subsequent actions by Congress, White House, or courts. \* \* \*

\* \* \* What were the politics of the August 5 policy?

Chairman Burch at one point declared to a House Committee that we could have a cable policy by the end of May 1971. That declaration prompted an immediate reaction from broadcasters, pressuring their Senators to hold up the policy one way or another. The Senators, in turn, communicated their constituent problems to Senator Pastore, Chairman of the Subcommittee on Communications of the Senate Commerce Committee. Senator Pastore, for whatever reasons, called the FCC before his Subcommittee in June 1971. At that time Chairman Burch outlined the substance of what became the August 5 policy. Senator Pastore indicated his desire to know the details of the policy before it was released. \* \* \*

\* \* \* Chairman Burch \* \* \* promised that the Committee could get an advance look at the final policy \* \* \* and that the

policy would be out before Congress adjourned (August 5, which I felt to be later than necessary). In no event do I think Senator Pastore's requests (for the hearing, and for the advance look at the policy) required that the August 5 policy be issued in anything other than final form. \* \* \* In any event, at that time we were promising the policy would be finally issued by December 31, 1971.

The question is, what would have happened had we issued that August 5 policy as final rule making sometime between August 5 and December 31? \* \* \*

Most significantly, Chairman Burch would have been going forward with a unanimous (or, at worst, nearly unanimous) Commission—something he clearly doesn't have for his current industry policy. \* \* \* No dissatisfied industry spokesmen could have argued to us, or to Congress, that they had not had an adequate opportunity to be heard—fully and fairly. Our 1971 hearings were widely known to have been among the best in the agency's history.

\* \* \* Broadcasters and copyright owners (and possibly even some cable operators) would have attempted to stop the policy. So what's new? They are trying to stop today's so-called "consensus" policy, too—giving further proof to the fact that there just ain't no such thing as a consensus between *all* the economic interests that are involved in this policy (as distinguished from those segments of industry represented at the closed White House meetings with Chairman Burch). What we're engaged in is predictions, game theory. So that's why I put all the chess men on the board. And when I look at them, and consider all the plays I've watched (and participated in) during the past 10 years in this town, what I *think* would have happened is that—after a few abortive phone calls and letters from the Hill, a threatened White House "task force," and some faulty court suits—the August 5 policy would have become the law of the land.

\* \* \*

## CONCURRING STATEMENT OF CHAIRMAN BURCH

### Prologue

Since the day I joined the Federal Communications Commission, on October 31, 1969, one of the most complex, controversial, and significant issues we have had to face has been the shaping of a regulatory program for cable television. In this we have been fortunate. Only rarely does a governmental body have the opportunity to take part in an act of genuine creation—in this instance, to turn a corner in communications technology that holds the promise at least of a whole new era of service to the American people. I believe the Commission's response has been in keeping with its opportunity: months of painstaking study, measured deliberation, culminating in regulatory craftsmanship of a high order. We have grounds for pride in a signal accomplishment.

During this same period of time, I and the other Commissioners have been exposed to an incessant barrage of vilification, willful misrepresentation, and left-handed slander issuing from our colleague, Commissioner Johnson. I have chosen in this Concurring Statement to respond in some detail to his latest polemic, not because it is particularly better or worse than the run of his performances but because of the unusual importance of the subject matter. And more, because he is essentially a performer, he is good copy. This means that his attempt to distort an act of creation into a public obscenity may end up becoming *the* story of the Commission's cable program. I find this insupportable and, charged as I am with leadership of this Commission (but speaking here for myself only), I am not about to let it go unchallenged.

There is another consideration that outweighs any reluctance I might feel about entering the lists. The end product of the regulatory craft is inherently unglamorous. It is all but incomprehensible to the layman. And because it generally melds a mixed bag of competing, conflicting options, a set of rules is a pale copy of the good, the true, and the beautiful. Responsible policy makers recognize the imperfections of their craft. They operate reluctantly but resignedly within the bounds of the possible.

Not so Commissioner Johnson. In the manner of demagogues, he elevates gross oversimplification to the level of a moral imperative. For him all differences are by definition *dis*-honest. Accommodation and compromise equal "sellouts". Any desire to preserve what we have—warts and all—can only be motivated by "greed". Commissioner Johnson's world is peopled wholly by white hats and black hats, and every role is type-cast in advance. I almost envy him the simplicity of his perspective. But I cannot wallow with him in the luxury of his irresponsibility.

And that, I am forced to conclude, is the explanation. Commissioner Johnson is preeminently an "irresponsible" in a policy-making milieu where complexities are the order of the day and simplistic answers no longer suffice. He practices the "scorched earth" technique—and, from his viewpoint, why not? Exploitable issues are what interest him, not practical results. He trafficks in bombast, not the undramatic reality of incremental progress. Today his target of opportunity is cable television—and if public comprehension of this emerging but largely untested technology is the necessary sacrifice, so much the worse for public comprehension. There is, as I suggest, a certain grandeur about his simplistic approach to a policy area so crowded with imponderables. But, for a Commissioner with undeniable capabilities and even charismatic powers, what a vast waste!

#### The Commission's Cable Program

Commissioner Johnson launches his critique of the Cable Television Report and Order from an irony, and it's downhill thereafter.

The irony, of course, is that he has the sheer brass to accuse the Commission majority of locking the door on cable's entry into the major television markets when it was they—three of whom cast their first key cable votes in the proceeding just concluded—who acted to institute a modest thaw and he—as recently as December 1968—who helped perpetuate a virtual freeze. That was the clear effect of past Commission decisions in which he participated, and he admits as much.

Like most newly-saved sinners, however, Commissioner Johnson would now move to the opposite extreme. His self-styled "market place" model contemplates unlimited distant signal importation—which, in his projection, would mean about 8-to-15 broadcast signals in the major markets—with little regard to impact on local television service. \* \* \*

Again, there is particular irony in Commissioner Johnson's concentration on distant signal importation and his only passing reference to cable's nonbroadcast services. Throughout the recent proceeding, he was an eloquent advocate for cable's unique capabilities—well beyond simply moving broadcast signals around—so much so, in fact, as to threaten cable's viability by loading on the burdens of "free" services. But now Commissioner Johnson is working the other side of the street, the better to chastise his colleagues for giving cable so few additional signals as to lock it out of the major television markets. Whatever else one can say about him, Commissioner Johnson is flexible.

But he is very nearly silent on the issue that has long been at the core of the controversy over cable's future—and that is cable's standing outside the competitive market for television programming. Commissioner Johnson acknowledges that copyright owners "should be compensated for the use of their product by cable systems" but argues that regulations to implement their ownership rights "need not take the form of exclusivity". Rather, they "could simply require the automatic payment of fees to copyright holders".

The question is, *what* regulations? Not this Commission's, to be sure, because we have no power to legislate copyright payments (and Commissioner Johnson agrees on this point). Regulation by the Congress then? But for reasons that I'll turn to in due course, and as Commissioner Johnson knows perfectly well, Congress has been unable to pass cable copyright legislation—and even assuming such legislation were passed, it clearly would take the form of exclusivity protection, not simply compulsory licenses, in the major television markets. \* \* \* There simply is no realistic prospect for the kind of Congressional regulation that Commissioner Johnson banks on—and he knows it.

\* \* \*



Commissioner Johnson is simply trying to slide past one of the gut issues of the cable controversy: that cable remains an uneasy outsider with respect to the programming market. And only when it is brought within that market, when its right to the use of its basic product is secure and regularized, only then will its future be unclouded. It is this issue that the Federal Communications Commission can neither resolve nor avoid. For this among many reasons, our August 5 Letter of Intent to the Congress was not and is not sufficient unto itself as a way to end the freeze and get cable moving.

#### The Consensus Agreement

The ultimate answer must finally be found in legislation, as the Supreme Court made clear in *Fortnightly*. But the obstacle to legislation has long been the ability of any or all the contending industries—cable, broadcasting, copyright—to block any particular legislative approach with which they might take issue. Congressional leaders have repeatedly called on the industries to reach some fair and reasonable accommodation. The Commission has also urged them to compromise their differences and pave the way for legislation, most recently in the August 5 letter. All these efforts have been unavailing.

After we outlined our regulatory program in the August 5 Letter, it seemed to me that the time was right for another try. Broadcasters were understandably nervous that this program would go into effect and the TelePrompTer case might go against them; cable was equally concerned about the outcome of litigation and the need to put itself on a solid base; and copyright owners were anxious to protect their major source of revenue in the top television markets. Then, too, the Office of Telecommunications Policy had a cable study under way, and all the principals were pressing their viewpoints in that forum. I joined OTP, therefore, in an effort to secure a consensus among the industries that would lead to resolution of the cable/copyright issue, de-escalate the level of violence, and thus greatly serve the public interest. There was no great secret about any of these developments. They were widely reported in the trade press. I would only point out, from my perspective as Chairman of the Commission, the practical difficulties of inviting a seven-member Commission to sit around the bargaining table or to take part in conference calls with the various parties.

I have already stated that my own motives were to find the basis for a consensus that would be reasonable, fair, and consistent with the public interest. I believe the November agreement meets the test. Using the August 5 Letter as a benchmark, there were two modifications in our earlier plan and one major addition—and I want to examine each in turn.

First, there was a change in the “viewing standard” (the test for defining a nearby-market signal as in effect a local signal) from a one

percent audience share to a two percent, with respect to independent stations. I cannot believe that Commissioner Johnson or anyone else seriously believes this change undercuts our August 5 proposal. It affects only 11 core cities and 16 signals, and cable's future in the major markets clearly does not turn on such (to use the Commission's own phrase in the Report and Order) "variations on a theme". Commissioner Johnson uses the example of Baltimore signals in Washington, D. C. But the fact is, there is no variation at all as to the signals that may be carried in the Baltimore-Washington markets, whether the viewing standard is set at one or two percent.

With respect to leapfrogging (the carriage rules that in general favor closer rather than more distant stations), the August 5 Letter imposed one set of restrictions and the consensus agreement another—both of them reasonable, and both of them a mixture of pluses and minuses from the viewpoint of broadcasters and cable systems. It is important to note that when a distant signal must be blacked out because of exclusivity protection, we have imposed no restriction on point of origin for substitute programming. \* \* \*

The addition to our August 5 proposal, and the core of the consensus agreement, is the exclusivity protection that will be afforded to non-network programming—protection for local broadcasters against distant stations and, more fundamentally, for the owner's rights to control the use of his product. This does represent a change from August 5, where we recognized the issue but promised merely to study it further. And, in my view, it represents a marked improvement. In the first place, exclusivity should be dealt with by the Commission, not left to Congress, because it is a complex area of regulation that will require revision and refinement as we accumulate experience with the effect of our rules. Moreover, it is important—both to cable and to broadcasting—to protect the copyright owner's continued ability to produce programming; and his right to sell "exclusives" in the major television markets is a key consideration in this respect. But after one terse reference to the owner's rights Commissioner Johnson simply drops that component of the public interest equation.

\* \* \*

Commissioner Johnson is quite right that cable will have no easy time of it in the very largest of the top markets where there is already a great deal of television service. That is true under the rules just adopted. And it was true under the terms of the August 5 proposal. In markets like New York and Los Angeles, for example, we have already recognized that a few additional television signals may not be enough to sell cable—that its ability to get started in such markets will be largely dependent on the new, nonbroadcast services that are unique to cable, and on its ability to serve select audiences. But what I do not comprehend is how Commissioner Johnson can equate the

opening to cable of over two-thirds of the top 100 markets with "a very modest start in some of the smallest markets". He is wrong. He must know it. And he must know, too, that he is distorting reality—complex as it may be—just to grab a few flashy headlines.<sup>7</sup>

\* \* \*

As one last shot, Commissioner Johnson asserts that we have trampled on the rights of the public to full participation in our processes. But on all the matters addressed in the consensus agreement—exclusivity, leapfrogging, overlapping market signals—the Commission gave full notice of the "subject matter and issues", as required by the Administrative Procedures Act, and full opportunity for public comment. For several years running, we have been inundated with comments, studies, analyses, and projections of probable impact.

But none of these comments gave us a detailed blueprint of cable regulations. That the Commission had to craft for itself, out of the public input and its own experience. The August 5 Letter outlined such a reasonable blueprint. And Commissioner Johnson does not argue that we should have put those proposals out for public comment—far from it. I agree. But so too did we have full public comment when we had to consider the details of the November consensus agreement. We had no sudden need for additional comment on such matters as leapfrogging or the viewing standard or even exclusivity. Most important, the fundamental judgment to be made—whether implementation of the agreement would contribute to a resolution of the underlying controversy—was a quasi-legislative policy determination. And here comment would not have helped: this was a judgment for each Commissioner to make, in his own wisdom and conscience.

\* \* \*

#### CONCURRING STATEMENT OF COMMISSIONER RICHARD E. WILEY

\* \* \*

Edmund Burke has said: "All government—indeed \* \* \* every prudent act—is founded on compromise." Ultimately, I have been persuaded that the adoption of this compromise package for the further development of cable television in this country is, administratively, a prudent act. The choice realistically confronting the Commission, after all, was this particular program—or none at all. And faced with this choice, I have selected the former with certain personal reservations \* \* \*.

7. The extent of his success is plain. The New York Times of February 4, 1972, for example, ran its cable story under the two-column head, "New Rules on Cable TV Limit Growth in

Cities". (Interestingly, The Washington Post—same day, same rules—headlined its story, "FCC Opens the Door to Let Cable TV Into Major Cities".) \* \* \*

DISSENTING STATEMENT OF COMMISSIONER  
ROBERT E. LEE

\* \* \*

For those who disagree with today's action, who quarrel not with the glittering promise of cable but rather the *means* selected today to achieve that goal, the implications of today's action are \* \* \* profound. The otherwise vast potential for development of UHF television, a potential the public has created through the investment of literally millions of dollars in all-channel receivers, is sharply curtailed. That money, which the Congress at this Commission's urging required the public to spend, has in essence been wasted. Both the quality and the quantity of local television broadcast service will be sharply reduced in future years from what it otherwise would be. Whether cable TV can supply services of its own (program originations) to make up for this deficiency is conjectural. More importantly, that is a moot question insofar as those who will not have cable TV are concerned. They include the many, perhaps millions, who cannot afford it and those living in sparsely settled areas where we have no reason to believe that nonsubsidized cable will ever develop.

Much of the importance of today's action lies in the change in basic regulatory policy which it reflects. The Commission began regulating cable TV carriage of broadcast signals in 1965 because of a concern that otherwise cable operations would lead to an impairment of broadcast service. The Commission's jurisdiction to regulate CATV was sustained by the Supreme Court precisely because we deemed such regulation to be essential, given our responsibility for the development of broadcast service. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Then the issue was, what is needed in the way of regulation to insure that the public does not suffer a loss in existing or potential broadcast service?

Now the issue is, what must cable be given in the way of opportunities to use broadcast signals in order to grow and prosper, and how much can be given to cable operators without *unduly* or unnecessarily impairing broadcast service to the public. \* \* \*

It is most unfortunate that action as important as today's is marred by a serious procedural flaw: The absence of an adequate opportunity for comment from the public on the new rules. The new rules adopted today bear little resemblance to the initial Commission proposals of December 1968 and July 1970 which initiated the proceedings from which this decision stems. The public has never been invited to comment on these new provisions [concerning, for example, program exclusivity requirements] and despite a massive record of written and oral comments much of what is done today can only be described as guesswork. \* \* \* The Report and Order argues that

in view of the "consensus agreement" \* \* \* further comment from the public is unnecessary: The compromise must be taken in its entirety or rejected and on that issue the broad consensus among the industries makes it unlikely that further comment would be helpful. This is not persuasive. Many within and without the affected industries do not accept the compromise and they should be heard. Further, the new rules clearly do not incorporate the consensus agreement in its entirety and parties to the compromise might very well have helpful views on whether the new rules reflect their understanding of the compromise. They too should be heard.

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#### NOTES AND QUESTIONS

1. (a) Who has the better of the difference between Chairman Burch and Commissioner Johnson concerning the "public interest" in the "consensus agreement"? That is, when the agency has once formulated its notion of what the public interest requires, as the FCC had in its Letter of Intent (August 5, 1971), does it also serve the public interest when it later promulgates a different regulatory scheme devised to win the allegiance of important industry groups in its effort to obtain related (copyright) legislation? Would you give the same answer if the FCC had made concessions to, say, the broadcast industry in return for its legislative support of an unrelated Commission position, e. g. on CB radio license fees? Or if the industry's quid pro quo took the form of editorial support for a Commission position?

(b) Commissioner Johnson concedes that nothing in the process by which the consensus agreement was hammered out at the White House violated the terms of the Administrative Procedure Act, yet finds it "clearly inconsistent with the spirit of an Act which attempts to set out an orderly public procedure by which decisions of this nature are made." p. 369, *supra*. Assuming (1) that Chairman Burch's political perception was accurate—that each of the concerned industries did indeed have the power to prevent the passage of cable copyright legislation it found unsatisfactory; (2) that "Congressional leaders" had encouraged the industries to reach some accommodation, p. 374 *supra*, and (3) had injected themselves into the process of FCC policy-making, what should the FCC have done? Was Commissioner Johnson's suggestion practical? What are the specific defects of the course it followed? Are they offset by the remarkable degree to which explicitly political decision-making was in this case, after all, ventilated in public?

(c) The process by which the consensus agreement was reached is analyzed in detail in R. Berner, *Constraints on the Regulatory Process* 39-50 (1976). With respect to the incentives for the various signatories to the consensus agreement, Berner observes first that

“the changes this compromise proposed in the August 5 letter were largely at the expense of the cable industry, which stood to lose most if no compromise could be reached, and the controversy were to move, as threatened [by the broadcasting industry], into the congressional communications subcommittees,” where the cable industry would confront powerful lobbying by the broadcasting industry. Broadcasters, however, also wished to avoid this confrontation in the Congress at that time “so they could concentrate their lobbying energies on obtaining favorable license-renewal legislation.” Program producers, who were less well organized than either broadcasters or cable operators, sought to improve their position from the August 5 proposal, which allowed free retransmission of their programming. Finally, a majority of the Commission simply found that, if they were to avoid substantial delay in getting a cable policy settled due to further congressional involvement, “account was best taken of the special concerns of those interests whose position had political backing”—principally the broadcasting industry.

Cf. R. Park (ed.), *The Role of Analysis in Regulatory Decision-making: The Case of Cable Television* 131 (Rand Corp. P-4929, 1973):

By thus affecting perceptions of the benefits and costs of cable growth, analysis undoubtedly had some effect on the rules adopted. For if those rules were (inevitably) much more the result of compromise than of analysis, still the compromise was hammered out against a background of perceptions of the likely effects of the policies adopted. By strengthening perceptions of cable's possible benefits and damping fears of its offsetting harms, analysis resulted in a compromise outcome that is (to some unknowable degree) more encouraging to cable growth than it otherwise would have been.

2. On reconsideration of the CATV Report and Order the FCC adhered in almost all respects to its original views. One exception related to the cable carriage of network programs from distant stations when those programs were not cleared for broadcast by the local network affiliate. At the instance of cable interests, the Commission agreed that such programs could be carried on the cable, since this would further its policy of assuring the availability of full network service in all communities served by cable. The Commission thought this exception to be of particular importance “in those cases where the programs not otherwise available include network news or other public affairs programming.” 36 FCC 2d 326, 333, 25 R.R.2d 1501, 1509 (1972).

Network affiliates will frequently delay the broadcast of a news or public affairs show scheduled for network presentation in prime time. Typically they will substitute entertainment fare that they

have procured, and broadcast the delayed show in "fringe" time, such as Saturday afternoon or Sunday morning. In this circumstance, should the cable system be permitted to carry the signal of a distant network affiliate that broadcasts the program as scheduled in prime time? Is it permitted to do so? See pp. 714 et seq., *infra*.

3. (a) On reconsideration the Commission did think better of the precise requirement it had imposed on new systems in the top 100 markets and decided to moderate them. Accordingly, it suspended the expansion of channel capacity rule, ¶ 120 *supra*, until March 31, 1977, when access requirements were to become applicable to existing systems in major markets, and required that access channels be provided prior to that date only to the extent that a cable system imported broadcast signals into the market. Thus, the carriage of one distant signal was to be complemented by the provision of a public access channel, that of a second by an educational access channel, and a third by a governmental access channel; additional imported signals were to be complemented by additional channels for leased access.

(b) Before the general rules were scheduled to go into effect in 1977, however, they were relaxed further. In May, 1976, the Commission (1) deleted the requirement that major market systems have the capacity to provide one non-broadcast channel for each channel used to distribute broadcast programming; (2) exempted systems with fewer than 3,500 subscribers from all capacity and access rules but (3) applied all such rules to systems with more than 3,500 subscribers regardless of the size of their market; (4) required the provision of four designated access channels only from those systems with sufficient activated capacity to provide them; (5) required the expansion of access channels, up to activated channel capacity, based upon demonstrated use; and (6) extended the March 31, 1977 deadline for compliance with the 20-channel construction requirement to June 21, 1986 for most existing systems. Cable Television Channel Capacity and Access Channel Requirements, 59 FCC 2d 294, 37 R.R.2d 213 (Dkt. No. 20508, 1976) ("1976 Report"). Commissioner Robinson, who would have gone "somewhat further than the majority in removing the burdens of the 1972 rules," characterized those requirements as "the product of expectations generated in cable's go-go years when the benefits of cable were sold as peddlers once sold Lydia Pinckham's Vegetable Compound, a veritable elixir for the ills of our time." 37 R.R.2d at 250.

(c) *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 42 R.R.2d 659 (8th Cir. 1978) (*Midwest Video II*), cert. granted, 47 U.S.L.W. 3187 (No. 77-1575). On review of the 1976 Report, the court of appeals held that the mandatory access, channel capacity, and equipment regulations of the 1976 Report (and, a fortiori, the more extensive requirements of the 1972 Cable Report) exceeded the

Commission's jurisdiction over cable matters "reasonably ancillary" to broadcasting. The court stated (footnotes omitted):

Because the free public access concept, on newly constructed, separately designated channels, has nothing to do with retransmission of broadcast signals on existing channels, the relationship or interaction between cable and broadcast systems present in *Southwestern* and *Midwest Video I* [1] is totally absent here. The present rules are not designed to govern some deleterious inter-relationship of cable systems to broadcasting, or to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into activities not engaged in or sought; activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting. *Id.*, at 1038.

To be 'reasonably ancillary,' the Commission's rules must be reasonably ancillary to something. [But] the Commission has no jurisdiction within its statutory grant, under the broadest view of that grant, to force the present free public access rules upon broadcasters, or to make broadcasters into common carriers. Because \* \* \* the 1976 *Report* regulations are an attempt to do just that to cable systems, they can fare no better. The Commission having no power to impose these access rules on either broadcast or cable systems, the 1976 *Report* regulations cannot be 'reasonably ancillary' to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. *Id.*, at 1040.

True, the Commission acted here with a view toward expanding what it considers the goals of the First Amendment. \* \* \* [B]ut we deal here with the Federal Communications Commission, not the Federal First Amendment Commission. We are aware of nothing in the Act \* \* \* which places with the Commission an affirmative duty or power to advance First Amendment goals by its own *tour de force*, through getting everyone on cable television or otherwise. Rhetoric in praise of objectives cannot confer jurisdiction. *Id.*, at 1042.

Has the court adequately distinguished *Midwest Video I*?

4. *Signal carriage.* The Commission has amended its CATV regulations with respect to signal carriage in two important respects since 1972.

(a) *Leapfrogging.* First, the leapfrogging provisions of the original regulations were deleted except insofar as to require that whenever a major market cable system is permitted to import three distant-independent stations, one of them must be a UHF station. Report



and Order Dkt. No. 20487, 57 FCC2d 625, 35 R.R.2d 1673 (1975). This action was taken, according to the Commission, in response to the (1) irrational and (2) costly but (3) unanticipated consequences of the anti-leapfrogging approach. Specifically addressing the former criticism, the FCC noted that some CATV systems were required to import signals from out-of-state markets because they were geographically somewhat closer than in-state markets that the cable operator would have preferred to carry. Western New York CATVs, for example, could import independent stations from either Pittsburgh or Cleveland, but not from New York City; northeastern New York CATVs could choose among Boston and Hartford, but not New York City, signals. Compare §§ 92-93 of the Report and Order, *supra*.

With respect to costliness, the Commission noted that microwave relay routes would sometimes have to be constructed in order to import an eligible signal while existing routes would have given inexpensive access to a more distant, but therefore ineligible, station. As a result, the cost of constructing new microwave routes would either be incurred and ultimately borne in some (unknowable) proportion by the CATV system and its subscribers, or the construction would be foregone and the cost implicitly borne, again by both parties, in the loss of the opportunity to provide and receive an additional channel.

There were also situations, the Commission realized, in which a cable system allowed to import two or three signals under the original rules would have had to take them from that many different markets. For example, the two top-25 markets closest to St. Louis are Kansas City and Indianapolis, each of which has only one independent station. Since they are in different directions, a St. Louis CATV would have incurred much greater transmission costs (had routes been available) to import these two signals than it would have to import two stations from Chicago.

In the 1972 Report and Order, the Commission had justified its anti-leapfrogging policy by reference not only to the policy favoring localism but also to its fear of the "risk that most cable systems would select stations from either Los Angeles, Chicago, New York, or one of the other larger markets. There would then be no general participation by broadcast stations in the benefits of cable carriage." § 92, *supra*. By 1975, however, the Commission had concluded on the basis of a regression analysis that "increased audience [by virtue of distant cable carriage] does not increase a station's revenues." 57 FCC2d, at 640, 35 R.R.2d, at 1690. This was in turn related to the issue of localism; since the expected relationship between audience and revenues did not exist in the world of cable, the "economic base for the creation of stations of clearly superior audience appeal will not be developed" and poses no threat to undermine local service.

Is there a plausible explanation for the FCC's inability to find a relationship between station revenues and cable carriage? Consider the following factors suggested by the Commission: (1) the operation of its exclusivity rules, causing syndicated programs to be deleted in the top-100 markets; (2) the local nature of some advertisers' needs; (3) the difficulty a broadcaster has in documenting to advertisers that significant additional exposure is available on the cable; and (4) the possibility that limited cable penetration in the distant community might not make cable an adequate substitute for broadcast exposure in that community. Or perhaps the Commission was simply premature in reaching any conclusion after limited experience. Consider:

The Motion Picture Association of America petitioned the FCC to reconsider whether "the development of cable super stations using satellite delivery systems is in the public interest," citing the potential impact on local service when "super stations with super expensive programming made possible by a national advertising base" are imported into small markets. The Association, whose members are concerned that losses in TV exhibition fees will exceed CATV copyright payments under the new Copyright Act, see ¶ 7, *infra*, noted that 465 cable systems in 27 states are now authorized to carry WTGC, an Atlanta UHF station, to more than 850,000 subscribers; an additional 207 systems with 370,000 subscribers have applied for such authority. Broadcasting (Aug.29, 1977) 20. The petition was denied. 42 R.R.2d 1441 (1978).

(b) Special formats. The other significant change in the signal carriage rules concerns stations with special formats. The 1972 Report and Order had encouraged rather than restricted cable carriage of two favored station classes—educational and foreign language stations—through the simple device of not counting them against the allowable number of imported signals. See ¶¶ 94-96, *supra*.<sup>\*</sup> Religious and other specially programed stations, such as those with automated news, weather, and stock ticker services, then sought similarly favored treatment on the ground that they, too, generally attract select, small audiences and therefore would not be carried by a cable system if counted against its distant signal quota. The FCC first rejected both of these claims to favored treatment. Unlimited carriage of religious programing, it said, would have a significant impact on competing local broadcast efforts, a fact distinguishing it from foreign-language programing, which is not generally available; specially programed stations shared this characteristic, *viz.*, competing with local broadcasts, and entailed the additional complication of requiring a definition. 36 FCC2d, at 334, 25 R.R.2d, at 1510.

\* The importation of a non-commercial educational signal could be protested by a similar local station. See, e. g., Public Cable Co., 40 R.R.2d 981 (1977) (two percent expected loss of revenue through subscriber diversion sufficient

to prohibit importation since loss would be directly reflected in programming expenditures, there being no "cushion of profits" to absorb the loss).

Then, in 1975, the Commission noticed, and in 1976 adopted, a rule to define and exempt from the distant signal quotas cable carriage of "specialty stations," in the interest of enhanced diversity. First Report and Order, Dkt. No. 20553, 58 FCC 2d 442, 36 R.R.2d 781 (1976); see 47 CFR § 76.5(kk). In four years' experience with cable carriage of educational and foreign-language stations the FCC had granted very few local broadcaster requests for relief from imported competition; all of the specialty stations, moreover, were themselves "struggling UHF stations." The FCC went on, however, to permit cable importation of individual programs—a practice known as "cherry-picking"—which enables the cable operator to select specialty format shows from different sources and, in effect, program as attractive a channel as the rules and availability will allow.

Commissioner Robert E. Lee dissented because of his "concern about small local stations offering specialty programming—or independent programming competitive with the non-specialty programming of the 'specialty' stations." He found it "little consolation to say that 'specialty' stations will benefit from expanded cable television carriage." Citing the absence of such benefit in the regression analysis concerning the anti-leapfrogging rules, he concluded that "if there is benefit from expanded cable television carriage \* \* \* [it] should not be limited to 'specialty' stations [but] made available to all independent stations, especially UHF stations, by enlarging the mandatory carriage zone for such stations." 36 R.R.2d, at 801.

(c) In October, 1977 the New Jersey Board of Public Utilities, Office of Cable Television petitioned the Commission to waive its rules respecting distant signal carriage for all cable systems in the state in order to ease "the severe lack of adequate New Jersey television coverage." Referring to the Commission's order in Dkt. No. 20350, supra at 187, requiring New York and Philadelphia television stations to provide "local" service to New Jersey, the Board points out that the signals of these stations reach only half the state between them. Residents in the central part of the state receive no VHF service over the air and some of them are not served by cable either. If distant signal carriage were entirely deregulated, it argues, cable systems would have an increased incentive to extend service to the central part of the state, and residents already served by cable would be enabled to receive the New Jersey-oriented programming originating in both major markets rather than just one, as at present. Moreover, "[i]mportation of these distant signals throughout the state could have no adverse impact on local broadcast service, as New Jersey's only 'local broadcast service' is that which is provided by the stations in the two major markets."

Is there a conflict between the Commission's distant signal carriage rules and its service-to-New Jersey policy? If so, how should it be resolved? (The Commission has instructed the staff to draft

an order waiving the signal carriage rules to permit unlimited carriage of New Jersey stations and the New Jersey news, public affairs, sports, and cultural affairs programming of New York and Philadelphia stations. Broadcasting, July 31, 1978, at 22.)

5. Both the deletion of the anti-leapfrogging rule and the amendment allowing liberal importation of specialty stations depart from the terms of the consensus agreement respecting signal carriage, and therefore economic impact. What do these developments suggest about the FCC's 1972 approach to the consensus agreement as a 'single package,' on an all-or-nothing basis? Is the Commission in any way obliged to maintain the consensus by procuring industry consent to alterations in the balance struck? Cf. Popham, *The 1971 Consensus Agreement: The Perils of Unkept Promises*, 24 *Cath.U.L. Rev.* 813, 828 (1975) (impact on FCC's credibility, ability to promote compromise).

6. In a prescient and sensitive analysis of the process culminating in the 1972 Cable Report, Professor Monroe Price distinguishes between the rules bargained out in the consensus agreement, such as those governing distant signal carriage and exclusivity, on the one hand, and the rules not subject to industry bargaining, such as those for access, basic channel capacity, and automatic expansion of capacity, which were, in Commissioner Robinson's phrase, "the product of expectations generated in cable's go-go years" (note 3(c), *supra*). Price correctly viewed the latter rules as "destined to be short-lived" and asked "what hypothesis can be drawn"?

Perhaps it is this: where non-bartered rules are imposed upon one set of economic competitors by the FCC, erosion is likely if (1) maintenance of those rules is marginally costly and (2) there is no effective constituency to press for continued application of the rules. And \* \* \* under most circumstances the only effective constituency is another economic competitor.

Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 *Va.L.Rev.* 541, 562 (1975). (This article also contains extensive references to and a review of the literature of "the go-go years.")

(a) Is the Price hypothesis testable, in principle? Is it consistent with the fates of the other non-bartered rules you have encountered? Consider the Commission's policies and rules concerning the local service obligation; media concentration and cross-ownership; the PTAR; and unique radio formats. Price himself suggests watching the future of the FCC's attitude towards children's television service, which is dealt with in Chapter VIII, *infra*.

(b) If Price is right, what is the meaning-in-fact of "the public interest" standard in the Communications Act? What is the signifi-

cance of the rise of organized communications "public interest" groups?

7. See generally, Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 *Bell J.* 98 (1972).

8. The Copyrights Act, P.L. 94-553, was passed in October, 1976. The provisions related to cable television are described in the following excerpt from H.Rep. No. 94-1476, 94th Cong., 2d Sess., 88-91.

#### SECTION 111. SECONDARY TRANSMISSIONS

##### *Introduction and general summary*

The complex and economically important problem of "secondary transmissions" is considered in section 111. For the most part, the section is directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works. However, other forms of secondary transmissions are also considered, including apartment house and hotel systems, wired instructional systems, common carriers, nonprofit "boosters" and translators, and secondary transmissions of primary transmissions to controlled groups.

\* \* \* [T]here is no simple answer to the cable-copyright controversy. In particular, any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to

negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined \* \* to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

The compulsory license is conditioned, however, on certain requirements and limitations. These include compliance with reporting requirements, payment of the royalty fees established in the bill, a ban on the substitution or deletion of commercial advertising \* \* \* Failure to comply with these requirements and limitations subjects a cable system to a suit for copyright infringement and the remedies provided under the bill for such actions.

In setting a royalty fee schedule for the compulsory license, the Committee determined that the initial schedule should be established in the bill. It recognized, however, that adjustments to the schedule would be required from time to time. Accordingly, the Copyright Royalty Commission, established in chapter 8, is empowered to make the adjustments in the initial rates, at specified times, based on standards and conditions set forth in the bill.

\* \* \* The Committee determined, however, that there was no evidence that the retransmission of "local" broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in "distant" markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.

By contrast, their transmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.

In implementing this conclusion, the Committee generally followed a proposal submitted by the cable and motion picture industries, the two industries most directly affected by the establishment of copyright royalties for cable television systems. Under the proposal, the royalty fee is determined by a two step computation. First, a value called a "distant signal equivalent" is assigned to all "distant" signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network,

and educational stations because of the different amounts of viewing of non-network programming carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent. These values are then combined and a scale of percentages is applied to the cumulative total.

\* \* \*

All the royalty payments required under the bill are paid on a semi-annual basis to the Register of Copyrights. Each year they are distributed by the Copyright Royalty Commission to those copyright owners who may validly claim that their works were the subject of distant non-network retransmissions by cable systems.

Based on current estimates supplied to the Committee, the total royalty fees paid under the initial schedule established in the bill should approximate \$8.7 million. Compared with the present number of cable television subscribers, calculated at 10.8 million, copyright payments under the bill would therefore approximate 81 cents per subscriber per year. The Committee believes that such payments are modest and will not retard the orderly development of the cable television industry or the service it provides to its subscribers.

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(a) The text of Section 111 appears *infra*, at 685. It is explicated in Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L.S.L.Rev. 545 (1977); Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 Cath.U. L.Rev. 263 (1978).

(b) Does it follow, as the House Report suggests, that because negotiations between each copyright owner and each cable system would be impractical the government should "establish a compulsory license" for cable retransmission? For the manner in which music performance royalties are collected from broadcasters and others through ASCAP and BMI, which are voluntary associations, see *CBS, Inc. v. American Society of Composers, Authors, and Publishers*, 400 F.Supp. 737, 741-45 (S.D.N.Y., 1975).

(c) Is there any justification for requiring that cable systems retransmit programs without substitution or deletion of commercial advertising? \* Is the Committee disregarding the FCC's position that distant presentation of advertising is of no economic significance to the originating station?

(d) Is it always true that the retransmission of network programming in distant markets does not injure the copyright owner? In what situation(s) might the harm accrue?

\* Cf. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976) (broadcast of edited version of "Monty

Python's Flying Circus" enjoined, where edited version impaired the artistic integrity of the work).

(e) Under the new Copyrights Act, §§ 111(d)(2)(C)–(D), the royalty fee payable by a cable system increases, as a percentage of gross receipts, as such gross receipts increase, i. e., like a progressive tax schedule. What would be the most theoretically appropriate standard for determining cable copyright royalties? The most easily administered?

(f) Does enactment of a copyright regime for cable alter the location of the “outer limits” of the Commission’s jurisdiction under *Midwest Video I*? Does it undermine the Commission’s rationale for regulating signal carriage (beyond prohibiting simultaneous duplication of network programming)? For subjecting cable systems to the exclusivity provisions negotiated between syndicated program suppliers and local broadcasters?

See Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 U.Cinn.L.Rev. 427, 510 (1975):

There is \* \* \* a fundamental difference between the economic perspectives of broadcasters and programmers. Market fragmentation does not pose a direct threat to copyright interests. Market fragmentation impairs copyright revenue only to the extent it allows for unremunerated program exposures.

Compare Besen, *The Economics of the Cable Television “Consensus,”* 17 J.L. & Econ. 39 (1974), with Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 Harv.L.Rev. 1820 (1970).

### C. PAY CABLE AND SUBSCRIPTION TELEVISION

In 1968 the FCC announced its program for the regulation and development of over-the-air subscription television (STV) service. The Commission would authorize one regularly licensed broadcaster—an incumbent or a new applicant—in each community located entirely within the Grade A contour of five or more commercial stations, to offer STV on a supplemental basis. The authorized broadcaster would still have to offer at least 28 hours of “free” programming per week, but further programming could be broadcast using a scrambled signal that could be unscrambled only by viewers who leased a device from the broadcaster for that purpose. In order to assure that the STV programming would also be supplemental to broadcasting in the sense that it would offer fare not otherwise available over the air, STV was subjected to extensive restrictions on the movies and sports events that it could show (and series programs were initially banned altogether). *Subscription Television Service*, 15 FCC 2d 466, 14 R.R.2d 1601 (Dkt. No. 11279, Fourth Report and Order, 1968); 19 FCC 2d 559, 17 R.R.2d 1509 (Fifth Report and Order, 1969). See 47 CFR § 73.641 et seq., *infra*, at 695.



STV service is just now getting under way in a few cities, but prospects are for its rapid expansion; applications have been approved in nine cities, including Philadelphia (on a new UHF station) and Los Angeles and Detroit (on existing UHF's).

The rules governing programing for STV were soon applied to "pay cable" as well. That service is provided on a cable channel to those cable subscribers who pay an additional fee to receive it. As of 1977, 1.6 million cable subscribers (about 15-20% of the total) took pay cable service from the 600 cable systems offering it. They paid an average monthly fee of \$8, in addition to the \$6 average for basic service. Broadcasting, January 2, 1978, at 50; May 1, 1978, at 32.

The significance of pay cable, and its regulation, is analyzed in the following congressional study.

### CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE

Staff of the Subcomm. on Communications of the House Interstate and Foreign  
Commerce Comm. 94th Cong., 2d Sess. 61-68 (Subcomm. Print 1976).

*Background.* We have already noted the unusual character of the commercial television industry. Instead of selling programming directly to viewers, broadcasters currently sell viewers to advertisers. Pay cable offers viewers the opportunity to express their program preferences more directly and, given the channel capacity of a cable system, to enjoy a much more diverse television service. It extends the exciting prospect of making special interest programming widely available. Also, it promises to give the cable home access to a much wider variety of the kinds of programming currently offered on over-the-air television, for example, feature films and sports.

The technical ability to make special interest programming available results from the multi-channel capacity of cable. Just as important, though, is the economic ability of the pay cable system to support diverse programming. The value of a commercial television viewer to an advertiser is measured in tenths of a cent. Consequently, it takes millions of viewers to support each program. With a direct payment from the viewer, however, a much smaller audience can support any particular program. Additionally, because many channels are being programmed, a decision to serve a minority does not mean that the rest of the audience is lost.

The features which make pay cable attractive also make it extremely controversial. The debate revolves around the danger of *siphoning*, i. e., the potential ability of pay cable programmers to outbid conventional television broadcasters in the programming market and thus deprive those that do not have access to pay cable, for economic or geographic reasons, of the programming they now enjoy. Siphoning is a word used by broadcasters, no doubt because it evokes

the image of a cable operator robbing the broadcaster of his programming. In fact, siphoning does not refer to anything being confiscated from the broadcaster, but rather to the fact that if pay cable is allowed to compete with over-the-air television for programming it might sometimes be able to offer the copyright owner a higher price. This is what took place when television was able to outbid radio for programming, even though part of the audience—those who could not afford television sets or were outside television service areas—was denied access to the programs.

This is not to say, however, that siphoning is not a problem worthy of regulatory concern and attention. Quite clearly, the public interest would be disserved if siphoning of some types of programming occurred. The Commission has properly stated that if, for example, pay cable obtained the exclusive right to present the Super Bowl or the World Series, such an action would not serve the public interest. For, instead of the widest possible dissemination of these events, they would be restricted to a limited audience characterized both by access to pay cable and the ability to pay for the service. \* \* \*

But pay cable is of great importance to cable television's development in major markets. Because broadcast service is generally good in the major urban areas, pay cable programming is the service most likely to make urban cable systems attractive to potential subscribers and, therefore, economically feasible. \* \* \*

It follows that the regulatory pattern to which pay cable must respond has had and will continue to have a significant impact upon cable's development in the major markets.

The 1970 FCC action. In 1969 the FCC issued its *First Report and Order* in Docket No. 18397, concluding that program origination on cable "free from limitations as to types of programming" is in the public interest because "the end result will be significant added diversity for the public." Upon Petition for Reconsideration filed by broadcast interests, the Commission, in 1970, imposed the anti-siphoning rules that had been adopted for over-the-air subscription television.

The procedural and substantive propriety of this extremely restrictive action was challenged by a number of parties including the Department of Justice in Petitions for Reconsideration. The Commission took no action for two years and when it finally acted in July, 1972, it technically denied the Petitions, instituted a broad inquiry into the rules (Docket No. 19554), and promised to reach a prompt decision in the matter.

Although this matter was seemingly ripe for expedited decision in 1972, the Commission delayed resolution for another three years to receive further comments twice and to hear oral argument twice. On March 20, 1975, the Commission issued its decision, almost five years after it adopted the 1970 restrictions.

*The 1975 FCC action.* It was therefore particularly incumbent upon the FCC, after such undue delay, to take action that would remedy the situation by removing unwarranted restrictions. But when the Commission acted in 1975, it fell short of such a standard.

The 1975 action purports to deal only with the siphoning issue, since the Commission had concluded that the economic impact of pay cable on conventional television would not undermine the health of the commercial system. Other more recent studies have reached the same conclusion. Indeed, statistics establish the overall financial well-being of the broadcasting industry, and that pay television is an emerging new service that faces competition of the entrenched commercial broadcasting system. In these circumstances, to protect the networks and the conventional television system against competition from pay television is to follow a wholly unwarranted "protectionist" course.

Siphoning should be the sole concern of the Commission. When the Commission has gone beyond that concern, it has been acting against the stated policy in its Report, and further, has acted unconstitutionally. Presentation of programming such as feature films is plainly entitled to First Amendment protection. The Commission cannot prohibit such presentation unless required by the public interest.

If the Commission's regulation goes beyond necessary anti-siphoning requirements, it thus violates the First Amendment as being overbroad for the accomplishment of its stated purpose, and, as a result, the Commission's restrictions are far more anticompetitive than they need be.

*Feature films.* The FCC's action is clearly far broader than is necessary to prevent siphoning. Under the new rules, cable cannot show feature films that have been in general release to theaters for more than 3 years unless a network or local television station has a nonexclusive *present* contractual right to exhibit the film, or the film is over 10 years old (from general theatrical release) and has not been shown by a station in the market for 3 years. \* \* \*

*Sports—the 25-percent criterion.* From the standpoint of telecasting, sports events are unique. They constitute popular and desirable programming that generally must be shown live, and thus have great value for only a short period of time. This contrasts sharply with feature films which can be released, "rested," and released again and again for many years. The issue, therefore, regarding sports events like the Super Bowl is *whether* they will be available on conventional television in light of pay possibilities, whereas the issue regarding feature films, like "Bridge Over the River Kwai," is *when* they will be available on conventional television. In view of this consideration and their great popularity, the FCC is properly concerned that sports events now available on commercial television to the largest possible audience not be siphoned to pay cable, and thus available only

to those who have access to pay cable and are able to pay for such a service. \* \* \*

The 1975 rules provide that if less than 25 percent of the events in a sports category<sup>16</sup> were broadcast live over conventional television in a market during the highwater mark season,<sup>17</sup> the number of events available for subscription exhibition would be the number of remaining games during that highwater mark season. If, however, 25 percent or more of the events in a category were broadcast live over conventional television in a market during the highwater mark season, the number of events available for subscription exhibition is only 50 percent of the remaining games during that highwater mark season. \* \* \*

The above issues are now before the courts. (See *Home Box Office, Inc. v. FCC*, *infra.*) It could be argued, therefore, that these matters are best suited for judicial resolution. But beyond the legal issues are important policy questions: What is the appropriate role of pay cable within the national telecommunications network? Should it be promoted by government policy or restricted; if the former, how energetically and if the latter, how severely? These policy questions, clearly of great importance to the entire American television audience, are appropriate for Congressional resolution.

We believe that:

Pay cable can potentially contribute greatly to the public interest by offering a viable alternative to the advertiser-supported system of over-the-air broadcasting;

The only detriment to the public interest is potential siphoning. But there appears to be no need presently for restrictions for the following reasons:

The common staples of pay and conventional television are feature films and sports. The film producers assert that they have no intention of withholding their product from conventional television; rather they see an orderly progression of sales to motion picture theaters, to pay television and finally to conventional television, the latter because it supplies vitally needed further revenue. Sports entrepreneurs similarly state that they will not withdraw programming from conventional television—that they also seek an additional box office dividend.

There is everything to gain and nothing to lose by testing these assurances. Doing so will permit pay cable to compete fully during a critical period, will avoid any “overkill” contrary to the First Amendment, and will still leave the FCC in a position to take prompt

16. The categories of events in each sport are limited to the following: pre-season home, pre-season away, regular season home and regular season away.

17. The highwater mark season is that season among the preceding five seasons when the largest number of events in the relevant category were broadcast.

remedial action if and when any problems emerge that require regulation during pay's gradual growth.

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### QUESTIONS

1. (a) Do you agree with the Staff Report that the public interest would be disserved "if, for example, pay cable obtained the exclusive right to present the Super Bowl or the World Series?" Why? What is the Staff's implicit criterion in distinguishing these two events from others? Would the public interest be disserved if pay cable acquired the exclusive right to present (i) the Miss America Pageant? (ii) World Cup Soccer? (iii) a popular entertainment series? (iv) a new series purchased on the basis of a pilot show?

(b) On what ground can one justify denying to the owner of the Super Bowl or World Series the ability to sell its exhibition to the highest bidder, whether it be a broadcaster or pay cable in a particular market? Would the situation be different if the owners of these various amusements also made them available by "closed circuit" in theatres in those markets where they were carried on television by pay cable or STV service?

(c) The significance of pay cable as a potential medium for the distribution of specialized program services is surveyed in Rappaport, *The Emergence of Subscription Cable Television and Its Role in Communications*, 29 *Fed.Comm.B.J.* 301 (1976). The author reports also on the hopes of performing arts companies to expand their audiences and financial bases through pay cable distribution of live theatrical events.

2. Be sure you understand the Commission's rules governing feature films. In 1972 ABC acquired the right to exhibit "Butch Cassidy and the Sundance Kid" three times during the period 1976-80; the film had been released in 1969. When could it first be shown on pay cable under the rules borrowed from STV? See 47 CFR § 73.643(a) (STV), *infra* at 697.

3. Should advertising be permitted during subscription television operations? On pay cable? The FCC prohibited it in each instance. See 47 CFR § 73.643(c) (STV).

## HOME BOX OFFICE, INC. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1977.

567 F.2d 9.

Certiorari denied 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1978).

Per Curiam: \* \* \*

## I. THE FACTUAL BACKGROUND

At the heart of these cases are the Commission's "pay cable" rules. [47 CFR § 76.225 (1976).]<sup>5</sup> The effect of these rules is to restrict sharply the ability of cablecasters to present feature film and sports programs if a separate program or channel charge is made for this material. In addition, the rules prohibit cablecasters from devoting more than 90 percent of their cablecast hours to movie and sports programs and further bar cablecasters from showing commercial advertising on cable channels on which programs are presented for a direct charge to the viewer. Virtually identical restrictions apply to subscription broadcast television.<sup>10</sup> To understand the function of these rules, it is useful to trace their origins.

The first application to establish a subscription broadcast television service was filed with the Commission in 1952. After a series of administrative proceedings and hearings before Congress, the Commission announced in 1959 that it would license a number of trial systems in order to gather information about the technical and economic aspects of subscription television. In its Fourth Report and Order, 15 FCC 2d 466, issued in 1968, the Commission analyzed in detail results achieved in the Hartford, Connecticut trial system and concluded that permanent subscription operations should be authorized with certain limitations.

For present purposes, the relevant limitations included restrictions on feature films, sports events, and series programs that could be shown for a fee, and prohibited commercial advertising during subscription operations. The purpose of these limitations was twofold. First, the Commission had agonized over both its authority to dedicate one or more channels from the electronic spectrum to subscription operations and the desirability of doing so. Such channels are scarce, and opponents of subscription television had argued that they should be used for conventional programming which would, of course, be free to all viewers. The Commission ultimately concluded that it had the required authority, a position sustained by this Court in Na-

5. In FCC Docket 18397 rules originally developed for application to subscription broadcast television were applied to pay cablecasting. 20 FCC 2d 201 (1969). \* \* \*

The subscription broadcast television rules were adopted by the Commission in Docket 11279, see Fourth Report

and Order, 15 FCC 2d 466 (1968). These rules were affirmed by this court in *National Ass'n of Theatre Owners (NATO) v. FCC*, 136 U.S.App. D.C. 352, 420 F.2d 194 (1969), cert. denied 397 U.S. 922 (1970). \* \* \* [Footnote relocated.]

10. [See 47 CFR § 73.643, at 697 *infra*.]

tional Ass'n of Theatre Owners (NATO) v. FCC, 136 U.S.App.D.C. 352, 420 F.2d 194 (1969), cert. denied 397 U.S. 922 (1970), but that subscription service would not be desirable unless the programming presented was distinct from that on conventional advertiser-supported television. As a result, the Commission placed restrictions on the number of hours of feature films and sports programs, both readily available on conventional television, that could be shown and prohibited commercial advertising in an effort to remove any economic pressure to appeal to a mass audience, a pressure to which the Commission attributed the sameness of conventional television fare. A second reason for restricting the feature films, sports events, and series programs that could be shown on subscription television was the Commission's fear that the revenue derived from subscription operations would be sufficient to allow subscription operators to bid away the best programs in these categories, thus reducing the quality of conventional television. By limiting the subscription operator to material that would not otherwise be shown on television, the Commission hoped both to prevent such "siphoning" and to enhance the diversity of program offerings on broadcast television as a whole.\*

Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for showing on a subscription cable channel. If such a transfer occurs, the Commission believes, the program or event will become unavailable for showing on the free television system or its showing on free television will be delayed \* \* \* In either case a segment of the American people—those in areas not served by cable or those too poor to afford subscription cable service—could receive delayed access to the program or could be denied access altogether. The ability of the half-million cable subscribers thus to preempt the other 70 million television homes is said to arise from the fact that subscribers are willing to pay more to see certain types of features than are advertisers to spread their messages by attaching them to those same features.  
\* \* \*

Whether such a siphoning scenario is in fact likely to occur and, if so, whether the result of siphoning would be to lower the quality of free television programming available to certain areas of the country or to certain economic strata of the population are matters of great dispute among the Commission and the various petitioners and intervenors seeking review of the Commission's regulations in this case. Other petitioners both here and before the Commission argue that the rules which ostensibly place cable in a subordinate role in order to

\* The court here related the technical and regulatory history of cable television. In 1969 the FCC had first specifically declined to apply to pay cable rules like those adopted for subscription television, since it had no basis for believing that pay cable television

could penetrate a market sufficiently to "siphon" programming; it then reversed its position. See note 5, supra. In 1975 the Commission deleted restrictions on subscription television's use of series programs.—D.G.

increase program diversity—a goal which has been basic to a number of Commission regulations <sup>40</sup>—in fact diminish diversity by prohibiting subscription cable operators from showing the programs that are most likely to be the financial backbone of a successful cable operation. As a result, it is claimed, cultural and minority programming that could otherwise “piggyback” on a cable system supported by more broadly popular fare is precluded. Indeed, some petitioners argue that the subscription broadcast television rules had the effect of killing that medium in its infancy by denying it access to necessary programming—a charge supported by the apparent lack of any viable commercial applications of subscription broadcast television today and left unrefuted by the Commission—and urge us not to let the Commission similarly snuff out pay cable. Finally, other petitioners take the position that the threat of siphoning is very real and that the Commission’s rules do not adequately cope with this threat to conventional television service.

## II. PAY CABLE RULES

### A. *Statutory Authority* \* \* \*

1. *The Standard for Determining Statutory Authority* *Midwest Video Corp.* and *Southwestern Cable Co.* hold that the Commission may only exercise authority over cable television to the extent “reasonably ancillary” to the Commission’s jurisdiction over broadcast television. \* \* \*

The Supreme Court’s opinions in *Southwestern Cable Co.* and *Midwest Video Corp.* thus look in two directions. First, they recognize an expansive jurisdiction for the Commission based on Section 2(a) of the Communications Act and the need to give the Commission sufficient latitude to cope with technological developments in a rapidly changing field. But the opinions are also narrow. Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast television. Indeed, even this standard will be too commodious in certain cases, since as we discuss in Part III infra the scope of the Commission’s constitutionally permitted authority over broadcast television in areas impinging on the First Amendment is broader than its authority over cable television. Finally, the opinions in both cases go no farther than to allow the Commission to regulate to achieve “long-established” goals or to protect its “ultimate purposes.”

\* \* \* [I]f judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-

40. E. g., 47 C.F.R. § 76.201 (1974) 39 Fed.Reg. 43310 (1974); 47 C.F.R. § (origination requirements), removed, 73.658 (prime time access regulations).



understood and consistently held policy developed in the Commission's regulation of broadcast television.\*

## 2. *Applying the Jurisdictional Standard*

The purpose of the Commission's pay cable rules is to prevent "siphoning" of feature film and sports material from conventional broadcast television to pay cable. Although there is dispute over the effectiveness of the rules, it is clear that their thrust is to prevent *any* competition by pay cable entrepreneurs for film or sports material that either has been shown on conventional television or is likely to be shown there. How such an effect furthers any legitimate goal of the Communications Act is not clear. \* \* \*

\* \* \* [T]he Commission seems to be making two more specific arguments which relate the public interest to retention of the conventional television structure. First, the Commission appears to take the position that it has both the obligation and the authority to regulate program format content to maintain present levels of public enjoyment. For this reason, and because the Commission also seems to assert that the overall level of public enjoyment of television entertainment would be reduced if films or sports events were shown only on pay cable or shown on conventional television only after some delay, it concludes that anti-siphoning rules are both needed and authorized. Second, and closely related, is the argument pressed here by counsel for the Commission that Section 1 of the Communications Act, 47 U.S.C. § 151 (1970), mandates the Commission to promulgate anti-siphoning rules since cable television cannot now and will not in the near future provide a nationwide communications service. \* \* \* Before considering each of these arguments in turn, we note that we do *not* understand the Commission to be asserting that subscription cable television will divide audiences and revenues available to broadcast stations in such a manner as to put the very existence of these stations in doubt. \* \* \* The Supreme Court's opinion in *Southwestern Cable Co.* is not, therefore, directly applicable.

The question of the Commission's obligation or authority to regulate television to maintain public enjoyment is one whose analysis takes us into a thicket of disagreement between this court and the Commission. See *Citizens Committee to Save WEFM v. FCC*, *supra* at 294.

In *WEFM* this court *en banc* rejected the *laissez faire* approach of the Commission \* \* \*. Our position is thus unmistakable: The Communications Act not only allows, but in some instances requires, the Commission to consider the preferences of the public,

\* Judge MacKinnon is of the view that the FCC's jurisdiction to regulate cablecasting in the interests of the broadcasting industry is restricted to

instances where the cable stations substantially rely on broadcast signals or their activities amount to unfair competition.

and the Commission in discharging this authority must regulate the entertainment programming which station owners can present whenever a significant segment of the public is threatened with the loss of a preferred broadcast format. Were *WEFM* the last word, it is at least possible that the Commission could promulgate the anti-siphoning rules under the theory of jurisdiction recognized by the plurality in *Midwest Video Corp.*, since the end to be achieved—protection of preferred television service for those not served by cable television—would also justify regulation of the broadcast media.

The Commission has not, however, acquiesced in *WEFM*. Instead, it recently launched and concluded a proceeding on “Changes in the Entertainment Formats of Broadcast Stations.” [Supra at 310.]

If the Commission’s own recently announced standards are applied to the rules challenged here, it seems clear that the rules cannot stand. The very essence of the feature film and sports rules is to require the permission of the Commission “to commence \* \* \* programming, including program format services, offered to the public.” However, it has been the consistent position of the Commission itself that cablecasters, like broadcasters, are not to be regulated as common carriers, a view sustained by a number of courts. Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission “regulatory tools” over cablecasting that it did not have over broadcasting. Thus, even if the siphoning rules might in some sense increase the public good, this consideration alone cannot justify the Commission’s regulations.

In addition, the record before us is devoid of any “reference to the actual preferences of real people.” While we would be willing to concede that certain formats, such as the World Series, are sufficiently unique and popular that a factual inquiry into actual preferences might not be required, this would not seem to be the case with either feature films or “non-specific” [i. e. regular season] sports events. Moreover, there is not even speculation in the record about what material would replace that which might be “siphoned” to cable television. Without such a comparative inquiry, we do not understand how the Commission could define the current level of programming as a baseline for adequate service. Finally, with regard to feature films we question how the Commission, which has stated that it has no criteria by which to distinguish among formats, could have determined that feature films are a sufficiently unique format to warrant protection. The record demonstrates that broadcasters are increasingly substituting made-for-television movies—for which “siphoning” is not a problem since the broadcasters own the copyrights—for feature films. The inference from this would seem to be that the Commission has drawn its categories too narrowly and that a feature film rule may not really be necessary to ensure broadcast presentation

of popular movie material. Whether or not this is the case, the inference is certainly too strong to be dismissed, as the Commission has done here, without discussion.

In analyzing the feature film and sports rules under the standards announced by the Commission in its broadcast format change proceeding, we do not wish to imply that we have reconsidered the position of this court in *WEFM*. The sole purpose of undertaking this analysis is to demonstrate that the Commission has, in this proceeding, seemingly backed into an area of regulation in which it would not assert jurisdiction were it to face the issues directly. Indeed, in this very proceeding, and despite the Commission's definition of current quantity and quality levels of films and sports events as the minimum level consistent with adequate television service, there is no indication that the Commission is prepared to require *broadcasters* to continue to present material presently on conventional television.

\* \* \* Because we understand the Commission's *Memorandum Opinion and Order* in the format change proceeding to constitute a request to this court to reconsider its position in *WEFM*, see 60 FCC 2d at 865-866, and because we are hesitant to approve rules which seem inconsistent with the Commission's best thinking in a closely analogous area, we think we should not affirm the feature film and sports regulations on the basis of *WEFM*.

[The court here rejected the Commission's arguments that jurisdiction to impose anti-siphoning rules on pay cable could be found in the mandate of Section 1 of the Act "to make available, so far as possible, to all the people of the United States \* \* \* Nationwide \* \* \* service \* \* \*."

The court then observed that "none of the suggested bases for Commission jurisdiction justifies imposition of the no-advertising and 90-percent rules," (the latter being the maximum permissible share of programming devoted to feature films and sports events combined). Those rules were derived from subscription broadcast television regulation, where the Commission was concerned that such service add to the diversity of fare available over the air to justify allocation of scarce spectrum to it.]

Although we hold today that the Commission has not established its jurisdiction on the record evidence before it, we think it important to note the limits of our holding. We do not hold that the Commission must find express statutory authority for its cable television regulations. Such a holding would be inconsistent with the nature of the FCC's organic Act and the flexibility needed to regulate a rapidly changing industry. However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media. Where the First Amendment is in-

volved, more will be required. See Part III *infra*. Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists. Because our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television. In order to avoid multiple remands, therefore, we will now consider other objections raised against these rules.

B. *The Evidence* \* \* \*

(a) *The Need for Regulation*

At the outset, we must consider whether the Commission has made out a case for undertaking rulemaking at all since a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago v. FPC*, 147 U.S.App.D.C. 312, at 323, 458 F.2d 731, at 742. Here the Commission has framed the problem it is addressing as

how cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that "free" television service.

Notice of Proposed Rule Making and Memorandum Opinion and Order, *supra*, 35 FCC 2d 893, 898 (1972). To state the problem this way, however, is to gloss over the fact that the Commission has in no way justified its position that cable television must be a supplement to, rather than an equal of, broadcast television. Such an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal. Moreover, by narrowing its discussion in this way the Commission has failed to crystallize what is in fact harmful about "siphoning." Sometimes the harm is characterized as selective bidding away of programming from conventional television, sometimes delay, and sometimes (perhaps) the financial collapse of conventional broadcasting.

As a result, informed criticism has been precluded and formulation of alternatives stymied.

Setting aside the question whether siphoning is harmful to the public interest, we must next ask whether the record shows that siphoning will occur. \* \* \* Our own review of the *First Report* and the joint appendix filed in these cases suggests that, if there is any evidentiary support at all, it is indeed scanty. As to the potential financial power of cable television we are left to draw the inference from two facts—that championship boxing matches often appear only on closed-circuit television in theaters and that Evel Knievel chose to televise his jet-cycled dive into the Snake River in the same fashion—and a series of mathematical demonstrations. While the

former may be directly relevant to siphoning of what the Commission has characterized as "specific" sports events, it is not at all clear what light they shed on the question of who is going to pay how much to see feature films and nonspecific sports events on pay cable.

The meaning of the various mathematical demonstrations is even less certain. \* \* \*

Justice Department and other petitioners have repeatedly pointed out that the conventional television industry is highly concentrated and is, therefore, likely to enjoy substantial monopoly and monopsony power. \* \* \* But the Commission did not consider whether conventional television broadcasters could pay more for feature film and sports material than at present without pushing their profits below a competitive return on investment and, consequently, it could not properly conclude that siphoning would occur because it could not know whether or how much broadcasters, faced with competition, would increase their expenditures by reducing alleged monopoly profits. Since the Commission did not assess either potential distorting effect of the comparison offered by the broadcasters, any conclusion it may have drawn from this evidence would be arbitrary.

We have similar difficulties with the second cardinal assumption of the Commission, i. e., that "siphoning" would lead to loss of film and sports programming for audiences not served by cable systems or too poor to subscribe to pay cable. To reach such a conclusion the Commission must assume that cable firms, once having purchased exhibition rights to a program, will not respond to market demand to sell the rights for viewing in those areas that cable firms do not reach. We find no discussion in the record supporting such an assumption. Indeed, a contrary assumption would be more consistent with economic theory since it would *prima facie* be to the advantage of cable operators to sell broadcast rights to conventional television stations in regions of the country where no cable service existed. Moreover, the greater the area not covered by cable, the greater the demand would tend to be for broadcast rights, and the more likely it would be that, through a combination of cable and broadcast, nationwide coverage would be achieved.

[Concerning the poor in areas where a film is shown first exclusively on the cable, and any possibility of broadcasting it is delayed, the court stated:] There is uncontradicted evidence in the record, for example, that the popularity of film material does not decline with an increase in the interval between first theater exhibition and first television broadcast. At least as to movies, therefore, "siphoning" may not harm the poor very much.

Equally important, the pay cable rules taken as a whole scarcely demonstrate a consistent solicitude for the poor. Thus, although "free" home viewing relies upon advertiser-supported programming, the Commission has in this proceeding barred cable firms from offer-

ing advertising in connection with subscription operations. As a result, the Commission forecloses the possibility that some combination of user fees and advertising might make subscription cable television available to the poor, giving them access to the diverse programming cable may potentially bring. As has already been noted, the advertising ban section of the regulations was developed to meet wholly different regulatory problems and it has been retained here, not because of its intrinsic merit, but only because no one objected too much. We are thus left with the conclusion that, if the Commission is serious about helping the poor, its regulations are arbitrary; but if it is serious about its rules, it cannot really be relying on harm to the poor. \* \* \*

(b) *Consideration of Anticompetitive Effects* \* \* \*

We cannot fathom how the Commission reached the conclusion that the balance here should be struck in favor of regulation. \* \* \* The Commission analogizes the regulatory problem here to that presented in *United States v. Southwestern Cable Co.*, supra. This is simply incorrect. The exclusivity and distant signal rules reviewed there did not implicate questions of anticompetitive impacts on filmmakers or sports entrepreneurs and presented no occasion for an attempt to quantify or qualify the competitive harm resulting from reinforcing broadcasters' monopsony power over those industries. Nor did these rules address situations of alleged selective siphoning; the harm to be avoided was fragmentation of audiences leading to the financial demise of UHF and educational broadcasting. Economic harm in this sense is not at issue here, as the Commission itself recognizes. \* \* \* *Southwestern Cable Co.* certainly does not establish the proposition that "unfair competition" requires the general protection of broadcast television.

Even had the *Southwestern Cable Co.* Court approved the Commission's "unfair competition" argument, application of that argument to cablecasting rather than retransmission of broadcast signals is unsupported. \* \* \* [C]ablecasters and broadcasters alike must pay copyright royalties, and there is no evidence that the cablecasting function is in any way subsidized by cable's broadcast retransmission function. \* \* \*

Petitioners' second argument—that the pay cable rules consolidate network control over program production and selection and are, therefore, inconsistent with other Commission policy and, perhaps, the First Amendment—had more force prior to repeal of the series restrictions in [1975. See note at 396, supra.] \* \* \* [T]he series rule would have restricted the market for independently produced entertainment programming, thereby creating an effect directly contrary to that sought to be achieved in the Prime Time Access Rules proceedings. As a result the series rules could not have been sustained on the record before us. \* \* \*

### V. SUBSCRIPTION BROADCAST TELEVISION

Over six years ago this court rendered its decision in *NATO v. FCC*, supra, affirming in all respects subscription broadcast television rules promulgated in the Commission's *Fourth Report and Order*. That inquiry, unlike the subscription broadcast rules here under review, was based on elaborate data generated in a two-year trial of subscription broadcast television in Hartford, Connecticut. Since *NATO* it appears that few, if any, subscription broadcast stations have begun operation on a commercial basis, and consequently the best information available about the general effect of subscription television on conventional broadcasting is that in the *Fourth Report*. Because of these essentially static factual circumstances, it would be inappropriate for us to reopen now questions of the overall rationality of antisiphoning rules as they pertain to subscription broadcast television and, as a result, we agree with a number of petitioners that the only question for review here is the rationality of the amendments to the subscription broadcast television rules announced in Dockets 18397 and 19554. We further hold that *NATO* forecloses general antitrust and First Amendment objections to the subscription broadcast television rules.

[The court upheld as rational various amendments in the STV rules, including deletion of the series programming prohibition.]

[Remanded with directions.]

WEIGEL, District Judge, concurring: In joining the court's opinion, I wish to emphasize the view that the Federal Communications Commission lacks the power to control the content of programs originating in the studios of cablecasters. Such programs involve neither retransmission of signals received over the air from conventional television broadcasting nor transmission over television broadcasting frequencies. They are offered to users of television sets on terms the users are free to accept or reject.

\* \* \*

Mr. Chief Justice Burger, concurring in the result in *Midwest*, upheld Commission action regulating CATV systems which made extensive use of television broadcasting signals. \* \* \* [He] declared his view that the Commission's position strained "the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." (Id. at 676.) In my view, Commission control of program content of cablecasting goes well beyond those outer limits.

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### NOTES AND QUESTIONS

1. In Part III of the *Home Box Office* opinion the court held that the pay cable rules were inconsistent with the first amendment. *NATO*

was distinguished on the ground that in regulating subscription television the Commission had merely resolved a conflict among speakers using scarce spectrum space (as in *NBC*, supra, at 254); here the Commission purported to remove a conflict between those with and those without access to pay cable television, but the record did not support the existence of such a conflict, and, assuming it to exist, the rules were overbroad to that purpose.

2. In Part IV the court took the Commission severely to task for tolerating *ex parte* contacts even after the rulemaking record was supposed to be closed and the FCC deliberating; and it remanded the record to the Commission for a hearing to determine "the nature and source of all *ex parte* pleas and other approaches that were made to the Commission or its employees after the issuance of the first notice of proposed rulemaking."

According to the trade press, "commission members and lawyers seemed appalled" by the court's direction to avoid *ex parte* contacts in all rulemaking. *Broadcasting*, at 29 (April 11, 1977). Some predicted greater use of the Notice of Inquiry device in order to invite focused industry contacts before the formal start of rulemaking.

See generally Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 *Va.L.Rev.* 169, 224-30 (1978).

3. The court relied in part on *WEFM*, which was predicated upon the inability of listeners to transact with broadcasters to secure their preferred programming; is it relevant to the removal of certain programs from broadcast availability to pay cable, where viewers would have the ability to transact? Would it be more or less relevant to the Commission's case for restricting "siphoning" by over-the-air subscription television?

4. The court critiques and ultimately rejects as unsupported and inconsistent the Commission's argument "that 'siphoning' could lead to loss of programming for those too poor to purchase cable television." Is the provision of programming, or programming of a particular sort, to poor persons a policy traceable to the Communications Act at all? I. e., if the Commission had avoided the asserted inconsistency by not prohibiting advertising on pay cable, could the court have sustained a well-documented anti-siphoning approach on anti-poverty grounds?

5. On the reasoning of the *Home Box Office* court, would the Commission exceed its jurisdiction if it were to prohibit cable systems from offering a pay cable attraction, other than a live event, during the prime time access hour? On Judge Weigel's reasoning?

6. The Commission has asserted pre-emptive jurisdiction over pay-cable and STV rate regulation, which would bar state or local rate regulation, and announced its intention to leave rates unregulated at the federal level. *Subscription TV Program Rules*, 52 *FCC 2d* 1, 67, 33



R.R.2d 367, 441 (Dkt. No. 19554, 1975). The court of appeals upheld the FCC as to STV in the *NATO* case, discussed in *Home Box Office*. It has now upheld the Commission as to pay-cable rates. *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978). Is this result consistent with *Home Box Office*?

7. The FCC has repealed its regulations restricting the presentation of feature films on subscription television, Dkt. No. 21311, 41 R.R.2d 1491 (1977), stating that although its regulation of STV and pay cable is "not totally parallel," the two services "may be viewed as directly competitive and \* \* \* should be given equal treatment in so far as program availability is concerned." It has also repealed the restrictions on STV presentation of sports events and commercial advertising. 42 R.R.2d 1207 (1978).

#### PROBLEM: WARNER COMMUNICATIONS, INC.

The National Association of Theatre Owners, Inc. (NATO), filed a "Petition for Special Relief" which sought a Commission order directing Warner Communications, Inc., and any other Warner subsidiary or affiliate, to cease exhibiting motion pictures on any pay cable television channel.

In 1938, the United States Government instituted an antitrust suit against Warner Brothers Pictures, Inc., Paramount Pictures, Inc., Loew's Incorporated (MGM), Radio-Keith-Orpheum Corporation (RKO), and Twentieth Century Fox Corporation. These five major companies engaged simultaneously in the production, distribution, and exhibition of motion pictures in the United States. The suit alleged, *inter alia*, that the system of common production, distribution, and exhibition utilized by the five major companies violated the anti-trust laws. After appeal to the Supreme Court and remand to the district court, a consent decree was entered in 1951. It provides for the division of Warner into two companies: the New Picture Company was to produce and distribute motion pictures; and the New Theatre Company was to exhibit films.\* The production and distribution functions were thus divorced completely from the exhibition business. Warner Communications is the descendant of the New Picture Company.

NATO stated that Warner Communications has not obtained court approval to exhibit motion pictures and contended that Warner therefore had violated, and is violating, the terms of the consent decree

\* Article VI of the consent decree states in relevant part:

"The New Picture Company shall not engage in the exhibition business, and the New Theatre Company shall not engage in the distribution business, except that permission to the New Picture Company to engage in the dis-

tribution business may be granted by the Court upon notice to the Attorney General and upon a showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures."

by showing films via pay channels on its cable television systems. Pay cable operations did not exist in 1951. NATO, however, maintained that the operative language of the consent decree went beyond merely prohibiting the exhibition of films in traditional theatres, and included "all forms of exhibition, regardless of the technological medium through which it occurs." It believed that the only difference between exhibiting films in traditional theatres as compared to showing them via pay cable is that in the latter instance the public pays by the month to see the films at home rather than paying a per film charge to view the movie in a central building.

NATO argued that many of the dangers that the Paramount case sought to prevent will arise anew if Warner is permitted to continue operating pay cable channels because Warner, as a distributor, supplies product to competing exhibitors, one of which it owns and operates. As examples of potential dangers, NATO cited Warner's right to license films to its pay cable operations rather than to traditional theatres; Warner's right to reduce the length of time between the film's exhibition in a theatre and its showing on pay cable channels; and the opportunity to cooperate rather than compete with other major film distributors.

Additionally, NATO argued that if Warner is allowed to continue its pay cable business, other major film producer-distributors will also enter the pay cable business. This development, according to NATO, would frustrate the antitrust laws because:

- (a) The producer-distributors would have greatly increased leverage over theatre owners (who must compete with these same suppliers' pay television programs), allowing the distributors to force unreasonable film license terms on the theatre owners;
- (b) The producer-distributors would obtain monopolies of motion picture exhibition in many communities, and possibly a nation-wide monopoly on the exhibition of first run films.

Although it conceded that the Commission does not have jurisdiction to enforce the antitrust laws or judicial consent decrees, NATO argued that the above-discussed matters were within the scope of the Commission's regulatory authority, and that the Commission should prohibit Warner from exhibiting motion pictures via cable television pay channels.

Warner countered by characterizing the instant case as an attempt by NATO to stifle potential competition from new technologies. It argued that the Commission is charged affirmatively with stimulating new wire and radio technologies, and not with protecting theatres or other leisure time activities beyond its jurisdiction. Specifically, Warner maintained that the Communications Act does not give the Commission authority to prohibit pay cable operations in or-

der to protect the motion picture theatre industry, over which the Commission has no jurisdiction. Warner also contended that NATO's interpretation of the consent decree was wrong because it ignored "what the Paramount case was all about \* \* \* and the state of the art at the time the decree was negotiated." And if the consent decree be construed to settle the questions raised by NATO's petition, Warner believed that the United States District Court for the Southern District of New York, and not the Commission, was the proper authority for making such constructions.

In its response to Warner's comments, NATO argued that it did not seek to have the Commission enforce the consent decree, but asked only that the Commission recognize the decree and the facts surrounding it.

Should the Commission (a) dismiss the petition, (b) grant the petition, or (c) proceed by rulemaking or otherwise to segregate the pay cable and program production industries? See 32 R.R.2d 1633 (1975); cf. Owen, Public Policy and Emerging Technology in the Media, 18 Pub.Pol'y 539 (1970) (proposal to regulate cable as a common carrier, prohibited from initiating or controlling any messages).

#### D. FEDERALISM AND STATE/LOCAL REGULATION OF CABLE

##### CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE

Staff of the Subcomm. on Communications of the House Interstate and Foreign Commerce Comm., 94th Cong., 2d Sess. 20-30 (1976).

##### STATE REGULATION OF CABLE TELEVISION

\* \* \* [A]s of December 11, 1975, eleven states had adopted some form of cable television regulation. Three states, Massachusetts, Minnesota and New York have established state cable television commissions; the franchising authority in these states rests with the localities rather than with the state. Eight states, Alaska, Connecticut, Delaware, Hawaii, Nevada, New Jersey, Rhode Island and Vermont regulate cable television through their public service or public utilities commissions; the franchising authority in these states rests solely with the state regulatory agency, with the exception of New Jersey and Delaware where cable is not defined as a public utility and the municipality, rather than the state, grants the franchise. For unincorporated areas of counties in the state of Delaware, the state authority issues the franchise. Although cable television is not defined as a public utility in the state of Rhode Island, the state PUC is the sole franchising authority.

Absent specific statutes, whether a broad constitutional or statutory provision authorizes franchising cable television systems is high-

ly subject to debate. \* \* \* The franchising authority in Alabama is granted to a local governing body by specific legislative acts. In Pennsylvania, however, the authority of municipalities is limited to the extent of permits for the right-of-way; this authority, too, is highly questionable for second-class townships and third-class cities.

## CABLE TELEVISION REPORT AND ORDER

Federal Communications Commission, 1972.  
36 FCC 2d 143, 24 R.R.2d 1501.

### V. FEDERAL-STATE/LOCAL RELATIONSHIPS

171. In our Notice of Proposed Rule Making in Docket 18892 we observed that "actions have been taken in the cable field without any overall plan as to the Federal-local relationship." This has resulted in a patchwork of disparate approaches affecting the development of cable television. While the Commission was pursuing a program to promote national cable policy, state and local governments were formulating policies to reflect local needs and desires. In many respects this dual approach worked well. To a growing extent, however, the rapid expansion of the cable television industry has led to overlapping and sometimes incompatible regulations. This resulted in confusion, and we faced an obvious need to clarify the respective federal, state, and local regulatory roles. Three possible approaches were outlined in Docket 18892:

- (a) Federal licensing of all cable television systems.
- (b) Maintenance of the current federal regulatory program enforced by Section 312(b) proceedings.
- (c) Federal regulation of some aspects, with local regulation of others under federal prescription of standards for local jurisdictions.

As we noted in Docket 18892:

"This last approach recognizes that although practical considerations argue in favor of leaving important aspects of cable regulation to State and local government, cable is nonetheless an integral part of the inter-State movement of electronic communications. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). In these circumstances, it is appropriate for this agency to establish uniform or minimum standards to which local actions must conform."

We requested comments on the form such "uniform or minimum standards" might take. The filings differed in their specific proposals for resolution of the questions raised in our Notice, thus indicating the wide diversity of opinion in this complex area of regulation.

*Analysis of Comments*

[Most broadcast interests favored a mixed federal and local regulatory approach. Cable television interests all favored some degree of or total federal pre-emption, except with respect to the local selection among franchise applicants; they cited a lack of regulatory expertise at the state and local levels and "unconscionable delay" in regulation by state public utility commissions. State and local governments uniformly opposed federal pre-emption and specifically opposed any federal limitation on the franchise fees they may charge cable systems.]

*Commission's Regulatory Program*

177. Dual Jurisdiction. The comments advance persuasive arguments against federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts. Local authorities are also in better position to follow up on service complaints. Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism. We are also persuaded that because of the limited resources of states and municipalities and our own obligation to insure an efficient communications service with adequate facilities at reasonable charges, we must set at least minimum standards for franchises issued by local authorities. \* \* \*

178. Franchising. We are requiring that before a cable system commences operation with broadcast signals, it must obtain a certificate of compliance from the Commission. The application for such a certificate must contain (§ 76.31(a)(1)) a copy of the franchise and a detailed statement showing that the franchising authority has considered in a public proceeding the system operator's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of construction arrangements. We expect \* \* \* that where appropriate a public hearing will be held to afford all interested persons an opportunity to testify on the qualifications of the applicants, and that the franchising authority will issue a public report setting forth the basis for its action. Such public participation in the franchising process is necessary to assure that the needs and desires of all segments of the community are carefully considered.

179. Applicant Qualifications. \* \* \* The character of an applicant, for example, is of particular importance especially because he may be engaged in program origination. Some governmental body must insure that a franchise applicant's qualifications are consistent with the public interest, and we believe this matter is appropriate for local determination.

180. Franchise Area. Another matter uniquely within the competence of local authorities is the delineation of franchise areas. We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances. While it is obvious that a franchisee cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. \* \* \*

181. Construction. We are establishing in § 76.31(a)(2) general timetables for construction and operation of systems to insure that franchises do not lie fallow or become the subject of trafficking. Specifically, we are providing that the franchise require the cable system to accomplish significant construction within one year after the certificate of compliance is issued, and that thereafter energized trunk cable be extended to a substantial percentage of the franchise area each year, the percentage to be determined by the franchising authority. As a general proposition, we believe that energized trunk cable should be extended to at least 20 percent of the franchise area per year \* \* \*.

182. Franchise Duration. We are requiring in § 76.31(a)(3) that franchising authorities place reasonable limits on the duration of franchises. Long terms have generally been found unsatisfactory by state and local regulatory authorities and are an invitation to obsolescence in light of the momentum of cable technology. We believe that in most cases a franchise should not exceed 15 years and that renewal periods be of reasonable duration. We recognize that decisions of local franchising authorities may vary in particular circumstances. For instance, an applicant's proposal to wire inner-city areas without charge or at reduced rates might call for a longer franchise. \* \* \*

184. Service Complaints. Section 76.31(a)(5) requires that franchises provide for the investigation and resolution of local service complaints and also that the franchisee maintain a local business office or agent for these purposes. \* \* \*

185. Franchise Fee. While we have decided against adopting a two percent limitation on franchise fees, we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have exacted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about five or six percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems

are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments. We are seeking to strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation.

186. \* \* \* It is our judgment that maximum franchise fees should be between three and five percent of gross subscriber revenues. \* \* \* When the fee is in excess of three percent (including all forms of consideration, such as initial lump sum payments), the franchising authority is required to submit a showing that the specified fee is appropriate in light of the planned local regulatory program, and the franchisee must demonstrate that the fee will not interfere with its ability to meet the obligations imposed by our rules.

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#### NOTES AND QUESTIONS

1. As of November, 1976, the FCC had certificated approximately 1,500 cable systems whose franchises it found to be fully consistent with its 1972 standards for state or local enfranchising. Another 900 systems in substantial compliance were certificated until March 31, 1977, and the agency had not passed upon the franchises of approximately 6,500 systems. Faced with the task of processing 7,400 applications for certification, and concerned that some of its standards ought to be relaxed in order to relieve cable television of non-essential regulatory burdens, the Commission undertook in a new proceeding to reconsider certification procedures and federal-state/local regulatory relationships generally. Dkt. No. 21002, 41 Fed.Reg. 54506, R.R.2d Cur.Svce. ¶ 85:269 (Notice of Proposed Rule Making, 1976).

2. Although the Commission was concerned with over-regulation at all levels of government, it determined to concentrate on relaxation of the regulatory burden imposed at the federal level rather than on the potential for duplication and over-regulation implicit in the dual state and local approach below the federal level.

This choice may have reflected some doubt about the extent of its jurisdiction, for the Commission mentioned, in noticing the new inquiry, that the congressional Staff Report, *Promise Versus Regulatory Performance*, supra, had "asserted that the matters covered [in the Commission's minimum franchise requirements were] not appropriate matters for federal regulation." R.R.2d Cur.Svce., at 85:276.

Indeed, the Staff Report was unequivocal in arguing that the Commission lacked authority, under the "reasonably ancillary to broadcasting" standard of *Southwestern Cable* and *Midwest Video*, supra, to require, *inter alia*, that a franchise be awarded only after a public proceeding, affording all interested persons an opportunity to testify; that it be for a term not exceeding 15 years; that the fran-

chisee be of good character; or that construction proceed at a specified pace. *Promise Versus Regulatory Performance*, at 80–81.

The Staff Report had argued first that the Commission could not assert jurisdiction on the theory that its various requirements were designed to promote cable origination, see, e. g., ¶ 179 of the Report and Order, since the imposition of the cable origination requirement had itself been at the limit of the agency's authority: "if it does have that additional authority, it means that the FCC can construct a mini-Communications Act for cable." Second, the Report had rejected the argument that the Commission must have broad authority over cable in order that its goal of integrating cable into the nationwide communications structure not be frustrated. "The difficulty with this approach," it said, "is that it assumes the Commission to have plenary jurisdiction over cable—as broad as required in the public interest," whereas the Court's requirement that regulation of cable be ancillary to broadcast regulation, if it means anything, must mean that the FCC's authority over cable is less than plenary. Thus, "it is difficult to see how it would encompass the requirement that the franchising authority have a complaint procedure or approve subscriber rate changes only after public proceedings."

3. The Commission has now acted, on policy rather than jurisdictional grounds, to delete from Rule 76.31(a) its franchise standards respecting public proceedings, franchise duration, construction timetables, and complaint procedures, and to substitute therefor a "Note" offering voluntary guidelines for the benefit of franchising authorities. At the same time the Commission determined to retain (as amended) the limitation upon franchise fees—an area in which "federal goals and local needs are not necessarily aligned." In this connection the Commission reaffirmed its assertion of jurisdiction:

Since the promise of cable's abundance and diversity of services is integrally linked to its financial viability, we believe the fee limitation serves the goal of diversity and thus is within the scope of our jurisdiction. *United States v. Midwest Video*.

Report and Order, Dkt. 21002, 41 R.R.2d 885 (1977). Commissioner Fogarty, dissenting, argued that the Commission lacked even this authority in the absence of record evidence showing that deletion of the fee maximum would frustrate cable development. "The requirement of a supporting factual record is especially critical where Commission regulation intrudes the federal government into an area of primarily local jurisdiction and concern. \* \* \* [T]he taxing power of state and local authorities is inherent and virtually unlimited unless it can be shown specifically to impose an unreasonable burden on interstate commerce or otherwise conflict with federal interests or objectives."



Commissioner Hooks, on the other hand, dissented from deletion of the public proceeding requirement of the 1972 rules.

Report and Order, Dkt. 21002, 41 R.R.2d 885 (1977).

4. Local—as opposed to state—regulation of cable has been sharply criticized as slipshod, shortsighted, and often corrupted by political favoritism. See, e. g., Leone and Powell, *CATV Franchising in New Jersey*, 2 *Yale Rev.L. & Soc.Act.* 252 (1972); Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 *Notre Dame Law.* 685 (1972). Under the amended cable rules, could the FCC refuse to grant a certificate of compliance to a cable company that obtained its franchise by bribing members of a city council? Cf. *Teleprompter Cable Systems, Inc. v. FCC*, 543 F.2d 1379 (D.C.Cir. 1976).

5. Under *Midwest Video II*, does the Commission have authority to limit the franchise fees that state or local governments may charge, or a cable system may pay? See *New York State Comm'n on Cable Television v. FCC*, 42 R.R.2d 265 (1978).

6. When the Commission determines that a franchise contains franchise fee requirements in excess of the Commission standard, should it refuse to issue a certificate? Should it certificate the system contingent upon compliance by the franchising authority as of a certain date? (Compliance may require passage of a new local ordinance, or even referendum approval of a franchise amendment, depending upon the requirements of state law.) Should it certificate the system and, invoking federal supremacy, direct it to comply with the federal standard, even though that would violate the terms of the franchise?

7. The Congress has now authorized the FCC to fine cable systems for violating Commission regulations. P.L. 95-234 (1978), amending § 503(b) of the Act. Chairman Ferris has disclosed that as a result the Commission is considering abolishing the present process of certifying cable systems, which it no longer needs in order to enforce its rules. *Broadcasting*, May 1, 1978, at 27.

## REVIEW PROBLEM FOR PART TWO: CANADIAN PRE-RELEASE OF NETWORK PROGRAMS

Federal Communications Commission.  
Dkt. No. 20649, R.R.Cur.Serv. ¶ 53:399.

### Notice of Inquiry

1. The Commission has under consideration a "Petition for Rule Making" submitted on behalf of the American Broadcasting Companies, Inc. ("ABC"), which seeks the adoption of a rule intended to restrict the licensing for exhibition by foreign television stations of programs which are produced in the United States and shown on foreign stations regularly received in the United States prior to national network exhibition in this country (hereinafter referred to as

“prerelease” or “prerelease programming”). Responses in support of the petition were filed by licensees of television stations in Buffalo, Rochester, and Watertown, N. Y., Erie, Pa., and Maine. A joint response opposing the petition was received from various program suppliers.

2. Prerelease programming occurs when a television station, in this case a Canadian station consistently received in the United States, airs a program in advance of the time the same program is scheduled to appear on network-affiliated stations in the United States. The ability of Canadian stations to air programs in advance of their showing on U. S. stations stems from the fact that Canadian licensees seek, and program suppliers grant, prerelease rights for specific programs and series of programs. Programs presented by Canadian TV stations on a prerelease basis may be seen by viewers in the U. S. either by tuning to the Canadian TV station directly or by subscribing to a cable television system in this country which imports the signals of Canadian TV stations. In either case, the viewer is able to see programs which, in many instances, will not be seen on U. S. network-affiliated stations until a later time. The result of this practice, say ABC and the supporters of the petition, is that viewers in this country prefer to watch Canadian TV stations rather than those in this country. It is our own observation that the growth of cable systems and increased over-the-air reception along the northern border areas of the United States (with the resultant increase in Canadian TV viewing opportunities for viewers in this country) may have elevated the prerelease practice, once thought to be insignificant, to a matter of genuine concern. Moreover it is apparent that whatever problem presently exists in this regard will be exacerbated by the new Toronto television supporting structure which, when completed, will enable Toronto TV stations to deliver Grade A signals to Buffalo.

3. In its petition, ABC outlines what it says is the general problem of Canadian pre-release programming vis-a-vis U. S. broadcasters; develops a theory of jurisdiction premised on the “delivered” language of Section 325(b) of the Communications Act of 1934, as amended;<sup>1</sup> and advances a specific proposal which it says will resolve the pre-release problem for broadcasters in this country.<sup>2</sup> ABC

1. Section 325(b) reads:

“(b) No person shall be permitted to locate, use or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are \* \* \* caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without

first obtaining a permit from the Commission upon proper application therefor.”

2. The proposed regulation offered by ABC states:

“Television programs produced in the United States for national network exhibition in the United States, shall not be licensed for exhibition by a foreign television station which can be regularly viewed in the United States, either by off-the-air reception or cable television service, upon terms

says it has attempted to negotiate with the program suppliers for more favorable distribution rights, but to no avail. It concludes that economic and competitive considerations have closed off the bargaining approach as a feasible solution and asserts that Commission action is the most prompt and effective remedy available. Urging that the pre-release problem be viewed in the larger context of recent Canadian government action,<sup>3</sup> ABC submits that the Commission has jurisdiction under which it may adopt rules regulating the licensing for exhibition in foreign countries of television programs produced in this country where the programs would first be shown on foreign stations that can be regularly received in this country.

4. The program suppliers disagree with the arguments advanced by ABC and the supporters of the petition. \* \* \*<sup>4</sup> The program suppliers also contend that adoption by the Commission of a rule such as that proposed by ABC would result in the violation of certain of the program suppliers' First Amendment rights, and would require the Commission to assume a policy position contrary to that of the Government of the United States which has openly advocated a free and unimpeded flow of information across international borders.

5. Although the Canadian pre-release practices have been described by various parties as a "problem," the nature and extent of the "problem" remains essentially undefined. The effect of the pre-release practice on viewers, licensees, cable television system operators, program suppliers, networks, and the interrelationships between those parties, has not, to our knowledge, been specifically examined, particularly in the context presented here. Nevertheless, all of the above have a particular stake in any public interest determination. We therefore invite all interested parties to submit comments on, or related to, the questions posed below. Although parties are encouraged to consider and comment on all aspects of the inquiry, they should, at a minimum, respond to the questions contained within the appropriate headings.

(a) General Inquiry: Are existing Canadian pre-release practices harmful to the public interest? If so, what reme-

which permit such foreign exhibition prior to first United States national network exhibition except pursuant to an authorization issued under Section 325(b) of the Communications Act."

3. These actions include a Canadian Radio-Television Commission ("CRTC") policy that commercial material be deleted from U. S. programs imported for airing on Canadian cable television systems, and a legislative proposal to eliminate business expense tax deductions for advertising placed by Canadian firms on U. S. broadcast stations.

4. *Baker v. United States*, 93 F.2d 332 (5th Cir. 1937), cert. denied 303 U.S. 642 (1938), which held that the physical delivery of records and transcriptions to a Mexican station, as opposed to the delivery of program by means of wireline interconnection, did not require the issuance of a program export permit under Section 325(b) of the Communications Act, *supra*. That determination was, however, made in the context of a criminal proceeding, and is otherwise distinguishable from the "pre-release" practice here considered.

dies other than Commission intervention are available? If program suppliers are required to apply for program export permits, by what criteria should they be judged?

(b) Specific Inquiry: Viewing Public. The perspective of the inquiry will be enhanced by the receipt of comments from members of the general public and public interest groups who may wish to inform the Commission of their opinion as to whether the existence of the Canadian pre-release practice is beneficial or detrimental to the public interest.

6. Alternative approaches to the "pre-release" problem. The ABC petition, and the foregoing discussion of it, represent an approach to the "pre-release" problem (assuming it is a problem) based on Section 325(b) of the Act—the Commission's authority to prohibit or condition the supplying of programs from the U. S. to foreign stations regularly received in the U. S. In our view, this is not the only possible approach to this subject, since there appear to be others which could be used (and which conceivably would be simpler) if it is established that, in fact, the pre-release matter requires Commission action. One would be adoption of regulations applying to those who supply programs to U. S. television networks (producers or distributors), under the Commission's established authority to adopt rules governing entities and practices having a substantial impact on broadcasting. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).<sup>5</sup> Such a regulation, for example, might prohibit such persons or entities from releasing their regular network entertainment series programs, contracted for by a U. S. network, to foreign stations, networks, or broadcasting authorities on terms which would permit showing on stations regularly received in the U. S. (directly or via cable) at a time earlier than their carriage on the U. S. network. Another approach would be the adoption of regulations applying to the U. S. networks, in this respect similar to the "financial interest" and "syndication" rules adopted in 1970 (§ 73.658j). Further, our cable television rules could be revised to restrict the importation of pre-released Canadian television programs. We are not here proposing these or any other specific regulations; comments are invited on any of these approaches, or others, in addition to the ABC approach based on Section 325(b).

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Draft comments for submission to the FCC, addressing the questions put in ¶ 5 of the Notice of Inquiry, and the question of

5. This authority, under Section 303(r) of the Act, would of course, be limited to those situations where there is some U. S. nexus with the program to

afford a basis for jurisdiction, either production in the U. S. or production or distribution by a U. S. person or entity.

how best to proceed, ¶ 6, assuming that the Commission determines to do so.

Thereafter, you may wish to consult the full text of Dkt. No. 20649, at R.R.Cur.Svce. ¶ 53:399, and Vanhu, Inc., 65 FCC 2d 986, 41 R.R.2d 366 (1977).

## Part Three

# CONTENT REGULATION

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### Chapter VI

## PRESS FREEDOM AND PRESS LICENSE

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### A. INTRODUCTION

Thus far we have examined aspects of broadcasting regulation that are at least ostensibly "content neutral." That is, their operation may affect the contents of broadcast programming—and may have been intended to do just that—but they did not involve any branch of the government in determining that a particular program, point of view, statement, or idea either must be or may not be broadcast by any licensee. Many of the regulations, for example, are directed toward increasing "diversity" in programming—the local service policy, the concentration of ownership, prime time access, and cable origination rules come to mind; or at economic protection of pre-existing interests—as in *Carroll* and the distant signal restrictions on cable. Each of these rules may affect what is ultimately seen or heard by the broadcast audience in ways that are difficult to predict, but none of them involves the government either in making programming decisions or in penalizing those decisions as made by broadcasters. Their impact upon the electronic press is not significantly different, therefore, from the impact of the antitrust laws, or the labor laws, or the tax laws, applied without discrimination, to all of the media of communication, electronic and printed. And none of these regimes can seriously be said to run afoul of the first amendment to the Constitution: "Congress shall make no law \* \* \* abridging the freedom of speech, or of the press. \* \* \*"<sup>†</sup>

We turn now to those aspects of FCC regulation concerned directly with the content of what is broadcast—either by requiring that a particular point of view be aired or by prohibiting or penalizing after the fact the dissemination of some expression. More particularly, we will be concerned with such requirements or prohibitions that could not constitutionally be applied to the non-electronic mass

<sup>†</sup>The first amendment freedoms of speech and press apply to the states, as well as the federal government, through their "incorporation" in the

due process clause of the fourteenth amendment. See, e. g., *Near v. Minnesota*, *infra* at 422.

media, such as newspapers and magazines. Thus, incitements to commit imminent violence, obscenity, fraudulent advertising and the like, which can be suppressed wherever they appear, present no problems unique to the realm of broadcasting, while prohibitions on merely indecent speech, or on cigarette advertising, and the requirements to present all sides of a controversial issue of public importance and to give equal time to all candidates for a public office appear only in the regime governing broadcasting.

In this inquiry, we will be concerned with three general questions: (1) What are the lawful limits of content regulation in broadcasting, insofar as they diverge from those applicable to printed mass communications? (2) What accounts for these differences in the two regimes? And (3) insofar as the content of broadcasting can lawfully be regulated in unique ways, how should this be done?

Related questions have arisen in analogous contexts before, indeed with the introduction of each new technology of communication and the resulting efforts of government to control it. In each successive instance, it seems, a greater role for governmental supervision has been tolerated. As you have seen, *supra* at 46, Professor Zechariah Chafee explained this general trend on the ground that "writers and judges had not got into the habit of being solicitous about guarding [the freedom of new media]. And so we have tolerated censorship of the mails, \* \* \* the stage, the motion picture, and the radio."

Chafee's hypothesis is not very convincing, however. It requires us to believe that a "habit" of mind associating only newspapers, books, pamphlets, and mass meetings with important communications worthy of protection from the government prevented our most articulate and self-interested citizens, and those most sensitive to the values both of free speech and of consistency in law—writers and judges—from realizing that changes in the technology of expression did not imply changes in the value of free expression to a free society.

Perhaps we will do better to begin our thinking by considering a debate joined within the Supreme Court. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), the Court considered the constitutionality of a film licensing law under which New York had rescinded a license to show "The Miracle" after public complaints that it was "sacrilegious." The Court squarely held for the first time that motion pictures are protected by the Constitution from such a vague standard for suppression amounting to "unbridled censorship." It deemed it irrelevant that they were operated for profit and "designed to entertain as well as to inform." \*

\* Accord, *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948): "The line between informing and entertaining is too elusive for the

protection \* \* \* of First Amendment rights to turn on that distinction."

But it explained:

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments \* \* \* is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. \* \* \* Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.

Thus, the Court did not entirely discount the claim that films have a "greater capacity for evil, particularly among the youth of the community." If true, this fact might be relevant "in determining the permissible scope of community control" over them.

In *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Court established the procedural safeguards that the Constitution requires of a film licensing scheme, over the dissent of Justice Douglas, who saw no warrant for any licensing scheme, no matter how well protected from abuse by expedited procedures and judicial review of license denials:

As I see it, pictorial presentation occupies as preferred a position as any other form of expression. \* \* \* I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment.

As a prelude to a more detailed consideration of the "peculiar problems" presented by the broadcasting media, and the scope of content regulation that they can justify, consider these questions.

(1) What are the peculiar problems presented by motion pictures, such as arguably to warrant their licensure in the public interest prior to exhibition?

(a) Do they indeed have a "greater capacity for evil" among the young, say than books or magazines? Why? How would one establish this?

(b) Are there other problems peculiar to motion pictures?

(2) Are the same problems, or additional problems, presented by

(a) radio broadcasting;

(b) television broadcasting in general; or

(c) television broadcasting of motion pictures, so as to suggest the constitutionality or advisability of a governmental pre-screening and approval power over particular broadcasts?

(3) Return to these questions after your judgment has been further informed by the Court's response to the nuisance abatement scheme for newspapers seen in the next case.



## B. PRIOR RESTRAINT AND LICENSING

### NEAR v. MINNESOTA

United States Supreme Court, 1931.  
283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides \* \* \* :

"Section 1. Any person who \* \* \* shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away \* \* \*

"(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,  
—is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined [in an action by the County Attorney].

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends \* \* \*."

\* \* \*

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as "The Saturday Press," published by the defendants in the city of Minneapolis. [T]he articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. \* \* \* There is no question but that the articles made serious accusations. [The district court issued a permanent injunction and the Supreme Court of Minnesota affirmed.]

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. \* \* \*

*First.* The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults

and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and for justifiable ends.  
\* \* \*

*Second.* The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. \* \* \*

*Third.* The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." \* \* \*

*Fourth.* The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which

all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner"

\* \* \*

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." \* \* \*

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. \* \* \*

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases \* \* \*. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community

life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force." *Schenk v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). These limitations are not applicable here. \* \* \*

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. \* \* \*

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. \* \* \*

The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. \* \* \*

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the consti-

tutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. \* \* \*

For these reasons we hold the statute \* \* \* to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. \* \* \*

Judgment reversed.

Mr. Justice BUTLER, dissenting. \* \* \*

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state supreme court, that they threaten morals, peace and good order. There is no question of the power of the State to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. \* \* \* There is nothing in the statute purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes. \* \* \*

The doctrine that measures such as the one before us are invalid because they operate as previous restraints \* \* \* exposes \* \* \* every individual to \* \* \* a scheme or program for oppression, blackmail or extortion. \* \* \*

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice SUTHERLAND concur in this opinion.

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#### NOTES AND QUESTIONS

1. By what reasoning did the Court find a "prior restraint" in a statutory scheme that required the State to show that an offending publication had already occurred in order to obtain any relief?
2. Would the situation be materially different if the remedy provided by statute were the imposition of a fine? Would that depend upon the amount of the fine? On its effect on the particular publisher's ability to continue operating? By the Court's reasoning in

*Near*, would imprisonment in that case also have been a "prior restraint?" If so, what does it mean to insist that "[s]ubsequent punishment for such abuses as may exist is the appropriate remedy \* \* \* ?"

3. Consider the following observations by Paul Freund in *The Supreme Court and Civil Liberties*, 4 *Vand.L.Rev.* 533, 537-39 (1951) (footnotes omitted):

Certain distinctions commonly drawn between prior restraint and subsequent punishment will not bear analysis. It is sometimes said that prior restraint is the greater deterrent. This generality depends on the psychological aspects of the case. An injunction running against a particular individual may, to be sure, deter him more sharply than the broad command of a criminal statute; but just as possibly the underlying statutory prohibition, whether enforceable by injunction or by criminal sanctions, may have a deterrent effect not varying with the particular sanction employed. It is said, moreover, that there is a difference in the time at which the offense is passed upon, that in the case of prior restraint the offense is judged prospectively while in the case of criminal sanctions it is judged after it has been committed. But the judicial sanction takes its bite after the fact in either case, whether the sanction be fine or imprisonment for criminal violation or fine or imprisonment for violation of an injunctive or administrative order. In either case the facts of the violation are spread before a judicial tribunal after the event.

Is there then no validity in the conventional contrast between prior restraint and subsequent penalty? Several possible differences do exist. In the first place, the identity of the trier of fact is important. There are two sets of facts to be judged: what may be called facts of coverage (including interpretation and application of the governing standards) and facts of violation. Under an outright criminal law the two coalesce into one stage, determined ordinarily by a jury and at all events according to criminal procedure. Under a licensing or injunctive scheme the one determination is made by an administrative official or by a judge, with review normally by a judge, and the other determination is made by a judge in contempt proceedings or by the processes of criminal law. To the extent that an advisory jury is used by a court at the injunctive stage, the difference between this procedure and the outright criminal sanction on the score of the trier of fact is minimized.

Second, there may be a difference in the clarity and definiteness of the prohibition. On this point, however, no gen-

eralization is possible. The injunctive order may in fact be just as clear and definite as a penal statute, particularly if the order is issued with respect to a designated publication. Indeed, an injunctive order in some circumstances may afford greater guidance than a penal statute. \* \* \*

A third difference between prior restraint and subsequent punishment is suggested by this problem of interim violations. Suppose that the individual offender, rather than ultimately losing, eventually prevails on a full hearing of the constitutional issues. In a criminal trial he would of course suffer no punishment. In an injunctive or administrative proceeding, where a restraining order or temporary injunction has been issued against him or a permit withheld, but where a final injunction is ultimately denied or a permit granted, there is the serious problem of penalties for interim violations. If disobedience of the interim order is *ipso facto* contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute. To the extent, however, that local procedure allows such a defense to be raised in a contempt proceeding, the special objection to prior restraint growing out of the problem of interim activity is obviated.

In sum, it will hardly do to place "prior restraint" in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.

Assuming (i) that an advisory jury was required under the scheme challenged in *Near*, (ii) that the injunction prohibited "further publication of *The Saturday Press*," and (iii) that no problem of "interim violations" could arise because no preliminary injunction was authorized or issued, what would a "pragmatic assessment" of the Minnesota statute's operation indicate about its constitutionality?

4. The Court in *Near* indicates that some types of speech would receive no immunity from prior restraints on publication, viz., military information, obscenity, and incitements to violence. The type of speech published in "*The Saturday Press*," however, seems to have been entitled to the highest degree of such immunity, viz. that for "publications relating to the malfeasance of public officers."

The celebrated "Pentagon Papers Case" may be understood in part as probing the limits of these categories. On June 13, 1971 the *New York Times* and then other papers began publishing serially the contents of a classified study by the Department of Defense, "History of U. S. Decision-Making Process on Viet Nam Policy."

The study indicated various facts to the contrary of those reported by successive Presidents and military officials to the Congress and the public. The United States sought temporary and permanent injunctions against continued publication, on the principle grounds that publication would have serious impact on the national security, concurrent diplomatic negotiations, and consequently, future military developments. A district court refused to issue a restraining order, but the Second Circuit Court of Appeals reversed; on June 30 the Supreme Court, having heard oral argument, reversed the court of appeals by a vote of 6-3. *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

Justice Black, joined by Justice Douglas, wrote of his reason for voting to vacate the injunction: "Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly."

Compare Chief Justice Burger, dissenting: "We do not know the facts of the cases. \* \* \* Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act? I suggest we are in this posture because these cases have been conducted in unseemly haste."

And Justice Blackmun, also dissenting: "What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. \* \* \* I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting [the orderly presentation of evidence]."

Justice White, who was in the majority for reversal, observed that "failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication." He went on to discuss a number of "potentially relevant" provisions of the United States criminal code.

Immediately after this case was decided, Attorney General Mitchell announced that the Justice Department would "prosecute all those who have violated federal criminal laws." Two persons were indicted for theft and espionage in connection with the release of the Pentagon Papers to the newspapers; these indictments were later dismissed due to improper government investigative conduct. No newspaper or reporters were indicted, however.



The following year the New York Times received a Pulitzer Prize for its part in making the Pentagon Papers public.

(a) What does this case suggest about the significance of the distinction between a prior restraint and a *post hoc* sanction for speech, or a certain type of speech?

(b) If the prohibition on prior restraints is not absolute or very nearly so, it would seem essential, as suggested by The Chief Justice and Justice Blackmun, to have some sort of proceeding to determine whether any particular speech falls within or without the immunity from prior restraint. So long as that proceeding must be a judicial one, at the instance of the government—that is so long as the government bears the burden of initiating restraint rather than the publisher bearing the burden of obtaining a license to speak—there would seem to be little opportunity for governmental restriction of a single isolated publication. Every speaker would still, that is, get “one free bite” before the government could act to prevent a recurrence of the speech.

(c) The “one free bite” corollary of the doctrine prohibiting prior restraints suggests that the *Times* case need not have arisen if the Pentagon Papers had not been too lengthy to publish in one day’s newspaper.

Nonetheless, when Random House prepared to publish “Decent Interval,” former agent Frank Snepp’s book about the fall of Saigon, it took elaborate precautions to keep the CIA from learning of its plans lest the Agency seek to enjoin its publication. Thus, the author met with his editor in city parks, and the book was sent unordered and unannounced to 2,000 bookstores, followed by an explanatory letter. Robert L. Bernstein, the president of Random House was quoted as saying, “What really is happening in publishing is that as issues get more complicated, more news is being published as books. So that book publishers are starting to face some of the same problems as newspaper and magazine publishers. And I think they find the same distaste for prior restraint as the rest of the American media.” *N.Y. Times*, Nov. 19, 1977, at 9, col. 1.

5. The government’s interest in suppressing speech is of course the easiest to protect if it has a monopoly upon the media of communication, as it typically has in a totalitarian regime. Short of that, its difficulty would be minimized by requiring, under heavy penalty for failure, that the private owners of the media clear all material with government censors prior to publication. Control is still more imperfect if prior restraints are unavailable since, as may be illustrated by the Pentagon Papers case, some revelations, if they can only be made, are so powerful that they disable the government from taking reprisals. Once “the cat is out of the bag,” not only can it not be gotten back in, but there may arise a constituency against efforts to punish its liberator.

A similar point is made by Hamilton, in *The Federalist* No. 84, where he argued that it would be bootless to include a Bill of Rights in the Constitution (Mentor ed. 1961, at 514):

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.

**TRINITY METHODIST CHURCH, SOUTH v.  
FEDERAL RADIO COMMISSION**

United States Court of Appeals, District of Columbia Circuit, 1933.  
62 F. 850. Certiorari denied 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975.

GRONER, Associate Justice.

Appellant, Trinity Methodist Church, South, was the lessee and operator of a radio-broadcasting station at Los Angeles, Cal., \* \* \* The station had been in operation for several years. The Commission, in its findings, shows that, though in the name of the church, the station was in fact owned by the Reverend Doctor Shuler and its operation dominated by him. Dr. Shuler is the minister in charge of Trinity Church. \* \* \*

In September, 1930, appellant filed an application for renewal of station license. Numerous citizens of Los Angeles protested, and the Commission \* \* \* set the application down for hearing before an examiner. \* \* \* [T]he Commission denied the application for renewal upon the ground that the public interest, convenience, and/or necessity would not be served by the granting of the application. Some of the things urging it to this conclusion were that the station had been used to attack a religious organization, meaning the Roman Catholic Church; that the broadcasts by Dr. Shuler were sensational rather than instructive; and that in two instances Shuler had been convicted of attempting in his radio talks to obstruct the orderly administration of public justice.

\* \* \* The basis of the appeal is that the Commission's decision is unconstitutional, in that it violates the guaranty of free speech, and also that it deprives appellant of his property without due process of law. It is further insisted that the decision violates the Radio Act because not supported by substantial evidence, and therefore is arbitrary and capricious.

\* \* \*

We need not stop to review the cases construing the depth and breadth of the first amendment. The subject in its more general

outlook has been the source of much writing since Milton's *Areopagitica*, the emancipation of the English press by the withdrawal of the licensing act in the reign of William the Third, and the *Letters of Junius*. It is enough now to say that the universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publications, as well as immunity of censorship, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare. In this aspect it is generally regarded that freedom of speech and press cannot be infringed by legislative, executive, or judicial action, and that the constitutional guaranty should be given liberal and comprehensive construction. It may therefore be set down as a fundamental principle that under these constitutional guaranties the citizen has in the first instance the right to utter or publish his sentiments, though, of course, upon condition that he is responsible for any abuse of that right. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4th Bl.Com. 151, 152. But this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter. In that case there is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority. See *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 60 App.D.C. 79, 47 F.(2d) 670.

\* \* \*

In recent years the power under the commerce clause has been extended to legislation against interstate commerce in stolen automobiles, *Brooks v. United States*, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699; to transportation of adulterated foods, *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364; in the suppression of interstate commerce for immoral purposes, *Hoke v. United States*, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523; and in a variety of other subjects never contemplated by the framers of the Constitution. It is too late now to contend that Congress may not regulate, and, in some instances, deny, the facilities of interstate commerce to a business or occupation which it deems inimical to the public welfare or contrary to the public interest. *Lottery Cases*, 188 U.S. 321, 352, 23 S.Ct. 321, 47 L.Ed. 492. Everyone interested in radio legislation approved the principle of limiting the number of broadcasting stations, or, perhaps, it would be more nearly correct to say, recognized the inevitable necessity. In these circumstances Congress intervened and asserted its paramount authority, and, if it be admitted, as we think it must be, that, in the present condition of the science with its limited facilities, the regulatory provisions of the Radio Act are

a reasonable exercise by Congress of its powers, the exercise of these powers is no more restricted by the First Amendment than are the police powers of the States under the Fourteenth Amendment. \* \* \* In either case the answer depends upon whether the statute is a reasonable exercise of governmental control for the public good.

In the case under consideration, the evidence abundantly sustains the conclusion of the Commission that the continuance of the broadcasting programs of appellant is not in the public interest. In a proceeding for contempt against Dr. Shuler, on appeal to the Supreme Court of California, that court said (*In re Shuler*, 210 Cal. 377, 292 P. 481, 492) that the broadcast utterances of Dr. Shuler disclosed throughout the determination on his part to impose on the trial courts his own will and views with respect to certain causes then pending or on trial, and amounted to contempt of court. Appellant, not satisfied with attacking the judges of the courts in cases then pending before them, attacked the bar association for its activities in recommending judges, charging it with ulterior and sinister purposes. With no more justification, he charged particular judges with sundry immoral acts. He made defamatory statements against the board of health. He charged that the labor temple in Los Angeles was a bootlegging and gambling joint. In none of these matters, when called on to explain or justify his statements, was he able to do more than declare that the statements expressed his own sentiments. On one occasion he announced over the radio that he had certain damaging information against a prominent unnamed man which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose. As a result, he received contributions from several persons. He freely spoke of "pimps" and prostitutes. He alluded slightly to the Jews as a race, and made frequent and bitter attacks on the Roman Catholic religion and its relations to government. However inspired Dr. Shuler may have been by what he regarded as patriotic zeal, however sincere in denouncing conditions he did not approve, it is manifest, we think, that it is not narrowing the ordinary conception of "public interest" in declaring his broadcasts—without facts to sustain or to justify them—not within that term, and, since that is the test the Commission is required to apply, we think it was its duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit, and, in the circumstances, the refusal, we think, was neither arbitrary nor capricious.

If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for

slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

Nor are we any more impressed with the argument that the refusal to renew a license is a taking of property within the Fifth Amendment. There is a marked difference between the destruction of physical property and the denial of a permit to use the limited channels of the air.

\* \* \* [T]he former is vested, the latter permissive, and, as was said by the Supreme Court in *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 593, 26 S.Ct. 341, 350, 50 L.Ed. 596: "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether the restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not an unconstitutional taking of property without compensation or without due process of law." *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548, 558, 34 S.Ct. 364, 368, 58 L.Ed. 721.

\* \* \*

Affirmed.

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### QUESTIONS

1. Did the content of Dr. Shuler's statements over the radio differ in kind from that of "The Saturday Press" in *Near*? How? Do the differences, if any, explain or justify the different outcome in *Trinity Church*?

2. Were you persuaded by the *Trinity Church* court's distinction of *Near* and the prior restraint doctrine? On the court's reasoning, could Congress have banned the New York Times from interstate commerce or use of the mails—surely subjects within its authority—for publishing the Pentagon Papers? For publishing “defamatory and untrue matter?” See Loevinger, *Free Speech, Fairness, and Fiduciary Duty in Broadcasting*, 34 *Law & Contemp.Probs.* 278, 281 (1969).

3. Would it matter to your view of the proper disposition of the case if Dr. Shuler could have produced some basis for the charges he made against public officials? Why? Would a claim of “divine guidance” suffice to provide such a foundation? What standard would you require? What standard of care did the newspaper in *Near* have to meet in order to be immune from injunction?

4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), holds that the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not \* \* \*.” This constitutional limitation on libel actions has been extended to “public figures,” i. e., non-officials “in which the public has a justified and important interest,” *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967). States may, however, continue to allow private citizens to recover for libel “on a less demanding showing \* \* \* so long as they do not impose liability without fault.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

(a) Is the reasoning in *Near* affected by the doctrine of *Times v. Sullivan*? Which way does it cut?

(b) Should the *Times v. Sullivan* standard for libel actions apply with equal force in broadcast license renewal proceedings? If so, would it protect the licensee in *Trinity Church*?

5. The *KFKB* case cited in *Trinity Church* upheld the denial of a renewal license to one Dr. Brinkley, who answered letters over the air by prescribing certain medicines designated only by a number. Listener-correspondents would then purchase the remedies from druggists, who had bought them from Dr. Brinkley. Is the holding in *KFKB* good law in light of the *Virginia Board of Pharmacies* case, *supra* at 294, under which commercial speech that is neither fraudulent nor deceptive is protected by the first amendment? Are there other public interest grounds on which to deny renewal of a license used in this manner?

## C. TWO APPROACHES TO CONTENT PROSCRIPTION

### 1. PROHIBITION OF "INDECENT" WORDS

#### FCC v. PACIFICA FOUNDATION

United States Supreme Court, 1978.  
— U.S. —, 98 S.Ct. 3026, 57 L.Ed.2d —

Mr. Justice STEVENS delivered the opinion of the Court \* \* \*.

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, \* \* \* indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station owned by respondent, Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that immediately before its broadcast listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people \* \* \*. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission issued a Declaratory Order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 FCC 2d 94, 99 (1975). The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will

then decide whether it should utilize any of the available sanctions it has been granted by Congress.”<sup>1</sup>

In its Memorandum Opinion the Commission stated that it intended to “clarify the standards which will be utilized in considering” the growing number of complaints about indecent speech on the airwaves. \* \* \* Advancing several reasons for treating broadcast speech differently from other forms of expression,<sup>2</sup> the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C.A. § 1464, which forbids the use of “any obscene, indecent, or profane language by means of radio communications,” and 47 U.S.C.A. § 303(g), which requires the Commission to “encourage the larger and more effective use of radio in the public interest.”

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the “law generally speaks to *channeling* behavior more than actually prohibiting it. \* \* \* [T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”<sup>5</sup>

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they “were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon),” and that the prerecorded language, with these offensive words “repeated over and over,” was “deliberately broadcast.” In summary,

1. Ibid. The Commission noted: “Congress has specifically empowered the FCC to (1) revoke a station’s license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C.A. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C.A. 307, 308.” Id., at 96 n. 3.

2. “Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference, see *Rowan v. Post*

*Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.” 56 FCC2d, at 97.

5. Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience.



the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C.A. 1464."

\* \* \*

The United States Court of Appeals for the District of Columbia reversed \* \* \*.

## II

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of 47 U.S.C.A. § 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U.S.C.A. § 1464. The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

\* \* \*

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.

During the period between the original enactment of the provision in 1927 and its re-enactment in the Communications Act of 1934, the courts and the Federal Radio Commission held that the section deprived the Commission of the power to subject "broadcasting matter to scrutiny prior to its release," but they concluded that the Commission's "undoubted right" to take note of past program content when considering a licensee's renewal application "is not censorship."<sup>10</sup>

\* \* \* And, until this case, the Court of Appeals for the District of Columbia has consistently agreed with this construction.

\* \* \*

Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language. A single section of the 1927 Act is the source of both the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

\* \* \*

<sup>10</sup>. [KFKB Broadcasting Association v. Federal Radio Commission, 47 F.2d 670 (1931); Trinity Methodist Church,

South v. Federal Radio Commission, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 (1933).]

We conclude, therefore, that § 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

### III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" monologue was indecent within the meaning of § 1464.<sup>13</sup> Even that question is narrowly confined by the arguments of the parties.

The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality.

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in *Miller v. California*, 413 U.S. 15. Pacifica relies most heavily on the construction this Court gave to 18 U.S.C.A. § 1461 in *Hamling v. United States*, 418 U.S. 87. *Hamling* rejected a vagueness attack on § 1461, which forbids the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material. In holding that the statute's coverage is limited to obscenity, the Court followed the lead of Mr. Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. In that case, Mr. Justice Harlan recognized that § 1461 contained a variety of words with many shades of meaning. Nonetheless, he thought that the phrase "obscene, lewd, lascivious, indecent, filthy or vile," taken as a whole, was clearly limited to the obscene, a reading well-grounded in prior judicial constructions: "the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." 370 U.S., at 483. In *Hamling* the Court agreed with Mr. Justice Harlan that § 1461 was meant only to regulate obscenity in the mails; by reading into it the limits set by *Miller v. California*,

<sup>13</sup>. In addition to § 1464, the Commission also relied on its power to regulate in the public interest under 47

U.S.C.A. § 303(g). We do not need to consider whether § 303 may have independent significance \* \* \*.

413 U.S. 15, the Court adopted a construction which assured the statute's constitutionality.

The reasons supporting *Hamling's* construction of § 1461 do not apply to § 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted § 1464 as encompassing more than the obscene. The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.<sup>17</sup>

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject *Pacifica's* construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

#### IV

[Parts IV-A and IV-B of Justice Stevens' opinion, joined only by The Chief Justice and Justice Rehnquist, are omitted.]

#### C

We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367.

17. This conclusion is re-enforced by noting the different constitutional limits on Congress' power to regulate the two different subjects. Use of the postal power to regulate material that is not fraudulent or obscene raises "grave constitutional questions." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156. But it is well settled that the First Amendment has a special meaning in the broadcasting context. See, e. g., *FCC v. National Citizens Com-*

*mittee for Broadcasting*, — U.S. —; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367; *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94. For this reason, the presumption that Congress never intends to exceed constitutional limits, which supported *Hamling's* narrow reading of § 1461, does not support a comparable reading of § 1464.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Department*, 397 U.S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. \* \* \*

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the "well being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. *Id.*, at 640 and 639.<sup>28</sup> The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing

28. The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. *Butler v. Michigan*, 352 U.S. 380, 383. Adults who feel the need may purchase tapes and records or go to theatres and nightclubs to hear these words. In fact, the Commission has

not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

in the wrong place—like a pig in the parlor instead of the barnyard.” *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

[The concurring opinion of Justice Powell, joined by Justice Blackmun, is omitted. The dissenting opinion of Justice Stewart, joined by Justices Brennan, White, and Marshall, is omitted. Justice White would have construed “indecent” in 18 U.S.C. § 1464 to mean no more than “obscene,” thereby avoiding the constitutional issue and reversing the FCC for want of statutory authority to bar non-obscene speech.]

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting. \* \* \*

## I

### A

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many—including the FCC and this Court—might find offensive.

“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is \* \* \* dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.” *Cohen v. California*, supra, at 21. I am in wholehearted agreement with my brethren that an individual’s right “to be let alone” when engaged in private activity within the confines of his own home is encompassed within the “substantial privacy interests” to which Mr. Justice Harlan referred in *Cohen*, and is entitled to the greatest solicitude. *Stanley v. Georgia*, 394 U.S. 557 (1969). However, I believe that an individual’s actions in switching on and listening to communications transmitted over the public airways and directed to the public at-large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. \* \* \* [T]he residual privacy interests he retains vis-à-vis the communication he voluntarily ad-

mits into his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

\* \* \* [T]he very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[t]he radio can be turned off," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974)—and with a minimum of effort.

\* \* \* Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. \* \* \*

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals comprising the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. Compare *Lehman v. City of Shaker Heights*, *supra*. *Rowan v. Post Office Department*, 397 U.S. 728 (1970), relied on by the FCC and by the [Court], confirms rather than belies this conclusion. In *Rowan*, the Court upheld a statute, 39 U.S.C.A. § 4009, permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not prevented from doing so. Equally important, the determination of offensiveness *vel non* under the statute involved in *Rowan* was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernable here.

## B

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to

adults," *Erznoznik v. City of Jacksonville*, supra, at 212; see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 106-107 (1973) (BRENNAN, J., dissenting), the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). \* \* \*

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them.<sup>2</sup> It thus ignores our recent admonition that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."<sup>3</sup> The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of *Butler v. Michigan*, 352 U.S. 380 (1957). *Butler* involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."

\* \* \* [T]his Court found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned:

"The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler v. Michigan*, supra, at 383-384.

Where, as here, the government may not prevent the exposure of minors to the suppressed material, the principle of *Butler* applies *a fortiori*. \* \* \*

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for

2. Even if the monologue appealed to the prurient interest of minors, it would not be obscene as to them unless, as to them, "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

3. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). It may be that a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the "other legitimate proscription[s]" alluded to in *Erznoznik*. \* \* \*

Pacifica's broadcast of the Carlin monologue, the [court stresses] the time-honored right of a parent to raise his child as he sees fit—a right this Court has consistently been vigilant to protect. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Yet this principle supports a result directly contrary to that reached by the Court. *Yoder* and *Pierce* hold that parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.<sup>4</sup>

\* \* \*

### III

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.). The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this Nation. Academic research indicates that this is indeed the case. See B. Jackson, *Get Your Ass in the Water and Swim Like Me* (1974); J. Dillard, *Black English* (1972); W. Labov, *Language in the Inner City: Studies in the Black English Vernacular* (1972). As one researcher concluded, "[w]ords generally

4. The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified

*increasing* the diversity of speakers and speech, it has never been held to justify censorship." 556 F.2d, at 29 (emphasis in original). See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969).



considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." C. Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," Language and Linguistics Working Papers No. 5, at 82 (Georgetown University Press 1972).

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences comprised of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.

\* \* \*

#### NOTES AND QUESTIONS

1. Under *Miller v. California*, 413 U.S. 15 (1973) and related cases, material may be deemed "obscene" if (a) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual or excretory conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. For purposes of applying these tests, the "community" whose standards are applied is the local community where the material is uttered or displayed.

Under *Pacifica*, "indecent" language as used in 18 U.S.C.A. § 1464, it seems, "merely refers to nonconformance with accepted standards of morality." Accepted by whom? The Court does not indicate whether the applicable standards are those of the community of broadcast, the national "community," or perhaps just those of the FCC. How should this issue be resolved? Does the Commission have access to information on local standards, such as a jury provides in criminal prosecutions? Should it conduct rule making proceedings to determine a set of national standards of decency? Or should it issue regulations or guidelines explicating its own expectations of broadcasters in this area?

Footnote: The Court recites that the Commission acted upon a single letter of complaint about the "Filthy Words" monologue, which was broadcast in New York City. The complaint was received from one John R. Douglas—a Floridian who is a member of the national planning board of Morality in Media. The "young son" whom he said was with him in his car when they heard the monologue was 15 years old at the time. Broadcasting, July 10, 1978, at 20.

2. The Court “emphasize[s] the narrowness” of its holding, which is said to be a function of “a host of variables,” including the time of day and the content of the program in which indecent language is broadcast—both presumably relevant to audience composition—and whether it is used on radio or television. These and other variables, it suggests, would determine whether the language as broadcast, was a “nuisance,” something to be “channeled” rather than prohibited, a “right thing in a wrong place.” What does all this mean in practice? May the Carlin monologue ever be aired? See footnote 28.

(a) According to a study cited by the court of appeals, 556 F.2d 9, 14, the number of children watching television does not fall below one million until 1:00 a. m. Would this fact justify the Commission, in a later case, determining that indecent language may not lawfully be broadcast before that hour? Is the Commission obliged by the Court’s opinion to take account of any countervailing interests, among adults in the audience or among broadcasters, in being able to hear and to say indecent words?

(b) Can the “channeling” concept, or any other scheme of accommodation (such as warnings regarding content) protect the speech interests of those AM licensees, approximately half of the total, authorized to operate during daytime hours only?

(c) Note that 18 U.S.C.A. § 1464 proscribes “profane” as well as “indecent” and “obscene” language. Could any of these categories be applied to prohibit speech other than “filthy words” on the ground that “the government’s interest in the well being of its youth and in supporting parents’ claim to authority in their own household justified the regulation of otherwise protected expression?” Suppose that the FCC determined as a fact that the great majority of parents would not want their children to hear atheism presented in a favorable light; could such a presentation be prohibited?

(d) The Commission has taken the position, by the way, that § 1464 is limited by its terms to spoken words, and that additional legislation is needed if the FCC is to reach indecent displays on television.

(e) The Commission has also taken steps to assure broadcasters that (as presently constituted) it will construe *Pacifica* narrowly to reach only a “concentrated and repeated assault” of indecent language broadcast outside of the late-night hours. It has thus rejected a complaint from Morality in Media concerning the use of occasional expletives in programs broadcast by WGBH-TV, a public television station. Broadcasting, July 24, 1978, at 32.

3. Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C.Cir. 1975), arose from the Commission’s response to certain radio call-in programs on sex-related topics, so-called “topless radio.” On March 27, 1973, the FCC announced an inquiry into the broadcast of obscene, indecent, or profane material. On the following day,

Chairman Burch, in a speech before the National Association of Broadcasters, urged licensees to exercise self-restraint. On April 11 a Notice of Apparent Liability proposing a forfeiture of \$2000 against one licensee was issued. The licensee paid the forfeiture but the Citizens Committee and the Illinois division of the American Civil Liberties Union, as representatives of the listening public, filed an Application for Remission of the Forfeiture and a Petition for Reconsideration. The Commission denied the petition.

The Court of Appeals, Leventhal, J., affirmed the Commission on the merits, but specifically upheld the appellants' standing. The government had urged that the public, as distinguished from the licensee, has no interest in a forfeiture proceeding. The court was concerned, however, that the public's interest in the flow of information would not be vindicated if the licensee that is subjected to a forfeiture proceeding finds the burden too great, in terms of its own interest, to warrant its undertaking the risk and expense involved in contesting the Commission's action. In a supplemental opinion, Judge Leventhal conceded that "no Supreme Court case \* \* \* goes this far in a situation where the producer or distributor directly affected has acquiesced. However, we found such a requirement implicit in the contours of the statute, a procedural right that furthers the substantive rights of the public under the First Amendment." *Id.* at 406.

What substantive interests should an intervenor such as the Illinois Citizens Committee be heard to assert: those of the broadcaster as well as the listeners? Do listeners have a right to any particular type of programming, including that which plays at the brink of indecency? Should it matter whether the sex-related call-in show under sanction was "unique" in the area? See *WEFM*, *supra* at 294.

4. In March, 1973 sex-related discussion shows had been ratings leaders in their time slots in several cities, including Chicago. Storer Broadcasting had syndicated one such show to twenty-one stations. Yet in June of that year, one month after Chairman Burch's speech, a National Association of Broadcasters survey showed that sex discussion shows had almost completely disappeared from the air. 515 F.2d 397, 408 (Bazelon, C. J., voting to grant rehearing *en banc*).

5. See generally Note, *Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 Va.L.Rev. 579 (1975), which concludes that the Commission's regulation of offensive speech should be limited to the control of obscenity, and that it should use its rule-making power to bring to this narrow area "more consistency and rationality" than case-by-case adjudication yields. On the general chilling effect created when the FCC retains any wider discretion than there proposed, the author states (at 642): "Broadcaster overreaction to protect the valuable license exacerbates this effect."

## 2. REGULATION BY RAISED EYEBROW

## YALE BROADCASTING v. FCC

United States Court of Appeals, District of Columbia Circuit, 1973.  
478 F.2d 594. Certiorari denied, 414 U.S. 914, 94 S.Ct. 211, 38 L.Ed.2d 152 (1973).

WILKEY, Circuit Judge:

\* \* \*

I. *Substance of the First and Second Notices*

In the late 1960's and early 1970's the FCC began receiving complaints from the public regarding alleged "drug oriented" songs played by certain radio broadcasters. In response to these complaints the Commission issued a Notice, the stated purpose of which was to remind broadcasters of their duty to broadcast in the public interest.<sup>2</sup> To fulfill this obligation licensees were told that they must make "reasonable efforts" to determine before broadcast the meaning of music containing drug oriented lyrics. The Notice specified that this knowledge must be in the possession of a management level executive of the station, who must then make a judgment regarding the wisdom of playing music containing references to drugs or the drug culture.

This initial Notice led to substantial confusion within the broadcast industry and among the public. Confusion centered around the meaning of phrases such as "knowing the content of the lyrics," "ascertain before broadcast," and "reasonable efforts."

In order to clarify these ambiguities, the FCC issued a second Memorandum and Order clarifying and modifying certain parts of the original Notice.<sup>3</sup> The thrust of this Order was that (1) the Commission was not prohibiting the playing of "drug oriented" records, (2) no reprisals would be taken against stations that played "drug oriented" music, but (3) it was still necessary for a station to "know" the content of records played and make a "judgment" regarding the wisdom of playing such records.

II. *Interpretation of the Definitive Order*

Many of appellant's fears and arguments stem from the apparent inconsistencies between the Notice and the subsequent Order. \* \* \* [W]e treat the Notice, as we believe the Commission intends, as superseded by the Order. Reference to the Commission's requirements is to those established by the Order.

Once the Order is taken as definitive, it becomes fairly simple to understand what the FCC asks of its licensees. The Order recognizes the gravity of the drug abuse problem in our society. From this basis,

2. Public Notice, 28 F.C.C.2d 409 (1971). 3. Memorandum Opinion and Order, 31 F.C.C.2d 377 (1971).

the Order proceeds to remind broadcasters that they may not remain indifferent to this severe problem and must consider the impact that drug oriented music may have on the audience. The Commission then makes the common sense observation that in order to make this considered judgment a broadcaster must "know" what it is broadcasting.<sup>6</sup>

The Commission went to great lengths to illustrate what it meant by saying that a broadcaster must "know" what is being broadcast. The Order emphasizes that it is not requiring the unreasonable and that the Commission was "not calling for an extensive investigation of each \* \* \* record" that dealt with drugs. It also made clear that there was no general requirement to pre-screen records.

The Commission in its Order was obviously not asking broadcasters to decipher every syllable, settle every ambiguity, or satisfy every conceivable objection prior to airing a composition. A broadcaster must know what he can reasonably be expected to know in light of the nature of the music being broadcast. It may, for example, be quite simple for a broadcaster to determine that an instrumental piece has little relevance to drugs. Conversely, it may be extremely difficult to determine what thought, if any, some popular lyrics are attempting to convey. In either case, only what can reasonably be understood is demanded of the broadcaster.

Despite all its attempts to assuage broadcasters' fears, the Commission realized that if an Order can be misunderstood, it will be misunderstood—at least by some licensees. To remove any excuse for misunderstanding, the Commission specified examples of how a broadcaster could obtain the requisite knowledge. A licensee could fulfill its obligation through (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public. The Order made clear that these procedures were merely suggestions, and were not to be regarded as either absolute requirements or the exclusive means for fulfilling a station's public interest obligation.

\* \* \*

### III. *An Unconstitutional Burden on Freedom of Speech*

Appellant's first argument is that the Commission's action imposes an unconstitutional burden on a broadcaster's freedom of speech. This contention rests primarily on the Supreme Court's opinion in

6. "The Commission did make clear in the Notice that the broadcaster could jeopardize his license by failing to exercise license responsibility in this area. Except as to broadcasts by political candidates, the licensee is responsible for the material broadcast over his facilities. \* \* \* The thrust of the Notice is simply that

this concept of licensee responsibility extends to the question of records which may promote or glorify the use of illegal drugs. The licensee should know whether his facilities are being used to present again and again a record which urges youth to take heroin or cocaine—that it is a wonderful, joyous experience." *Id.* at 379.

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), in which a bookseller was convicted of possessing and selling obscene literature. The Supreme Court reversed the conviction. Although the State had a legitimate purpose in seeking to ban the distribution of obscene materials, it could not accomplish this goal by placing on the bookseller the procedural burden of examining every book in his store. To make a bookseller criminally liable for all the books sold would necessarily "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature \* \* \*."

Appellant compares its own situation to that of the bookseller in *Smith* and argues that the Order imposes an unconstitutional burden on a broadcaster's freedom of speech. The two situations are easily distinguishable.

Most obviously, a radio station can only broadcast for a finite period of twenty-four hours each day; at any one time a bookstore may contain thousands of hours' worth of readable material. Even if the Commission had ordered that stations pre-screen all materials broadcast, the burden would not be nearly so great as the burden imposed on the bookseller in *Smith*. As it is, broadcasters are not even required to pre-screen their maximum of twenty-four hours of daily programming. Broadcasters have specifically been told that they may gain "knowledge" of what they broadcast in other ways.

A more subtle but no less compelling answer to appellant's argument rests upon *why* knowledge of drug oriented music is required by the Commission. In *Smith*, knowledge was imputed to the purveyor in order that a criminal sanction might be imposed and the dissemination halted. Here the goal is to assure the broadcaster has adequate knowledge. Knowledge is required in order that the broadcaster can make a judgment about the wisdom of its programming. It is beyond dispute that the Commission requires stations to broadcast in the public interest. In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required. The Order issued by the Commission has merely reminded the industry of this fundamental metaphysical observation—in order to make a judgment about the value of programming one must have knowledge of that programming.

We say that the licensee must have *knowledge* of what it is broadcasting; the precise *understanding* which may be required of the licensee is only that which is reasonable. No radio licensee faces any realistic possibility of a penalty for misinterpreting the lyrics it has chosen or permitted to be broadcast. If the lyrics are completely obscure, the station is not put on notice that it is in fact broadcasting material which would encourage drug abuse. If the lyrics are meaningless, incoherent, the same conclusion follows. The argument of

the appellant licensee, that so many of these lyrics are obscure and ambiguous, really is a circumstance available to some degree in his defense for permitting their broadcast, at least until their meaning is clarified. Some lyrics or sounds are virtually unintelligible. To the extent they are completely meaningless gibberish and approach the equivalent of machinery operating or the din of traffic, they, of course, do not communicate with respect to drugs or anything else, and are not within the ambit of the Commission's order. Speech is an expression of sound or visual symbols which is intelligible to some other human beings. At some point along the scale of human intelligibility the sounds produced may slide over from characteristics of free speech, which should be protected, to those of noise pollution, which the Commission has ample authority to abate.

We not only think appellant's argument invalid, we express our astonishment that the licensee would argue that before the broadcast it has no knowledge, and cannot be required to have any knowledge, of material it puts out over the airwaves. \* \* \* No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it and standing back of both its content and quality. The Commission is not required to allow radio licensees, being freely granted the use of limited air channels, to spew out to the listening public canned music, whose content and quality before broadcast is totally unknown.

\* \* \* Far from constituting any threat to freedom of speech of the licensee, we conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities.

\* \* \*

#### IV. *The Requirement of Rulemaking*

We turn next to appellant's contention that the Commission in its Order has imposed a new duty on the broadcasting industry. If the FCC were indeed imposing a new duty on its licensees, its action should be subject to the public debate and scrutiny of rulemaking proceedings.<sup>16</sup> If the Commission is simply reminding broadcasters of an already existing duty, rulemaking is not required. We conclude that the stated purpose and the actual result of the Commission's Notice and Order was to remind the industry of a pre-existing duty.

\* \* \* The most thorough articulation of this duty was given in the Commission's 1960 Program Policy Statement wherein it said:

Broadcast licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they

16. Citizens Communications Center v. FCC, [supra at 124], note 5.

present to the public. \* \* \* This duty is personal to the licensee and may not be delegated. \* \* \*

The only real difference between the 1960 Statement and the Order under attack is that the Order (1) deals with programming as it relates to drugs rather than programming generally, and (2) specifically states that a broadcaster must have "knowledge" of what he is programming.

\* \* \*

It is entirely reasonable for the Commission to issue "reminders" referring to specific areas when such problems exist. The Commission need not content itself with repeating general policy statements when the general policy is being violated in a very specific way. It is much more logical for the Commission to point out the specific problem and then illustrate how the general policy applies in the particular situation.

\* \* \*

#### V. *Asserted Vagueness*

[The court here rejected arguments "(1) that the Order is unconstitutionally vague, or (2) that the Order is so vague that the Commission abused its discretion in refusing to clarify it."]

#### VI. *Conclusion*

In spite of the horrendous forebodings which brought appellant into court the fact is that appellant has recently had its license renewed. Likewise, there has been no showing or suggestion that the standard enunciated in the Order has been employed to deny any license to a broadcaster. If such a denial does occur and can be shown to be unfair or due to a misapplication of the Commission's own guidelines (as described in Part II of our opinion), then redress may be sought in the courts. Until that time, appellant might commit its energies to the simple task of understanding what the Commission has already clearly said, rather than instituting more colorful but far less fruitful actions before already heavily burdened federal courts.

For the reasons given above, the action of the Federal Communications Commission is

Affirmed.

#### ON MOTION FOR REHEARING EN BANC

Separate Statement by Chief Judge BAZELON as to why he would grant rehearing *en banc*, *sua sponte*.

BAZELON, Chief Judge:

\* \* \*

The panel opinion found that the language of the Commission's directives does not purport to censor popular songs. But that language



can only be understood in the light of the Commission's course of conduct.

The Commission's initial statement in the area of "drug-oriented" songs was a "Public Notice" issued on March 5, 1971. The Notice, entitled "Licensee Responsibility to Review Records Before Their Broadcast", did not specifically prohibit the playing of particular songs. But broadcasters might well have read it as a prohibition. For one thing, two members of the Commission, including the member reported to be the originator of the Notice, appended to it a formal statement explaining that their goal was to "discourage, if not eliminate, the playing of records which tend to promote and/or glorify the use of illegal drugs." Five weeks after the Notice was issued, the Commission's Bureau of Complaints and Compliance provided broadcasters the names of 22 songs which had come to its attention as "so-called drug-oriented song lyrics."<sup>7</sup>

\* \* \* It appears that radio stations moved quickly to ban certain songs. In some cases stations stopped playing, regardless of subject or lyric, all the works of particular artists whose views might lift the Commission's eyebrow. Broadcasters circulated the list of 22 songs throughout the industry as a "do not play" list.

The Commission's subsequent "Memorandum Opinion and Order", issued on April 16, 1971, and designated by the Commission as its "definitive statement" on the subject, appeared to backtrack somewhat. The Order repudiated the list of 22 songs. It stated that the evaluation of which records to play "is one solely for the licensee", and that "[t]he Commission cannot make or review such individual licensee judgment."

But the Commission's order went further. Instead of rescinding the Public Notice, the Order restated its basic threat: "the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area." As we have recognized, "licensee responsibility" is a nebulous concept. It could be taken to mean—as the panel opinion takes it—only that "a broadcaster must 'know' what it is broadcasting." On the other hand, in light of the earlier Notice, and in light of the renewed warnings in the Order about the dangers of "drug-oriented" popular songs, broadcasters might have concluded that "responsibility" meant "prohibition".

7. In its subsequent Order, *infra*, the Commission reported that the 22 songs had been identified by the Department of the Army. Apparently the Commission conferred with military officials before issuing the initial

Public Notice. 31 FCC2d 79 (1971). The Commission did not consult with the Bureau of Narcotics and Dangerous Drugs. N. Y. Times, March 28, 1971, p. 41, c. 1.

\* \* \* The confusion was crystallized later in 1971 in Congressional testimony by FCC Chairman Burch. At one point, the Chairman offered this assurance:

Chairman Burch: \* \* \* [C]ontrary to Commissioner Johnson's statement that we banned drug lyrics, we did not ban drug lyrics. \* \* \*

Moments later, however, the following ensued:

Senator Nelson: All I am asking is: If somebody calls to the FCC's attention that a particular station is playing songs that, in fact, do promote the use of drugs in the unanimous judgment of the Commission, if you came to that conclusion, what would you do?

Chairman Burch: I know what I would do, I probably would vote to take the license away.

\* \* \*

In *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed. 2d 405 (1963), Mr. Justice Brennan observed that "precision of regulation must be a touchstone" in the area of freedom of expression. There is no precision here. The Commission's chameleon-like directives reflect the spectrum from confusion to deliberate obfuscation. The court must look to the impact of these directives, not merely their language. Such review is all the more necessary where the Commission's directives are couched in code words for license renewal such as "public interest" or "licensee responsibility". Seven years ago, a member of the Commission explained:

Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air.

Judge (now Chief Justice) Burger found this reasoning to be "unanswerable." *Anti-Defamation League of B'nai B'rith v. FCC*, 131 U.S.App.D.C. 146, 148, 403 F.2d 169, 171 (1968). In the differing circumstances of this case, that reasoning might be answerable. But the court cannot abdicate its responsibility to face the question.

The panel opinion indicates that the present challenges to the Commission's directives are premature; that the Commission's final

sanction is denial of a license, and until that sanction is imposed, the petitioners cannot demonstrate any harm from the Commission's actions. Opposed to this viewpoint is the often recognized principle that the threat of legal sanction can have as much effect on the conduct of threatened parties as the sanction itself.<sup>22</sup> If that principle applies here, as petitioners argue, then there is a judicially cognizable injury as soon as broadcasters begin to alter their programming to avoid governmental reprisal.

This case presents several other questions of considerable significance: Is the popular song a constitutionally protected form of speech? Do the particular songs at which these directives were aimed have a demonstrable connection with illegal activities?<sup>24</sup> If so, is the proper remedy to "discourage or eliminate" the playing of such songs? Can the FCC assert regulatory authority over material that could not constitutionally be regulated in the printed media?

Clearly, the impact of the Commission's order is ripe for judicial review. And, on that review, it would be well to heed Lord Devlin's recent warning:

If freedom of the press \* \* \* [or freedom of speech] perishes, it will not be by sudden death. \* \* \* It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it.

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### QUESTIONS

1. Is *Smith v. California* convincingly distinguished by the court?

(a) Concerning the "burden" distinction, assume that a radio station with a contemporary music format receives 250 new records per week, many of which are quite difficult to interpret. Is it reasonable to compare the time it would take to pre-screen "twenty-four hours of daily programming" with the "thousands of hours' worth of readable material" in a bookstore? See Comment, 5 *Loyola L.A. L.Rev.* 329, 355 (1972).

22. *CBS v. U. S.*, 316 U.S. 407, 414, 62 S.Ct. 1194, 86 L.Ed. 1563 (1941); see *Environmental Defense Fund v. Hardin*, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1098-1100 (1970); cf. the candid statement of Clay T. Whitehead, Director of Telecommunications Policy in the White House, as to why the threat of license removal is an effective means of program control: "The main value of the sword of Damocles is that it hangs, not that it drops. Once you take a guy's license away,

you no longer have any leverage against him." *The Washington Post*, March 9, 1973, at p. A 17, col. 3.

24. The only evidence in the record on this point is the statement of the Director of The Bureau of Narcotics and Dangerous Drugs expressing strong doubt that there is any connection between "drug-oriented song lyrics" and the use of drugs. *The New York Times*, March 28, 1971, p. 41, c. 1. \* \* \*

(b) Concerning the “more subtle” distinction between the state’s purpose in *Smith* and the FCC’s purpose here—to assure broadcaster knowledge—is the court implying that a broadcaster might discharge its public interest obligation by knowingly playing drug oriented music? If so, is that a realistic proposition, in light of the FCC’s implied distaste for such programming? If not, does the court’s distinction still obtain?

2. Even a broadcaster with knowledge of what it is broadcasting is held only to a reasonable understanding of the material, i. e., as to whether it is “drug oriented.” How would you advise a broadcaster to make that determination? Consider both substance and procedure. As to substance, would you say that “Lucy in the Sky with Diamonds,” by the Beatles, is “drug-oriented?” Why? As to procedure, bear in mind that “most of the drug-oriented songs do not explicitly promote or glorify the use of drugs, and such meanings must be drawn out of innuendo, *double entendre*, and special lingo.” Note, Drug Songs and the FCC, 5 U.Mich.J.L. Reform 334, 337 (1972). What procedures are therefore indicated to the broadcaster anxious to take reasonable steps to know the contents of what it broadcasts?

3. How would you argue against the court’s analogy between “canned-music” and canned food, the producers of which are required to know the contents and to “stand back of” both contents and quality? Are broadcasters being required to warrant the quality of their product? Are broadcasters more like the producers or the retailers of canned goods?

4. Compare the court’s rather unruffled attitude toward the potential impact of the FCC Order (e. g., “no \* \* \* suggestion that the \* \* \* Order has been employed to deny any license”) with Judge Bazelon’s concern for its potential chilling effect on expression. (See text at n. 22.) As Judge Bazelon recognizes, the relevance of that concern turns ultimately upon whether “the popular song [is] a constitutionally protected form of speech.” How should that question be answered? Does the answer depend upon whether a particular song is “drug oriented,” or, in the FCC’s phrase the song “promote[s] or glorif[ies] the use of illegal drugs?”

5. If the FCC can deny a broadcaster’s license renewal on public interest grounds for having played songs promoting illegal drug use, does it follow that a state could ban the sale of the same songs in printed (i. e., sheet music) form? Could it ban their sale to children only?

**WRITERS GUILD OF AMERICA, WEST, INC. v. FCC**

United States District Court, Central District of California, 1976.  
423 F.Supp. 1064. Appeal pending United States Court  
of Appeals, Ninth Circuit.

FERGUSON, District Judge.

**INTRODUCTION**

More than half a century ago, Secretary of Commerce Herbert Hoover warned that, "We cannot allow any single person or group to place themselves in a position where they can censor the material which shall be broadcast to the public, nor do I believe that the government should ever be placed in a position of censoring this material." The plaintiffs in this case have exposed a joint agreement on the part of the three major television networks, the Federal Communications Commission ("FCC"), and the National Association of Broadcasters ("NAB") to permit one group—the NAB Television Code Review Board—to act as a national board of censors for American television. The plaintiffs have evidenced a successful attempt by the FCC to pressure the networks and the NAB into adopting a programming policy they did not wish to adopt. The plaintiffs have proven that the FCC formulated and imposed new industry policy without giving the public its right to notice and its right to be heard.

The policy involved is well known. It has been called the "family hour," the "family viewing policy," the "9:00 rule," even the "prime time censorship rule." Specifically, the policy is that "Entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program is deemed to be inappropriate for such an audience, advisories should be used to alert viewers." NAB, *The Television Code* 2-3 (18 ed. June, 1975).

\* \* \*

Much of the energy associated with this case has been generated because the plaintiffs and defendants disagree about the wisdom of the family viewing policy. In the last analysis, however, this is not the family hour case. The desirability or undesirability of the family viewing policy is not the issue. Rather the question is who should have the right to decide what shall and shall not be broadcast and how and on what basis should these decisions be made. This court will not evaluate the family viewing policy except to say that individual broadcast licensees have the right and the duty to exercise independent judgment in deciding whether or not to follow that policy. This court has no authority to declare an end to the family hour. At the same time, however, neither the FCC nor the NAB has the right to com-

promise the independent judgments of individual station owner licensees. The court will formulate remedies designed to let those with the right and the duty to make programming decisions make them without improper interference from government or other broadcasters. If the family hour continues, it should continue because broadcasters in their independent judgment decide that it is desirable policy, not because of government pressure or NAB regulation. If government intervenes in the future to control entertainment programming on television, it shall do so not in closed-door negotiating sessions but in conformity with legislatively mandated administrative procedures. If the government has any power to regulate such programming, it must be exercised by formal regulation supported by an appropriate administrative record, not by informal pressure accompanied by self-serving and unconvincing denials of responsibility. In short, the family hour may or may not be desirable. Censorship by government or privately created review boards cannot be tolerated.

\* \* \*

## II. FACTUAL FINDINGS

The parties, of course, characterize the factual circumstances leading up to the adoption of the family viewing policy quite differently. None of the defendants are prepared to accept the plaintiffs' position that Chairman Wiley and the Commission staff, acting on behalf of the Commission, pressured the networks and the NAB into adopting the family viewing policy thereby causing injury to the plaintiffs. The government defendants maintain that Chairman Wiley merely made suggestions and they deny that he threatened anyone. \* \* \*

Moreover, the government defendants deny that Chairman Wiley's activities, whatever their character, were anything more than a "personal initiative." They contend that his "personal" activities "cannot in any way be construed as agency action by, or on behalf of the Commission."

\* \* \* At oral argument, however, the private defendants\*\* conceded that the Chairman had clearly done more than offer suggestions. How much more they were unable to say.

[All of the defendants] contend that the adoption of the family viewing policy was not caused by Chairman Wiley. In fact, they maintain that Wiley's proposals were rejected. Instead the private defendants suggest that the adoption of the policy is best viewed as "a continuation of the industry's response to public concern over televised violence and other offensive material." The family viewing policy, they claim, is "a direct outgrowth of the work of [CBS President]

\* The FCC and each of the seven Commissioners.—D.G.

\*\* ABC, CBS, NBC, and the National Association of Broadcasters.—D.G.

Arthur Taylor, and not the result of pressure or suggestions by Chairman Wiley."

\* \* \*

Such post hoc rationalizations, however, cannot be squared with the evidence accumulated by the plaintiffs. \* \* \* Based on the totality of the evidence accumulated in this case the court finds that Chairman Wiley, acting on behalf of the Commission (and with the approval of the Commissioners) in response to congressional committee pressure launched a campaign primarily designed to alter the content of entertainment programming in the early evening hours. The evidence discloses, as former Commissioner Johnson put it, that the government activities involved amounted to "a virtually unprecedented orchestration of regulatory tools by the FCC." \* \* \* The court finds that Chairman Wiley in the course of his campaign threatened the industry with regulatory action if it did not adopt the essence of his scheduling proposals. On some occasions, when the persuasive demands of the situation so dictated, he would withdraw his threats or assume a low profile. But the Commission's pressure in this case was persistent, pronounced, and unmistakable. Chairman Wiley's actions were the direct cause of the implementation of the family viewing policy: were it not for the pressure he exerted, it would not have been adopted by any of the networks nor by the NAB. The threat of regulatory action was not only a substantial factor leading to its adoption but a crucial, necessary, and indispensable cause.

This is not to say that other factors did not contribute to the policy's acceptance. Taylor, for example, was in part genuinely concerned with the level of violence on television. Other prominent CBS officials, however, believed that the problem was exaggerated and that the network had already taken positive steps to deal with it. To be sure, there had been a public outcry surrounding the broadcasting of several shows particularly the showing of the movie "Born Innocent." But most of the leading network officials were satisfied that individual networks could handle and were handling the problem. In the absence of government threats, no drastic changes would have been made. Even Taylor would not have locked CBS into a public commitment to the family viewing policy unless it were clear that the rest of the industry would be bound by it. While it is doubtful that Taylor could have persuaded his own network to commit itself publicly to the family viewing policy in the absence of Wiley's offensive, it is clear beyond doubt that the rest of the industry could not have been "persuaded" without Wiley's pressure.

Taylor feared that if CBS publicly committed itself to such a policy that the commitment would work to CBS's competitive disadvantage in the absence of a binding enforcement mechanism applicable to the industry at large. Past experience in children's pro-

gramming had led him to the conviction that broadcasters, more interested in dollars than in the public interest, would use violence as a tool to hike program ratings if they were left free to program in their own discretion. CBS was thus prepared to delegate its program discretion to the NAB, but only if its major competitors could be persuaded to do so as well. FCC pressure was necessary to achieve this objective.

The evidence supporting these conclusions is contained in the massive record before this court. Further findings are discussed in detail below.

1. The depiction of violence on television has been a continuing source of congressional and public concern for more than two decades. Broadcasters had responded to these concerns in a variety of ways. Attempts were made to reduce gratuitous violence, to schedule particularly violent programs in later hours of the evening, and to use advisories alerting audiences to the presence of disturbing material. These policies were employed as factors in the decisionmaking process rather than as hard and fast rules. They were serious considerations in broadcaster decisionmaking, but were by no means uniformly followed. Many of the broadcasters provided evidence of the fact that broadcasters have used violence as an easy way to raise ratings.  
\* \* \*

2. Although the FCC had been urged on a number of occasions to initiate regulatory efforts with respect to sex and violence on television, its response had been to hope, as former Commissioner Johnson testified, "that the problem would go away and that the issue raised by Congress one year would be forgotten the next, as sometimes happens." \* \* \*

3. The patience of congressional committees, however, had worn thin. \* \* \* [T]he House Appropriations Committee demanded action:

This is the fifth consecutive year the Committee has included language in its report expressing concern with the effects of violence and questionable programming on children. It appears that the Commission has taken little or no action in response to those expressions.

The Committee feels that this issue needs resolution. Therefore the Commission is directed to submit a report to the Committee by December 31, 1974, outlining specific positive actions taken or planned by the Commission to protect children from excessive programming of violence and obscenity.

\* \* \* The Committee is reluctant to take punitive action to require the Commission to heed the views of the Congress, and to carry out its responsibilities, but if this is



what is required to achieve the desired objectives, such action may be considered. The Committee hopes the Commission will move promptly to resolve the administrative, jurisdictional, and constitutional problems associated with this issue. H.R.Rep.No.1139, 93d Cong., 2d Sess. 15 (1974).

The Senate Appropriations Committee followed suit \* \* \*

4. Chairman Wiley's reluctance to enter into the field had not been caused by a lack of concern for the problem as a private citizen and parent. Instead it stemmed from a deep belief that constitutional, statutory and prudential considerations dictated that government had no proper role to play. Nonetheless in response to the political pressure created by the House Report, Wiley instructed his staff to begin working to determine "how the Commission can set about to comply with the House Committee's request."

5. \* \* \* Sometime in August 1974, acting at the request of Chairman Wiley, Lawrence Secrest, Legal and Administrative Assistant to the Chairman, requested the NAB to strengthen its position on televised violence by reinstating language which had earlier existed in the Code. The proposal, which had been reduced to writing, was delivered by Secrest to John Summers, the NAB general counsel, and was considered by the NAB Television Code Review Board (hereinafter "Code Board") at their October 1-2 meeting in San Antonio, and was rejected. \* \* \*

7. On October 4, 1974, the FCC staff presented three proposals to Chairman Wiley which they hoped might serve as appropriate Commission responses to the congressional directives. The staff proposals included a variety of administrative responses, including notices of inquiry, notices of proposed rulemaking and policy statements. The goal of pressuring broadcasters into regulatory efforts was manifest throughout the proposals. For example, the document submitted by the Office of Plans and Policy opined that the "emphasis of [the] Policy Statement should be 'jaw-boning' and self-regulatory efforts to eliminate gratuitous violence and 'indecent' programming during those times when children are most likely to view television." Moreover, the staff recommended that the Commission speak in terms of the public interest in order to provide a color of legal authority for its views. \* \* \*

Essentially the theory was that since the FCC was required to determine whether relicensing of a station was in the "public interest" it could identify in advance those matters which it considered to be outside the public interest. Thus Commission statements clothed in the language of "public interest" would warn broadcasters of consequences in the relicensing process. Moreover although the Commission could not directly censor programming content, it could achieve the same result by "public interest" jawboning. Finally, it is clear

that NAB regulation in some form was viewed as an important component. \* \* \*

8. Chairman Wiley was convinced that formal Commission action was unwise policy. Moreover he believed that the staff proposals for formal Commission action presented severe First Amendment and section 326 problems. Instead of moving ahead with formal proceedings, he decided to do something "more quick and more dramatic." Despite grave reservations about the viability of formal Commission actions, Wiley permitted the staff to continue working on proposed notices of rulemaking and inquiry. This work continued well into November. Its continuation served two purposes. First, it preserved an option in the event of network recalcitrance. Equally important, since the industry press was aware of the continued work and reported it to an audience which included broadcaster executives, the fact of continued FCC staff work enhanced the threat of unwelcome Commission action. The statement by the government defendants that the work continued because of a desire to avoid discouraging certain staff members supplies no believable alternative explanation.

9. Six days after the October 4 meeting Wiley took the first in a series of steps designed to bring Commission pressure to bear on the industry. In a speech delivered to the Illinois Broadcasters Association, he focused on "the question of violence and obscenity on television—particularly as to the effect of such presentations on our children." The speech reminded broadcasters of their "public accountability" and "special" responsibilities as licensees. It stated that "[I]f self-regulation does not work governmental action to protect the public may be required—whether you like it or whether I like it" and stressed that the issue involved was on the "front-burner of a rather 'well-heated' Chairman's desk at the FCC." Specifically it called for "intelligent scheduling, appropriate warnings, and, perhaps, even some kind of industry-administered rating program \* \* \*." In the process, it referred to a speech delivered in Atlanta by Wiley proposing a reduction in children's commercials, and it applauded industry code amendments which had followed that speech, stating that "I am frankly optimistic that the combined effect of government encouragement and enlightened self-regulation will bring about constructive change in this very important aspect of public service."

10. The import of the speech was unmistakable and the industry press was quick to say so. \* \* \*

11. The witnesses uniformly testified that network executives and FCC officials religiously read the trade press. \* \* \*

13. On November 7, 1974, Chairman Wiley and members of the FCC staff met with the Washington vice presidents of CBS, NBC and ABC. At that meeting, Wiley proposed that each network issue a statement of policy on violence and obscenity, that the policies include

cautionary warnings, and that programs requiring warnings be scheduled later in the evening. \* \* \* [CBS Vice President Richard] Jencks' memo of November 8 to Taylor discusses the scheduling proposal:

Chairman Wiley also asked consideration of an agreement that programs bearing such a warning would not be scheduled before a certain time which, for discussion purposes, he identified as 9 p. m. local time, although in the discussion he conceded that time zone difficulties might make the selection of such a time impracticable.

At this point, the specifics of the Wiley proposals were negotiable and subject to discussion. But if anything was clear at this point, it was that the FCC had decided that the networks were required to do *something* about violence and sex related material on television,<sup>44</sup> and that "something" would have to involve a visible and substantive commitment to its reduction. As Jencks mentioned in his memo, the Chairman gave the "*clear indication* that, if the networks were unable to agree to an approach upon these *general* lines, he would urge the Commission to take alternative action which, however, he did not specify." (emphasis added).

This is not to say that Wiley had somehow changed his mind about the constitutionality of formal Commission action. He explicitly reaffirmed his doubts about its propriety. Rather Wiley left the impression that, as Jencks put it \* \* \* on November 14, "Chairman Wiley is in a bind in that he feels he has to deliver to satisfy Congress." Clearly Chairman Wiley's initiative was perceived as something more than the suggestions of a concerned parent.

14. On November 22, the Chairman and members of the FCC staff met for two hours with the presidents of the networks and other network executives in the Chairman's office in Washington. Most of the highlights of the meeting are well summarized by Adams of NBC in a November 25 memorandum to NBC President Herbert Schlosser.

Wiley opened the meeting by referring to the fact that there was a serious problem with "undue violence' and 'fairly explicit' sexual material" on television and that complaints from a variety of sources had been received by the Commission. He indicated that, "The Commission was reluctant, for legal and policy reasons, to try to lay down specific program rules, but *something had to be done* \* \* \*." (emphasis added). The Chairman was concerned with the lack of public visibility of network standards with respect to sex and violence and concerned about their substantive inadequacy as well. \* \* \*

44. The Chairman, for example, referred to the French practice of a white dot on the screen serving as a

warning device. This idea was mentioned as a discussion point—a true suggestion. \* \* \*

\* \* \* Each of the network representatives said they had been "following a selective practice of warnings in appropriate cases, and that they generally scheduled the early evening hours with programs suitable to all-family audiences."

\* \* \*

But Taylor made it clear that he felt that an industry-wide solution was necessary to deal with the problem. As Adams put it, "He claimed that there were occasions when CBS rejected a program, to find it turning up on 'other stations,' to its competitive disadvantage." As Taylor later explained at trial his thinking had been influenced by a prior experience with children's programming. CBS had changed its programming to make it more socially beneficial for children and discovered "to our horror that the programming that everyone else had complained about so bitterly and which we had changed ended up on the independent stations \* \* \*. [T]he kids stopped watching our prosocial programming and watched the stuff we took off \* \* \*. [W]hat we did was to damage CBS and the public \* \* \*." Taylor's perception was that a network change without industry-wide enforcement would damage CBS financially without benefiting the public.

Chairman Wiley made it clear that he too was aiming for industry-wide acceptance of the scheduling proposal. His view was that in the early prime time hours parents all over the country should be assured that there would not be any programming "upsetting or disturbing to their children." They could, therefore, permit their children to watch television during a specified time period free from the fear that offensive material would be presented. To advance this concept, he offered to contact the Independent Television Association and the Public Broadcasting System, i. e., he would use the power and prestige of his office to bring about industry-wide compliance. Nor did the Chairman confine his comments to approving the goal of industry-wide compliance and offering to help bring it about. As Adams recorded:

This opening led Chairman Wiley, later in the meeting, to make some not very veiled threats, as a response to Taylor's point: that perhaps the FCC could deal with the 'separate station problem' by including in the license renewal forms, new questions on stations' policies regarding the acceptance and scheduling of programs with sex and violence. We asked what the Commission would do with the information it obtained, since it was dedicated not to intrude on programming, and could not comprehend the Chairman's response. He said the Commission might also consider issuing a general policy statement, along the lines of the one on children's programming/advertising, outlining what it expected of licensees in guarding against sex and violence, particu-

larly when there were significant numbers of children in the audience.

Thus the Chairman threatened action which he himself believed to be unconstitutional. He did not press the suggestion of putting questions on the license renewal forms when immediate and deep hostility was evident, but the message was clear. Something had to be done or the FCC would be forced to take some kind of action—the issuing of a policy statement perhaps being the most likely first step. \* \* \*

16. Within three days of the meeting in the Chairman's office, ABC forwarded two policy statements to the FCC which represented its existing policies. They did not address the Chairman's specific proposals.

The activities at NBC and CBS were more complicated. [For Adams at NBC the] principal issue \* \* \* was whether to include this sentence in the NBC statement:

Program series of a theme or nature that would be unsuitable for young children are avoided at the opening of the network evening schedule, and if an individual or special program containing material that parents might consider unsuitable for their children is scheduled in such period, the system of warnings described below will be followed with regard to that program.

The scheduling aspect of the proposed sentence represented then existing NBC policy. It was slightly different from the Wiley proposal in that the opening show could be less than an hour in length. Nonetheless, there was a reluctance to express a public commitment to this continuing practice largely because such a statement would limit NBC's future programming flexibility. NBC had been doing satisfactorily in the ratings by using "family" programming in its opening show. But if public moods shifted it wanted to retain the ability to change. \* \* \*

The pressure of the Wiley campaign, however, led NBC executives to change their position. The key evidence on the point comes from a November 27 Adams memo to Schlosser:

The section on scheduling \* \* \* concludes with a sentence in parenthesis. Without that sentence it is the minimal statement we could make and I believe would be regarded as saying nothing. With the sentence, I believe it reflects what we are prepared and plan to do and although it might be less than expected, it will be responsive. *If the future discussions with Chairman Wiley result in a common approach by all networks along these lines starting next season, I believe we will be better served than driving the matter to regulatory action.* I would therefore vote for inclusion of the

sentence in parenthesis. (Emphasis added). \* \* \* Nonetheless it was decided in the short run not to include the scheduling commitment in the statement sent to the FCC. As Adams observed, “\* \* \* a conclusion was reached in which I concurred that *as a tactical matter* it was not necessary or advisable at this stage in a first submission to include that sentence \* \* \*.” \* \* \*

Ironically Wiley did not and could not know that he had succeeded in the NBC camp. \* \* \* [I]n a series of communications by him and/or members of his staff he attempted to get NBC to commit themselves publicly at least to what they were already doing. These persuasive efforts, he did not realize, were unnecessary. NBC was bargaining for industry-wide compliance; it was no longer pondering its basic course of action. The question was now one of tactics. Wiley's threats of FCC action had succeeded.

17. The FCC staff met in New York with NBC executives having program standards responsibilities in the morning of December 10, with CBS in the afternoon of the same day, and with ABC on December 11. \* \* \*

The FCC proposals at these meetings were also described by Paul Putney, Assistant Chief for Law in the Broadcast Bureau of the FCC, in a memorandum to the Chairman:

1. A joint policy statement by the three networks emphasizing their commitment to protect children;
2. Scheduling after 9:00 p. m. series programs which (in the judgment of the network) would be inappropriate for young children \* \* \*;
3. Warnings (audio, video and in printed schedules) would be given for any material broadcast before 9:00 p. m. local time which (in the judgment of the network) was unsuitable for young children;
4. Programs broadcast at any time which would receive a warning under current standards because of the likelihood of offense to a significant segment of the audience would continue to receive such warnings; and
5. The pre 9:00 p. m. children's warnings would be a standardized symbol and text while other warnings would be specifically tailored to state the reason for the warning.

\* \* \*

18. On December 17, the FCC staff members who had met with the network executives in New York met with Chairman Wiley in his office to discuss the status of the campaign in the light of the December 10-11 meetings. \* \* \* The FCC personnel did not know that NBC had already decided to go along and certainly nothing

said at the December meetings gave them any encouragement. The bright hope was thought to be Arthur Taylor, but the objections raised by CBS representatives Swafford, Mater, Kirschner, and Goldberg indicated that Taylor would have to overcome internal obstacles at CBS if CBS was to provide a constructive response. The scheduling difficulties presented to ABC by the proposals made it apparent that in the absence of movement from the other networks, ABC was unlikely to respond positively to the initiative.

The question was what, if anything, Wiley should do to generate a response. Essentially the group decided that the initiative had been made, that any further move by them would appear heavy handed, that each of the networks was aware of the approaching December 31 deadline for the FCC reports to Congress, and that no "reminder" of the urgency of the situation was necessary. The only thing the FCC could do was wait.

On the other hand, it was apparent that the December 31 deadline was unrealistic, particularly \* \* \* in view of the time delays involved in going through the NAB Code structure. \* \* \* Wiley, therefore, decided to ask for and ultimately did receive an extension of the deadline for the report to Congress from December 31, 1974 to February 15, 1975.

19. During the FCC staff meeting of December 17, Les Brown, a reporter for the New York Times, contacted the Chairman and interviewed him over the telephone. In the course of that interview, the Chairman indicated in response to questions that public hearings on the question of sex and violence were always a possibility and conceded that the networks would not like that possibility. The next day a Les Brown column appeared in the *New York Times* headlined "Head of F.C.C. Weighing Hearing on T.V. Violence." The article stated that Wiley "made no secret of the fact that he might use the prospect of hearings as negotiating leverage to spur the networks into adopting policies on their own to protect the young from adult-oriented programs." The Chairman was quite concerned about the article, first, because he thought it imported a threatening tone to his remarks which he did not believe had been present and second, because it would appear as though he were deliberately using the press at this late hour to put additional public pressure on the networks.

20. On the same day that the Brown article appeared, Wiley had telephone conversations with Erlick and Taylor in which he told them he had been misquoted. He placed a call with Schlosser \* \* \* on December 20.

The first telephone conversation was with Taylor. According to Meade, a CBS vice president, Taylor in essence told Wiley, "We are not going to send you this letter right now. We are working on something much more important and we need a lot of support. We

don't want to muddy the waters with this. We don't want you in the act. Be patient and bide your time." Moreover, Meade continued:

He admonished Mr. Wiley to—, I don't like to be rude, but to keep his mouth shut in terms of throwing his weight around, that he was having this jawboning and so forth \* \* \* and the essence of what Taylor said is, "You are making it much more difficult for us, because it has to be an industry-regulated thing. We cannot have the government breathing down our neck, and, furthermore, if you continue in your present tone, you are going to make it impossible to get anything through the Code \* \* \*."

21. \* \* \* The episode richly illustrates the general approach taken by the Chairman throughout. He did not want to "threaten" anyone. At the same time, he wanted the networks to know that if something constructive in the eyes of Congress, the FCC, and the public were not done, the FCC would be compelled to take some sort of action. He felt that FCC action of any type at the very least raised serious constitutional questions and would strongly prefer as a matter of policy that the FCC do nothing. But if the networks were to be so unwise as not to act, the Commission (probably but not necessarily with his support) would be forced by the circumstances (which he had created) to take action. Thus Wiley could offer "suggestions" initially caring little about the specifics of the response but requiring that something constructive with public visibility be accomplished. On some occasions, he viewed himself not as personally threatening anyone but rather as offering advice as a friend concerning the consequences which would follow if constructive action were not taken. On other occasions in the heat of the campaign, he would deliberately threaten. Sometimes he would repudiate "threats." The bottom line, however, remained the same, in substance if not in tone—"Do something to curb 'offensive' material or we, the FCC, will be forced to take action."

\* \* \*

22. During this same December period, CBS was groping for an appropriate response to Wiley's "initiative." At the November 22 meeting, CBS had agreed to send Wiley a statement of principles which it followed. No such statement existed, and the network's first attempt was to produce one. The process was frustrating because nothing but platitudes were produced. This was why CBS had no written set of procedures. Its mode had been to rely on the experience and judgment of its personnel in program practices. The kinds of judgments which needed to be made on a day to day basis were so diverse and variable, and were so related to questions of aesthetics that discursive law-like standards were impractical. Taylor was convinced that since judgments in this area resisted definition, an outside



enforcement body was needed to police the industry—to keep it honest.

\* \* \*

The Les Brown article threatened to create an industry image of subservience to the FCC and, thereby, reduce the possibility of the kind of action Taylor wanted. It is unclear whether it was the Brown article which caused executives at CBS to stop drafting letters to Wiley and start writing them to [Wayne Kears, Chairman of the NAB Television Code Review Board]. \* \* \* A letter directed to Kears \* \* \* made CBS's action *appear* to be an exercise in industry self-regulation.

\* \* \*

24. On January 2 or 3, NBC issued another release, dated January 6, in which it announced that it "plan[ned] to devote the first hour of its prime time network schedule to programming suitable for general family viewing." \* \* \*

25. On January 7, the Code Board, pursuant to a request of CBS, met in special session to consider the CBS proposal. \* \* \* The address given by [CBS's] Swafford attempted to justify the proposal not in terms of the desirability of protecting children from televised violence or in terms of the intrinsic desirability of curbing abuses. Instead the speech spoke to the dangers of government censorship. The speech outlined past government censorship attempts and argued that the danger of censorship was particularly acute because the liberals who would ordinarily oppose censorship efforts, were on the bandwagon to combat the presence of violence in the media. \* \* \* Specifically Swafford told the Board that:

A Senator has told the Chairman of the Federal Communications Commission in so many words: "Forget about the First Amendment; we'll let the courts worry about that."

During the conversation we at CBS had last month with members of the FCC staff, they told us quite bluntly that when they say to members of Congress that the Commission does not have the power to censor program content, they're asked: "What do you need? Tell us what you need, and we'll give it to you."

\* \* \* Grover Cobb, now deceased, but then the Senior Executive Vice President for Government Relations of the NAB, arrived at the meeting to give a report from Chairman Wiley. Cobb in part stated, according to Al Schneider, ABC's representative to the Code Board, that the Chairman applauded the actions of CBS and NBC and anticipated a similar statement from ABC. Cobb reported that the Chairman wanted the NAB to act as the machinery or the mechanism to oversee compliance with the newly announced network policies since statutory restrictions inhibited him from doing so.

Thus, from the very outset of the official NAB deliberations, FCC involvement and encouragement of NAB adoption and enforcement of the family viewing policy was in evidence.

\* \* \* The meeting ultimately "disintegrated" into a shouting match over the potential application of the family viewing policy. In one particularly inelegant display of competitive fervor, the ABC representative upon learning that CBS did not know how the proposed policy would apply to "All In The Family" retorted, "Well, if you are not going to move the goddamn program, we are not going to move the goddamn 'Rookies.'"

Swafford sensed that passage of the CBS proposal was not at hand and succeeded in engineering a delaying resolution. It directed the Program Standards Committee "to review and to make recommendations \* \* \*". \* \* \*

26. On January 8, 1975, ABC announced that "the first hour of each night of its prime time network entertainment schedule will be devoted to programming suitable for general family audiences starting with the new television season in the Fall of 1975." \* \* \*

Although the ABC officials do not recall that FCC pressure played a significant role in their decisionmaking, the court finds it difficult to conclude otherwise. \* \* \* Most important, however, is that the January 8 announcement itself recognizes that the fear of government action was a substantial factor in ABC's thinking:

*We wish to emphasize the necessity to preserve the basic rights of freedom of expression under the Constitution and under the Communications Act. Government action in the area of program content must be both cautious and carefully limited lest we do permanent damage to the principles of free expression which are so fundamental in our society. All Americans recognize, we are sure, that these are sensitive and fragile concepts. Accordingly, ABC strongly supports the concept of industry self-regulation.*

This is not to suggest that fear of government action was the only factor in ABC's decision. Public relations seems to have played an important role. NBC and CBS had already declared their approval of the family viewing principle. ABC was reluctant to stand alone. One of the significant risks of going it alone, however, was the risk of government retaliation. ABC was unwilling to bear that burden. There is, moreover, precious little evidence to support the notion that ABC's decision had anything to do with a concern for programming in the public interest. \* \* \*

27. On January 9, 1975, Chairman Wiley and his staff met again with the same network executives who had attended the November 22 meeting. In addition, however, Vincent Wasilewski, the President of the NAB, and Grover Cobb were in attendance on the in-

vitiation of the Chairman. Taylor had attempted to have the meeting cancelled on the ground that it was unnecessary, but Wiley was anxious to facilitate an expeditious adoption of the family viewing policy, to clarify certain features about it, and to encourage that the policy be extended to the first two hours of prime time.

With respect to the timing of the NAB actions, Wiley asked Cobb and Wasilewski if there were any way to secure NAB Code Board approval prior to the NAB convention in April. In doing so, he referred to the Commission's obligation to report to Congress in the middle of February and, as Cole recalls it, said in substance that "the more that he could report back in terms of the developments from \* \* \* the Chairman's point of view, the better." \* \* \* Wasilewski and Cobb agreed to investigate the possibility of expediting NAB action.

The FCC did, however, receive some more definite commitments from the networks at the meeting. The networks agreed that their policies did not mean that "anything goes" after 9:00 and that programming suitable for family viewing necessarily meant programming suitable for young children. CBS affirmed that its proposal did not envision prescreening by the NAB.<sup>77</sup>

\* \* \*

28. The Wiley request that the NAB adoption process be expedited bore fruit within the week. On January 15, the NAB Television Board of Directors met in Palm Springs. \* \* \* Spurred by Wasilewski and some effective lobbying by CBS's T.V. Board representative Jencks and by the FCC staff, the T.V. Board passed a resolution which provided in part that:

The Television Board of Directors of the NAB commends the three television networks for their individual actions with respect to programming in the initial hour of network prime time. At the same time, mindful of the keen interest in the subject, the Board recommends that the Television Code Review Board direct its Program Standards Committee to expedite as much as possible its review and recommendations affecting (1) principles relating to the scheduling of programs in early evening prime time periods, and (2) the use of suitable advisory legends as to the nature of program content.

77. This point was crucial to industry-wide acceptance. NBC particularly was unalterably opposed to prescreening. On the other hand, since the NAB might determine after the showing of a first show in a series that

the concept of the series itself was inappropriate for general family viewing, the effect of the determination is difficult to distinguish from prescreening. Syndication efforts, for example, would be made more difficult.

\* \* \* The Board requests the Television Code Review Board to meet on or before, February 15, 1975, to consider these recommendations.

The influence of Wiley could not have been more apparent. The "request" that the Code Board meet in February rather than in April was specifically calculated to elicit Code Board action prior to the Commission's report to Congress. \* \* \*

29. On January 28, the Program Standards Committee of the Code Board met to consider the role of the NAB with respect to the family viewing policy. \* \* \* The Committee could not agree to do anything more than pass this resolution:

Because several constructive proposals were proffered as to the approach to be taken by the Television Code Review Board in response to the NAB Television Board of Directors' resolution, the Program Standards Committee recommends that the same be presented to the full Television Code Review Board for its review and resolution.

That innocuous resolution masked a bitter set of differences. CBS, of course, was very much in favor of NAB Code enforcement. Both NBC and ABC were opposed to NAB enforcement but were willing to support some type of NAB statement of principle. \* \* \*

30. [On February 4, ABC and NBC acceded to the CBS proposal for NAB enforcement.]

The FCC and CBS had successfully maneuvered the two networks into a position where blockage of the proposal had become unthinkable. To block the proposal two weeks before the FCC's report to Congress would have required a degree of political masochism rarely displayed by large corporations. Here apparent corporate political benefits clearly outweighed corporate political risks. The contention that this grudging support of the NAB Code amendment arose independently of the substantial pressure generated by the imminence of the FCC report is not credible. In the absence of Wiley's statements at the January 9 meeting, no February Code Board meeting would even have been held. In the absence of the pressure generated by the prospect of the FCC report to Congress, and the threats as to what it would contain, NBC and ABC would not have delegated their programming authority to the NAB. No other credible explanation for the shift in vote from January 28 to February 4 has been provided.

31. On February 19, 1975 the Commission submitted its Report to Congress. *See Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 FCC 2d 418 (1975). Significantly the Report did not do what the congressional committees had asked it to do: to determine what its powers were "in the area of program violence \* \* \*." \* \* \* Instead the Commission after reviewing the policy statements issued by the networks, and the action taken by the

Code Board, and characterizing them as "commendable," *id.* at 422, concluded that, "This new commitment suggests that the broadcast industry is prepared to regulate itself in a fashion that will obviate any need for governmental regulation in this sensitive area."

The Commission thus refused to delineate what powers, if any, it thought it had in this area. By doing so, it preserved its option to threaten governmental action while simultaneously recognizing that any action it might take would involve First Amendment difficulties.

33. On March 24, 1975, the Chairman and members of his staff met with Herman Land, the president of INTV (the Association of Independent Television Stations) to discuss the application of the family viewing policy to the independent stations. As Land explained during the course of the meeting, the independents had a number of concerns. First, they viewed the policy as a network attack on them. They could not understand a policy which permitted the networks to program "rough stuff" from 4-6 p. m. when millions of children watched television, but prohibited the independents from broadcasting similar material during the most crucial hours of their program day, i. e., 7-9 p. m.<sup>91</sup> If any changes were to be made, Land felt the whole schedule should be looked at, not merely the two prime time hours. Moreover he was concerned about the First Amendment implications of the venture, about the difficulties of defining family viewing, and about the imposition of a network standard of propriety into a broadcasting system which emphasized diversity at the local level. Finally, of special and pressing concern, was the problem of contractual obligations already assumed by independent stations. Some stations were already committed under long term contracts to show programs which would probably not meet the Code Board's proposed requirements. If an amendment were passed which did not at least take this fact into account, some independents would be forced into violating contracts or withdrawing from the Code. Land informed Wiley that INTV would ask the T.V. Board to delay action so that INTV would have time to prepare an alternative proposal.

\* \* \* Needless to say Wiley was anxious to blunt any organized opposition to the adoption of the NAB amendment. He resorted to a familiar strategy. He told Land that he and his organization were free to do whatever they wished with respect to the NAB Code but the Chairman would report the results to Congress.<sup>93</sup> Wiley, however, sympathized with the contracts problem of the independents and

91. The hour 7-8 was particularly important for the independents because given the practical impact of the prime time access rule they were not faced during that hour with network competition in entertainment programming. The hour 8-9 was important because many independents began movies during that period.

93. The Chairman was under no obligation to report Land's activities to Congress. The warning, however it may have been phrased, and however friendly the tone of voice in which it was delivered, constituted a threat pure and simple.

indicated that an accommodation to the independents on that score would not "cause any concern."

34. On April 8, 1975, the Television Board met in Las Vegas and adopted the recommendation of the Code Board along with an amendment in the form of a grandfather clause designed to minimize the contract problems of the independents. \* \* \*

35. The Commission contends that even if Chairman Wiley had been guilty of any wrongdoing, his actions were "personal" in character and should not be construed as agency action by, or on behalf of, the Commission. The position is similar to that successfully advanced by the Commission in *Illinois Citizens Committee for Broadcasting v. FCC*, 169 U.S.App.D.C. 166, 515 F.2d 397 (1975). There the Commission argued that a speech by then Chairman Dean Burch represented "his personal opinion rather than any Commission action." The facts in this case demonstrate beyond question, however, that the Chairman's actions were official, not personal; and the circumstantial evidence is persuasive that the Chairman was acting on behalf of, and with the approval of, the Commission. That Chairman Wiley was acting in his official capacity cannot be questioned. He so admitted in his trial testimony. \* \* \* Wiley's chief assistant Secrest was working virtually full time on the matter. Many members of the FCC staff were heavily involved in the transactions at issue. It would be surprising indeed if the government time, money and resources so effectively marshalled in this case were all directed toward furthering the personal desires of a concerned citizen.

The evidence presented in the trial also indicates that the Chairman was not acting in his sole, albeit official capacity; rather, he was acting on behalf of the Commission. The testimony of former Commissioner Nicholas Johnson gives strong support to this conclusion:

[T]he agency really has an enormous array of things that it can do and does do in trying to regulate broadcasting.

[W]e would often in our formal meetings on Wednesdays consider whether we should use a rulemaking approach *or the Chairman should give a speech* or there should be some proposed legislation or perhaps a press release or notice of some kind would go out that would be short of a formal rulemaking proceeding; whether perhaps we should select a given case that is available to us to select if we want to use it as an example and do that as an alternative to a rulemaking.

\* \* \*

Sometimes you can get the NAB Code to adopt some provision and that can be used as a way of getting the Congressional heat off your back \* \* \*. (emphasis added).

Having identified speeches as one form of regulatory tool consciously employed by the Commission, Johnson was careful to point out that all speeches are not Commission actions and are not perceived as such:

Often ideas will be floated in speeches as a genuine effort to open up a dialogue, to suggest an idea, see what response it gets \* \* \*

And I think that's generally understood by the trade press and reported by them. \* \* \*

In short, Johnson's testimony indicated that the trade press and broadcast industry regularly were called upon to distinguish between speeches that were employed as regulatory devices by the Commission and those which were "not part of such an orchestrated effort to bring about a regulatory response."

Of course, in this case more than a single speech was involved. Here the Chairman and his staff launched a series of meetings as well as speeches, timed and orchestrated to generate press coverage and pressure. \* \* \*

Although Johnson could not recall a campaign of informal Commission pressure of the scale and intensity of that involved in this case because he believed there had been none, he did cite a number of specific examples of Commission use of speeches or meetings as regulatory devices. One particular example is of special importance.

\* \* \*

- A. Well, I remember one meeting we held where we had gotten a complaint or two from Congress involving what was then called "topless radio," which were radio call-in discussion programs dealing with matters of sexual behavior and what not on the part of the caller and the complaints had been registered about this from the public and from the Congress and there was a discussion amongst the seven Commissioners as to what to do about it and we agreed in that particular instance that we would deal with it in the form of a speech by Chairman Burch on the "topless radio" problem.

At the same time in that instance, as I recall, we were also trying to use the NAB Code and the NAB as a way of dealing with this and be able to report back to Congress that we had solved the problem through industry action.

The example provided by Johnson is significant not merely as an illustration of how the Commission functions in general, but also affords evidence as to how it has operated in this case. The Dean Burch speech discussed by Johnson is the same Dean Burch speech

which was at issue in *Illinois Citizens Committee for Broadcasting*. It is the same speech which the Commission there characterized as merely expressing the "personal" views of Chairman Burch. The uncontradicted testimony of this record is that the speech was given with the express approval and direction of the Commission and that the Commission knew its characterization of the speech before the court of appeals was false. During the course of litigation in *Illinois Citizens Committee*, the Commission never revealed that it had voted in closed door sessions to use Burch's speech as a regulatory device. \* \* \*

\* \* \* The case calls into serious question the credibility of the Commission in general and it makes it difficult for this court to accord any respect to its position on this issue. \* \* \*

But even if Commissioner Johnson had not testified in this case, the Commission would not prevail on this issue. \* \* \*

\* \* \* The Commission approved of [the Chairman's] activities before the fact, permitted him to engage in activities which they knew would be perceived as regulatory moves by the agency, were regularly kept abreast of the developments, and provided input into the process. Any other conclusion would suggest that the other Commissioners were irresponsibly uninterested in a vital issue before the agency. No member of the Commission at any time (at least as revealed in the record) gave the slightest public or private hint that Chairman Wiley was not acting on behalf of and with the support of the Commission. When the Report to Congress was issued, not one member of the Commission expressed any dissatisfaction with the course pursued by the Chairman and the staff. When agencies of government consciously permit their authority to be wielded with such great public fanfare, they can hardly complain, when it is concluded that the actions of its agents can appropriately be ascribed to them.

36. \* \* \* The defendants suggest that the Code is consistent with independent licensee program decisionmaking because the licensee voluntarily subscribes to the Code and, therefore, presumably agrees with each of its provisions. But Wilson Wearn, the Joint Chairman of the NAB Television Board, testified that the members of the NAB (who now are required to subscribe to the Code as a condition of membership) do not agree with each of the provisions of the Code. \* \* \*

The members are not permitted to violate provisions of the Code, however, merely because they, in their independent judgment, disagree. Indeed a subscriber who is found to violate the Code is advised to make a correction or lose his membership. \* \* \* Nor can it be denied that the NAB functions as an effective enforcement mechanism. First, it has designed and applied procedures to consider alleged violations of the Code. \* \* \*



In addition to creating a system that would allow challenges from any source to be considered by the Code Authority, the Code Authority itself undertook an extensive monitoring process. As Code Authority Director Helffrich noted in an August 25, 1975 memo, the monitoring would be "complicated by the fact that the Television Code Review Board has not established criteria designed to help determine whether or not a program, or part thereof, scheduled in the 7-9 p. m. (EST) slot conforms to the 'family viewing' concept." Rather than formulate "rigid definitions" Helffrich proposed that the members of the staff proceed by "trial-and-error." And so they did.

\* \* \*

The definition of family viewing propriety thus turned on interaction between the networks, other broadcasters, and the Code Authority with the touchstone being what Helffrich and ultimately the Code Board would think was appropriate.

\* \* \* Instead of programming on the basis of their own *independent* judgment, broadcasters have been forced to program with a view toward what would be considered unobjectionable by the Television Code Review Board. Indeed the whole point of mobilizing the NAB Code as a vehicle was to lessen what was believed to be competitive opportunism by permitting one all powerful umpire to regulate programming decisions in prime time viewing. Widespread compliance was the goal; the goal has been achieved. The achievement of the goal, however, necessitated the delegation of programming authority to the NAB.

37. \* \* \* The plaintiffs have introduced evidence \* \* \* to demonstrate the effectiveness of the NAB as a vehicle and to demonstrate the vagueness of the family viewing policy. \* \* \*

Larry Gelbart, the producer of "M\*A\*S\*H," testified that despite every effort to avoid it, in the family viewing regime, "There's a self-censorship that goes on no matter how much you are trying to bolster the other guy. When you get a call that attacks four out of ten ideas that you've submitted, you begin to see any new ideas you're getting in the light of that."

This is not to suggest that the producers habitually capitulated to these pressures. Each of the testifying producers recounted that they had initiated virtual civil wars with respect to some of the network decisions which they particularly opposed. Arnold, [producer of Barney Miller] for example, testified to incidents in which a network had told him that because of the family viewing policy, he should not continue with a script he was working on in a particular week. Nonetheless he continued, shot the show, sent it on to New York for reconsideration, and awaited the outcome. The enormity of the gamble is easily understood; "The average cost of a show on 'Barney Miller' is somewhere between \$130,000 and \$140,000."

\* \* \*

The networks make much of the fact that in each of the cases in which the producers "went to the wall," the networks acquiesced. From this they conclude that the plaintiffs suffered only "irritation" and "subjective chill." \* \* \*

The record discloses that the producers did not fight City Hall every week. Significant self-censorship was evident. Characters were not developed, themes were not explored, language was deleted—all in response to network adherence to family viewing principles. To denigrate this phenomenon as mere "irritation" or "subjective chill" bespeaks a reckless indifference to the fact that the family viewing policy significantly changed the process of television editing. It transformed network editors from independent decisionmakers into conduits of FCC and NAB policy. Instead of deciding what should and should not be broadcast, they decided what material would evoke criticism from other networks and NAB functionaries. In fact, at one early and hysterical point one CBS executive told producers that they should limit the material in their shows to that which would avoid embarrassing the most "uptight parent that could be imagined."

Although the record reveals that the standards eased as the season continued (perhaps in part because of the filing of this lawsuit) there is no credible evidence that the networks are at the present time any less dependent on NAB authority. Rather, the delegation of their authority persisted through the period following the adoption of the family viewing policy.

The plaintiffs' injuries, however, are not confined to the fact that their material was excluded from the air because of government censorship. The record also discloses significant economic injury to the plaintiffs. First, it is clear that the frenzied character of the editing process increased the plaintiffs' production costs. The writing of television scripts, the evidence reveals, is an ongoing process. Revisions are constantly being made throughout a production week—in the middle of rehearsals, after a show is taped and shot again. Network representatives are present through the week.

Arnold testified that family viewing disputes caused him to be "writing the last sequence of a show \* \* \* while we're taping and having to shoot 'till 3:00, 4:00, 5:00 o'clock in the morning \* \* \*"—all the while "paying overtime \* \* \* to personnel engaged in the production process." Gelbart put it crisply, "It's costly for a cast to wait and not be filmed while you run to the phone and find out children aren't supposed to know what virgins are."<sup>110</sup>

In addition to economic impact in terms of production costs, the evidence is persuasive that the syndication value of "All In The Family" has been significantly diminished by the defendants' conduct.

<sup>110</sup>. The particular incident apparently referred to involved the use of the word "virgin" in an entirely non-sex-

ual context, i. e., a character was described as a virgin in terms of military service.

Despite the defendants' protestations to the contrary, "All In The Family" was rescheduled out of the family viewing time period because of the family viewing policy. \* \* \*

Nonetheless the private defendants contend, based primarily on the testimony of CBS's Robert Wood, that "All In The Family" was moved in an effort principally to strengthen the Monday night schedule.

\* \* \* The "shoring up Monday night" explanation was developed precisely because CBS did not want to damage the syndication value of the show. In the syndication market, shows are sold to independent stations after they have completed their run on the network. Largely because of the prime time access rule, the most valuable time for the independents is the first hour of prime time. If "All In The Family" is a show which cannot be shown during the family viewing period, it could not be used in the independents' most lucrative market. Its value hence diminishes. \* \* \*

### III. LEGAL LIABILITY ISSUES

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976). The most difficult First Amendment questions presented by this case revolve around that "commonplace." It is obvious that the government can only act through its agents, but its agents may or may not be government employees. The difficulty is to determine when action, apparently private in character, can fairly be attributed to the government. The set of concepts normally employed to solve questions such as these cluster under the rubric of "state action." Predictably since the interrelations between private and governmental action are so various and so complicated and because the questions of agency and responsibility so often turn on questions of fact and degree, no test has been formulated which can avoid the necessity for the application of judgment and the weighing of values in variegated factual contexts. \* \* \*

Here the plaintiffs' complaints, insofar as they refer to the FCC, its Commissioners, and Chairman Wiley, clearly implicate government conduct. The First Amendment issue becomes whether that conduct abridges freedom of speech, and if so, what remedies are appropriate? Insofar as the private defendants are concerned the issues are threefold. Is their conduct properly characterized as government conduct? If so, does their conduct violate the First Amendment? And if that is the case, what remedies are appropriate? Since, as will become clear, the standards for answering these questions vary as a result of the different balance of interests involved in the application

of state action principles, the plaintiffs' complaints against the two sets of defendants to some extent require separate discussion.

A. *The Private Defendants.*

The liability of the private defendants turns on four questions. First, does broadcaster adoption of the family viewing policy constitute a violation of the First Amendment even in the absence of government encouragement or pressure? Second, assuming it does not, does the presence of government encouragement without more vary the result? Third, assuming it does not, does broadcaster adoption of the family viewing policy violate the First Amendment when the decision to do so is substantially motivated by a desire to defuse the consciously exploited threat of government regulation? Fourth, as an entirely separate matter, does a government-network-NAB agreement to compromise licensee program decisionmaking violate the First Amendment?

\* \* \*

1. *Broadcaster Freedom to Adopt Family Viewing.*

It is helpful to inquire first as to the First Amendment consequences which would flow if the networks had each adopted the family viewing policy without any input from government officials.

\* \* \*

The importance of independent judgments by local licensees has been affirmed again and again by the FCC. In its Network Programming Inquiry, 25 Fed.Reg. 7291, 7295 (1960), the Commission proclaimed that,

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs \* \* \* which they present to the public \* \* \*. This duty is personal to the licensee and may not be delegated \* \* \*

It was precisely because of these principles that the Commission enacted the Chain Broadcasting Regulations which were particularly designed to prevent network control over local licensees' decision-making as to programming. \* \* \*

The right and the duty to make independent and final decisions as to who shall and who shall not get access to the media resides not with the networks (except in their capacity as owners of local stations), not with the NAB, not with the FCC, not with the screen writers, director or actors, not with Norman Lear or Tandem Productions and not with this or any other court. The constitutionality of the broadcasting system depends on the conclusion that the right and duty to make these decisions reside in hundreds of different licensees.

This principle controls both the state action and substantive First Amendment questions of this case. First, is it constitutional

(even assuming state action) for the networks in their capacity as station owners (i. e., licensees) to adopt a family viewing policy and to independently apply it? The answer must clearly be yes. Surely if the decision to refuse editorial advertisements is within the range of editorial discretion afforded to broadcasters, [CBS v. Democratic National Committee, *infra*, at 515] then an individual decision to adopt a policy such as family viewing must be similarly safeguarded. \* \* \* The question of what the needs of the community are at particular times is peculiarly the province of the licensee. If the licensee should determine that an audience is likely to be composed of children and adults at particular hours, nothing in the First Amendment prohibits it from programming accordingly. Nor is it the province of the court or the Commission to second guess good faith judgments in applying such a policy. \* \* \* [S]uch decisions are inherent to the broadcasting function and constitutionally protected whether or not state action is present. Therefore, independent adoption of and application of a family viewing policy by a licensee does not violate the First Amendment.

### 2. *Government Influence.*

The plaintiffs contend, however, that if the source of the idea for the policy adopted comes from the government or if the broadcaster's conduct was "influenced in any way" by government suggestions, the First Amendment has been violated. \* \* \* [It] should be apparent from the implications of the argument that it proves too much.

\* \* \*

Nor do any of the cases cited by the plaintiffs warrant the conclusion that mere encouragement even accompanied by causation is invariably sufficient to fix a state action label on the private defendants' conduct. \* \* \*

But even if governmental encouragement were sufficient to make out a state action showing in this context, there would be no First Amendment violation. As discussed previously, the First Amendment is not concerned with what broadcasters decide to program; it rather requires that the decision as to what should be broadcast be independently arrived at by the licensee. If the licensee has in good faith adopted a policy which it reasonably believes to conform with the public interest and applicable regulations and if it has adopted it not because of government pressure, but because it believes it to be wise policy, the First Amendment not only permits the decision, but secures it from judicial restraint.

### 3. *Government Pressure.*

As discussed, in section II, however, it is clear that the adoption of the family viewing policy was caused substantially by government pressure. The adoption of the policy was not the kind of independent decision required by the First Amendment. Instead the networks

served in a surrogate role in achieving the implementation of government policy. The defendants, however, are apparently saying that even assuming this state of facts (which they deny), they cannot be held liable. The position of the defendants is most clearly stated by the FCC in its post trial brief: "In order \* \* \* for governmental action to be encompassed by the strictures of the First Amendment, the action at issue must be one by Congress in enacting a law abridging freedom of speech, or *official* action by an empowered department, agency or official taken pursuant to federal law. In the instant case, however, the injuries complained of by plaintiffs are not derived from such binding regulatory action." \* \* \*

The short answer to this whole line of argument is that Chairman Wiley admitted at trial that all of his actions throughout the campaign were made in his official capacity as Chairman of the FCC.  
\* \* \*

The case law is clear that the concern of the courts is with substance and not form. Such a focus in the First Amendment area is especially appropriate. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480 (1960). Nothing whatever turns upon whether governmental abridgments of First Amendment rights are achieved through formal regulation or backroom bludgeoning.

Here the Chairman threatened the networks at the very least with actions that would impose severe economic risks and burdens. By indicating that a policy statement might be issued on the matter, the Chairman impliedly threatened the networks with the burden of a full-fledged administrative proceeding together with necessary appeals therefrom. Moreover since a policy statement would outline responsibilities of licensees, the networks' fifteen stations could be held accountable in the licensing process for their adherence to the policy. In addition, the Chairman's use of the "public interest" standard as the rubric with which to clothe his proposals and his continual references to the "public trustee" status of the broadcasters again subtly but unmistakably indicated that the FCC could employ formal regulatory mechanisms to burden the networks if they did not go along. That the networks might have successfully resisted the government actions is no call for the conclusion that the burdens were absent. The economic hardships involved in "success" and the risks involved in possible failure were sufficiently onerous that the defendants here "voluntarily" deprived themselves of a flexibility which they would not otherwise have relinquished. The parallels to *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) are unmistakable.

There the Rhode Island Commission to Encourage Morality in Youth issued notices to Max Silverstein & Sons, a book distributor,

which informed the company that in the judgment of the Commission certain books were inappropriate for display or sale to children. The notice warned that if it distributed the materials, the Commission, in conformity with its obligations, would recommend an obscenity prosecution to the attorney general. Copies of the notices were distributed to the police as well. As luck would have it, some of the books contained in the notices might have met the obscenity definition; others definitely would not. The distributor, unwilling to assume the financial and mental burdens of the *possible* prosecution which would have followed if the attorney general had agreed with the judgment of the Commission, declined to distribute any book listed in a Commission notice. Four publishers of paperback books who relied on Max Silverstein & Sons for distribution brought an action to enjoin the issuance of the Commission's notices. The defendants in *Bantam Books* argued that since they themselves were without power to apply formal legal sanctions (since they were only able to recommend prosecution—an act which anyone could perform), they could not appropriately be charged with abridging speech. To this argument the Court produced a stiff response:

But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed “objectionable” and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief. *Id.* at 67, 83 S.Ct. at 637.

Here the Commission deliberately set about to suppress material it considered to be objectionable and succeeded in its aim. The distributors bowed to the informal scheme of censorship and those who seek to market their products have brought suit. \* \* \*

#### 4. *Agreement to Compromise Independent Programming of Licensees.*

Additionally, each of the defendants is liable for a First Amendment violation with respect to the NAB adoption of the family viewing policy. As discussed earlier, the purpose of using the NAB Code was to undermine independent licensee decisionmaking, to transform the system of decentralized decisionmaking as to programming into a system where one board would have the power to control the early evening programming of most television stations in the United States. Clearly this joint attempt to monopolize the nation's airwaves is in direct conflict with the central philosophy of the First Amendment and the Communications Act as discussed in section IIIA1. \* \* \*

The defendants suggest, however, that their conduct is immunized by a line of cases which cause them to conclude that "no one can doubt citizens have the right to engage in concerted action designed to influence legislative or regulatory actions." Indeed no one does doubt the right of citizens, regardless of motive, to engage in publicity campaigns to influence legislative and/or executive action (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)), to personally contact executive officials in an effort to influence policy (*United Mineworkers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)) \* \* \*. No one doubts the right of broadcasters to gather together to form a trade association which has a goal of lobbying on behalf of the industry, nor the right of broadcasters to share ideas about programming, nor the right of the NAB to promote what it believes to be high standards by adopting a code. What is in "doubt" is the "right" of the NAB to influence the legislature or the FCC by interfering with the public's right to independent program decisionmakers. The fact that some means to induce legislative or executive action or inaction are constitutionally protected does not mean that all means to influence conduct or policymakers is similarly sanctioned. \* \* \*

In short, the NAB has no constitutional right to set up a network board to censor and regulate American television. See generally, Brenner, "The Limits of Broadcast Self-Regulation Under the First Amendment," 27 *Stan.L.Rev.* 1527, *reprinted with revisions*, 28 *Fed. Comm.B.J.* 1 (1975). Even when station managers are willing to abdicate their responsibilities by delegating their programming authority in exchange for membership in the NAB (with the convenient advantages of access to lobbying and informational services together with whatever prestige attaches to membership), the First Amendment requirement of diversity in decisionmaking does not protect such tie-in arrangements.

\* \* \*

And there is no merit to the idea that the broadcasters have a right to deter legislation by programming to prevent it or by compromising other broadcasters' independent judgments. \* \* \*

\* \* \* Adoption of the family viewing policy in order to avoid government reaction and delegation of programming authority to the NAB may have been good "business," but it was not consistent with the broadcaster's status as public trustee. NAB counsel tells the court that we would live in a better world if the NAB could control access to the nation's airwaves. Counsel may be right, but the First Amendment has committed us to a different course, a course which reflects the wisdom of Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." *The Bill of Rights* 73 (1958).



B. *The Government Defendants.*

1. *First Amendment.*

Although the First Amendment principles discussed *supra* apply to the government defendants *a fortiori*, considerations affecting the scope of declaratory relief warrant discussion of the fact that less stringent standards triggering First Amendment liability are appropriately applied to the government defendants. Here, considerations of private autonomy cut in the opposite direction. The more that government is permitted to interfere in programming by way of pressure, threats, and intimidation, the less independent broadcasters will be or appear to be. If broadcasters face liability for responding to government pressure (or risk it by appearing to do so), it is critical that inappropriate government pressure be terminated.

At the outset, therefore, it is important to establish why the FCC has been able to apply pressure effectively. The root of the power is the uncertainty of the relicensing process and the vagueness of the standards which govern it. Significantly, the Commission has not disclaimed any power to use the licensing process to curb abuses in this area. Indeed in its brief \* \* \* in *The Polite Society, Inc. v. FCC*, 541 F.2d 283 (7th Cir. 1976), the Commission intimated that it was without power to formulate rules regulating the portrayal of violence, but specifically maintained that, "[T]he Commission may evaluate past programming to determine if the licensee has met the obligation to serve the public interest, but *otherwise* the Commission will not interfere with licensee programming discretion." Government Brief at 20 (emphasis added). Moreover, the Commission continued, "The consideration of past programming in connection with grant of license renewal has received judicial acceptance \* \* \* and is not considered censorship. This is consistent with the reasoning that 'no one has a First Amendment right to a license \* \* \*'; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" (Citations omitted; emphasis added.)

Thus when Chairman Wiley spoke of the "public interest" responsibilities of broadcasters during 1974-75 in connection with adult programming in early evening hours, when he talked of putting questions on the license renewal form, when he spoke of policy statements (which are, of course, enforced in the license renewal process), he credibly threatened the use of the ultimate regulatory tool. Broadcasters have always taken the position that the FCC cannot constitutionally employ the licensing process in the manner suggested by the Commission, but it is understandable that they would not want to put the issue to the test by making their license the vehicle for the test case. Thus as Commissioner Johnson testified, the Commission has extraordinary bargaining power which gives it the ability to do what the First Amendment and section 326 prohibits—censor television.

\* \* \*

Significantly the government defendants have made no attempt to defend the proposition that the Commission has the power to force broadcasters to adopt the family viewing policy. Equally significant is the absence of a concession that it is without such power.<sup>137</sup> It is precisely this sort of ambiguity that has given the Chairman such bargaining power with the broadcasting industry.

This court will not rule that the Commission could not develop constitutional regulations (properly supported in a record compiled pursuant to the procedures and protections of the APA) which deal with the questions of violence or of programming for children in the early evening hours. It may be, for example, that a record could be compiled that would demonstrate that particular types of programming are so demonstrably injurious to the public health that their entitlement to First Amendment protection in the broadcasting medium could properly be questioned. It may be that the rights of children to diversity of programming have been so severely ignored by broadcasters that affirmative requirements that broadcasters meet their needs in the times when children most frequently watch television could be constitutionally supported in a properly prepared administrative record.

Here, however, the government defendants have made no attempt to suggest that the government policy is supported by evidence sufficient to permit the court to conclude that exceptions to First Amendment principles justify government regulation. Indeed the record in this case unmistakably demonstrates that the policy as enacted is so vague that no one can adequately define it. The policy has come to mean that "[W]e don't know what 'inappropriate' means but the NAB Board will know it when they see it." Clearly this is not the "precision of regulation" we have come to recognize as the "touchstone" of First Amendment freedoms. See *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Moreover this court holds that unless the Commission enacts valid regulations giving fair notice to licensees of what is expected, the Commission has no authority to use the licensing process to control the depiction of violence or the presentation of adult material on television. \* \* \* The licensing process cannot be used as a vehicle to spring new rules on licensees. This principle is necessary not merely out of fairness to stations but also to protect the paramount rights of the viewing public. As the court stated in *Citizens Communications Center v. FCC*, supra, 447 F.2d at 1214, "The suggestion that the possibility of non-renewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly."

\* \* \*

137. Instead the Commission carefully concedes that the exercise of such a power would be questionable.

This is not to say that the Commission is powerless to prevent abuses. Evidence was presented in this case that some broadcasters have programmed violence not because they believe it is in the public interest but because it is in the financial interest of the licensee. Indeed evidence was introduced that if there were no NAB to govern the airwaves, many broadcasters would deliberately program for profits, rather than for the public interest. Quite obviously if a broadcaster deliberately programs in a manner which it believes is inconsistent with the public interest, the Commission has power to take action. \* \* \* In the absence of valid regulation, however, it has no right to interfere with those decisions.

But this court is not prepared to hold that the Commission acts beyond its power when it merely brings to the attention of broadcasters considerations which they may wish independently to consider in their programming. \* \* \* [I]t seems entirely consistent with the goals of the Act to permit the Commission to offer *suggestions* when it believes it has information or ideas which broadcasters may wish to consider in making their independent determinations as to what will and will not be in conformance with the public interest. If the First Amendment means anything, however, the Commission has no right to accompany its suggestions with vague or explicit threats of regulatory action should broadcasters consider and reject them. \* \* \* Particularly when Commissioners make recommendations in areas where formal regulation would be questionable, it is vital that any suggestion of pressure or the appearance of pressure be scrupulously avoided. Plaintiffs contend that "suggestions" emanating from the Commission automatically exert improper pressure because of the delicacy of the regulatory system. The answer to this problem is not to outlaw suggestions but to relieve the ambiguities of the system—to make it clear not only that the Commission cannot use the licensing system to combat material it believes to be offensive but also that government threats to use regulatory tools if programming suggestions are not adopted violate the First Amendment.

The existence of the threats, and the attempted securing of commitments coupled with the promise to publicize noncompliance in this case constituted *per se* violations of the First Amendment. \* \* \* Here the Commission compromised licensee independence in two ways: first, it pressured the networks to adopt the family viewing policy; second, it participated in a conspiracy to usurp licensee independence through the vehicle of the NAB. Those activities violated the First Amendment.

## 2. *Administrative Procedure Act.*

The record in this case reflects a total disregard of the procedural protections afforded by the APA. Without providing public notice and without affording any opportunity for interested parties to be heard, the Commission, acting through its Chairman, negotiated with powerful industry forces to form new policy for television \* \* \*.

## IV. REMEDIAL ISSUES

The court's approach to the question of determining proper remedies in this case has been guided by three principles: (1) individual licensees should be free to program as they see fit without judicial interference; (2) neither the FCC nor the NAB should be permitted to interfere with independent licensee decisionmaking; (3) the court should adopt a coercive remedy, i. e., an injunction, only if there were a serious danger that the defendants would ignore the implications of declaratory relief.

A. *Relief with Respect to the Networks' Adoption of Family Viewing and CBS's Scheduling of "All In The Family"*

The plaintiffs seek a declaration that the family viewing policy was adopted by each of the networks as the impermissible product of government action—i. e., that the adoption of the family viewing policy by each of the networks violated the First Amendment. They are clearly entitled to that relief. The limited scope of that relief, however, needs emphasis. The networks are free to continue or to discontinue the family viewing policy. The decision is to be based on their independent conception of the public interest. It is regrettable that no fully satisfactory relief can be formulated in these circumstances. The government has foisted a policy on the networks. The networks have publicly committed themselves to that policy, and have put themselves in a public relations position where any departure from the policy would produce considerable controversy. One would like to think that the networks would evaluate the programming policy independent of corporate pressures such as these, but the record in this case reveals that such independence is unlikely. This is not to suggest that the family viewing policy is not a desirable one. Rather it is to say that the policy should be evaluated by broadcasters on its merits. The court is painfully aware that it cannot erase all the effects of the FCC's illegal campaign. However, any attempt by this court to dictate that the networks not program in consonance with the family viewing policy would violate the very precepts which the FCC has ignored in this case. If the First Amendment has any meaning at all, it is that broadcasters, not FCC officials or judges, have the authority to make programming decisions. Prior restraints on freedom of expression become no less offensive when imposed by judicial order instead of by executive intimidation. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

Tandem, however, would have this court issue an order directing CBS to move "All In The Family" back into the family viewing time period. \* \* \* Tandem's request for relief on these lines must be denied. The court cannot restore the status quo. Program schedul-

ing decisions involve many variables, not the least of which is the nature of the programs on the programming network and the nature of their appeal to audiences vis-a-vis the programs of other networks. Changing lineups each season, therefore, are the rule. The scheduling considerations in 1976, therefore, cannot be equated with those prevailing in the fall of 1975. If only the plaintiff's rights vis-a-vis CBS's were at issue, the balance of equity would tip to the plaintiff. But the rights of viewers are at stake, and they are entitled to independent broadcaster decisions. The evidence does not disclose why CBS programmed "All In The Family" on Wednesday at 9:00 in the fall of 1976. The court cannot assume that the decision would have been different in the absence of NAB pressure. Beyond declaring CBS's duty to make independent decisions, the court will not go.

B. *Relief with Respect to the NAB and the Networks'  
Duty to Independently Program*

First, the plaintiffs seek a declaration that the NAB's adoption of the family viewing policy violated the First Amendment and seek to restrain enforcement of the rule by the NAB. The court will confine itself to a declaration that NAB adoption of the rule involved First Amendment violations by each of the defendants and a declaration that NAB enforcement of the family viewing policy violates the First Amendment. \* \* \*

The court emphasizes that nothing in its declaration implies that broadcasters are precluded from enunciating codes of conduct, including codes which contain the family viewing policy. Nothing in its declaration speaks to the question of whether or not NAB enforcement of a code *per se* is government action for First Amendment purposes. Nor does anything in this opinion address the question of whether or not NAB enforcement of any other section of the Code amounts to a First Amendment violation. \* \* \*

Second, the plaintiffs seek a declaration that the networks are required to program on the basis of their own judgment rather than that of the NAB. Again the court will so declare, but the scope of the declaration requires discussion. The networks are free to consider the views of others in making their decisions. They, thus, may consider the views of other broadcasters as enunciated in the NAB Code. They may not delegate their authority to the NAB, however. They cannot contract with the NAB to respect the family viewing policy, let alone the family viewing policy as interpreted by the NAB.

C. *First Amendment Relief Against Government Defendants*

1. The plaintiffs are entitled to a declaration that the government defendants violated the First Amendment by issuing threats of government action should industry not adopt the family viewing policy or the equivalent thereof. This declaration does not imply that the FCC cannot make suggestions for broadcasters to consider. \* \*

2. The plaintiffs are entitled to a declaration that the FCC may not enforce the family viewing policy and in the absence of valid statutes or regulations, may not use the licensing process to prevent programming which it regards as offensive. \* \* \*

D. *Administrative Procedure Act Relief Against the FCC*

The plaintiffs are entitled to a declaration that the government defendants violated the Administrative Procedure Act by imposing policy on the industry without resort to the protections afforded by that Act. The plaintiffs would have the court go further and declare that any programming suggestions emanating from the FCC would violate the APA and the First Amendment. As previously discussed, the court must decline to do so. However, official FCC endorsements of and recommendations for change in industry policy must comply with APA procedures. \* \* \*

E. *Damages*

[The court held the private defendants liable to Tandem for any loss in the syndication value of "All in the Family."]

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QUESTIONS

1. How does the court distinguish between a Commissioner's speeches that have no special legal significance and "speeches [used] as one form of regulatory tool," as it found Chairman Burch's speeches to be? See ¶ 35. Is the court delegating the distinguishing function to "the trade press and broadcast industry?" Or making it a function of the Commission's intent, as determined perhaps from testimony concerning its internal proceedings? Must the Commission then publicly disavow any speech in which a single Commissioner is speaking only for himself, lest it be considered agency action?
2. What must the networks have done, in the face of Chairman Wiley's threats and pressure on them, if they were to avoid liability under the first amendment?
3. Suppose that the FCC had refused the congressional invitation to "do something" about violence on television, and one of the committees that had been pressing it announced that it was considering legislation to regulate early evening program content; at hearings to which it invited the networks it obtained undertakings from each network to program only family fare before 9:00 p. m., so as to make formal legislation unnecessary. Is the resulting network programming conduct "government action" for the purposes of the first amendment? Has the committee run afoul of the court's distinction between "government encouragement" and "government pressure?" If so, what remedy would be appropriate?

4. In the actual case, the court predicated its conclusion that there had been "government pressure" on the threat, delivered implicitly by Chairman Wiley, of imposing on the networks "the burden of a full-fledged administrative proceeding together with necessary appeals therefrom." P. 483. Is this sort of threat—of presumptively lawful regulatory proceedings—normally a cognizable harm? Consider *WEFM*, supra, in which the agency, and not the court, attempted to avoid "the ominous threat of a hearing." Cf. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (federal injunctive relief against state prosecution undertaken in bad faith to harass defendant).

5. At one point the court attributes the FCC's ability successfully to apply pressure to "the uncertainty of the relicensing process and the vagueness of the standards which govern it." P. 486. This perception leads it to require that any agency content regulation be precisely articulated in formal regulations, yet the court stops short of prohibiting the agency from offering "*suggestions* when it believes it has information or ideas which broadcasters may wish to consider in making their independent [programming] determinations." But see *Kalven*, as quoted in *CBS v. DNC*, infra, at 525 (Douglas, J., concurring).

Does this bring the court into essential congruence with the opinion in *Yale Broadcasting*, supra? Could the Commission's approach to "drug lyrics" be adapted to accomplish a similar broadcaster sensitivity to demands for "family viewing," e. g., by requiring broadcasters to know whether their early evening programming is harming or disturbing children, so that they can then make a programming decision in the public interest with full knowledge of its consequences?

6. Can the NAB now lawfully re-adopt a new family viewing policy, free of the taint of governmental pressure? See § IV.B of the court's opinion.

7. *Writers Guild* is noted at 28 *Syr.L.Rev.* 583 (1977).

#### D. ACCESS, FAIRNESS AND THE FIRST AMENDMENT

##### MIAMI HERALD PUBLISHING CO. v. TORNILLO

United States Supreme Court, 1974.  
418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730.

Mr. Chief Justice BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.

## I

In the fall of 1972 appellee \* \* \* was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. In response to these editorials appellee demanded that appellant print verbatim his replies \* \* \*. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of \$5,000. The action was premised on Florida Statute § 104.38 (1973), a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. \* \* \*

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court \* \* \* held that § 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. 38 Fla.Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." \* \* \*

On direct appeal, the Florida Supreme Court reversed, holding that § 104.38 did not violate constitutional guarantees. 287 So.2d 78 (1973). It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." \* \* \*

## III

## A

\* \* \*

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First

2. "104.38 *Newspaper assailing candidate in an election; space for reply*— If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of

cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."



Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and which is not defamatory.

## B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public. The contentions of access proponents will be set out in some detail. It is urged that at the time the First Amendment to the Constitution was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. \* \* \* Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns,<sup>13</sup> are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

13. "Nearly half of U. S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One-newspaper towns have become the rule, with effective

competition operating in only 4 percent of our large cities." Background Paper by Alfred Balk in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 18 (1973).

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. \* \* \*

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. \* \* \*

\* \* \* They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson. *The System of Freedom of Expression* 671 (1970).

#### IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. \* \* \*

We see that beginning with *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), the Court has expressed sensitivity as to whether a restriction or requirement con-

stituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which " 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean v. American Press Co.*, 297 U.S. 233, 244-245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co. v. Sullivan*, 376 U.S., at 279. \* \* \*

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.<sup>24</sup>

24. "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print

observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

Mr. Justice BRENNAN, with whom Mr. Justice REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, *Vindication of the Reputation of a Public Official*, 80 Harv.L.Rev. 1730, 1739-1747 (1967).

Mr. Justice WHITE, concurring.

\* \* \*

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. The press would be unlicensed because, in Jefferson's words, "[w]here the press is free, and every man able to read, all is safe." Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in matters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment. \* \* \*

The constitutionally obnoxious feature of § 104.38 is not that the Florida Legislature may also have placed a high premium on the protection of individual reputational interests; for government certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination

in the news without dictating selection?" 2 Z. Chaffee, *Government and Mass Communications* 633 (1947).

Quite the contrary, this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.

But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation. At least until today, we have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel characteristically provided by state law. He has been unable to force the press to tell his side of the story or to print a retraction, but he has had at least the opportunity to win a judgment if he can prove the falsity of the damaging publication, as well as a fair chance to recover reasonable damages for his injury.

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#### NOTES AND QUESTIONS

1. Did the Court implicitly find that the Florida statute was unconstitutionally vague?
2. Could a monopoly newspaper be compelled to carry "legal notices," publication of which in a newspaper of general circulation is argueably required by the due process standard of "best practicable notice under the circumstances?" Or by Fed.R.Civ.P. 71A(d) (3) (ii) (condemnation of property, owner unavailable for personal service)? Cf. *Mack v. Costello*, 32 S.D. 511, 143 N.W. 950 (1913) (declining to order publication on a theory of affectation with the public interest).
3. (a) Prior to *Tornillo*, there was a considerable literature urging the need for a private right of access. Perhaps the leading essay is Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv.L.Rev.* 1641 (1967). And, as the *Tornillo* Court noted in a passage omitted here, the plurality opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 & n. 15 (1971) (Brennan, J.), had observed that "[i]f the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."
  - (b) What is the constitutional status of such defamation "retraction" statutes in light of the reasoning in *Tornillo*? Does a judicial order to print a retraction amount also to "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published?" Are the countervailing considerations stronger when the original publication has first been proved in court to be false? Should

it matter whether the defamed plaintiff is a public figure, barred by *New York Times v. Sullivan*, supra at 435, from recovering from a publisher that was neither malicious nor reckless in printing the libel.

Consider also the view of Judge Boreman, in *J. P. Stevens & Co. v. NLRB*, 406 F.2d 1017 (4th Cir. 1968) (dissenting), where the court enforced the Board's order that the employer assemble its employees and read them a Board-dictated notice listing unfair practices that would violate the labor laws and promising not to engage in them:

Even the convicted felon can never be made to confess that he has violated the law and he can, and often does, deny guilt; indeed, at every opportunity he may proclaim that he has been unjustly convicted.

The forcing of such declarations, in the nature of confessions or recantations, is not a matter to be lightly regarded. The feeling and the resolution of free men against forced utterances can become extremely intense. Over many centuries they have suffered oppressions rather than admit wrongdoing which they deeply and devoutly believed they had not committed. \* \* \*

Justice Learned Hand clearly expressed the thought in the following terms: ‘ \* \* \* Forcibly to compel anyone to declare that the utterances of any official, whoever he may be, are true, when he protests that he does not believe them, has implications which we should hesitate to believe Congress could ever have intended. \* \* \* [W]e can very well understand the sense of outrage which anyone may feel at being forced publicly to declare that he has committed even a minor dereliction of which in his heart he does not believe himself guilty.’ *Art Metals Construction Co. v. N. L. R. B.*, 110 F.2d 148, 151 (2 Cir. 1940).

4. Are the considerations mentioned in *Tornillo* equally relevant to the constitutionality of a right to reply to a broadcast? Are there stronger reasons for recognizing such a right? What is the implication of the Court's observation that “a newspaper is not subject to the finite technological limitations of time that confront a broadcaster?”

### RED LION BROADCASTING CO. v. FCC

United States Supreme Court, 1969.  
395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371.

Mr. Justice WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that

each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

## I.

### A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. [The court of appeals affirmed.]

### B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed.Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. \* \* \* [T]he rules were held unconstitu-

tional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit, on review of the rule-making proceeding, as abridging the freedoms of speech and press.

As they now stand amended, the regulations read as follows:

“Personal attacks; political editorials.

“(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee’s facilities.

“(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

“Note: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], above. The categories listed in [(3)] are the same as those specified in section 315(a) of the Act.

“(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee’s facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or



candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

### C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

## II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

### A.

\* \* \* [T]he Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies \* \* \* to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App.D.C. 197, 37 F.2d 993, cert. dismissed, 281 U.S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South v. FRC*, 61 App.D.C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F.C.C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F.C.C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258

(1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. Cullman Broadcasting Co., 25 P & F Radio Reg. 895 (1963). \* \* \*

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

#### B.

\* \* \*

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "*from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*" This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. \* \* \* Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. \* \* \*

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

\* \* \* [W]e cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority.

\* \* \*

### III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

## A.

Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.<sup>15</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

\* \* \*

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an

15. The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in *Government and Mass Communications* (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in *Freedom and Responsibility in Broadcasting* (J. Coons ed.) (1961). See also Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 *J. Law & Econ.*

15 (1967); M. Ernst, *The First Freedom* 125-180 (1946); T. Robinson, *Radio Networks and the Federal Government*, especially at 75-87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change*, Printed for Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce (1968).

unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

\* \* \*

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362 (1955); 2 *Z. Chafee, Government and Mass Communications* 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See *Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 *Harv.L.Rev.* 1 (1965). It is the right of

the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

\* \* \*

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. \* \* \*

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The

communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

\* \* \*

#### D.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed.Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with those problems if and when they arise.

\* \* \*

#### E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. \* \* \*

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allo-

cation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.

\* \* \*

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. \* \* \*

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.<sup>25</sup> \* \* \*

Not having heard oral argument in these cases, Mr. Justice DOUGLAS took no part in the Court's decision.

#### NOTE, THE STRUCTURE OF THE FAIRNESS DOCTRINE

1. The general fairness doctrine imposes two distinct duties on broadcasters: to give adequate coverage to "controversial issues of public importance"; and to do so fairly, by giving some attention to all sides of the controversy. The Commission has enforced the former obligation only once, against a West Virginia radio station that did not cover the locally "critical" issue of national strip mining legislation (apart from reporting news developments). The Commission found this an unreasonable exercise of the licensee's admittedly "wide journalistic discretion" in the choice of issues to address, noting that the Court in *Red Lion* had said (in a passage omitted supra) that "if the present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and

25. We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the

broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. \* \* \*



fair attention to public issues \* \* \*." Rep. Patsy Mink, 59 FCC 2d 987, 37 R.R.2d 744 (1976); noted, 26 Cath.U.L.Rev. 434 (1977).

The Commission in *Mink* rested its conclusion that strip mining was too important and controversial to be overlooked by the licensee in part upon the extensive coverage given it by other media, particularly the local newspaper. Is the Commission, then, merely encouraging redundancy in its approach to the first part of the fairness doctrine? How else might the Commission determine that a particular issue is indeed a controversial issue of public importance? Should it also inquire whether it is an issue receiving "inadequate" media attention? What problems would that raise?

2. The second obligation of the fairness doctrine, to provide coverage of all sides of a controversial issue if one side is presented, is taken up in detail in Chapter VII. For now, bear in mind that this is not an "equal time" requirement, nor does it give any particular person a right to present his or her view of the issue; the broadcaster has the discretion to determine how best to arrange for the airing of different views.

In contrast, the personal attack corollary to the fairness doctrine vests a personal response right in the individual or group attacked, but it operates only as to attacks made "during the presentation of views on a controversial issue of public importance." What rationale can you supply for this limitation? Is the person whose character is attacked differently situated if the attack occurs during a non-controversial discussion? Is the broadcaster? Is the public interest served by the personal attack rule weaker in such a case?

Truth is not a defense to the broadcaster's obligation under the personal attack doctrine. Should it be?

#### NOTES AND QUESTIONS ON RED LION

1. (a) Do you agree with the Court that the Congress, in adding Section 315 to the Act "ratified" the Commission's interpretation of the public interest standard to include the fairness doctrine? What is the alternative statutory construction? Under the Court's construction of Section 315, may the Commission lawfully rescind the fairness doctrine if it should determine that it is either unnecessary or in fact chills speech concerning controversial issues?

(b) Senator Proxmire, who sponsored the bill adding Section 315 to the Act after winning an election in which the Wisconsin media strongly opposed his candidacy, has since changed his view; he has now introduced legislation to eliminate the fairness doctrine as well as other restraints on broadcasters' editorial policies. See S.22, 95th Cong., 1st Sess., 1977.

2. Why is it significant that "the Government could surely have decreed that each frequency should be shared among all or some of

those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week?" Not having done so, does it follow that the government can require that its licensees "make available a reasonable amount of broadcast time" to those with views contrary to his or her own? Could the same obligation be made a condition for the grant of the present postal rate subsidy to magazines?

3. Is it sensible to require that each broadcaster present a balanced view of a public issue so long as the broadcast media—or perhaps the media overall—have done so? Could the FCC, as a practical matter, implement this broader conception of balanced discussion?

#### NOTES AND QUESTIONS ON THE IMPORT OF THE FAIRNESS DOCTRINE

1. Is *Red Lion* consistent with *Tornillo*? What differentiates broadcasting and newspapers for purposes of constitutional analysis? How did the Court distinguish *Red Lion* when it decided *Tornillo*? If it is relevant that there are many fewer daily newspapers (about 1500) than broadcasters, nationally (about 8,000) and in almost all locales, which way does that cut? Is there any reason to believe that broadcasting has a greater impact on public affairs than newspapers and magazines? (Compare the New York Times and any single New York City broadcast licensee.) If so, is that of constitutional significance?

2. What is the relevance of the fact that the government licenses broadcasters but not newspapers? Recall that the rationale for licensing was technological—to avoid interference. If a sudden and dramatic shortage of newsprint developed, due to war or natural disaster, for example, such that the government undertook to allocate supplies at controlled prices in the interest of assuring some to each publisher, would it follow that the government could require that each newspaper cover all sides of controversial issues?

3. Henry Geller has concluded that "there is a direct conflict between *Tornillo* and *Red Lion*," but rather lamely defends the fairness doctrine nonetheless as a "necessary incident" to the fact of government licensing lest minority groups and interests be "denied the right to express their views over the broadcast media." Geller, *Does Red Lion Square With Tornillo?*, 29 U.Miami.L.Rev. 477 (1975). Putting aside the apparent non sequitur, what empirical assumption is he making? Is it plausible?

4. (a) A more imaginative defense of the present position is offered by Professor Bollinger, who suggests that "it is the *first amendment itself* that justifies this differential treatment of mass communications technologies" in order simultaneously to realize "the benefits of two distinct constitutional values \* \* \*: access in a highly concentrated press and minimal governmental intervention." This could "theoretically" have been accomplished by requiring public access to the pages of newspapers and instead deregulating broadcasting, but

the order of their development has brought us to the opposite resting point. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich.L.Rev. 1, 36 (1976) (emphasis in original).

A premise of Professor Bollinger's argument is that access in fact furthers a first amendment goal: "It seeks to neutralize the disparities that impede the proper functioning of the 'market-place of ideas,' to equalize opportunities within our society to command an audience and thereby to mobilize public opinion, and in that sense to help realize democratic ideals." *Id.*, at 27.

Viewed with an eye on this premise, "partial regulation of the mass media" can be roughly evaluated as a success or failure. Has the broadcast press, governed by the fairness doctrine, equalized opportunities to mobilize public opinion? Can you think of some instances when it has done so, i. e., where a minority view found expression on the electronic soap box and acquired a following? Do they involve local, or national, issues?

(b) The real test of the fairness doctrine as explained by Bollinger comes in comparing the discussion of public affairs on radio and television with that in newspapers and magazines. Which media—broadcast or printed—have been more effective in mobilizing public opinion? It is often said that television turned the country against the Viet Nam war because it brought into our homes a vision of that country's agony on and off the battlefield. Even if true, however, that is not a good example because it does not relate to the workings of the fairness doctrine; the contribution of that doctrine was to assure presentation of the view, initially held by a minority, that the war should be ended, but that contribution is not often cited as a causative factor in changing national policy.

"Watergate" is probably a better example, at least at the national level. What were the respective contributions of the broadcast and printed media in correcting "the disparities that impede the proper functioning of the market-place of ideas"? Did the fairness doctrine provide helpful access to the view, again initially held by a minority, that the Nixon Administration had abused governmental powers? The answer is probably that it did; but at what cost? Why, that is, did the investigative, adversarial role fall so heavily to the printed press?

5. Consider these hypotheses about the effect of the fairness doctrine, in addition to Professor Bollinger's:

A. The doctrine, by requiring presentation of all sides to a controversy, deprives the broadcast press of a discrete political voice and disables it from performing in the historic role of the press—for which it received constitutional protection—that of an independent check on governmental arrogations of power. Broadcasters are deterred from taking strong positions because they must then confound

themselves by giving circulation to the opposite view. Hence, there is no William Randolph Hearst, no William Loeb or I. F. Stone, no National Review or New Republic of broadcasting. Indeed, anyone with strong views would lay better claim to his soul by staying out of the broadcasting business and assuming among the powers of the press. Whatever can be said for "access," then, it is purchased at this price: the press is half free and half slave, and it is the potentially more potent medium, not surprisingly, that the government has chosen to enslave.

B. On the contrary, the fairness doctrine hardly affects the content of broadcasting at all, and what effect it has is salutary. First, the operative word in proposition (A) is "business." Broadcasting is a business, primarily an entertainment business since entertainment is profitable and discussion of public affairs is not (or not as much so). Thus, left to their own devices—as they largely are by the FCC—broadcasters shun political debate and even if relieved of the fairness doctrine would surely not take as their own controversial views that offended any significant number of viewers.

Second, to the extent that broadcasters do present controversy, either by choice or in response to the Commission's subtle pressure, it is important that, as government licensees, they give a balanced presentation. Otherwise they give the appearance, and invite the reality, of government censorship, for, as has been pointed out "the government could select licensees on the basis of its preferences for their demonstrated political view, and could foreclose access to the media for all those views it disapproved." Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 *Geo.Wash. L.Rev.* 974, 992 (1970). Accordingly, the fairness doctrine should be seen as a governmental abjuration of power over the press.

C. Both of the prior views fail to appreciate the significance of the fact that broadcasting is licensed by the government. As Bernard Kilgore, the President of the Wall Street Journal, said in a speech in 1961, "no matter how loose the reins may be, \* \* \* the argument that freedom of the press protects a licensed medium from the authority of the government that issues the license is double talk. \* \* \* [I]f we try to argue that freedom of the press can somehow exist in a medium licensed by the government we have no argument against a licensed press." Quoted in Kalven, *Broadcasting and the First Amendment*, 10 *J.Law & Econ.* 1, 16 (1967). This is what accounts for broadcasting's non-persona in the conduct of public affairs. Indeed, in the Watergate scandal when The Washington Post performed in the traditional role of the press as a check on the government, it found its jointly-owned television station, WTOP, in a license challenge instigated in the White House. And the three networks were the objects of direct intimidation by the government (as recounted in detail by Thomas Whiteside in *Annals of Television: Shaking the Tree*, *The New Yorker*, Mar. 17, 1975, at 41). That was

possible only because the networks are licensees in their capacity as owners of some of the largest television and radio stations.

It is no explanation at all that broadcasting is a business; so is a newspaper or a magazine, yet in the free press some publishers find they can make money without devoting their pages entirely to entertainment or presenting a "balanced" view of public affairs. William Randolph Hurst sold a lot of newspapers, and publications like those mentioned in proposition (A) are often run with an eye not to maximizing profits but to spreading a view, often at large personal costs to their backers. Not so with broadcasters, and the reason isn't the fairness doctrine, it's licensing. Indeed, many of the most reputable and influential newspapers in the country have followed the New York Times' example in opening their pages to submitted essays rebutting their editorials, and carry letters to the editor, and columnists reflecting a spectrum of political views. To some unlicensed publishers, that is, a self-imposed variant of the fairness doctrine seems to be good business and good journalism. "Fairness" is not the cause of the broadcasters' political blandness; licensing is.

7. (a) The late Professor Harry Kalven's comments speak to proposition (C):

The speech problems posed by broadcasting are probably not unique, but belong to a category that is hard to capture. Various analogies come to mind and suggest the possibility of working toward a firmer theory of how communications problems of this type ought to be handled. \* \* \*

Take the town meeting which is often thought of as a model of free speech in operation. If the Chairman is keeping order he has problems somewhat like those of broadcasting. Not everyone can talk at once nor can they talk too long since time is scarce nor can they talk far off the point. *The speakers are in effect 'licensed' by the chairman*, yet no one has ever said that this spoiled the game. What is understood by us all here is an implicit standard limiting the chairman to noncontent regulation. He may supervise the program but only in this critically limited sense. Probably the FCC can go somewhat farther, but it may prove profitable to play with the analogy of the FCC as the chairman of the meeting.

Then consider cases like *Cox v. New Hampshire*, 312 U.S. 569 (1941), holding that it is constitutional to require licensing of parades to avoid having two parades on the same corner at the same time. Here again is an analogy to the Roberts Rules of Order of the town meeting and another firm example of the compatibility, at times, of licensing with freedom of speech and press. The case has not yet arisen, but what would we think if the state were to choose between

competing parades on the grounds that it preferred the quality or public service of the one parade over the other. 10 J.Law & Econ., at 47 (emphasis in original; footnotes omitted).

(b) But cf. Marks, *supra*, 38 Geo.Wash.L.Rev., at 986: As between mutually exclusive applications for parade permits to use Fifth Avenue on St. Patrick's Day—one by the DAR and one by the St. Patrick's Day Committee—the latter would be preferred “on the grounds that its parade offered the better public service that day. The choice would reflect the government's estimate of the community's desire and expectation \* \* \*.” Do you agree?

Marks continues in response to Professor Kalven's analogy of the town meeting, with broadcasters the townspeople and the FCC the moderator: “But it is wrong to equate each speaker, rather than the meeting as a whole, to a broadcast station. Like a local station, the meeting is a forum serving community needs. The role of the chairman of the meeting is analogous to the licensee's: he himself can speak on any issue, but he cannot exclude other speakers on the basis of their viewpoints. The expectation is the same as the one implicit in the fairness doctrine, that fairness results from a multiplicity of viewpoints, none of which is prevented from being heard.”

Who should prevail in this war of analogies? Is it significant that Marks says “fairness” results from a multiplicity of viewpoints, rather than “truth?”

8. The next case sheds additional light on the role of the broadcaster qua chairman of the town meeting.

**COLUMBIA BROADCASTING SYSTEM, INC. v.  
DEMOCRATIC NATIONAL COMMITTEE**

United States Supreme Court, 1973.  
412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772.

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writs of certiorari in these cases to consider whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934, \* \* \* or the First Amendment.

The complainants in these actions are the Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), a national organization of businessmen opposed to United States involvement in the Vietnam conflict. In January 1970, BEM filed a complaint with the Commission charging that radio station WTOP in Washington, D. C., had refused to sell it time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. WTOP, in common with many, but not all, broad-

casters, followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues. WTOP took the position that since it presented full and fair coverage of important public questions, including the Vietnam conflict, it was justified in refusing to accept editorial advertisements. WTOP also submitted evidence showing that the station had aired the views of critics of our Vietnam policy on numerous occasions. \* \* \*

Four months later, in May 1970, DNC filed with the Commission a request for a declaratory ruling:

"That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues."

DNC claimed that it intended to purchase time from radio and television stations and from the national networks in order to present the views of the Democratic Party and to solicit funds. Unlike BEM, DNC did not object to the policies of any particular broadcaster but claimed that its prior "experiences in this area make it clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the Commission should decline to issue a ruling as requested." DNC cited *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), as establishing a limited constitutional right of access to the airwaves.

In two separate opinions, the Commission rejected respondents' claims that "responsible" individuals and groups have a right to purchase advertising time to comment on public issues without regard to whether the broadcaster has complied with the Fairness Doctrine. \* \* \*

\* \* \* The Commission did, however, uphold DNC's position that the statute recognized a right of political parties to purchase broadcast time for the purpose of soliciting funds. The Commission noted that Congress has accorded special consideration for access by political parties, see 47 U.S.C. § 315(a), and that solicitation of funds by political parties is both feasible and appropriate in the short space of time generally allotted to spot advertisements.<sup>1</sup>

A majority of the Court of Appeals reversed the Commission, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." 146 U.S.App.D.C., at 185, 450 F.2d, at 646. Recognizing that the broadcast frequencies are a scarce resource in-

1. The Commission's [ruling] \* \* \* in favor of DNC's claim that political parties should be permitted to purchase air time for solici-

tation of funds were not appealed to the Court of Appeals and are not before us here.

herently unavailable to all, the court nevertheless concluded that the First Amendment mandated an "abridgeable" right to present editorial advertisements. The court reasoned that a broadcaster's policy of airing commercial advertisements but not editorial advertisements constitutes unconstitutional discrimination.\* The court did not, however, order that either BEM's or DNC's proposed announcements must be accepted by the broadcasters; rather, it remanded the cases to the Commission to develop "reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air." \* \* \*

## I

Mr. Justice WHITE's opinion for the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. \* \* \* Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned. The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change \* \* \*.

Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. \* \* \*

\* \* \* That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. \* \* \*

## II

\* \* \* [O]nce it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between private and public control. \* \* \*

The legislative history of the Radio Act of 1927, the model for our present statutory scheme, reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.

\* In the court of appeals' view, broadcasters were subject to the requirements of the First Amendment because, having been granted use of

part of the public domain and regulated as "fiduciaries of the people," they are instrumentalities of the government.—D.G.



Some members of Congress—those whose views were ultimately rejected—strenuously objected to the unregulated power of broadcasters to reject applications for service. \* \* \* They regarded the exercise of such power to be “private censorship,” which should be controlled by treating broadcasters as public utilities. \* \* \*

\* \* \* [In 1934] Congress after prolonged consideration adopted § 3(h), which specifically provides that “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”

[And Section 326 specifically prohibits censorship by the Commission.]

From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act. License renewal proceedings, in which the listening public can be heard, are a principal means of such regulation.

Subsequent developments in broadcast regulation illustrate how this regulatory scheme has evolved. Of particular importance, in light of Congress’ flat refusal to impose a “common carrier” right of access for all persons wishing to speak out on public issues, is the Commission’s “Fairness Doctrine,” which evolved gradually over the years spanning federal regulation of the broadcast media. \* \* \*

\* \* \* In its decision in the instant cases, the Commission [stated]:

“The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners. \* \* \* This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the ‘profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.’ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co., Inc. v. F. C. C.*, 395 U.S. 367, 392 (n. 18) (1969) \* \* \*.” 25 F.C.C.2d, at 222-223.

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. \* \* \* Consistent with that philosophy, the Commission on several

occasions has ruled that no private individual or group has a right to command the use of broadcast facilities. \* \* \*

### III

[The Chief Justice, here joined only by Justices Stewart and Rehnquist, argued that broadcasters' editorial policies and judgments should not be considered governmental actions subject to the restraint of the First Amendment.]

### IV

There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment. \* \* \*

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. Cf. *Red Lion*, supra, at 392. Even under a first-come-first-served system, proposed by the dissenting Commissioner in these cases, the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently. Moreover, there is the substantial danger \* \* \* that the time allotted for editorial advertising could be monopolized by those of one political persuasion.

These problems would not necessarily be solved by applying the Fairness Doctrine, including the *Cullman* doctrine, to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. Thus, the very premise of the Court of Appeals' holding—that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have little meaning to those who could not afford to purchase time in the first instance.

If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement; indeed, BEM has suggested as much in its brief. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable

for broadcast performance to private individuals who are not. The public interest would no longer be "paramount" but, rather, subordinate to private whim \* \* \*.

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression. \* \* \* In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view.

The Court of Appeals \* \* \* suggested that broadcasters could place an "outside limit on the total amount of editorial advertising they will sell" and that the Commission and the broadcasters could develop "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints." \* \* \*

By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of Government control over the content of broadcast discussion of public issues. This risk is inherent in the Court of Appeals' remand requiring regulations and procedures to sort out requests to be heard—a process involving the very editing that licensees now perform as to regular programming.

Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broad-

casters is too radical a therapy for the ailment respondents complain of.<sup>21</sup>

\* \* \*

The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive audience." Cf. *Public Utilities Comm'n v. Pollak*, 343 U.S., at 463; *Kovacs v. Cooper*, 336 U.S. 77 (1949). The "captive" nature of the broadcast audience was recognized as early as 1924 when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set." As the broadcast media became more pervasive in our society, the problem has become more acute. \* \* \*

"Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' \* \* \* Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." *Banzhaf v. FCC*, 405 F.2d 1082, 1100-1101 (1968), cert. denied 396 U.S. 842 (1969).

It is no answer to say that because we tolerate pervasive commercial advertisements we can also live with its political counterparts.

The rationale for the Court of Appeals' decision imposing a constitutional right of access on the broadcast media was that the licensee impermissibly discriminates by accepting commercial advertisements while refusing editorial advertisements. The court relied on decisions holding that state-supported school newspapers and public transit companies were prohibited by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements. The court also attempted to analogize this case to some of our decisions holding that States may not constitutionally ban certain protected speech while at the same time permitting other speech in public areas. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). \* \* \* Respondents also rely on our recent decisions in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), where we held un-

21. DNC has urged in this Court that we at least recognize a right of our national parties to purchase air time for the purpose of discussing public issues. We see no principled means

under the First Amendment of favoring access by organized political parties over other groups and individuals. [Footnote relocated.]

constitutional city ordinances that permitted "peaceful picketing of any school involved in a labor dispute," *id.*, at 93, but prohibited demonstrations for any other purposes on the streets and sidewalks within 150 feet of the school.

Those decisions provide little guidance, however, in resolving the question whether the First Amendment requires the Commission to mandate a private right of access to the broadcast media. In none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees. In short, there is no "discrimination" against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when.

\* \* \*

Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. \* \* \*

For the present, the Commission is conducting a wide-ranging study into the effectiveness of the Fairness Doctrine to see what needs to be done to improve the coverage and presentation of public issues on the broadcast media. Notice of Inquiry in Docket 19260, 30 F.C.C.2d 26, 36 Fed.Reg. 11825. \* \* \* [T]he history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees. \* \* \* At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding.

The judgment of the Court of Appeals is  
Reversed.

Mr. Justice STEWART, concurring.

## II

Part IV of the Court's opinion, as I understand it, seems primarily to deal with the respondents' statutory argument—that the obligation of broadcasters to operate in the "public interest" supports the judgment of the Court of Appeals. Yet [Justices BLACKMUN and POWELL, concurring] understand Part IV as a discussion of the First Amendment issue that would exist in these cases were the action of broadcasters to be equated with governmental action. So, according to my Brother BLACKMUN, "the governmental action issue does

not affect the outcome of this case." The Court of Appeals also conflated the constitutional and statutory issues in these cases. It reasoned that whether its decision "is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little."

I find this reasoning quite wrong and wholly disagree with it, for the simple reason that the First Amendment and the public interest standard of the statute are not coextensive. The two are related in the sense that the Commission could not "in the public interest" place a requirement on broadcasters that constituted a violation of their First Amendment rights. The two are also related in the sense that both foster free speech. But we have held that the Commission can under the statute require broadcasters to do certain things "in the public interest" that the First Amendment would not require if the broadcasters *were* the Government. For example, the Fairness Doctrine is an aspect of the "public interest" regulation of broadcasters that would not be compelled or even permitted by the First Amendment itself if broadcasters were the Government.

If the "public interest" language of the statute were intended to enact the substance of the First Amendment, a discussion of whether broadcaster action is governmental action would indeed be superfluous. For anything that Government could not do because of the First Amendment, the broadcasters could not do under the statute. But this theory proves far too much, since it would make the statutory scheme, with its emphasis on broadcaster discretion and its proscription on interference with "the right of free speech by means of radio communication," a nullity. Were the Government really operating the electronic press, it would, as my Brother DOUGLAS points out, be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of "fairness" to deny time to any person or group on the grounds that their views had been heard "enough." Yet broadcasters perform precisely these functions and enjoy precisely these freedoms under the Act. The constitutional and statutory issues in these cases are thus quite different.

\* \* \* We are told that many, if not most, broadcasters do accept advertising of the type at issue here. This variation in broadcaster policy reflects the very kind of diversity and competition that best protects the free flow of ideas under a system of broadcasting predicated on private management.

Even though it would be in the public interest for the respondents' advertisements to be heard, it does not follow that the public interest requires *every* broadcaster to broadcast them. And it certainly does not follow that the public interest would be served by *forcing* every broadcaster to accept any particular kind of advertising. In the light of these diverse broadcaster policies—and the serious First

Amendment problem that a contrary ruling would have presented—there are surely no “compelling indications” that the Commission misunderstood its statutory responsibility.

### III

There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater Government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers. And it would require no great ingenuity to argue that newspapers too *are* Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity. The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers, too, be compelled to open their pages to all comers.

\* \* \*

I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court. And if I have exaggerated, it is only to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its “values.”

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that “fairness” was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.

This Court was persuaded in *Red Lion* to accept the Commission’s view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters’ First Amendment rights were “abridgeable.” But surely this does not mean that those rights are nonexistent. And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment “values” alone, I could not agree with the Court of Appeals. For if those “values” mean anything they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters or imposed by bureaucratic fiat, the choice must be for freedom.

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The concurring opinions of Justice White and of Justice Blackmun, with whom Justice Powell joined, are omitted.

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Mr. Justice DOUGLAS, concurring in the judgment.

While I join the Court in reversing the judgment below, I do so for quite different reasons.

My conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications. That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people.

\* \* \*

## II

\* \* \*

It is said that TV and radio have become so powerful and exert such an influence on the public mind that they must be controlled by Government.<sup>3</sup> Some newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind. But even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils.

\* \* \*

Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the Government is the censor, administrative *fiat*, not freedom of choice, carries the day.

As stated recently by Harry Kalven, Jr.:

“It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism. There is perhaps a paradox in that the suppression of speech by speech is part and parcel of the principle of freedom of speech. Indeed, one big reason why policy dictates that gov-

3. “To say that the media have great decisionmaking powers without defined legal responsibilities or any formal duties of public accountability is both to overestimate their power and to put forth a meaningless formula for reform. How shall we make the *New York Times* ‘accountable’ for its anti-Vietnam policy? Require it to print letters to the editor in support of the war? If the situation is as grave as stated, the remedy is fantastically inadequate. But the situation is not that grave. \* \* \* The implication that the people of this

country—except the proponents of the theory—are mere unthinking automata manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.” Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 *Harv.L.Rev.* 768, 786-787 (1972).



ernment keep its hands off communication is that, in this area, self-help of criticism is singularly effective. \* \* \*

“Free, robust criticism of government, its officers, and its policy is the essence of the democratic dialectic—of ‘the belief,’ again to quote Brandeis, ‘in the power of reason as applied through public discussion.’ The government cannot reciprocally criticize the performance of the press, its officers, and its policies without its criticism carrying implications of power and coercion. The government simply cannot be another discussant of the press’s performance. Whether it will it or not, it is a critic who carries the threat of the censor and more often than not it wills it. Nor is it at all clear that its voice will be needed; surely there will be others to champion its view of the performance of the press.

“The balance struck, then, is avowedly, and even enthusiastically, one-sided. The citizen may criticize the performance and motives of his government. The government may defend its performance and its policies, but it may not criticize the performance and motives of its critics.” 6 *The Center Magazine*, No. 3, pp. 36–37 (May/June 1973).

*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, in a carefully written opinion that was built upon predecessor cases, put TV and radio under a different regime. I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. \* \* \*

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs, dissenting.

\* \* \* In practical effect, the broadcaster policy here under attack permits airing of only those paid presentations which advertise products or deal with “non-controversial” matters, while relegating the discussion of controversial public issues to formats such as documentaries, the news, or panel shows, which are tightly controlled and edited by the broadcaster. The Court holds today that this policy—including the *absolute* ban on the sale of air time for the discussion of controversial issues—is consistent with the “public interest” requirements of the Communications Act of 1934.<sup>2</sup> The Court also holds that the challenged policy does not violate the First Amendment. It is noteworthy that, in reaching this result, the Court does *not* hold that there is insufficient “governmental involvement” in the promul-

2. I do not *specifically* address the “statutory” question in this case because, in practical effect, the considerations underlying the “statutory”

question are in many respects similar to those relevant to the “substance” of the “constitutional” claim.  
\* \* \*

gation and enforcement of the challenged ban to activate the commands of the First Amendment. On the contrary, only THE CHIEF JUSTICE and my Brothers STEWART and REHNQUIST express the view that the First Amendment is inapplicable to this case. My Brothers WHITE, BLACKMUN, and POWELL quite properly do not decide that question, for they find that the broadcaster policy here under attack does not violate the "substance" of the First Amendment. Similarly, there is no majority for the *holding* that the challenged ban does not violate the "substance" of the First Amendment. \* \* \*

## I

[Justice Brennan here argued that broadcasters should, like the government, be governed by the first amendment with respect to the particular subject involved in these cases, viz. a broadcaster's ability to adopt a policy of "refus[ing] absolutely to sell any advertising time to those wishing to speak out on controversial issues." The factors on which he based his opinion are summarized in his conclusion:]

Thus, given the confluence of these various indicia of "governmental action"—including the public nature of the airwaves, the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government "has so far insinuated itself into a position" of participation in this policy that the absolute refusal of broadcast licenses to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.

## II

\* \* \* In fulfilling their obligations under the Fairness Doctrine \* \* \* broadcast licensees have virtually complete discretion, subject only to the Commission's general requirement that licensees act "reasonably and in good faith," "to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format." Thus, the Fairness Doctrine does not in any sense require broadcasters to allow "non-broadcaster" speakers to use the airwaves to express their own views on controversial issues of public importance. On the contrary, broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and, perhaps most important, who shall speak. Given this doctrinal framework, I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited, robust, and wide-open" exchange of views to which the public is constitutionally entitled.

As a practical matter, the Court's reliance on the Fairness Doctrine as an "adequate" alternative to editorial advertising seriously overestimates the ability—or willingness—of broadcasters to expose the public to the "widest possible dissemination of information from diverse and antagonistic sources." As Professor Jaffe has noted, "there is considerable possibility the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can." Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even to allow others to espouse—the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's "marketplace of ideas."

Moreover, the Court's reliance on the Fairness Doctrine as the *sole* means of informing the public seriously misconceives and underestimates the public's interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen. \* \* \*

Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates. Under the Fairness Doctrine, however, accompanied by an absolute ban on editorial advertising, the public is compelled to rely *exclusively* on the "journalistic discretion" of broadcasters, who serve in theory as surrogate spokesmen for all sides of all issues. This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression. Indeed, we emphasized this fact in *Red Lion* \* \* \*.

\* \* \*

Nor are these cases concerned solely with the adequacy of coverage of those views and issues which generally are recognized as "newsworthy." For also at stake is the right of the public to receive suitable access to new and generally unperceived ideas and opinions. Under the Fairness Doctrine, the broadcaster is required to present only "*representative* community views and voices on controversial issues" of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure of the public to those "views and voices" that are novel, unorthodox, or unrepresentative of prevailing opinion.<sup>27</sup>

\* \* \*

27. Indeed, the failure to provide adequate means for groups and individu-

als to bring new issues or ideas to the attention of the public explains, at

## III

\* \* \*

This is not to say, of course, that broadcasters have *no* First Amendment interest in exercising journalistic supervision over the use of their facilities. On the contrary, such an interest does indeed exist, and it is an interest that must be weighed heavily in any legitimate effort to balance the competing First Amendment interests involved in this case. In striking such a balance, however, it must be emphasized that these cases deal *only* with the allocation of *advertising* time—air time that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here, not with the speech of broadcasters themselves, but, rather, with their “right” to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public.

\* \* \* Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects, and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate “trustee” appointed by the Government to argue his case for him.

\* \* \*

## IV

Finally, the Court raises the specter of administrative apocalypse as justification for its decision today. The Court’s fears derive largely from the assumption, implicit in its analysis, that the Court of Appeals mandated an *absolute* right of access to the airwaves. In reality, however, the issue in these cases is not whether there is an *absolute* right of access but, rather, where there may be an *absolute denial* of such access. \* \* \*

\* \* \* I must agree with the conclusion of the Court of Appeals that although “it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial \* \* \* we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy.”

least to some extent, “the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to \* \* \* the inability to secure access to the conventional means of reaching and changing public opinion. [For by] the

bizarre and unsettling nature of his technique, the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message.” Barron, 80 Harv.L.Rev. at 1647.

## NOTES AND QUESTIONS

1. What is the holding of *CBS*?
2. (a) In Part II of his opinion for the Court, Chief Justice Burger views the fairness doctrine as Congress' uniquely chosen instrument "for providing the listening and viewing public with access to a balanced presentation of issues of public importance." Under that doctrine, however, broadcasters have the greatest discretion to choose the issues to be addressed over their station, whereas under *CBS* their choices cannot be supplemented by members of the public who wish to put a particular issue on the broadcast agenda. Is this approach consistent with the philosophy of *Red Lion* that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," and that "the licensee has no constitutional right to \* \* \* monopolize a radio frequency to the exclusion of his fellow citizens"? Could Congress constitutionally compel broadcasters to accept editorial advertisements? Cf. Opinion of the Justices to the Senate, 363 Mass. 909, 298 N.E.2d 829 (1973).

(b) See L. Tribe, *American Constitutional Law* 699 (1978): *CBS* "took a step away from *Red Lion* by its treatment of broadcasters as part of the 'press' with an important editorial function to perform \* \* \*." Do you agree? Certainly the Court uses the vocabulary of the press when it says (in Part IV) that "editing is what editors are for; and editing is selection and choice of material." But it justifies this assimilation of broadcasting to the press in terms that would surely sound ominous if applied to preserve the journalistic discretion of the printed press from a statutory right of access (as in *Tornillo*) when it speaks of public accountability: "No such accountability attaches to the private individual \* \* \*."

3. (a) Do you agree that a paid right of access for editorial advertisements presents a danger that "the views of the affluent could well prevail over those of others"? Would the danger be greater than it is in the printed media? Were either of the two complainants before the Court representatives of the affluent?

(b) The Court foresaw a further erosion of their journalistic discretion if, to satisfy the fairness doctrine, broadcasters were required to make additional time available to those who wish to respond to a paid editorial advertisement. Could this problem have been solved by conditioning the first editorializers' right of access upon its identifying, and if necessary paying for, the time used by, someone who wished to respond to it?

4. In footnote 21 the Court despairs of any principled distinction between political parties and others insofar as they claim a right to purchase air time for the discussion of public issues. Does it follow that the question noted in footnote 1—whether political parties have

a right to buy air time to solicit funds—must be answered in the negative?

5. (a) Although the Court concludes by allowing the possibility that Congress may “at some future date \* \* \* devise some kind of limited right of access,” the Congress had in fact acted when *CBS* was decided. In 1972 it added subsection (a) (7) to section 312 of the Communications Act, requiring broadcasters “to allow reasonable access to or to permit purchase of reasonable amounts of time \* \* \* by a legally qualified candidate for Federal elective office on behalf of his candidacy.”

(b) The Commission has held that reasonable access under Section 312(a) (7) is denied by a broadcaster’s refusal to sell prime time spots to candidates, but not by its refusal to sell them spot time within any news program. Anthony R. Martin-Trigona, 42 R.R.2d 567 (1978) (sep. stmt. of Chmn. Ferris). Is such refusal “reasonable” if the broadcaster does sell news program spots to oil companies presenting “advocacy ads”?

(c) For some of the many problems encountered in defining a “legally qualified candidate,” see Notice of Proposed Rule Making, BC Dkt. No. 78-103, 43 Fed.Reg. 3,402, R.R. ¶ 53:353 (Cur.Svce.) (1978). See also Policy in Enforcing Section 312(a) (7), 43 Fed.Reg. 12,938, R.R. ¶ 53:163 (1978).

6. WSTC and WSTC (FM), which are commonly owned by one licensee (Western), are the only radio stations licensed to Stamford, Conn. During the 1969 mayoral election campaign in Stamford, Western required two of the three candidates to submit the scripts of their political messages in order to ensure that the material was in good taste; on several occasions it required the excision of material it considered to be in bad taste. The third candidate, on whom no such requirement was imposed, won the election, and the other two sued the broadcaster, asserting a cause of action directly under the first amendment.

The district court held that the broadcasters’ actions were governmental, and thus subject to the first amendment, since “by giving Western monopoly control over the local airways, federal regulation has invested Western with the capacity to obstruct free speech in local elections.” *Kuczo v. Western Conn. Broadcasting Co.*, 424 F.Supp. 1325, 1327 (D.Conn.1976). Is it relevant to the question whether there was governmental action that Western was in violation of Sec. 315(a) of the Act? Consider *Writers Guild*, supra, and see 566 F.2d 384 (2d Cir. 1977), reversing the district court on this point.

## Chapter VII

### THE FAIRNESS DOCTRINE APPLIED

In this chapter we examine the application of the fairness doctrine to several specific subject areas: political, and especially presidential, broadcasts; documentary or investigative broadcast journalism; and paid and unpaid (public service) advertising. Throughout the chapter, you should consider three related questions: (1) To what extent is the existence of the fairness doctrine likely to affect a broadcaster's decisions as to what material to present in the first instance, and in what way? (2) To what extent does the administration of the fairness doctrine intrude the Commission into day-to-day review of broadcasters' journalistic judgments? And (3) How does the fairness doctrine inject new strategic considerations into the decisions of others who use the broadcast media, specifically incumbent politicians and political candidates, and advertisers whose advertisements may be subject to fairness treatment?

#### A. POLITICAL BROADCASTS

The fairness doctrine applies generally to the presentation of controversial issues of public importance, including ballot issues. Section 315—the equal opportunities provision of the Act—applies specifically to “uses” of the broadcast medium by a legally qualified candidate for public office, at any level of government. The two are related, as the Court suggested in *Red Lion*, supra at 499, but must not be confused. Before considering the fairness doctrine materials in this part of Chapter VII, therefore, read Section 315 and the following notes with care.

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#### NOTES AND QUESTIONS ON EQUAL OPPORTUNITIES UNDER SECTION 315

1. The following is excerpted from the National Association of Broadcasters' Legal Guide to FCC Broadcast Rules, Regulations, and Policies II-16 (1977):

Section 315(a) of the Communications Act requires that if a station permits a “legally qualified candidate” for public office to use its facilities, it shall afford “equal opportunities” to all other candidates for that public office. The “equal opportunities” requirement applies only to the use of broadcast facilities through a candidate's personal appearance by voice or image (i. e., where the candidate is either identified by name or is “readily identifiable to a substantial degree by the listening or viewing audience”). Accordingly, this does not apply to broadcasts by supporters of a candidate or by a political figure

who is not running for public office. Under the FCC's rules, a person is not a "legally qualified candidate" until he has publicly announced his candidacy and has met the qualifications prescribed by the election laws for candidates to the office he seeks. In 1976, the FCC revised the definition of a "legally qualified candidate" to include an individual who (a) has qualified for a place on the ballot or has publicly committed himself to seeking election by the write-in method; (b) is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method; and (c) makes a substantial showing that he is a bona fide candidate for nomination or office. Primary elections are subject to Section 315, but only candidates for the same party's nomination are entitled to "equal opportunities" in response to opposing candidate "uses."

Subject to the statutory exceptions \* \* \*, if a candidate appears on a broadcast, this constitutes a "use" of the station's facilities and the "equal opportunities" requirement is applicable. It makes no difference whether the candidate appears on an audience participation program, or makes a recorded announcement on behalf of charity.

\* \* \*

With respect to the exemption of on-the-spot coverage of bona fide news events, the FCC, in *Aspen Institute*, 55 FCC 2d 697 (1975), affirmed sub. nom. *Chisholm v. FCC*, 538 F.2d 349 (D.C.Cir.) cert. denied 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976), reversed earlier decisions by ruling that press conferences of candidates for political office and debates between candidates are exempt "news events" where the press conference or debate is broadcast live, in its entirety, and is not sponsored or controlled by the licensee or the candidate. The FCC subsequently ruled that the delayed broadcast of such a debate may qualify as a "news event" if aired in its entirety and the delay does not extend past the next day. \* \* \* The press conference [exception] is applicable to all levels of political office, and to any candidates whose press conferences are considered newsworthy and subject to on-the-spot coverage. Here, the degree of candidate control may not always be decisive, since arranging a press conference per se indicates control. However, this may be a useful guide for classifying events (i. e., whether there is an independent purpose to the broadcast, aside from its use to further a particular candidacy). Regarding debates, the same criteria would be applicable. It should be emphasized that in order to qualify as on-the-spot coverage of a news event, the debate should be held outside the studio, and should be organized by a neutral party (i. e., neither the candidates nor the station) which retains final authority in "staging" the debate.

2. The Commission has held that a candidate for President or Vice President, even if legally qualified in only one state, would be entitled to equal opportunities with any other candidate who appeared on a national network program. In each presidential year there are more than a dozen such qualified candidates, although it is only the occa-



sional contest in which there is a "major" third party—i. e., one potentially capable of preventing the Democrat or Republican candidate from achieving a majority of the votes cast in the Electoral College. As a result, broadcasters, and the networks in particular, have argued that the effect of the equal opportunities provision is to prevent their giving as much non-news coverage, e. g., in interviews, as they would like to the major contenders. The Commission's new policy respecting debates may alleviate the problem somewhat, but of course only to the extent that the major candidates agree to debate.

3. (a) Notice that Section 315 speaks of "equal opportunities" rather than of "equal time." As the Commission has interpreted the term, "equal" has both a quantitative and a qualitative dimension. Thus, if candidate A appears for x minutes, all other candidates (B \* \* \* n) must be allowed to appear for x minutes. If candidate A appeared in prime time, all other candidates must be offered prime time, rather than, say 2x time during the day. The term "opportunities" is also interpreted literally, so that if A purchased his or her time, the others must be allowed to purchase equal time (again, in both senses), at the same rate; they need not be given free time. Cf. Section 312(a) (7).

(b) See generally Use of Broadcast Facilities by Candidates for Public Office, 35 Fed.Reg. 13048, 19 R.R.2d 1913 (1970).

4. Who, among political candidates and political parties, is benefitted and who is disadvantaged by the neutral operation of Section 315? How might it affect the strategy of an incumbent who plans to seek re-election?

5. Proposals for repeal or amendment of Section 315 are legion and varied. Among the more interesting are Barrow, The Presidential Debates of 1976: Toward a Two Party Political System, 46 U.Cinn.L. Rev. 123 (1977) (equal time for major candidates, half time for minor candidates); and Singer, The FCC and Equal Time: Never-Neverland Revisited, 27 Md.L.Rev. 221 (1967) (equal time for major candidates, half or more time for minor candidates depending on the vote received by their party in the last election, and repeal of all Sec. 315 exceptions other than for newscasts).

### NICHOLAS ZAPPLE

Federal Communications Commission, 1970.  
23 FCC 2d 707, 19 R.R.2d 421.

\* \* \* [Y]our first question concerns the station licensees' obligation to authorized spokesmen or supporters of a political candidate in the following circumstances:

"(a) A broadcast station sells time to Candidate A, his authorized spokesman, an individual, a group, or an organiza-

tion supporting him to urge his election. Candidate A does not appear personally on any of these broadcasts; however, issues in the campaign and/or the candidate are discussed. An authorized spokesman, an individual, a group, or an organization supporting Candidate B requests fairness time under the FCC's existing policies."

\* \* \* The Commission has consistently held that the Fairness Doctrine is applicable to programs on which supporters of a candidate discuss the candidates or the issues. See also, Section 315(a), where Congress specifically recognized the applicability of the Fairness Doctrine to those news-type appearances of the candidates themselves which were exempted from the equal opportunities provisions by the 1959 Amendments to Section 315(a).

As you know, the Fairness Doctrine requires that when a licensee presents one side of a controversial issue of public importance, he must afford a reasonable opportunity for the presentation of contrasting views. Unlike the precise equal opportunity standard of Section 315, the licensee's obligation under fairness must be determined in light of all the relevant facts of a particular case. Initially it is for the licensee to make good faith judgments on a number of questions, such as whether a controversial issue of public importance is involved, what are the contrasting views which should be presented, who are appropriate spokesmen, what format should be employed, etc. Thus, while it is not possible to give a definitive answer to your question absent the full facts concerning a particular case, we nevertheless believe we can set forth some of the principles which would govern the type of situation you have outlined.

\* \* \* Where a spokesman for, or a supporter of Candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues, there has clearly been the presentation of one side of a controversial issue of public importance. It is equally clear that spokesmen for or supporters of opposing Candidate B are not only appropriate, but the logical spokesmen for presenting contrasting views. Therefore, barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of Candidate B comparable to that previously bought on behalf of Candidate A. A further issue raised by your question is whether a licensee must provide free time to Candidate B's spokesmen or supporters. As a general proposition the Commission has held that the public's right to know cannot be defeated by the licensee's inability to obtain paid sponsorship for presentation of a contrasting viewpoint even where the initial presentation was made under paid sponsorship. *Cullman Broadcasting Co.*, 40 FCC 576, 25 R.R. 895 (1963). While we continue our firm support for this general proposition, we believe it should not have applicability in the direct political arena. When spokesmen or supporters of Candidate A have purchased time, it is

our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing Candidate B's spokesmen or supporters with free time (e. g., the Chairman of the National Committee of a major party purchases time to urge the election of his candidate, and his counterpart then requests free time for a program on behalf of his candidate). Any such requirement would be an unwarranted and inappropriate intrusion of the Fairness Doctrine into the area of political campaign financing. \* \* \*

Your second question concerns \* \* \* the following circumstances:

"(b) A broadcast station sells time to an individual, a group or organization supporting Candidate A and such broadcast time is used to criticize Candidate B or his position on the issues of the campaign. An authorized spokesman, an individual, a group or an organization supporting Candidate B requests fairness time under the FCC's existing policies."

We believe the answer to your second question is governed by essentially the same principles, as the answer to the first, i. e., that the Fairness Doctrine is applicable, but that the licensee would not be obligated to provide free time to authorized spokesmen for Candidate B or to those associated with him in the campaign if authorized spokesmen of Candidate A or those associated with him in the campaign had used paid time on the licensee's station to criticize Candidate B or his position on the campaign issues. Here, of course, there is a closer analogy to the personal attack situation, although mere criticism would not constitute a personal attack within the meaning of our rules.

\* \* \*

CONCURRING OPINION OF COMMISSIONER  
NICHOLAS JOHNSON

\* \* \*

I would like to add several observations. First, the Commission has not discussed the question whether a licensee must seek out and present the views of an opposition candidate who does *not* come forward to purchase rebuttal time. Presumably, if the Fairness Doctrine is invoked by the supporters of or spokesmen for one candidate, the licensee has an affirmative obligation to present the other side of the controversy. In most large electoral races—e. g., Presidential, Senatorial, Congressional, etc.—news coverage of the campaign may, under a few limited circumstances, satisfy this obligation. The opposition candidate (or his spokesmen or supporters) might, for example, hold a press conference to rebut the charges, and this conference might receive normal news coverage.

In smaller races, however—e. g., state assemblymen, local school board, etc.—there may be no news reporting of the opposition candidate's views in the normal course of campaign coverage. Under such circumstances, if the Fairness Doctrine truly applies, I would assume that the licensee would be required to present the opposition candidate's views in *some* manner. If that candidate himself is the only person qualified to speak on his position, and if he does not step forward because he cannot afford to pay the going rate, how is the licensee to avoid putting him on—*free*? The alternative would seem to be an "uninformed public." I do not believe the majority letter has resolved this question. I would at least have preferred some explicit discussion—or even acknowledgement—of this problem.

Second, I do not believe the Commission has made it clear that the free time requirements of Cullman are not abolished altogether in the area of political campaigns. As the majority correctly states, it is, at least initially, a matter for the licensee to make good faith judgments as to which person might be an appropriate spokesman to rebut the charges of a candidate's spokesman or supporters. If this is true, the majority has left open the possibility that the licensee might legitimately and reasonably conclude that the opposition's views can be fairly presented by someone who is *not* a candidate, or the supporter or spokesman for a candidate, and proceed in such a manner. If so, he must presumably offer the time free.

Third, I am uncertain whether the Commission believes it *cannot* (legally) provide *free* rebuttal time under the Fairness Doctrine and Cullman to opposition spokesmen or supporters; or whether it feels it is merely *inadvisable* (in terms of policy) to do so. As a matter of legal construction, the phrase "equal opportunities," in Section 315(a), appears broad enough to accommodate a doctrine which would enable a political candidate to obtain *free* rebuttal time upon some convincing showing that he was unable to raise the necessary money to buy time. Therefore, this argument is even stronger for "supporters" of or "spokesmen" for political candidates—persons not expressly covered by the language of Section 315(a). \* \* \*

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#### NOTES AND QUESTIONS

1. (a) Insofar as *Zapple* deals with the broadcaster's obligation to sell time, you might think that a broadcaster would be reluctant to deal with B's supporters only if he were himself a supporter of A. In fact, however, many broadcasters are reluctant, for economic rather than partisan reasons, to sell time for political messages, especially those longer than one minute. Program-length political broadcasts may cause a large part of the audience to change stations, never to return that day or evening. In television particularly, messages of less than program-length cause coordination problems in resuming regularly scheduled network broadcasts. In either case, they may

anger part of the audience by pre-empting all or part of a show they have been expecting to see.

(b) In fact, *Zapple* is applied also to non-purchased time in which the supporters of a candidate appear. Should it also be subject to the exceptions to the equal opportunities doctrine enumerated in Section 315?

(c) If the first speaker did not refer to A by name, how is the broadcaster to determine, when B's supporter or spokesman asks to buy comparable time, whether the first speaker was a "supporter" of A?

2. What practical problems and strategic behavior would you anticipate arising if the FCC were ever to adopt Commissioner Johnson's reading of Section 315 to require the donation of free rebuttal time where the supporters of a candidate are unable to pay for it? Cf. Council for Employment and Economic Energy Use v. FCC, 575 F.2d 311 (1st Cir. 1978).

3. Because it holds that, under the fairness doctrine, a broadcaster must make available "comparable" time to the supporters or spokesman of a candidate whose opponent's supporters have appeared, *Zapple* is often said to create a right of "quasi-equal opportunities" for such supporters, or a "political party doctrine."

4. (a) If A's supporters appear on a broadcast on which they take a position concerning a campaign issue, does *Zapple* require that the broadcaster make comparable time available to both the supporter of B and the spokesman of C, each of whom wish to take the opposite position? In other words, does *Zapple* apply the fairness doctrine so as to assure that the public is informed on the issue or on the candidates' views of the issue?

(b) Would your answer to the previous questions be different if the supporter of A did not mention A by name in the broadcast? Does the holding in *Zapple* differentiate among appearances by a candidate's supporters on that basis?

5. Suppose that spokesmen for the President, a candidate for reelection, set forth his views on campaign issues in various broadcast appearances; the opposing party's spokesman appears to reply under *Zapple*; the President's men then claim that he addressed additional campaign issues not raised by them. Does the President's party have a right to comparable time for a surrebutter? See *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018 (D.C.Cir. 1971) (*semble*); § 315(a) (proviso).

6. The next case presents the fairness doctrine issue, as it relates to the President, outside the electoral context.

**COMMITTEE FOR THE FAIR BROADCASTING  
OF CONTROVERSIAL ISSUES**

Federal Communications Commission, 1970.

25 FCC 2d 283, 19 R.R.2d 1103.

Rev'd on other grounds sub nom. CBS v. FCC 454 F.2d 1018 (1971).

**MEMORANDUM OPINION AND ORDER**

1. The Commission has before it a series of separate complaints and petitions relating to alleged violations of the fairness doctrine by various television networks, their owned and operated stations and individual network affiliated stations in their coverage of issues relating to the war in Southeast Asia (also referred to as the Indochina War.) \* \* \*

3. The Complaint: Between November 3, 1969, and April 30, 1970, the President presented his views on the war in Southeast Asia (including the issues of the origins of the war, the alternative courses of action available, "Vietnamization," rate of U.S. troop withdrawal, American incursion into Cambodia) on four separate occasions with wide prior publicity. The speeches were broadcast during prime time and varied in length from 15 to 30 minutes. The President entertained no questions before, during or after the speeches; the presentations were not interrupted in any other manner; and the President's remarks were broadcast live and complete. The Committee contends that neither WTIC-TV nor WCBS-TV has presented any program which presented contrasting viewpoints on the issues the President addressed and which received significant prior publicity, was broadcast nationwide on network owned and operated and affiliated stations during prime time and had the same uninterrupted orderly exposition on a single issue or set of issues. The Committee contends that the programming concerning the Vietnam-related issues presented by WTIC-TV and WCBS-TV is, in and of itself, balanced.<sup>4</sup>

30. \* \* \* First, we deal with those complaints which in effect request that an appropriate spokesman be selected to respond, on an equal opportunities basis, to any broadcast Presidential address on a controversial issue of public importance. As stated in the BEM complaint, each network would be required to provide "a substantial block of uninterrupted prime time and permit the format to be controlled by the respondents to answer the President's presentation on views on controversial issues; and that the opposing presentation should follow immediately after the President has spoken." In the complaint of the 14 Senators, it is that "the Commission should require networks to provide time to any substantial group of Senators opposing the President's views on a controversial issue of national importance when-

4. E. g., Face the Nation—10 guests favoring Administration policy and 8 opposed; documentaries are internally

balanced with both proponents and opponents included in each show.

ever the issue is one in which the Senate has a role to perform in seeking resolution of the issue, and the President has initiated debate via nationwide television." \* \* \* [W]e deny these requests as contrary to the established principles of the fairness doctrine.

37. \* \* \* In this section, we deal with those complaints (or aspects of complaints) that as to the Indochina War issue, the networks or licensees have presented since November 1969 five Presidential addresses on the Indochina War in prime time,<sup>22</sup> and that while spokesmen for the contrasting viewpoint have been presented in newscasts, interview programs, and documentaries, no one has been afforded the kind of opportunity which the President had; that the President was the only person appearing during these prime time speeches, he answered no questions, there were no interruptions of the President's presentation, commercial or otherwise, and the speech was unedited \* \* \*.

38. First, we do not depart from the basic principles governing the application of the fairness doctrine. We therefore stress, as we have in the past cases, that we look to all the programming that has been presented on the issue. In making the judgment whether the networks have acted reasonably we must take into account the nature of the programming presented on one side of the issue; and in this instance, that means of course the number of Presidential addresses in prime time.

39. There is no question but that the networks have presented extensive programming dealing with the issue of the Indochina War. CBS submitted a detailed showing in this respect, which we take to be typical for the networks. The showing encompasses presentations in newscasts, news interview shows, documentaries, or on-the-spot coverage of bona fide news events, which involved either analysis by network commentators or very frequent appearances of partisan spokesmen for the contrasting viewpoints on this issue, including in prime time periods. Relevant here also are the analyses by the commentators after the Presidential addresses. In addition to the network newscasts, licensees present their own newscasts, which again deal extensively with the Indochina War issue. Further, many licensees editorialize. As an example, we point to the showing made by WCBS-TV, where it has editorialized extensively against the Indochina War and afforded appropriate spokesmen the opportunity to reply.

40. The question is whether in the circumstances the networks have afforded reasonable opportunity for the presentation of the contrasting viewpoints on this issue. All of the foregoing presentations were roughly balanced—that is, the newscasts, documentaries, inter-

22. [In addition to the four broadcasts referred to in ¶ 3, the] Vietnam War was discussed in the President's State of the Union Message (1/22/70—12:30-1:30 p. m.), and com-

parable time was afforded by the three networks to spokesmen of the Democratic Party to respond to this speech on the State of the Union.

view shows, etc., all presented a balanced number of spokesmen on each side of the issue. The CBS showing indicates that the balance would slightly favor the Administration side of the issue, without consideration of the five Presidential addresses. The critical consideration thus becomes: Are reasonable opportunities afforded when there has been an extensive but roughly balanced presentation on each side and *five* opportunities in prime time for the leading spokesman of one side to address the nation on this issue? We believe that in such circumstances there must also be a reasonable opportunity for the other side geared specifically to the five addresses (i. e., the selection of some suitable spokesman or spokesmen by the networks to broadcast an address giving the contrasting viewpoint). We wish to stress that we are not holding that such obligation arises from a single speech—that where an uninterrupted address is afforded one side, the fairness doctrine demands that the other side be presented in the same format. That is the modified “equal opportunities” doctrine discussed in [¶ 30] *supra*, and rejected by us. Rather, our holding here is based upon the unusual facts of this case—five addresses by the outstanding spokesman by one side of an issue.<sup>23</sup>

41. It is thus critical to examine what the networks have done in this respect, i. e., affording time for an address to answer those of the President on this issue, such as was done when Senator Mansfield was invited to respond to the President’s speech on the economy. \* \* \* However, in light of the fact of five Presidential speeches on this issue, we believe that more is required of each of the networks in this respect (i. e., affording prime time for a speech by an appropriate spokesman for the contrasting viewpoint to that of the Administration on the Indochina War issue). We do not hold that there is any requirement for “equal treatment” to the five speeches; that is again a modified “equal opportunities” requirement which we reject for the reasons previously stated. While, as shown, all the networks have done something in the area of uninterrupted presentations in covering this issue, the result in each case falls short of what is reasonable in the circumstances. Thus, we require that at the least, time be afforded for one more uninterrupted opportunity by an appropriate spokesman to discuss this issue, with the length of time to be determined by the nature of the prior efforts in this area of uninterrupted presentations \* \* \*. We of course leave entirely to the judgment of the networks the selection of the appropriate spokesmen.

23. In referring above to the leading spokesman (i. e., the President), we wish to emphasize that we are not in any sense addressing ourselves to the matter of equalizing impact—of the effectiveness of various spokesmen or their presentation. As many of the complainants recognize, the President stands alone in this respect, and ob-

viously, by the very fact of his office, commands very great audiences, particularly when he speaks on a grave national problem such as Cambodia. We thus repeat that our concern is rather the question of reasonable opportunity in the circumstances for the public to be informed concerning the contrasting viewpoint.



42. We believe it important to make clear two things. First, our holding does not reflect adversely on the networks. On the contrary, we recognize that the networks have been making good faith efforts to inform the public on this vital issue. Further, we appreciate that there is some support for their position in the "theory" of the fairness doctrine, stressed by the networks in their arguments to us. But, as the Supreme Court stated in a different context, "Legal theory is one thing. But the practicalities are different." (*Ashbacker v. United States*, 326 U.S. 327, 332 (1943.)) Here "practicalities—or, stated differently, what is "reasonable" in the circumstances of five prime time addresses by one side—clearly call for the greater effort by the networks which we have noted above.

43. Second, in so holding, we do not mean to discourage in any way the networks' presentation of Presidential reports to the nation. It requires no discussion by us to point up the important contribution which such addresses make to an informed public. \* \* \* Our holding is thus directed solely to the matter of a reasonable opportunity for the expression of the contrasting viewpoint. It is limited to the unusual facts of this case—near balance on an issue, with one side in addition afforded five prime time opportunities to deliver speeches on that issue.

44. Finally, we note that we are dealing here with continuing plans to deal with a continuing issue, in terms of the presentations by both sides. Obviously, the licensee's future efforts must therefore be tailored reasonably to take into account future developments. We thus stress that on an issue of this over-riding importance, there must be continuing and strict adherence to the requirements of the fairness doctrine that the public be reasonably and realistically informed in light of the circumstances. \* \* \*

[The concurring statements of Chairman Burch, Commissioners Robert E. Lee and Johnson, and the dissenting statement of Commissioner H. Rex Lee, are omitted.]

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#### NOTES AND QUESTIONS

1. What is the holding in the *Fair Broadcasting* case?
2. If the networks had already presented "extensive" and "roughly balanced" programing on the issues relating to the war, what basis did the Commission have for concern that the public was not "informed concerning the [anti-war] view"? Alternatively, if the Commission was not trying to "equal[ize the] impact" of each side's views, what was it trying to do?
3. What problems do you see in the request of the 14 Senators? In the proposal that an appropriate spokesman make an "opposing presentation \* \* \* immediately after the President has spoken"? (§ 30.) How would the proposals be administered? What effect might

they have on the President's use of broadcasting? See Cohn, *Access to Television to Rebut the President of the United States: An Analysis and Proposal*, 45 *Temple L.Q.* 141, 183-87 (1972).

4. (a) Does *Fair Broadcasting* imply that the fairness doctrine, as applied to the President, requires that the opposition view be given quantitatively more than equal time in order to compensate for the prestige or credibility inherent in the President's speeches? What is the significance assigned to the "uninterrupted" nature of the President's speeches, and the "uninterrupted opportunity" (§ 41) that the networks were ordered to provide to an opponent of the war?

(b) Would an anti-war Republican Senator be an "appropriate spokesman" for the networks to select? How would you argue that he would not be?

5. Would the case have been resolved differently if the fairness doctrine complaint had been filed after the President had spoken only four times?

### DEMOCRATIC NATIONAL COMMITTEE v. FCC

United States Court of Appeals, District of Columbia Circuit, 1973.  
481 F.2d 543.

MackINNON, Circuit Judge: Once again we are confronted with the issue on appeal of whether the FCC has properly applied its fairness doctrine to a particular set of facts. The petitioner, the Democratic National Committee (hereinafter DNC), contends that the Commission erred in determining that the three major television networks had acted reasonably in pursuing their obligation to provide adequate coverage of public issues in their refusal in August-October 1971 to make available free prime time television air to DNC to respond to certain Presidential addresses concerning the Administration's economic policy.

The Presidential broadcasts at issue consisted of the following appearances on all three networks:

(1) An address on August 15, 1971, announcing the Administration's new economic program, broadcast by the networks live on television and radio between 9:00 p. m. and 9:20 p. m., EDT.

(2) A Labor Day address on September 6, 1971, clarifying the new program, broadcast by the networks live on radio only between 12:00 noon and 12:15 p. m., EDT.

(3) An address delivered on September 9, 1971, at the request of the Democratic congressional leadership to a joint session of Congress explaining the President's new economic policy and outlining legislation designed by the Administration to help achieve the policy's goals. The networks broadcast this speech

live on television and radio during non-prime time from 12:30 p. m. to 1:08 p. m., EDT.

(4) An address on October 7, 1971, announcing Phase II of the new economic program, broadcast live by the networks on television and radio between 7:30 p. m. and 7:46 p. m., EDT.

Petitioner also argues that three non-prime time press conferences with then Treasury Secretary John Connally dealing with the President's economic program should be weighed along with the President's personal addresses.<sup>1</sup> DNC sought permission from the networks to respond to some of these broadcasts, and, upon being refused, filed a complaint with the Commission seeking an order to compel NBC, CBS, and ABC to provide free time for the presentation of its viewpoint on the national economy. In its arguments to the Commission, DNC again pressed its contention that Presidential addresses should give rise to an *automatic right of reply* by spokesmen of the opposing party—a position emphatically rejected by us in *Democratic National Committee v. FCC*, 460 F.2d 891, cert. denied 409 U.S. 843 (1972). In addition, DNC argued that under the Commission's decision in *Committee for the Fair Broadcasting of Controversial Issues*, supra, p. 539, (hereinafter *Fair Committee*) these facts must give rise to a right of reply. In *Fair Committee* the Commission held that five uninterrupted prime time television (and radio) Presidential addresses dealing with the Indochina war in a seven month period where coverage had otherwise been roughly in balance, presented a unique situation requiring the networks to provide an opportunity for some spokesman for the other side to respond with one uninterrupted prime time appearance. In opposing these contentions, each of the three networks responded to DNC's complaint by pointing out the factual distinction between this case and *Fair Committee* and describing a comprehensive coverage of the viewpoints of critics of the President's economic program that had already been implemented by them. These facts relating to network programming of opposing viewpoints were uncontested by DNC. \* \* \*

On February 17, 1972, the Commission denied DNC's complaint. The Commission held that there was no showing that the networks had failed to meet their fairness doctrine obligation to present contrasting views on the President's economic program. Following its earlier rulings, the Commission reaffirmed that there is no automatic right of reply to Presidential broadcast appearances. While recognizing that in *Fair Committee* it had required the networks to afford additional time to respond to the President on the special facts of that case, the Commission noted that the present case was readily distinguishable from its earlier ruling and that, in light of the policies of

1. Secretary Connally's press conferences were broadcast by the three television and radio networks. The Commission declined to equate the Connolly conferences with the President's addresses and we agree.

\* \* \*

the fairness doctrine and the Communications Act, the factual differences between the cases justified different results. Finally, the Commission ruled that even if DNC's complaint were substantively meritorious, DNC would not be entitled to an order requiring the networks to afford DNC time to respond to the President, since the fairness doctrine left the selection of appropriate spokesmen to the licensee's discretion. The Commission found the inappropriateness of the relief requested to be an independent ground for its decision.

\* \* \* [I]t is clear that DNC was not entitled automatically to any right to reply. That there is no equal-opportunities rule in the context of the fairness doctrine is now beyond dispute. The Commission must look to all the relevant facts and circumstances to determine whether the public had been left uninformed of opposing viewpoints during the period in question and the burden is on the petitioner to show that the networks had not exercised reasonable judgment in this regard. We feel that the Commission was completely justified in finding in this case that no such showing had been made. It correctly concluded that in light of "the extensive coverage which the networks appear to have given to the current issue, including presentation of contrasting viewpoints on their news and interview programs, as well as some special programs they have cited \* \* \* we cannot find that the broadcast licensees have acted unreasonably or left the American people uninformed on the issue of the economic program."

\* \* \*

Petitioners also vigorously claim that the facts of this case are indistinguishable from those in Fair Committee. We are convinced the Commission was correct in ruling to the contrary. The scope of the holding in Fair Committee was very carefully circumscribed by the Commission in its fear that it would be considered a step towards a modified equal-opportunities rule. In other words, it correctly envisioned the inevitability of a case such as this. In recognizing that Fair Committee was an exception to the mainstream of fairness doctrine cases, the Commission stated:

"We wish to stress that we are not holding that such an obligation arises from a single speech—that where an uninterrupted address is afforded one side, the fairness doctrine demands that the other side be presented in the same format. \* \* \* *Rather, our holding here is based upon the unusual facts of this case—five addresses by the outstanding spokesman on one side of an issue.*"

(Emphasis added.) Indeed, the FCC emphasized that "the question of reasonableness calls for a judgment on the facts of each case." The Commission repeatedly underscored the unique facts of that case, mentioning over and over that the President had appeared *five times* on *prime time* television and radio to deliver *uninterrupted* messages justifying his Indochina policy. In this case there were only two Presi-

dential prime time broadcasts accompanied by two other *non*-prime time appearances. Comparison of the total prime time coverage reveals only 36 minutes in this case as compared with 132 minutes in Fair Committee. The Commission declined to "add in" Secretary Connally's press conferences, stating that he "was subject in the three press conferences to the same kind of critical questioning that he would have faced on news interview programs, and his appearances were neither uninterrupted nor in prime time." In light of the special emphasis placed on the Presidential and the *uninterrupted* nature of the addresses involved in Fair Committee, we cannot say the Commission was incorrect in this regard.

That such distinctions as these perhaps seem overly refined is a direct consequence of DNC's attempts to convert the "reasonable under the circumstances" rule to a more rigid, mathematical "modified equal-opportunities" doctrine—the very result the Commission was most cautious to avoid in deciding Fair Committee. The Commission declined in this case to extend Fair Committee for precisely that reason. The Commission declared its belief that extension of its earlier decision would result in a "whittling away" of basic fairness doctrine principles and lead to the substitution of an equal-opportunities approach which Congress had expressly rejected. The Commission further expressed its fear that a broad interpretation of its earlier decision would "lead us down a slippery slope with a consequent undesirable diminution of licensee responsibility \* \* \* [since] a continuing series of ad hoc rulings by the Commission which necessarily constitute special departure from the general fairness weighing process would inevitably push the Commission further and further into the programming process." <sup>5</sup>

We find the Commission was correct in refusing to venture upon such dangerous waters. In light of the factual distinctions between this case and Fair Committee, and in view of the fact that the networks had adequately fulfilled their obligation to inform the public on the issue of the economy, as determined by the Commission, we cannot

5. In the Commission's words:

" \* \* \* extension of the Fair Broadcasting ruling to the facts of this case would lead us down a slippery slope with a consequent undesirable diminution of proper licensee responsibility. If, for example, we were now to hold that the broadcast of two prime-time Presidential addresses and two not in prime time (including the extra radio address) requires the networks to afford additional time for response despite their other presentations on the issues and without any showing of overall unfairness, what ruling would be appropriate if there were only one prime-time plus three

non-prime-time addresses? or one prime-time plus two non-prime-time speech, with or without one or more non-prime-time press conferences by a Cabinet member? Of course, the making of distinctions is a normal function of the application of policy; but a continuing series of ad hoc rulings by the Commission which necessarily constitute special departures from the general fairness weighing process would inevitably push the Commission further and further into the programming process. We believe this to be both undesirable and not required by the situation."

say that the Commission erred in holding that this particular pattern of Presidential addresses was not so intense as to give rise to a right of response. The decision of the Commission is therefore affirmed.

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### NOTES AND QUESTIONS

1. (a) Does the Commission lack the authority to promulgate a "more rigid, mathematical 'modified equal opportunities' doctrine"? See Section 315(c).

(b) Would doing so entail an "undesirable diminution of proper licensee responsibility"?

2. What stake does the Commission have in its present approach to presidential television? Would any significant change in its approach exceed its institutional competence, or involve it in matters appropriately left to the law-making processes of the Congress and the Executive?

### THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT

Federal Communications Commission, 1972.

36 FCC 2d 40, 37 Fed.Reg. 12,744, 24 R.R.2d 1917 (Dkt. No. 19260, First Report).

#### A. *The fairness doctrine with respect to appearances of the President or other public officials*

25. The Commission can appreciate why so much attention is focused on the question of the application of the fairness doctrine to Presidential appearances. As the court noted in *Democratic National Committee v. FCC*, 460 F.2d 891, cert. denied, 409 U.S. 843 (1972), " \* \* \* the President's status differs from that of other Americans and is of a superior nature," and calls for him to make use of broadcasting to report to the nation on important matters:

"While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and \* \* \* this obligation exists for the good of the nation \* \* \*."

Because of this use of broadcasting by the nation's most powerful and most important public office, the argument has been made by DNC and by ACLU that there must be special provision for a response by the opposition party—some specific corollary to the general fairness doctrine that ensures equal or comparable use of the broadcast media by an opposition party spokesman.

26. We make two preliminary observations. First, the issue is not whether the American people shall be reasonably informed concerning the contrasting viewpoints on controversial issues of public importance covered by Presidential reports. The fairness doctrine is in any event applicable to such reports—as indeed it is to a report by any public official that deals with a controversial issue of public importance. See Section 315(a). Rather, the issue is whether something more—something akin to equal time—is to be required. The word “required” brings us to our second point. Because our goal is robust, wide-open debate, the Commission of course welcomes any and all programming efforts by licensees to present contrasting viewpoints on controversial issues covered by Presidential addresses. As we stated in our commendation of the CBS series, “The Loyal Opposition”, Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 300 [19 R.R.2d 1103] (1970); Republican National Committee, 25 FCC 2d 739, 745-46 [20 R.R.2d 305] (1970), the more debate on such issues, the better informed the electorate. But the issue is not what programming judgment the licensee makes in this area but, rather, whether there should be an FCC requirement. With this as background, we turn to the proposal that equal time be afforded to an opposition spokesman to respond to a Presidential report.<sup>5</sup>

27. First, there is a substantial issue whether any such Commission prescription might not run counter to the Congressional scheme. In Section 315(a), Congress has specified that equal opportunities shall be applicable to appearances of legally qualified candidates and that in other instances “fairness” be applicable—that is, that there be afforded “\* \* \* reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance.” While fairness may entail different things in particular circumstances there is a substantial question whether it is not a matter for Congress to take the discussion of public issues by the President out of the fairness area and place it within the equal opportunities requirement—just as, for example, it was up to Congress in 1960 to take appearances by candidates for President out of equal opportunities and place them under fairness. There is a further troublesome issue here—whether we could create a special fairness rule for Presidential reports but then hold that a report by Governor Reagan in California or

5. We are not dealing here with Presidential appearances during election campaigns where equal opportunities

or Zapple [supra, p. —] would ordinarily be applicable.

Mayor Lindsay in New York, for example, would come only under the "reasonable opportunities" standard of Section 315(a), in the face of arguments that such reports dealt with state or local issues of the greatest importance. Again we do not say that distinctions cannot be made here \* \* \* but rather raise the issue whether such distinctions are not more appropriately the province of the Congress.

28. But in any event, it would not be sound policy to adopt the DNC or ACLU proposals. From the time of the Editorializing Report, 13 FCC 1246 [25 R.R. 1901] (1949), to the present, we have been urged to adopt ever more precise rules—always in the cause of insuring robust debate (e. g., the argument, advanced in 1949 and now repeated by the ACLU, that fairness requires the contrasting viewpoint to follow immediately the presentation of the first viewpoint. \* \* \* However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide-open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate. \* \* \* [W]e do not believe it appropriate to adopt equal time policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring that the public is reasonably informed concerning the contrasting viewpoints best serves the public interest. See *DNC v. FCC*, supra. ("\* \* \* The President is obliged to keep the American people informed and as this obligation exists for the good of the nation, this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party \* \* \*") \* \* \*.

29. In this connection, we note that the Commission believes that the public interest would be served by revision of the equal opportunities requirement so as to make it applicable only to major party candidates, with such candidates liberally defined to include any candidate with significant public support (see *infra*, ¶ 35); it has also supported, as a less desirable alternative, suspension or repeal of that requirement as to the offices of President and Vice President. It would surely be anomalous for us to seek relaxation of the equal opportunities requirement as to candidates for the office of President, and at the same time to apply a new policy akin to the equal opportunities to Presidential broadcasts not coming within the present statutory equal opportunities requirement. We decline to do so.

#### B. *The Zapple ruling*

31. What we were stating in *Zapple* was simply a common sense application of the statutory scheme. If the candidate himself appears to some significant extent, then the Congressional policy is clear;



equal opportunities, which means no applicability of Cullman but rather mathematical precision of opportunity. Suppose neither the picture or voice of the candidate is used—even briefly—but rather a political message devised by him and his supporters is broadcast. In those circumstances, a common sense view of the policy embodied in Section 315 would still call for the inapplicability of Cullman and for some measure of treatment that, while not mathematically rigid, at least took on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? Clearly, these examples deal with exaggerated, hypothetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the Zapple ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, the application of Zapple, for all practical purposes, is confined to campaign periods). Significantly, because it does take into account the policies of Section 315, the public interest here requires both more (comparable time) and less (no applicability of Cullman) than traditional fairness. Based on practical experience, we stress that in any event—taking into account the sum total of political broadcasts and news-type programs—the American people are reasonably informed on campaign issues, and thus that the basic public interest requirement is being met in this vital area.

32. It follows that Zapple did not establish that in the political broadcast field there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. This would clearly undermine any future suspension or repeal of the “equal opportunities” requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 Amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates. We need not belabor the point further.

*C. Commission efforts to encourage the widest possible coverage of political campaigns*

34. We have considered most seriously what steps we can take in this respect. There would appear to be little we can do on an ad-

ministrative agency basis. Let us take the most obvious suggestion: That the Commission by rule specify that a certain amount of time be set aside for presentation of political broadcasts on a sustaining basis. There are a number of difficult policy issues that would have to be resolved in any such undertaking. But there is, we believe, again an overriding consideration here—namely, that this is truly a matter for Congressional resolution. Congress is aware of the high expense of running for political office, particularly in view of mounting broadcast costs. It has considered a number of worthwhile suggestions \* \* \*. Its response to this problem has been the Federal Election Campaign Act of 1971 (Public Law 92-225), with its limitations on spending, and requirement for reasonable access for those running for federal office and reduced rates for all political candidates. We do not see how we can sweep aside this scheme, and substitute our own. Indeed, we could not in any event be truly effective in any such agency action. Take the most important office—the Presidency. Were we to require free time for that office, we would run afoul of the equal time provision; we would find that we had required the broadcaster to devote hours of prime time not just to the significant candidates but also to as many as 15 fringe party candidates (e. g., Socialist Labor, Socialist Worker, Vegetarian). Our point is obvious: Reform here is needed, we believe, but it must come from the Congress because that is the only way it can be effectively accomplished.

35. Congress then can do much. We believe that consideration should again be given to the Voters Time concept or to some scheme akin to that used in Great Britain (i. e., blocs of free time to the major political parties). At the least, we propose again to urge Congress to adopt our proposed amendment to Section 315, limiting to major party candidates the applicability of the equal time provision in partisan general election campaigns. \* \* \*

36. As an alternative, we propose an additional exemption to Section 315(a) to cover any joint or back-to-back appearances of candidates. Additionally, consideration should be given, we think, to the further exemption that we urged upon Congress in connection with our 1970 Advocates ruling, 23 FCC 2d 462 [19 R.R.2d 179]. We suggested the addition of the following provision to Section 315(a):

- “(5) any other program of a news or journalistic character—
- (i) which is regularly scheduled; and
  - (ii) in which the content, format, and participants are determined by the licensee or network; and
  - (iii) which explores conflicting views on a current issue of public importance; and
  - (iv) which is not designed to serve the political advantage of any legally qualified candidate.”

\* \* \*

DISSENTING OPINION OF COMMISSIONER  
NICHOLAS JOHNSON

III. Jurisdiction and Abdication

The power to regulate political broadcasts may be found in at least two separate parts of the Communications Act. Section 303 (g) gives the Commission the authority to "encourage the larger and more effective use of radio in the public interest." Section 315 of the Act (the "equal time" requirements), so heavily relied upon by the majority as a limitation upon changes and clarifications of the fairness doctrine, expressly provides that it does not relieve licensees "from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

\* \* \*

\* \* \* Red Lion upheld the Commission's authority to make political broadcast rules complementary to Section 315. Section 315 not only does not inhibit the Commission from making fairness rules, it affirmatively requires that public issues be discussed. It is the duty of this Commission to make rules that encourage effective discussion on broadcast facilities.

By today's action the Commission seeks to have Congress do the very job Congress established the Commission to execute.

\* \* \*

IV. Presidential Reports

The Commission leaves the President in undisputed control of the nation's broadcast resources. From Roosevelt's fireside chats to the reports of the present President, Presidents increasingly have made extensive use of broadcasting for reports to the nation.

\* \* \*

This brings me to the heart of the unfairness. The President can command all three networks simultaneously for a prime time speech. By so doing he is able to reach audiences of over 55% of the over sixty million television homes. (Significantly, when the President appeared in prime time on only one of the major networks he drew only 14% of the same audience.) Thus, by his ability to use all three networks the President not only increases dramatically his own audience, for *any* message he wishes to disseminate, but he also captures a viewing audience far larger than any of his opponents could ever hope for. Unless this factor is taken into consideration, fairness with regard to the President's use of broadcasting is a joke.

VI. Congressional Action

Well, says the majority, that's a matter for the Congress. I would agree that it is most desirable (although not entirely neces-

sary) for Congress to act in this area. We must recognize, however—as I am confident the majority knows full well—that it is difficult for it to do so. Congressional regulation of election ground rules necessarily gets bogged down in politics in an election year. Congress reflects the two party system. Every action affecting elections is gauged on both sides of the aisle against the vital standard, “Will it help or hurt the chances of our party?” And because Congress is made up of incumbents, the further question surfaces, “Am I voting for a principle that, if extended, will hurt me in my own campaign?” I do not think that I have to belabor the point. In 1964 the party urging that fairness required an answer to a Presidential broadcast was the Republican National Committee. The DNC—now so active—was silent. Today we get petition after petition from the DNC concerning the right to answer Presidential appearances.

But if Congress understandably has difficulties acting in this sensitive field, that makes it all the more important that the agency—set up in part because of Congress’ awareness of its limitations—not abdicate its responsibilities at this hour. Yet that is what we have done.

\* \* \*

## VII. Proposals

The potential solutions are obvious. For example, we could require that whenever there have been two prime time appearances by the President on all three networks, the networks must schedule a prime time program, also to be presented simultaneously over the three networks, in which opposition spokesmen are given the opportunity to present contrasting viewpoints on the issues.

This would be eminently fair. It would give the President greater exposure than his opponents by a ratio of two to one, but it would still prevent the situation from getting totally out of hand, as it is today. It cures the basic defect—that, unlike anyone else, the President dominates the airwaves by getting on all three networks at the same time. Such an approach would also force opposition spokesmen to be truly on their mettle, because they are given the privilege of reaching such an enormous audience. Finally, it would institutionalize a solution, removing this Commission and the courts from difficult, and narrow ad hoc decisions, often made without the benefit of total perspective.

I do not understand the majority position that an opportunity for the other side to be heard will inhibit Presidential reports. Is the majority really arguing that if the American people are given a fair opportunity to hear contrasting viewpoints, the President will be deterred from using the airwaves, that his arguments are so lacking in strength that they cannot withstand healthy debate? That he will speak only if he can dominate the situation? For people who

profess to believe that the goal of the First Amendment is to promote robust, wide open debate, this surely is an untenable position.

As for the broadcasting industry, I should think that it would welcome the policy. \* \* \* This would give them a sound base with which to plan their operations, and to answer critics. For example, they could undoubtedly include Congressional leaders, when they find them to be appropriate spokesmen for the contrasting viewpoint—and thus largely meet the objections raised frequently by Senators and Congressmen that they receive quite unfair treatment in comparison to the President.

\* \* \*

Nor can it be argued that the Commission lacks the authority to take these specific actions. The statutory command in Section 315(a) is that “reasonable opportunity” be afforded. In a case where the President gives prime time reports on all three networks, “reasonable opportunity” requires that at least a contrasting viewpoint be similarly presented, and at no more than a two-to-one imbalance. Significantly, even the Commission recognized that “reasonable opportunity” calls for some response on one occasion when the President gave five speeches in a row on television. See Committee for the Fair Broadcasting of Controversial Issues [supra, p. 539]. And it did so even though the main subject of these talks—the Indochina War—was being given wide coverage by the networks on news-type programs. The same principle is applicable here. The only difference is that I would not permit the imbalance to go beyond two-to-one, and that I would face up to the critical issue of simultaneous use of all three networks.

The Majority claims such a ruling would have to be extended to reports by all public officials. I fail to see why. First, I believe a distinction can be made on the basis of the importance to the nation of the issues covered in Presidential Reports. But even that is not the basis of my comments. The crux is that the President, with increasing frequency, commands all three networks for reports to the nation and that any application of fairness must take that into account. No other public official, whether a governor or mayor, similarly dominates the airwaves in his state or city. Should that day arise, we will have time enough to consider extending the principle.

\* \* \*

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#### NOTES AND QUESTIONS

1. Of the Commission's three legislative proposals (§§ 29, 36), which is the most desirable?

(a) The constitutionality of a distinction between major and minor parties, with the equal opportunities requirement applicable

only to the former (§ 29), may now be deemed likely, in light of *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). That case upheld the Federal Election Campaign Act in making a similar distinction for purposes of the formula by which presidential candidates receive public subsidies, because the funding scheme did not operate actually to reduce non-major parties' strength "below that attained without any public funding." On the other hand, there is an argument that suspension of equal opportunities would have the prohibited effect. What is it?

(b) The "voters time" scheme (§ 36) used in Great Britain since 1936 is described in more detail in [1977] Report of the Comm. on the Future of Broadcasting (Cmnd. 6753), at 296-99. Briefly, it entails an allocation of time annually among the major parties based on substantial support in the last General Election, and when a new General Election is called additional parties are allocated time if they have at least 50 candidates standing for election to Parliament.

An American cognate is proposed in *The Twentieth Century Fund Comm'n on Campaign Costs in the Electronic Era, Voters Time* (1969). See generally N. Minow, J. Martin, & L. Mitchell, *Presidential Television* (1973). If equal time were suspended, what rationale would there be for "voters time" to be shared among the major parties?

(c) What would be the effect of the Commission's proposed additional exemption to Section 315? (§ 36) Would it effectively swallow up the general rule of equal opportunities? What is the meaning of the fourth requirement?

2. (a) Would Commissioner Johnson's "obvious" solution be constitutional insofar as it required the networks to present opposition spokesmen simultaneously?

(b) Who would set the time, if the networks failed to agree?

(c) The networks are not required to carry the President's speeches, and sometimes one or more of them decline; nor are they required, if they do carry them, to do so live and therefore simultaneously. What sort of incentive would Johnson's solution introduce into their decisions on whether and when to carry the President live?

(d) Would the public be better off if the networks did not carry the President simultaneously? Normally such duplication of programming, as on an AM-FM combination, is considered waste of scarce spectrum resources.

## B. FAIRNESS AND INVESTIGATIVE REPORTING

### E. EPSTEIN, NEWS FROM NOWHERE

65-72 (1973).\*

Although no license has ever been revoked or not renewed because of a violation of it, the Fairness Doctrine has affected the form and content of network news in a number of ways. First of all, it puts an obligation on affiliates to "balance" any network program which advances only one side of an issue by themselves providing the "other side" in the course of their own programming. Rather than risk having to fulfill such an obligation, which could prove extremely costly and bothersome, affiliates insist, virtually as a condition of taking network news, according to executives at all three networks, that the networks themselves incorporate the requisite "contrasting viewpoints" in their news reports. Networks, in turn, require as a matter of policy that opposing views be presented on any issue that could conceivably be construed as controversial. \* \* \*

These network policies confer clear responsibility on the producers of news programs. Elmer Lower, president of ABC News, said: "It is the job of seasoned producers and editors to decide what news goes into news broadcasts and to make *certain* [emphasis added] that the Doctrine of Fairness and Balance enunciated by the Federal Communications Commission is strictly observed." Robert Kintner wrote that "this situation is ready-made for what someone once called 'regulation by lifted eyebrow' \* \* \* [since when] the FCC receives a complaint that a public affairs or news show was unfair, and asks us to justify ourselves, we hop to it."

To enforce these policies, producers of news and documentary programs have adopted what might be called the "dialectical" model for reporting controversial issues, in which the correspondent, after reporting the news happening, juxtaposes a contrasting viewpoint and concludes his synthesis by suggesting that the truth lies somewhere in between. If the correspondent is unable immediately to ferret out or induce a "contrasting viewpoint," producers will usually shelve the film story until an opposing view can be found to provide a balance. For example, during the \* \* \* teachers strike in New York City in 1968, executives at NBC ordered a number of stories prepared for the Evening News to be reshot or canceled because the views of the black community leaders were not adequately "balanced" by filmed interviews with teachers and union officials. And it is quite common for producers to order correspondents to insert "pro" or "con" material in their voice-over narration \* \* \*. Further, producers as well as correspondents are "cued into" this need to

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achieve a near symmetry of opinions by content analysis or "word counts," as one former network vice-president explained. As an example of the "self-analysis and self-evaluation" that the networks are "constantly engaged" in, Elmer Lower gave the results of one such study, conducted in 1969, which showed such precise results as "news tending to support the administration viewpoint totaled 12 hours, 39 minutes; news likely to displease Nixon supporters, 10 hours, 18 minutes; neutral news, 8 hours, 18 minutes."

This model of "pro and con" reporting is perfectly consistent with the usual notion of objectivity—if objectivity is defined, as it is by most of the correspondents interviewed, as "telling both sides of a story." It can, however, seriously conflict with the value that journalists place on investigative reporting, the purpose of which is "getting to the bottom" of an issue or "finding the truth," as correspondents put it. Since a correspondent is required to present contrasting points of view, even if he finds the views of one side to be valid and those of the other side to be false and misleading (in the Fairness Doctrine, \* \* \* truth is no defense), any attempt to resolve a controversial issue and find "the truth" can become self-defeating.

Robert MacNeil, then an NBC correspondent, has described the difficulties in presenting the conclusions he arrived at in an hour-long documentary on the subject of federal gun-control legislation. In the original version of the documentary he concluded that it was necessary to restrict the ownership of firearms, and that Congress had not passed such a bill because of the pressures put on it by the "well-financed lobby led by the National Rifle Association." He explains what happened next:

Shortly after the screening [of the original version] the word came down that the program would have to be re-edited. The instructions came from the NBC lawyers and were ostensibly based on the needs to observe the Fairness Doctrine. It was also mentioned that NBC representatives expected to have to testify in forthcoming congressional hearings on broadcasting and did not want to be under any cloud of disapproval when they did so. The instructions were resisted by the NBC News Department, whose president, the late William R. MacAndrews, thought the program was strong and should be aired as it was. However, the wishes of the network prevailed and the film was reedited. The effect was to soften considerably the impact of the argument and to weaken the case against the N.R.A. In particular, the lawyers considered that we had been too tough on Franklin Orth [executive director of the N.R.A.]. Passages embarrassing to him were cut out and passages were inserted which either put him in a better light or permitted him to filibuster. \* \* \* In the first editing, we selected



the paragraph of the letter [an N.R.A. newsletter implying that Orth opposed firearms legislation] which made it clear that the N.R.A. was deceiving its membership. In the re-editing ordered by the network, the entire letter was put in. Again, the effect was to obscure the editorial point by softening the focus on the relevant part. \* \* \* In addition to other changes which softened the impact of the Orth interview, an exceedingly tame ending was concocted.

The "new" conclusion was reported by MacNeil himself on the program, even though it ran directly contrary to what he apparently believed to be the true findings of the investigation—that the legislation was purposefully forestalled by the gun lobby, not by "reasonable men" disagreeing on the "form" of the law—which suggests that when the values of the journalist and the organization conflict, the journalist must modify his reporting to conform to the organization's values and policies. The producer of this program, who dealt directly with the network's lawyers and executives on the re-editing, subsequently explained that the program was modified to meet the network's general policy on "fairness" and "nonadvocacy," and the lawyers were primarily concerned that if the documentary appeared to be a brief against the National Rifle Association, NBC or its affiliates might be forced to give the N.R.A. time for a reply.

Closely related to the Fairness Doctrine, and proceeding from the same sort of logic, is the "personal attack" rule \* \* \*. Even if the allegation, or "attack," is completely and demonstrably accurate, a broadcaster is still obliged to offer air time to the offended party for a reply. Unlike the laws of libel, again truth is *not* a defense for broadcasters. Although regular newscasts and on-the-spot coverage of events are exempted from this particular rule, it applies to all other news programing, including documentaries and unscheduled or "special" news reports. \* \* \*

As most of the network executives and producers who were interviewed agreed, the "personal attack" rule has had an inhibiting effect on news documentaries and at times, even "the way a correspondent tackles a subject," as one CBS producer put it. Indeed, in asking the Court of Appeals to nullify the "personal attack" rule, the Radio Television News Directors Association argued that if it were strictly enforced,

(1) A licensee will be unwilling to broadcast personal attacks or political attacks or to allow his facilities to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruptions that the

necessity of airing replies will have in displacing previously scheduled programs.

(2) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules.

Network executives must take these possible effects into account in the planning and approval of projected news programs. In a panel discussion of the Fairness Doctrine, Reuven Frank said, "We can recognize the increasing strain the Fairness Doctrine can place on a vigorous news operation. \* \* \* It seems to me that this kind of regulatory constraint must inevitably have a progressive flattening effect on news presentation, particularly in their most vital and sensitive and socially useful areas—the treatment of controversy." Leon Brooks commented that the "personal attack" rule "in the area of controversial programming, could, of course, have a damaging effect on material broadcast, since it may tend to cause many licensees to avoid the presentation of programs which could create for them serious administrative inconvenience. The result therefore may be to stifle rather than to encourage the dissemination of strong opinion on radio and television." The perception of network executives of what sort of programs might not be broadcast by affiliates can easily become self-fulfilling prophecies.

Richard Jencks noted: "If CBS were today to present its documentary on the Ku Klux Klan, the leaders of the Klan could piously avail themselves of the right to make a reply over the full network, even though, in most communities throughout the nation, it is decades since responsible news organs would turn over facilities for an uncritical presentation of the Klan's point of view." Thus, the implication is strong that such a news program could not be presented without a great deal of thought of the consequences under the FCC rules. This is more or less what happened after NBC did a scorching exposé of the unorthodox investigation of the Kennedy assassination by Jim Garrison, the district attorney of New Orleans. Garrison immediately appealed to the FCC for equal time, and NBC found it necessary to turn over a half-hour of prime time to him, in which he presented his own theories as established facts. "To say this didn't please the powers that be at NBC is to put it mildly," the producer commented. (A CBS documentary unit that reached similar conclusions about Garrison was more restrained in what they presented on the air, according to the producer, because of the intervention of CBS attorneys.)

**NATIONAL BROADCASTING CO. v. FCC**

United States Court of Appeals, District of Columbia Circuit, 1974.  
516 F.2d 1101. Vacated as moot, id. at 1180, certiorari denied 424 U.S. 910,  
96 S.Ct. 1105, 47 L.Ed.2d 313 (1976).

LEVENTHAL, Circuit Judge: On September 12, 1972, the television network of the National Broadcasting Company broadcast its documentary entitled "Pensions: The Broken Promise," narrated by Edwin Newman. \* \* \* [O]n May 2, 1973—as it happens, the same day NBC received the George Foster Peabody Award for its production—the Commission's Broadcast Bureau advised NBC that the program violated the Commission's fairness doctrine. That decision was upheld by the Commission. We reverse.

**I. The Program**

\* \* \*

The "Pensions" program studied the condition under which a person who had worked in an employment situation that was covered by a private pension plan did not in fact realize on any pension rights. Its particular focus was the tragic cases of aging workers who were left, at the end of a life of labor, without pensions, without time to develop new pension rights, and on occasion without viable income.

[The program gave specific examples of employees who did not realize their expected pension benefits due to plant closings, employer bankruptcy, or discharge prior to vesting of pension rights, and of abuses in the literature ostensibly explaining the plans to employees.]

Much of the program was a recount of human suffering, interviews in which aging workers described their plight without comment on cause or remedy. \* \* \* Interspersed with these presentations by workers were comments by persons active in the pension field, public officials, and Mr. Newman.

None of those interviewed—and these included two United States Senators, a state official, a labor leader, a representative of the National Association of Manufacturers, a consumer advocate, a bank president, and a social worker—disputed that serious problems, those covered by the documentary, do indeed exist. Some of the comments related to the overall performance of the private pension system. \* \* \* In addition to comments on the private system generally, there were isolated expressions of views on the related but nonetheless quite distinct issue of the wisdom of reliance on private pensions, regardless of how well they function, to meet the financial needs of retirees. Finally, several speakers gave broad, general views as to what could be done.

There were also comments on legislative reforms that might be taken to cope with problems. \* \* \*

### Concluding Remarks

It may be appropriate to quote in full the concluding remarks of narrator Edwin Newman, since the FCC considered them "indicative of the actual scope and substance of the viewpoints broadcast in the 'Pensions' program." He said:

"Newman: This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

"There are certain technical questions that we've dealt with only glancingly, portability, which means, being able to take your pension rights with you when you go from one job to another, vesting, the point at which your rights in the pension plan become established and irrevocable.

"Then there's funding, the way the plan is financed so that it can meet its obligations. And insurance, making sure that if plans go under, their obligations can still be met.

"Finally, there's what is called the fiduciary relationship, meaning, who can be a pension plan trustee? And requiring that those who run pension funds adhere to a code of conduct so that they cannot enrich themselves or make improper loans or engage in funny business with the company management or the union leadership.

"These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

"Our own conclusion about all of this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

"The situation, as we've seen it, is deplorable.

"Edwin Newman, NBC News."

### Success of Program

Like many documentaries, "Pensions" was a critical success but not a commercial success. \* \* \* Critics called it, "A potent program about pitfalls and failures of some private pension plans \* \* \*," "a harrowing and moving inquiry \* \* \*," and "a public service." Dissenting notes were also struck.

As to the viewing public, "Pensions" ran in competition with a popular medical drama and a crime movie, and ran a poor third,

garnering only a 16% share of the viewing audience. In fact, NBC was able to sell only two-and-one-half minutes of advertising time out of an available six.

## II. Commission Proceeding

Watching the program with particular interest was Accuracy in Media ("AIM"), a "nonprofit, educational organization acting in the public interest" that seeks to counter, in part by demanding aggressive enforcement of the fairness doctrine, what it deems to be biased presentations of news and public affairs. On November 27, 1972, the Executive Secretary of AIM wrote to the FCC complaining of the following:

"Our investigation reveals that the NBC report gave the viewers a grotesquely distorted picture of the private pension system of the United States. Nearly the entire program was devoted to criticism of private pension plans, giving the impression that failure and fraud are the rule. \* \* \* The reporter, Mr. Newman, said that NBC did not want to give the impression that there were no good private pension plans, but he did not discuss any good plans or show any satisfied pensioners."

In subsequent correspondence, AIM added the accusations that NBC was attempting "to brainwash the audience with some particular message that NBC is trying to convey" and that the program was "a one-sided, uninformative, emotion-evoking propaganda pitch." Thus AIM not only claimed that the program had presented one side of an issue of public importance, the performance of private pension plans, it also charged that NBC had deliberately distorted its presentation to foist its ideological view of events on the viewing public.

In its reply, NBC rejected the allegations of distortion. It asserted that the "Pensions" broadcast had not concerned a controversial issue of public importance:

"The program constituted a broad over-view of some of the problems involved in some private pensions plans. It did not attempt to discuss all private pension plans, nor did it urge the adoption of any specific legislative or other remedies. Rather, it was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look."

Since, in the view of NBC, there was no attempt to comment on the overall performance of private pension plans, no controversial issue had been presented, for all agreed that the examples of suffering depicted were not themselves subject to controversy. Even so, NBC pointed out that it had presented the view that the system as a whole was functioning well; consequently, it asserted, even if it had

inadvertently raised the issue of the overall performance of private pension plans, the side generally supportive of the system had been heard.

In a letter to NBC, the Broadcast Bureau of the Commission rejected AIM's allegations of distortion as being unsupported by any evidence but upheld the fairness doctrine complaint. The staff took issue with "the reasonableness of your [NBC's] judgment that the program did not present one side of a controversial issue of public importance" and concluded that the program's "overall thrust was general criticism of the entire pension system, accompanied by proposals for its regulation." \* \* \* Only four brief statements were singled out as containing "general views" on the overall performance of the private pension system. NBC appealed the Broadcast Bureau ruling to the entire Commission.

\* \* \*

The Commission found that "Pensions" had in fact presented views on the overall performance of the private pension system. It took note of the "pro-pensions" views expressed during the documentary, but concluded that the "overwhelming weight" of the "anti-pensions" statements required further presentation of opposing views. The Commission commended NBC for a laudable journalistic effort, but found that the network had not discharged its fairness obligations and ordered it to do so forthwith. This petition for review followed.

\* \* \*

#### V. Application of the Fairness Doctrine to News Documentaries

Our assumption of the propriety of the FCC's current practice that it may make rulings whether particular programs violate the fairness doctrine does not lessen our concern as to those rulings; it rather enhances the need for careful scrutiny, particularly where, as here, a ruling is challenged on the ground that it displaces the judgment entrusted to the broadcast journalist.

##### A. The Function of the FCC

The principal controversial issue the Commission identified for the "Pensions" program is "the overall performance of the private pension plan system." In NBC's submission, the focus of the program was the existence of abuses, of "some problems in some pension plans." While one understands NBC's point as made, it might be refined as a statement that NBC was engaged in a study in abuses and did not separately examine how pervasive those abuses were. On what basis did the Commission reject NBC's position, and accept AIM's view that the point of the program was the performance of the common run of pension plans?

The staff ruling of May 2, 1973, said this:

"The Pensions program thus did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans. Your judgments to the contrary, therefore, cannot be accepted as reasonable."

One is struck by the palpable flaw in the staff's reasoning. The staff actually put it that because the staff found as a fact that the program was broadly critical of the entire private pension plan system, NBC's contrary judgment "therefore" cannot be accepted as reasonable. The flaw looms the larger, in that it appears in the ruling of the staff of an agency operating under the Rule of Administrative Law. Under that Rule agencies daily proclaim that their findings of fact must be upheld if reasonable and if supported by substantial evidence, even though there is equal and even preponderant evidence to the contrary, and even though the courts would have found the facts the other way if they had approached the issue independently.

The Commission's opinion of December 3, 1973, corrected the staff's error of logic, but it made a mistake of law. It stated:

"The specific question properly before us here is therefore *not whether NBC may reasonably say* that the broad, overall 'subject' of the 'Pensions' program was some problems in some pension plans, but rather whether the program did *in fact* present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system." [Emphasis added.]

Thus the Commission ruled that even though NBC was reasonable in saying that the subject of "Pensions" program was "some problems in some pension plans," in determining that this was the essential subject of the program, its dominant force and thrust, nevertheless NBC had violated its obligation as a licensee, because the Commission reached a different conclusion, that the program had the effect "in fact" of presenting only one side of a *different* subject.

The Commission's error of law is that it failed adequately to apply the message of applicable decisions that the editorial judgments of the licensee must not be disturbed if reasonable and in good faith. The licensee has both initial responsibility and primary responsibility. It has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion.

The pertinent principle that the Commission will not disturb the editorial judgment of the licensee, if reasonable and in good faith, is applicable broadly in fairness doctrine matters. It has distinctive force and vitality when the crucial question is the kind raised in this case, i. e., in defining the scope of the issue raised by the program, for this inquiry typically turns on the kind of communications judgments that are the stuff of the daily decisions of the licensee. There may be mistakes in the licensee's determination. But the review power of the agency is limited to licensee determinations that are not only different from those the agency would have reached in the first instance but are unreasonable.<sup>58a</sup>

In *CBS v. DNC* [supra, at 515,] the Court stressed the wide latitude entrusted to the broadcaster. See 412 U.S. at 110–111:

“Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.

“The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations, although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered.”

While the government agency has the responsibility of deciding whether the broadcaster has exceeded the bounds of discretion, the Court makes clear that any approach whereby a government agency would undertake to govern “day-to-day editorial decisions of broadcast licenses” endangers the loss of journalistic discretion and First Amendment values.

What is perhaps most striking and apt for present purposes is the figure used by Chief Justice Burger wherein the licensee is identified as a “free agent” who has “*initial and primary* responsibility for fairness, balance, and objectivity,” with the Commission serving as an “overseer” and “ultimate arbiter and guardian of the public interests.” [Emphasis added.]

\* \* \* And the Court cited with approval a passage, as old as the fairness doctrine itself, wherein the Commission stated that the licensee “is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved.”

58a. \* \* \*

While the Supreme Court's recent opinions in non-broadcast areas do not undercut a role for the Commission in the fairness doctrine, the underlying principles underscore the appropriateness of confining that role. In addition to *Tornillo*, [supra,] see, e. g.,

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 94 S.Ct. 2997, 3010, 41 L.Ed. 2d 789, 809 (1974), referring to the “difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of ‘general or public interest’ and which do not.”



Where the Commission has relatively specific rules under the fairness doctrine, as in the personal attack and political editorializing rules, it has a more ample role in determining whether the licensee was in compliance with his obligations. But when the claim is put in terms of the general obligation concerning controversial issues of public importance, there is primary reliance on the journalistic discretion of the licensee, subject to supervision by the government agency only in case he exceeds the bounds of his discretion. This yields as a corollary that if the broadcast licensee was reasonable in his premise, and his projection of the subject-matter of the program, he cannot be said by the supervising agency to have abused or exceeded his sound discretion.

The FCC's function becomes that of correcting the licensee for *abuse* of discretion, as our function on judicial review is that of correcting the agency for *abuse* of discretion.

\* \* \* In this case, we think it plain that the licensee has not been guilty of an unreasonable exercise of discretion. Where the Commission may have started on the wrong path in its approach is the place where the Commission undertook to determine for itself as a fact whether "the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system." This is not a sufficient basis for overturning the licensee. It is not clear from the Commission's opinion that it also appreciated the need for a finding of abuse of discretion by the licensee in concluding that no controversial issue had been presented. In any event, we are clear that the licensee's discretion was not abused in this respect.

\* \* \*

A substantial burden must be overcome before the FCC can say there has been an unreasonable exercise of journalistic discretion in a licensee's determination as to the scope of issues presented in the program. Where, as here, the underlying problem is the thrust of the program and the nature of its message, whether a controversial issue of public importance is involved presents not a question of simple physical fact, like temperature, but rather a composite editorial and communications judgment concerning the nature of the program and its perception by viewers. In the absence of extrinsic evidence that the licensee's characterization to the Commission was not made in good faith, the burden of demonstrating that the licensee's judgment was unreasonable to the point of abuse of discretion requires a determination that reasonable men viewing the program would not have concluded that its subject was as described by the licensee.

\* \* \*

### B. The Function of the Reviewing Court

\* \* \* [I]ndustry regulation has been entrusted by Congress "to the informed judgment of the Commission, and not to the preferences of reviewing courts." If an agency has "genuinely engaged in reasoned decision-making \* \* \* the court exercises restraint, and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards."

In the case of the fairness doctrine, a reviewing court is under the same injunction against injecting its own preferences as the rule of decision. And so when the Commission, in the exercise of its discretion, affirms the licensee's exercise of its discretion, the role of the court is most restricted. But the court has a greater responsibility than is normally the case, when it reviews an agency's fairness rulings that upset the licensee's exercise of journalistic discretion, both because the area is suffused with First Amendment freedoms and because Congress has determined that the interest of the public, and its right to know, is furthered by giving primary discretion not to the government agency but instead to the regulated licensee. Congress has sharply narrowed the scope of agency discretion—which the court must see is not exceeded—to a government intervention permissible only for abuse of the licensee's journalistic judgment. If the Commission can claim wide latitude in and deference for its exercise of prerogative to overrule and discard the journalistic judgments of the broadcast licensees, the very premise of the legislative structure is undermined.

\* \* \*

### C. The Need for Selection Latitude of Broadcast and Investigative Journalism

The doctrine that respects licensee determination, if not unreasonable, concerning the issues tendered in a news broadcast, is a matter of concern for the vitality of broadcast journalism generally, and for investigative journalism in particular.

The Commission's opinion in this case reaffirmed—

"our recognition of the value of investigative reporting and our steadfast intention to do nothing to interfere with or inhibit it. See *WBBM-TV*, 18 FCC2d 124, 134 [16 R.R.2d 207] (1969); *Hunger in America*, 20 FCC2d 143, 150 [17 R.R.2d 674] (1969)."

In *Hunger in America*, *supra*, it \* \* \* reiterated the ruling of *ABC*, 16 FCC2d 650 [15 R.R.2d 791] (1969), that it would require extrinsic evidence of e. g., a charge that a licensee staged news events. "Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been

presented—a judgmental area for broadcast journalism which this Commission must eschew.” 16 FCC2d at 657-58.

\* \* \*

Investigative reporting has a distinctive role of uncovering and exposing abuses. It would be undermined if a government agency were free to review the editorial judgments involved in selection of theme and materials, to overrule the licensee’s editorial “judgment as to what was presented,” though not unreasonable, to conclude that in the agency’s view the expose had a broader message in fact than that discerned by the licensee and therefore, under the balancing obligation, required an additional and offsetting program.

The field of investigative exposures, as the Commission has noted, is one in which “[p]rint journalism has long engaged [and] been commended.” and to which broadcast journalism, also part of the press is “no less entitled.” Even for print journalism, not subject to the extreme time coverage limitations of broadcasters, a requirement like the Commission’s would be considered a “millstone” burdening investigative reporting. We refer to the affidavit supplied to the Commission by J. Edward Murray, associate editor of the Detroit Free Press and immediate past president of the American Society of Newspaper Editors. These are representative excerpts:

“The whole process of investigative reporting is a complex and sensitive equation involving editors with high purpose and intuition, reporters with skill and courage, and publishers willing to incur heavy expense and the risk of offending both public opinion and advertisers. \* \* \*

“If we weight the equation with the requirement that the press look for, and report, good wherever it finds and reports evil, we might as well forget investigative reporting. We will have overwhelmed it with the deadly commonplace of things as they are.

\* \* \*

“[I]t would be commonplace newspaper procedure that if an editor decided that some private pensions are flawed or useless, and published a typical expose to this effect, the expose would simply assume that the majority of private pension plans were more or less in acceptable shape. Otherwise, the forces of both law and business would have corrected so obvious a deficiency.

\* \* \*

“The investigative reporter’s thrust is against presumed evils in society. If he must always give an equivalent weight to the good (which is now presumed) in the situation he is investigating, his thrust would become so dulled as to be boring—and unread. Newspapers, including the Detroit Free Press, investigate and expose policemen who are on the ‘take’ in the

dope rackets. If an equivalent weight or time must be given to policemen who are not on the 'take', the whole campaign becomes so unwieldy and pointless as to be useless.

\* \* \*

"The suggestion of a positive non-expose, in the wake of an original negative expose, falls of its own weight. No one would read it. It would thus be a waste of space. And it would add one more millstone to the already considerable burden of legitimate investigative reporting."

To like effect are affidavits in the record from broadcast journalists.<sup>76</sup> The basic point merits emphasis: A report that evils exist within a group is just not the same thing as a report on the entire group, or even on the majority of the group. An expose that establishes that certain policemen have taken bribes, or smoked pot, or participated in a burglary ring, is not a report on policemen in general. It may be that the depiction of particular abuses will lead to broader inferences. Certainly severe deficiencies within an industry may reflect on the industry as a whole. When one bank fails, others may suffer a run. But the possible inferences and speculations that may be drawn from a factual presentation, are too diverse and manifold—ranging, as they inevitably must, over the entire span of viewer predilections, characteristics and reactions—to serve as a vehicle for overriding the journalistic judgment.

There is residual latitude in the Commission to condemn the journalist's vision as an unreasonable exercise of discretion. But if the Commission is to condemn a journalist's vision as excessively narrow, it must show that its own vision is broadgauged. Yet here we are reviewing a Commission opinion that says: "It is difficult to see why a network would devote its time and effort to a program with no broad impact or value." But abuses in an industry are of interest to the public, and merit a documentary, if they exist in any significant amount, even though they are not the general rule. \* \* \* The Commission simply neglected our caution in *Healey v. FCC*, 460 F.2d 917, at 922:

" \* \* \* Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance."

The point is fundamental. In a case where NBC has made a reasonable judgment that a program relates to, and the public has an interest in knowing about, the "broken promise" abuses that its reporters have identified in various private pension plans, and there is

76. An apt example appears in Mr. David Brinkley's affidavit concerning a program he narrated on highway construction: "I did not think at that time that I was obliged to recite (or

find someone to recite) that not all highway construction involves corruption, that many highways are built by honorable men, or the like."

no controversy concerning the existence in fact of such abuses, then the balancing of the fairness doctrine cannot permit the intrusion of a government agency to make its own determination of the subject and thrust of the program as a report that such abuses feature private pensions generally, and with such enlargement to a controversial status to burden the reporting with the obligation of providing an opposing view of the escalated controversy.

VI. The Present Record Sustains the Licensee's Editorial Judgment Against a Charge of Requisite Bad Faith or Unreasonableness

This is the first case in which a broadcaster has been held in violation of the fairness doctrine for the broadcasting of an investigative news documentary that presented a serious social problem. We have already stated that the Commission used an unsound legal standard in reviewing the licensee's exercise of discretion. What result ensues—on the record before us—from application of the sound legal standard?

A. The Issue as to the Issue

In law, as in philosophy, the task of ascertaining the sound rule or precept often turns significantly on rigor in the statement of the problem. Nowhere is this more the case than in the application of the fairness doctrine, for in regard to the determination that a program raised a "controversial issue of public importance," the first and often most difficult step is "to define the issue."

\* \* \* [T]he Commission defined that issue [as] being the overall performance of the private pension system and the need for governmental regulation of all private pension plans."

\* \* \*

The controversial "issue" identified by the Commission reflects a compound of issues—one, whether problems exist in private pension plans generally, and two, whether overall legislation should be enacted to remedy those problems. In aid of analysis, these issues will be discussed separately.

In our view, the present record sustains NBC as having exercised discretion, and not abused discretion, in making the editorial judgment that what was presented in the dominant thrust of the program, was an expose of abuses that appeared in the private pension industry, and not a general report on the state of the industry. If this judgment of NBC may stand, there is no showing of a controversial issue. The staff's ruling that NBC was unreasonable in this judgment was not sustained by the Commission. And in our view, the present record does not establish a basis for the conclusion that the licensee's judgmental conclusion may be set aside as unreasonable and as constituting an abuse rather than a permissible exercise of discretion.

1. The description of the program in TV columnist reviews.

NBC offered the Commission an exhibit showing the appraisal of some 25 television critics who reviewed the program \* \* \*.

\* \* \* In general, the reviewers' appraisals of the nature of the program are consistent with NBC's editorial judgment. Examples include the Philadelphia Daily News: "A potent program about pitfalls and failures of some private pension plans of business and unions \* \* \* it was an angry, incisive study that focused on some people who felt cheated by their blind faith in Pensions." More succinct was UPI: "Tough study of the failure of some private pension systems."

\* \* \*

\* \* \* [I]ntervenor AIM brings to our attention that John J. O'Connor in the New York Times has written: "The NBC program strongly implied that 90 percent were failures. The title was, 'Pensions: The Broken Promise,' not 'Pensions: Broken Promises.'" AIM stresses that reviews in the Boston Globe, Chicago Today and Hollywood Reporter, reflected reactions to the program as commenting on the private pension system as a whole.

The Commission's opinion dismissed the newspaper reviews. It stated its determination of the question must rest with the program itself \* \* \*.

Obviously, television reviews cannot be conclusive, for the obligation of licensees and the Commission to determine fairness doctrine questions is not delegable. The opinion of this court does not depend in any critical measure on television reviews. Yet we are here concerned, not with some broad question of fairness doctrine responsibility, but with something that is not only closer to a question of fact—the description of the program—but is a matter on which the reviewer is expected to make an accurate report to the public as his primary task. Even if the Commission believed the reviewer to be wrong, it should have considered whether the review did not have more than minimal value on the issue of the NBC's reasonableness in saying that the subject of the program was that of abuses discovered, of some problems in some pension plans. \* \* \*

2. Application of the correct standard.

Had the Commission applied the correct standard of review, the consequence clearly would have been an acceptance of NBC's position as a reasonable statement of the subject of the "Pensions" broadcast. There were a few explicit statements of views on the overall performance of private pension plans that are of no consequence in terms of fairness doctrine, as will be presently seen. Otherwise, the plain heft of the program was the recitation of case histories that identified shortcomings of private pensions, and various interviews that identified the abuses in more general terms. But effective presentation of problems in a system does not necessarily generate either comment on

the performance of the system as a whole, or a duty to engage in a full study. This is plain from our discussion of investigative journalism.

The licensee does not incur a balancing obligation solely because the facts he presents jar the viewer and cause him to think and ask questions as to how widespread the abuses may be.

\* \* \*

#### B. Comments on the "Overall" Performance of the Private Pension Plan

In previous sections of this opinion we have identified the dangers to broadcast journalism, and investigative reporting in particular, if descriptions of abuses in a system are converted inferentially into a broadside commenting adversely on the overall system.

A separate question is presented, however, by the comments in the program that differs from the description of particular evils. [The court here examined such comments.]

#### C. Reasonable Balance

As the foregoing shows, there were a handful of comments on "overall performance" of the private pension plan system. Some were favorable, more were adverse, but there was adequate balance of both sides of that issue and a reasonable opportunity for presentation of both sides of that issue. \* \* \*

#### D. The Non-Controversial Nature of the Issue Whether Some Reform Legislation Should be Enacted

The FCC concluded that the "Pensions" program "supported proposals to regulate the operation of all private pension plans." NBC does not deny, and it would be patently unreasonable for NBC to deny, that it broadcast its view that there was a need for legislative reform. We refer to Edwin Newman's concluding paragraph[s, supra] \* \* \*

An entirely different problem is presented by the Commission's conclusion that there was a controversial issue in "the need for governmental regulation of all private pension plans." The Commission stressed that at the time of the program "Congress was engaged in a study of private pension plans and considering proposed legislation for their regulation—legislation which was opposed in whole or in part by various private and public groups and spokesmen."

The fairness doctrine would require that when a controversial bill is pending, if advocates of its passage have access to a licensee's facilities, so must opponents. But the Commission wholly failed to document its premise that there is a controversial issue in the assertion that there is a need for some remedial legislation applicable generally to pension plans. \* \* \*

This case does not involve any controversial issue derived from favoring certain specific proposals under consideration by Congress. And AIM did not contend before the FCC that at the time of the broadcast there were any significant groups opposed in principle to the idea of remedial legislation. \* \* \* NBC's letter of July 13, 1973, called the Commission's attention to the wide span of sources supporting some form of remedial legislation. And NBC specifically emphasized that there was no indication of any meaningful view opposing the concept of some reform legislation.

"In the 786 page transcript of the most recently published Congressional hearings with respect to pensions, in which 35 witnesses testified on all sides with respect to pensions, *not one* took the position that some kind of meaningful reform (usually mandated by legislation) of the pension system was unwarranted or should not be instituted. \* \* \*" (Emphasis in original.)

In the light of this record, it is plain that while the "Pensions" program recommended that legislation regulating pension plans be passed, it did not address controversial issues, and there is no reasonable basis for invoking the fairness doctrine on this ground.

## VII. Conclusion

\* \* \*

We find no basis for the Commission's conclusion that the need for reform legislation in the pensions field was a controversial issue. There are controversies as to specific proposals, but they were not the subject of the Pensions broadcast.

The complaint is made that a more balanced presentation was made in a newspaper article that did consider specific proposals and their various pro's and con's. But there are different strengths and weaknesses in printed and oral presentation, as lawyers and judges well know, and it would be an impermissible intrusion on broadcast journalism to insist that it adopt techniques congenial to newspaper journalism. This approach might well undercut the particular values, of intensity of communication through interviews, that make broadcast journalism so effective in enhancing public awareness. The fairness doctrine—which rests, says Red Lion, on the distinctive characteristic of broadcasting—cannot be applied by the government to alter broadcasting's distinctive quality.

We have analyzed the various segments of the "Pensions" broadcast, and have not found them to justify the Commission's invocation of the fairness doctrine. We also take account of the Commission's statement that its decision was based upon the "overall impact" of the program. In some fields, the whole may be greater than the sum of its parts—according to the precepts of Gestalt Psychology. In general, however, the evils of communications controlled by a nerve



center of Government loom larger than the evils of editorial abuse by multiple licensees who are not only governed by the standards of their profession but aware that their interest lies in long-term confidence. The fairness doctrine requires a demonstrated analysis of imbalance on controversial issues. This cannot be avoided by recourse to a subjective and impressionistic recording of overall impact.

[The case was remanded for the Commission to vacate its order. A brief concurring statement by Judge Fahy, and a supplemental concurring statement by Judge Leventhal, are omitted.]

TAMM, Circuit Judge dissenting:

This case presents us squarely with questions arising from the head-on collision of First Amendment rights of freedom of the media and the right of the people to know. \* \* \* Involved is not the so-called "on the spot reporting" which makes up a substantial portion of television newscasts but a documentary type of presentation referred to in these proceedings as investigative reporting. The editorial supervision and selectivity frequently approved in judicial decisions was not herein discharged under the pressure of time considerations essential to the preservation of news values, but permitted, according to representations made to us, the digesting of eighty thousand feet of film into a two thousand foot final product. Most importantly we are not dealing with a printed publication utilizing its private property to disseminate its news and views in the exercise of that freedom of the press which is the central freedom of the whole democratic process. Our petitioner, the National Broadcasting Company, Inc. is the temporary licensee of a right to utilize the public's airways in the public interest and for the public welfare. To me this is the dominant element in distinguishing the rights and obligations of a telecaster from those of the press, which under controlling Supreme Court opinions has an unlimited freedom to report events in the public domain.

No right is absolute. It is elementary that each right carries with it an obligation. In accepting the right to use the public airways our petitioner, willingly or reluctantly, assumed the obligation of utilizing those airways in the public interest. The public interest in television programming expressed in fundamentals is to know the facts.

Petitioner argues that investigative reporting is somehow a special specie to which the application of a fairness requirement is constitutionally repugnant. The majority opinion supports in substance this position and capsulized into its basic and ultimate holding concludes that fairness, meaning a presentation of both sides of a question of public interest, is not a practically enforceable obligation of a licensee of the public airways. This position means that a telecaster's presentation under the label of investigative reporting of a few factual bones covered with the corpulent flesh of opinion and comment fulfills the obligation of the network to give a fair picture to the public

and to assist the public in knowing the facts essential to a determination of basic policies. The majority opinion fails to recognize that as a practical matter there is no real distinction between this type of so-called investigative reporting and propaganda. The investigative reporter, regardless of his initial motivation too often reaches a point where objectivity disappears and he becomes an ardent advocate for a particular position or viewpoint. Developing a feeling for what might or should be, rather than awareness of what is, he produces a manipulated and selective presentation which ignores all viewpoints and positions other than his own. There is no doubt but that embellishment, color and opinion often prove to be more interesting than objective presentation of both sides of an issue of public interest but is such a production a discharge of the responsibility of the telecaster to give a fair picture and a presentation of all points of view?

The history of democracy is a record of the fear and distrust by the people of unrestrained power. This is the womb in which was gestated the constitutional amendments which we identify as the Bill of Rights. First Amendment guarantees were and are designed to afford the people an effective weapon against the existence or use of destructive and abusive power. Does anyone doubt that a tremendous reservoir of power exists today in the radio and television industry? Are not television and radio newscasters and commentators dominant in the shaping of the public's viewpoints and opinions? Does not their ability to capture the public attention arm them with a weapon of such magnitude that public officials are too often completely subject to their influence? Is it an exaggeration to say that the telecasting industry constitutes a power system comparable if not superior to government itself but basically free of the restraints imposed on government power? We proudly proclaim that in our democracy all power is in the people, but is this power impartially exercised today upon a full knowledge of all facts which affect the public order? The answer is obviously dependent upon the public's ability to learn the facts and again we are face to face with the use which is made of the public airways by the licensees.

I recognize and will readily defend the constitutionally mandated right of the licensed media to exercise its choice of what to report and what not to report. Beyond this the right to editorialize with properly descriptive identification is judicially recognized, but confining my position to the record before us, in the presentation of a so-called investigative or documentary report I believe that there is a legally enforceable obligation on broadcasters to present a report in which all conflicting positions and viewpoints are fairly portrayed. To require less in my view is to permit an abuse of the public's right to know, and a desecration of the license to use the public airways in the public interest.

\* \* \* Rapid development of the utilization of the public airways as a means of informing the public has placed tremendous power in these media. The fairness doctrine, as the Federal Communications Commission has exercised it in this case, is not a censorship, is not a prior (or subsequent) restraint, is not a usurpation of what the majority describes as "Journalistic Discretion" but is merely a policy that requires in the public interest all viewpoints be presented in factual matters of public interest. \* \* \* The resulting problem of the Commission is then the securing of responsibility in the exercise of the freedom which the broadcasting industry enjoys. We are asked to rule that on the traditional scales of justice the right of the people to know is outweighed by the claimed right of the telecasters to exercise a constitutional infallibility in determining what the public is entitled to know. I cannot so hold. I would affirm the Commission's action.

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#### NOTES AND QUESTIONS

1. Is the court's analogy between judicial review of agency action and Commission review of broadcaster judgments (as to the subject matter of a broadcast) sound? Should the broadcaster's judgment be sustained if supported merely by "substantial evidence," as would an agency determination of fact? Should the Commission defer to broadcaster "expertise" in characterizing the issue addressed by a program?
2. (a) Did the Court, in assimilating broadcast journalism to "the press," and relying upon evidence concerning the nature of investigative journalism by newspapers, which are not subject to the fairness doctrine, effectively read that doctrine out of the jurisprudence of the Communications Act?  
(b) Can the court's analysis logically be confined to "investigative" reporting? On what ground could the broadcaster's judgment concerning the issues it has addressed be considered narrower, or the agency's reviewing function broader, in other contexts?
3. (a) Bear in mind that the "Pensions" opinion was ultimately vacated as moot, and does not represent the law of the court of appeals—although it may represent its thoughts on the subject. See *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (1976).  
(b) The Commission has since overruled a broadcaster's determination that an advertisement by an oil company, which claimed that it achieved economy and efficiency through its operation at various levels in the oil industry, did not constitute a presentation on one side of the debate over "breaking up" the integrated oil companies. The advertisements did not refer to the possibility of divestiture, nor to pending legislation on the subject, but the Commission

concluded that the assertions concerning the efficiency due to vertical integration went "to the very essence of the divestiture issue. [It was not] reasonable to conclude that the ad discussed the economy and efficiency only of Texaco's operation and not of the entire oil industry." Energy Action Comm., Inc., 64 FCC2d 787, 40 R.R.2d 511 (1977).

Is the Commission's reasoning consistent with the court's analysis?

### C. CONTROVERSIAL ISSUES IN ADVERTISING: THE PROBLEM OF ISSUE DEFINITION

#### 1. STANDARD PRODUCT ADVERTISEMENTS

##### BANZHAF v. FCC

United States Court of Appeals, District of Columbia Circuit, 1968.  
405 F.2d 1082. Certiorari denied 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969).

BAZELON, Chief Judge:

In these appeals we affirm a ruling of the FCC requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. \* \* \*

The history of the cigarette ruling dates to December 1966, when citizen John F. Banzhaf, III asked WCBS-TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast. Although he cited several specific commercial messages, Banzhaf's target included

all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.

He said this point of view raised one side of a "controversial issue of public importance" and concluded that under the FCC's fairness doctrine, WCBS was under obligation to "affirmatively endeavor to make [its] \* \* \* facilities available for the expression of contrasting viewpoints held by responsible elements. \* \* \*"

WCBS replied that it had broadcast several news and information programs presenting the facts about the smoking-health controversy, as well as five public service announcements of the American Cancer Society aired free of charge during recent months. On the basis of these broadcasts it was confident that "its coverage of the

health ramifications of smoking has been fully consistent with the fairness doctrine." But it doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services. \* \* \*"

Thereupon, Banzhaf forwarded the correspondence to the Federal Communications Commission under cover of a complaint that the station was violating the fairness doctrine. And thereby hangs the following legal tale.

The Commission sustained the Banzhaf complaint. \* \* \* It said in part:

We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e. g., the 1964 Report of the Surgeon General's Committee) and congressional action (e. g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.

The Commission refused, however, to require "equal time" for the anti-smoking position and emphasized that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee. \* \* \*" But it directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint. \* \* \*" And by way of illustration it suggested they might discharge their responsibilities by presenting "each week \* \* \* a number of the public-service announcements of the American Cancer Society or HEW in this field."

[On reconsideration the Commission made it] clear that cigarette advertising *in general*, not any particular commercials, necessarily conveys the controversial view that smoking is a good thing. But the Commission stressed again that its ruling was "limited to this product—cigarettes" and disclaimed any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance."

\* \* \* [I]n response to a request for clarification, the Commission ruled that stations which carry cigarette advertising are under no obligation to provide the cigarette companies free time in which to respond to broadcast claims that smoking endangers health.

\* \* \*

A fundamental question, of course, is whether the Commission's ruling, though not expressly forbidden by statute, is within the scope of its delegated authority. The ruling originated in response to a "fairness doctrine" complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it "clearly has the authority to make this public interest ruling" under the public interest standard of the Communication Act and relied upon "the licensee's statutory obligation to operate in the public interest."

There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" \* \* \* is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. \* \* \* [T]here is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that a public interest means nothing if it does not include such a responsibility.

The fairness doctrine, we think, serves chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed.

The attack on the alleged statutory authority for this "public interest" ruling takes two forms: (1) a general denial that the Commission has any authority to supervise the content of broadcasting under the public interest standard; and (2) an argument that any delegation of the power to make ad hoc public interest determinations of this kind is invalid for want of adequate limiting standards.

\* \* \* [I]n the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to "censorship" within the meaning of the Act. However, there is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.

\* \* \*

Whatever else it may mean however, we think the public interest indisputably includes the public health. There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. \* \* \*

\* \* \* [A]s a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.

The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the “public interest” or even the “public health.”

Affirmed.

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#### NOTES AND QUESTIONS

1. Would a station that did not carry cigarette commercials, but did carry anti-smoking messages as public service announcements, be obliged to give time to the pro-smoking point of view? See *Larus & Bro. Co. v. FCC*, 447 F.2d 876 (4th Cir. 1971).
2. (a) Is *Banzhaf* a fairness doctrine case at all? If so, what made cigarette smoking a “controversial issue of public importance?”  
(b) Would the same factors also make ads for foods with high cholesterol content subject to the fairness doctrine?
3. *Postscript*. In the wake of the *Banzhaf* decision, the tobacco industry lent its support to legislation prohibiting the advertising of cigarettes on radio and television, which passed in 1969. 15 U.S.C.A. § 1335. Why? The cigarette companies could not have agreed among themselves to refrain from broadcast advertising, due to the antitrust laws. Yet, if any one company decided to advertise all would feel compelled to do so for competitive reasons; at the same time all would be harmed by the anti-smoking messages broadcasters would have had to put on.

In 1967, the year in which the Commission ruled in *Banzhaf*, cigarette advertising had accounted for 7.2% of total television revenues. Needless to say, the broadcasting industry did not support the

legislation; but it was upheld against their challenge, in part on the ground that commercial speech was entitled to less than full first amendment protection. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C.1971), *aff'd*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972); but see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976) (non-fraudulent commercial speech entitled to first amendment protection).

### FRIENDS OF THE EARTH v. FCC

United States Court of Appeals, District of Columbia Circuit, 1971.  
449 F.2d 1164.

McGOWAN, Circuit Judge:

Petitioners \* \* \* attack the dismissal by the Federal Communications Commission, without hearing or oral argument, of their fairness doctrine complaint in respect of Station WNBC-TV in New York City. The issue raised is that of the reach of the fairness doctrine in relation to product advertising, in this instance automobile and gasoline commercials. \* \* \*

#### I

On February 6, 1970, petitioners wrote a letter to WNBC-TV, complaining of the "spot advertisements for automobile and gasoline companies [which] constantly bombard the New York area viewers with pitches for large-engine and high-test gasolines which are generally described as efficient, clean, socially responsible, and automatically necessary." \* \* \*

Petitioners asserted, contrarily, that these products were especially heavy contributors to air pollution, which had become peculiarly oppressive and dangerous in New York City; and that they fell within the reach of the decisions of the Commission and of this court on cigarette advertising. *Banzhaf v. FCC*, [supra]. Petitioners noted that, just as the Commission in the case of cigarette advertising relied heavily upon the report of the Surgeon General's Advisory Committee, so had the Surgeon General, in his 1962 report on "Motor Vehicles, Air Pollution and Health," concluded that automobile emissions offer significant dangers to human health and survival—a conclusion reiterated by a more recent report issued by the National Academy of Science and the National Academy of Engineering. Reference was also made to the 1969 report of Mayor Lindsay's Task Force on Air Pollution, which said that "[T]he best way to cut down on dangerous hydrocarbons in the air is to cut down on horsepower."

Thus, so it was said, the treatment by the communications media of the relationship of air pollution to automobiles occurs in the context of a public controversy in which government officials and pro-



fessional and lay people concerned about health are pitted against the automobile manufacturers and the oil companies, and presents a situation to which the fairness doctrine applies. Petitioners asked that the licensee "promptly make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy;" and, although asserting financial inability to purchase time, offered to produce and make available to the licensee spot advertisements presenting the anti-auto-pollution case.  
\* \* \*

On February 18, the licensee replied. It took the position that the Commission's tobacco decision was limited by its terms to cigarette advertising, and that it did not, in the Commission's words in that decision, impose any fairness doctrine obligation "with respect to other product advertising." Further, said the licensee, there is no real controversy about whether transportation by automobile should continue and that, therefore, the advertising of automobiles and of the fuels which propel them is not related to any controversial issue of public importance. Finally, the licensee referred to a number of programs presented by it in which the problem of air pollution by automobiles had been discussed; and it suggested that this represented an adequate discharge of any public interest obligation it had to inform its viewers on this subject.

[Petitioners then filed a fairness doctrine complaint with the Commission.] \* \* \* [T]he Commission reviewed the contentions made in the foregoing correspondence and reported its conclusion that "no action is warranted against WNBC." It recognized that automobiles "result in many deaths each year and because their gasoline engines constitute the main source of air pollution they raise most serious environmental problems." This was, however, said to be true of "a host of other products or services—detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc." Cigarettes, said the Commission, are distinguishable from products of this nature, since smoking them is a habit "which can fade away" without impact upon other aspects of life, and which official voices have urged the public to avoid or to abandon. Contrarily, the Government is not urging discontinuance of the use of automobiles \* \* \*.

The Commission represented itself as being without power to take the kind of action which could solve or alleviate the air pollution problems caused by the use of automobiles. That was a matter about which it was not expert, and which falls within the competence of other agencies of the Government. The Commission also stated that there was a threshold issue as to whether the commercials complained of did in fact present one side of a controversial issue. It purported not to have the information available to exercise judgment on the question of whether the differences in the amount of time respectively

involved in the advertising of large and small cars is sufficiently great to call for further time to be afforded to the side taken by petitioners.

The Commission went on to say that [extension of the cigarette ruling "generally to the field of product advertising" would] undermine the present system which is based on product commercials, many of which have some adverse ecological effects." It justified this conclusion by pointing to the fact that a licensee had a public interest obligation to provide discussions of the environmental issues affected by some of the advertised products \* \* \*.

## II

\* \* \*

No more than in *Banzhaf* did the Commission here deny the existence or the persuasiveness of expert evidence, from both official and private quarters, of the very real dangers to health presented by air pollution, and the significant degree to which automobile emissions both create and aggravate the air pollution problem. To this point, therefore, the pattern of the problem unfolding before the Commission and its response to it are very like that in *Banzhaf*. Where the Commission departs from *Banzhaf* is in insisting that, because cigarettes are unique in the threat they present to human health, the public interest considerations which caused it to reach the result it did in *Banzhaf* have no force here.

The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger. Neither are we impressed by the Commission's assertion that, because no governmental agency has as yet urged the complete abandonment of the use of automobiles, the commercials in question do not touch upon a controversial issue of public importance. Matters of degree arise in environmental control, as in other areas of legal regulation. To say that all automobiles pollute the atmosphere is not to say that some do not pollute more than others. Voices have already been lifted against the fetish of unnecessary horsepower; and some gasoline refiners have begun to make a virtue of necessity by extolling their nonleaded, less dynamic, brands of gasoline. Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of *Banzhaf* inescapable.

In its *Banzhaf* ruling the Commission was at great pains to warn that it did not contemplate its extension to product advertising generally; and the Commission's action now under review reflects, more

than anything else, a purpose to make good on that representation. But the Commission has since been obliged to moderate its view that commercial advertising, apart from cigarettes, is immune from the fairness doctrine. \* \* \*

On June 30 last, the Commission in the so-called *Esso* case, 30 FCC 2d 643, 22 R.R.2d 407, sustained a fairness doctrine complaint \* \* \* about commercials sponsored by Standard Oil Company of New Jersey which related to the development of oil reserves in Alaska, and which were said "to discuss one side of controversial issues of public importance, namely (1) the need of developing Alaskan oil reserves quickly and (2) the capability of the oil companies to develop and transport that oil without environmental damage." The licensee took the position that the commercials in question were institutional advertising which did not involve any controversial issue of public importance. The Commission held that this approach was unreasonable, and that the fairness doctrine was triggered by the commercials in issue.

\* \* \*

It is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine. It has said as much \* \* \* [when] it announced its purpose to initiate in the near future a wide ranging inquiry which "will permit a thorough re-examination and re-thinking of the broader issues suggested by this and other recent cases before us. \* \* \*" We do not, of course, anticipate what the result of that proceeding will prove to be, nor do we minimize either the seriousness or the thorny nature of the problems to be explored therein. Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

It is true that fairness doctrine obligations can be met by public service programs which do give reasonable vent to points of view contrary to those reflected in the offending commercials. The Commission recognized this principle in the decision now under review, and noted that the licensee had listed programs carried by it as allegedly discharging this responsibility. The Commission, however, explicitly restricted the basis of its ruling to the inapplicability of the fairness doctrine; and it did not regard as being before it for decision the question of whether the licensee had otherwise met its fairness obligations. \* \* \*

\* \* \* [W]e remand the case to the Commission for determination by it of this second issue.

It is so ordered.

WILBUR K. MILLER, Senior Circuit Judge, would affirm.

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## NOTES AND QUESTIONS

1. What made the desirability of large-engine automobiles a controversial issue of public importance? Their danger to an asthmatic in New York City? Is the court applying that categorical concept because it is aware of a present controversy, or because it believes that in all logic there should be one?

2. On the court's analysis, would the fairness doctrine apply if, in response to *Friends of the Earth*, advertisements for cars that were in fact high-powered did not mention that feature but touted their other virtues?

3. (a) Which of the following products' advertisements would not raise a controversial issue of public importance: soft-drinks; chewing gum; children's breakfast cereals; spray deodorants; a non-union textile company's towels; imported television sets?

(b) See Statement of the Federal Trade Comm'n, FCC Dkt. No. 19260, *reprinted in* Antitrust L. & Econ.Rev. 46 (1971), which suggests an extensive program of "counter-advertising," under the fairness doctrine, for products that explicitly or implicitly raise controversial issues or whose advertising claims rely upon disputed scientific premises or are silent about negative aspects of the product. The statement also reports that more than half of 1970 television revenues were for food, toiletry, automotive, drug, and soap and detergent advertising, all of which could be related to various public issues.

(c) A representative of the National Welfare Rights Organization and the Sierra Club argued before the FCC that the fairness doctrine, as applied to television advertising generally, requires coverage of the view that personal consumption should be discouraged in favor of greater public and private expenditures to abate hunger, illiteracy, and pollution. What is the counter-argument? Cf. *National Organization for Women, New York City Chapter v. FCC*, 555 F.2d 1002, 1011-15 (D.C.Cir. 1977).

## 2. PUBLIC SERVICE ANNOUNCEMENTS

## DONALD A. JELINEK

Federal Communications Commission, 1970.

24 FCC 2d 156, 19 R.R.2d 501.

Affirmed sub nom. *Green v. FCC*, 447 F.2d 323 (D.C.Cir. 1971).

The Commission is in receipt of a complaint filed on February 25, 1970, on behalf of San Francisco Women For Peace, The GI Association and The Resistance (complainants), against numerous radio and television stations in the San Francisco, California area. Briefly stated, complainants contend that the San Francisco stations have violated the fairness doctrine in that armed forces recruitment messages

have been broadcast as public service announcements, but the stations have refused to broadcast "public service announcements opposing the viewpoints expressed in the military recruitment announcements" which complainants have offered to supply.

In support of their contention that the armed forces recruitment announcements raise a controversial issue of public importance, complainants assert that: There are many groups in the San Francisco area who do not believe it is beneficial to the individual or society at large for people to participate in the armed forces; armed forces recruitment cannot be considered without reference to the war in Vietnam since the primary purpose of the U.S. Armed Forces is to fight wars and a military recruit is very likely to be stationed in the Vietnam war zone at some time during his military career; and there are many groups in the San Francisco area who believe the best course of action for young men "is to seek one of the many possible deferments from military service provided for by Congress". Complainants assert that the Commission's application of the fairness doctrine to cigarette advertising is analogous and requires application of the fairness doctrine to the recruitment announcements complained of and that the fact that the U.S. Government is the sponsor does not exclude the matter from application of the fairness doctrine. Complainants also argue that their point of view is entitled to exposure through spot announcements rather than news and discussion coverage because of the more effective motivating factors inherent in an "uninterrupted" "prepackaged message" which "allows the sponsor [in this case, complainants] to prepare the announcements in such a manner as to have a desired psychological effect" rather than the "straightforward manner aimed at persuading the listener's rational sense" which is the way views are presented on news and talk programs. Finally, complainants argue that the fairness doctrine applies to public service announcements because, as opposed to normal commercial announcements, the broadcaster is making an editorial judgment in choosing the particular spot announcement and must therefore be more cognizant of his fairness obligations to preserve his facilities as an "uninhibited market place of ideas" (*Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 [16 R.R.2d 2029] (1969)). In the present case, we do not believe that the broadcast of armed forces recruitment messages, any more than similar recruitment messages for policemen, firemen, teachers, census enumerators, peace corp volunteers, etc., in and of itself, raises a controversial issue of public importance requiring presentation of conflicting viewpoints. We note that the power of the Government to raise an army has not been questioned; rather the thrust of the complaint is an objection to the use made of the army (war in Vietnam) and the manner in which manpower is conscripted (Selective Service draft). In reaching this conclusion we also note that complainants themselves reason that recruitment messages are controversial be-

*cause* they are inextricably intertwined with the conduct of the war in Vietnam and the Selective Service draft. There is no indication that any of the stations against whom the complaint was filed have failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine. Moreover, the only indication as to what complainants consider the "opposing viewpoint" to the armed forces recruitment announcements is one spot announcement entitled "Draft Counseling", which offers information pertaining to draft deferments. The fact that Vietnam and the draft are controversial issues of public importance does not, in our view, automatically require that recruitment messages also be considered as such, and we are unable to conclude that it was unreasonable for the broadcast stations in the San Francisco area to decline to broadcast the "opposing" spot announcements.

In reaching the conclusion that no fairness doctrine violation has been demonstrated, we do not mean to imply that nothing connected with a public service announcement could bear upon a controversial issue of public importance. Such announcements, in particular instances, may present one side of a controversy. \* \* \*

#### DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

\* \* \* [G]roups opposed to military service in general and the Vietnam War in particular, are now left with nothing but the recourse of demonstrations and draft-card burning to attract the largess of the news media's television cameras. To put it bluntly, the majority has held that the young people of this nation must find their path to the Fairness Doctrine in the streets. I dissent.

#### II.

On June 2, 1967, this Commission applied the Fairness Doctrine to cigarette advertising. In that ruling we stated:

"The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. [Except, of course, the actual sale of cigarettes.] But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."

See *Cigarette Advertising*, 9 FCC 2d 921, 938 (1967). In reaffirming the ruling, we emphasized that the "desirability" of smoking in cigarette advertisements "is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing

the impression is conveyed that smoking carries relatively little risk. \* \* \*

Petitioners have attached the text of 18 military service recruitment announcements to their petition. \* \* \*

I think it is clear from [these] advertisements that the “desirability” of joining the Marines is portrayed in terms of the “satisfactions” to be derived from such an experience [you’ll “stand taller”, you’ll be “proud”, etc.] and by “associating” membership in the Marines “with attractive people” [real “men”, men who “have what it takes”, etc.] and “enjoyable events and experiences” [travel, on-job training, thirty days off per year, a chance to continue one’s education, etc.].

As with the cigarette advertisements, there is something missing. What is noticeably absent from these advertisements is the view, widely held by many respected citizens, that “for hundreds of thousands of soldiers the pay is poor, the principal ‘educational opportunity’ is the opportunity to learn how to kill, and the ‘travel’ is to Vietnam, where the question of whether the military is making a ‘really worthwhile contribution to the security of [the United States]’ is a highly controversial one”. Letter from Mr. Donald A. Jelinek to the FCC.

### III.

\* \* \* So far as I can determine \* \* \* the majority seems to be saying that advertisements asking young men to join the Army—like “similar recruitment messages” asking people to become “policemen, firemen, teachers, census enumerators, peace corp volunteers, etc.”—only raise the issue whether the particular institution in question (here the Army) has the legitimate power to recruit members. (The majority states: “We note that the power of the Government to raise an army has not been questioned. \* \* \*” I cannot imagine why the majority merely “notes” this point if it is the crux of its holding.) The majority then goes on to reject the petitioners’ arguments, stating that the recruitment advertisements do not refer to the “use made of the army (war in Vietnam)” and the “manner in which manpower is conscripted (Selective Service draft”).

This reasoning seems faulty on a number of counts.

First, it merely illustrates the principle that determined men, if they try hard enough, can define any problem out of existence. If the Commission had applied similar reasoning to cigarette advertisements three years ago, we would presumably have ruled that cigarette advertisements raise only the issue of whether cigarette manufacturers have the right to recruit customers. Not surprisingly, the broadcasting industry made precisely this argument with respect to cigarette advertising, contending that “no controversial issue of public importance can be presented where a lawful business is advertising a lawful product”. Not surprisingly, we gave it suitably short shrift. \* \* \*

Second, it seems obvious to me from the text of the recruitment advertisements that they do far more than merely assert the right of the Army to recruit members. Indeed, it is difficult to treat this latter notion seriously. What would the average listener or viewer think upon hearing a military recruitment advertisement such as, "Should your boy join the U. S. Marines? \* \* \* It really depends on \* \* \* how soon he wants to be a man"? Would he assume that this is the Army's effort to persuade him that it can legitimately recruit members? On the contrary, the rather blatant message of these spots is that it is "*desirable*", for a multitude of reasons, for a young man to join the military. The principle question, therefore, is whether promotion of the "*desirability*" of military service raises a controversial issue of public importance.

Third, it seems clear that the majority's references to other types of recruitment—"policemen, firemen, teachers, census enumerators, peace corp volunteers, etc."—are simply misplaced. For one thing, so far as I know policemen, firemen, teachers, etc., are not threatened with the prospect that if they do not "volunteer" for service, they will be drafted! Congressional appropriations for "standing armies", the quartering of troops, and the relative role of the military generally have been controversial issues since the very founding of our nation. They are no less so at this hour. This is in part because the military conscripts men against their will, forces them to kill and destroy, and subjects them to the omnipresent threat of death. These risks are simply not shared by census enumerators, whatever else may be the hazards of their job. For another thing, there is no question as to the power of municipalities and schools to hire policemen and teachers. Serious question has been raised, however, as to whether the President can legitimately conduct a war in Southeast Asia, invading new countries at will, without a declaration of war by the Congress, as required by Article I, Section 8, of the Constitution. It is one thing to hire men to teach school; it is quite another to force them to fight and die in a war that may be illegal.

#### IV.

The majority finally advances as its essential argument the proposition that there is no connection between military recruitment announcements and two other issues of admittedly high controversy—the Vietnam War and the Selective Service system. This argument is faulty for many reasons.

\* \* \*

Even if the recruitment advertisements made no claims that military service was "*desirable*", but merely contained the exhortation "Join the Army, Join the Army", I believe they would raise an issue of controversy and public importance. The reason is that one simply cannot separate the controversiality of a recruitment advertisement from the nature and function of the job in question. If—to pick a



deliberately strong example—the Government were to recruit soldiers for a special commando troop whose function was widely known as encompassing the assassination of civilians in Vietnamese villages, and used advertisements which simply urged men to “Join the Commandos, Join the Commandos”, only a person with the most tenuous grip on reality could reason that nothing more than “the power of the Government to raise an army” had been placed in question. Recruitment advertisements for policemen, firemen, teachers, census enumerators, and so forth, are not controversial because the work they do is not controversial. But I suspect recruitment solicitations for National Guardsmen in the Kent State University region of Ohio, or for the CIA in Berkeley, would be highly controversial. So it is for recruitment into the armed forces generally at this time.

Second, the military recruitment advertisements before us obviously do far more than urge young men to “Join the Army”. They make grandiose and wide-ranging claims as to the “*desirability*” of military service, just as cigarette commercials taught the desirability of smoking. And once the desirability of military service is placed in issue, I simply do not see how one can avoid a discussion of what one will be doing there \* \* \*.

Finally, consider some simple statistics. In 1969, some 59,000 Americans (49,000 men and 10,000 women) died of lung cancer, and over 90% of these deaths are reputedly linked to cigarette smoking. This means that of the 70,000,000 Americans who consume tobacco in one form or another, approximately 53,100—or *one out of 1,300*—died of lung cancer in 1969. \* \* \*

\* \* \* During 1969, the same period in question, the United States had 3,127,000 servicemen in uniform around the world—many of whom were thousands of miles from Vietnam. Of that total number, however, approximately 11,527—or *one out of 275*—lost their lives in Vietnam. Simply stated, it is *at least* as dangerous to enlist in the armed services as it is to use tobacco. This Commission has ruled that invitations to smoke cigarettes raise issues of sufficient controversy and public importance to invoke the Fairness Doctrine. Yet invitations to join the military do not. Why? Frankly, the majority’s reasoning—what there is of it—escapes me.

Cigarette advertisements were brought under the Fairness Doctrine—which, after all, requires only that the other side be told—in part because they were inherently deceptive. The ads represented to their audience that smoking was “desirable”, without warning that death or serious illness might follow. I believe that solicitations for military service are similarly deceptive, for they do not warn their audience that death or serious injury might follow as a statistical consequence of enlistment, or that a young man of draft age may have *alternatives* to the “enlist-or-be-drafted” dilemma. Congress itself has, in the Selective Service Act, exempted from military service, for

reasons of strong national policy, persons who fall in numerous categories. Persons, therefore, whom Congress did not intend to induct, may be induced into a military obligation which was unrequired, and perhaps even undesirable, as a direct consequence of partial truths contained in the advertisements before us. To the extent these advertisements suggest that young men can satisfy their patriotic obligations to their country only by military service, they are inherently deceptive. Only the application of the Fairness Doctrine can correct this deception by requiring the presentation of alternative views.

## V.

\* \* \*

One final point requires mention: The broadcasting industry bitterly fought the anti-smoking announcements, fearing that their insertion into daily programming might eliminate time that otherwise could be used for paying commercials. The military recruitment advertisements before us, however, provide the licensee with no income. They are donated, free of charge, by broadcasters as an alleged "public service announcement". If a station broadcast two such advertisements a day, it could easily reduce this number to one a day, and fill the vacated spot with the proffered anti-military recruitment advertisements. In so doing, the licensee would be out-of-pocket nothing. It seems clear to me, therefore, that the intensity of resistance to petitioner's message may be caused more by "political" than "economic" considerations. Let's face facts. One ruffles no feathers when one supports the military establishment; but opposition to that establishment always seems controversial. I find it revealing, to say the least, that broadcasters find themselves so eager to donate free time to the Army to recruit soldiers to fight its wars, yet deny a portion of that free time to opponents of that process. \* \* \*

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NOTES

1. The Commission did find that a public service announcement—supporting the United Appeal in Dayton, Ohio—presented a controversial issue of public importance. The controversy arose from the campaign of "United People," which urged people to give directly to their favorite charity and not to the United Appeal, on the ground that that organization did not allocate its funds to the most important community needs and was governed by a board unrepresentative of workers, the poor, and young people.

Commissioner Robert E. Lee dissented, fearing that this "expansion" of the fairness doctrine "morass" would discourage licensees from airing announcements on behalf of charities. Avco Broadcasting Co., 32 FCC 2d 124, 23 R.R.2d 111 (1971).

2. In June of 1971 the Commission opened a general inquiry into its policies concerning the fairness doctrine. This culminated in the 1974 Fairness Report, which substantially curtailed application of the fairness doctrine to advertising.

The report distinguishes among advertisements that are explicitly editorials—for example, urging a constitutional amendment; institutional ads that implicitly but obviously raise a controversial issue of public importance; and standard product or service advertisements, which do no more than portray the product or service favorably and are no longer to be subject to the fairness doctrine. The Commission gave four reasons for exempting standard advertisements: (1) Congress is the appropriate body to determine whether particular products jeopardize the public interest; (2) nothing is accomplished by way of public understanding when the fairness doctrine is applied to them; (3) the first amendment rights of broadcasters were being chilled; and (4) the economic foundation of commercial broadcasting was being threatened. Compare Simmons, *Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 Colum. L.Rev. 1083 (1975) (approving), with Note, *The Fairness Doctrine and Access to Reply to Product Commercials*, 51 Ind.L.J. 756 (1976) (“the Constitution and the first amendment principles embodied in the public interest standard” require application to “controversial products,” narrowly defined).

Excerpts from the Commission’s opinion denying reconsideration follow.

#### D. FAIRNESS RECONSIDERED

##### THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS

Federal Communications Commission, 1976.  
58 FCC 2d 691, 36 R.R.2d 1021 (Dkt. No. 19260), rev’d in part, 567 F.2d 1095 (D.C.Cir. 1977), cert. denied, — U.S. —, 98 S.Ct. 2820, 56 L.Ed.2d 769 (1978).

#### I. Introduction

1. During the past four years, the Commission has engaged in a comprehensive inquiry into the purposes and the application of the fairness doctrine. The extent of public input in this proceeding is documented in the Fairness Report, 48 FCC 2d 1 [30 R.R.2d 1261] (1974). We now have before us various petitions for reconsideration of that Report. \* \* \*

2. The petitions for reconsideration present a vigorous disagreement with the Report’s position on applying the doctrine to standard product commercial advertising, and present a proposed alternative to the doctrine. They further suggest that the doctrine be invoked only

in license renewal proceedings, and suggest applications of the doctrine for slanted or staged news, personal attacks, and editorial advertising.

3. Petitioner Henry Geller argues that the Commission is prohibited from applying the doctrine except as part of a license renewal proceeding. Mr. Geller's conclusion is based on his reading of two recent Supreme Court decisions<sup>1</sup> and on the early history of the fairness doctrine. He proposes that licensees adopt a "ten issue" approach to meeting fairness obligations and that all complaints be referred to the licensee when they are received. He further advocates a "hands-off" policy for the Commission concerning news distortion or slanting.<sup>2</sup>

4. Mr. Geller further urges the Commission to modify its "crazy quilt" personal attack rules. He suggests instead that if such an attack is made as part of the discussion of a controversial issue of public importance and the licensee has not achieved fairness nor made timely plans to do so, then the licensee must notify the attacked party within a "reasonable time" and offer an opportunity for response. Geller urges us to require broadcasters to examine and consider editorial advertising without requiring them to accept any. Finally, he opposes the decision not to apply the doctrine to product efficacy advertising. In this last position, he is joined by the Media Access Project (MAP) petitions. MAP contends that the Commission has failed to articulate its reasons for allegedly exempting product advertising from the doctrine and that hearings should have been held to determine that decision's economic impact. Moreover, MAP argues that prior court decisions require that the Commission include product advertising within the ambit of the fairness doctrine, and that it is improper to conclude that advertisements for particular product line or brand cannot advocate a controversial issue of public importance.

7. The final petition, by the Committee for Open Media (COM), proposes an optional plan which, if adopted by the licensee, would satisfy his general fairness obligations. COM proposes a scheme of access through "Free Speech Messages" (FSM), publicly available spot announcements aired at different times during the week. One-half of the spots would be allocated on a first-come, first-served basis, and the remainder would be rotated among "representative spokespersons" from groups which have demonstrated significant community support. COM would not apply this system to partisan political access and recommends amending the personal attack rules to exempt such attacks made in an FSM.

1. *Miami Herald Publishing Co. v. Tornillo* [supra, at 492]; *CBS v. DNC* [supra, at 515].

2. Under his proposal, Commission action would be taken only upon extrinsic evidence showing that the owner

or "top management" gave instructions for deliberate slanting. Deliberate slanting by other station personnel would be a matter to be resolved by the licensee without any Commission follow-up.

## II. Discussion

### A. Purpose of the Fairness Doctrine

10. \* \* \* Full information is the theoretical underpinning of the broadcaster's two duties; to cover controversial issues of public importance fairly by providing an opportunity for the presentation of contrasting points of view; and to devote a reasonable amount of broadcast time to the coverage of public issues.

11. We do not subscribe to the theory that recent Supreme Court decisions have established boundaries concerning the fairness doctrine. In *Miami Herald v. Tornillo*, *supra*, the Court's opinion was limited only to print media and cited language in *CBS v. DNC*, *supra*, which set apart broadcasting and newspapers. 418 U.S. 241, 255 (1974), quoting from 412 U.S. 94, 117 (1973).

12. It is suggested that the Court's language in *CBS*, *supra*, that "[f]or better or worse, editing is what editors are for \* \* \*," is a pronouncement that the Commission must abandon its current views on the fairness doctrine. Yet the lines preceding that quotation reveal that language as presenting a choice between the view "that every potential speaker is 'the best judge' of what the listening public ought to hear" and the view that such choices are better left to editors. 412 U.S. at 124. The Supreme Court did not address in *CBS* the question of licensee discretion vis-à-vis the Commission's role as the ultimate arbiter of the fairness doctrine. The Court did not generalize that overzealous invocation of the fairness doctrine might cause an "erosion of the journalistic discretion of broadcasters in the coverage of public issues." 412 U.S. at 124. The Court was instead specifically concerned with the question of licensee discretion vis-à-vis individuals demanding a right of access. \* \* \*

13. The *CBS* decision's denial of the right of access was predicated on the continued existence and enforcement of the fairness doctrine as it has developed over the years. [T]he Court implied that it preferred control over the treatment of public issues to remain with licensees because they are "accountable for broadcast performance." The Court further stated that it feared that a transfer of such control would jeopardize the effective operation of the fairness doctrine. In *CBS*, therefore, the Supreme Court reaffirmed its continued belief in and support for the fairness doctrine and *Red Lion*.

16. In the Fairness Report, *supra*, we rejected the notion that all fairness complaints should be reviewed only as part of license renewal proceedings. There, we said that we believed it would be impossible to evaluate overall licensee performance at renewal time without considering the specifics of individual complaints. The public's right to be informed is best safeguarded by an ongoing review of all fairness complaints. For example, the incentive for citizens to file complaints would be removed if their complaints would not result in

the opposing viewpoint being aired before the issue has become stale with the passage of time. Continuing enforcement helps the broadcaster by helping to remedy violations which would place his license in jeopardy before a flagrant pattern of abuse develops. We do not believe that a departure from that position would be in the public interest. We conclude, therefore, that in view of the considerations enunciated above, it would be most appropriate to utilize this case by case approach to ensure that broadcasters fulfill their affirmative responsibilities under the fairness doctrine to adequately cover controversial issues of public importance and to present differing viewpoints on those issues.

17. As part of the ongoing review procedure of fairness complaints, the Commission will continue to make its determinations of licensee reasonableness in the context of overall programming on an issue rather than on a particular program. We recognize that there are difficulties inherent in selecting a finite period of time (i. e., a "cut-off" date) in which to view the "overall" programming on an issue. We see no advantage to the arbitrary selection of the license term as the period over some other time period. Indeed, since the fairness doctrine is oriented toward issues and varying viewpoints, it is preferable to retain the present flexibility in reviewing a time period during which the issue is a matter of public controversy and public importance.

18. We are urged to reconsider our procedure for handling fairness complaints. \* \* \*

19. The Commission does not ordinarily invoke the fairness doctrine on its own motion. Action by the Commission must await a dispute between the complainant and the licensee which is not resolved by those parties. Thus, where the licensee agrees to present opposing views on an issue the Commission need not become involved. However, no specific action is *required* of the licensee until prima facie evidence of a violation is presented to the Commission by a complainant. This policy is part of the delicate balance allocating burdens between licensees and complainants. This policy prevents broadcasters from being burdened with the task of answering idle or capricious complaints.

22. The requirement of specificity was reemphasized in *David C. Green*, 24 FCC 2d 171 [19 R.R.2d 498] (1970), affirmed *Green v. FCC*, 447 F.2d 323 (D.C.Cir. 1971), where the court recognized that in order to allege that an issue is a controversial issue of public importance the complainant must first define the issue. This requirement is needed so that complainants, licensees and the Commission will have a clearer understanding of the positions of the parties. This is particularly true because once the burden of specificity has been placed upon the complainant, our attention and that of the licensee is then directed to the issue as framed by the complainant. We do not intend to be placed in the position of specifying the alleged controversial issue of

public importance in a complaint. It is not the proper function of the administering agency to frame the complaints coming before it and it is incumbent upon the complaining party to bring before us a prima facie complaint.

23. After the complainant has presented prima facie evidence of a fairness violation, the licensee is called upon to answer an inquiry by the Commission staff which recites the issue specified by the complaint. The licensee is asked whether that issue is a controversial issue of public importance, whether the program in question addressed that issue, and whether other programming has been or will be presented on that issue. The Commission must then decide whether the licensee's responses to these questions are reasonable.

#### C. Standard Product Commercials

26. In the Fairness Report, *supra*, we declared after much deliberation that the public interest would be served best by not applying the doctrine to standard product commercials. At least two petitioners disagree strongly with this decision and suggest that the Commission was without power to effect such a change, and that it failed to articulate sufficient grounds for the policy. We disagree.

27. \* \* \* The Commission clearly stated that the standard was being changed and not ignored, and it set forth a reasoned opinion explaining the change. Indeed, the U. S. Court of Appeals for the First Circuit, in sustaining the Commission, recently determined that the Commission had acted within its statutory authority when it "with appropriate notice and \* \* \* sufficient clarity" concluded that it was in the public interest to "abandon [its] earlier precedents and frame new policies." *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1065 (1975), cert. denied 424 U.S. 965 (1976). The court went on to say:

"Given the necessity of product advertisement in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in *Red Lion*, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine."

28. In the Report, we concluded that the application of the doctrine to cigarette commercials had been a mistake because it departed from the doctrine's central purpose of developing an informed public opinion. The extension of the cigarette ruling to other commercials, as in *Friends of the Earth v. FCC*, [*supra*], compounded the problem, and forced broadcasters and the Commission to balance two sets of com-

mercials "which contribute nothing to public understanding" of the underlying issues. Therefore we concluded:

"In the absence of some meaningful or substantive discussion \* \* \*, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance." 48 FCC 2d, at 76.

Furthermore, we said that the diversion of broadcasters' attention to the fairness implications of ads would hinder their fulfillment of responsibilities to develop informed public opinion in more meaningful ways.

#### D. Free Speech Messages

31. In the Fairness Report, *supra*, suggestions for a system of mandatory access were rejected as neither practical nor desirable. In *CBS v. DNC*, 412 U.S. 94 [27 R.R.2d 907] (1973), the Supreme Court held that mandatory access is not a matter of either constitutional or statutory right. We are now presented instead with a proposal for an optional access system to be administered by the licensee, and supplemented by the fairness doctrine.

32. The essential requirements for any such system would be that licensee discretion be preserved and no right of access accrue to particular persons or groups. Further the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, the system must not draw the government into the role of deciding who should be allowed on the air and when.

33. The proposal of the Committee for an Open Media (COM) is the first serious attempt to meet these requirements. It is neither perfected nor ready for adoption as rule or policy. We do not envision that system as a substitute for fairness obligations, but it has the potential to offer a format which acts consistently and complementarily with the purposes of the doctrine. We view Free Speech Messages as a supplement to a licensee's fairness obligations, but we reiterate our view that the licensee is responsible for seeing that important controversial issues are discussed and that opposing viewpoints are provided an opportunity for presentation.

#### SEPARATE STATEMENT OF CHAIRMAN RICHARD E. WILEY

\* \* \*

There is little reason to believe that fairness enforcement is necessary in the major radio markets. The doctrine, as we all know, is predicated upon the assumption that there is a scarcity of broadcast frequencies and that licensees should not be permitted to monopolize these channels so as to deny the public access to contrasting viewpoints on public issues. In the larger markets, it seems clear that the problem of scarcity is not so significant as to make it likely that radio debate



could be monopolized by a single philosophy or point of view. In the Chicago market, for example, there are some 65 commercial radio stations; in Los Angeles the figure is 59; and in New York there are 43 stations. Even in the absence of governmental control and supervision, it seems to me that a wide variety of opinion would be presented in these markets.

\* \* \*

DISSENTING STATEMENT OF COMMISSIONER  
GLEN O. ROBINSON

I. The Vulnerability of Venerability

\* \* \*

I agree with the Commission's conclusion that Red Lion is still good law, although *Tornillo* clearly does undermine the foundations on which Red Lion appeared to rest. The original Red Lion decision assumed (1) that the imposition of an obligation of fairness (including a private right to reply in certain instances) did not restrain ("chill") free speech, but actually served to promote it by ensuring greater diversity; and (2) that because the broadcast media operated under conditions of physical scarcity, the marketplace could not be relied upon to produce adequate diversity of speech and, therefore, some forms of regulation, such as the fairness obligation, were appropriate, and necessary. Clearly, *Tornillo* repudiates the first assumption of Red Lion. Logically at least, this conclusion is necessary; otherwise there is no basis for the Court's invalidating the right of reply statute in that case. Can Red Lion stand on the second assumption independent of the first? I have some doubts whether it can as a matter of pure logic, for I do not think the condition of scarcity is a compelling basis for distinguishing between electronic and print media<sup>1</sup>—particularly on the finding made in *Tornillo* that a compulsory right of reply tends to reduce public debate, contrary to the purpose of the fairness doctrine. Nevertheless, however the logic of the matter may appear to me, I am forced also to admit that it appears to appear differently to the Supreme Court; as recently as two months ago, the Supreme Court indicated (albeit in dicta) that it still regards Red Lion as good law. See *Buckley v. Valeo*, 421 U.S. 1, 96 S.Ct. 649, n. 55 (1976).

The question remains whether, constitutional issues aside, the doctrine could nevertheless be repudiated by the Commission. I once

1. Sec. e. g., Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 *Minn.L.Rev.* 67, 88 (1967). See also Barron, *Access to the Press—A New First Amendment*

*Right*, 80 *Harv.L.Rev.* 1641 (1967), who argues similarly but draws inferences the opposite of mine, concluding that the print media should be subject to some kind of fairness doctrine. *Tornillo*, of course, chilled that idea.

thought so,<sup>3</sup> but the Supreme Court appears to have disagreed. In *Red Lion* the Court said:

“that Congress in 1959 [intended] that the phrase ‘public interest,’ which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC’s general view that the fairness doctrine inhered in the public interest standard.” 395 U.S. at 380.

It thus seems to be beyond our power to eliminate altogether the general requirement that licensees give a reasonably balanced presentation of controversial public issues. However, I do not interpret *Red Lion* as depriving the FCC of all power to reshape the rule according to changing perceptions of the public interest. While our discretion is circumscribed, I think we still have freedom to redefine how the basic fairness obligation may be satisfied by licensees. Given the Commission’s action in narrowing the scope of the doctrine to exclude routine commercial product advertising from its coverage—an action with which I wholeheartedly agree—my colleagues evidently agree that some reshaping of the doctrine is still within our power.

The majority and I part company on whether that power should be exercised to seek alternatives to the present formulation of the fairness doctrine. In contrast to the Commission’s evident satisfaction with the present fairness doctrine, I believe it has proved to be unworkable and, at least potentially, dangerous—raising public expectations that cannot be fulfilled within the limits which the First Amendment places on our oversight of electronic journalism. Accordingly, within the limits of our discretion under Section 315, I think we should explore alternative possibilities for achieving the underlying goals of the fairness doctrine.

## II. The Right to Speak Versus the Right to Hear

Before turning to a critique of the fairness doctrine, a brief note on First Amendment philosophy is appropriate, for it is my belief that much of the debate over the fairness doctrine is needlessly clouded and misdirected by superficial and sophistical reasoning about the

3. The question turns on the interpretation of \* \* \* the 1959 amendments to Section 315 of the Communications Act \* \* \*. I argued in my 1967 article (*supra*, footnote 1 at 134) that this language need not be read to codify the fairness doctrine, and that it is better understood simply as a clarification that Congress did not intend, by creating exemptions from the equal time obligation, to disturb the status quo as far

as the fairness doctrine was concerned. Under this reading, the clause “and to afford reasonable opportunity \* \* \*” would be read disjunctively rather than conjunctively with the preceding clause. This reading of the statute, which conforms with the legislative history \* \* \* would preserve our discretion to abandon or alter the administration of the doctrine.

free speech ideal. The Commission begins its defense of the fairness doctrine on a high constitutional plane, quoting from Red Lion:

“There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that ‘[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount.’ ”

Insofar as this dictum is intended merely to express the traditional utilitarian notion that free speech is protected not only in the interest of the individual speaker but also that of the broader social interest of the public as listeners, the “listener’s right” theory is unexceptionable. Similarly, as a simple (if rather elliptical) statement that “free speech” is subject to some restrictions “in the public interest,” it can pass without protest, at least pending the review of the specific restrictions imposed. But inasmuch as the above formulation suggests some general principle that the First Amendment gives positive rights to listeners/viewers to dictate what speakers shall tell them, I believe it is pregnant with mischief.

I concede that freedom of speech is conducive to social welfare (a small concession), and it is generally that social interest which underlies the constitutional protection. But I reject the notion that only speech which promotes government or social welfare policies in a narrow sense is worthy of constitutional protection;<sup>6</sup> and, in the same vein, I disagree with the implication that the First Amendment is a tool of social policy, to be used and interpreted in an activist, affirmative way which promotes the “spirit” and “purpose” of free speech \* \* \*. Such an instrumentalist view of the First Amendment effectively reduces the constitutional guarantee of free speech to the same standing and dignity as that of any conventional governmental policy. Therein lies the vice of the listeners’ rights theory. If the speaker truly has the right to hear, it follows (from Hohfeld<sup>7</sup> and from common sense) that the speaker has a correlative duty to speak. If a listener has a legal right to hear certain things for certain purposes, then a speaker—some speaker—must have correlative duty to speak to those things. On this theory the people have the right to determine what the speaker shall say—in order to serve the “spirit” of the First Amendment to advance the social welfare of “the people.”

6. Alexander Meiklejohn, one of the most admired modern theorists, insisted that the First Amendment protects only “public” speech of a kind useful to self government. A. Meiklejohn, *Free Speech and Its Relation to Self Government*, 61-63 (1948). As a corollary of this general proposition Meiklejohn excluded commercial broadcasting from his narrow sphere of relevant speech, on the apparent ground that profit-making was incompatible with free speech. A. Meiklejohn, *Political Freedom*, XV (M. Sharp, ed.

1960) (forward by Malcolm Sharp). \* \* \* His views, if adopted, would sweep away the better part of all the positive First Amendment jurisprudence which has developed in the past score years, not only in the field of mass communications, but elsewhere.

7. Hohfeld, *Some Fundamental Legal Conceptions As Applied to Judicial Reasoning*, 23 *Yale L.J.* 16, 31-32 (1913).

Once it is explained in this way, it becomes apparent why the listeners' rights theory has not taken hold as a general theory of the First Amendment and, indeed, appears to have now been at least impliedly repudiated even for the electronic media.<sup>8</sup> As a general conception, the listeners' rights theory makes nonsense of the First Amendment; in fact, it stands it on its head. The First Amendment may indeed belong to everybody—as the listeners' rights theory suggests—but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor. To be sure, this interference is intended to further the “spirit” and “larger purposes” of the First Amendment. For my part, however, I prefer to entrust my political freedoms to the Constitution rather than to the ardent schemes of well-meaning persons.

In summary, we err when we stray beyond the simple proposition that the First Amendment is a *restraint* on government—nothing less, but also nothing more. Of course, it does not follow from this that the First Amendment restrains every act of government touching free speech (whether that action is intended to further free speech, to restrain it, or is neutral with respect to it). Thus, rejection of the listeners' rights idea expressed in *Red Lion* would not *necessarily* alter the decision, but it would, at least, have the clear virtue of removing from the debate over fairness the misleading and mischievous notion that the First Amendment is an expression of the right of the public, through their government, to regulate speech in the interest of listeners.

### III. The Concept of Fairness

I assume no one has any serious difficulties either with the concept of fairness or its applicability to the communications media. It is the administration of that idea, as legally obligatory conduct, which creates the hard problems. As Lewis Carroll reminds us, the linguistic barriers on the way to resolving a problem may be the most difficult to pass. In *Through the Looking-Glass*, Alice and Humpty Dumpty are debating how words mean what they mean:

\* \* \*

“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

8. Tornillo must be considered an implied repudiation of the theory so far as the print media are concerned; and with respect to the electronic media, *CBS v. DNC* seems basically hostile to the theory. Thus, the listeners'

rights theory seems to have no real vitality except as a rhetorical bow to the unexceptional notion that free speech does not totally supplant the rights of the people at large to exercise their sovereign powers.

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Through the Looking-Glass 94 (Random House ed., 1946). \* \* \* [S]o with fairness: the important question is not *how* the word is to be defined but *who* is to be master. The idea of obligatory fairness includes the idea of a standard of conduct external to the speaker, against which his conduct is to be measured. In short, unlike Humpty Dumpty, a speaker who is obligated to be "fair," according to the definition of another, is not completely master of his own wall. That is the problem. It is not simply that the need for enforced fairness is difficult to determine, but the fact that someone other than the speaker has the task of determining it. Particularly is this the case where that "someone" is a government agency with far-reaching enforcement powers, including sanctions like fines or license revocation, at its disposal. \* \* \*

We must therefore consider the question of the cost of mandating "fairness". That cost, of course, is the risk that government-mandated fairness impedes ("chills") speech. Clearly, we are in the land of shadows here, for it is hard to prove that an enforceable fairness obligation has an adverse impact on a robust free press. The Supreme Court has been of two minds on whether such an impact is reasonably to be feared. In *Red Lion*, the Court found no reason to think that the fairness doctrine would discourage free speech by broadcasters; but in *Tornillo*, it found the opposite would hold for the print media. Those cases are difficult to reconcile. In neither was there any specific evidence of effects. Thus, as in other First Amendment cases, reliance had to be placed on certain general assumptions. What justified the different assumptions about the respective impact on the different media? The technological differences between the two seem clearly insufficient to explain the different assumptions about the impact of enforced fairness.<sup>12</sup> However, whatever the differences between the media of mass communications, the central point in either case is whether such obligations can have a tendency to impede free speech. Without suggesting that the answer is undebatable, it seems clear enough that reasonable people can, and plainly do, believe there is a significant risk of such a tendency. It may be that this possible inhibition is an acceptable cost when compared with the promised benefits to be derived from fairness. That evidently is what *Red Lion* decided for purposes of sustaining the constitutionality of the fairness doctrine. However, within our discretion to shape and modify the

12. Indeed, \* \* \* on the reasoning of *Tornillo*, the chilling effect of enforced fairness in broadcasting is greater than in the print media since the scarcer the resource, the greater

the cost of requiring portions of that resource to be devoted to meeting fairness (or public access) obligations—hence the greater the "chilling effect."

doctrine, we ought to continue to consider whether the possible benefits of fairness outweigh the possible costs.

Measuring the benefits of fairness is as difficult as assessing the costs. The expected benefits are simply described: increased diversity of viewpoints and greater balance in airing controversial public issues. If we can really obtain these desiderata, fine; but the question is whether they *can* be obtained through the use of the fairness doctrine. This consideration is the crucial one—and it has been somewhat slighted in the debate over fairness. Even if the risks of inhibiting free speech are slight, whether they are worth incurring turns not merely on the importance of the benefits sought, but also on the likelihood of achieving it. Cf., *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). A clock that cannot keep time is no bargain even at garage-sale prices, unless it is esteemed as an ornament.

Can the Commission's fairness clock keep time, or is it merely an ornament? I am skeptical—and I become more skeptical with time—that this aging timepiece is anything more than an objet d'art, and at that, more objet than art. I do not think this Commission can in practice define "fairness" with sufficient clarity to enforce this norm as law. To be sure, there are some steps we "could" take, in theory, if we were willing. But we can in theory do many things that, in practice, we will not do, and should not do. One of these things is to second-guess licensee judgments on fairness, except in the most extraordinary cases. In a two year period, 1973 and 1974, the Commission received 4,280 formal fairness complaints. Of these only nineteen— $\frac{4}{10}$  of one percent—resulted in findings adverse to the licensee.<sup>14</sup>

Adverse findings, few and far between in the past, are likely to be even more exceptional in the future as a consequence of *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C.Cir. 1976) and *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1117-1122 (D.C. Cir. 1974) ("Pensions") (opinion of Leventhal, J.), vacated, etc., at id.; cert. denied 424 U.S. 910 (1976), which explicitly caution that the First Amendment requires the agency to defer to the licensee's judgment unless it is found to be unreasonable or in bad faith. The court, in *Straus*, underlines this point by noting that the "unreasonable/bad faith" standard applies to all components of the doctrine; it is the licensee, in the first instance, who decides, for example, exactly what issue is involved and whether that issue is controversial and of public importance."

Data on the small number of adverse findings are frequently cited to show how small is the risk to licensees of government inter-

14. \* \* \* Violations in this period included: seven violations of the political editorializing rules, seven

personal attack rule violations and five general fairness doctrine rulings.

ference.<sup>16</sup> What they show even more persuasively, however, is how small are the benefits. That there were only nineteen adverse findings in two years<sup>17</sup> bears witness to one (or more) of three things: (1) incredible fairness by the media; (2) remarkably ineffective enforcement by the FCC; or (3) a standard of licensee discretion so broad as to permit almost any judgment to stand. On the first assumption, the fairness doctrine seems to me unnecessary; on the second and third, it is ineffectual.

Innate suspicion tells me the first assumption is unlikely: I just cannot believe that with several thousands of licensees and millions of broadcast hours yearly, the fairness doctrine does not suffer many more violations than those few found. The second and third assumptions are interrelated. The FCC's enforcement of the fairness doctrine has always been less than rigorous. In the face of increasing demands to redress fairness grievances the Commission has evolved procedural barriers, \* \* \* in order to forestall becoming too easily involved in licensee programming judgments. And, where we have become involved, we have, with few exceptions accorded the licensee broad discretion to define what constitutes a controversial issue of public importance, and almost equal latitude in satisfying the obligation of fairness with respect to such issues. \* \* \* The situation is untenable. The very existence of the fairness doctrine has given rise to public expectations that are quite unrealistic. The volume and the character of fairness doctrine mail which the Commission receives bears witness to such expectations. The Commission cannot come close to meeting those exaggerated expectations without infringing the Constitution; indeed, it apparently cannot

16. I am not at all certain that the data will support that conclusion since the degree of the "chill" on free speech that may flow from government intrusion is not simply a function of the number of adverse findings or even the number of inquiries made of licensees. The chill stems from the licensee's perception of the costs of presenting certain programs, and those perceptions may be based more on anxiety than on any objective, actuarially sound, assessment of risk. In any case, the more immediate concern of the licensee will be whether the marginal benefit of broadcasting matter bearing on a controversial public issue outweighs the possible battling with citizen groups, disgruntled viewers/listeners, and last, but not least, the FCC.

17. An adverse finding is not necessarily followed by a separate punishment; indeed, usually it is not. Most adverse findings result either in a ruling

that certain programming requires presentation of another viewpoint or a letter admonishing the licensee to comply with the fairness doctrine. Of the nineteen adverse findings in 1973 and 1974, only eight (seven political editorial cases and one personal attack) resulted in any tangible punitive action—*forfeiture* in each case. Of course, the *forfeiture* penalty is available to the Commission only in the case of personal attack—*political editorializing* violations inasmuch as these alone have been crystallized into specific rules. As for the ultimate sanction, *non-renewal of license*, the Commission will not consider this except in the most egregious case of licensee irresponsibility towards its fairness obligation, and it has found this but once, in *Brandywine-Main Line Radio, Inc.*, 24 FCC2d 18 [19 R. R.2d 433] (1970), *aff'd* 473 F.2d 16 (D. C. Cir. 1972), *cert. denied* 412 U.S. 922 (1973). \* \* \*

even continue its own very limited enforcement course if I correctly gauge the direction of the prevailing judicial winds.

#### IV. Alternatives

Given the infirmities of the fairness doctrine, it is time to start looking for alternatives. My preferred course—retiring the fairness doctrine altogether—is presumably beyond our power unless and until the Supreme Court reverses or reinterprets *Red Lion*. A second possibility is simply to forget about enforcement. But as I have argued above, this is about what we have done in effect, with an occasional exception; I regard this course as totally unsatisfactory. It breeds disrespect for the law. Worse, it is an unstable state, which produces not desuetude, but erratic (and hence discriminatory) enforcement. Just as nonenforcement is not a practicable option, so too is the similar proposal of Mr. Henry Geller to relegate enforcement of the fairness doctrine to the end of the license period. Under the Geller proposal the Commission would revert to its earlier (pre-1962) practice of examining the licensee's overall fairness as part of its three year performance record rather than, as now, evaluating individual complaints. I concur in the Commission's rejection of this proposal. I am sympathetic to what I discern to be the purpose of this proposal, to eliminate detailed scrutiny of, and interference with, licensee news judgments. However, I do not think Mr. Geller's proposal would necessarily work as he supposes. In fact, I think the Commission would still ultimately be led to responding to particular complaints as it does now, except that its response would be to an accumulation of complaints—most of them on a stale record. If this were the outcome of such a proposal, it could increase the problem of discriminatory enforcement, and also aggravate the risk of adverse impact on licensee news judgments. The accumulation of complaints, the uncertainty of how they would be regarded, the increased scope of Commission scrutiny and finally the greater ultimate sanction to the licensee with a license renewal at stake (as opposed merely to an adverse finding of the kind now typically made in cases of violation), could increase the chilling effect of the fairness doctrine. In return for these new risks the Geller proposal offers no significant additional benefits in terms of surer enforcement, or more probable achievement of fairness. As has been explained, this last aspect is a crucial flaw in the present fairness doctrine: against the risk (however slight it may be) of adverse effects, the actual benefits are, as a practical matter, negligible.

In my view a more attractive alternative to either the present process or the Geller option is the optional access-in-lieu-of-fairness proposal of the Committee for Open Media (COM).

COM suggests a system of optional access in lieu of the fairness doctrine. Instead of being required to program discussions of controversial matters of public importance in a reasonably balanced



manner, licensees might instead be allowed to choose to set aside time to allow members of the public to appear on the air.

As an alternative to what we have now, the access idea is appealing; by automating the process for permitting different views to be expressed, the subjective determinations that are now the core concern would be largely eliminated. I am not an admirer of access in and for itself, and for this reason have never supported the idea of mandatory access, *per se*. But mandatory access is not the issue here. The question is not whether a public access period is good, but whether it is better than what we now have. In fact, even the latter formulation is somewhat beside the point for the proposal is not to compel access in lieu of fairness, but to permit the licensee to opt for it. There is reason to doubt that many licensees would select access over their present fairness obligations. But that is no concern of ours. To permit the substitution would at least give those licensees who are troubled by the fairness doctrine (or who may feel "chilled" by it) an opportunity to opt out in favor of an alternative that at least minimizes the risk of vexing the FCC.

At the outset it would be necessary to prescribe clear guidelines of how such an access alternative would work. COM proposes so-called "free speech messages"—short radio or television spots made available to any number of the public. Under this approach people could then get air time to criticize the fairness of the station's news or public affairs programming, or to talk about anything else that deserved public notice. Some administrative problems come to mind immediately. How much time must be allocated, and in what time periods, in order to exempt the licensee from its traditional fairness obligation? How are speakers to be chosen, assuming that more will want to speak than time can reasonably be provided for? Should stations have at least a minimal role in selecting the speakers?

These questions are not so difficult; but to a degree, their answers proceed on faith. If the Commission were to allow access as an alternative to fairness, it would be simple to frame rules requiring that access messages be aired at times throughout the day when significant segments of the viewing public were watching. Likewise, the FCC could provide by rule that speakers be chosen, either by lot or by queue, so as to minimize broadcaster bias and ensure that each chosen speaker was allowed to go before the public within a reasonable period—say a week—after requesting access time. The third point is related to the second. Whatever means of allocation were chosen would have to prevent monopolization by any one group. COM resolves the problem by providing that half the spots would be allocated by the licensee to representative speakers. But no allocation system to which our attention has been directed can completely automate the selection function or remove the practical need for a supervisory intelligence of some sort—at the very least to monitor

what goes over the air to ensure that it is not defamatory nor obscene. Obviously, the pressure of this supervisory intelligence re-introduces the problem of licensee bias. But it would be a lesser problem than the one we have now. Certainly, it seems intuitively obvious that, if a licensee threw himself open to all comers (or a random selection of all comers) who fell somewhere in the zone of reasonableness, a greater diversity of viewpoints would more probably be represented than where the licensee himself generates the entire broadcast agenda. To be sure, the access message system could be perverted by licensee bad faith—this system has that vulnerability in common with all the institutions of democracy—but I do not fear this possibility. \* \* \* [I]t seems to me that we twentieth century bureaucrats ought to be willing to take a gamble on the broadcast media similar to that the Founding Fathers took on pamphlets and newspapers two hundred years ago.

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#### NOTE

On appeal, the court of appeals affirmed in most respects but reversed and remanded the Report insofar as it rejected the COM (§§ 7, 33) and Geller 10-issue (§ 4) approaches without giving them adequate consideration. Excerpts follow.

#### NATIONAL CITIZENS COMMITTEE FOR BROADCASTING v. FCC

United States Court of Appeals, District of Columbia Circuit, 1977.  
567 F.2d 1095, cert. denied, — U.S. —, 98 S.Ct. 2820, 56 L.Ed.2d 769 (1978).

McGOWAN, J.

#### II

The FCC's decision to limit the applicability of the fairness doctrine lays upon it some obligation to consider carefully other serious suggestions that have been made to ensure sufficient and balanced coverage of important public issues. \* \* \*

\* \* \* The Commission has chosen to rely primarily on third-party complaints and limited review of fairness doctrine decisions by individual broadcasters in order to avoid excessive governmental supervision of licensee operations.

Yet case-by-case, issue-by-issue enforcement of the second obligation of the fairness doctrine still requires considerable Commission intrusion into the licensee decision-making process. At the same time, reliance on third party complaints means that many fairness violations will not be called to account with respect to both part one and part two obligations.

The Commission procedures with respect to part two complaints are spelled out in the *Fairness Report*. The complainant must describe the station, issue, and program involved, and must also "state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue." An unavoidable consequence of these procedures is that complaints will not be received, or will not be acted upon, unless there exist persons or organizations who are simultaneously "regular" viewers or listeners of the relevant station, aware that there exist opposing points of view to that presented by the station, and interested enough in having those opposing views aired that they are willing to initiate a Commission inquiry into the matter.

The potential for less than full enforcement of the first obligation under the fairness doctrine—provision of "a reasonable amount of time for the presentation \* \* \* of programs devoted to the discussion and consideration of public issues"—is even greater. Given the Commission's view that it is rare that a particular issue is "of such great public importance that it would be unreasonable for a licensee to ignore [it] completely," there exists very little incentive for members of the public, whom we may conclude are vitally concerned with a limited number of public issues, to initiate complaints relating to the first fairness obligation. A citizen would almost have to consider himself a guardian of the general public interest in being informed in order successfully to initiate such a complaint. Thus, it is not surprising that the usual fairness complaint relates to the part two obligation.

The Commission received three major proposals designed to overcome these difficulties of current fairness doctrine enforcement.  
\* \* \*

#### A. *The COM Access Proposal*

The *Fairness Report* stated that the fairness inquiry did not disclose "any scheme of government-dictated access which we consider 'both practicable and desirable.'" The Commission concluded that (1) a system of paid access would favor wealthy spokesmen, (2) a system of first-come, first-served free access would "give no assurance that the most important issues would be discussed on a timely basis," and (3) any alternative system of free access would inevitably require the FCC to determine who should be allowed on the air.

After the *Report* was issued, COM petitioned the Commission to reconsider or clarify its position with respect to right-to-access policies voluntarily adopted by licensees. In its petition, COM proposed a specific access scheme, not presented to the Commission during the fairness inquiry itself, which would be deemed presumptive compli-

ance with the fairness doctrine. Under the scheme suggested by COM:

(1) A licensee would set aside one hour per week for spot announcements and lengthier programing which would be available for presentation of messages by members of the public.

(2) Half of this time would be allocated on a first-come, first-served basis on any topic whatsoever; the other half would be apportioned "on a representative spokesperson system."

(3) Both parts of the allocation scheme would be "nondiscretionary as to content with the licensee."

(4) However, the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" are broadcast.

The Commission addressed COM's proposal in its order denying reconsideration \* \* \*.

\* \* \* Nevertheless, we think that the COM proposal has desirable aspects that the Commission may have overlooked, and indeed that the Commission may not have correctly understood the true nature of the proposal. In these circumstances, we conclude that the Commission should give further consideration to the proposal, including the solicitation of comments thereon.

Our conclusions are prompted by the Commission's own criteria for what would constitute an acceptable "optional access system to be administered by the licensee, and supplemented by the fairness doctrine:"

The essential requirements for any such system would be that [1] licensee discretion be preserved and [2] no right of access accrue to particular persons or groups. Furthermore, [3] the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, [4] the system must not draw the government into the role of deciding who should be allowed on the air and when.

First, it seems to us that the Commission has not explained adequately why the COM proposal does not meet most of these requirements. The fourth requirement would be furthered even more than it is under present fairness doctrine enforcement, since under the COM proposal the licensee would be subject to fairness complaints only with respect to "editorial advertisements." The nondiscretionary apportionment system in the COM proposal would appear to be responsive to the second requirement listed above. COM vigorously argues that the third requirement would be met because spokesmen will inevitably come forth to speak on important issues.

The first FCC requirement is that "licensee discretion be preserved." \* \* \*

The Commission evidently bases this requirement on language in *CBS v. DNC*, [supra at 515] that "the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many." However, while the Court did state that "'public trustee' broadcasting" should not be exchanged "for a system of self-appointed editorial commentators," it also stated that there might be devised "some kind of limited right of access that is both practicable and desirable." We cannot read *CBS v. DNC*—which held that broadcasters were not statutorily or constitutionally *required* to accept paid editorial messages—as indicating that voluntary licensee adoption of a system of limited access such as that proposed by COM would violate the public interest standard of the Communications Act. The COM proposal is of course not aptly characterized as solely "a system of self-appointed editorial commentators," because it would retain the broadcaster's present responsibility to present opposing points of view in response to editorial advertisements.

Moreover, in stating its "essential requirements" for an access system as a substitute for the current fairness doctrine, the Commission appears to want to have its cake and eat it too. If the preservation of journalistic "discretion" under the first requirement is meant to mandate that all decisions with respect to which issues are covered be left to the licensee, then substantial government involvement in the form of agency oversight, contrary to the spirit if not the letter of the fourth requirement, cannot be avoided. We do not think that the Commission has demonstrated \* \* \* that the COM proposal retains insufficient licensee discretion.

Nor do the Commission's stated requirements take into account all crucial elements of an access scheme, or indeed any other mechanism of fairness doctrine enforcement. Certainly, the "essential requirements" must include some consideration of the scheme's likely success in meeting the first obligation of the fairness doctrine: the coverage of controversial issues. We have already described the limited extent to which current enforcement procedures can assure that this obligation is fulfilled, and we understand the reluctance of the Commission to become more involved in dictating which issues must be covered under the obligation. COM's proposal will involve the Commission even less than do present procedures in overseeing compliance with the first obligation. At the same time, the proposal would ensure a minimum amount of coverage of public issues.

Similarly, we think that the Commission cannot ignore the advantage of an access system in providing information to the public which would not be provided under even full compliance with both obligations of the fairness doctrine as currently implemented. For instance, we have sustained the Commission's decision to exclude

standard product commercials from the part two fairness obligation. Although we have determined that presentation of counter-commercials is not required by the public interest standard of the Communications Act, neither the Commission's decision nor our affirmance of it was based on the view that the information contained in counter-commercials is useless or harmful. Allowing presentation of these messages would certainly not be inconsistent with the Commission's statutory obligations. The only reservation about the utility of counter-commercials stated in the *Fairness Report* and *Reconsideration Order* was that they would present only one side of controversial issues of public importance. But an access system could result in presentation of information opposing the purchase of certain products and messages opposing these counter-commercials.

We recognize, of course, that there may be significant difficulties with the COM access proposal. For instance, there is no absolute assurance that the issues addressed during access time will be the most important or controversial issues facing the licensee's community, and even less assurance of balance in presentation of opposing viewpoints. In its further inquiry into the COM proposal, we expect the Commission to ascertain how serious these potential defects are and to examine whether they can be overcome. Throughout this process, it is especially important that the nature and scope of issue coverage under the proposed access scheme be compared to the degree of coverage actually achieved under the current system of fairness doctrine implementation, not to the coverage that would be achieved were both fairness obligations currently complied with and enforced.

#### B. *Other Proposals Relating to the First Fairness Obligation*

In conducting further inquiry on the COM proposal, the Commission will have to examine how best to ensure that licensees devote a reasonable amount of time to programming on public issues, as is required under the first obligation under the fairness doctrine. We do not think that this examination should be limited to comparison of only two alternatives: present procedures for implementing this obligation, on the one hand, and the COM proposal, on the other. There may well exist other ways of achieving compliance with the first obligation that deserve critical consideration, either in conjunction with, or as alternatives to, the procedures referred to above.

One of the proposals submitted to the Commission during the fairness inquiry seems especially promising as one step toward fuller compliance with the first fairness obligation. Intervenor Geller suggests that

the licensee list annually the ten controversial issues of public importance, local and national, which it chose for the most coverage in the prior year, set out the offers for response made; and note representative programming that was presented on each issue.

\* \* \* Although the Commission alluded to the proposal in its order denying reconsideration, it failed to state even in conclusory terms why the proposal was being rejected. Therefore, we conclude that further inquiry into the Geller proposal would be appropriate as part of, or as a supplement to, additional examination of the COM access scheme.

\* \* \*

#### QUESTIONS

1. What problems would you anticipate in administration of the COM access proposal? Do you agree with COM that the Commission's "third requirement would be met because spokesmen will inevitably come forth to speak on important issues?" If spokesmen come forth, but only to address unimportant issues, would you infer that the access policy is inferior to the present fairness doctrine?
2. What problems would you anticipate with the Geller 10-issue proposal? (See Robinson opin., § IV, supra at 605.) Would Commissioner Robinson's concerns be met if complaints were forwarded to licensees for information only, and not kept in the FCC's station file for renewal proceedings?

#### REVIEW PROBLEM: ACCESS PROGRAM

Station KANT is a standard broadcast station licensed to serve Berkeley, California. On September 1, KANT voluntarily began presenting a nightly live "community access hour" from 9:00 to 10:00 p. m. This program, which was not commercially sponsored, consisted of four 15-minute segments during which community residents could speak about any subject they chose. KANT made the segments available on a first-come/first-served basis: would-be speakers had to line up at the studio door where at 15-minute intervals they were admitted, one by one, and handed a live microphone. Station personnel did not know what subject any particular speaker might address; they were instructed not to censor any speaker under any circumstances.

At first the access program, which was called "KANT Hears You," operated without incident. About half of the speakers addressed one of several current local and national issues—pending electric rate increases, whether to close a primary school, whether to build the B-1 bomber, and the like. The remaining speakers divided among those who were airing a personal gripe, the lovelorn appealing for companionship, and the incoherent.

On October 1, however, this pattern suddenly changed. The first four persons lined up at the studio door that night delivered themselves as follows.

Mr. A read a speech denouncing the junior Senator from California as being "no better than a thief for accepting his pay while absenting himself from the Senate." The speech dwelt almost exclusively on the Senator's alleged inattention to Senate business and constituent concerns, his absence during certain important roll call votes in the Senate, and the number of days during which he had been either on vacation or out of the country during each of the previous six years. Although the Senator was then seeking re-election, Mr. A made no reference to the election or the challenger; his theme was instead to propose that the Senator be called upon to return to the taxpayers the "unearned" portion of his government salary, which Mr. A put at \$165,000.

Speaker B devoted her fifteen minutes to the virtues of the president of the state university. His "firmness under fire," his financial prudence, and his even-handedness were all extolled by Ms. B, who concluded her remarks with a warm endorsement of his candidacy for the junior Senator's seat.

Speaker C related in great detail, but not without humor, his summer vacation in Europe, closing with the following statement:

"You can have as good a time as I did, and I can guarantee it, if you'll just put your vacation plans in the hands of World Wide Travel, 124 Long Street, or call 555-1234, and ask for me, Mr. C."

Ms. D began by addressing the primary school closing issue that had so occupied the "community access hour" speakers of previous nights, but her presentation differed from the others. As she warmed to the task, she began to pepper her speech with relatively mild curses; with two minutes to go in her allotted time she shifted to gross indecencies, and practically the entirety of her final minute of air time was consumed by stringing together, often in novel ways, the most infamous terms for sexual and excretory activities and organs, generally in connection with the names of city council members who favored closing the elementary school in question.

(a) On the morning of October 2, the manager of KANT called you regarding the legal consequences, if any, of the various presentations made the night before on the "community access hour." Advise him.

(b) On the evening of October 2, you receive a telephone call from the night manager of KANT. He relates that when he arrived at the station at 6:00 p. m. he found Messrs. A and C and the Mss. B and D lined up in the appropriate place to claim air time on that night's access hour. Since the station has already received dozens of outraged telephone calls concerning the prior night's broadcast, he would like to deny them air time and either put on the next four people to line up or cancel tonight's show altogether, but he thought that he ought



not do either without first consulting you. Advise the night manager and explain your reasoning to him.

(c) In view of your experience representing KANT, what specific rules would you advise the FCC to adopt in the event it takes (either optional or mandatory) access approach to the problem of fairness and controversial issues programming?

## Chapter VIII

### CHILDREN'S TELEVISION: WHAT IS GOOD FOR THE GOSLINGS?

#### CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT

Federal Communications Commission, Dkt. No. 19142, 1974,  
50 FCC2d 1, 31 R.R.2d 1228, affirmed, 564 F.2d 458 (D.C.Cir.1977).

#### I. Introduction

2. This inquiry was instituted at the request of Action for Children's Television (ACT) and our notice specifically called for comment on ACT's proposal that the Commission adopt certain guidelines for television programming for children. These guidelines are as follows:

(a) there shall be no sponsorship and no commercials on children's television.

(b) no performer shall be permitted to use or mention products, services or stores by brand names during children's programs, nor shall such names be included in any way during children's programs.

(c) each station shall provide daily programming for children and in no case shall this be less than 14 hours a week, as part of its public service requirement. Provision shall be made for programming in each of the age groups specified below, and during the time periods specified: (i) Pre-school: Ages 2-5, 7 a. m.-6 p. m. daily, 7 a. m.-6 p. m. weekends; (ii) Primary: Ages 6-9, 4 p. m.-8 p. m. daily, 8 a. m.-8 p. m. weekends; (iii) Elementary: Ages 10-12, 5 p. m.-9 p. m. daily, 9 a. m.-9 p. m. weekends.

3. In addition to comments on the specific ACT proposal, the Commission requested interested parties to submit their views on such issues as the proper definition of what constitutes "children's programming", the appropriate hours for broadcasting children's programs, the desirability of providing programs designed for different age groups, commercial time limitations, separation of advertising from programming content, and other areas of concern. The Commission also requested all television licensees and networks to submit detailed information on their current children's programming practices, including a classification of programs as being either entertainment or educational. \* \* \*

## II. Children's Television Programming

7. We believe that proposals for a set amount of programming for children of various age groups should appropriately be considered in terms of our statutory authority and against the background on the Commission's traditional approach to program regulation.

### B. History of General Program Categories

12. The Commission's first recognition of children's programs as a distinct category came in the 1960 statement of basic programming policy. Report and Statement of Policy Re: Programming, 20 P&F R.R. 1901 (1960). In this report, "Programs for Children" was listed as one of fourteen "major elements usually necessary to meet the public interest, needs and desires of the community." \* \* \*

13. The Supreme Court, in its landmark decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), gave considerable support to the principle that the FCC could properly interest itself in program categories. In this decision, the Court specifically affirmed the Commission's fairness doctrine and noted that the doctrine (in addition to requiring a balance of opposing views) obligates the broadcaster to devote a "reasonable percentage" of broadcast time to the discussion of controversial issues of public importance. The Court made it plain that "the Commission is not powerless to insist that they give adequate \* \* \* attention to public issues." *Id.* at 393.

14. While the holding of the *Red Lion* case was limited to the fairness doctrine, the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues. The Court resolved the First Amendment issue in broadcasting by stating that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390. It stated further, that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by the Congress or by the FCC." *Id.* This language, in our judgment, clearly points to a wide range of programming responsibilities on the part of the broadcaster.

### C. Programs Designed for Children

15. One of the questions to be decided here is whether broadcasters have a special obligation to serve children. We believe that they clearly do have such a responsibility.

16. As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities, and children obviously represent such a group. Further, because of their immaturity and their special needs, children require programming de-

signed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience.

18. In this regard, educational or informational programming for children is of particular importance. It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the "public interest." Once these children reach the age of eighteen years they are expected to participate fully in the nation's democratic process \* \* \*. We believe that the medium of television can do much to contribute to this educational effort.

#### Amount of Programming for Children

19. While we are convinced that television must provide programs for children, and that a reasonable part of this programming should be educational in nature, we do not believe that it is necessary for the Commission to prescribe by rule the number of hours per week to be carried in each category. As noted above, we are involved in a sensitive First Amendment area, and we feel that it is wise to avoid detailed governmental supervision of programming whenever possible. Furthermore, while the amount of time devoted to a certain category of program service is an important indicator, we believe that this question can be handled appropriately on an ad hoc basis. Rules would, in all probability, have been necessary had we decided to adopt ACT's proposal to ban advertising from children's programs. As explained below, however, we have not adopted that proposal and it may be expected that the commercial marketplace will continue to provided an incentive to carry these programs.

20. Even though we are not adopting rules specifying a set number of hours to be presented, we wish to emphasize that we do expect stations to make a meaningful effort in this area. During the course of this inquiry, we have found that a few stations present no programs at all for children. We trust that this Report will make it clear that such performance will not be acceptable for commercial television stations which are expected to provide diversified program service to their communities.

#### Educational and Informational Programming for Children

21. Our studies have indicated that, over the years, there have been considerable fluctuations in amount of educational and informational programming carried by broadcasters—and that the level has sometimes been so low as to demonstrate a lack of serious commit-

ment to the responsibilities which stations have in this area.<sup>7</sup> Even today, many stations are doing less than they should.

22. We believe that, in the future, stations' license renewal applications should reflect a reasonable amount of programming which is designed to educate and inform—and not simply to entertain.

\* \* \*

#### Age-Specific Programming

24. In its original petition, ACT requested the Commission to require broadcasters to present programming designed to meet the needs of three specific age groups: (1) pre-school children, (2) primary school aged children, and (3) elementary school aged children.

\* \* \*

25. While we agree [with ACT's later position,] that a detailed breakdown of programming into three or more specific age groups is unnecessary, we do believe that some effort should be made for both pre-school and school aged children. Age-specificity is particularly important in the area of informational programming because pre-school children generally cannot read and otherwise differ markedly from older children in their level of intellectual development. A recent schedule indicated that, although one network presented a commendable five hours a week for the pre-school audience, the others did not appear to present any programs for these younger children. In the future, however, we will expect all licensees to make a meaningful effort in this area.

#### Scheduling

26. Evidence presented in this inquiry indicates that there is tendency on the part of many stations to confine all or most of their children's programming to Saturday and Sunday mornings. We recognize the fact that these are appropriate time periods for such shows, but are nevertheless concerned with the relative absence of children's programming on weekdays. It appears that this lack of weekday children's programs is a fairly recent development. In the early 1950's, the three networks broadcast twenty to thirty hours of children's programming during the week. During the late fifties and early sixties many popular shows such as "Howdy Doody", "Mickey Mouse Club" and "Kukla, Fran and Ollie" disappeared, and, by the late sixties, "Captain Kangaroo" was the only weekday children's show regularly presented by a network. While some stations, particularly those not affiliated with networks, do provide weekday programming for children, there is nevertheless a great overall imbalance in scheduling.

7. In 1968 and 1969, for example, none of the networks carried a single informational program in its Saturday

morning line-up of children's shows, and only one network presented an educational program during the week.

27. It is clear that children do not limit their viewing in this manner. They form a substantial segment of the audience on weekday afternoons and early evenings as well as on weekends. In fact, the hours spent watching television on Saturday and Sunday constitute, on an average, only 10% of their total viewing time. (A. C. Nielsen Company, February, 1973). Accordingly, we do not believe that it is a reasonable scheduling practice to relegate all of the programming for this important audience to one or two days. Although we are not prepared to adopt a specific scheduling rule, we do expect to see considerable improvement in scheduling practices in the future.

### III. Advertising Practices

#### A. Background

28. The second major area of concern in this inquiry has to do with advertising practices in programs designed for children. In its original petition, ACT requested that the Commission eliminate all commercials on programs designed for children and prohibit any other use or mention of any product by brand name. During the course of the proceeding various parties criticized the amount of commercial matter now directed toward children, the frequency of program interruptions and a variety of other specific advertising practices: these included the use of program talent to deliver commercials ("host selling") or comment on them ("lead-ins and/or outs"); the prominent display of brand name products on a show's set ("tie-ins"); the presentation of an unrealistic picture of the product being promoted; and the advertising generally of products which some parties consider harmful to children (e. g., snack foods, vitamins and drugs).

29. The Commission's statutory responsibilities include an obligation to insure that broadcasters do not engage in excessive or abusive advertising practices. \* \* \*

30. Traditionally, however, the Commission has not attempted to exercise direct supervision over all types of advertising abuses. Since the Federal Trade Commission has far greater expertise in, and resources for, the regulation of false or deceptive advertising practices, the FCC has largely confined its role in this area to notifying stations that the broadcast of material found to be false or deceptive by the FTC will raise questions as to whether the station is operating in the public interest. We do not believe that it would be appropriate to change this policy at the present time. The Federal Trade Commission is currently conducting inquiries into advertising practices on children's programs and food advertising which cover many of the advertising practices objected to by the parties before the Commission. In light of the actions of the FTC, we have chosen not to address some of these specific promotional practices. On the basis of this proceeding, however, we are persuaded that an examination of the broadcaster's responsibility to children is warranted in the areas

of the overall level of commercialization and the need for maintaining a clear separation between programming and advertising.

### B. Overcommercialization

31. While it is recognized that advertising is the sole economic foundation of the American commercial broadcasting system and that continued service to the public depends on broadcasters' ability to maintain adequate revenues with which to finance programming, the Commission has a responsibility to insure that the "public interest" does not become subordinate to financial and commercial interests. Although this proceeding marks the first instance in which the level of advertising on programs designed for children has been singled out as possibly abusive, the federal government has been concerned about the problem of overcommercialization in general since the beginning of broadcast regulation. \* \* \* In the definitive 1960 policy statement, licensees were admonished to "avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages."

32. Although some of the parties to this proceeding questioned the Commission's authority to limit the level of commercialization on children's programs, the Commission believes that it has ample authority to act in this area. This issue was raised in conjunction with the Commission's general inquiry into overcommercialization in 1963-1964, when the Commission concluded that it could adopt rules prescribing the maximum amount of time a licensee may devote to advertising \* \* \*.

If a licensee devoted an excessive amount of his broadcast time to advertising, the Commission could certainly consider that factor in deciding whether a renewal of the license would serve the "public interest". [Citations.] If a given policy is an appropriate consideration in individual cases, then, as the Supreme Court has suggested, "there is no reason why [the policy] may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity." *FCC v. American Broadcasting Company*, 347 U.S. 284, 289-290, note 7 (1954).

33. A restriction on the amount of time a broadcaster may devote to advertising does not constitute censorship or an abridgment of freedom of speech. The courts have traditionally held that commercial speech has little First Amendment protection. *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Breard v. City of Alexandria*, 341 U.S. 622 (1951).<sup>\*</sup> A Congressional ban on cigarette advertising on

<sup>\*</sup> But cf. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (commercial speech is protected by the first amendment

but some forms of commercial speech regulation are permissible, e. g., to prevent fraud; prohibition on advertising prices of prescription drugs held unconstitutional).—D.G.

television was held not to violate the First Amendment, in part, because broadcasters "[had] lost no right to speak—they [had] only lost an ability to collect revenue from others for broadcasting their commercial messages." *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 584 [23 R.R.2d 2001] (1971), *aff'd* 405 U.S. 1000 (1972).

34. If our policy against overcommercialization is an important one, and we believe that it is, it is particularly important in programs designed for children. Broadcasters have a special responsibility to children. Many of the parties testified, and we agree, that particular care should be taken to insure that they are not exposed to an excessive amount of advertising. It is a matter of common understanding that, because of their youth and inexperience, children are far more trusting of and vulnerable to commercial "pitches" than adults. There is, in addition, evidence that very young children cannot distinguish conceptually between programming and advertising; they do not understand that the purpose of a commercial is to sell a product. See Report to the Surgeon General, *Television and Growing Up: The Impact of Televised Violence*, Vol. IV at 469, 474 (1970). Since children watch television long before they can read, television provides advertisers access to a younger and more impressionable age group than can be reached through any other medium. For these reasons, special safeguards may be required to insure that the advertising privilege is not abused. \* \* \*

35. Despite these concerns, we have chosen not to adopt ACT's proposal to eliminate all sponsorship on programs designed for children. The Commission believes that the question of abolishing advertising must be resolved by balancing the competing interests in light of the public interest.<sup>11</sup> Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming. Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area. Moreover, it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task.

11. At one time the Commission maintained the position that "sustaining" programming (which was not commercially sponsored) played an important role in broadcasting. The Commission's 1949 policy statement placed considerable emphasis on sustaining programs to assure balanced program-

ming and to serve minority tastes and interests. In 1960, however, the Commission reversed its position on the grounds that "under modern conditions sponsorship fosters rather than diminishes the availability of important public affairs and 'cultural' broadcast programming."



37. The present proceeding has indicated, however, that there is a serious basis for concern about overcommercialization on programs designed for children. Since children are less able to understand and withstand advertising appeals than adults, broadcasters should take the special characteristics of the child audience into consideration when determining the appropriate level of advertising in programs designed for them. Many broadcasters substantially exceed the level of advertising that represents the best standard followed generally in the industry. The Television Code of the National Association of Broadcasters, for example, permits only nine minutes and thirty seconds of non-program material (including commercials) in "prime-time" programming (i. e., 7:00-11:00). In contrast, many stations specify as much as sixteen minutes of commercial matter an hour for those time periods in which most children's programs are broadcast.

38. Although advertising should be adequate to insure that the station will have sufficient revenues with which to produce programming which will serve the children of its community meaningfully, the public interest does not protect advertising which is substantially in excess of that amount. These revenues, moreover, need not be derived solely from programs designed for children.

39. On the basis of this proceeding, the Commission believes that in many cases the current levels of advertising in programs designed for children are in excess of what is necessary for the industry to provide programming which serves the public interest. Recently, following extensive discussions with the Commission's Chairman, the National Association of Broadcasters agreed to amend its code to limit non-program material on children's programs to nine minutes and thirty seconds per hour on weekends and twelve minutes during the week by 1976; the Association of Independent Television Stations (INTV) has agreed to reduce advertising voluntarily to the same level. By these actions the industry has indicated that these are advertising levels which can be maintained while continuing to improve service to children.

40. The Commission's own economic studies support this assumption. The economic data indicates that there is an "inelasticity of demand" for advertising on children's programs. It appears, therefore, that the level of advertising on children's programs can be reduced substantially without significantly affecting revenues because the price for the remaining time tends to increase. In 1972, for example, the NAB reduced the permissible amount of nonprogram material on weekend children's programs from 16 to 12 minutes per hour; although the amount of network advertising was cut by 22%, the networks' gross revenues for children's programs fell by only 3%. The Commission anticipates similar results if advertising were further limited to nine minutes per hour: there should be minimal financial hardship on networks and affiliates, although the problem could be

somewhat more significant for independent stations. Most independent stations, however, have already agreed to make reductions, and the fact that 12 minutes per hour will still be permitted on weekdays (when most of these stations program for children) should soften any adverse economic effect.

41. The issue remains, however, whether the Commission should adopt per se rules limiting the amount of advertising on programs designed for children or await the results of the industry's attempt to regulate itself. The decisions of the NAB and the INTV to restrict advertising voluntarily are recent developments which occurred during the course of this inquiry and after consultation with the Commission's Chairman and staff. The Commission commends the industry for showing a willingness to regulate itself. \* \* \*

42. In light of these actions, the Commission has chosen not to adopt per se rules limiting commercial matter on programs designed for children at this time. The standards adopted by the two associations are comparable to the standards which we would have considered adopting by rule in the absence of industry reform.<sup>12</sup> \* \* \*

44. For the present, compliance with the advertising restrictions adopted by the industry and endorsed by the Commission will be sufficient to resolve in favor of the station any questions as to whether its commercial practices serve the public interest. Licensees who exceed these levels, however, should be prepared to justify their advertising policy. We recognize that there may be some independent VHF and UHF stations which cannot easily afford such a reduction in advertising; such stations should be prepared to make a substantial and well-documented showing of serious potential harm to support their advertising practices. However, we anticipate accepting very few other justifications for overcommercialization in programs designed for children.

### C. Separation of Program Matter and Commercial Matter

46. The Commission is concerned, in addition, that many broadcasters do not presently maintain an adequate separation between programming and advertising on programs designed for children. The Commission has ample authority under the Communications Act to require broadcasters to maintain such a separation. Any practice which is unfair or deceptive when directed to children would clearly

12. The Commission, in addition, finds the proposed differentials between weekend and weekday programming to be acceptable. Unlike Saturday and Sunday morning when there is no significant audience other than children, weekday mornings and afternoons are attractive periods to program for adults. The more substantial the differential between the permissible level

of advertising on children's and adult programs during the week, the greater is the disincentive to program for children on weekdays. Since we are already concerned about the concentration of children's programming on the weekend, we are willing to accept the balance which the industry has struck on this issue.

be inconsistent with a broadcaster's duty to operate in the "public interest" and may be prohibited by the Commission. Section 317 of the Communications Act, in addition, specifically requires that all advertisements indicate clearly that they are paid for and by whom. 47 U.S.C. § 317. The rationale behind this provision is, in part, that an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message. \* \* \*

47. On the basis of the information gathered in the course of the Commission's inquiry, it has become apparent that children, especially young children, have considerable difficulty distinguishing commercial matter from program matter. Many of the participants knowledgeable in the areas of child development and child psychology maintained that young children lack the necessary sophistication to appreciate the nature and purpose of advertising. Also, a study sponsored by the government concluded that children did not begin to understand that commercials were designed to sell products until starting grade school. Report to the Surgeon General, Television and Growing Up: The Impact of Televised Violence, Vol. IV at 469 (1970). Kindergarteners, for example, did not understand the purpose of commercials; the only way they could distinguish programs from commercials was on the basis that commercials were shorter than programs. The Commission recognizes that, as many broadcasters noted, these findings are not conclusive; psychological and behavioral questions can seldom be resolved to the point of mathematical certainty. The evidence confirms, however, what our accumulated knowledge, experience and common sense tell us: that many children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming.

49. Special measures should, therefore, be taken by licensees to insure that an adequate separation is maintained on programs designed for children. One technique would be to broadcast an announcement to clarify when the program is being interrupted for commercial messages and when the program is resuming after the commercial "break." Another would be to broadcast some form of visual segment before and after each commercial interruption which would contrast sufficiently with both the programming and advertising segments of the program so as to aid the young child in understanding that the commercials are different from the program. In this context, again following discussions with the Commission's Chairman and staff, the NAB Code Authority has recently amended its advertising rules to require a comparable separation device. We applaud this action by the industry to improve advertising practices directed to children.

51. The Commission is also concerned that some broadcasters are now engaging in a commercial practice which takes unfair advan-

tage of the difficulty children have distinguishing advertising from programming: the use of program characters to promote products ("host-selling"). In some programs designed for children, the program host actually delivers the commercial in his character role on the program set. In others, although the host does not actually deliver the commercial, he may comment on the advertisement in such a manner as to appear to endorse the product ("lead-in/lead-out").

52. The Commission does not believe that the use of a program host, or other program personality, to promote products in the program in which he appears is a practice which is consistent with licensees' obligation to operate in the public interest. One effect of "host-selling" is to interweave the program and the commercial, exacerbating the difficulty children have distinguishing between the two. In addition, the practice allows advertisers to take unfair advantage of the trust which children place in program characters. Even performers themselves recognize that, since a special relationship tends to develop between hosts and young children in the audience, commercial messages are likely to be viewed as advice from a friend. The Commission believes that, in these situations, programming is being used to serve the financial interests of the station and the advertiser in a manner inconsistent with its primary function as a *service* to children. In this regard, it should be noted that many stations, in particular NAB Code member stations, have already eliminated host selling.<sup>20</sup>

53. Finally, the Commission wishes to caution licensees against engaging in practices in the body of the program itself which promote products in such a way that they may constitute advertising. The inquiry revealed that some broadcasters weave the prominent display of the brand names of products into the program sets and activities. \* \* \* One of the clearest examples of incorporating promotional matter into a program was a cartoon series entitled "Hot Wheels" which was the trade name of a toy manufacturer's miniature racing cars; the manufacturer developed an additional line of cars modeled after those featured in the cartoon series. The Commission found that the program itself promoted the use of the product and required the licensee to log more of the program as commercial mat-

20. Public interest questions may also be raised when program personalities or characters deliver commercial messages on programs other than the ones on which they appear. Although this practice would not have the effect of blurring the distinction between programming and advertising, some advantage may be taken of the trust relationship which has been developed between the child and the performer. We recognize, however, that it may not be feasible, as a practical matter, for small stations with limited

staffs to avoid using children's show personnel in commercial messages on other programs. While we are not prohibiting the use of selling by personalities on other programs, broadcasters should be cognizant of the special trust that a child may have for the performer and should exercise caution in the use of such selling techniques. This may be particularly important where the personality appears in a distinctive character costume or other efforts are made to emphasize his program role.

ter. See Topper Corporation, 21 FCC2d 148 (1969); American Broadcasting Companies, 23 FCC2d 132 (1970).

#### IV. Conclusion

58. We \* \* \* realize that it will necessarily take some period of time for broadcasters, program producers, advertisers and the networks to make the anticipated changes.<sup>22</sup> Stations, therefore, will not be expected to come into full compliance with our policies in the areas of either advertising or programming until January 1, 1976. \* \* \*

60. In view of the fact that we plan to evaluate the improvements in children's programming and advertising which are now expected, the proceedings in Docket No. 19142 will not be terminated at this time.

#### SEPARATE STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I believe the Commission has gone about as far as is appropriate, in light of the evidence *presently* before us and mindful of the ever-present dangers that lurk in the area of program regulation. Indeed, I would have made this point a little bit more emphatic in our Policy Statement. It seems to me that a Statement of Policy is meaningful not only for what it says can and will be done, but in what it proclaims cannot or should not be done. I have no fixed notions where the proper boundaries of our concern lie with regard to children's programming; but I think the present Statement comes fairly close to the line which I would ultimately draw with regard to the matters herein considered. I do not mean to suggest by this that there are no respects in which I could not be persuaded to adopt a "harder line" towards the regulation of children's programming, or attendant advertising. What I do mean to suggest is that, as far as I am concerned, we are pressing very close to the limits of our sound discretion.

My reason for emphasizing all of this is simple: while I recognize the legitimate concerns of those who have pressed for regulation in this field, and while I endorse the Commission's present efforts in that direction, I would not have these efforts interpreted as merely the first step in a continuous series of measures by the FCC to act

22. The Commission anticipates that the networks will take the lead in producing varied programming for children. The networks are responsible for the bulk of the programs now being broadcast: they provide most of the children's shows carried by network-owned or affiliated stations and originally produced most of the syndicated material presented by independent stations. Changes in network

programming will, therefore, have both an immediate and a long-range impact as programs gradually become available on a syndicated basis. It is also clear that the networks have the financial resources to make a significant effort in this area. The Commission's economic studies indicate that network children's programming has been consistently profitable for many years.

as a censor for children's programming. There is an especially seductive appeal to the idea of "protecting" children against television. There are areas where the prospect of governmental control of programming has only to be suggested to evoke opposition and antipathy. This is not one of them. It is with respect to children's television that our strongest instinct is to reach out and put the clamp of governmental control on programming. For this reason, regulation of children's programming raises the most subtle and the most sensitive of problems. Everyone recognizes the free speech dangers of governmental control of political broadcasting. Not enough people appreciate the far more subtle problem of governmental control when it is extended into an area like this one, where there is widespread popular sentiment supporting some measure of governmental control. But if the First Amendment is to mean anything at all, it obviously does not mean that we can make judgments on the basis of majoritarian sentiment alone.

\* \* \*

I am not altogether comfortable with the distinction made in this Report and Policy Statement between educational programming and entertainment programming and the insistence that a certain amount of programming be didactic ("instructional") in character. For myself I would prefer that my children's time be occupied with Bach rather than Alice Cooper \* \* \*. Nevertheless, I feel somewhat diffident, as an officer of federal government, in urging that my preferences concerning what values are best for children to learn are the only ones that can claim the label "educational." In spite of the considerations counseling diffidence, however, I am satisfied that we have not gone beyond our proper discretion with today's Report and Policy Statement. The importance of the "cultural" values we have counseled our licensees not to slight is rooted firmly enough in consensus to allay any fears that we are significantly interfering with the prerogatives of any state or any family.

The Report and Policy Statement treats advertising to children as, at best, a necessary evil. The only difference between its view and that of ACT (and other opponents of advertising on children's programming) seems to be a pragmatic judgment that some advertising is necessary to sustain the programming. That is not quite the way I view the matter. I agree that, within the present economic structure of television, advertising is necessary to support children's programming of respectable quality. I cannot agree, however, that apart from this fact it is somehow wrong, per se, to advertise to children. Indeed, if advertising to children were as undesirable as some opponents have made it out to be, I doubt that the programming which it now supports could really redeem it.

By arguing that children are not properly the object of advertisers, ACT appears in effect to regard children, as a class, as outside

the economic framework of our society. This seems to me dubious. Like adults, children are consumers. Like adults, their tastes are not genetically determined. Among the influences upon the tastes of consumers—be they adults, or children—is advertising. Irrespective of its target, its purpose is to motivate behavior that would not otherwise, but for the advertising, have occurred. For better or for worse, commercial messages, even those involving significant amounts of non-information mental massaging, have long been tolerated in our society. Some people even regard them as economically and socially useful. Whether they are or not, however, is beside the point. It seems to me a little late in the day to decide that advertising, per se, is *contra bonos mores*. If it is not, then I suggest that we candidly acknowledge that within proper limits it is not a sin, and certainly not a crime, to try to influence the consumption desires of children. It may be argued that children are “special” consumers in that they are not the direct purchasers of much of what is advertised to them—their parents are. To my mind, this fact is without significance. It is a legitimate aim to stimulate demand for a product, and, as a practical matter, this requires that the consumer of the product be reached. In the case of toys and breakfast cereals, that consumer is the child. In theory, the child will then tell the parent what he desires, and the parent will either buy or not. According to some commentators, this places an unfair burden on parents, who are required to spend significant portions of their parental energies vetoing purchases of new toys, breakfast cereals, candy products and soft drinks. \* \* \* Our sympathy for parents who “just can’t say no” is rightly thin. Just as we cannot be surrogate parents so we should not attempt to insulate parents from the necessary responsibility of parental supervision.\*

I do not wish to be understood as endorsing all the TV advertising I have seen directed at children. Quite the contrary. I am sometimes revolted by commercials aimed at children (as well as many

\* One further point needs to be made in this connection. To a considerable degree the real discomfort of ACT and other like groups relates not to advertising but to the product advertised. This is most clearly illustrated in the demands which ACT has made on the Federal Trade Commission—concerning, e. g., the allegedly inherent “unfairness” of premiums—and it is also evident in the demands which have been pressed upon us as well. The Federal Trade Commission will have to sort out its own jurisdiction in this matter, but I think our response must clearly be negative: we do not have authority to restrict marketing of lawful products merely because the products are promoted

through the medium of radio and television. It is conceivable that there might be some exceptions to this in the case of patently dangerous products, but even here I am hesitant to state in unequivocal terms that we have authority. The cigarette advertising episode, which has been cited numerous times to us in support of such authority, is not apposite even if it were a wise precedent to follow. The only action which the Commission took in regard to cigarettes was to make advertising subject to the fairness doctrine, and even that limited precedent has now been restricted by our recent Fairness Report, 48 FCC 2d 1 [30 R.R.2d 126] (1974).

aimed at adults). Reason and common sense obviously have a role in a licensee's discharge of its public responsibilities. In my judgment, licensees have an obligation to appreciate the ways in which children differ from adults, and not to suffer advertisers to prey upon or exploit the peculiar vulnerabilities of immature judgment or unsophistication.\* There is a difference between salesmanship and exploitation, just as there is a difference between the spirit of enterprise and the spirit of larceny. Licensees will simply have to observe the distinction.

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[The separate statements of Commissioners Hooks and Washburn are omitted.]

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#### NOTES AND QUESTIONS

1. Do you agree that *Red Lion* "has a significance which reaches far beyond the category of programming dealing with public issues" (§ 14)? If so, would it follow that the Commission could constitutionally require broadcasters to present a minimum number of hours of children's programming each week? Is the Commission implicitly arguing this proposition?

2. ACT supported its proposal to ban advertising from children's television in part on the ground that it was an obstacle to age-specific programming; in order to attract the largest possible audience of two-to-twelve-year old children, programs must be "based on a lowest common denominator approach." Thus, it was said, broadcasters placed the needs of advertisers above those of their viewers.

In this light, the demand for age-specific programs can be seen as similar to the demand for preservation of a radio format, such as classical music in *WEFM*, supra. What might account for the Commission's very different reactions to these demands, then?

3. (a) The Commission has amended the license renewal form to require licensees to indicate programs "specifically designed for children." Assuming that the Commission might distinguish between programs designed for pre-school and for school-age children on the basis of whether they presumed a degree of literacy among the audience, see § 25, how should it distinguish between programs that are "specifically designed for children" and programs that are not, in reviewing the performance of a renewal applicant?

(b) Apparently it does not. According to B. Cole and M. Oettinger, *Reluctant Regulators* 283-84 (1978), the renewal branch staff

\* I do not suggest that I think it proper to prey upon gullible adults ei-

ther, but setting aside deception, there are necessary limits to our solicitude.



of the Commission have been instructed to approve any application, insofar as the provision of children's programming is concerned, "as long as the licensee puts down some answer." One employee is quoted as saying, "We've gotten some crazy answers as to what makes a kid's program, but we're not going to get into the problem of deciding what is and what isn't a children's program and how much is enough."

Is there an alternative to such self-certification by licensees? Is it constitutional? Is there reason to expect that even the present system of inquiry-without-scrutiny might have some effect on broadcasters' policies respecting children's programming?

4. Does the Commission have the authority it claims "to limit the level of commercialization on children's programs"? (§ 32.)

(a) In 1963 the Commission proposed to set limits on commercial time, but receded when the measure proved unpopular in Congress. Indeed, the House had already passed a bill to prevent the Commission from acting—in a manner described by the committee report as "arrogating to itself the right to legislate." Which way does the House action cut in measuring the Commission's authority?

(b) The National Association of Broadcasters (NAB) has petitioned the Commission to engage in rulemaking to eliminate its present monitoring of AM and FM license renewal applicants' commercial time practices. (Ironically, the FCC demands special justification only from those radio broadcasters that exceed the maximum advertising time suggested by the NAB's Radio Code.) The NAB contests the Commission's authority, and characterizes the present approach as regulation by "lifted eyebrow."

(c) Whatever the Commission's general authority to limit or discourage advertising above a certain level, might its reach be greater when directed only at the advertising on children's programs? Is *Banzhaf*, supra at 577, a helpful precedent in this regard?

5. Concerning the Commission's commendation for the NAB's and INTV's "voluntary" reduction in the level of advertising in their members' children's programs, compare *Reluctant Regulators*, supra, at 276-77, where Chairman Wiley's negotiation with the associations is detailed ("\* \* \* Wiley employed the tactics of a Kojak."), with *Writers Guild*, supra, at 458.

6. (a) What precisely is the evil perceived by the Commission in advertising directed to children? Would the same objections hold regardless of the products being advertised? Regardless of whether the program in which the advertisement appears is specifically directed to children? Cf. *Children's Programming*, 39 R.R.2d 1032 (1977) (Commission will not redefine children's programming to include programs significantly viewed by, although not designed for, children.)

(b) The Commission has declined to institute a rule-making proceeding to ban television advertising of over-the-counter drugs before 9:00 p. m., relying upon *Virginia State Board of Pharmacy*, noted above at ¶ 33 of the Children's Television Report.

(c) What is the implication of the Virginia case for such advertising techniques as "host-selling" on children's programs?

7. ACT has petitioned the Commission to reopen Dkt. No. 19142 in order "to examine the efficacy of industry self-regulation in the area of children's television programming and advertising" and to regulate practices continuing since the 1974 Report and Policy Statement. The petition also seeks a rule-making looking again toward the elimination of all advertising on children's programs. (Petn. filed Feb. 23, 1978.)\*

8. (a) Meanwhile, the Federal Trade Commission has begun a rule-making proposing to:

(a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising:

(b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;

(c) Require televised advertising for sugared food products not included in paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers. Trade Reg. Rep. (CCH) ¶ 38,046 (Feb. 28, 1978).

(b) The FTC, which has also asked for comment on alternative proposals, is suggesting that televised advertising "directed to, or seen by," children too young to evaluate it is an "unfair" or "deceptive" trade practice within the meaning of Section 5 of the Federal Trade Commission Act. Is there any theory on which to distinguish television advertising, for the purposes of Section 5, from other advertising directed to or seen by young children? To distinguish television advertising of "sugared food products" from other advertising, of the same products, directed to or seen by older children?

\* The Commission has reopened the children's proceeding with the issuance of a Second Notice of Inquiry seeking information on compliance with the 1974 guidelines and on their economic im-

pact, and requesting comments on the proposal to broaden the definition of children's programs subject to the guidelines. Broadcasting, July 31, 1978, at 21.

### REVIEW PROBLEM: PROPOSED BARTER DEAL

One of the most popular daily children's television shows of the 1950s was Mickey Mouse Club. The principle performers in this half-hour show were a dozen children aged 7 to 14, who would sing, dance, and act out short skits. The show also featured (1) filmed segments in which one or more of the child performers would be shown learning about or exploring some activity, such as taking a tour of a dairy farm and asking questions about what he or she saw, and (2) a Mickey Mouse cartoon. The show was generally well-received among parents and educators.

The Realistic Toy Company has acquired the Mickey Mouse Club show (on film), and all of the rights to the Mickey Mouse Club trade mark and characters. It is now marketing a line of Mickey Mouse Club toys, called the Mickey Mouse Club Weapons Systems, the largest seller of which is the Mickey Mouse Club Surface-to-Air Missile (SAM). This item sells for \$79.95.

Realistic has proposed the following barter arrangement to station WXYZ. Realistic will supply the station with Mickey Mouse Club programs at no cost. Each program will provide time for six minutes of commercials, two of which will be reserved for Realistic and four of which the station will be able to sell to other advertisers. Of the two minutes reserved by Realistic, one will be used to sell the Mickey Mouse Club SAM toy; all advertising of this product is done by animated cartoons featuring the Mickey Mouse character (which is also pictured prominently on the package in which the toy is sold). The other reserved minute will be used by the Realistic Toy Foundation to air a series of so-called "You Can Do it Too!" messages. These messages depict teen-age girls and adult women competently participating in activities and careers formerly thought to be appropriate only for males. Each "You Can Do it Too!" message ends with the announcement, spoken and visual:

Girls! For your free "I Can Do it Too!" t-shirt, write to  
Realistic Toy Foundation, Realistic, Iowa

The Realistic Toy Foundation was established by the president of the Realistic Toy Company to encourage girls and young women to pursue careers. Although most of its previous efforts have been devoted to providing college scholarships to needy girls of academic promise, its new policy is to affect as many girls as it can through inspirational messages such as the "You Can Do it Too!" series. Each of the "I Can Do it Too!" t-shirts that it is giving away comes with a packet of literature explaining the Realistic Toy Foundation's aims, its scholarship program, and what the recipient can do to encourage enactment of the Equal Rights Amendment.

You are an attorney in the Program Practices Department of Station WXYZ. The Sales Department has routinely passed along for your opinion the barter terms proposed by Realistic, which the station management is inclined to accept. The Sales Department calculates that it could easily sell the four minutes of advertising time that would be available to the station on the Mickey Mouse Club show for a total of \$2,000 per day, and that with no program production or procurement costs—since Realistic provides the program at no cost to the station—WXYZ will realize a net profit substantially higher than it could by producing a children's show of its own or by buying a syndicated program and selling the maximum allowable number of minutes of advertising.

Draft a memorandum identifying any issues of broadcast law or regulation that would be raised by acceptance of Realistic's proposal, and evaluating the merits of any objections that might be made to the FCC should the station accept.

## Chapter IX

### CODA: PUBLIC BROADCASTING

Supplementing the commercial broadcasting system discussed thus far is the non-commercial system, now often referred to as "public broadcasting." Originally of course all broadcasting was non-commercial in the sense that "direct" advertising was unknown; department stores and other radio "sponsors" were content to be credited at intervals for underwriting the stations' operations. But from the start at least a few stations were non-commercial in the sense of being non-profit organizations as well, and educational institutions were most active in sponsoring them. The government did not take an active role in encouraging early non-commercial licensees, however. Standard broadcasting had simply developed too quickly for the government to reserve educational channels; the spectrum was occupied by entrepreneurs before the advent of regulation. In 1940, however, when the FCC first allocated spectrum space for regular FM broadcasting, it reserved five channels for non-commercial educational licensees. In 1945, when the FM band was relocated to its present position, the twenty channels between 88 and 92 MHz were reserved for non-commercial educational licensees.

The Commission also reserved television channels for non-commercial educational use in 1952, but since the great majority of VHF channels had been licensed to the commercial broadcasters, most of the reserved channels were on the UHF band. The FCC later expanded the number of reserved non-commercial channels to more than 600, of which more than 500 are on UHF.

Congress has also acted to encourage non-commercial broadcasting. In 1962, it passed the Educational Television Facilities Act which provided 50% of the funds toward constructing and equipping new and expanding educational (ETV) stations. The number of ETV stations on the air or under construction increased from 82 to 183 during the four years of funding provided by that Act. The number of people within reach of an ETV signal rose from 105 to 155 million.

The Public Broadcasting Act of 1967, based on the recommendations of the Carnegie Commission on Educational Television, extended the 1962 Act in a revised form that also provided aid to non-commercial radio (with which we will not specifically deal). More important, it created the Corporation for Public Broadcasting (CPB), which channelled government funds into program production for the first time. The Act attempted to remove the CPB from politics by vesting control in an independent board (appointed by the President) and imposing the neutrality requirements of sections 396 and 399, which are explicated in the *AIM* case, in part B of this chapter.

Before reading these materials, you should read the excerpts from the Public Broadcasting Act set out in the Appendix at 680.

### A. THE FUNCTION OF PUBLIC BROADCASTING

Ambiguity of purpose has plagued rational discussion of non-commercial broadcasting since its inception, never more so than in recent years under the regime of the Public Broadcasting Act. Is non-commercial broadcasting “educational” broadcasting? Would that imply “instructional” programming? Is it “cultural” broadcasting? Why and how is it different from commercial broadcasting, then, since that is probably more reflective of, (if not more determinative of—a question we leave to others) our culture than any other institution in American society?

E. B. White expressed one vision of what non-commercial television should be, with his customary grace and high ideals, in a letter to the Carnegie Commission:

Noncommercial television should address itself to the ideal of excellence, not the idea of acceptability—which is what keeps commercial television from climbing the staircase. I think television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills. It should be our Lyceum, our Chautauqua, our Minsky’s, and our Camelot. It should restate and clarify the social dilemma and the political pickle. Once in a while it does, and you get a quick glimpse of its potential.

What is the vision implicit in Section 396 of the Public Broadcasting Act, which the Commission so deeply inspired? See, particularly, §§ 396(a) (4), (6); (g) (1) (A). Is it the same as White’s? Contrast the view of Commissioner Hooks in the following case.

### PUERTO RICAN MEDIA ACTION AND EDUCATIONAL COUNCIL, INC.

Federal Communications Commission, 1975.  
51 FCC 2d 1178, 32 R.R.2d 1423.

[The Council challenged the renewal of WNET-TV, New York. The Commission disposed of the untimely petition on procedural grounds, but dealt with the facial validity of the Council’s allegations in explaining its refusal to institute revocation-of-license proceedings, which it could have done on its own motion during the term of the renewed license under Section 312(a) of the Communications Act.]

DISSENTING STATEMENT OF COMMISSIONER  
BENJAMIN L. HOOKS

WNET, the radiant jewel in the public television's crown, is unquestionably a media symbol of sophistication and urbanity whose programs I (along with millions of other Americans of every race persuasion, and background) have watched and frequently enjoyed. WNET does not, however, serve the public interest and I cannot put an approving imprimatur on its licenseeship by dismissing the instant complaint.

WNET's glaring deficiencies, its failure to live up to the purposes for which it was conceived and licensed, and its gross misinterpretation of its mission as a "public" broadcaster could not be better illuminated than by this complaint by Puerto Rican Media Action and Educational Council (hereinafter, "Council"). The Council's cogent, passionate, and important complaint beams a needed spotlight on what I believe to be the central offense committed by a public licensee. WNET's sin, one of arrogance, is to have concentrated its efforts on one minority group, the cultured, white cosmopolites, and too often neglected the enlightenment of other less fortunate minorities which it has a fundamental duty to serve. Because New York, like this nation, is nothing but an amalgam of discrete minorities, the highly educated white community should, indeed, be served by WNET. But, its current pattern of establishmentarian predomination must cease; the time has come for a showdown with public television.

In its complaint, the Council contends that WNET has failed to provide sufficient programming of particular importance to the Hispanic community, has "either ignored the Puerto Rican community or failed to take into consideration the cultural, linguistic or educational needs of the Puerto Rican community," and has "consistently refused to produce Puerto Rican programming despite specific demands from the community for special programs." It is pretty well stipulated that the particular Hispanic and Latino community described by the Coalition is about one and one-half million people in WNET's service area.

In response to the million-plus Hispanics who look to WNET as their "public" broadcasters, WNET asserts that the indictment is unjustified, citing some occasional examples of programs of Hispanic interest, and seeking to excuse the balance of violations of its charter obligations with alleged financial inability. WNET says that it has "aggressively sought funding for Hispanic programming, but has not been able to develop funding for one specific group from any of its sources."

The Commission, although, candidly, uncertain of the appropriate role of contemporary public broadcasting, dismisses the essence of the Coalition grievance by a statement, which—in view of precedent and

past expressions—I don't think it literally intended, declaring: "[W]e have consistently held that programming which is responsive to the needs of a community in general, need not be shown to be responsive to the particular needs of each individual group within that community." That statement is an unfortunate distortion of settled Commission policy and the law. Without going further back than our En Banc Programming Inquiry where we specifically admonished licensees that they must direct programming to minorities, 44 FCC 2303, 2314 (1960), we have continuously ordered that a licensee cannot short change an expressed need and that special interest minorities must receive appropriate attention through programming.

We have unequivocally held that "special problems \* \* \* give rise to a need for specific programming" to meet those needs. Evening Star Broadcasting Company, 27 FCC 2d 316, 332 (1971); and that "[t]he problems of minorities must be taken into consideration by broadcasters in planning their program schedules to meet the needs and interests of the communities they are licensed to serve." Time-Life Broadcast, Inc., 33 FCC 2d 1081, 1093 (1972). With specific reference to this duty by public broadcasters, we recently said:

"\* \* \* educational programming—its responsibilities to minorities within its service area are no less important than those of commercial broadcasters. Both types of stations do, of course, use a valuable public resource, for which privilege they are rightly expected to serve the needs of the public. This obligation includes not merely service to the general public but also service to significant, distinctive minority interests which are not and cannot be as fully served by commercial stations." Alabama Educational Television Commission, 50 FCC 2d 461, 32 R.R.2d 539, at par. 21 (1975) (footnotes omitted).

The courts have ratified that position, noting that although "[h]ow a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore an expressed need \* \* \*" Stone v. FCC, 151 U.S.App.D.C. 145, 157, 466 F.2d 316, 328 (1972).

\* \* \* A hint as to what the courts consider an "expressed need", and the magnitude of public dissatisfaction necessary to require the FCC to dig into programming neglect of a significant minority is found in the so-called "format cases." The "public grumbling" about insufficient programming attuned to expressed needs represented by the Coalition is from over one million persons of Spanish lineage and its views with respect to inadequate minority attention are shared by other identifiable minority segments of the WNET service area.



That the principal purpose of public broadcasting is to provide an alternative education media is clear from the legislative history of the Public Broadcasting Act of 1967 (Public Law 90-129, approved November 7, 1967, 81 Stat. 368, 47 USC § 396 et seq.). Congressional intent in adopting public broadcasting's organic statute was:

to assist in establishing innovative educational programs, to facilitate educational program availability, and to aid the operation of educational broadcasting facilities; and to authorize a comprehensive study of instructional television and radio.

H.R.Rep.No.794, 90th Cong., 1st Sess. 1, (1967). The above language, as well as the Public Broadcasting Act itself, confirms that education and instruction of excellence was the prime objective of government in conceiving this service; not, fundamentally, enlightened entertainment. The Commission has reiterated that purpose especially with regard to minorities by pointing out that the strength of educational television derives "from its ability to be innovative and to serve significant minority tastes, needs and interests." Ascertainment of Community Problems by Educational Broadcast Applicants, 42 FCC 2d 690, 693. "Indeed an argument can be made that the educational broadcaster has a very special obligation to serve needs over and above what is expected of commercial stations, inasmuch as the educational broadcaster not only receives the benefits of the public spectrum but also is supported by general public funds, the rationale for which is providing special services to the community." Alabama Educational Television Commission, *supra*, at note 17.

\* \* \* With respect to the Coalition's complaint, the record shows that over a three-month period from November, 1973, to January, 1974, (about  $\frac{1}{4}$  of a year), WNET presented a lean and sporadic schedule of Spanish-oriented programming. The only such program presented on an almost weekly basis, "Realidades," was reduced in presentations later that season. Thus, where the educational and cultural needs of the million and one-half Hispanics, many of whom cannot even speak another language, should have been attended to nearly daily because of their great need, WNET is fortunate to be able to show barely one regular program a week so intended. Compare this niggardly apportionment of program time to the overwhelming amount of scheduling directed to the white intelligentsia. The comparison speaks, disparagingly, for itself. The manifest unreasonableness of these programming balances raises questions about WNET's bona fides and reasonableness calling for review.

Again, this is not to say that lofty, cultural programming is not properly within the province of public broadcasting. As I said at the outset, and not at all facetiously, I have enjoyed many of WNET's presentations. So too, do almost all of the minority citizens, Black, Yellow, Brown and White, and public interest group representatives

I've spoken to about public broadcasting. They agree that esoteric fare, spurned by the mass-targeted, privately-owned stations, belongs on public television because it is not mass-oriented. From its perpetually low ratings, it is evident that WNET's British drama, German music, French cuisine, and Russian ballet are of interest to a minimal portion of the television audience.

\* \* \*

By styling itself, preponderantly, as an electronic Harvard liberal arts course, public broadcasting has forsaken those less privileged and influential whose cultural and educational needs are far more on a "street academy" or community college scale. By aspiring to titillate the sensibilities and sensitivities of the twentieth century Renaissance man, it has overlooked the intellectual needs and sensitivities of that core of the population which, after years of third-rate education and cultural repression is just emerging from the chains of the eighteenth and nineteenth centuries. By disproportionately featuring the refinements of Western European heritage, it has slighted those whose heritage derives from Africa, Latin America and the Orient.

Public television, without the legal or moral right to do so, has become the Caucasian intellectual's home entertainment game. Its attitude toward the Council's lament of insufficient programming for Latinos is reflective of the disdain it has shown to many Black groups and others. It throws these disadvantaged people a few token bones and, aloofly, turns its back, wanting not to "mingle with the masses." Who then, if not public broadcasting whose very reason for being is its great alternative promise, will supplement the cultural and educational offerings of majority institutions? What media, if not "the people's television", will explain the complex social, financial and political intricacies of New York, the nation and this world? Does public television expect to continue to slough off these responsibilities, wholly or primarily, to commercial broadcasters?

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#### NOTES AND QUESTIONS

1. The questions put before the last case can be re-cast to reflect the legal issue presented in that case. In renewing a non-commercial broadcaster's license, what is the meaning of the "public interest" standard? First, is it to be different than it is for commercial licensees? If so, then second, in what way(s)? Would a non-commercial licensee that broadcast fare typical of a commercial network affiliate, but without commercials, meet the standard? Should non-commercial stations ascertain, and seek to serve, the "cultural" problems, needs, and interests of their communities? Shouldn't commercial licensees, also?

2. (a) Relative to Commissioner Hooks' charges of cultural elitism, consider who are the decision-makers among non-commercial licensees. The licensees themselves are generally either educational institutions or consortia of educational and cultural institutions. Their boards are composed of the heads of such organizations and the public-spirited citizens with an inclination, and the means, to serve selflessly. They are "community leaders" in the ordinary sense of the term.

(b) Consider also the fact that non-commercial stations typically receive a portion of their support by over-the-air solicitations—a subject to which we shall return. As a class, the likelier contributors are the more affluent, and it may not be unreasonable to view Commissioner Hooks as criticizing WNET for catering to those who support it financially through their contributions rather than the public at large who support it through their taxes.

3. In response to criticism of the Hooks variety, CPB in 1975 commissioned the Roper organization to conduct a survey of the public television viewing (PTV) audience. The report concluded that "the demographic characteristics of the PTV viewer parallel those of the total population 18 and over fairly closely. There is some tendency, however, among PTV viewers to have a somewhat higher proportion of families with young children, college education, and incomes over \$15,000." "A Fresh Look At the PTV Viewer," in CPB Focus on Research, No. 8, Feb. 2, 1976.

Far from settling the debate, however, this survey generated a spirited critique of its use of data, suggesting a substantial disproportionality in the educational, income, and occupational make-up of the PTV audience. See Farr, Ask a Silly Question, Pub. Television Rev., March/April, 1976, at 7.

4. As a first approximation in identifying the Congress' vision for non-commercial broadcasting, it may be significant that the Public Broadcasting Financing Act of 1975 provides \$1 in public matching funds for every \$2.50 the station raises.

## NONCOMMERCIAL NATURE OF EDUCATIONAL BROADCAST STATIONS

Federal Communications Commission, Dkt. No. 21136, 1977.  
42 Fed.Reg. 15,927, R.R. 53:129.

### NOTICE OF INQUIRY

1. \* \* \* In this proceeding we wish to inquire as to various activities engaged in by educational stations, such as announcements promoting the sale of products or services, underwriting credits, and over-the-air auctions. \* \* \*

### Announcements Promoting the Sale of Product or Service

3. The pertinent rules<sup>3</sup> prohibit the broadcast of announcements promoting the sale of a product or service on educational stations. We nonetheless receive complaints from time to time that educational stations have broadcast hard-sell advertising pitches for products or services.<sup>4</sup> On inquiry, we frequently receive responses indicating that the licensee believes that the broadcast of such announcements is appropriate because it received no payment for their broadcast and/or because the announcements promoted the sale of products or services offered by or for the benefit of nonprofit organizations. The lack of payment is not determinative under the rules. If the announcements "promote" the sale of a service, paid for or not, they are prohibited. We also find unpersuasive the contention that announcements for nonprofit organizations are exempt from the rules. Such announcements are contrary to our policy of avoiding "commercial clutter" on educational stations. Further, many nonprofit organizations (some concert or theatrical promoters, for example) engage in out-and-out commercial activity. It makes little sense to permit the promotion of their services on educational stations while prohibiting announcements promoting the activities of their profit-making counterparts.

4. On the other hand, an educational licensee may determine that the public interest would be served by advising its listeners or viewers as to upcoming events in the community. Many stations do broadcast "community bulletin boards" or similar programs or announcements briefly describing what entertainment or cultural activities are available in the area. We have no problem with such programs or announcements. The difficulty is segregating the "bulletin board" announcement from the hard-sell pitch. We are tentatively suggesting a prohibition against the broadcast of announcements that *directly* promote the sale of products or services, but permitting the broadcast of information that may indirectly promote their sale. \* \* \* Under this standard, an announcement that urged attendance and gave ticket prices would be prohibited. On the other hand, brief announcements would be permissible if limited to the dates, location and time, or advising how further information might be obtained. We recognize that such a standard leaves room for some licensee discretion,

3. Sections 73.503(d) (FM) and 73.621(e) (TV) of our rules.

4. For example:

I'm Jim Houston of the Cleveland Browns inviting you to the second annual Cleveland Classic. It's world championship tennis right here in Public Hall. April 9th through 15th. I may be a football pro, but I love to watch the great pros of tennis like

Rosewall and Ashe play for big stakes. Tickets from \$3.00 on sale at Richmans, Burrows, Severance Hall, and Mayflower Travel in Akron. Call 283-7178 for information about the great Cleveland Classic for the benefit of the Cleveland Orchestra. Don't miss this great pro tennis action. I think it's the second best game in town!

and that we may be called upon for rulings as to its applicability in specific cases. However, we believe that this standard would provide useful guidance. We seek comments on this matter \* \* \*.

5. The above standard approaches the problem generally. There are some specific areas that deserve additional comment. Many educational stations broadcast courses that can be taken for credit. We believe that such practices are entirely in keeping with providing an educational broadcast service, even though the payment of tuition is the "business" of the institution. However, announcements of upcoming courses and the purchase of books or supplies for the courses should be governed by our policy of avoiding "commercial clutter" and hard-sell pitches for the sale of those products. We have also received inquiries from educational broadcasters or their attorneys concerning announcements distributed by federal agencies or departments that may urge the purchase of documents from the Government Printing Office. Others have inquired as to whether it is appropriate to sell material related to the program, such as transcripts of public affairs programs. Finally, we have received inquiries concerning the propriety of using identified credit cards as a part of the station's over-the-air fund-raising activities. The concern expressed is that such announcements may promote the sale of the credit-card service. We seek comments on these matters.

6. It has also come to our attention that at least one educational station, during a fund-raising marathon, set up a remote origination point at a downtown store, and then urged listeners to come to the store, giving the location. It seems to us that such announcements directly promote that particular business and are inappropriate for a station limited to providing a noncommercial broadcast service. However, the licensee contended that the practice gave the station extra "visibility" during its marathon, which may have helped its fund-raising efforts. Although our initial reaction is negative, we seek comments in light of the possible economic impact on licensees that may regularly be engaging in this practice.

7. We have also received inquiries concerning the use of prizes on educational stations. These inquiries fall into two categories. The first is the use of prizes as an inducement to make larger donations. Thus, some stations will offer a certain book to anyone donating more than a specified amount. Our experience has been that such announcements have been limited to fund-raising purposes, and references to the product are reasonably related to a description of its value as a "prize." We find no abuse in these practices \* \* \*. The second category is the use of prizes in contests, usually to promote listenership but not part of a fund-raising program. Those examples we are aware of have been small prizes such as free meals or snacks at an identified restaurant, or similar prizes requiring the identity of the donor in order to describe its value as a prize. In our view, this seems

to be an exchange of the prize for a mention over the air, since the donation of the prize appears to be contingent on the over-the-air mention. We believe that a prohibition or some guidelines should be adopted in this area.

#### Underwriting Announcements

8. [Read the notes to § 73.621, at pp. 694–95, *infra*.]

9. We have received inquiries as to what constitutes a bona fide operating division or subsidiary within the meaning of the notes. It would appear that a case-by-case approach will be required due to the myriad arrangements that can be found between parent and subsidiary business entities. Factors such as whether there is a separate corporate charter, the degree of overlap of the officers and directors of the two entities, the maintenance of separate books, and whether the subsidiary includes in its own books a separate fund for advertising or public relations. However, we shall consider any suggestions that may be offered in providing guidelines in this area.

10. Under the notes, an underwriter of a program may be identified at the beginning and end of the program. We have been questioned as to the propriety of making the two announcements at the beginning and end of a five-minute program. We are tentatively thinking of modifying the rule to permit only one underwriting announcement for programs of less than one-half hour duration. However, before instituting a rulemaking proceeding on that point, we believe it appropriate to obtain comments as to the impact, if any, such a proposal might have.

11. The notes quoted above refer to the furnishing of programming or funds for their production. However, we are aware that many educational licensees receive gifts in kind, e. g., studio equipment, carpeting, records, recording tape, painting and other maintenance service. While these donations do not constitute “funds” for the production of programming, they clearly free other funds for programming purposes. We have some indication that in-kind donations provide substantial assistance to some educational licensees. We believe that the contributors of these products or services should be treated similarly to contributors of programs or funds for their production. Further, the identification of the in-kind contributor over the air may assist educational licensees in gaining additional support for their operations. However, the existing notes do not place any limits on the broadcast of such announcements, unlike program underwriting announcements. Thus, we seek to balance our interest in encouraging economic support for educational broadcasting with our concern over excess commercial-like clutter. [What guidelines should be adopted?]

### Auctions

13. It has been more than six years since we stated our intention to review the practice of conducting auctions. We believe that it is appropriate to do so now. We take official notice of the preliminary report of the Corporation for Public Broadcasting, "Summary of Financial Report of Public Television and Radio Licensee," CPB Report, Vol. VII, No. 31, October 25, 1976. The Report shows selected information as to expenditures and income, including auction income, for educational television stations. Income from auctions was \$10,000,000 (4.02 percent of total income) in fiscal year 1975, up from \$3,453,000 (3.45 percent) in 1970. These figures demonstrate that auctions were a small but significant source of income. We believe in light of this information that it would be inappropriate for us to take steps to eliminate them at this time.

14. Nonetheless, there are other matters raised in connection with auctions that we believe should be re-examined. Accordingly, we are asking for information concerning the number of times per year stations hold auctions, the number of days involved, and the format of the auction. As to the latter, we are specifically interested in whether stations suspend normal programming entirely to conduct the auction, or whether the auction is interspersed with normal programming. In the latter case, information as to the percent of the broadcast day devoted to auction purposes would be helpful.

15. Present policy permits an entity to "underwrite" a day of the auction. That is, in exchange for the payment of money, the underwriter's name and/or trademark can be visually displayed in the auction area or its name announced aurally. We seek information as to the percent of auction income that comes from underwriters. We note that at least one licensee has been defining an "underwriter" of an auction to include those providing goods or services of nominal value (e. g., coffee for those conducting the auction at the studio) in apparent exchange for a plug over the air. If we are to permit continuation of auction underwriting, it would appear appropriate to set some guidelines as to what constitutes an underwriter for the purpose of the rule. \* \* \*

### "Marathons" and Membership Drives

17. Many educational licensees raise funds by means other than auctions including "marathons" and membership drives. So that we can be fully informed, we are seeking information as to the duration and frequency of such activities, and, during their course, the percent of the broadcast day devoted to them. \* \* \*

18. Under our present rules, underwriters of auctions to raise funds may be identified over the air. There are no comparable guidelines for those entities that may provide support for station fund-raising.

ing activities other than auctions, such as membership drives or fund-raising "marathons." Accordingly, we seek comments on the following:

What guidelines should be adopted as to entities "underwriting" fund-raising activities other than auctions?

What, in these circumstances, constitutes an underwriter?

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#### NOTES AND QUESTIONS

- (a) Why should the Commission be concerned (§§ 3-4) with "announcements that *directly* promote the sale of products or services" so long as they are not made for compensation but presumably because the licensee believes they serve the listening or viewing public?

(b) On the other hand, the Commission is not troubled by advertisements for broadcast courses for which the licensee charges tuition, unless they are "hard-sell." Is the distinction of such courses from other direct sales promotion reasonable? Could the Commission constitutionally sanction a non-commercial broadcaster for using a "hard" rather than a "soft" sales approach?
2. Comment on the remote origination practice described in paragraph 6. (Where have we seen this before?)
3. What approach should the Commission take to the problem of licensees accepting donations of "small prizes" in exchange for a mention over the air? (§ 7) Should it set a minimum value on prizes that qualify for a donor plug? Is the Commission's concern here chiefly that licensees are selling their time for too low a price?
4. What can be done to control announcements concerning gifts in kind? (§ 11) Should a licensee use an explicit "rate card" relating the number of acknowledgements it makes to the value of the gift? Should it do the same for gifts of cash?
5. Comments filed by commercial broadcasters strongly condemn the use of frequent or extended fund-raising auctions and marathons on non-commercial stations. The NAB's filing reports that WNET (TV) pledge periods carried up to 48 minutes per evening of fund-raising appeals. WPBT (TV), Miami, defends its auctions as "something of a community talent show because it permits so many people and businesses some TV exposure." "It has become a popular program in its own right." Quoted in *Broadcasting*, July 25, 1977, at 80.
6. (a) Corporate "underwriting" of particular programs plays the largest role in funding public television—about 40% of revenues—and the availability of funding inevitably influences the choice of programs to produce. Naturally, corporate sponsors want to be acknowledged during or adjacent to programs that attract a relevant audience. Thus, the MacDonaldis Foundation has sponsored "Sesame Street";



and Mobil Oil Corporation tries to "get a hearing with opinion leaders" in choosing what to sponsor. Mobil Opens Good Will Umbrella, N.Y. Times, Nov. 19, 1975, at 63.

(b) In order to reach their intended audiences over public television, some corporate sponsors even advertise "their" program in newspapers and magazines, and on commercial stations that accept such ads. In order to advertise times in national media, these sponsors prefer to have their programs run simultaneously on all local stations, thus creating some incentive for public broadcasters to delegate their scheduling decisions to the Public Broadcasting Service (PBS)—their central association, which is interconnected like a network.

(c) PBS itself has begun encouraging members to adhere to a set schedule for programs, both to facilitate its own national advertising and to improve ratings by "counter-programming" against the commercial networks' competition. Brown, PBS Designs Fall Lineup to Complement Networks', N.Y. Times, May 10, 1976.

7. (a) Should non-commercial stations try to maximize their audience ratings? Or serve a special segment of the public? Or maximize their audience demographics in order to attract sponsors? WNET (TV) has as its goal reaching 10 percent of the total audience; its president has said that if it were "to achieve 20 percent [it] could be accused of diluting the mix." Brown, TV Station Chases Money and Ratings—It's Channel 13, N.Y. Times, Nov. 3, 1975, at 66. What does that mean?

(b) WNET's staff devoted to attracting corporate sponsors includes "several former network salesmen." *Id.*

8. Regardless of whether non-commercial broadcasting, or at least public television, is or was intended to be a cultural welfare program for the rich, or a new medium for advertising, we may rightfully inquire whether all of the resources dedicated to it are being used wisely, in comparison with their alternative uses. The next case raises this question.

### KQED, INC.

Federal Communications Commission, 1976.  
58 FCC 2d 751, 36 R.R.2d 1096.

1. The Commission has before it for consideration an unopposed petition for partial reconsideration of Memorandum Opinion and Order KQED, Inc., 57 FCC 2d 264 [35 R.R.2d 1243] \* \* \*.

2. To place this proceeding in proper perspective, a brief recitation of its background will be helpful. Licensee acquired Station KQEC-TV (Channel 32) from Metromedia, Inc., on September 17, 1970. Broadcasting operations began on June 28, 1971, but on

September 2, 1972, after receiving permission from the Commission, the station, due to unforeseen fiscal difficulties, was forced to suspend all programming. It has remained dark since that time. On August 1, 1974 licensee filed license renewal applications for its two television stations, KQED-TV and KQEC-TV. These applications were thereafter challenged by the Community Coalition for Media Change which charged, inter alia, that the license for Station KQEC-TV should not be renewed since it has failed to offer any programming whatsoever, contrary to commitments made when licensee acquired Channel 32. Subsequently, by Memorandum Opinion and Order, the Commission denied the petition as against KQED-TV and granted its renewal, but ordered licensee to resume operation of KQEC-TV on or before March 29, 1976. KQEC-TV's application was not renewed, but kept on deferred status. Contained in the order was a warning that a failure to comply "could result in dismissal of KQEC-TV's renewal application, cancellation of authorization, deletion of call letters or other appropriate sanction." While the Commission was disturbed by licensee's past failure to use the channel, its overriding concern was that the pending renewal application contained no firm plans to resume broadcasting. Thus, it appeared that Channel 32 would continue to lie fallow indefinitely, thereby imposing on the public an intolerable disservice. Now licensee has responded with the instant petition for partial reconsideration, requesting the Commission to allow KQEC-TV to remain off the air until January 2, 1977—nine months later than the March 29 deadline.

5. After careful consideration of licensee's request, we are persuaded that the circumstances here warrant the relief sought. Our decision is founded upon several factors. First, and perhaps most important, licensee has marshalled evidence that it would not be feasible for KQEC-TV to resume broadcasting before the end of this year. As licensee pointed out, a resumption of programming at an earlier date would put a strain on licensee's already shaky finances and possibly force a cutback in the service now offered on its other facilities. Licensee's revised programming proposal is another factor we have considered in reaching our decision. Originally, licensee proposed to use KQEC-TV primarily for instructional and educational offerings. However, during the interim between the filing of its license renewal application and now, licensee has determined that the public interest would be served by adding to these proposals a broader range of programming. Specifically, licensee has chosen to offer, in addition to the original instructional and educational proposals, programs designed to meet the needs of children, ethnic and racial minorities, women, the deaf and the elderly. These proposals appear meritorious and, when implemented, will offer special-interest programming to Bay Area residents.

6. For the reasons stated above, we shall modify our order by extending our original deadline from March 29, 1976 to January 2, 1977, as requested. \* \* \*

DISSENTING STATEMENT OF COMMISSIONER GLEN O.  
ROBINSON IN WHICH COMMISSIONER BENJAMIN L.  
HOOKS JOINS

\* \* \* The majority's patience for the licensee's failure to make use of this facility is, in my view, more charitable than wise. This permissive attitude merely compounds the problem raised by the Commission's toleration of duopoly ownership of noncommercial stations about which a brief word is appropriate.

Common ownership of two television stations serving "substantially the same area" was barred as long ago as 1941—ancient history so far as this industry is concerned. Subsequently the Commission exempted noncommercial educational stations from this stricture for reasons not known nor readily ascertainable.† \* \* \*

Of course, the merits of common ownership of noncommercial stations are before us here only incidentally and I do not suggest that we use this as the occasion for remaking general policy on this matter. But the unwisdom of the general policy of allowing such ownership deepens the error of allowing a jointly owned station to lie fallow.

† \* \* \* One possible explanation is that the Commission saw no particular danger in concentration of educational stations as these were expected to serve primarily as adjuncts of public and private educational systems and only secondarily were they to serve the general public. The Commission might have concluded that the question of concentrated control vel non of educational frequencies was thus essentially a question, not of federal communications policy but rather of local educational policy. Another explanation might be that duopoly was considered necessary to promote fledgling noncommercial stations—in much the same way that permitting AM-FM and AM-TV combinations were seen as a means of promoting FM and TV services in their infancies. On either of these possible explanations the time is overdue to rethink the issue. With regard to the first rationale "educational" broadcasting is no longer a specialized auxiliary of the educational system. In its present incarnation, it is intended to furnish a balanced program service to the general public. Diversification and nonconcentration of ownership policies underlying the Commission's duopoly rules would seem to be as applicable to such a service as to commercial broadcasting. As for the second rationale, one wonders what to make of it in connection with, for ex-

ample, the present case. What has duopoly done for KQEC-TV that commonplace poverty could not do as well? The station has been dark for over three years and intends to remain dark almost another year more. The licensee claims not to have sufficient cash to operate KQEC-TV as a broadcast service and indeed claims as one of the reasons for its embarrassment the financial demands of KQED-TV, the favored, sister station. Far from helping KQEC-TV, duopoly is a millstone around its neck.

The situation is not unique to San Francisco. In some nine cities in which two stations are now licensed to a single licensee (Boston, Chicago, Miami, Milwaukee, Minneapolis, Philadelphia, Pittsburgh, Richmond, San Francisco) three stations (KQEC-TV, WXXW-TV, Chicago; WUHY-TV, Wilmington) are dark and two others (WMVT-TV, Milwaukee, WLRN-TV, Miami) are on for very limited periods. It is possible, of course, that no other noncommercial entity would do more with such licenses. But it is certain that none would do less. And if no noncommercial entities would be forthcoming to operate these second outlets in place of the duopoly licensee, we ought to consider returning the frequencies to a commercial status, so that, even if they cannot be used as had originally been hoped, at least they will be used.

It is bad enough to license a single owner to operate two television stations in the same community; it is worse to tolerate one of the facilities being kept off the air entirely—occupying the resource, immobilizing it for use by another, and providing *nothing* instead.

The Commission is willing to waive years of nonperformance and waste on the strength of a promise that the deficiency will be corrected—next year. That promise is not good enough for me. Although, I am confident of the licensee's sincerity and good faith in making this promise, I think the time has passed for reliance on good faith alone.

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### NOTES AND QUESTIONS

1. (a) Is there a good reason to tolerate duopoly among non-commercial licensees (assuming that both facilities are used)? What is the effect on "diversity" in programing?\*

(b) Several states operate statewide networks of non-commercial stations. There is some inevitable overlap in their signal contours, but the Commission does not apply to them its general prohibition on such overlap among co-owned stations.

2. Where a non-commercial reserved channel is dark for an extended time, should the frequency be returned to commercial designation? Is the case for doing so stronger where the dark channel is part of a non-commercial duopoly? Could it practically be licensed for commercial operation only until such time as a qualified applicant appeared to re-claim it for non-commercial use? Wouldn't that be the case anyway, inasmuch as the non-commercial applicant's program proposal, in a comparative hearing on renewal of the commercial license, would prevail on "public interest" grounds?

## B. THE STRUCTURE OF PUBLIC BROADCASTING

### ACCURACY IN MEDIA, INC. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1975.  
521 F.2d 288.

BAZELON, Chief Judge.

Accuracy in Media, Inc. (AIM) filed two complaints with the FCC against the Public Broadcasting Service (PBS) concerning two programs distributed by PBS to its member stations. AIM alleged that the programs, dealing with sex education and the American system of criminal justice, were not a balanced or objective presentation of each subject and requested the FCC to order PBS to rectify the situation. The legal basis for AIM's complaints was the Fairness Doctrine and 47 U.S.C. § 396(g) (1) (A) (1970). On its initial hearing

\* These issues are now under consideration in Dkt. 78-165, Amendment of Multiple Ownership Rules to include

educational FM and TV Stations, R.R.Cur.Socce ¶ 53:203.

of the matter, the FCC concluded that the PBS had not violated the Fairness Doctrine and invited comments from interested parties on its authority to enforce whatever standard of program regulation was contained in § 396(g)(1)(A). AIM does not seek review of the Commission's decision on the Fairness Doctrine issue.

Section 396(g)(1)(A) is part of the Public Broadcasting Act of 1967, an act which created the Corporation for Public Broadcasting (CPB) and authorized it to fund various programming activities of local, non-commercial broadcasting licensees. Section 396(g)(1)(A) qualifies that authorization in the following language:

In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—

(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. \* \* \*

AIM contends that since the above-mentioned PBS programs were funded by the CPB, pursuant to this authorization, the programs must contain "strict adherence to objectivity and balance", a requirement AIM contends is more stringent than the standard of balance and fairness in overall programming contained in the Fairness Doctrine. AIM alleges that the two relevant programs did not meet this more stringent standard of objectivity and balance.

After consideration of the comments received on the matter, invited in its preliminary decision discussed above, the Commission concluded that it had no jurisdiction to enforce the mandate of § 396(g)(1)(A) against CPB. Having reached this result, the Commission thought it inappropriate to comment on what standard of program regulation was established by § 396(g)(1)(A) and whether that standard was more stringent than the Fairness Doctrine. \* \* \*

### *I. The Organization of Public Broadcasting in the United States*

Resolution of the issues raised by AIM's petition requires an understanding of the operation of the public broadcasting system. There are three tiers to this operation, each reflecting a different scheme of governmental regulation. The basic level is comprised of the local, noncommercial broadcasting stations that are licensed by the FCC and, with a few exceptions,<sup>7</sup> subject to the same regulations

7. See, e. g., 47 C.F.R. § 73.621 (1973) (qualification standards for noncommercial broadcasters and regulations pertaining to advertising); 47 U.S.C. §

399 (1970) (educational broadcasting stations prohibited from editorializing and required to keep tapes of controversial programs).

as commercial licenses. \* \* \* [T]he FCC has reserved exclusive space in its allocation of frequencies for such noncommercial broadcasters. Other than this specific reservation, noncommercial licenses are still subject to the same renewal process and potential challenges as their commercial counterparts.

\* \* \* The [Educational Television Facilities Act of 1962] added the element of government funding to public broadcasting by establishing a capital grant program for noncommercial facilities. This second level of the system was reorganized and expanded by the Public Broadcasting Act of 1967 which created the Corporation for Public Broadcasting (CPB). \* \* \* In setting up this nonprofit, private corporation, the Act specifically prohibited CPB from engaging in any form of "communication by wire or radio."

The third level of the public broadcasting system was added in 1970 when CPB and a group of noncommercial licensees formed the Public Broadcasting Service (PBS) and National Public Radio. The Public Broadcasting Service operates as the distributive arm of the public television system. As a nonprofit membership corporation, it distributes national programming to approximately 150 educational licensees via common carrier facilities. This interconnection service is funded by the Corporation (CPB) under a contract with PBS; in addition, much of the programming carried by PBS is either wholly or partially funded by CPB. National Public Radio [NPR] provides similar services for noncommercial radio. In 1974, CPB and the member licensees of PBS agreed upon a station program cooperative plan<sup>14</sup> to insure local control and origination of noncommercial programming funded by CPB. Though PBS is the national coordinator under this scheme, it is not a "network" in the commercial broadcasting sense, and does not engage in "communication by wire or radio," except to the extent that it contracts for interconnection services.

## II. *FCC Jurisdiction Over the Corporation for Public Broadcasting*

With the structure of the public broadcasting system in view, we turn to AIM's contention that the FCC should enforce the mandate of § 396(g)(1)(A) against the CPB. Since the Section is clearly directed to the Corporation and its programming activities, we have no doubt that the Corporation must respect the mandate of the Sec-

14. The Station Program Cooperative (SPC) is a unique concept in program selection and financing for public television stations. Though the idea of public television as a "fourth network" had been proposed at various times, the 1974 plan reversed this trend toward centralization. Under the SPC, certain programming will be

produced only if the individual local stations decide together to fund the production. The local licensees will be financed through the CPB and other sources \* \* \*. The aim of this cooperative is to reinforce the existing licensee responsibility for programming discretion. \* \* \*

tion. However, we conclude that nothing in the language and legislative history of the Federal Communications Act or the Public Broadcasting Act of 1967 authorizes the FCC to enforce that mandate against the CPB.

Section 398 of the Communications Act expresses the clear intent of Congress that there shall be no direct jurisdiction of the FCC over the Corporation. That section states that nothing in the 1962 or 1967 Acts "shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors \* \* \*." Since the FCC is obviously an "agency \* \* \* of the United States" and since any enforcement of § 396(g)(1)(A) would necessarily entail "supervision" of the Corporation, the plain words of subsection (2) preclude FCC jurisdiction. We decline to rely entirely on the literal meaning of § 398, however. Section 399 of the 1967 Act, as amended in 1973, is contrary to the § 398 prohibition in that it mandates "supervision" of noncommercial licenses and contemplates FCC enforcement.<sup>16</sup> The conflict between § 398 and § 399 creates at least an ambiguity which casts a cloud on the literal meaning of § 398. To resolve any doubts created thereby, we look to the legislative history of the 1967 Act for extrinsic evidence of its meaning.

Congress desired to establish a program funding agency which would be free from governmental influence or control in its operations. Yet, the lawmakers feared that such complete autonomy might lead to biases and abuses of its own. The unique position of the Corporation is the synthesis of these competing influences. Reference to the legislative history of the 1967 Act shows a deep concern that governmental regulation or control over the Corporation might turn the CPB into a Government spokesman. Congress thus sought to insulate CPB by removing its "programming activity from governmental supervision." \* \* \*

In addition to this legislative history and the aforementioned prohibition contained in § 398, we note that any FCC jurisdiction over the CPB would constitute a radical extension of the FCC's basic jurisdictional grant. The jurisdictional provisions of the Communications Act limit FCC regulation to "interstate and foreign communication by wire or radio." The Corporation for Public Broadcasting is expressly forbidden to engage in such activities. \* \* \* No case has ever permitted, and the Commission has never, to our knowledge, as-

16. Section 399 prohibits noncommercial licensees from political editorializing and requires them to keep tapes

of controversial programming. This requirement implies a supervisory role for the FCC over the record-keeping.

serted jurisdiction over an entity not engaged in "communication by wire or radio."

Petitioner's reliance upon FCC jurisdiction over cable television franchises to support its jurisdictional claim is misplaced. Jurisdiction over CATV was expressly predicated upon a finding that the transmission of video and aural signals via the cable was "interstate \* \* \* communication by wire or radio." Further, assertions of "jurisdiction" over networks are really no more than claims of expansive authority over the owned or affiliated individual licensees. In no case has the FCC taken direct jurisdiction over a network; in any event, CPB cannot be considered a network. In view of these prevailing limits, we will not presume that Congress meant by § 396 (g) (1) (A) to radically alter the jurisdictional base of the FCC absent a clear statement to that effect.

AIM maintains that this view of FCC jurisdiction to enforce § 396(g) (1) (A) renders the Section nugatory and hence ignores the Congressional sentiment that biases and abuses within the public broadcasting system should be controlled. We do not view our holding on the FCC's jurisdiction as having that effect. Rather, we take notice of the carefully balanced framework designed by Congress for the control of CPB activities.

The Corporation was established as nonprofit and non-political in nature and is prohibited from owning or operating "any television or radio broadcast station, system or network, community antenna system, or interconnection, or production facility." Numerous statutory safeguards were created to insure against partisan abuses.<sup>28</sup> Ultimately, Congress may show its disapproval of any activity of the Corporation through the appropriation process. This supervision of CPB through its funding is buttressed by an annual reporting requirement. Through these statutory requirements and control over the "purse-strings," Congress reserved for itself the oversight responsibility for the Corporation.

A further element of this carefully balanced framework of regulation is the accountability of the local noncommercial licensees under established FCC practice, including the Fairness Doctrine in particular. This existing system of accountability was clearly recognized in the 1967 legislative debates as a crucial check on the power of the CPB. \* \* \*

The framework of regulation of the Corporation for Public Broadcasting we have described—maximum freedom from interference with

28. Other statutory checks on the Corporation include: restricting the Board membership to no more than eight out of fifteen members from the same political party, § 396(c)(1). The composition of the Board was an im-

portant issue during debate and the decision to make the Board bi-partisan was a significant addition to the original Carnegie Commission proposal. \* \* \*



programming coupled with existing public accountability requirements—is sensitive to the delicate constitutional balance between the First Amendment rights of the broadcast journalist and the concerns of the viewing public struck in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). There the Supreme Court warned that “only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters” will governmental interference with broadcast journalism be allowed. The Court on the basis of this rule rejected a right of access to broadcast air time greater than that mandated by the Fairness Doctrine as constituting too great a “risk of an enlargement of Government control over the content of broadcast discussion of public issues.”

It is certainly arguable that FCC application of the standard—whatever that standard may be—of § 396(g)(1)(A) could “risk [an] enlargement of Government control over the content of broadcast discussion of public issues” in the following two ways: whereas the existing Fairness Doctrine requires only that the presentation of a controversial issue of public importance be balanced in *overall* programming, § 396(g)(1)(A) might be argued to require balance of controversial issues within each individual program. Administration of such a standard would certainly require a more active role by the FCC in oversight of programming. Furthermore, whereas the FCC has at present carefully avoided anything but the most limited inquiry into the factual accuracy of programming, § 396(g)(1)(A) by use of the term “objective” could be read to expand that inquiry and thereby expand FCC oversight of programming. Both of these potential enlargements of government control of programming, whether directed against the CPB, PBS or individual noncommercial licensees, threaten to upset the constitutional balance struck in *CBS*. We will not presume that Congress meant to thrust upon us the substantial constitutional questions such a result would raise. We thus construe § 396(g)(1)(A) and the scheme of regulation for public broadcasting as a whole to avoid such questions.

Our view of § 396(g)(1)(A), as colored by the constitutional misgivings just expressed, does not presume the Section to be superfluous. Rather we view the provision as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire. The provision is not a substantive standard, legally enforceable by agency or courts. \* \* \* We leave the interpretation of this hortatory language to the Directors of the Corporation and to Congress in its supervisory capacity. We hold today only that the FCC has no function in this scheme of accountability established by § 396(g)(1)(A) and the 1967 Act in general other than that assigned to it by the Fairness Doctrine. \* \* \*

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## NOTES AND QUESTIONS

1. Non-commercial broadcasters do not have to affiliate with PBS or NPR, and many have not done so—particularly on the radio side. Conversely, affiliates of these CPB distribution services must be non-commercial licensees.
2. (a) Since non-commercial broadcasters are subject to the fairness doctrine, does it matter that the FCC has no enforcement role under § 396(g) (1) (A), which applies by its term to CPB? Does the requirement of “strict adherence to objectivity and balance in all programs or series of programs of a controversial nature” impose any greater obligation on CPB than the fairness doctrine imposes on individual licensees? See Note, “Balance and Objectivity” in *Public Broadcasting: Fairer than Fair?* 61 Va.L.Rev. 643 (1975).  
(b) Recall the objection raised by the Court in *CBS* that a private right of paid access to broadcast time might enable the affluent to “determine in large part the issues to be discussed.” Is it equally a hazard that CPB, as to which “Congress reserved for itself the oversight responsibility,” may set the agenda for discussion of public affairs on non-commercial radio and television? Is the court using words in a Pickwickian sense when it describes CPB as “non-political in nature” in the same paragraph in which it details the instruments for congressional oversight of it?
3. (a) Relations between PBS and CPB deteriorated during the Nixon Administration, as station managements came to suspect that the Corporation, “which was supposed to insulate the system from the influence of its Federal funding source, was in fact proposing programs and policies that were consistent with the wishes of the Administration”—such as its proposals that PBS stations carry 21 hours of the Apollo 17 moon walks and downplay public affairs programming. In April, 1973 the chairman of CPB resigned, charging that White House aids tried to influence members of the board. Brown, Senate Hearings on Nomination of Coors Raise Grave Questions About Public Broadcasting Once Again, *N. Y. Times*, Sept. 19, 1975, at 62.  
(b) As a result, the CPB–PBS relationship was redefined in their so-called “partnership agreement” of May 31, 1973. It provided, in part: “Should there be any conflict of opinion as to balance and objectivity of any programs \* \* \* either group can appeal to a monitoring committee consisting of three CPB trustees and three PBS trustees. It will take four votes of this committee to bar a program’s access to the interconnection.” *Pub. Telecom. Rev.*, August, 1973, at 49.  
(c) Also in 1973, certain public television viewers and individuals who have written, directed, and produced public television programs sued CPB, PBS, and Clay T. Whitehead, Director of the White House Office of Telecommunications Policy, alleging that CPB and PBS, with

Whitehead's encouragement, eliminated funding for controversial programs, prescreened and censored programs, and issued warnings to local stations about particular programs they considered controversial. Plaintiffs sought an injunction and damages under the Public Broadcasting Act and the first amendment. Held: for the reasons assigned in *AIM*, the Act does not contemplate a private right of action to enforce the policies of Sections 396 and 398. *Network Project v. CPB*, 561 F.2d 963 (D.C.Cir. 1977). Should an action lie directly under the first amendment? If so, would that upset the congressional allocation of authority over CPB, as explicated in *AIM* and relied upon again in the statutory phase of *Network Project*?

**COMMUNITY SERVICE BROADCASTING OF  
MID-AMERICA, INC. v. FCC**

United States Court of Appeals, District of Columbia Circuit, 1977,  
— F.2d —, rehearing en banc granted.\*

WRIGHT, Circuit Judge:

This case involves a challenge by a number of noncommercial educational broadcast stations to the constitutionality of Section 399(b) of the Communications Act, and the rules promulgated thereunder by the Federal Communications Commission, Report and Order, Docket 19861, 57 FCC 2d 19 [35 R.R.2d 1154] (1975). \* \* \*

Section 399(b) and the rules implementing it require all noncommercial radio and television stations which receive any federal funding to make audio recordings of all broadcasts "in which any issue of public importance is discussed." The licensee, or in the case of programs supplied by a network or other entity the supplying entity, must retain a copy of the recording for 60 days and must provide copies at cost to any person requesting them. After receiving a request for a copy, including advance payment, the licensee has seven days, and designated entities 21 days, to provide a copy.

The legislative history of Section 399(b) reveals that a primary—if not the only—purpose of the legislation was to allow for congressional review of the contents of noncommercial broadcasts. This objective is clearly stated in the only extended discussion of the purpose of the legislation, a colloquy between Senator Griffin, a member of the Senate Subcommittee on Communications, and Mr. Hartford Gunn, then president of Public Broadcasting Service. Senator Griffin, who had previously been rebuffed in an attempt to secure a tape of a public television program dealing with the antiballistic missile which he had heard was "biased and unbalanced," took issue with the policy of making tapes available only to persons with proper journalistic or research credentials. In explaining the purpose of the legislation he twice referred to it as an alternative to "Government censorship of your programs." \* \* \* The relationship between the recording requirement and Government censorship was noted in the House de-

\* See Postscript, *infra* at p. 661 ¶ 4.

bates as well. Representative VanDeerlin observed: "Of course, no commercial broadcaster is saddled with this requirement—it comes dangerously close to censorship. For this reason, I must point out that as far as I am concerned the provision in question is in no way a 'hunting license' for the federal government. Rather, it is a house-keeping device, which I anticipate will be rarely if ever used."

It is true, of course, that Congress is responsible for appropriating funds for distribution to noncommercial stations and, in so doing, may take account of the extent to which the Corporation for Public Broadcasting is meeting its statutory mandate of "objectivity and balance." See *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 294 (D.C. Cir. 1975). But this oversight function has never been thought to encompass sporadic review by congressmen or the FCC of the contents of particular programs. Indeed, the entire system of appropriations in this area was intentionally structured so as to avoid any congressional interference with programming: once funds are allocated to the Corporation, Congress has no control over their ultimate distribution and use.

Moreover, attempts to allow private citizens or the FCC to enforce consistency of individual programs with the general statutory mandate of objectivity have been rejected by both the Commission and this court. See *The Network Project v. Corp. for Public Broadcasting*, 561 F.2d 963 (D.C.Cir. 1977); *Accuracy in Media, Inc. v. FCC*, supra, 521 F.2d at 296–297. As a result, whether one characterizes Section 399(b) as a "hunting license" or a "housekeeping device," the fact remains, as Senator Griffin's remarks make clear, that it was intended and expected to serve as a means for unprecedented government review—in effect, government censorship—of the specific contents of programs broadcast by noncommercial stations.<sup>5</sup> Viewed in these terms, the statute and regulations are grounded on a governmental objective which is not only neither "compelling," see *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), nor "substantial," see *United States v. O'Brien*, 391 U.S. 367, 377 (1968), but is itself impermissible, see *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270 (1964).

5. \* \* \* Self-censorship caused by fear of government disapproval, because of its subtle nature, is perhaps the most pernicious form of government infringement of First Amendment freedoms, and is deserving of the most careful scrutiny. As a result, the danger posed by the recording requirement cannot—as Judge Leventhal would have it—be viewed in terms of any actual instances of harassment or direct censorship; it must also include the effect on the programming of noncommercial broadcasters created by the potential for

censorship \* \* \*. And the fact that the access provision of the recording requirement has rarely been resorted to in the past three years, may well be the most telling evidence of its success in chilling controversial public interest programming by non-commercial broadcasters. In any event, we need not attempt to quantify this chill in precise terms, for the fact remains that a statute whose purpose is to limit First Amendment freedoms is not saved by any lack of success it has achieved in doing so.

This is not to say that recording and access provisions could not conceivably be grounded on any legitimate governmental objective. But given the absence of similar regulation of commercial stations, such alternative objectives cannot sustain the statute and regulations at issue here against a Fifth Amendment equal protection challenge. For the distinction between the requirements imposed on commercial and noncommercial stations is not even relevant to any legitimate government interests, let alone sufficiently supported to meet the strict scrutiny appropriate where First Amendment rights are implicated.

Thus the Commission's claim in its response to remand that "one purpose" of the statute is "to give taxpayers, who provide the bulk of financial support for these stations, a means for reviewing the stations' performance" inevitably falters on equal protection grounds. For the fact is that public support is not limited to noncommercial stations; by providing and policing the exclusive channels and frequencies of commercial stations, the Government—and thus the taxpayers—provide a benefit to commercial stations which in all likelihood is many magnitudes larger than any benefits provided to noncommercial stations. If recording and access requirements are to be imposed on this basis, they must be applied to all stations. A similar conclusion must be reached with respect to any claim that these provisions are justified as a means of facilitating the responses secured by the fairness doctrine. Since that doctrine is equally applicable to commercial and non-commercial stations, requirements predicated on compliance with it cannot constitutionally be imposed, as they have been here, only upon noncommercial stations.

Because we are unable to find any legitimate governmental interest served by these provisions which does not at once fail on equal protection grounds, Section 399(b) and the rules promulgated there under must be found unconstitutional.

So ordered.

LEVENTHAL, Circuit Judge, dissenting:

\* \* \* [W]hen providing public funding for activities, Congress may constitutionally require information as to what is being done with those (public) funds, even though the same information is not required of institutions that do not receive public funds.

\* \* \*

For me the nub of the case is the contention that the requirement of keeping a temporary recording is either disguised censorship or a wedge for censorship. The majority quotes some statements of legislative sponsors of the measure. These sponsors said they were trying to avoid censorship, and wished only to provide a mechanism whereby members of the public who have questions to raise about a broadcast may obtain an authentic copy.

\* \* \*

The FCC is of the view that no less burdensome means could be devised for informing the public. The case does not involve the kind of fine tuning that the Supreme Court has used in other First Amendment cases, invalidating one measure by restricting Congress to less burdensome means of satisfying the pertinent interest.

I do not dispute the First Amendment violations warrant could intervention on a lesser showing than might be required for some other kind of constitutional claim. But here there has been no showing of any use, let alone substantial use, of the power to request recordings. The possibility that this may reflect an active self-censorship is abstract. There is no testimony that this has happened: no account by a person who either is or was a manager, staff person, or counsel for a licensee that a station was influenced in the designing of a public affairs program by the possibility that a tape would be requested.

Abstraction can make any claim loom large, but in this case it seems likely that there has been much ado about little. I have no doubt that it is pesky to keep these recordings available, and that a sense of grievance arises when the commercial licensees are excused. The difference in treatment does not rise to the level of invidious discrimination or denial of equal protection. There is frequently a greater reporting burden on those who come to the public till.

Congress has made clear that in providing aid to noncommercial licensees, it has a high objective: to "facilitate the full development of educational broadcasting" with "programs of high quality" and "strict adherence to objectivity and balance in all programs \* \* \* of a controversial nature." As this court has noted, realization of this objective calls for "oversight" by Congress, which acts "in its supervisory capacity."<sup>4</sup> Congress may show any disapproval "through the appropriation process," and it may draw on information generated by "reporting requirements." And as this court has only recently pointed out, without disapproval, Congress's retention of exclusive oversight responsibility anticipated "that citizen participation through the political process would assist Congress in its oversight function."<sup>6</sup> Reporting and recordkeeping requirements to aid "interested citizens" and Congress in performing this function is totally different from advance registration or bureaucratic monitoring of programming, especially since the ultimate sanction that is contemplated is only a funding reduction through the annual legislative appropriations process.

It is well to be wary of chills, but not to the point of hypochondriasis. In foreglimpsing the impact of the tapekeeping require-

4. *Accuracy in Media, Inc. v. FCC*, [supra].

6. *Network Project v. Corporation for Public Broadcasting*, \* \* \* ac-

knowledged that the House committee report on the Act expressly assumed that the objectives of the Act would be "constantly safeguarded by interested citizens."

ment under review, one must bear in mind that the licensee has a duty to present public affairs broadcasts, and beyond that a duty to present broadcasts of a controversial nature that fairly reflect differing views. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110-14 [27 R.R.2d 907] (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377-86 [16 R.R.2d 2029] (1969). Fulfillment of these composite duties reduces the likelihood of provoking criticism, even from zealots, and provides an answer to the occasional blast that may be an inescapable hazard of broadcasting. If the "chill" theory were pressed to the full, it would undercut the constitutionality of the fairness doctrine. When the Supreme Court upheld the constitutionality of that doctrine, it rejected the chill claim as abstract and insubstantial, in short as speculative. \* \* \* The majority, as I see it, is engaging in the type of speculation shunned in *Red Lion*.

In my view, the court should give a provisional approval to the legislation subject to reconsideration in light of experience. If experience shows that this requirement leads to harassment or such intensive scrutiny of the noncommercial licensee as to be tantamount to censorship, or to veer strongly in that direction, then a regulation neutral on its face may be shown to be invalid in the light of experience. \* \* \*

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#### NOTES AND QUESTIONS

1. Is the court correct in stating that the recording requirement imposed only upon non-commercial stations is not "even relevant to any legitimate government interests"?
2. (a) The court sees a denial of "equal protection" in this distinction between commercial and non-commercial stations because, it says, they are treated differently although similarly situated as beneficiaries of governmental benefits. Would the reporting requirement be constitutionally unobjectionable if applied to commercial and non-commercial stations alike? Could the Congress constitutionally direct, say, the Library of Congress to record only non-commercial stations' public affairs programs, perhaps on a home video tape recorder, and to make them available to the public for 60 days?  
(b) If the difference between receipt of a broadcasting license, on the one hand, and a license plus funds for controversial programs, on the other, is not relevant to the recording requirement, would it be powerful enough to support the Section 399 prohibition on editorializing by non-commercial licensees? What "compelling" governmental objective does it serve?
3. (a) The requirement of "reasonable access" for federal election candidates, Section 312(a)(7) of the Communications Act, applies equally to commercial and non-commercial stations. Senator James

F. Buckley, 63 FCC2d 952, 38 R.R.2d 1255 (1976). Within the non-commercial group, however, only those on channels dedicated to non-commercial use—which are basically those on UHF—are prohibited from charging for the time they must make available.

(b) Commissioner Fogarty has lamented (but conceded) the application of Section 312(a)(7) to non-commercial licensees “in light of the unique dependence of public broadcasting on federal funding and the corollary objective of insulating [it] from extraneous interference or control.” *The Labor Party*, 42 R.R.2d 307 (1978). Are the Commissioner’s concerns warranted?

(c) Non-commercial broadcasters have expressed different sorts of apprehensions over the *Buckley* decision—that their stations will become just “another busy outlet for packaged political messages during campaign seasons,” and that without a market to measure by they cannot tell how much time on their stations is “reasonable.” *Wall Street Journal*, Aug. 8, 1976, at 10.

4. *Postscript to Community Service Broadcasting*. The court of appeals en banc, per Wright, C. J., adhered (5–4) to the reasoning and result of the panel decision *supra*. Judges Wright and Wilkey were of the view that Section 399(b) was invalid under first amendment as well as under the equal protection principle of the fifth amendment. Slip op. (D.C.Cir. Aug. 25, 1978).

#### NOTES ON THE FUTURE OF PUBLIC BROADCASTING

1. (a) Are there superior alternative methods for funding public broadcasting stations? Several methods have been proposed, some of them reminiscent of the early proposals for financing the radio industry. They include taxes on commercial broadcasting’s advertising revenues, or profits, or on the sale or use of television and radio receivers; increased appropriations from general tax revenues of the government; allowing some outright advertising on public stations, perhaps during restricted hours. What are the appropriate criteria for evaluation of these ideas?

(b) Are there better ways of organizing public broadcasting? E. g., publicly-subsidized programs could be offered on STV channels only; or a public programing entity could produce programs and purchase time on commercial stations for their presentation. Are there useful analogies in other areas of governmental support for cultural activities? For example, public education is produced directly by the government or government authorities, such as public universities, but support for the performing arts is by grants to private producing companies rather than by government production or grants to the distributors (theatres). Was the creation of the CPB the best approach? What dangers inhere in the creation of a public au-



thority for the mass dissemination of information and ideas? How can they best be avoided? \*

2. The Carter Administration has proposed legislation to amend the Public Broadcasting Act. H.R. 11,100, 95th Cong., 2d Sess. (1978) would reduce the number of presidential appointees on the CPB board from 15 to 11, replacing them with two members each from NPR and PBS; authorize appropriations through 1985; direct an increase in CPB's spending for national programing procured from other entities, while removing it from individual program decisions; increase the matching fund ratio from \$1:2.50 to \$1:2.25; and limit the editorial ban of Section 399 to those stations licensed to government agencies. (The bill would also substitute the term "public" broadcasting for "non-commercial" and "educational" broadcasting throughout the Act.)

The Administration wants to defer proposing an alternative funding mechanism—independent of the annual appropriation process—until it receives the report of the new Carnegie Commission on the Future of Public Broadcasting, which is due early in 1979.

\* For a proposal that CPB and PBS be divested of all editorial power; that funds be distributed by CPB directly to local public television stations, which could pool them for program production; and that PBS provide an

interconnection service with no control over the content of its transmissions, see Chase, *Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution*, 9 *U.Mich.J.L. Reform* 62 (1975).

## APPENDIX A

### COMMUNICATIONS ACT OF 1934—Selected Provisions

#### Title I—General Provisions

47 U.S.C. §§ 151 et seq.

#### PURPOSES OF ACT; CREATION OF FEDERAL COMMUNICATIONS COMMISSION

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

#### APPLICATION OF ACT

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided \* \* \*.

#### DEFINITIONS

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this Act.

## APPENDIX

- (d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.
- (h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.
- (i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.
- (j) "Corporation" includes any corporation, joint-stock company, or association.
- (k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.
- (o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.
- (p) "Chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.
- (cc) "Station license," "radio station license," or "license" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio by whatever name the instrument may be designated by the Commission.
- (dd) "Broadcast station," "broadcasting station," or "radio broadcast station" means a radio station equipped to engage in broadcasting as herein defined.
- (ee) "Construction permit" or "permit for construction" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

## PROVISIONS RELATING TO THE COMMISSION

SEC. 4. (a) The Federal Communications Commission (in this Act referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

## Title III—Provisions Relating To Radio

47 U.S.C. §§ 301 et seq.

## PART I—GENERAL PROVISIONS

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION  
OF ENERGY

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio \* \* \* (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) \* \* \* to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State. \* \* \* except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

## GENERAL POWERS OF THE COMMISSION

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

- (a) Classify radio stations;
- (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
- (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;
- (d) Determine the location of classes of stations or individual stations;
- (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public. [See Sec. 330.]

#### WAIVER BY LICENSEE

SEC. 304. No station license shall be granted by the Commission until the applicant therefore shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

#### GOVERNMENT-OWNED STATIONS

SEC. 305. (a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this Act. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. \* \* \*

## ALLOCATION OF FACILITIES; TERM OF LICENSES

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years \* \* \* and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, \* \* \* if the Commission finds that public interest, convenience, and necessity would be served thereby. \* \* \* Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. \* \* \*

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

## APPLICATIONS FOR LICENSES

SEC. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it \* \* \*.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station \* \* \*; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. \* \* \*

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS  
ATTACHED TO LICENSES

SEC. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with

## APPENDIX

it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting \* \* \* services \* \* \*

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license \* \* \*.

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing. \* \* \* The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that a grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. \* \* \* The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant \* \* \*.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act \* \* \*.



## LIMITATION ON HOLDING AND TRANSFER OF LICENSES

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

- (1) Any alien or the representative of any alien;
- (2) Any foreign government or the representative thereof;
- (3) Any corporation organized under the laws of any foreign government;
- (4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by [any of the above].

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

SPECIAL REQUIREMENTS WITH RESPECT TO CERTAIN  
APPLICATIONS IN THE BROADCASTING SERVICE

SEC. 311. (a) When there is filed with the Commission any application to which section 309(b)(1) applies, for an instrument of authorization for a station in the broadcasting service, the applicant—

- (1) shall give notice of such filing in the principal area which is served or is to be served by the station; and
- (2) if the application is formally designated for hearing in accordance with section 309, shall give notice of such hearing in such area at least ten days before commencement of such hearing.

The Commission shall by rule prescribe the form and content of the notices to be given in compliance with this subsection, and the manner and frequency with which such notices shall be given.

(c) (1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

(4) For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

#### ADMINISTRATIVE SANCTIONS

SEC. 312. (a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;  
or

(6) for violation of section 1304 [Broadcasting lottery information], 1343 [Fraud by wire, radio, or television], or 1464. [Broadcasting obscene, indecent, or profane language] of title 18 of the United States Code; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase or reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.\*

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. \* \* \*

#### APPLICATION OF ANTITRUST LAWS; REFUSAL OF LICENSES AND PERMITS IN CERTAIN CASES

SEC. 313. (a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease \* \* \*.

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

\* See also Campaign Communications Reform Act (Title I of the Federal Election Campaign Act of 1971), Pub-

lic Law 92-225, approved February 7, 1972.

## FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

SEC. 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any

- (1) bona fide newscast,
- (2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) For the purposes of this section:

(1) The term "broadcasting station" includes a community antenna television system; and

(2) The terms "licensee" and "station licensee" when used with respect to a community antenna television system, mean the operator of such system.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

ANNOUNCEMENT WITH RESPECT TO CERTAIN MATTER  
BROADCAST

SEC. 317. (a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

CONSTRUCTION PERMITS

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station \* \* \* unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character,

and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station \* \* \*, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. \* \* \*

(b) Such permit for construction \* \* \* shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309(a), (b), (c), (d), (e), (f), and (g) shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

#### REBROADCASTING

SEC. 325. (a) \* \* \* [N] or shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

#### CENSORSHIP

SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

#### PROHIBITION AGAINST SHIPMENT OF CERTAIN TELEVISION RECEIVERS

SEC. 330. (a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant

to the authority granted by that paragraph: *Provided*, That this section shall not apply to carriers transporting such apparatus without trading in it.

#### Title IV—Procedural and Administrative Provisions

##### JURISDICTION TO ENFORCE ACT AND ORDERS OF COMMISSION

SEC. 401. (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. \* \* \*

SEC. 402. (a) [Provides that any proceeding to review an order of the Commission not appealable under Sec. 402(b) is within the exclusive jurisdiction of the courts of appeal, venue to lie in the circuit in which the filing party resides or has his principal office, or in the D. C. Circuit.]

(b) [Provides that appeals from licensing decisions and cease and desist orders may be taken to the D. C. Circuit Court of Appeals.]

#### Title V—Penal Provisions—Forfeitures

47 U.S.C. §§ 500 et seq.

##### CRIMINAL PENALTIES

SEC. 501. [Provides a criminal penalty for willful and knowing violation of the Act insofar as no penalty, other than forfeiture, is elsewhere provided by the Act.]

SEC. 502. [Provides a lesser criminal penalty for each day of willful and knowing violation of any Commission rule or regulation.]

##### FORFEITURES

SEC. 503. \* \* \*

(b) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certifi-

cate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this Act; or

(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act \* \* \*.

(2) The amount of any forfeiture penalty determined under this subsection shall not exceed \$2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice or the notice of apparent liability issued under this subsection, shall not exceed—

(A) \$20,000, if the violator is (i) a common carrier subject to the provisions of this Act, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or

(B) \$5,000, in any case not covered by subparagraph (A). \* \* \*

#### PROVISIONS RELATING TO FORFEITURES

SEC. 504. (a) The forfeitures provided for in this Act \* \* \* shall be recoverable in a civil suit in the name of the United States \* \* \* ; *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo \* \* \*.

#### DISCLOSURE OF CERTAIN PAYMENTS

SEC. 508. (a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter



which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d), an announcement is not required to be made under section 317.

(e) The inclusion in the program of the announcement required by section 317 shall constitute the disclosure required by this section.

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than \$10,000 or imprisoned not more than one year, or both.

#### PROHIBITED PRACTICES IN CASE OF CONTESTS OF INTELLECTUAL KNOWLEDGE, INTELLECTUAL SKILL, OR CHANCE

SEC. 509. (a) It shall be unlawful for any person, with intent to deceive the listening or viewing public—

(1) To supply to any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined.

(2) By means of persuasion, bribery, intimidation, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined.

(3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

(4) To produce or participate in the production for broadcasting of, to broadcast or participate in the broadcasting of, to offer to a licensee for broadcasting, or to sponsor, any radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance constituting any part of such program, any person has done or is going to do any act or thing referred to in paragraph (1), (2), or (3) of this subsection.

(5) To conspire with any other person or persons to do any act or thing prohibited by paragraph (1), (2), (3), or (4) of this subsection, if one or more of such persons do any act to effect the object of such conspiracy.

(b) for the purposes of this section—

(1) The term “contest” means any contest broadcast by a radio station in connection with which any money or any other thing of value is offered as a prize or prizes to be paid or presented by the program sponsor or by any other person or persons, as announced in the course of the broadcast.

(2) The term “the listening or viewing public” means those members of the public who, with the aid of radio receiving sets, listen to or view programs broadcast by radio stations.

(c) Whoever violates subsection (a) shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

## PUBLIC BROADCASTING ACT

47 U.S.C. §§ 396 et seq.

## CORPORATION FOR PUBLIC BROADCASTING

## CONGRESSIONAL DECLARATION OF POLICY

SEC. 396. (a) The Congress hereby finds and declares—

(1) that it is in the public interest to encourage the growth and development of noncommercial educational radio and television broadcasting including the use of such media for instructional purposes;

(4) that it furthers the general welfare to encourage noncommercial educational radio and television broadcast programming which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence;

(6) that a private corporation should be created to facilitate the development of educational radio and television broadcasting and to afford maximum protection to such broadcasting from extraneous interference and control.

## CORPORATION ESTABLISHED

(b) There is authorized to be established a nonprofit corporation, to be known as the "Corporation for Public Broadcasting," which will not be an agency or establishment of the United States Government.  
\* \* \*

## BOARD OF DIRECTORS

(c) (1) The Corporation shall have a Board of Directors \* \* \* consisting of fifteen members appointed by the President, by and with the advice and consent of the Senate. Not more than eight members of the Board may be members of the same political party.

(2) The members of the Board (A) shall be selected from among citizens of the United States (not regular fulltime employees of the United States) who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; (B) shall be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation.

(4) The term of office of each member of the Board shall be six years \* \* \*.

## NONPROFIT AND NONPOLITICAL NATURE OF THE CORPORATION

(f) (1) The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, employee, or any other individual except as salary or reasonable compensation for services.

(3) The Corporation may not contribute to or otherwise support any political party or candidate for elective public office.

#### PURPOSES AND ACTIVITIES OF THE CORPORATION

(g) (1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to

(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

(B) assist in the establishment and development of one or more systems of interconnection to be used for the distribution of educational television or radio programs so that all noncommercial educational television or radio broadcast stations that wish to may broadcast the programs at times chosen by the stations;

(C) assist in the establishment and development of one or more systems of noncommercial educational television or radio broadcast stations throughout the United States;

(D) carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the noncommercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities.

(2) Included in the activities of the Corporation authorized for accomplishment of the purposes set forth in subsection (a) of this section, are, among others not specifically named—

(A) to obtain grants from and to make contracts with individuals and with private, State and Federal agencies, organizations, and institutions;

(B) to contract with or make grants to program production entities, individuals, and selected noncommercial educational broadcast stations for the production of, and otherwise to procure, educational television or radio programs for national or regional distribution to noncommercial educational broadcast stations;

## APPENDIX

(C) to make payments to existing and new noncommercial educational broadcast stations to aid in financing local educational television or radio programming costs of such stations, particularly innovative approaches thereto, and other costs of operation of such stations;

(E) to arrange, by grant or contract with appropriate public or private agencies, organizations, or institutions, for interconnection facilities suitable for distribution and transmission of educational television or radio programs to non-commercial educational broadcast stations;

(G) to encourage the creation of new noncommercial educational broadcast stations in order to enhance such service on a local, State, regional, and national basis;

(3) \* \* \* [T]he Corporation may not own or operate any television or radio broadcast station, system, or network, community antenna television system, or interconnection or program production facility.

## FINANCING

(k) \* \* \* (3) There is hereby established in the Treasury a fund which shall be known as the "Public Broadcasting Fund" administered by the Secretary of the Treasury. There are authorized to be appropriated to such fund for each of the fiscal years during the period beginning July 1, 1975, and ending September 30, 1980, an amount equal to 40 per centum of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year second preceding each such fiscal year \* \* \*, except that the amount so appropriated shall not exceed \$88,000,000 for the fiscal year ending June 30, 1976; \$22,000,000 for the period July 1, 1976, through September 30, 1976; \$103,000,000 for the fiscal year ending September 30, 1977; \$121,000,000 for the fiscal year ending September 30, 1978; \$140,000,000 for the fiscal year ending September 30, 1979; and \$160,000,000 for the fiscal year ending September 30, 1980.

(5) The Corporation shall reserve for distribution among the licensees and permittees of noncommercial educational broadcast stations that are on-the-air an amount equal to not less than 40 per centum of the funds disbursed to the Corporation from the Public Broadcasting Fund during the period July 1, 1975, through September 30, 1976, and in each fiscal year in which the amount disbursed is \$88,000,000 or more, but less than \$121,000,000; not less than 45 per centum in each fiscal year in which the amount disbursed is \$121,000,000 or more, but less than \$160,000,000; and not less than 50 per centum in each fiscal year in which the amount disbursed is \$160,000,000.

(6) The Corporation shall, after consultation with licensees and permittees of noncommercial educational broadcast stations that are on-the-air, establish, and review annually, criteria and conditions regarding the distribution of funds reserved pursuant to paragraph (5) of this subsection, as set forth below:

(A) The total amount of funds shall be divided into two portions, one to be distributed among radio stations, and one to be distributed among television stations. The Corporation shall make a basic grant from the portion reserved for television stations to each licensee and permittee of a noncommercial educational television station that is on-the-air. The balance of the portion reserved for television stations and the total portion reserved for radio stations shall be distributed to licensees and permittees of such stations in accordance with eligibility criteria that promote the public interest in noncommercial educational broadcasting, and on the basis of a formula designed to

(i) provide for the financial need and requirements of stations in relation to the communities and audiences such stations undertake to serve;

(ii) maintain existing, and stimulate new, sources of non-Federal financial support for stations by providing incentives for increases in such support; and

(iii) assure that each eligible licensee and permittee of a noncommercial educational radio station receives a basic grant.

(B) No distribution of funds pursuant to this subsection shall exceed, in any fiscal year, one-half of a licensee's or permittee's total non-Federal financial support during the fiscal year second preceding the fiscal year in which such distribution is made.

#### DEFINITIONS

SEC. 397.—For the purposes of this part

(7) The term "noncommercial educational broadcast station" means a television or radio broadcast station, which (A) under the rules and regulations of the Federal Communications Commission in effect on the date of enactment of the Public Broadcasting Act of 1967, is eligible to be licensed or is licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

(9) The term "educational television or radio programs" means programs which are primarily designed for educational or cultural purposes.

#### FEDERAL INTERFERENCE OR CONTROL PROHIBITED

SEC. 398. Nothing contained in this part shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors, or over the charter or by-laws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

#### EDITORIALIZING AND SUPPORT OF POLITICAL CANDIDATES PROHIBITED; RECORDINGS OF CERTAIN PROGRAMS

SEC. 399. (a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

(b) (1) \* \* \* [E]ach licensee which receives assistance under this part after the date of the enactment of this subsection shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed. Each such recording shall be retained for the sixty-day period beginning on the date on which the licensee broadcasts such program.

(3) Each licensee \* \* \* shall, in the period during which such recording is required \* \* \* to be retained, make a copy of such recording available

(A) to the Commission upon its request, and

(B) to any other person upon payment to the licensee

\* \* \* of its reasonable cost of making such copy.

#### NEWSPAPER PRESERVATION ACT OF 1970

15 U.S.C.A. § 1801 et seq.

SEC. 2. In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this Act.

## SEC. 3. As used in this Act—

(2) The term “joint newspaper operating arrangement” means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution; *Provided*: That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined. \* \* \*

(5) The term “failing newspaper” means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

## SEC. 4. \* \* \*

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this Act.

(c) Nothing contained in the Act shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this Act, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law. \* \* \*

## COPYRIGHTS ACT

P.L. 94-553

## SEC. 111. Limitations on exclusive rights: Secondary transmissions \*

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

\* See Sec. 111(f), *infra*, for definitions of terms.



(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or \* \* \*

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other non-profit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) **SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.**—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, \* \* \* if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided*, however, That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) **SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.**—

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico [hereinafter “a broadcast station”] and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regula-

tions, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station and embodying a performance or display of a work is actionable as an act of infringement under section 501, \* \* \* in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station and embodying a performance or display of a work is actionable as an act of infringement under section 501, \* \* \* if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions \* \* \*.

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall \* \* \* record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal \* \* \* shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c)

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shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal \* \* \* prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal \* \* \* from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programing of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total \$80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which \$80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than \$80,000 but less than \$160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to \$80,000; and (ii) 1 per centum of any gross receipts in excess of \$80,000 but less than \$160,000, regardless of the number of distant signal equivalents, if any.

(3) \* \* \* The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part be-

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yond the local service area of the primary transmitter  
\* \* \*

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal. \* \* \*

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall \* \* \* conduct a proceeding to determine the distribution of royalty fees.

(e) NONSIMULTANEOUS SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, \* \* \* unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system \* \* \*.

(f) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary

transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d) (2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter", in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976 or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. The "local service area of a primary transmitter", in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

A "distant signal equivalent" is the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programming so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission. \* \* \*

A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day.

An "independent station" is a commercial television broadcast station other than a network station.

A "noncommercial educational station" is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.

## CODE OF FEDERAL REGULATIONS, TITLE 47

### PART 1—PRACTICE AND PROCEDURE

#### § 1.525 Agreements between parties for amendment or dismissal of, or failure to prosecute broadcast applications.

(a) Whenever applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the Commission by withdrawal or amendment of an application or by its dismissal \* \* \* all parties thereto shall, within 5 days after entering into the agreement, file with the Commission a joint request for approval of such agreement. The joint request shall be accompanied by a copy of the agreement and an affidavit of each party to the agreement setting forth in full all relevant facts including, but not limited to: (1) The exact nature of any consideration (including an agreement for merger of interests) promised or paid; (2) information as to who initiated the negotiations; (3) summary of the history of the negotiations; (4) the reasons why it is considered that the arrangement is in the public interest; and (5) a statement fully explaining and justifying any consideration paid or promised. The affidavit of any applicant to whom consideration is paid or promised shall, in addition, include an itemized accounting of the expenses incurred in connection with preparing, filing and advocating his application, and such factual information as the parties rely upon for the requisite showing that such reported expenses represent legitimate and prudent outlays. No such agreement between applicants shall become effective or be carried out unless and until the Commission has approved it, or until the time for Commission review of the agreement has expired.

(b)(1) Whenever two or more conflicting applications for construction permits for broadcast stations pending before the Commission involve a determination of fair, efficient and equitable distribution of service pursuant to section 307(b) of the Communications Act, and an agreement is entered into to procure the withdrawal (by

amendment to specify a different community or by dismissal \* \* \*) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section. If upon examination of the proposed agreement the Commission finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities, then the Commission shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.

(c) (1) Except where a joint request is filed pursuant to paragraph (a) of this section, any applicant filing (i) an amendment or a request for dismissal which would remove a conflict with another pending application; (ii) a petition for leave to amend which would permit a grant of the amended application or an application theretofore in conflict with the amended application \* \* \* shall file with it an affidavit as to whether or not consideration (including an agreement for merger of interests) has been promised to or received by such applicant, directly or indirectly, in connection with the amendment, petition or request. Upon the filing of a petition for leave to amend or to dismiss an application for broadcast facilities which has been designated for hearing or upon the dismissal of such application on the Commission's own motion each applicant or party remaining in hearing, as to whom a conflict would be removed by the amendment or dismissal shall submit for inclusion in the record of that proceeding an affidavit stating whether or not he has directly or indirectly paid or promised consideration (including an agreement for merger of interests) in connection with the removal of such conflict.

(2) Where an affidavit filed pursuant to this paragraph states that consideration has been paid or promised, the affidavit shall set forth in full all relevant facts, including, but not limited to, the material listed in paragraph (a) of this section for inclusion in affidavits.

## PART 73—RADIO BROADCAST SERVICES

### § 73.621 Noncommercial educational stations.

In addition to the other provisions of this subpart, the following shall be applicable to noncommercial educational television broadcast stations:

(a) Except as provided in paragraph (b) of this section, noncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.



(b) Where a municipality or other political subdivision has no independently constituted educational organization such as, for example, a board of education having autonomy with respect to carrying out the municipality's educational program, such municipality shall be eligible for a noncommercial educational television broadcast station. In such circumstances, a full and detailed showing must be made that a grant of the application will be consistent with the intent and purpose of the Commission's rules and regulations relating to such stations.

(c) Noncommercial educational television broadcast stations may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as well as routine and administrative material pertaining thereto.

(d) A noncommercial educational television station may broadcast programs produced by or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. \* \* \*

(e) Each station shall furnish a nonprofit and noncommercial broadcast service. However, noncommercial educational television stations shall be subject to the provisions of § 73.654 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others, except that no announcements (visual or aural) promoting the sale of a product or service shall be broadcast in connection with any program: *Provided, however,* That where a sponsor's name or product appears on the visual image during the course of a simultaneous or rebroadcast program either on the backdrop or in similar form, the portions of the program showing such information need not be deleted.

Note 1: Announcements of the producing or furnishing of programs, or the provision of funds for their production, may be no more than twice, at the opening and at the close of any program, except that where a program lasts longer than 1 hour an announcement may be made at hourly intervals during the program if the last such announcement occurs at least 15 minutes before the announcement at the close of the program. The person or organization furnishing or producing the program, or providing funds for its production, shall be identified by name only, except that in the case of a commercial company having *bona fide* operating divisions or subsidiaries one of which has furnished the program or funds, the division or subsidiary may be mentioned in addition to or instead of the commercial company. No material beyond the company (or division or subsidiary) name shall be included. Upon request for waiver of this provision, the Commission may authorize the inclusion of brief additional descriptive material only when deemed necessary to avoid confusion with another

company having the same or a similar name. No mention shall be made of any product or service with which a commercial enterprise being identified has a connection, except to the extent the name of the product or service is the same as that of the enterprise (or division or subsidiary) and is so included. A repeat broadcast of a particular program is considered a separate program for the purpose of this note.

Note 2: Announcements may be made of general contributions of a substantial nature which make possible the broadcast of programs for part, or all, of the day's schedule. Such announcements may be made at the opening and closing of the day or segment, including all of those persons or organizations whose substantial contributions are making possible the broadcast day or segment. In addition, one such general contributor may be identified once during each hour of the day or segment. The provisions of Note 1 of this section as to permissible contents apply to announcements under this note.

Note 4: The provisions of Notes 1 and 2 of this section shall not apply during the broadcast times in which "auctions" are held to finance station operation. Credit announcements during "auction" broadcasts may identify particular products or services, but shall not include promotion of such products or services beyond that necessary for the specific auction purpose. Visual exposure may be given to a display in the auction area including the underwriter's name and trademark, and product or service or a representation thereof.

Note 5: The numerical limitations on permissible announcements contained in Note 1 and 2 of this section do not apply to announcements on behalf of noncommercial, nonprofit entities, such as the Corporation for Public Broadcasting, State or regional entities, or charitable foundations.

#### OVER-THE-AIR SUBSCRIPTION TELEVISION OPERATIONS

##### § 73.641 Definitions.

(a) *Subscription television.* A system whereby subscription television broadcast programs are transmitted and received.

(b) *Subscription television broadcast program.* A television broadcast program intended to be received in intelligible form by members of the public only for a fee or charge.

##### § 73.642 Licensing policies.

(a) Subscription television service may be provided only upon specific authorization therefor by the Commission. Such authorization will be issued only to:

- (1) The licensee of a commercial television broadcast station;
- (2) The holder of a construction permit for a new commercial television broadcast station; or

(3) An applicant for a construction permit for a new commercial television broadcast station: *Provided, however*, That such authorization will not be issued prior to issuance of the construction permit for the new station.

Moreover, such an authorization will be issued only for a station the principal community of which is located entirely within the Grade A contours of five or more commercial television broadcast stations (including the station of the applicant), whether the principal community each station is authorized to serve is the same as that of the applicant, or is a nearby community. Only one such authorization will be granted in any community. No such authorization will be granted unless, not counting the station of the applicant, at least four of the stations which include the community of the applicant within their Grade A contours are operating nonsubscription stations.

(b) Application for such authorizations shall be made in the manner and form prescribed by the Commission. If the Commission, upon consideration of such application finds that the public interest, convenience and necessity would be served by the granting thereof, it will grant such application. In the event it is unable to make such a finding, the Commission will then formally designate the application for subscription television authorization for hearing and proceed pursuant to the provisions of section 309(e) of the Communications Act and the Commission's rules and regulations applicable thereto. The Commission may impose such conditions upon the grant as may be appropriate.

(d) A subscription television authorization will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast authorization. Renewals of such authorizations will usually be considered together with renewals of the regular station authorizations.

(f) No subscription television authorization or renewal thereof shall be granted to a party having any contract, arrangement, or understanding, expressed or implied, with other parties the provisions of which do not comply with the following policies of the Commission:

(1) Unless a satisfactory signal is unavailable at the location where service is desired, subscription television service shall be provided to all persons desiring it within the Grade A contour of the nonsubscription television service provided by the station broadcasting subscription programs: *Provided, however*, That geographic or other reasonable patterns of installation for new subscription services shall be permitted: *And provided further*, That, for good cause, service may be terminated.

(2) Charges, terms and conditions of service to subscribers shall be applied uniformly: *Provided, however*, That subscribers may be divided into reasonable classifications approved by the Commission, and the imposition of different sets of terms and conditions may be

applied to subscribers in different classifications: *And provided further*, That within such classifications deposits to assure payment may, for good cause, be required of some subscribers and not of others; and, also for good cause, if a subscription system generally uses a credit-type decoder cash operated decoders may be installed for some subscribers.

(3) Subscription television decoders shall be leased, and not sold, to subscribers.

(g) All applications for subscription television authorization or renewal shall set forth, in such detail as the Commission may require, the terms of agreements and arrangements the applicant has or intends to have with other parties concerning the supplying of subscription television programs, including specifically any provision that such programs shall be presented at a particular time or during a certain number of hours during the day (or segments thereof) or week, any arrangement or understanding which might hinder or prevent the presentation of programs from different sources, or penalize the applicant for so doing \* \* \*.

**§ 73.643 General operating requirements.\***

Subscription television broadcast programming shall comply with the following requirements:

(a) Feature films shall not be broadcast except as provided in this paragraph.

(1) A feature film may be broadcast if—

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed broadcast;

(ii) A conventional television broadcast station licensed in the market of the subscription television broadcast station holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed subscription broadcast and the film has not been exhibited over conventional television in the market of the subscription television broadcast station for three (3) years prior to its proposed subscription broadcast. Once a film has been broadcast in the market pursuant to this subdivision or cablecast on a subscription basis pursuant to § 76.225(a)(1)(iii), such film may thereafter be broadcast

\* Repealed in part. See p. 406, supra.

on a subscription basis in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this paragraph may be broadcast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(b) Sports events shall not be broadcast live except as provided in this paragraph.

(1) A specific event may be broadcast if the event has not been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceding the proposed subscription broadcast. If a regularly recurring event takes place at intervals of more than one year (e. g., summer Olympic games), the event shall not be broadcast on a subscription basis if it has been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the ten (10) years preceding the proposed subscription broadcast.

(2) New specific sports events that result from the restructuring of existing sports shall not be broadcast on a subscription basis until five (5) seasons after their first occurrence. Thereafter, subscription broadcasts shall be governed by paragraph (b) (1) of this section.

(3) The number of non-specific events which may be broadcast on a subscription basis in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during each of the five (5) seasons preceding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed the number of events in the category not conventionally broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast over conventional television.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceding the proposed subscription broadcast, the number of events in the category broadcast on a subscrip-

tion basis shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast over conventional television. However, if the number of events in the category to be broadcast over conventional television in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be broadcast on a subscription basis pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast over conventional television.

(c) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(d) Not more than 90 percent of the total subscription programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 95 percent of the total subscription programming hours in any calendar month.

(e) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast in addition to its subscription broadcasts, at least the minimum hours of nonsubscription programming required by § 73.651.

(f) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules and policies applicable to regular television broadcast stations are applicable to subscription television operations.

#### GENERAL OPERATING REQUIREMENTS

##### **§ 73.651 Time of operation.**

(a)(1) All television broadcast stations will be licensed for unlimited time operation. Each such station shall maintain a regular program operating schedule as follows: Not less than 2 hours daily in any 5 broadcast days per week and not less than a total of 12 hours per week during the first 18 months of the station's operation; not less than 2 hours daily in any 5 broadcast days per week and not less than a total of 16 hours, 20 hours and 24 hours per week for each successive 6-month period of operation, respectively; and not less than 2 hours in each of the 7 days of the week and not less than a total of 28 hours per week thereafter.

## TELEVISION NETWORK AFFILIATION AGREEMENTS

**§ 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.**

(a) *Exclusive affiliation of station.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. (The term "network organization" as used in this section includes national and regional network organizations.)

(b) *Territorial exclusivity.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, or which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization. This section shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its community upon the programs of the network organization. As employed in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

(c) *Term of affiliation.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original terms, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than 2 years: *Provided*, That a contract, arrangement, or understanding for a period up to 2 years may be entered into within 6 months prior to the commencement of such period.

(d) *Station commitment of broadcast time.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with any network organization, which provides for optioning of the station's time to the network organization, or which has the same restraining effect as time optioning. As used in this section, time optioning is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

(e) *Right to reject programs.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or (2) substituting a program which, in the station's opinion, is of greater local or national importance.

(f) *Network ownership of stations.* No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control of a network organization for a television broadcast station in any locality where the existing television broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. (The word "control" as used in this section, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.)

(g) *Dual network operation.* No license shall be issued to a television broadcast station affiliated with a network organization which maintains more than one network of television broadcast stations: *Provided,* That this section shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

(h) *Control by networks of station rates.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

(i) No license shall be granted to a television broadcast station which is represented for the sale of non-network time by a network organization or by an organization directly or indirectly controlled by or under common control with a network organization, if the station has any contract, arrangement or understanding, express or implied, which provides for the affiliation of the station with such network organization: *Provided, however,* That this rule shall not be applicable to stations licensed to a network organization or to a subsidiary of a network organization.



TELEVISION NETWORK SYNDICATION,  
FINANCIAL INTERESTS

§ 73.658 (j) *Network syndication and program practices.* (1) Except as provided in subparagraph (3) of this paragraph, no television network shall:

(i) After June 1, 1973, sell, license, or distribute television programs to television station licensees within the United States for nonnetwork television exhibition or otherwise engage in the business commonly known as "syndication" within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States; or reserve any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution; or

(ii) After August 1, 1972, acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network: *Provided*, That if such network does not timely avail itself of such license or other exclusive right to network exhibition within the United States, the grantor of such license or right to network exhibition may, upon making a timely offer reasonably to compensate the network, reacquire such license or other exclusive right to exhibition of the program.

(2) Nothing contained in subparagraphs (1) and (2) of this paragraph shall prevent any television network from selling or distributing programs of which it is the sole producer for television exhibition outside the United States, or from selling or otherwise disposing of any program rights not acquired from another person, including the right to distribute programs for nonnetwork exhibition (as in syndication) within the United States as long as it does not itself engage in such distribution within the United States or retain the right to share the revenues or profits therefrom.

(3) Nothing contained in this paragraph shall be construed to include any television network formed for the purpose of producing, distributing, or syndicating program materials for educational, non-commercial, or public broadcasting exhibition or uses.

(4) For the purposes of this paragraph and paragraph (k) of this section the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television li-

censees in 10 or more States; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.

#### PRIME TIME ACCESS RULE

§ 73.658 (k) Effective September 8, 1975, commercial television stations owned by or affiliated with a national television network in the 50 largest television markets shall devote, during the four hours of prime time (7–11 p.m. e.t. and p.t., 6–10 p.m. c.t. and m.t.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films: *Provided, However,* That the following categories of programs need not be counted toward the three-hour limitation:

(1) On nights other than Saturdays, network or off-network programs designed for children, public affairs programs or documentary programs (see Note 2 to this paragraph for definitions).

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming.

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control. This exemption does not apply to post-game material.

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones.

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

Note 2. As used in this paragraph, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs

which are nonfictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself. The term "public affairs programs" means talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national, and international public affairs.

## PART 76—CABLE TELEVISION SERVICE

### Subpart A—General

#### § 76.5 Definitions.

(a) *Cable television system (or CATV system)*. Any facility that, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(d) *Principal community contour*. The signal contour that a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(e) *Grade A and Grade B contours*. The field intensity contours defined in § 73.683(a) of this chapter.

(f) *Specified zone of a television broadcast station*. The area extending 35 air miles from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in § 76.53. \* \* \*

(g) *Major television market*. The specified zone of a commercial television station licensed to a community listed in § 76.51 \* \* \*.

(h) *Designated community in a major television market*. A community listed in § 76.51.

(i) *Smaller television market*. The specified zone of a commercial television station licensed to a community that is not listed in § 76.51.

(j) *Substantially duplicated*. Regularly duplicated by the network programming of one or more stations in a week during the hours of 6 to 11 p. m., local time, for a total of 14 or more hours.

(k) *Significantly viewed.* Viewed in other than cable television households as follows: (1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See § 76.54.

Note: As used in this paragraph, “share of viewing hours” means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and “net weekly circulation” means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area.

(l) *Full network station.* A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i. e., right of first refusal or first call).

(m) *Partial network station.* A commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the three major national television networks, but less than the amount specified in paragraph (l) of this section.

(n) *Independent station.* A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.

(o) *Network programming.* The programming supplied by a national or regional television network, commercial or noncommercial.

(p) *Syndicated program.* Any program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States for noninterconnected (i. e., nonnetwork) television broadcast exhibition, but not including live presentations.

(q) *Series.* A group of two or more works which are centered around, and dominated by the same individual, or which have the same, or substantially the same, cast of principal characters or a continuous theme or plot.

(r) *Off-network series.* A series whose episodes have had a national network television exhibition in the United States or a regional network exhibition in the relevant market.

(s) *First-run series.* A series whose episodes have had no national network television exhibition in the United States and no regional network exhibition in the relevant market.

(t) *First-run nonseries programs.* Programs, other than series, that have had no national network television exhibition in the United States and no regional network exhibition in the relevant market.

(u) *Prime time.* The 5-hour period from 6 to 11 p.m., local time, except that in the central time zone the relevant period shall be between the hours of 5 and 10 p. m. \* \* \*.

(v) *Cablecasting.* Programing (exclusive of broadcast signals) carried on a cable television system.

(w) *Origination cablecasting.* Programing (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator.

(x) *Access cablecasting.* Services provided by a cable television system on its public, educational, local government, or leased channels.

(kk) *Specialty station.* A commercial television broadcast station that generally carries foreign-language, religious, and/or automated programing in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours.

#### Subpart B—Applications and Certificates of Compliance

##### § 76.11 Certificate of compliance required.

(a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission: *Provided, however,* That an existing system may add a television signal, pursuant to §§ 76.57(a) (1)–(3), 76.59(a) (1)–(3) and (5), 76.61(a) (1)–(3), or 76.63(a) (as it relates to § 76.61(a) (1)–(3)), or the signal of a noncommercial educational television station that is operated by an agency of the state within which the system is located, pursuant to §§ 76.57(b), 76.59(c), 76.61(d), or 76.63(a) (as it relates to § 76.61(d)), without filing an application or receiving a certificate of compliance, if the system serves the information required by § 76.13(b) (1) on the Commission and the parties named in § 76.13(a) (6) and (7) at least thirty (30) days before commencing such carriage and no objection is filed with the Commission within (30) days after such service is made. See § 1.47 of this chapter.

(b) No cable television system lawfully carrying television broadcast signals in a community prior to March 31, 1972, shall continue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives [or has applied for] a certificate of compliance.

**Subpart C—Federal-State/Local Regulatory Relationships****§ 76.31 Franchise standards.\***

(a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:

(1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;

(2) The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter reasonably make cable service available to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority; \* \* \*

(3) The initial franchise period shall not exceed fifteen (15) years, and any renewal franchise period shall be of reasonable duration;

(5) The franchise shall: (i) specify that procedures have been adopted by the franchisee and franchisor for the investigation and resolution of all complaints regarding cable television operations; (ii) require that the franchisee maintain a local business office or agent for these purposes; (iii) designate by title, the office or official of the franchising authority that has primary responsibility for the continuing administration of the franchise and implementation of complaint procedures; and (iv) specify that notice of the procedures for reporting and resolving complaints will be given to each subscriber at the time of initial subscription to the cable system.

(b) Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising of authority, that it is appropriate in light of the planned local regulatory program.  
\* \* \*

\* Deleted in part. See p. 413, supra.

**Subpart D—Carriage of Television Broadcast Signals****§ 76.51 Major television markets.**

For purposes of the cable television rules, the following is a list of the major television markets and their designated communities:

(a) First 50 major television markets:

- (1) New York, New York—Linden—Paterson—Newark, New Jersey.
- (2) Los Angeles—San Bernardino—Corona—Fontana, Calif.
- (3) Chicago, Ill.
- (4) Philadelphia, Pa.—Burlington, N. J.
- (5) Detroit, Mich.
- (6) Boston—Cambridge—Worcester, Mass.
- (7) San Francisco—Oakland—San Jose, Calif.
- (8) Cleveland—Lorain—Akron, Ohio.
- (9) Washington, D. C.
- (10) Pittsburgh, Pa.
- (11) St. Louis, Mo.
- (12) Dallas—Fort Worth, Tex.
- (13) Minneapolis—St. Paul, Minn.
- (14) Baltimore, Md.
- (15) Houston, Tex.
- (16) Indianapolis—Bloomington, Ind.
- (17) Cincinnati, Ohio—Newport, Ky.
- (18) Atlanta, Ga.
- (19) Hartford—New Haven—New Britain—Waterbury, Conn.
- (20) Seattle—Tacoma, Wash.
- (21) Miami, Fla.
- (22) Kansas City, Mo.
- (23) Milwaukee, Wis.
- (24) Buffalo, N. Y.
- (25) Sacramento—Stockton—Modesto, Calif.
- (26) Memphis, Tenn.
- (27) Columbus, Ohio.
- (28) Tampa—St. Petersburg, Fla.
- (29) Portland, Oreg.
- (30) Nashville, Tenn.
- (31) New Orleans, La.
- (32) Denver, Colo.

- (33) Providence, R. I.—New Bedford, Mass.
  - (34) Albany—Schenectady—Troy, N. Y.
  - (35) Syracuse, N. Y.
  - (36) Charleston—Huntington, W. Va.
  - (37) Kalamazoo—Grand Rapids—Battle Creek, Mich.
  - (38) Louisville, Ky.
  - (39) Oklahoma City, Okla.
  - (40) Birmingham, Ala.
  - (41) Dayton—Kettering, Ohio.
  - (42) Charlotte, N. C.
  - (43) Phoenix—Mesa, Ariz.
  - (44) Norfolk—Newport News—Portsmouth—Hampton, Va.
  - (45) San Antonio, Tex.
  - (46) Greenville—Spartanburg—Anderson, S. C.—Asheville,  
N. C.
  - (47) Greensboro—High Point—Winston Salem, N. C.
  - (48) Salt Lake City, Utah.
  - (49) Wilkes Barre—Scranton, Pa.
  - (50) Little Rock, Ark.
- (b) Second 50 major television markets:
- (51) San Diego, Calif.
  - (52) Toledo, Ohio.
  - (53) Omaha, Nebr.
  - (54) Tulsa, Okla.
  - (55) Orlando—Daytona Beach, Fla.
  - (56) Rochester, N. Y.
  - (57) Harrisburg—Lancaster—York, Pa.
  - (58) Texarkana, Tex.—Shreveport, La.
  - (59) Mobile, Ala.—Pensacola, Fla.
  - (60) Davenport, Iowa—Rock Island—Moline, Ill.
  - (61) Flint—Bay City—Saginaw, Mich.
  - (62) Green Bay, Wis.
  - (63) Richmond—Petersburg, Va.
  - (64) Springfield—Decatur—Champaign, Illinois.
  - (65) Cedar Rapids—Waterloo, Iowa.
  - (66) Des Moines—Ames, Iowa.
  - (67) Wichita—Hutchinson, Kans.
  - (68) Jacksonville, Fla.



## APPENDIX

- (69) Cape Girardeau, Mo.—Paducah, Ky.—Harrisburg, Ill.
- (70) Roanoke—Lynchburg, Va.
- (71) Knoxville, Tenn.
- (72) Fresno, Calif.
- (73) Raleigh—Durham, N. C.
- (74) Johnstown—Altoona, Pa.
- (75) Portland—Poland Spring, Maine.
- (76) Spokane, Wash.
- (77) Jackson, Miss.
- (78) Chattanooga, Tenn.
- (79) Youngstown, Ohio.
- (80) South Bend—Elkhart, Ind.
- (81) Albuquerque, N. Mex.
- (82) Fort Wayne—Roanoke, Ind.
- (83) Peoria, Ill.
- (84) Greenville—Washington—New Bern, N. C.
- (85) Sioux Falls—Mitchell, S. Dak.
- (86) Evansville, Ind.
- (87) Baton Rouge, La.
- (88) Beaumont—Port Arthur, Tex.
- (89) Duluth, Minn.—Superior, Minn.
- (90) Wheeling, W. Va.—Steubenville, Ohio.
- (91) Lincoln—Hastings—Kearney, Nebr.
- (92) Lansing—Onondaga, Mich.
- (93) Madison, Wis.
- (94) Columbus, Ga.
- (95) Amarillo, Tex.
- (96) Huntsville—Decatur, Ala.
- (97) Rockford—Freeport, Ill.
- (98) Fargo—Valley City, N. D.
- (99) Monroe, La.—El Dorado, Ark.
- (100) Columbia, S. C.

**§ 76.55 Manner of carriage.**

(a) Where a television broadcast signal is required to be carried by a cable television system, pursuant to the rules in this subpart:

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art) \* \* \*;

(2) The signal shall, on request of the station licensee or permittee, be carried on the system on the channel number on which the station is transmitting, except where technically infeasible;

**§ 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.**

A cable television system operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:

(a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

(4) Commercial television broadcast stations that are significantly viewed in the community of the system.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry any additional television signals.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a) [and (b)] of this section, any television station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior Commission notification or approval in the certificating process.

**§ 76.59 Provisions for smaller television markets.**

A cable television system operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the system is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt.—Plattsburgh, N. Y., television market);

(6) Commercial television broadcast stations that are significantly viewed in the community of the system.

(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television station \* \* \*.

(c) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the system is located. Such system may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or State or local educational television authority.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (c) of this section, any such cable television system may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior Commission notification or approval in the certificating process.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the system is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior Commission notification or approval in the certificating process.

#### **§ 76.61 Provisions for first 50 major television markets.**

A cable television system operating in a community located in whole or in part within one of the first 50 major television markets

listed in § 76.51(a) shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such cable television system may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part: *Provided, however,* That where a cable television system is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the cable system is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);

(5) Commercial television broadcast stations that are significantly viewed in the community of the system.

(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations \* \* \*.

(1) Whenever, pursuant to this section a cable television system is permitted to carry three additional independent signals, one of these signals must be that of a UHF television broadcast station.

(2) Whenever, pursuant to Subpart F of this part, a cable television system is required to delete a television program on an independent signal carried pursuant to this section, or a program on such a signal is primarily of local interest to the distant community (e. g., a local news or public affairs program), such system may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(c) After the service standards specified in paragraph (b) of this section have been satisfied, a cable television system may carry two additional independent television broadcast signals: *Provided, however,* That the number of additional signals permitted under this para-

graph shall be reduced by the number of signals added to the system pursuant to paragraph (b) of this section.

(d) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the system is located. Such system may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or State or local educational television authority.

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior Commission notification or approval in the certificating process.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the system is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior Commission notification or approval in the certificating process.

#### **§ 76.63 Provisions for second 50 major television markets.**

(a) A cable television system operating in a community located in whole or in part within one of the second 50 major television markets listed in § 76.51(b) shall carry television broadcast signals only in accordance with the provisions of § 76.61, except that in paragraph (b) of § 76.61, the number of additional independent television signals that may be carried is two (2).

#### **§ 76.65 Grandfathering provisions.**

The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972 \* \* \*.

**§ 76.67 Sports broadcasts.**

(a) No cable television system located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place, shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast signal carried by the system pursuant to the mandatory signal carriage rules of this part. \* \* \*

(d) Whenever, pursuant to this section, a cable television system is required to delete a television program on a signal regularly carried by the system, such system may, consistent with the rules contained in Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

**Subpart F—Nonduplication Protection and  
Syndicated Exclusivity****§ 76.92 Stations entitled to network program nonduplication protection.**

(a) Any cable television system which operates in a community located in whole or in part within the 35-mile specified zone of any commercial television broadcast station or within the secondary zone which extends 20 miles beyond the specified zone of a smaller market television broadcast station (55 miles altogether), and which carries the signal of such station shall, except as provided in paragraphs (e) and (f) of this section, delete, upon request of the station licensee or permittee, the duplicating network programming of lower priority signals in the manner and to the extent specified in §§ 76.94 and 76.95.

(b) For purposes of this section, the order of nonduplication priority of television signals carried by a cable television system is as follows:

(1) First, all television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

(2) Second, all smaller market television broadcast stations within whose secondary zone the community of the system is located, in whole or in part.

(c) For purposes of this section, all noncommercial educational television broadcast stations licensed to a community located in whole or in part within a major television market as specified in § 76.51 shall be treated in the same manner as a major market commercial television broadcast station, and all noncommercial educational television broadcast stations not licensed to a community located in whole or in part within a major television market shall be

treated in the same manner as a smaller market television broadcast station.

(f) Any cable television system which operates in a community located in whole or in part within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any major market television broadcast station whose reference point (See § 76.53) is also within 55 miles of the community of the system.

**§ 76.151 Syndicated program exclusivity; extent of protection.**

Upon receiving notification pursuant to § 76.155:

(a) No cable television system, operating in a community in whole or in part within one of the first 50 major television markets, shall carry a syndicated program, pursuant to § 76.61(b), (c), (d), or (e), for a period of 1 year from the date that program is first licensed or sold as a syndicated program to a television station in the United States for television broadcast exhibition;

(b) No cable television system, operating in a community in whole or in part within a major television market, shall carry a syndicated program, pursuant to §§ 76.61(b), (c), (d), or (e), or 76.63(a) (as it refers to § 76.61(b), (c), (d), or (e)), while a commercial television station licensed to a designated community in that market has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program: *Provided, however,* That if a commercial station licensed to a designated community in one of the second 50 major television markets has such exclusive rights, a cable television system located in whole or in part within the market of such station may carry such syndicated programs in the following circumstances:

(1) If the program is carried by the cable television system in prime time and will not also be broadcast by a commercial market station in prime time during the period for which there is exclusivity for the program;

(2) For off-network series programs:

(i) Prior to the first nonnetwork broadcast in the market of an episode in the series;

(ii) After a nonnetwork first-run of the series in the market or after 1 year from the date of the first nonnetwork broadcast in the market of an episode in the series, whichever occurs first;

(3) For first-run series programs:

(i) Prior to the first broadcast in the market of an episode in the series;

(ii) After two (2) years from the first broadcast in the market of an episode in the series;

(4) For first-run, nonseries programs:

(i) Prior to the date the program is available for broadcast in the market under the provision of any contract or license of a television broadcast station in the market;

(ii) After two (2) years from the date of such first availability;

(5) For feature films:

(i) Prior to the date such film is available for nonnetwork broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(ii) Two (2) years after the date of such first availability;

(6) For other programs: 1 day after the first nonnetwork broadcast in the market or 1 year from the date of purchase of the program for nonnetwork broadcast in the market, whichever occurs first.

**§ 76.153 Parties entitled to exclusivity.**

(a) Copyright holders of syndicated programs shall be entitled to the exclusivity provided by § 76.151(a). \* \* \*

(b) Television broadcast stations licensed to designated communities in the major television markets shall be entitled to the exclusivity provided by § 76.151(b). \* \* \*

(c) In order to be entitled to exclusivity for a program under § 76.151(b), a television station must have an exclusive right to broadcast that program against all other television stations licensed to the same designated community and against broadcast signal cable carriage of that program in the cable system community \* \* \*.

**§ 76.159 Grandfathering.**

The provisions of § 76.151 shall not be deemed to require a cable television system to delete programming from any signal that was carried prior to March 31, 1972, or that any other cable television system in the same community was carrying prior to March 31, 1972 \* \* \*.

**§ 76.161 Exception.**

The provisions of \* \* \* § 76.151 shall not apply to a cable television system (as described in § 76.5(a)) serving fewer than 1,000 subscribers or to a conglomerate of commonly-owned and technically-integrated cable systems serving fewer than 1,000 subscribers.



**Subpart G—Cablecasting****§ 76.225 Subscription cablecasting.**

Cable television system operators or channel lessees engaging in origination or access cablecasting operations for which a per-program or per channel charge is made shall comply with the following requirements:

(a) Feature films shall not be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of this part, except as provided in this paragraph.

(1) A feature film may be cablecast if—

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed cablecast;

(ii) A conventional television broadcast station licensed in the market of the cable television system holds a present contractual right to exhibit the film. For purposes of this subparagraph, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed cablecast and the film has not been exhibited in the market of the cable television system over conventional television for three (3) years prior to its proposed cablecast. Once a film has been cablecast in the market pursuant to this subparagraph, or broadcast on a subscription basis pursuant to § 73.643(a)(1)(iii), such film may thereafter be cablecast in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this paragraph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(b) Sports events shall not be cablecast live by a cable television system subject to the mandatory signal carriage requirements of Subpart D of this part, except as provided in this paragraph.

(1) A specific event may be cablecast if the event has not been broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast. If a regularly recurring event takes place at intervals of more than one year (e. g., summer Olympic games), the event shall not be cablecast if it has been broadcast live over conventional television in the market during any one of the ten (10) years preceding the proposed cablecast.

(2) New specific sports events that result from the restructuring of existing sports shall not be cablecast until five (5) seasons after their first occurrence. Thereafter, subscription cablecasts shall be governed by paragraph (b) (1) of this section.

(3) The number of non-specific events which may be cablecast in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during each of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast. However, if the number of events in the category to be broadcast in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be cablecast pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast.

(c) Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis,

but absent a showing of good cause, the percentage of such programming hours may not exceed ninety-five (95) percent of the total cablecast programming hours in any calendar month.

(d) No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

## APPENDIX B

### CENTRAL FLORIDA ENTERPRISES, INC. v. FCC

United States Court of Appeals for the D.C. Circuit, 1978.  
— F.2d — (No. 76-1742).

[Intervenor Cowles Broadcasting, Inc. purchased WESH-TV, Channel 2, Daytona Beach, Florida, in 1966. In 1969 it applied for renewal of its license. Appellant Central filed a competing application for a permit to construct a new station to operate on the same channel. The mutually exclusive applications were the subject of a comparative hearing. Cowles was re-licensed, and Central sought review. The court of appeals filed the following decision of September 25, 1978.]

WILKEY, Circuit Judge:

\* \* \*

#### I. Issues in Comparative Renewal Proceedings, Past and Present

What is at issue here is the validity of the process by which the competing applications of Central and Cowles were compared and the adequacy of the Commission's articulated rationale for its choosing to renew Cowles' license. This may well be a typical comparative renewal case, hence the careful scrutiny we give the Commission's procedure and rationale herein.

Aside from the specific facts of this case, there is other evidence indicating the state of administrative practice in Commission comparative renewal proceedings is unsatisfactory.<sup>2</sup> Its paradoxical history reveals an ordinarily tacit presumption that the incumbent licensee is to be preferred over competing applicants. Because the Federal Communications Act fairly precludes any preference based on incumbency *per se*, the practical bias arises from the Commission's discretionary weighing of legally relevant factors. Of course, the general preference, and *a fortiori* the disposition in any given instance, may be a lawful exercise of the Commission's "substantive discretion." However, it is the judicial function to insure that such discretionary choices as are entailed in these proceedings are rigorously governed by traditional principles of fairness and administrative regularity.

[The court here briefly reviewed the evolution of the comparative hearing procedure for initial licensing.]

2. See generally *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 705-17 (D.C. Cir.) (Bazelon, C. J.) (voting to grant rehearing en banc), cert. denied, 423 U.S. 926 (1975); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1206-10 (D.C. Cir. 1971), clarification

granted, 463 F.2d 822 (1972); *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 435-42 (1976) (Commissioner Robinson, dissenting); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 Va.L.Rev. 471 (1975).

The applicability of the Commission's usual comparative criteria to comparative *renewal* proceedings has been uncertain. The fact of incumbency without more would appear legally irrelevant under the statute. \* \* \*

Despite the apparent statutory assurance of a free-wheeling inquiry into the relative merit of challenger and incumbent licensee, the history of Commission practice reveals a strong preference for renewal. Further, until fairly recently, such choices by the Commission were routinely affirmed by this court. This general phenomenon has been rationalized into what we have called on occasion "a renewal expectancy." The question arises, material in this case to what extent such an expectancy is compatible with the full hearing guaranty of Section 309(e). This was essentially the question we confronted in *Citizens Communication Center v. FCC*. \* \* \*

We did note the relevance of the incumbent's past performance:

We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a licensee. \* \* \* At the same time, superior performance should be a plus of major significance in renewal proceedings. The Court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.

Thus expectations are confined to the likelihood that a showing of superior performance will be sufficient, in light of the comparative criteria, to carry the day in the overall public interest inquiry.

## II. The Course of the Litigation

\* \* \*

In addition to inquiry into diversification of media ownership and "best practicable service," which comprise the customary comparative issues, certain special issues were designated for hearing. These were (a) whether contrary to Commission regulation, Cowles had moved its main studio without prior Commission approval; and (b) whether alleged mail fraud by five related corporations supported inferences adverse to Cowles' character. Following extensive findings, the Administrative Law Judge (ALJ) concluded that renewal of Cowles' license would best serve the public interest. By a 4-3 vote the Commission affirmed with certain modifications.

### A. The Initial Decision

#### 1. Designated Issues.

##### a. *The Main Studio Move.*

Commission rules require that "[t]he main studio of a television broadcast station shall be located in the principal community to be served." WESH-TV's city of assignment is Daytona Beach, and the

station had always had a studio just outside the city at Holly Hill. In addition, WESH-TV maintained "auxiliary" studios in Winter Park, just outside Orlando. Since 1960, the station had been authorized to identify as a Daytona Beach-Orlando station, although the Commission stressed that Daytona remained the city of assignment and "principal city." The rule prescribing the location of the "main" studio, unlike the analogous rules governing radio stations, contains no definition of "main" studio and there is little clarifying precedent.

Still, the ALJ found "inescapably" that "Cowles treats its Winter Park [Orlando] facility as its principal place of business." Because there had been an unauthorized move of the "main studio" contrary to rule, the ALJ gave Cowles a comparative demerit. However, the demerit was not given much weight in light of what the ALJ considered to be mitigating factors. First, the ALJ stressed that there was "little evidence that the move resulted from a deliberate corporate decision to move the main studio in defiance of the Commission's rules." Rather, a "series of changes" responding to the "commercial lure" of Orlando, resulted in a "de facto move of the main studio." Second, the ALJ concluded that "the unauthorized move had not resulted in the downgrading of service to the community of assignment which [the rule] is designed to prevent."

b. *Mail Fraud.*

Cowles is a wholly owned subsidiary of Cowles Communications, Inc. (CCI). During the license period CCI also published Look Magazine and owned five other subsidiaries, each in the business of obtaining magazine subscriptions. The five subsidiaries conducted so-called "paid during service" (PDS) operations in which subscribers paid installments of the purchase price over the life of the subscription.

[The ALJ found that CCI had acquired the PDS operations realizing that they would be prone to commit massive fraud. Its supervision of them was "spotty" and "ineffectual" until they came under government investigation. CCI then negotiated for the PDS companies *nolo contendere* pleas to mail fraud charges and a consent decree regarding future practices.]

The ALJ concluded, however, that Cowles was insulated from these "harsh" findings concerning its parent. Although the ALJ supposed such evidence of fraud would probably disqualify an original applicant, the findings in this case were not "decisionally material" in light of Cowles' broadcast record which better predicts future performance. Consequently, it was "unnecessary to attempt to draw inferences from the nonbroadcast conduct of CCI and its non-broadcast subsidiaries;" and "no conclusions adverse to the character qualifications of [Cowles] should be reached on the basis of that issue."

On the two specially designated issues, the main studio move and the mail fraud inquiry, by the ALJ's reasoning Cowles escaped unscathed.

2. Standard Comparative Issues.

a. *Diversification of Media Ownership.*

The ALJ concluded that “the advantage lies with Central” under the diversification factor because it had “no connection of any sort with any other mass media outlet.” Cowles’ parent, CCI, owned an AM-FM-TV combination in Des Moines, Iowa, and another CCI subsidiary owned AM and FM radio stations in Memphis, Tennessee. While these interests were “remote” from Daytona Beach, the ALJ held that they remained a “significant factor in the ultimate choice.” The ALJ further noted that CCI owned a substantial stock interest in the New York Times Company, which publishes the *New York Times* and has extensive publishing and broadcast holdings. Gardner Cowles, Chairman of CCI, was then a director of the New York Times Company. In addition, certain CCI stockholders had substantial mass media interests. The Des Moines Register and Tribune Company owned 9% of CCI’s stock and had an 11% stock interest in the Minneapolis Star and Tribune Company. But the ALJ concluded these related mass media interests were of “little decisional significance” because CCI did not control the New York Times Company, nor did the Des Moines Register and Tribune Company control CCI. Thus, no potential existed for compelling the media involved to “speak with a common voice,” and the basic policy underlying the diversification standard was “not disserved.”

The ALJ then concluded that although Central’s advantage was “clear,” it would not be “compelling” unless Central were shown likely to render public service “at least as good” as that of Cowles. This was especially true in the present context where renewal “would not increase the existing concentration of control.” The ALJ found that Cowles’ incumbency evinced a prior Commission determination that its media connections were not contrary to the public interest. Moreover, the ALJ noted the Commission’s reluctance to employ comparative renewal proceedings to restructure the broadcast industry. In his view, the benefits from increased diversification had to be balanced against the public necessity of a stable broadcast industry. Accordingly, the ALJ concluded that a comparative renewal hearing should occasion an increase in diversification only if the competing applicant appeared likely to render service at least as good as that which the public had been receiving.

b. *Best Practicable Service.*

Under the criterion of “best practicable service” the ALJ made findings with respect to two matters: (1) Central’s proposals regarding the participation of owners in the station management; and (2) the quality of Cowles’ past service.

(1) *Integration of Ownership and Management.* The ALJ found Central’s integration proposals to be “very weak,” and concluded that Central’s owners would probably not play more than a nominal role

in station affairs. He noted full time participation by station owners is of substantial importance under the 1965 criteria. But here, full time participation was proposed by only three of Central's shareholders, collectively owning 10.5% of Central's stock. While "not inconsequential," this ownership interest was not sufficient to control corporate policy. Further, the proposed integration was largely temporary. \* \* \*

The ALJ conceded several of Central stockholders would participate in management on a part-time basis, primarily as consultants, but noted that little weight attached to such participation under the *Policy Statement*. In his view, part-time contributions by those who are "essentially dilettantes" rarely has a material effect on overall station operations.

(2) *Cowles Past Service*. The ALJ found that Cowles' past performance had been "thoroughly acceptable." He observed that Cowles had developed and presented "a substantial number of programs \* \* \* designed to serve the needs and interests of its community." A number of local residents and community leaders had expressed satisfaction with the station's performance, and there had been no complaints concerning the station's operation. Moreover, the ALJ found "no reason to believe that future performance would be less satisfactory." Although the unauthorized move of the main studio warranted a "comparative demerit," since it was not done in bad faith and had not lowered the quality of service to Daytona Beach, it would not support a conclusion that Cowles was unlikely to continue to provide "proper service."

c. *The Public Interest Finding on the Two Standard Comparative Issues*.

In the end, the ALJ concluded that Cowles merited a "distinct preference" under the best practicable service criterion and that that preference outweighed Central's preference under the diversification criterion. The ALJ reasoned that absent a showing that the degree of industry concentration which had existed when Cowles was originally licensed had "actually disserved the public interest," the more compelling objective was obtaining the best practicable service.

B. The Commission Decision

[The Commission affirmed the ALJ with respect to the main studio and mail fraud issues.]

Again, by the Commission's reasoning on the two specially designated issues, Cowles lost no ground. The Commission then turned to the two standard issues, diversification and service.

Reviewing the ALJ's treatment of the diversification issue, the Commission affirmed the award of a preference, finding Central's advantage "clear." The Commission agreed that the significance of the preference was reduced by the fact that CCI's other broadcast and



newspaper interests were remote from Daytona Beach and were not shown to dominate their markets. Moreover, the Commission reiterated its reluctance to use the diversification criterion to restructure the broadcast industry, observing that "the need for industry stability had its own decisional bearing here." In a subsequent order, the Commission expanded its discussion, finding that the autonomy which CCI accorded to the local station management further reduced the significance of Central's preference. Inasmuch as the Commission could find no evidence in the record "that the dangers of concentration \* \* \* exist in this case," the preference was found to be "of little decisional significance."

The ALJ's conclusions with respect to the best practicable service issue were modified in light of this court's *TV-9* decision and the Commission's finding that insufficient weight had attached to Cowles' broadcast record. The Commission held that the minority group participation proposed by Central entitled it to a merit under our *TV-9* decision. Nonetheless, even when considered in conjunction with the merit to which Central was admittedly entitled for integration of ownership and management, the additional merit was not sufficient to outweigh the facts in Cowles' favor under the best practicable service criterion.

Finally, the Commission revised the ALJ's characterization of Cowles' record as "thoroughly acceptable." Finding this phrase "too vague to be meaningful," and not adequately expressing "the outstanding quality of Cowles' past performance," the Commission found that performance to have been "superior" in the sense in which we used the word in our *Citizens* opinion—"justifying a plus of major significance," and inferentially, supporting an expectation of renewal. In a subsequent order, the Commission clarified its use of the word "superior." It had meant that the level of service provided by Cowles was "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." It had not intended to suggest that the performance was exceptional when compared to other stations.

The Commission thus articulated the final and decisive tally:

The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i. e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial

service Cowles rendered to the public during the last license period.

## II. Analysis

The function of this court in reviewing a Commission decision is, as we have often recounted, a fairly limited one. This is particularly the case when the Commission acts under its broad mandate to license in the public interest. However, within the constraints upon our review, we must insist on adherence to those principles which assure the rule of law. Thus we must be satisfied that the agency has given reasoned consideration to all the material facts and issues; that its findings of fact are supported by substantial evidence; and that if its notion of the public interest changes, that at least it has not deviated from prior policy without sufficient explanation.<sup>55</sup> In general, the agency must engage in reasoned decision-making, articulating with some clarity the reasons for its decisions and the significance of facts particularly relied on. Admittedly, this is not an easy matter in comparative renewal proceedings, "but at least so long as the government uses the forms of adjudication, and does not turn, e. g., to bidding, or even chance \* \* \*, reasoned decision-making remains a requirement of our law."<sup>56</sup>

With this preface, we hold that the Commission acted unreasonably and without substantial record support in this matter and we remand for further proceedings.

The Commission's rationale in this case is thoroughly unsatisfying. The Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration, and minority participation, and adversely to Cowles on the studio move question. Then simply on the basis of wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy." Even were we to agree (and we do not agree) with the Commission's trivialization of each of Central's advantages, we still would be unable to sustain its action here. The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on "administrative 'feel.'" Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.

The Commission's treatment of the standard comparative issues—diversification of media ownership and best practicable service—is the most worrisome aspect of this case. The Commission plainly disfavors use of the 1965 criteria in comparative renewal proceedings. This in turn is largely because the Commission dislikes the idea of com-

55. See, e. g., *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C.Cir. 1971).

56. *Greater Boston Television Corp. v. FCC*, 444 F.2d at 852 (footnote omitted).

parative renewal proceedings altogether<sup>58</sup>—or at least those that accord no presumptive weight to incumbency *per se*. As long as the renewal hearings were carried on in a completely *ad hoc* manner, it was little noticed that they were not really comparative. But the restatement of the comparative criteria in 1965 imposed an orderliness on the inquiry which made it obvious when applicants were not in fact on an equal footing. This would never have been a problem if the Commission had been able to distinguish in its rules between hearings comparing only new applicants and comparative renewal hearings. This it was unable to do and the *1965 Policy Statement* has since governed comparative renewal proceedings more or less by a default.<sup>60</sup>

Since the 1965 *Statement* admits little room for a presumption of renewal, the Commission has reconstructed the criteria in a manner creating a *de facto* presumption. Whether justified in precedent or logic, the process has been straightforward and comports at least formally with the requirement of a “full hearing”: (1) the criteria of diversification and integration were converted from structural questions (challengers usually prevailed on the simple numbers) to functional questions regarding the consequences of other media ownership and autonomous management (but challengers could rarely show injury to the public service); (2) a finding of “substantial,” if not above average, past performance by the incumbent would be given decisive weight; and (3) other comparative or designated issues favoring the challenger would be noted, but would not be dispositive “even in conjunction with other factors,” unless pertaining to grievous misconduct by the incumbent.

\* \* \* [T]he Commission’s handling of the facts of this case make embarrassingly clear that the FCC has practically erected a presumption of renewal that is inconsistent with the full hearing requirement of § 309(e).

#### A. The Designated Issues.

##### 1. The Main Studio Move.

\* \* \* Cowles was given a “slight demerit” for its violation. Apparently even this would overstate the Commission’s reaction, for in its original order it appeared to give the violation no weight at all.

Admittedly, the choice of remedies and sanctions for violations of Commission rules “is a matter wherein the Commission has broad

58. Although we would ordinarily be reluctant to reach such conclusions concerning the Commission’s state of mind, it has been extraordinarily candid in this matter. \* \* \*

60. In light of *Citizens*, it is doubtful whether any such distinction would be lawful without an amendment to the hearing provisions of the Communica-

tions Act, 47 U.S.C.A. § 309(e) (1970). The Commission abandoned its effort to substitute simple quantitative standards for its *ad hoc* inquiry under the 1965 criteria in comparative renewal hearings. See [Dkt. 19154, *supra* at 142]. review pending sub nom. *National Black Media Coalition v. FCC*, No. 77-1500 (D.C.Cir.).

discretion.” Moreover, in exercising that discretion the Commission is free to consider mitigating factors. But the Commission is not free wholly to disregard violations of its rules. Moreover, we find neither of the “mitigating” factors relied on by the Commission in this case to be persuasive.

First, while a showing of harm occasioned by the violation would be relevant to the *severity* of the sanction imposed, the failure to show injury hardly excuses a plain violation. The regulation here involves a presumption that it is bad to have the main studio located—or slyly relocated—other than in the principal community. The rule would be substantially undercut if a party relying on it were forced in each case to show that the move did in fact injure the quality of service.

Second, we fail to see how Cowles’ violation is “mitigated” by the fact that its conduct may not have been nefarious. \* \* \* Of course, if Cowles had acted in bad faith, that might aggravate its violation; but the mere absence of bad faith cannot mitigate it.

On remand, the Commission should reconsider what weight to accord Cowles’ plain violation of an FCC rule.

## 2. The Mail Fraud Issue.

\* \* \* [I]t appears from the record that there were at least two persons who were principal officers of Cowles and of each of the five PDS subsidiaries. *Neither the ALJ nor the Commission made findings concerning these common officers.* In light of this uncontradicted evidence it is plain that the Commission’s finding that there was no connection between Cowles and the PDS companies apart from common ownership by CCI is unsupportable. On remand the Commission will have to reconsider its findings and, if appropriate, consider the relevance of wrong-doing by a related corporation sharing principal officers with the licensee.

\* \* \*

## B. Standard Comparative Issues

### 1. Diversification.

The effect of the Commission’s reconstruction of the diversification criteria is obvious in its belittling of Central’s advantage there. Because of its lack of other media interests, as contrasted with those of Cowles, Central was found by the ALJ and the Commission to have a “clear advantage” and was consequently accorded a “clear preference.” However, the Commission found that the significance of the “clear preference” was reduced by several factors and that, in the end, the preference was “of little decisional significance.”

We fail to see how a “clear preference” on a matter which the Commission itself has called a “factor of primary significance” can fairly be of “little decisional significance.” We should have thought the relevance of unconcentrated media *ownership* to the public interest inquiry was well-settled. \* \* \* Nor, as we have noted, does the

Commission in this case purport to disregard the diversification factor. It merely found the applicants' clear difference uninteresting as there was no showing "that the dangers of concentration \* \* \* exist in this case."

Apart from the obvious unfairness of placing this novel burden on Central without fair notice, the question arises whether this has not seriously undercut the utility of the diversification criterion. The brief answer must be that it has.

There is *some* support for the relevance of the factors on which the Commission relied. The *1965 Policy Statement* did say that related media interests within the service area were usually *more* important than more distant interests. It did not nearly say that interests outside the service area were unimportant. In fact, the fairer inference, and the one more consistent with other Commission policy,<sup>75</sup> is that related media interests anywhere in the nation are quite material.

More troubling still is the Commission's reliance on the autonomy which CCI accorded the local management of Cowles. This, in conjunction with the "remoteness" of CCI's other media interests, led the Commission to conclude that there had been "no adverse effect upon the flow of information to those persons in WESH-TV's service area."

\* \* \*

The theory that management autonomy may satisfy the function of diversification was wholly novel when presented to this court in *Fidelity Television, Inc., v. FCC*. \* \* \* We held that the FCC had not acted unlawfully in finding that local autonomy met the objectives of diversification "sufficiently to withstand the competition of a 'nothing' competitor. Whether it would have been more appropriate in *Fidelity* to concede the challenger's advantage under diversification but to conclude that that need not carry the day, is not now before us."

In any case we are reluctant to expand the relevance of local autonomy much beyond the facts of *Fidelity* for two reasons. First, the prospect of inquiry into the content of programming as would be entailed in defining "uniform expression" raises serious First Amendment questions. Indeed, the Commission was sensitive to the threat of just such intrusions when it declined to employ quantitative program standards in comparative renewal hearings. Second, to require a showing of the "dangers of concentration" in each case would remove the customary presumption on which the structural approach to increasing ownership diversification has rested. Given the likely difficulties of proof in such matters, widespread reliance on the autonomy excuse would effectively repeal the diversification criterion.

75. See *Multiple Ownership of AM, FM, and Television Broadcast Stations*, 18 F.C.C. 288 (1953). These regulations limited each person to a total of seven

AM radio stations, seven FM radio stations, and five VHF television stations *anywhere in the United States*.  
\* \* \*

\* \* \* On remand, it will be appropriate for the Commission to reconsider its conclusions in light of \* \* \* the evident hazards of relying on local management autonomy as a surrogate for diversification of media ownership.

## 2. Best Practicable Service.

Whatever weight the Commission may have given to Central's advantages under the integration and minority participation criteria, it was not enough to "outweigh" Cowles' unexceptional record. This puzzling result appears more bizarre as it is thought about.

\* \* \* For at the end of a hearing the Commission is left on the one hand with a series of comparative findings pertaining to integration, etc., and on the other hand with a wholly incommensurable and noncomparative finding about the incumbent's past performance. Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be. But findings on integration and minority participation are evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger.*\*

In a comparative inquiry evidence of past performance is ordinarily relevant only insofar as it predicts whether future performance will be better or worse than that of competing applicants. The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's. In fact, as we have noted, *Central prevailed on each of the questions supposedly predicting which applicant would better perform*—the same criteria the Commission uses for this purpose in nonrenewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practicable service.

In light of this we leave to conjecture what leap of faith would be required to find that Cowles prevailed in the overall inquiry. On remand, the Commission will have to reconsider its manner of deriving a preference under the best practicable service criterion, and if appropriate, how such a preference should be balanced against other factors in the more general public interest inquiry. To avoid, if possible, further appeal in this case, we address ourselves to more specific objections to the disposition of the best practicable service question.

### a. *Integration.*

We confess we were unable to make sense of the Commission's treatment of the integration issue, though we will reconstruct its language. The ALJ found that Central's integration proposals were "very weak." The Commission agreed, although it found Central's

\* The challenger's proposed programming is not designated an issue absent a prima facie showing of significant differences related to its ascertainment of

community needs. Central did not request a hearing on its program proposals.—D.G.

showing “somewhat stronger than that of Cowles.” The Commission then noted that the ALJ’s findings should be amended in light of this court’s intervening *TV-9* decision; it thus gave Central a “merit” for its proposed black participation. Pre-figuring the outcome, the Commission said that the “merit” and the “slight preference” (for integration) were insufficient to outweigh the factors in Cowles’ favor under the best practicable service criterion. Oddly, four paragraphs later the Commission rethought the integration matters and decided that “neither is entitled to a preference”—not even a slight one—though Central was entitled to a “merit.” Odder still, this “merit” (distinct from the *TV-9* merit) is never heard of again.<sup>86</sup>

More troubling is the manner by which Central’s integration “preference” became a “merit.” In a way wholly analogous to the diversification question, the Commission replaced the customary integration criterion (under which Cowles fared miserably, being absentee-owned by CCI) with a functional inquiry into whether management autonomy had been an adequate surrogate for owner-management. Unsurprisingly, the Commission concluded that on this record it had. This permitted it to conclude “that the integration proposals of both applicants are substantially similar.” Mildly put, this finding is incredible if anything remains of the customary integration criterion.

This further repeal of the 1965 standards again derives some support from our opinion in *Fidelity*. Like the reconstructed diversification analysis, the notion of functional integration was novel when presented in that case, and we have already recounted the special circumstances presented there. It may well have seemed, recalling the court’s characterization of *Fidelity* as a “nothing” applicant, that the modifications of the 1965 criteria left the substance of the comparative hearing unimpaired. On the facts of this case, the same cannot be said. The Commission’s treatment of the integration criterion, in light of its treatment of diversification and Cowles’ past performance, has denied Central the substance of its right to a full hearing, and is *ipso facto* unreasonable. The Commission may not, comfortably with the hearing mandate of § 309(e), practically abandon the 1965 criteria without providing an alternate scheme affording a thorough and intelligible comparison. On remand, the Commission will have occasion to reconsider its findings on the integration issue.

b. *Cowles’ Past Performance.*

For anyone who remained hopeful that Central’s now-shrunken advantages would carry the day, the treatment of Cowles’ past performance was plainly the *coup de grace*. The Commission recharacterized as “superior” the record which the ALJ had found “thoroughly

86. Leading the cynical to suggest that the only difference between a “preference” and a “merit” is that the latter

may be misplaced without embarrassment.

acceptable." Evidently, the Commission felt that a recitation of the idiom in *Citizens* would permit it to recognize Cowles' "renewal expectancy." If that were correct, we might be more inclined to resist the Commission's characterization. However, a finding of "superior" service is not an end to the inquiry; it is rather, as we stated in *Citizens*, a "plus of major significance" to be factored into the comparative analysis. In its reconsideration, the Commission resisted general use of the word "superior" preferring the word "substantial" to describe records such as Cowles'. This the Commission felt would not "convey the impression that \* \* \* past programming was exceptional when compared to other broadcast stations in service area or elsewhere." If by this the Commission means either (1) that "substantial" service will justify renewal *more or less* without regard to comparative issues; or (2) that "substantial" performance which is not above the average is entitled to "a plus of major significance," it is plainly mistaken. We emphasize that lawful renewal expectancies are confined to the likelihood that an incumbent will prevail in a fully comparative inquiry. "Superior" or above average past performance is, of course, highly relevant to the comparison, and might be expected to prevail absent some clear and strong showing by the challenger under the comparative factor (either affirmative bearing on the challenger's projected program performance, or negative regarding the incumbent's media ties or perhaps discovered character deficiencies) or other designated issues. But we do not see how performance that is merely average, whether "solid" or not, can warrant renewal or in fact, be of especial relevance without some finding that the challenger's performance would likely be no more satisfactory.

\* \* \*

Remanded.

\*





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